# CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE (CJP)

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[No. 158. Aug. 15, 2001.]

# INQUIRY CONCERNING JUDGE PATRICK COUWENBERG

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance concluded that the judge should be removed from the bench for (1) misrepresenting his educational background on his personal data questionnaires in 1993 and 1996 when seeking judicial appointment; (2) falsely representing, in the course of seeking a judicial appointment, that he was a Vietnam veteran; (3) misrepresenting his educational background, legal experience and affiliations on his 1997 judicial data questionnaire; (4) falsely representing to the judge who was to introduce him at his enrobing ceremony that he was a Vietnam veteran who had received a Purple Heart; (5) falsely representing to attorneys that he served in Vietnam, had a master's degree in psychology and had shrapnel in his groin received in military combat; and (6) making false statements about his education and military experience in letters and in testimony to the commission during its investigation of his conduct. The record indicated that the judge committed four counts of willful misconduct and four counts of prejudicial conduct in what appeared to be a deliberate course of misrepresentation. A public censure would not have adequately conveyed the commission's reproval of the judge's course of misconduct. The commission was convinced that protection of the public and the judiciary's reputation required the judge's removal from the bench. (Opinion by Michael A. Kahn, Chairperson.)

## HEADNOTES

(1) **Judges § 6—Discipline—Commission Jurisdiction—Prebench Conduct.**—The Commission on Judicial Performance has jurisdiction to sanction a judge for conduct occurring within six years prior to the start of the judge's current term of office (Cal. Const., art. VI, § 18, subd. (d)).

(2) **Judges § 6—Discipline—Conduct Prejudicial—Prebench Conduct.**—The judge's prebench submission of personal data questionnaires

to the Governor, which included misrepresentations as to his educational background, constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The judge's false affirmation to two judges that he was a Vietnam veteran was also made in an effort to further the likelihood of a judicial appointment and was also conduct prejudicial.

(3) **Judges § 6—Discipline—Willful Misconduct—Providing False Information.**—Providing material false information about one's qualifications and experience is conduct done in bad faith, i.e., for a purpose other than the faithful discharge of judicial duties. Also, providing such false information about one's experience and qualifications violates the basic precepts of Cal. Code Jud. Ethics, canons 1 & 2. Because he had assumed judicial office, the judge was acting in a judicial capacity when he filled out a judicial data questionnaire (JDQ) and his false statements on the JDQ constituted willful misconduct. The judge's giving false information to another judge for use in the public enrobing ceremony also constituted willful misconduct.

(4) **Judges § 6—Discipline—Conduct Prejudicial—False Statements to Attorneys.**—The judge's false statements in the courthouse to attorneys regarding his background and education constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(5) **Judges § 6—Discipline—Improper Action—Misrepresentations to Newspaper Reporter.**—The judge's false statement to a newspaper reporter about seeing combat in Vietnam constituted improper action.

(6) **Judges § 6—Discipline—Willful Misconduct—Misrepresentations During Commission Investigation.**—The judge's conduct in providing false information to the Commission on Judicial Performance, both in written responses to commission investigation letters and in his oral testimony, constituted willful misconduct, since the judge was acting in a judicial capacity and gave his responses and testimony in bad faith.

(7) **Judges § 6—Disciplinary Proceeding—Purpose.**—The purpose of a judicial disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

(8) **Judges § 6—Discipline—Removal from Office—Deliberately Providing False Information—Course of Investigation.**—There are few judicial actions that provide greater justification for removal from office than

the action of a judge in deliberately providing false information to the Commission on Judicial Performance in the course of its investigation.

(9) **Judges § 1—Mininium Qualification—Honesty.**—Honesty is a minimum qualification expected of every judge. The public will not, and should not, respect a judicial officer who has been shown to have repeatedly lied for his or her own benefit.

(10) **Judges § 6—Discipline—Mitigation—Legal Knowledge and Administrative Skills.**—A good reputation for legal knowledge and administrative skills, although relevant to the degree of discipline, does not mitigate either willful misconduct or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(11) **Judges § 6—Discipline—Removal from Office—Misrepresenting Education and Experience.**—The judge was removed from the bench for (1) misrepresenting his educational background on his personal data questionnaires when seeking judicial appointment; (2) falsely representing, in the course of seeking a judicial appointment in 1996, that he was a Vietnam veteran; (3) misrepresenting his educational background, legal experience and affiliations on his 1997 judicial data questionnaire; (4) falsely representing to the judge who was to introduce him at his enrobing ceremony that he was a Vietnam veteran who had received a Purple Heart; (5) falsely representing to attorneys that he served in Vietnam, had a master's degree in psychology, and had shrapnel in his groin received in military combat; and (6) making false statements about his education and military experience in letters and in testimony to the Commission on Judicial Performance during its investigation of his conduct.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 76.]

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## OPINION

**KAHN, Chairperson.**—This disciplinary matter concerns Judge Patrick Couwenberg, a judge of the Los Angeles County Superior Court. Judge Couwenberg was charged with (1) misrepresenting his educational background on his personal data questionnaires when seeking judicial appointment; (2) falsely representing, in the course of seeking a judicial appointment in 1996, that he was a Vietnam veteran; (3) misrepresenting his educational background, legal experience and affiliations on his 1997 judicial data questionnaire; (4) falsely representing to the judge who was to introduce him at the public enrobing ceremony that he was a Vietnam veteran who had

received a Purple Heart; (5) falsely representing to attorneys that he went to Vietnam, had a master's degree in psychology and had shrapnel in his groin received in military combat; (6) falsely telling a newspaper reporter that he was in Vietnam in 1968 and 1969; and (7) making false statements about his education and military experience in letters and in testimony to the commission during its investigation of his conduct.

A panel of three judges, sitting as special masters, found that virtually all of the factual allegations were supported by clear and convincing evidence. For the reasons set forth in this decision, the commission adopts the masters' findings of fact. The commission finds that Judge Couwenberg made misrepresentations in order to become a judge, continued to make misrepresentations while a judge, and deliberately provided false information to the commission in the course of its investigation. For this misconduct, the commission hereby removes Judge Patrick Couwenberg from the bench.

## PROCEDURAL HISTORY

Judge Couwenberg first sought a judicial appointment in 1993 in Los Angeles or Orange County and filled out a personal data questionnaire (PDQ) dated October 18, 1993. He was not successful. He applied again in 1996, this time limiting his application to Los Angeles County. His second PDQ is dated July 10, 1996.

Governor Wilson appointed Judge Couwenberg to the Superior Court of Los Angeles County on April 24, 1997. On July 31, 1997, Judge Couwenberg signed a completed judicial data questionnaire (JDQ) that was provided by, and returned to, the presiding judge. A public enrobing ceremony was held on August 25, 1997, for Judge Couwenberg and 11 other new judges. Retired Judge Frisco introduced Judge Couwenberg and the other new judges. He based his introduction of Judge Couwenberg on Judge Couwenberg's JDQ and discussions with Judge Couwenberg.

On February 19, 1998, the Los Angeles Daily Journal published a profile of Judge Couwenberg noting his inconsistent statements about serving in Vietnam. This profile prompted the filing of a complaint with the commission (the complainant sent a copy to Judge Couwenberg) alleging that Judge Couwenberg had lied about having a degree from the California Institute of Technology (Cal Tech), being a Vietnam veteran, and receiving a Purple Heart.

On March 13, 1998, the commission received an unsolicited letter from Judge Couwenberg in response to the complaint, which included the statement, "At no time did I lie to the Governor nor did I attempt to mislead anyone."

On August 25, 1998, the commission sent a preliminary investigation letter to Judge Couwenberg. The investigation continued over the next year with responses from the judge and a second letter from the commission. In December 1999, the commission wrote Judge Couwenberg indicating that it was concerned that he had provided false and misleading information in response to the commission's inquiries concerning his military service and requested that he come to the commission's office for the taking of a statement. On January 21, 2000, Judge Couwenberg, accompanied by counsel, came to the commission's office and gave a statement under oath.

On June 30, 2000, the commission filed a six-count notice of formal proceedings. Another investigation letter was sent to Judge Couwenberg on July 25, 2000, a response was received in September, and on October 20, 2000, the commission filed a nine-count first amended notice of formal proceedings.

In the meantime, on August 17, 2000, the Supreme Court appointed three judges as special masters in this case. The evidentiary hearing before the masters[1] commenced on February 21, 2001, and concluded February 28, 2001. Mr. Jack Coyle and Mr. Sei Shimoguchi of the commission's office of trial counsel presented the case in support of the charges. Judge Couwenberg was represented by Mr. Edward P. George, Jr., Mr. Thomas M. Goethals, and Mr. Timothy L. O'Reilly. The masters submitted their 47-page report to the commission on May 16, 2001.

Following receipt of objections and briefs from Judge Couwenberg and the office of trial counsel, the matter was orally argued before the commission on July 19, 2001. Mr. Coyle presented argument on behalf of trial counsel and Mr. George and Mr. Goethals presented argument on behalf of Judge Couwenberg.

## FINDINGS OF FACT

### A. *Counts One and Two—Misrepresentations on the Personal Data Questionnaires*

An applicant for judicial appointment submits a completed PDQ to the Governor. In addition to being reviewed by the Governor, when Judge Couwenberg submitted his PDQ's in 1993 and 1996, they were sent to the Commission on Judicial Nominees Evaluation of the State Bar of California

[1] Judge Ina Levin Gyemant of the San Francisco County Superior Court was appointed as the presiding special master. Judge Thomas P. Hansen of the Santa Clara County Superior Court and Judge K. Peter Saiers of the San Joaquin County Superior Court were the associate masters.

and the judicial selection advisory board, to facilitate those entities' review of the applicant. Representatives for both entities testified that the entities generally assumed that the factual information on a PDQ was true and that discovery of an applicant's material misrepresentation on the PDQ would end the applicant's chance of a favorable report.

The masters found that on both of his PDQ's, Judge Couwenberg provided the following false information: (1) he had attended California State Polytechnic University, Pomona (Cal Poly Pomona) from 1964 to 1968 when he had actually attended from 1966 to 1968 only, and had attended Chaffey Junior College from 1963 to 1966, which information was omitted from the PDQ's; (2) he went to California State University, Los Angeles (Cal State L.A.), from 1970 to 1972 and received a master's degree, when he was never enrolled there and did not have a master's degree from any school; (3) there was no mention that he attended Western State University College of Law from 1969 to 1970; (4) he attended Loyola Law School in 1972 and 1973, when he never went to Loyola; (5) he attended University of La Verne College of Law from 1973 to 1976 when he actually attended La Verne from 1970 to 1973.

Judge Couwenberg admitted that the information was false, but denied that he provided "intentionally false" information. The masters rejected Judge Couwenberg's attempts to distance himself from the misrepresentations. They found that it "is simply not believable that the judge would be uncertain who filled out his judicial application," and that "even assuming that his wife did type the applications, it is not believable that she remembered the specifics of his educational background for 20 years." In response to Judge Couwenberg's claim that he did not review the educational information on the PDQ's because he did not believe it was important, the masters stated that a "judicial candidate must assume that everything on the application form to the Governor is of some importance or it would not be on the form," and found that "Judge Couwenberg's professed view that education is essentially irrelevant to a judicial application is manufactured, in an effort to minimize his lies to the Governor." They further noted that even "according to the judge's version of the facts, he knowingly provided false information to the Governor—he assumed that his wife would provide the false information he had given her, but did nothing about it."

The masters had little trouble understanding why Judge Couwenberg lied. They noted: "The reason for these lies is self-evident. Seeking appointment to the bench is a competitive situation. Judge Couwenberg would have been competing with 20 to 30 applicants. The school the judge lied about attending (Loyola) is more prestigious (as he acknowledged) than the ones he actually attended (La Verne and Western). It was also the only school of the three that

was accredited. As he admitted, he told his wife he went to a large accredited law school 'to make himself look better.' His testimony that he didn't want to make a similar impression on the Governor because he'd already told his wife that is not credible." They also noted: "It is also more impressive to have passed the bar exam on the first try than after multiple attempts. Regardless of the Judge's attempt to portray failing the bar five times as something positive, this is the only logical reason for listing the date of graduation from La Verne as 1976, rather than the true date of 1973." The masters concluded that Judge Couwenberg "knowingly and intentionally provided the Governor with false information material to his applications for judicial appointment," and noted that had the lies been discovered at the time, he would not have been appointed to the bench.

The masters' findings concerning the allegations in counts one and two of the first amended notice of formal proceedings are supported by clear and convincing evidence and the commission adopts the masters' findings.

B. *Count Three—Statements to Judges About Serving in Vietnam*

The masters found that in late 1995 or early 1996, Judge Cowell of the Los Angeles County Superior Court, in order to further Judge Couwenberg's efforts to obtain a judicial appointment, arranged a luncheon with Judge Couwenberg, Judge DiLoreto, and himself. Judge DiLoreto had been helpful to Judge Cowell in obtaining a judgeship, and Judge Couwenberg wanted to meet Judge DiLoreto.

At the lunch, Judge Cowell made a reference to Judge Couwenberg's being a veteran. The masters explain: "Judge DiLoreto then asked Judge Couwenberg, 'you were in Vietnam and you were in combat?' As Judge DiLoreto recalls, the judge said 'yes.' Judge Cowell was not sure if Judge Couwenberg nodded or said yes, but testified that Judge Couwenberg affirmed Judge Cowell's statement that he was in Vietnam in some manner, and 'certainly did not disabuse us [of] the idea that he was a veteran.' " Judge DiLoreto told Judge Couwenberg that it was critical that Governor Wilson know this because both he and his judicial appointments secretary, Mr. John Davies, were ex-Marines. Judge Couwenberg indicated that he thought it was important too.

The masters noted that Mr. Davies testified that a war record was a plus with Governor Wilson and that he recalled his interview with Judge Couwenberg because of his "unusual war experiences." He did not recall the details, but remembered that it involved "undercover work" and that there was some "sort of heroism involved."

After the lunch meeting, Judge DiLoreto took several steps to help Judge Couwenberg. He called another judge to try and find out what had happened

to Judge Couwenberg's 1993 application, he called Judge Couwenberg a couple of times, and he called Mr. Davies to check on the status of Judge Couwenberg's application.

The masters noted that Judge Couwenberg claimed that he did not think that he discussed his military career when he met with Mr. Davies and that he remembers having lunch with Judge DiLoreto only (not with both Judges Cowell and DiLoreto), and denies any recollection of discussing Vietnam or his military career. The masters, however, credited the testimony of Mr. Davies as well as the testimony of Judges Cowell and DiLoreto that the luncheon conversation took place as alleged in count three.

The masters' findings, that Judge Couwenberg met with Judges Cowell and DiLoreto and in furtherance of his efforts to obtain a judicial appointment affirmed that he was a veteran of the Vietnam War, are supported by clear and convincing evidence and the commission adopts those findings as its own.

Count three also alleged that Judge Cowell submitted a letter to Governor Wilson on Judge Couwenberg's behalf, which included the false statement that Judge Couwenberg was a veteran of the Vietnam War. The masters found that such a letter was written by Judge Cowell and given to Mrs. Couwenberg (Judge Cowell's court reporter) to prepare the envelope and mail. The Governor's office, however, could not locate the letter. The masters found that the evidence was insufficient to establish that the letter was in fact sent. The commission accepts the masters' findings concerning the letter and dismisses the allegations in count three concerning the letter.

### C. *Count Four—Misrepresentations on the Judicial Data Questionnaire*

Judge Couwenberg received a JDQ from the presiding judge's office, filled it out, signed it on July 31, 1997, and returned it to the presiding judge. The presiding judge provided Judge Frisco with a copy of the JDQ for the enrobing ceremony. The JDQ is used as a record of a judge's background information and for public announcements.

Judge Couwenberg's JDQ had the following misrepresentations: (1) his attendance at Chaffey Junior College and Western State University College of Law are omitted; (2) he falsely claims to have attended Loyola Law School (listed here as 9/73 through 9/74, as opposed to 9/72 through 6/73 on the PDQ's); (3) the dates of attendance at University of La Verne College of Law are 9/74 through 6/76, when his actual attendance dates were 1970 to 1973; (4) the attendance dates for Cal Poly Pomona are 9/64 through 6/66, when he actually attended that school from 1966 to 1968; (5) he attended "Cal Inst of

Techn. Pasadena" (Cal Tech) from 9/66 to 6/68 and received a Bachelor of Science degree from that school, when he never attended Cal Tech; (7) the box next to "Veterans of Foreign Wars" was checked although Judge Couwenberg was never a member; (8) under "Armed Services Record," he entered "US Navy," instead of "US Navy Reserve"; and (9) under "Private Practice Experience," the application noted, "1976 Gibson, Dunn," although Judge Couwenberg never worked for the law firm of Gibson, Dunn & Crutcher.

There is no dispute as to the falsity of these statements. Judge Couwenberg attempted to sidestep responsibility by denying that he filled out the form himself. The masters found Judge Couwenberg's testimony "inconsistent and vague." They noted that Judge Couwenberg's claim that he did not review the JDQ before he signed it was inconsistent with his response letter to the commission, that he had no explanation for some of the false entries, and that his claim that the Cal Tech entry was a joke was contradicted by his statement under oath in January 2000 and by Judge Frisco. The masters concluded that Judge Couwenberg provided false information on the JDQ about his education, military service, and past employment. The masters' findings are supported by clear and convincing evidence and the commission adopts those findings as its own.

D. *Count Five—Misrepresentations to Judge Frisco*

The masters found that Judge Couwenberg gave or affirmed to Judge Frisco the following false information (as alleged in count five): (1) he was recruited from the Navy to the Army, when he was in the Navy Reserve and never in the Army; (2) he attained the rank of corporal in the Army; (3) he served in the Army for two years and was in Vietnam for 16 months, when he was never in the Army in Vietnam or elsewhere; and (4) he had received a Purple Heart, when he had never received or been eligible to receive a Purple Heart.

With the exception of the statement that he was recruited from the Navy to the Army, this false information was included in Judge Frisco's introductory remarks at the enrobing ceremony, along with false information that Judge Couwenberg attended Cal Tech for two years, earned a B.S. in physics from Cal Tech, and attended Loyola Law School for a year.

Judge Couwenberg admits that Judge Frisco's introductory remarks regarding his military service were false, but claims that he "does not recall" giving the alleged information or affirming it to be true. The masters rejected Judge Couwenberg's testimony noting that (1) in his prehearing statement under oath, Judge Couwenberg admitted making certain misrepresentations to Judge

Frisco; (2) Judge Frisco's handwritten notes of his conversations with Judge Couwenberg reflect that Judge Couwenberg was the source of the false information; (3) his claim that he discussed Cal Tech with Judge Frisco because Cal Tech was listed on the JDQ, is inconsistent with his testimony that he told his wife to list Cal Tech on the JDQ after he had joked with Judge Frisco about the difference between Cal Poly Pomona and Cal Tech; and (4) Judge Couwenberg's testimony that he thought the enrobing ceremony would be in the nature of a humorous roast is not believable as he admits that he had never been to an enrobing ceremony, which by its nature is a serious event, and he could not think of how receiving a Purple Heart could be mentioned as a joke. The masters also noted that Judge Couwenberg had the opportunity to correct Judge Frisco both before and after the enrobing ceremony, but did not do so.

The masters' findings that Judge Couwenberg gave or affirmed to Judge Frisco false information concerning his military service are supported by clear and convincing evidence and the commission adopts those findings.

E. *Count Six—False Statements to Attorneys*

An experienced attorney, who appeared frequently before Judge Couwenberg, testified that Judge Couwenberg told a group of attorneys in the courthouse that (1) he moved to the United States when he was 18 and shortly after that served in the armed forces; (2) he went to college on the GI Bill; (3) he received his undergraduate degree in physics from Cal Tech; (4) he had a master's degree in psychology; and (5) he had a medical appointment for shrapnel in his groin.[2]

Judge Couwenberg in his answer denied making such statements but acknowledged that they would have been false if made. He claimed that he sometimes made statements about his background that were humorous or made in jest.

The masters found that Judge Couwenberg made the statements recalled by the attorney and that the statements were false. They noted that there is no reason to doubt the attorney's testimony and that it is documented that Judge Couwenberg made the same or similar false statements elsewhere.

The masters' findings are supported by clear and convincing evidence and the commission adopts those findings.

[2] The masters noted that the attorney also testified that Judge Couwenberg stated that he worked for Gibson, Dunn & Crutcher, but that this false statement was not charged in count six.

F. *Count Seven—The Daily Journal Profile*

On February 19, 1998, the Los Angeles Daily Journal published a profile of Judge Couwenberg written by reporter Cheryl Romo, which was based on her two interviews with the judge. Ms. Romo had worked for the Daily Journal for over six years and testified that Judge Couwenberg made the statements to her that were quoted in the article. Specifically, he falsely stated in the initial interview that he was in Vietnam in 1968 and 1969 and saw combat. In the subsequent interview he told her that he was in the United States Navy Reserve from 1965 to 1969, that he was not in Vietnam and that she should "just leave that part out."

The masters stated that they "are convinced that Judge Couwenberg initially made the false statements about his military service," but "are likewise convinced that he effectively retracted these misrepresentations in his later conversations with Romo and his direction to 'leave that part out.' "

The masters' findings that Judge Couwenberg initially made false statements and subsequently sought to retract those misrepresentations are supported by clear and convincing evidence and are adopted by the commission.

G. *Counts Eight and Nine—Misrepresentations During the Commission's Investigation Concerning Covert Operations and Educational Background*

1. *Misrepresentations About Covert Operations*

The masters noted that count eight alleges that in January 2000, Judge Couwenberg under oath "testified falsely that he had been involved in covert Central Intelligence Agency (CIA) operations in Southeast Asia between June 1968 and December 1969, and had made a delivery of funds or documents to Africa for the CIA around 1984. Count nine alleges that in three response letters to the commission (two before and one after his statement under oath), the judge both implied and stated the same false claim about participating in covert CIA operations in 1968–1969."

The masters found these allegations to be true. They found that Judge Couwenberg "was never affiliated with the CIA or any other agency involved in covert operations during the Vietnam War, and was not involved in any CIA covert operations at any time." The masters rejected Judge Couwenberg's testimony at the hearing where he maintained his story was true. They found that his testimony "was vague and unpersuasive in and of itself, is contradicted in part by circumstantial evidence, and was not corroborated. Most

significantly, it was flatly refuted in its entirety by compelling testimony from a representative of the CIA."

The masters noted that in his January 2000 statement under oath Judge Couwenberg "testified at length that he had participated in a covert CIA operation in Southeast Asia . . . where, among other adventures, he was wounded in a firefight resulting in his purported shrapnel wound." Also, in a subsequent letter to the commission, dated May 26, 2000, "the judge again stated that he participated in a classified, covert CIA operation in the Far East in 1968 and 1969 on two separate operations."

Military records establish that Judge Couwenberg received an honorable early discharge from the Navy Reserve in 1967 because of a liver problem. Judge Couwenberg testified that in 1966 he met a man named Jack Smith (or it could have been Jones), who told him that he could get a discharge without fulfilling his six-year commitment with the Navy Reserve if he said there was something medically wrong with him. The masters noted that Judge Couwenberg "claims he told Smith he didn't want a medical discharge, and testified that he did not know until receiving discovery in this case that he had been discharged for these reasons. However, it is apparent that he knew of the medical discharge at the time. In a letter dated September 5, 1966, from the judge to his commander, the judge discusses his prospective medical discharge."

Judge Couwenberg testified that he went to Laos for a month in December 1968 and then went again for three or four weeks around June 1969. During this time he was working full time with the Los Angeles County Department of Social Services. Judge Couwenberg claimed he was able to be absent from work without a problem, despite the fact that he had started work there in June 1968. He could not recall whether he took vacation or leave without pay and he produced no employment records to verify that he was off work during these periods.

Mr. William McNair has been designated by the head of the CIA as the records validation officer. Although the CIA is not subject to a commission subpoena, the CIA voluntarily agreed to allow Mr. McNair to testify. Mr. McNair stated that the CIA has records of everyone who has ever been engaged in a clandestine or covert relationship with the CIA in an operational capacity. These records have been maintained since the mid-1940's and include anyone an operations officer has talked to and considered using. McNair testified that a thorough search was made of the CIA records to determine whether Judge Couwenberg, by any name, appears in the CIA records. He does not. Accordingly, he was never under consideration for, or employed by or utilized for, clandestine operations by the CIA. Mr. McNair

testified, "if someone were picked out, recruited in the U.S., and transported to Laos under our sponsorship, we would have a record of it."

Mr. McNair further testified that at the time in question there were no other United States agencies operating in Laos. The only speculative possibility would have been an agency operating illegally. Mr. McNair testified that he was well versed in what was going on in Laos at the time and would be "stunned" to find out any agency other than the CIA was conducting an operation in Laos, such as described by Judge Couwenberg.

Judge Couwenberg also testified that the same agency that sent him to Laos used him to make a delivery in Africa in the 1980's. Mr. McNair testified that if the CIA had so employed Judge Couwenberg, the CIA would have a record of the event and that the CIA does not have any record of the alleged event.

The masters noted that Judge Couwenberg now suggests that he never said he was with the CIA, but only guessed or assumed that the agency was the CIA. They find, however, that "the evidence is clear that Judge Couwenberg wanted the commission to believe that he was with the CIA, and ultimately flatly asserted as the truth that he was with the CIA." They noted his January 2000 testimony under oath and his letters to the commission, particularly Judge Couwenberg's May 26, 2000, response through counsel which states that the "August 3, 1999 letter correctly states that Judge Couwenberg participated in a classified, covert CIA operation in the Far East."[3]

The masters' findings that Judge Couwenberg testified falsely that he had been involved in covert CIA operations in Southeast Asia in December 1968 and June 1969 and had made a delivery of funds or documents to Africa for the CIA around 1984 are supported by clear and convincing evidence and the commission adopts those findings.

2. *False Testimony Concerning a Master's Degree*

Judge Couwenberg admits that he was never enrolled at Cal State L.A. and has no master's degree. Nonetheless, on January 21, 2000, Judge Couwenberg came to the commission and gave a statement under oath which included the following:

"Q. And after Cal State Pomona your education after that?

[3] Commission on Judicial Performance rule 106 reads, in relevant part: "The written communication of counsel shall be deemed to be the written communication of the judge. Counsel has the authority to bind the judge as to all matters except a stipulation as to discipline."

"A. After that I went part time to Cal State. Then went to law school, graduated from the University of La Verne.

"Q. Okay. When you say you went to Cal State part-time, Cal State Pomona?

"A. L.A.

"Q. And did you get a degree from Cal State L.A.?

"A. Yes.

"Q. What was the degree in?

"A. Psychology.

"Q. Master's degree?

"A. (Witness nods head).

"MS. DOI: I am sorry, I don't think that was verbal.

"THE WITNESS: Yes.

"MR. COYLE: Q. Do you know why it is that your master's degree from Cal State L.A. would not be on the Judge's Data Questionnaire?

"A. I have no idea."

When this misrepresentation was first brought to Judge Couwenberg's attention, he suggested that he failed to focus on the question. At the hearing before the masters, Judge Couwenberg stated that he was focused on the question, that his response was not true, and that he volunteered the information. When asked why this was not perjury, he responded, "I suppose in the true sense it is. I just don't know why I did it."[4]

The masters concluded that as a matter of fact and law that when Judge Couwenberg testified under oath on January 21, 2000, that he had a master's degree in psychology from Cal State L.A., he knowingly gave material false

[4] The record suggests at least one possible explanation. Judge Couwenberg had indicated on his PDQ's that he had a master's degree. In January 2000, Judge Couwenberg may not have known whether the commission was aware of this misrepresentation. He may have feared that if he failed to repeat this misrepresentation, the commission would investigate the inconsistency between his testimony and his PDQ's.

testimony under oath. The masters' findings are supported by clear and convincing evidence and the commission adopts those findings.

## JUDGE COUWENBERG'S MENTAL DEFENSE

Judge Couwenberg offered as a psychological defense that he had a mental condition known as "pseudologia fantastica." This defense was presented by Judge Couwenberg's expert witness, psychiatrist Dr. Charles V. Ford. He described pseudologia fantastica as "story telling that often has sort of a matrix of fantasy interwoven with some facts."[5] Dr. Ford, as well as Judge Couwenberg's two other medical experts, however, agreed that the objective medical tests that were administered to Judge Couwenberg did not reveal any suggestion of cognitive or psychological disorder. Dr. Ford conceded that pseudologia fantastica is a description rather than a diagnosis.

The masters recognized that there was evidence that Judge Couwenberg was in a detention camp as a very young child in Indonesia and suffered racial discrimination in Holland in his youth. Judge Couwenberg's doctors said that these experiences caused him to have low self-esteem which, according to Dr. Ford, led to pseudologia fantastica. The masters found little evidence of this connection. They noted that none of the psychological tests revealed any evidence of a traumatic stress disorder, Judge Couwenberg had never been treated for any psychological disorder, and the subscales for posttraumatic stress disorder in the Minnesota Multiphasic Personality Inventory test were all normal. They further noted that the many letters of recommendation on behalf of Judge Couwenberg suggest that he never exhibited any self-image problems either as an attorney or as a judge.

The masters properly questioned whether a judge may avail himself or herself of a psychological defense in a disciplinary hearing. They also noted that there was no evidence that Dr. Ford's contentions regarding pseudologia fantastica are accepted in the psychiatric community. They further opined that unless low self-esteem is a recognized mental disorder, it makes no difference whether or not the judge had the symptom of pseudologia fantastica, because a symptom without some mental disorder is of no legal consequence to the allegations of misconduct. The masters concluded as a matter of fact and law that Judge Couwenberg did not have any mental condition that excuses or mitigates his misconduct in this case.

[5] Dr. Ford explained: "When we use the word 'lying,' we generally mean that the person knows what he's saying is not true and is deliberately attempting to mislead another person. There's a two-part definition to lying. With the pseudologia [f]antastica it is really kind of an admixture of self-deception and trying to present oneself to other people in a certain way and not really related to a conscious intent to defraud or to lie, such as we might see in a person with antisocial personality."

The commission agrees that Judge Couwenberg does not have any mental condition that excuses or mitigates his misconduct. As noted by the masters, the possession of a "symptom" without any mental disorder is of little legal consequence. Also, it appears that pseudologia fantastica is an attempt to explain why a person lies in a way that does not directly promote his or her self-interests. The reasons for Judge Couwenberg's misrepresentations, however, are self-evident. He misrepresented his qualifications in order to become a judge, to maintain the false premise which appears to have been critical to his judicial appointment, and to frustrate the commission's investigation. As Judge Couwenberg's misrepresentations were clearly calculated to advance his self-interests, a theory aimed at explaining why a person lies in a way that does not obviously advance the person's self-interests has no application. Furthermore, as put forward by Dr. Ford, pseudologia fantastica attempts to explain why a person knowingly lies. Judge Couwenberg has not admitted to many of his lies, such as making misrepresentations to Judge Frisco and his alleged presence in Laos in 1968 and 1969. The application of Dr. Ford's contentions to these misrepresentations would suggest that Judge Couwenberg is continuing to knowingly lie to the commission.

## CONCLUSIONS OF LAW

A. *Counts One and Two (the Personal Data Questionnaires)*

**(1)** The masters noted that although the PDQ's were submitted before Judge Couwenberg became a judge, a judge's prebench conduct is subject to general ethical standards.[6] The commission has jurisdiction to sanction a judge for conduct occurring within six years prior to the start of the judge's current term of office (Cal. Const., art. VI, § 18, subd. (d)). The masters observed that judges have been disciplined for prebench conduct that was determined to constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[7]

**(2)** The masters concluded: "Submitting false PDQs to the Governor constitutes an obvious violation of general ethical standards, and constitutes

[6] The fact that Judge Couwenberg was not yet a judge when he submitted his PDQ's precluded the masters from reaching a conclusion of willful misconduct in office.

[7] The masters cited *In re Stevens* (1981) 28 Cal.3d 873 [172 Cal.Rptr. 676, 625 P.2d 219] (judge censured for discussing his sexual experiences and fantasies with a married couple employed by the Legislature; discussions began while judge was member of the Legislature and continued after he took the bench); *In re Blackwell* (1999) Public Admonishment No. 18 (judge's prebench conduct involved his failure to disclose acceptance of overpayment from his former employer, a bank, while seeking a general release of claims against him from the bank); and *In re Van Voorhis* (1992) Public Reproval No. 8 (public reproval for conduct that included one instance of prebench misconduct, misinforming the public of judge's marital status during his judicial campaign).

prejudicial misconduct. Honesty is a 'minimum qualification' expected of every judge (*Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239]) and presumably of every applicant for judicial position. Judge Couwenberg's falsehoods create the appearance that he obtained his judicial office by deceit. The 1996 PDQ also violates canon 5's specific prohibition against a knowing misrepresentation of qualifications. A judicial applicant who gets appointed after submitting falsified qualifications brings the judiciary into disrepute and damages public confidence in the integrity of the judiciary."[8]

For the reasons set forth by the masters, the commission concludes that Judge Couwenberg's submissions of PDQ's to the Governor, which included misrepresentations as to his educational background, constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

B. *Count Three—Statements to Judges About Serving in Vietnam*

The commission has found that in an effort to further the likelihood of a judicial appointment, Judge Couwenberg had lunch with Judges DiLoreto and Cowell and falsely affirmed to them that he was a veteran of the Vietnam War. Judge Couwenberg's conduct violated California Code of Judicial Ethics canon 5B and constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

C. *Count Four—Misrepresentations on the Judicial Data Questionnaire*

**(3)** The commission agrees with the masters that Judge Couwenberg's false statements on the JDQ constitute willful misconduct in office. Judge Couwenberg was acting in his judicial capacity when he filled out the JDQ. He had already assumed judicial office. The form was used exclusively for judges in connection with public enrobing ceremonies and other administrative purposes concerning the judges. Judge Couwenberg received the JDQ from the presiding judge's office and returned it to that office. As noted by the masters, by definition, providing material false information about one's qualifications and experience is done in bad faith, i.e., for a purpose other than the faithful discharge of judicial duties. Also, providing such false information about one's experience and qualifications violates the basic

[8] The masters noted that effective January 15, 1996, the California Supreme Court adopted a revised California Code of Judicial Ethics that includes canon 5B, which provides that a "candidate for election or appointment to judicial office shall not . . . (2) knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate . . . ."

precepts of California Code of Judicial Ethics canon 1 (judge shall uphold the integrity of the judiciary) and canon 2 (judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

D. *Count Five—Giving False Information to Judge Frisco*

The commission agrees with the masters that giving false biographical information to Judge Frisco for use in the public enrobing ceremony constitutes willful misconduct. The statements were made in Judge Couwenberg's judicial capacity, to another judge in connection with the public enrobing ceremony, and were not made for the faithful discharge of judicial duties, but to mislead Judge Frisco, other members of the legal community and the public.

E. *Count Six—False Statements to Attorneys*

**(4)** The commission has found that Judge Couwenberg made false statements in the courthouse to attorneys regarding his background and education. This conduct violated canons 1 and 2A of the Code of Judicial Ethics and constitutes conduct prejudicial to the administration of justice that brings the judicial office into dispute.

F. *Count Seven—Misrepresentations to the Newspaper Reporter*

**(5)** The commission has found that Judge Couwenberg falsely stated to the newspaper reporter that he saw combat in Vietnam and then in a subsequent conversation told her that he was not in Vietnam and that she should "just leave that part out." The newspaper article accurately recounted the false statement, the subsequent withdrawal and the direction to leave the information out. Judge Couwenberg knew or should have known that a misrepresentation of this caliber, when made to a newspaper reporter who was preparing an article on the judge, would become public. The commission concludes that Judge Couwenberg's misrepresentation violated canon 2A of the Code of Judicial Ethics and constitutes improper action.

G. *Counts Eight and Nine—Misrepresentations During the Commission's Investigation Concerning Covert Operations and Educational Background*

**(6)** The commission agrees with the masters that Judge Couwenberg's conduct in providing false information to the commission, both in his written responses to commission investigation letters and in his testimony, constitutes

willful misconduct. He was acting in his judicial capacity when he took these actions. (See *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 910 [42 Cal.Rptr.2d 606, 897 P.2d 544] [judge acts in judicial capacity when responding to investigation letters from commission].) Judge Couwenberg's responses and testimony were given in bad faith. (See *Adams, supra,* 10 Cal.4th at pp. 910–911 [judge acts in bad faith by providing false and misleading information in response to investigation letter from commission]; *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 887–891 [81 Cal.Rptr.2d 58, 968 P.2d 958] [judge committed willful misconduct in presenting commission with grossly incomplete and misleading responses and with continually shifting explanations].) Finally, as noted by the masters, providing false information to the commission, in writing and in sworn testimony, constitutes egregious violations of the fundamental precepts of canons 1 and 2 of the California Code of Judicial Ethics. (See *Adams, supra,* 10 Cal.4th at p. 914.)

## DISCIPLINE

**(7)** The commission is guided by the Supreme Court's reiteration that the purpose of a judicial disciplinary proceeding is not punishment, "but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system."[9] The commission concludes that these purposes require the removal of Judge Couwenberg from the bench.

The facts establish that Judge Couwenberg's successful application for a judicial appointment was premised on material misrepresentations. First, through misrepresentations on his PDQ he made it appear that he was in school from 1964 through 1976, except for two years between his undergraduate degree and starting on a master's degree. In fact, Judge Couwenberg never entered any master's degree program. His misrepresentations also masked, and thereby avoided any questions concerning, the three-year period of time between his graduation from law school and admission to the California State Bar. Second, Judge Couwenberg encouraged Judges Cowell and DiLoreto, and the Governor's judicial appointments secretary (according to his testimony) to believe that Judge Couwenberg was a veteran of the Vietnam War. As noted by the masters, seeking appointment to the bench is a competitive situation. Although there is no evidence of the Governor's reasons for appointing Judge Couwenberg, it appears that Judge Couwenberg's misrepresentations were critical to his judicial appointment. Any discipline

[9] *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112 [77 Cal.Rptr.2d 408, 959 P.2d 715], citing *Adams v. Commission on Judicial Performance, supra,* 10 Cal.4th at page 912.

other than removal would leave the public paying Judge Couwenberg for a judgeship he apparently procured through misrepresentations.

**(8)** Second, Judge Couwenberg lied in writing and in testimony under oath to the commission during the course of its investigation. The Supreme Court has noted that there "are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission in the course of its investigation." (*Adams v. Commission on Judicial Performance, supra*, 10 Cal.4th at p. 914.) When his misrepresentation that he was in the Army in Vietnam was exposed, Judge Couwenberg told the commission—in testimony and in writing—that he had been employed by the CIA in Laos. When the CIA refuted this lie, Judge Couwenberg testified that he was in Laos working for some other agency—a representation that the masters found to be a lie. In addition, Judge Couwenberg volunteered in a statement under oath that he had a master's degree. At the hearing before the masters, he basically admitted that this was perjury. Any discipline other than removal for such blatant misrepresentations might well encourage others who are investigated by the commission to prevaricate and develop faulty memories.

Although some of the false information concerning Judge Couwenberg's education on his PDQ's reflected misrepresentations that he first made years ago, his fanciful military career is of a more recent vintage. The record suggests that initially Judge Couwenberg simply failed to correct others when they misrepresented that he had been in the Vietnam War and that this developed into affirming the misrepresentation. By 1997 Judge Couwenberg was emboldened to tell Judge Frisco that he had received a Purple Heart as a result of being injured in Vietnam while in the Army. By 2000, however, Judge Couwenberg had admitted that these representations were lies, and was asserting that he had been employed by the CIA in Laos. At the hearing before the masters, Judge Couwenberg contended that he was not employed by the CIA, but by some other agency in Laos. The masters found clear and convincing evidence that this was not credible. Thus, the record shows that Judge Couwenberg's inability to testify forthrightly about himself is an ongoing, rather than past, problem.

**(9)** Third, Judge Couwenberg's persistent misrepresentations might well require his removal from the bench, even if the misrepresentations had not been critical to his bid for a judicial appointment and had not been made to the commission in the course of its investigation. The Supreme Court has noted that honesty is a "minimum qualification[]" expected of every judge (*Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d at p. 865). The commission has in a prior decision observed that the "public will

not, and should not, respect a judicial officer who has been shown to have repeatedly lied for his own benefit."[10]

**(10)** Judge Couwenberg complains that the masters failed to consider the numerous letters and witnesses testifying to his exemplary judicial performance and urges that on the basis of such "mitigating" evidence, the commission allow him to remain on the bench. Even assuming that his judicial performance was exemplary, it would not excuse his misconduct. In *Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d at page 865, the Supreme Court noted that "a good reputation for legal knowledge and administrative skills," although relevant to the degree of discipline, does not mitigate either willful misconduct or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Here, the record indicates that Judge Couwenberg committed four counts of willful misconduct and four counts of prejudicial conduct in what appears to be a deliberate course of misrepresentation. He lied to become a judge, elaborated on his misrepresentations for his enrobing ceremony, and subsequently lied to the commission in an apparent attempt to frustrate its investigation. A public censure would not adequately convey the commission's reproval of Judge Couwenberg's course of misconduct. (See *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 802 [119 Cal.Rptr. 841, 532 P.2d 1209].) The commission is convinced that protection of the public and the judiciary's reputation requires Judge Couwenberg's removal from the bench. (See *Fletcher v. Commission on Judicial Performance, supra*, 19 Cal.4th at p. 921.)

## CONCLUSION

**(11)** The commission orders Judge Patrick Couwenberg of the Los Angeles County Superior Court removed from the bench for (1) misrepresenting his educational background on his Personal Data Questionnaires when seeking judicial appointment; (2) falsely representing, in the course of seeking a judicial appointment in 1996, that he was a Vietnam veteran; (3) misrepresenting his educational background, legal experience and affiliations on his 1997 Judicial Data Questionnaire; (4) falsely representing to the judge who was to introduce him at the public enrobing ceremony that he was a Vietnam veteran who had received a Purple Heart; (5) falsely representing to attorneys that he went to Vietnam, had a master's degree in psychology, and had shrapnel in his groin received in military combat; and (6) making false statements about his education and military experience in letters and in testimony to the commission during its investigation of his conduct. The

[10] *Inquiry Concerning Murphy* (2001) No. 157, Decision and Order Removing Judge Murphy from Office [48 Cal.4th CJP Supp. 179].

commission concludes that its responsibility to protect the public, to enforce rigorous standards of judicial conduct, and to maintain public confidence in the integrity of the judiciary, require that Judge Couwenberg be removed from office.

This decision shall constitute the order of removal of Judge Patrick Couwenberg and pursuant to the provisions of Commission on Judicial Performance rule 120(a) and article VI, section 18, subdivision (b) of the California Constitution, Judge Patrick Couwenberg is hereby disqualified from acting as a judge.

Commission members Mr. Michael A. Kahn, Judge Risë Jones Pichon, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Marshall B. Grossman, Mrs. Crystal Lui, Justice Vance W. Raye, and Ms. Ramona Ripston voted in favor of all the findings and conclusions expressed herein and in the removal of Judge Patrick Couwenberg from judicial office. Commission member Ms. Gayle Gutierrez did not participate in this proceeding. There are currently two public member vacancies.

The judge's petition for review by the Supreme Court was denied on January 16, 2002.

[No. 162. Aug. 5, 2002.]

# INQUIRY CONCERNING JUDGE MICHAEL E. PLATT

## SUMMARY

A disciplinary proceeding was brought against a superior court judge.

The Commission on Judicial Performance ordered the judge's removal from office. The commission found that the judge had engaged in willful misconduct under Cal. Const., art. VI, § 18, subd. (d). After having been privately admonished, the judge dismissed three traffic tickets, and attempted to dismiss a fourth, in violation of Cal. Code Jud. Ethics, canons 1, 2A, 2B(1), 2B(2), and 3B(7), and twice attempted to improperly influence another judicial officer, in violation of Cal. Code Jud. Ethics, canons 1, 2A, 2B(1), 2B(2) and 3B(7). None of the tickets would have come before him in the ordinary course of judicial business. The judge's insensitivity to ethical restraints was further reflected in his two attempts to influence other judicial officers on behalf of a friend or an acquaintance. The enforcement of rigorous standards of judicial conduct favored removal, as anything less might appear to countenance the judge's multiple acts of willful misconduct. (Opinion by Risë Jones Pichon, Chairperson.)

## HEADNOTES

(1) **Judges § 6.2—Discipline—Grounds—Sanctions.**—Cal. Const., art. VI, § 18, subd. (d), provides that a judge may be censured or removed from office for an act that constitutes willful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. It further provides that a judge may be publicly or privately admonished for engaging in improper action.

(2) **Judges § 6.2—Discipline—Willful Misconduct—Definition.**—To commit willful misconduct, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity. Whether a judge's conduct is unjudicial is measured by reference to the California Code of Judicial Ethics and its canons. A judge acts in bad faith only by (1) performing a judicial act for a corrupt

purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority. A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose.

(3) **Judges § 6.2—Discipline—Prejudicial Conduct—Improper Actions—Definitions.**—Prejudicial conduct by a judge is either conduct that a judge undertakes in good faith but that nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office or willful conduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring the judicial office into disrepute, that is, the conduct would appear to an objective observer to be prejudicial to public esteem for the judicial office. An improper action is conduct that violates the California Code of Judicial Ethics, but that, when viewed from the perspective of an objective observer, does not constitute prejudicial conduct.

(4) **Judges § 6—Discipline—Willful Misconduct—Ticket Fixing.**—The judge's attempts to dismiss four separate traffic tickets constituted willful misconduct. In each instance, the judge, acting in a judicial capacity, sought to dismiss a traffic ticket that was not before him based on ex parte communications. In each instance, the judge acted in bad faith because he acted for a purpose other than the faithful discharge of his judicial duties, i.e., to benefit a friend.

(5) **Judges § 6—Discipline—Improper Action—Ex Parte Communication.**—The judge's conduct in relaying information concerning a family in dependency proceedings to the judge presiding over the case violated the prohibition on ex parte communications contained in Cal. Code Jud. Ethics, canon 3B(7), and was an improper action under Cal. Const., art. VI, § 18, subd. (d). In light of the judge's arguably laudable reason for becoming involved in the proceeding and the fact that the communication in no way benefited either the judge or the family, it was not clear to the Commission on Judicial Performance that the communication brings the judiciary into disrepute.

(6) **Judges § 6—Discipline—Conduct Prejudicial—Ex Parte Communication.**—The judge's conduct in conveying information to a commissioner about his godfather who had received a traffic citation constituted an improper ex parte communication and an attempt to influence the commissioner and was conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(7) **Judges § 6—Discipline—Willful Misconduct—Request for Own Recognizance Release.**—The judge's conduct in visiting another judge and asking that judge to grant an own recognizance release of a family member of an acquaintance of the judge constituted willful misconduct. It was undertaken in a judicial capacity because the judge was using the authority of his office for an improper purpose, and was done in bad faith because it was an attempt to benefit the relative of an acquaintance.

(8) **Judges § 6.4—Discipline—Proceedings—Determining Appropriate Sanction—Factors.**—When determining the appropriate resolution of a disciplinary proceeding, the Commission on Judicial Performance is guided by the California Supreme Court's pronouncement that the purpose of the proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. In determining the appropriate discipline, each case must be considered on its own facts. The commission is guided in its evaluation of the facts by opinions of the California Supreme Court. In decisions concerning the removal of judges, the California Supreme Court has referred to several factors. It has often emphasized the number of acts of misconduct. The disposition of a case depends in large measure on the nature and number of charges found to be true. The number of a judge's wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing lack of temperament and ability to perform judicial functions in an even-handed manner.

(9) **Judges § 6.4—Discipline—Proceedings—Determining Appropriate Sanction—Factors Supporting Removal from Office.**—Notwithstanding the California Supreme Court's emphasis on the number of a judge's offenses, an overarching consideration remains whether removal is necessary to protect the public, enforce rigorous standards of judicial conduct and maintain public confidence in the integrity and independence of the judicial system. The court would hesitate to remove a judge who showed himself or herself ready, willing, and able to reform under a less severe sanction. The ability to reform or, conversely, the likelihood that the judge will reoffend if permitted to remain on the bench, thus

emerges as a second important factor in deciding whether the removal sanction should be applied. An isolated instance of misconduct may arise from a momentary ethical lapse, but a continuing pattern reflects poor judgment and lack of judicial temperament. The California Supreme Court has identified two additional factors suggesting inability to reform and hence unsuitability for judicial office. A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform. The failure of past sanctions to effect a change in conduct also suggests a lack of ability to reform and unsuitability for judicial office. The court has made note of prior discipline in deciding whether removal is appropriate.

(10) **Judges § 8—Standard of Conduct.**—Since the advent of the Commission on Judicial Performance, judges have been held to a higher standard of conduct than attorneys. The California Supreme Court expects all judges to comply with the canons, and failure to do so suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.

(11) **Judges § 6.2—Discipline—Grounds—Ticket Fixing.**—Judges are not insulated from society. Most, if not all, judges have friends and acquaintances who on occasion receive traffic tickets or have other difficulties that result in court appearances. Thus, there is always a temptation to do a friend a favor, to put in a good word with the judicial officer who will preside over a traffic ticket. Accordingly, the Commission on Judicial Performance's response to proven instances of ticket fixing should discourage requests for favors and strengthen judicial resistance to such requests. Ticket fixing is among the most obvious forms of abuse of judicial authority. It is an abuse that citizens unquestionably understand and are suspicious about. An ordinary citizen would not respect a judge who dismissed multiple tickets, that were not even before him or her, and then claimed that he or she did not recognize that doing so was wrong. The commission's responsibility for the protection of the public weighs against subjecting future litigants, witnesses, the public, and court staff to a judge who is dishonest or who, after a career in the district attorney's office and five years on the bench, cannot recognize the impropriety of ticket fixing when he or she does it.

(12) **Judges § 6.4—Discipline—Proceedings—Mitigating Factors.**—While factors in mitigation do not excuse a judge's willful misconduct, the Commission on Judicial Performance may take them into account in considering the totality of the circumstances that are pertinent to determining the appropriate discipline.

(13) **Judges § 6.4—Discipline—Proceedings—Removal from Office—Ticket Fixing—Attempts to Influence Other Judicial Officers.**—The Commission on Judicial Performance removed the judge from office because, after having been privately admonished, the judge dismissed three traffic tickets, and attempted to dismiss a fourth, and twice attempted to improperly influence another judicial officer. In each instance, the judge had the opportunity to consider alternatives before he acted. Furthermore, none of the tickets would have come before him in the ordinary course of judicial business. Although the judge maintained that when he dismissed the tickets, he did not see any ethical problems with his actions, it was inconceivable that he did not know that ticket fixing is wrong.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 57, 76.]

## OPINION

**PICHON, Chairperson.**—This disciplinary matter concerns Judge Michael E. Platt, a judge of the San Joaquin County Superior Court. Judge Platt was charged with four counts of ticket fixing, three counts of attempting to influence other jurists, and one count of improperly issuing a stay in a detainer proceeding.

The Commission on Judicial Performance finds that the four charges of ticket fixing and three charges of attempting to influence other jurists are supported by clear and convincing evidence. The commission concludes that Judge Platt's actions on four separate traffic tickets and on one of his attempts to influence another jurist constitute acts of willful misconduct under article VI, section 18, subdivision (d) of the California Constitution. For the reasons set forth in this decision, the commission hereby removes Judge Michael E. Platt from the bench.

## PROCEDURAL HISTORY

Judge Platt was appointed to the San Joaquin County Superior Court in September 1994. On October 27, 1997, the commission sent Judge Platt a notice of intended public admonishment for soliciting fundraising contributions from attorneys and court staff. On November 4, 1997, Judge Platt sent the commission a letter accepting the private admonishment and assuring the commission that he would conduct himself and his affairs in compliance with the California Code of Judicial Ethics.

In May 2001, the commission sent a preliminary investigation letter to Judge Platt. Following his response, a second preliminary investigation letter

was sent to Judge Platt in June 2001. After considering his response, the commission, on August 31, 2001, issued a notice of formal proceedings. Judge Platt filed his answer on September 18, 2001.

On October 16, 2001, the commission sent another preliminary investigation letter to Judge Platt, to which he responded on November 1, 2001. The commission issued a first amended notice of formal proceedings and Judge Platt filed his answer on December 19, 2001.

Meanwhile on October 16, 2001, the Supreme Court, at the commission's request, appointed Justice Arthur G. Scotland of the Court of Appeal, Third Appellate District (presiding), Judge Jamie A. Jacobs-May of the Superior Court of Santa Clara County, and Judge Peter L. Spinetta of the Superior Court of Contra Costa County, as special masters. A hearing was held before the special masters from February 26 through February 28, 2002, in Sacramento, California. Mr. Jack Coyle and Mr. Brad Battson of the commission's office of trial counsel presented the case in support of the charges. Judge Platt was represented by Mr. Albert M. Ellis, of the Law Offices of Hakeem, Ellis and Marengo in Stockton, California. On April 19, 2002, the masters filed their 50-page report with the commission.

Following the receipt of objections and briefs from Judge Platt and the office of trial counsel, the matter was argued before the commission on June 26, 2002. Mr. Coyle presented argument on behalf of trial counsel. Mr. Ellis represented Judge Platt, and Judge Platt also spoke in his own behalf.

## FINDINGS OF FACT

A. *Count One*

The notice of formal proceedings alleges, and Judge Platt admits, that he had a personal relationship with Mr. G, including the fact that in October 1998, Mr. G loaned Judge Platt approximately $3,500, which debt was discharged in July 1999 by way of bankruptcy proceedings.

On or after December 28, 1999, Mrs. G (Mr. G's wife) telephoned Judge Platt and informed the judge that her niece, Ms. M, had received a speeding ticket in San Joaquin County. Although Ms. M's ticket would not have come before Judge Platt for any purpose in the regular course of judicial business, Judge Platt instructed his clerk, "Clerk N," to locate the court records of the ticket. Subsequently, on or about February 29, 2000, Judge Platt instructed Clerk N to dismiss Ms. M's ticket. As a result, the ticket was dismissed on the court's own motion without an appearance by Ms. M and without a hearing.

The masters noted that Judge Platt testified that, although he now realizes that dismissing the ticket was wrong, he did not perceive any legal or ethical problem when he told his clerk to dismiss the ticket in February 2000. Judge Platt testified that Mrs. G never asked him to dismiss the traffic ticket, and that his decision to dismiss the ticket was not influenced by any sense of obligation to Mr. G's family due to the fact that the loan received from Mr. G was never repaid and had been discharged in bankruptcy. Judge Platt testified that he dismissed the ticket solely because Ms. M had left or was leaving for school in Southern California and would be gone for an extended period of time.

The masters found that Judge Platt's "explanation for dismissing Ms. M's ticket, and his claim that he did not realize at the time his action was wrong, are after-the-fact rationalizations which lack credibility." They noted that common experience and common sense indicate that "ticket fixing is a quintessential bad act of a judge. It is an abuse of power that citizens unquestionably understand and are suspicious about." Judge Platt was described as a careful decision maker who has a good knowledge of the law. Yet he claims that he did not realize that dismissing Ms. M's ticket was improper. The masters found that "it is inconceivable he did not know the obvious, that ticket fixing was wrong when he dismissed Ms. M's traffic ticket."

The masters offered four additional grounds for their finding. First, they found that Judge Platt offered no adequate justification for the act. Judge Platt acknowledged that judges ordinarily do not act on cases which are not pending before them, that Ms. M's departure for Southern California did not justify the dismissal of her ticket, and that there were other solutions available. Second, the masters cited the court staff's reaction to Judge Platt's conduct. The masters explained that Judge Platt had to ask Clerk N several times if she had found Ms. M's ticket and that she later rebuffed Judge Platt's request for her to inquire into the status of Mr. A's ticket (see count six). Although Clerk N never told Judge Platt about her discomfort with his conduct, the masters "infer that Platt recognized Clerk N's reluctance because he then approached Clerk G, rather than Clerk N, on December 26, 2000, about the ticket received by Mrs. G"[1] (see count three).

Third, the masters noted Clerk G's testimony that Judge Platt initially told her that Mrs. G was the wife of a police officer and that when Judge Platt

[1] The masters further note that Judge Platt explained that he called "Clerk G" because he was unable to contact Clerk N, who he believed was on vacation or had taken a few days off. Clerk N, however, testified that she was at work on that date. Also, when Clerk G called Clerk N to inquire why Judge Platt had contacted her, Clerk N responded that the judge knew that she, Clerk N, would not enter the dismissal of Mrs. G's ticket.

asked her to dismiss Mrs. G's ticket he told her to keep the matter "just between you and me." The masters were of the opinion that both statements suggested a consciousness of wrongdoing. Judge Platt denied the statement about Mr. G, but the masters found Clerk G's testimony more credible. Judge Platt in his testimony conceded that he must have said something to the effect of the second statement. Finally, the masters noted that, although it obviously was wrong, "Judge Platt's dismissal of Ms. M's ticket was consistent with his belief in the need, some might say his compulsion, to help others even at his own risk." The commission adopts the masters' findings of fact on count one.

B. *Count Two*

The notice of formal proceedings alleges, and Judge Platt admits that, sometime on or after February 8, 2000, Mrs. G telephoned Judge Platt and informed him that her husband, Mr. G, had received a speeding ticket in San Joaquin County. Although Mr. G's ticket would not have come before Judge Platt for any purpose in the regular course of judicial business, Judge Platt instructed his clerk, Clerk N, to locate the court records of the speeding ticket. Subsequently, on or about February 29, 2000, Judge Platt instructed Clerk N to dismiss Mr. G's ticket. As a result, the ticket was dismissed on the court's own motion without an appearance by Mr. G and without a hearing.

Judge Platt testified before the masters that, although he now realizes that dismissing the ticket was wrong, at the time he dismissed it he did not perceive any legal or ethical problem when he instructed his clerk to dismiss the ticket. The masters noted that, according to Judge Platt, "he dismissed the ticket due to the fact that [Mr. G], a professional baseball player who was Platt's friend, was going to be out of the state for the duration of the baseball season."

The masters concluded, as they did in count one, that at the time he dismissed Mr. G's traffic ticket, Judge Platt "knew this act was unjustified and wrong, but he nonetheless dismissed the ticket to help a friend (rather than for any personal gain)." They also found that Judge Platt's act had a negative effect on the way the public perceives the integrity and impartiality of judges. The commission adopts the masters' findings of fact on count two.

C. *Count Three*

The notice of formal proceedings alleges, and Judge Platt admits that, sometime on or after November 16, 2000, Mrs. G telephoned Judge Platt and informed him that she had received a speeding ticket in San Joaquin County. Although Mrs. G's ticket would not have come before Judge Platt for any purpose in the regular course of judicial business, Judge Platt instructed his

clerk, Clerk N, to locate the court records of the speeding ticket. Subsequently on December 26, 2000, Judge Platt telephoned his former courtroom clerk, Clerk G, then the courtroom clerk for another judge, and told her that he wanted to be certain that Mrs. G would be eligible for traffic school in connection with her outstanding traffic ticket. Clerk G made an entry on the court records that Mrs. G had phoned and would be in to sign up for traffic school and that Judge Platt had "OK'd" her attendance at traffic school. On January 9, 2001, Judge Platt telephoned Clerk G and told her that he wanted Mrs. G's ticket dismissed. He asked Clerk G to enter the dismissal on the court records and told her to keep the matter between him and her. Clerk G subsequently decided not to enter the dismissal and so informed Judge Platt.

Judge Platt testified before the masters that, although he now realizes that directing Clerk G to dismiss Mrs. G's ticket was wrong, he did not perceive any legal or ethical problem when he instructed Clerk G to do so in January 2001. The masters noted that, according to Judge Platt, "he believed it was appropriate to dismiss [Mrs. G's] ticket because she told him that she had missed the traffic school appearance and was leaving the state with her husband to attend spring training."

The masters concluded, as they did in counts one and two, that at the time he instructed Clerk G to dismiss Mrs. G's ticket, Judge Platt "knew this act was unjustified and wrong, but he nonetheless sought to dismiss the ticket to help a friend (rather than for any personal gain)." They also found that Judge Platt's act had a negative effect on the way the public perceives the integrity and impartiality of judges. The commission adopts the masters' findings of fact on count three.

D. *Count Four*

The notice of formal proceedings alleges, and Judge Platt admits, the following facts. Sometime after March 27, 2000, Judge Platt's bailiff, Deputy A, informed him that F had received a speeding ticket in San Joaquin County. F was the minor son of a reserve deputy sheriff who had acted as Judge Platt's bailiff on occasion. Deputy A explained the circumstances of F receiving a speeding ticket and asked Judge Platt if he could help. Thereafter, Judge Platt contacted the California Highway Patrol officer who had issued the speeding ticket to F and discussed the case with him ex parte. Although the speeding ticket would not have come before Judge Platt for any purpose in the regular course of judicial business, on or about May 23, 2000, Judge Platt dismissed or directed the dismissal of the speeding ticket issued to F without a hearing.

The masters explained that Deputy A felt some responsibility for F's ticket or felt bad about it because the ticket was received while F was on an errand

for Deputy A and F's father. After Deputy A explained the circumstances of the ticket to Judge Platt and asked if anything could be done about it, Judge Platt told Deputy A to get the citation number and stated that he would look into it when the matter got close to the court date. Deputy A or F's father told Judge Platt that F had done well in school, was a productive young man who was graduating from high school, was heading to USC (University of Southern California), and was scheduled to leave for Southern California or possibly New Zealand for water polo competitions or something to that effect.

When Deputy A told Judge Platt that F had a court date to appear regarding the ticket, Judge Platt telephoned the California Highway Patrol officer who issued the ticket. Judge Platt indicated that he called the officer to "find out how the minor had reacted and find out what the specific circumstances were" in order to "make a determination about whether anything could be done with the case or should be done with the case." The officer indicated that F's demeanor was appropriate for somebody receiving a citation and that F acknowledged that he was speeding. Based on the information he received from the officer, Judge Platt decided to dismiss the ticket. He asked the officer if the officer had any objection to the ticket being dismissed and the officer said no. Judge Platt had identified himself as a judge, but he did not tell the officer that he was not the judge assigned to F's case.

The masters noted that, although the matter was not pending before him, Judge Platt claimed he had authority to dismiss the ticket because he was the presiding judge of the juvenile court and the commissioners who handled traffic matters were under the presiding judge's position. The masters found, however, that "at the time he dismissed the minor's ticket, Platt was handling an adult murder trial, and Judge Harrington and/or Judge Parker were handling juvenile court matters."

The masters concluded, as they did in counts one, two and three, that at the time he dismissed or directed the dismissal of F's speeding ticket, Judge Platt "knew this act was wrong, but he nonetheless had the ticket dismissed to help the son of an acquaintance (rather than for any personal gain)." They also found that Judge Platt's act had a negative effect on the way the public perceives the integrity and impartiality of judges. The commission adopts the masters' findings of fact on count four.

E. *Count Five*

The notice of formal proceedings alleges, and Judge Platt admits, the following facts. On or about July 16, 1998, Judge Platt telephoned Judge Holland at his chambers in Stockton, where Judge Holland was assigned to

the juvenile dependency calendar. Judge Platt told him that a case that was assigned to him involved the family of a former client (Mr. S) from when Judge Platt had been in private practice as an attorney. Judge Platt told Judge Holland that Mr. or Mrs. S had contacted him regarding their two sons who were dependents of the court; that Mr. S had allegedly absconded with the younger child; that the family was dysfunctional; that Judge Platt had advised Mr. S to return and to cooperate with child protective services; and that Mr. or Mrs. S had inquired when they would be seeing a judge. Judge Holland told Judge Platt that the matter would be heard that day or the next, that the parents would be assigned counsel, and that a date would be scheduled for a jurisdictional hearing.

The notice of formal proceedings further alleges that, when the matter came before Judge Holland the next day, during the hearing Judge Platt "entered Judge Holland's courtroom through a side door and remained in the courtroom near the door, creating the impression that [he was] in a special position to influence the judge and that [he was] attempting to lend the prestige of [his] judicial office to advance the interests of Mr. S or his family." Judge Platt admits, and the masters found, that Judge Platt did briefly stand in the doorway to Judge Holland's court, but that he did so solely to make sure that the S family had remained in the court and that he left almost immediately after determining that they were there. The masters found that Judge Platt's appearance did not create the impression that Platt was in a special position to influence Judge Holland, as the S family did not see him and there was a lack of evidence to establish that anyone else in the courtroom, other than Judge Holland, actually saw Judge Platt.

Judge Platt testified that late in the afternoon of July 16, 1998, Mrs. S telephoned him in his chambers and told him one of her sons was the subject of a pending juvenile dependency proceeding. Mrs. S expressed concern that the father and son had "taken off" and were "going to run" rather than appear at the dependency hearing. Mrs. S asked what could be done about this problem. Judge Platt told her to locate her husband and son and talk them into coming to court and cooperating. She indicated that they had no faith in the system, and Judge Platt told her that if they would be more comfortable, they could come to his chambers and he would take them to the dependency proceeding. Judge Platt then checked with the juvenile court, determined that the proceeding was to be held the next morning before Judge Holland, and telephoned Judge Holland.

The following morning Mr. S and his son came to Judge Platt's courtroom. He escorted them to Judge Holland's courtroom and told them to remain there until their case was called. Judge Platt returned to his courtroom to do his morning calendar. At the midmorning break, Judge Platt went back to

Judge Holland's courtroom and looked into the courtroom through an open side door that led into a private hallway. The S family was at the counsel table with their backs to him. After seeing that they were there, Judge Platt left without saying anything to anyone. The commission adopts the masters' findings of fact on count five.

F. *Count Six*

The notice of formal proceedings alleges that sometime in 1999 or 2000, Judge Platt telephoned Commissioner Kronlund, who was assigned to the Tracy branch of the San Joaquin Superior Court. Judge Platt said he was calling about a friend of his, Mr. A, whom he referred to as his godfather. Judge Platt asked the commissioner questions concerning the handling of traffic tickets, in particular the handling of late fees. Mr. A had received a speeding ticket on October 12, 1999. He appeared before Commissioner Kronlund in April 2000, pled guilty to the speeding ticket, and was ordered to pay a fine and fees, including a late fee.

Judge Platt—in both his answer and testimony—admits to the factual allegations, but denies that he asked the commissioner to do anything with respect to the traffic ticket or that he in any way attempted to influence her.

Judge Platt testified that Mr. A is his godfather. At some point, Mr. A told Judge Platt that he had received a traffic ticket, it was old, and he had never gone to court about it. Mr. A wanted to find out whom he could contact to schedule a court appearance. Judge Platt told him that he did not know how the Tracy court set up its traffic calendar, but that he would find out. Because the ticket was old, Judge Platt assumed a late fee would be an issue. Judge Platt called Commissioner Kronlund because they had previously been colleagues in the district attorney's office and he knew she would be able to tell him how Mr. A could get the matter on the calendar. Judge Platt did not know whether she would be the commissioner who would ultimately adjudicate Mr. A's ticket. The commissioner told him that a personal appearance would have to be made in the clerk's office on a Thursday in order to put the matter on the calendar, and she may have mentioned how late fees were handled. Judge Platt relayed the information to Mr. A and his wife, but he did not tell Mr. A that he had contacted Commissioner Kronlund to get the information.

In his testimony before the masters, Judge Platt explained his conversation with Commissioner Kronlund as follows:

"Q. I may have missed this, but, Judge Platt what did you tell the Commissioner was your reason for calling?

"A. To find out what date and time traffic citations appear so that somebody could put it on the calendar, and I mentioned—and I believe I did mention his name.

"Q. Did you mention you had some relationship to this individual?

"A. I believe so, either as a very close friend—I don't know that I said he was my godfather, but certainly I said it was somebody that I knew and was active in the community, and that was the reason I gave the name, is I knew that Barbara or that Commissioner Kronlund was active in the community, and that that individual at some point, I assumed, would be putting something on the calendar down there, and I didn't know that it was or wasn't her calendar, but that certainly was the information that I provided and asked for."

In her stipulation in lieu of testimony, Commissioner Kronlund recalled receiving a phone call from Judge Platt about his friend, Mr. A, having received a traffic ticket. She recalled that he asked questions about how late fees in traffic cases were determined and whether there was a "going rate." Commissioner Kronlund indicated that Judge Platt did not ask her "to do anything with the ticket, such as dismissing it or taking care of the ticket," and that she did not know "whether [Mr. A] to whom Judge Platt referred ever showed up in her courtroom."

The commission adopts the masters' findings that Judge Platt telephoned Commissioner Kronlund and mentioned that his friend, Mr. A, had received a traffic ticket.

G. *Count Seven*

The notice of formal proceedings alleges that, at the end of a workday in approximately 1999, Judge Platt approached a clerk in the clerk's office concerning a stay of execution of an order that had been issued by Judge Smith in an unlawful detainer action. Judge Smith had granted the landlord possession of the premises. Judge Platt approached the clerk shortly after Judge Smith had denied the tenant's request for a stay of execution of her order. The notice alleges that the tenant was a personal acquaintance of Judge Platt's and accompanied him on his visit to the clerk. Judge Platt instructed the clerk to enter his order granting a stay, effectively vacating Judge Smith's order.

The masters found that Judge Platt did enter a stay of execution in the unlawful detainer action, but that there was nothing improper in his doing so. They found that Judge Platt entered the clerk's office in order to pick up his

mail and that he overheard a person at the public counter speaking in a raised voice and giving the clerk a "hard time." Instead of going to the mail area, Judge Platt turned to the clerk and asked if she needed assistance. The clerk explained that the person was requesting a stay of an eviction order, which required that he be out by 8:00 a.m. the following morning. As he spoke to the clerk, Judge Platt recognized the person who was seeking the stay as someone he had seen refereeing youth basketball games. Judge Platt had never handled an unlawful detainer action, but the person was persistent, and the clerk indicated that both Judge Smith and the judges in the other civil departments, who reviewed such emergency requests, had left for the day. The clerk indicated that any judge could look at the request and make a determination whether to grant a stay. Judge Platt decided to grant the temporary stay.

The masters found that there was a lack of clear and convincing proof to support the allegations in count seven that Judge Platt acted at the ex parte request of a personal acquaintance in a matter not pending before him. Trial counsel agrees. The commission adopts the masters' findings on count seven and hereby dismisses count seven.

H. *Count Eight*

The notice of formal proceedings alleges that, during the spring or summer of 2000, Judge Platt visited Judge James E. Hammerstone, Jr., at his chambers in the Stockton branch of the court. Judge Platt told Judge Hammerstone that a personal acquaintance of Judge Platt's, or a family member of the acquaintance, was being held in the county jail for a theft-related offense. Judge Platt asked Judge Hammerstone to grant an own recognizance (O.R.) release or to call the jail and order the individual released on her own recognizance. Judge Hammerstone declined to do so.

Judge Platt, in his answer and his testimony, admits that he visited Judge Hammerstone and told him that a family member of an acquaintance was being held in the county jail and raised the issue of a release on one's own recognizance. Judge Platt, however, contends that he told Judge Hammerstone that the family would be requesting a release on her own recognizance, and that he was not vouching for them.[2]

Judge Hammerstone, however, was firm in his testimony that Judge Platt did ask him to grant the relative release on her own recognizance.

[2] Judge Platt testified before the masters: "[W]hen I handled the arraignment calendar for almost two years or two-and-a-half years, on countless occasions people would mention they knew somebody, and I wanted to make sure that Judge Hammerstone knew that if that was done I knew these people, I did not know the individual that was arrested, I wasn't vouching for them."

The masters concluded: "We find credible and convincing Judge Hammerstone's testimony that Judge Platt made an unexpected ex parte visit to Hammerstone's chambers and asked Hammerstone to grant an O.R. release for a family member of an acquaintance of Platt's. Not only did Platt's testimony to the contrary lack credibility, it was inconsistent with Platt's personality trait which motivates him to help others in need. . . . In every other alleged incident, Platt sought to help a friend or acquaintance. But Platt claimed that, in this instance, he in effect was trying to *undermine* the effort of an acquaintance to receive help for a problem. Rather than ask Hammerstone to grant an O.R. release, Platt went all the way to Hammerstone's chambers simply to tell him that Platt had only seen the family at church and that Hammerstone could factor this into whatever information the family gave him about their relationship with Platt. In other words, Platt 'wasn't vouching for them' and did not want Hammerstone to overvalue the fact that they knew Platt, or otherwise be misled by the information. Simply stated, we find this unbelievable."

The commission adopts the masters' findings of fact on count eight.

## CONCLUSIONS OF LAW

**(1)** The California Constitution, article VI, section 18, subdivision (d) provides that a judge may be censured or removed from office for an act that constitutes "willful misconduct in office" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." It further provides that a judge may be publicly or privately admonished for engaging in "improper action." (*Ibid.*)

**(2)** A judge, to commit willful misconduct, "must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).) Whether a judge's conduct is "unjudicial" is measured by reference to the California Code of Judicial Ethics and its canons. (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*); accord, *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 395 [84 Cal.Rptr.2d 466, 975 P.2d 663].) "A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra,* 18 Cal.4th at p. 1092.) "A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or

administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose." (*Id.* at p. 1104, citing *Dodds, supra,* 12 Cal.4th at p. 172.)

**(3)** The Supreme Court has defined "prejudicial conduct" as follows: "Prejudicial conduct is '*either* "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" [citation] *or* "willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity" [citation].' (*Doan* v. *Commission on Judicial Performance* [(1995)] 11 Cal.4th [294,] 312 [45 Cal.Rptr.2d 254, 902 P.2d 272], original italics (*Doan*).) In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring 'the judicial office into disrepute,' that is, the conduct would appear to an objective observer to be prejudicial to ' "public esteem for the judicial office." ' (*Kennick* v. *Commission on Judicial Performance* [(1990)] 50 Cal.3d [297,] 314 [267 Cal.Rptr. 293, 787 P.2d 591].)" (*Broadman, supra,* 18 Cal.4th at pp. 1092–1093.)

An improper action is conduct that violates the California Code of Judicial Ethics, but which, when viewed "from the perspective of an objective observer," does not constitute prejudicial conduct. (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 899 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams*).)

A. *Counts One Through Four*

**(4)** Each of Judge Platt's attempts to dismiss the four separate traffic tickets violated canon 1 (a judge shall uphold the integrity of the judiciary), canon 2A (a judge shall respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), canon 2B(1) (a judge shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment; a judge shall not convey, or permit others to convey, that any individual is in a special position to influence the judge), canon 2B(2) (a judge shall not lend the prestige of judicial office to advance the personal interests of others), and canon 3B(7) (a judge shall perform the duties of judicial office impartially by permitting every person who has a legal interest in a proceeding, including the prosecuting authority, a full right to be heard according to law) of the California Code of Judicial Ethics.

Judge Platt's conduct concerning the four separate traffic tickets constitutes willful misconduct. In each instance, Judge Platt, acting in his judicial capacity, sought to dismiss a traffic ticket that was not before him based on ex parte communications. The masters found, and the commission agrees, that in each instance Judge Platt acted in bad faith because he acted for a purpose other than the faithful discharge of his judicial duties, "i.e. to benefit a friend." In addition, the masters concluded, and the commission agrees, that Judge Platt's actions had a negative effect on the way the public perceives the integrity and impartiality of judges.

B. *Count Five*

The masters concluded, and the commission agrees, that Judge Platt's appearance in the doorway of Judge Holland's courtroom did not create the impression that Judge Platt was in a special position to influence Judge Holland and that Judge Platt was not consciously attempting to influence his decision in the case or to lend the prestige of his judicial office to advance the interests of the S family. In sum, there is insufficient evidence to support any conclusion of unjudicial conduct based on Judge Platt's appearance in a side doorway of Judge Holland's courtroom during a proceeding involving the S family.

**(5)** The evidence before the commission, however, supports the conclusion that Judge Platt, in relaying information concerning the S family to Judge Holland in the initial phone call that he placed to Judge Holland, violated the California Code of Judicial Ethics. The masters found (as Judge Platt testified) that he had already learned from the clerk that the S family matter would be before Judge Holland the next morning when he telephoned Judge Holland. In his verified answer, Judge Platt admits that he "informed Judge Holland that he had been contacted by the family of Mr. S regarding their two sons who were dependents of the court; that Mr. S allegedly had absconded with the younger child; that the family was dysfunctional; that [Judge Platt] had advised Mr. S to return the boy and to cooperate with child protective services; and that Mr. or Mrs. S had inquired when they would be seeing a judge."

Count five alleges that Judge Platt's actions violated canon 3B(7) of the California Code of Judicial Ethics, which includes a proscription against ex parte communications. In his response brief to the commission, Judge Platt argues that the masters' finding that he "became involved in the S family dependency matter for the sole reason of ensuring that the father and son would come to court rather than hide from authorities," supports a conclusion that his phone conversation with Judge Holland was permissible under canon 3B(7)(b), which provides that a "judge may consult with court personnel

whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges."

This argument is not well taken because the information conveyed—that the family was dysfunctional, the father had absconded with the son and that Judge Platt had advised them to return—in no way furthered the purpose of "ensuring that the father and son would come to court" and in no way facilitated either Judge Platt's or Judge Holland's "adjudicative responsibilities."[3] In fact, the ex parte conveyance of information relevant to the substance of the underlying issues before Judge Holland compromised his impartiality. Judge Holland could do nothing until the case was called the following morning and the father and son either appeared or did not appear. Had they not appeared, Judge Holland would have been placed in the position of having to determine what action to take without considering the improper ex parte communication from Judge Platt that the father and son had absconded and that Judge Platt had advised them to appear in court.

The commission concludes that Judge Platt's ex parte conveyance of information concerning the S family to Judge Holland violated canon 3B(7) and canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activity) of the California Code of Judicial Ethics.

The commission further concludes that this conveyance of substantive information constitutes an improper action under article VI, section 18, subdivision (d) of the California Constitution. The communication violated the California Code of Judicial Ethics, but in light of Judge Platt's arguably laudable reason for becoming involved in the proceeding and the fact that the communication in no way benefited either Judge Platt or the S family, the commission concludes that it is not clear that the communication brings the judiciary into disrepute.

C. *Count Six*

**(6)** Judge Platt admits to contacting Commissioner Kronlund, asking her questions concerning the handling of traffic matters and informing her that his godfather, Mr. A, had a traffic ticket and that he was active in the community. The commission concludes that in conveying this information to the commissioner, Judge Platt violated the California Code of Judicial Ethics.

The masters found that Judge Platt "did not know, or attempt to find out, what commissioner would handle Mr. A's ticket when it was calendared,"

[3] As noted in trial counsel's reply brief, the consultation exception of California Code of Judicial Ethics canon 3B(7)(b) cannot apply because Judge Platt, due to his relationship to the S family, was disqualified from acting in its case.

"did not talk with Kronlund about the specific case pending before her," and "did not ask her to take any action on the ticket." The commission accepts these findings, but they do not compel a conclusion that Judge Platt did not intend to attempt to influence the commissioner. Judge Platt could have learned all about the procedures from Commissioner Kronlund (or the clerk's office) without revealing that he was calling on behalf of his godfather. Judge Platt does not offer any legitimate reason for telling the commissioner about Mr. A.[4] Furthermore, the fact that Commissioner Kronlund was not influenced does not mean that she did not perceive the telephone call as an attempt to influence.[5]

The commission agrees with former Judge David M. Rothman when he writes in California Judicial Conduct Handbook (2d ed. 1999) section 5.10, pages 131–132: "A traffic referee is about to hear a speeding ticket case. A judge sends a note to the referee indicating that the offender is a very good citizen. What should the referee do? This is an inappropriate ex parte communication and the judge who sent the note has engaged in judicial misconduct by attempting to influence another judicial officer. The contact must be disclosed to the parties. In addition, although recusal is not mandatory, it must be considered depending on consideration of the factors set forth in Code of Civil Procedure sections 170.1(a)(1), (6)." In the example, the judge does not explicitly ask the referee to do anything. The judge simply mentions that the offender is a "very good citizen." The attempt to influence is inherent in the unsolicited telephone call and the ex parte conveyance of positive information about the offender. The judge's failure to explicitly ask the referee to do anything does not change the nature of the communication.

[4] In his response brief, Judge Platt indicates that he wanted Commissioner Kronlund to be aware of Mr. A's name so that if he "came to court she would be able to hear it or not hear it." He suggests that if he had not identified Mr. A in connection with the inquiry, the commissioner "would not have been in a position to properly address the fact of their brief conversation regarding the citation, and to disclose it to the parties if necessary pursuant to canon 3B(7)(d)(ii)." Canon 3B(7)(d)(ii) of the California Code of Judicial Ethics requires the disclosure of ex parte communications. A general inquiry concerning the procedures for handling traffic tickets does not become an ex parte communication until or unless it is linked to some specific case. Thus, Judge Platt appears to be admitting that by informing the commissioner that he was calling on behalf of Mr. A, he was making an ex parte communication that the commissioner might have to disclose under the canon. Absent some legitimate reason for the conveyance of the information, such an ex parte communication is a violation of the California Code of Judicial Ethics.

[5] Commissioner Kronlund did not appear before the masters. Instead, the parties submitted a stipulation in lieu of testimony. The stipulation recites that "Judge Platt did not ask Commissioner Kronlund to do anything with the ticket, such as dismissing or taking care of the ticket." This does not mean that the commissioner did not recognize the phone call from the judge on behalf of his friend as an attempt to influence, even though she resisted the attempt.

The commission concludes that Judge Platt's conveyance of information to Commissioner Kronlund regarding Mr. A violated canons 1, 2A, 2B(1), 2B(2) and 3B(7) of the California Code of Judicial Ethics.

The commission further concludes that Judge Platt's conduct constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Prejudicial conduct includes " ' "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." ' "[6] Even accepting that Judge Platt conveyed the information in "good faith," this was a violation of the California Code of Judicial Ethics. In addition, this type of subtle attempt to influence is unquestionably prejudicial to public esteem for the judicial office. As the masters noted, ticket fixing "is a quintessential bad act of a judge," and an "abuse of power that citizens unquestionably understand and are suspicious about." The public will perceive an attempt to influence the disposition of a ticket whenever a judge calls a commissioner—who may or may not hear a traffic ticket—and tells her that the offender is his godfather and active in the community, even if the judge does not explicitly ask the commissioner to do anything.

D. *Count Eight*

**(7)** The commission agrees with the masters that Judge Platt, in visiting Judge Hammerstone and asking him to grant an O.R. release, was attempting to use the prestige of his office to advance the personal interests of an acquaintance and that his conduct violated canons 1, 2A, 2B(1), 2B(2) and 3B(7) of the California Code of Judicial Ethics.

Judge Platt's conduct constitutes willful misconduct in office. The masters noted that Judge Platt was acting in a judicial capacity "because he was 'us[ing] the authority of [his] judicial office for an improper purpose.' (*Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th at p. 1104, [citing *Dodds, supra,* 12 Cal.4th at p. 172].)" The conduct was undertaken in bad faith because Judge Platt acted for a purpose other than the faithful discharge of his judicial duties, i.e., in an attempt to benefit the relative of an acquaintance.

## DISCIPLINE

A. *Criteria*

**(8)** When determining the appropriate resolution of a disciplinary proceeding, the commission is guided by the Supreme Court's pronouncement

[6] *Broadman, supra,* 18 Cal.4th at page 1092, quoting *Doan, supra,* 11 Cal.4th at page 312.

that the purpose of the proceeding " 'is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' "[7]

The Supreme Court has recognized that in determining the appropriate discipline, each case must be considered on its own facts. "Proportionality review based on discipline imposed in other cases, however, is neither required nor determinative. The factual variations from case to case are simply too great to permit a meaningful comparison in many instances. 'Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar.' "[8]

Even though each case is considered on its own facts, we are guided in our evaluation of the facts by opinions of the Supreme Court. In decisions concerning the removal of judges, the Supreme Court has referred to several factors. It has often emphasized the number of acts of misconduct.[9] In *Furey v. Commission on Judicial Performance, supra*, 43 Cal.3d at page 1307, footnote 2, the court explained that "the disposition of a case depends in large measure on the nature and number of charges found to be true . . . ." In *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958] (*Fletcher*), the Supreme Court, in agreeing with the commission's recommendation to remove Judge Fletcher, noted: " 'The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing "lack of temperament and ability to perform judicial functions in an even-handed manner." [Citation.]' (*Wenger* [*v. Commission on Judicial Performance* (1981)] 29 Cal.3d [615,] 653 [175 Cal.Rptr. 420, 630 P.2d 954].) We have determined that petitioner twice committed willful misconduct and committed prejudicial misconduct on multiple occasions. 'Together

[7] *Broadman, supra,* 18 Cal.4th at pages 1111–1112, quoting *Adams, supra,* 10 Cal.4th 866, 912.

[8] *Broadman, supra,* 18 Cal.4th at page 1112, quoting *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1318 [240 Cal.Rptr. 859, 743 P.2d 919].

[9] See, for example, *Adams, supra,* 10 Cal.4th 866 (Judge Adams was removed from office for engaging "in successive extrajudicial transactions that extended over a significant period of time, creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary—a consequence petitioner either deliberately ignored or was unable to appreciate." (10 Cal.4th at p. 914)); *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826 [264 Cal.Rptr. 100, 782 P.2d 239] (*Kloepfer*) (judge removed for a continuing, pervasive pattern of misconduct—four charges of willful misconduct and 21 charges of prejudicial conduct); *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186 [260 Cal.Rptr. 557, 776 P.2d 259] (Judge McCullough was removed for committing four acts of willful misconduct and one act of persistent failure to perform his judicial duties, and his failure to respond to a prior public censure evidenced a lack of regard for the commission, the court and his obligations as a judge).

these incidents reflect a continuing, pervasive pattern of' misconduct. (*Kloepfer*, *supra*, 49 Cal.3d at p. 849.)"

**(9)** Notwithstanding the court's emphasis on the number of offenses, an overarching consideration remains whether removal is necessary to protect the public, enforce rigorous standards of judicial conduct and maintain public confidence in the integrity and independence of the judicial system. In *Doan v. Commission on Judicial Performance, supra*, 11 Cal.4th at page 339, the Supreme Court removed a judge for willful and prejudicial conduct that displayed moral turpitude, dishonesty and corruption, but noted that it "would hesitate to remove a judge who showed himself ready, willing, and able to reform under a less severe sanction."[10] The ability to reform or conversely the likelihood that the judge will reoffend if permitted to remain on the bench, thus emerges as a second important factor in deciding whether the removal sanction should be applied. An isolated instance of misconduct may arise from a momentary ethical lapse, but a continuing pattern "reflects poor judgment and lack of judicial temperament."[11]

The Supreme Court has identified two additional factors suggesting inability to reform and hence unsuitability for judicial office. A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform. In *Fletcher, supra*, 19 Cal.4th at page 919, the Supreme Court noted that "contrary to the contrite tone he sounds in this court, petitioner's primary response to the misconduct allegations during the Commission proceedings was to allege a conspiracy against him." The court concluded as to Judge Fletcher that: "[T]he record 'belies petitioner's claim that he has learned from past experience and has modified his courtroom behavior. It demonstrates instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in *every* case.' (*Kloepfer, supra,* 49 Cal.3d at p. 866, fn. omitted, original italics.) It 'does not suggest that petitioner has, or will be able to, overcome [his demonstrated lack of judicial temperament] and that similar incidents will not recur.' (*Ibid.*)"[12]

Finally, the failure of past sanctions to effect a change in conduct also suggests a lack of ability to reform and unsuitability for judicial office. The Supreme Court has made note of prior discipline in deciding whether removal

[10] See also *Kennick v. Commission on Judicial Performance, supra*, 50 Cal.3d 297. There the Supreme Court declined to remove Judge Kennick from office because of misconduct noting that "it seems likely that our public censure of each of petitioner's misdeeds would have led him to correct and improve his judicial behavior." (50 Cal.3d at p. 341.) The court did remove the judge from office for his persistent failure or inability to perform judicial duties.

[11] *Kloepfer, supra,* 49 Cal.3d at page 848.

[12] *Fletcher, supra,* 19 Cal.4th at pages 920–921.

is appropriate. (See *Doan, supra*, 11 Cal.4th at pp. 339–340; *McCullough v. Commission on Judicial Performance, supra*, 49 Cal.3d at p. 197.) In *Doan, supra*, 11 Cal.4th at page 340, the court wrote:

"Lastly, Doan did not learn from her public reproval in 1990 for lending the prestige of her office to advance the private interest of others. She again lent the prestige of her office to advance the private interest of others, even though she had promised not to do so in connection with the 1990 public reproval, in the matters relating to Darlene's nephew Darren Powell in 1992, Meneses in 1993, and Darlene herself in 1993.

"In sum, Doan has had three opportunities for reformation. She will have no more."

B. *The Case at Bar*

There are two troubling features in this case. First, there is a pattern of Judge Platt's continuing failure or inability to recognize when his professional responsibilities and personal proclivities clash. Second, Judge Platt's responses to the allegations raise concerns about his truthfulness.

1. *Pattern of Misconduct.*

Judge Platt took the bench in 1994. In the fall of 1997, Judge Platt received a private admonishment because in 1995, 1996, and 1997, he (a) solicited attorneys who appeared before him to purchase raffle tickets for a fundraiser for a local church and to purchase tickets for a fundraiser for a local childcare center, and (b) placed open boxes of candy bars in his chambers and on his bailiff's desk for purchase by attorneys and court staff, with the proceeds benefiting his children's parochial school. The private admonishment noted that in 1995, "Judge Platt was advised of the impropriety of soliciting fundraising contributions from attorneys and court staff by two of his fellow judges." Judge Platt's letter accepting the private admonishment offered his assurance that, "not just in the complaint areas, but in all aspects of my future, I shall conduct myself and my affairs in compliance with . . . the Code of Judicial Ethics."

Despite this assurance, in July 1998, Judge Platt, at the request of a former client, injected himself in a juvenile dependency proceeding pending before Judge Holland (count five).

In December 1999, Judge Platt received his first phone call from Mrs. G telling him that her niece Ms. M had received a speeding ticket. Even though the ticket was not before him and would not in the ordinary course of judicial

business come before him, Judge Platt apparently offered to be of some assistance and instructed his clerk to locate the court records of the speeding ticket. (Count one.)

In February 2000, Mrs. G again called Judge Platt and this time informed him that her husband (Mr. G) had received a speeding ticket. Again, even though the ticket was not before him and would not in the ordinary course of judicial business come before him, Judge Platt apparently offered to be of some assistance and instructed his clerk to locate the court records of the speeding ticket. (Count two.)

Three weeks later, Judge Platt instructed his clerk to dismiss Ms. M's ticket and Mr. G's ticket. Both tickets were dismissed on the court's own motion without an appearance or hearing.

Sometime in 1999 or 2000, Judge Platt's godfather, Mr. A, informed him that he had an old speeding ticket that he had never gone to court on. He wanted to know whom he should contact to schedule a court appearance. Judge Platt called one of the two commissioners at the Tracy branch of the court to learn how Mr. A might go about getting his ticket on calendar. In his conversation with the commissioner, Judge Platt mentioned Mr. A's name and that he was active in the community. (Count six.)

In March or April 2000, Judge Platt's bailiff informed the judge that F, the son of a reserve bailiff that the judge knew, had received a speeding ticket. The bailiff asked if Judge Platt could do something to help. The judge told the bailiff to get the citation number and offered to look into the matter when F had a court date. The bailiff subsequently told Judge Platt that F had a court date. Judge Platt then attempted to contact the California Highway Patrol officer who had issued the ticket. After several unsuccessful attempts, Judge Platt spoke with the officer, listened to the officer's perspective and ascertained that the officer did not oppose the dismissal of the ticket. Even though the ticket was not pending before him, Judge Platt caused the ticket to be dismissed without any appearance or court hearing. (Count four.)

In the summer of 2000, a family from Judge Platt's church approached him concerning their daughter who was in jail for a theft-related offense. Judge Platt testified that although he did not know the family well, he indicated that he would talk to the judge who would hear the daughter's case. The following day, Judge Platt visited Judge Hammerstone in his chambers and asked him to grant the daughter a release on her own recognizance. (Count eight.)

Sometime on or after November 16, 2000, 11 months after she had first called him, Mrs. G telephoned Judge Platt and told him that now she had

received a speeding ticket. Again Judge Platt apparently offered to help. He asked his clerk, Clerk N, to locate the court records of the speeding ticket. Even though he asked her a couple of times, Clerk N did not produce the record. On December 26, 2000, Judge Platt telephoned his former clerk, Clerk G, and told her that he wanted to be certain that Mrs. G would be eligible for traffic school in connection with her outstanding traffic ticket. On January 9, 2001, Judge Platt again called Clerk G and this time asked her to enter a dismissal of Mrs. G's ticket on the record. Clerk G at first agreed to, then decided not to and so informed Judge Platt. (Count three.)

In May 2001, the commission commenced its investigation in response to a complaint noting Judge Platt's conduct with regard to Mrs. G's speeding ticket.

The above chronology suggests that throughout his judicial career, Judge Platt has been willing to use his judicial position for the benefit of friends and acquaintances, even after being warned by his colleagues and privately admonished by the commission.

2. *Issues of Credibility.*

Judge Platt had served 15 years in the district attorney's office and had been a judge for five years when Mrs. G first called him regarding a traffic ticket. He did not immediately dismiss the ticket. He asked his clerk to locate the court records for the speeding ticket, which she did. Still he did not dismiss the ticket until after Mrs. G had again called him and told him about Mr. G's ticket. He dismissed both tickets in February 2000, some two months after Mrs. G had initially called him. Thus, the dismissals were entered after Judge Platt had considered the matters several times. Nonetheless, Judge Platt told the masters that at the time that he dismissed the tickets, he did not perceive any legal or ethical problem with doing so.

The masters found that Judge Platt's alleged ignorance was an after-the-fact rationalization that lacks credibility. The masters cited Judge Platt's reputation as a careful decision maker with a good knowledge of the law and concluded that "it is inconceivable he did not know the obvious, that ticket fixing was wrong when he dismissed [Ms. M's] traffic ticket."

Judge Platt also had a number of opportunities to consider his actions in regard to F's speeding ticket. His bailiff brought the ticket to his attention several times and Judge Platt testified that it took him a couple of attempts to contact the officer who issued the ticket. Judge Platt proceeded to elicit information about F from the officer, his bailiff, and even F's father.

Nonetheless, Judge Platt told the masters that he did not perceive any legal or ethical problems with his handling of the matter and dismissal of the ticket in May 2000.[13]

Judge Platt also testified before the masters that he believed he had authority to dismiss F's ticket because he was the presiding judge of the juvenile court and the commissioners who handle the traffic matters for juveniles were under him. The masters, however, found that at the time he dismissed the ticket, Judge Platt was handling an adult murder trial. This finding raises concerns as to whether the claim of authority is another "after-the-fact rationalization."

Judge Platt admits that he called Commissioner Kronlund, but protests that he did not have any intention to influence her. Nonetheless, as previously noted, he offers no valid alternative explanation for revealing his relationship to Mr. A and Mr. A's involvement in civic affairs.

Judge Platt's testimony surrounding his visit to Judge Hammerstone is troublesome. He testified before the masters that he told the parents that he would talk to the judge who would hear their daughter's case. He then told the masters that he only visited Judge Hammerstone to alert him that the parents might claim a friendship and that he, Judge Platt, could not vouch for the family. Did Judge Platt, when he told the family he would talk to the judge, intend to undermine the family's case by telling the judge that he could not vouch for the family? The masters found Judge Platt's explanation to be "unbelievable," noting that the explanation was "inconsistent with Platt's personality trait which motivates him to help others in need."[14]

Judge Platt testified that when Mrs. G called him in October 2000, it did not occur to him that, as he had dismissed two tickets at her request, she might expect him to do so a third time. Judge Platt had several opportunities to contemplate his possible actions as his clerk, Clerk N, failed to get him the information on the ticket as he requested. Eventually, Judge Platt contacted his former clerk, Clerk G, and asked her first to note that Mrs. G was eligible for traffic school and subsequently to dismiss the ticket. Judge Platt testified that he contacted Clerk G because Clerk N was absent. The evidence,

[13] Although Judge Platt indicated that he did not think there was anything wrong with his ex parte discussions with the officer and others, he reassured the masters that when he was in the district attorney's office his expectation was that all the information that a judge would consider in deciding an issue of bail or O.R. would be presented in open court.

[14] The masters also note that Judge Platt initially testified, in response to Judge Hammerstone's testimony that he had asked for the daughter's release, that if he had wanted a person to get an O.R. release, he would have done it himself. However, when questioned by a master, Judge Platt admitted that, as he was not doing the felony master calendar and it was not a case that was pending before him, he would not have called the jail to authorize an O.R.

however, shows that Clerk N was not absent. Furthermore, there was evidence that when Clerk G asked Clerk N why Judge Platt had contacted her, Clerk N responded that the judge had done so because he knew that Clerk N would not dismiss the ticket for him.

Clerk G further testified that Judge Platt told her that Mrs. G was the wife of a police officer and that when the judge asked her to dismiss the ticket he told her to keep it between themselves. The masters found Clerk G's testimony to be credible. Judge Platt initially denied both allegations. However, he testified before the masters that while he did not recall saying any particular words, he may well have said something to the effect of keeping the matter between themselves. The masters found Judge Platt's statement to be "strong evidence" that he knew the ticket fixing was wrong. Despite all of the above, Judge Platt maintained before the masters that at the time he handled Mrs. G's ticket he did not see any ethical problems with his actions.

3. *Application of the Standards Guiding the Commission.*

The first of the three standards guiding the commission's decision is "protection of the public." This concern prompts the question, "Is Judge Platt likely to again violate the Code of Judicial Ethics?" The commission is of the opinion that Judge Platt is unlikely to conform his future conduct to the canons.

As noted, a common thread running through all of the counts of misconduct against Judge Platt is his failure to recognize the restraints imposed by his ethical responsibilities as a judge. Whether it is fundraising for a childcare center, helping a niece of a friend with a ticket, or trying to assist a friend from church, Judge Platt repeatedly took up the cause without considering ethical restraints. Furthermore, despite his expressions of remorse, it appears that Judge Platt has not been able to honestly admit or accept his misconduct. Judge Platt admits the fact that he fixed, or attempted to fix, four traffic tickets. He contends, however, that he did not know that it was wrong to do so when he acted. The masters, to be blunt, say this is a lie. There is sufficient evidence to support the masters' findings. Accordingly, it appears that this is a judge who either (a) will not or cannot face the reality that he knowingly engaged in judicial misconduct, or (b) has such a myopic view of his conduct that three masters reasonably believe that he is not telling the truth.

The second standard guiding the commission's decision is "the enforcement of rigorous standards of judicial conduct." This concern prompts the question, "What message will the commission's decision send to the bench?"

**(10)** Since the advent of the commission, judges have been held to a higher standard of conduct than attorneys.[15] The Supreme Court has noted that it expects all judges to comply with the canons and that failure to do so " 'suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.' "[16]

Judge Platt, after being privately admonished for allowing his judicial office to benefit the interests of others, admittedly dismissed three tickets and attempted to dismiss a fourth ticket to benefit friends and acquaintances. He did so after having had opportunities to consider his actions. He also injected himself into a request for O.R. in a criminal case and into a juvenile dependency proceeding, neither of which was before him. Judge Platt's only explanation is that he did not recognize at the time that his actions were wrong—a response that the masters found to be incredible.

**(11)** Judges are not insulated from society. Most if not all judges have friends and acquaintances who on occasion receive traffic tickets or have other difficulties that result in court appearances. Thus, there is always a temptation to do a friend a favor, to put in a good word with the judicial officer who will preside over a traffic ticket. Accordingly, the commission's response to proven instances of ticket fixing should discourage requests for favors and strengthen judicial resistance to such requests.

The third standard guiding the commission is "the maintenance of public confidence in the integrity and independence of the judicial system." This prompts the question, "What message will the commission's decision send to the public?"

Ticket fixing is among the most obvious forms of abuse of judicial authority. As the masters noted, "it is an abuse that citizens unquestionably understand and are suspicious about." An ordinary citizen would not respect a judge who dismissed multiple tickets, that were not even before him, and then claimed that he did not recognize that doing so was wrong.

4. *Mitigation.*

**(12)** The masters noted that while factors in mitigation do not excuse willful misconduct, the commission may take them into account in considering the totality of the circumstances that are pertinent to determining the

[15] See *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 287 [110 Cal.Rptr. 201, 515 P.2d 1].

[16] *Fletcher, supra,* 19 Cal.4th 865, 883, footnote 5, quoting *Kloepfer, supra,* 49 Cal.3d at page 838, footnote 6.

appropriate discipline.[17] The masters listed five factors: (1) Judge Platt's remorse, (2) his early acknowledgement of wrongdoing, (3) his performance as a judge, (4) his support in the legal community, and (5) his capacity to rehabilitate.[18] In addition, the record shows that Judge Platt voluntarily sought counseling on ethics issues from retired Judge Martin.

The commission notes Judge Platt's expressions of remorse, his apologies to his colleagues, court staff and others, and his efforts to better understand the California Code of Judicial Ethics. The problem, however, is that, although Judge Platt intellectually recognizes ethical issues once they are brought to his attention,[19] Judge Platt, despite advice from his colleagues, a prior admonition, and even lack of cooperation from his staff, repeatedly fails to recognize that his proclivity to help others causes him to violate judicial canons.

## CONCLUSION

**(13)** The commission has determined to remove Judge Platt from office.[20] This conclusion is mandated by two interrelated factors. First, after having been privately admonished, Judge Platt dismissed three traffic tickets, and attempted to dismiss a fourth, and twice attempted to improperly influence another judicial officer. In each instance he had the opportunity to consider alternatives before he acted. Furthermore, none of the tickets would have come before him in the ordinary course of judicial business. Second, Judge Platt maintains that when he dismissed the tickets he did not see any ethical problems with his actions. The commission agrees with the masters that it is inconceivable that Judge Platt did not know that ticket fixing is wrong.

The application of the guiding standards for disciplinary proceedings supports removal. The commission's responsibility for the "protection of the public" weighs against subjecting future litigants, witnesses, the public and court staff to a judge who is dishonest[21] or who, after a career in the district attorney's office and five years on the bench, cannot recognize the impropriety of ticket fixing when he does it. Judge Platt's insensitivity to ethical

[17] The masters cited *Adams, supra,* 10 Cal.4th 866, 911–912.

[18] The special masters made "no finding as to whether Judge Platt is capable of rehabilitation, i.e. whether Platt can overcome his 'rescuer' personality trait that apparently has caused him to act to help friends or acquaintances solve their problems rightly or wrongly."

[19] Judge Platt admits that his communications with Judge Holland and Commissioner Kronlund might suggest appearances of impropriety.

[20] This discipline is based on the commission's findings and conclusions on counts one, two, three, four, six and eight. Although Judge Platt's conduct as alleged in count five affirms Judge Platt's pattern of practice, the discipline would be the same even if count five were dismissed.

[21] The Supreme Court has held that honesty is a minimum qualification expected of every judge. (*Kloepfer, supra,* 49 Cal.3d 826, 865.)

restraints is further reflected in his two attempts to influence other judicial officers on behalf of a friend or an acquaintance. The "enforcement of rigorous standards of judicial conduct" favors removal, as anything less might appear to countenance Judge Platt's multiple acts of willful misconduct. The "maintenance of public confidence in the integrity and independence of the judicial system" also weighs in favor of removal. The public understands ticket fixing and knows that it is wrong. The public need not tolerate a judge who dismisses multiple traffic tickets for friends and acquaintances and then says he saw nothing wrong with what he was doing when he did it.

This decision shall constitute the order of removal of Judge Michael E. Platt and pursuant to the provisions of article VI, section 18 of the California Constitution and rule 120(a) of the Rules of the Commission on Judicial Performance, Judge Michael E. Platt is hereby disqualified from acting as a judge.

Commission members Judge Risë Jones Pichon, Justice Vance W. Raye, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Marshall B. Grossman, Mr. Michael A. Kahn, Mrs. Crystal Lui, Ms. Barbara Schraeger, and Dr. Betty L. Wyman voted in favor of all the findings and conclusions expressed herein and in the removal of Judge Michael E. Platt from judicial office. Commission member Ms. Ramona Ripston voted in favor of all the findings and conclusions expressed herein, but voted to publicly censure Judge Platt. One public member position is vacant.

The judge's petition for review by the Supreme Court was denied on February 19, 2003.

[No. 165. Feb. 27, 2003.]

# INQUIRY CONCERNING JUDGE BRUCE VAN VOORHIS

## SUMMARY

A disciplinary matter was brought concerning a judge of the Contra Costa County Superior Court.

The Commission on Judicial Performance removed the judge from office, determining that he had committed four acts of willful misconduct and seven acts of prejudicial misconduct related to the judge's comments to prosecutors, a public defender, jurors, and staff members. Although the judge sought to minimize his misconduct by characterizing it as a demeanor problem, his "demeanor problem" was much more than being impolite. It included such "demeanor" misconduct as loss of judicial temperament, abuse of authority, and embroilment. The commission found that the misconduct occurred after the judge had been publicly reproved for similar conduct, and had received a separate private admonishment. Furthermore, all but two of the incidents occurred after an incident that reminded the judge of his public reproval and caused his presiding judge to meet with him and warn him that his misconduct must not be repeated. The commission also found that the judge did not appreciate the inappropriateness of his misconduct and that there was a strong likelihood that if he were allowed to remain on the bench he would commit future violations of the California Code of Judicial Ethics. Those conclusions were compelled by the judge's frank admission that the longer he was on the bench, the more difficult it was for him not to lose his temper, and by his failure to recognize that his subjective good intent did not allow him to abuse his authority, become embroiled in matters, or lash out at employees or attorneys. The commission concluded that the judge's misconduct not only brought the judicial office into disrepute, but also interfered with the administration of justice in particular cases. (Opinion by Risë Jones Pichon, Chairperson.)

## HEADNOTES

**(1) Judges § 6—Prejudicial Misconduct—Comments Suggesting Intentional Disregard of Law.**—The judge, by his comments, gave the

appearance of having decided a legal issue to teach a new lawyer how to handle adversity. The comments violated Cal. Code Jud. Ethics, canons 1 and 2A and constituted prejudicial misconduct.

**(2) Judges § 6.2—Discipline—Prejudicial Misconduct—Definition.**—Prejudicial conduct is conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. The provision that the conduct must be that which brings the judicial office into disrepute does not require actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office.

**(3) Judges § 6—Prejudicial Misconduct—Objective Observer Standard.**—The "public esteem for the judicial office" aspect of prejudicial misconduct is measured by an objective observer standard. This aspect is established when it would appear to an objective observer familiar with the facts and the standards of conduct that the conduct in question is prejudicial to public esteem for the judicial office. The views of actual observers are sufficient, but not necessary, to establish judicial misconduct under an objective observer standard. The judge's intent and motivation are not significant factors in assessing whether prejudicial conduct has occurred under this standard.

**(4) Judges § 6—Prejudicial Misconduct—Demeanor.**—The judge engaged in prejudicial misconduct by his comments in front of the jury disparaging the competence of an attorney.

**(5) Judges § 6.2—Discipline—Willful Misconduct—Elements.**—To commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority. Because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith.

**(6) Judges § 6—Willful Misconduct—Demeanor.**—The judge engaged in willful misconduct and violated Cal. Code Jud. Ethics, canons 1 and 3B(4) by his comments, in front of a jury, questioning the prosecutor's motives for seeking the introduction of evidence, ridiculing her perspective, and threatening to declare a mistrial if she continued. The judge's comments were made in bad faith because they were made for the corrupt purpose of ridiculing the prosecutor.

**(7) Judges § 6.2—Discipline—Abandonment of Judicial Role—Acting in Anger or Frustration.**—When a judge lashes out in anger or frustration or personally attacks an attorney or becomes embroiled in a matter, the judge abandons his or her judicial role. Although any evaluation of a judge's conduct should consider the context in which the conduct took place, the canons apply even when a judge is angry or frustrated.

**(8) Judges § 6—Prejudicial Misconduct—Demeanor.**—The judge engaged in prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 1, 2A and 3B(4) by telling a deputy public defender, in front of his client, that his accent was charming but he should lose it and suggesting that the public defender needed speech therapy.

**(9) Judges § 6—Willful Misconduct—Demeanor.**—The judge's comments to a prosecutor, in front of a jury, attacking the prosecutor's competence, legal training, and motives demonstrated embroilment and were made in bad faith for the corrupt purpose of venting his anger. The comments constituted willful misconduct and violated Cal. Code Jud. Ethics, canons 1, 2A and 3B(4).

**(10) Judges § 6—Willful Misconduct—Demeanor.**—The judge abused his authority and engaged in willful misconduct by ordering the prosecutor to tell the jury that the evidence she sought to admit "did not mean anything." The judge also engaged in willful misconduct through his comments forcing the prosecutor to agree with his rulings, admit to the jury that the evidence to which she was objecting was relevant, and confess to the jury that she made a mistake. The judge's comments violated Cal. Code Jud. Ethics, canons 1, 2A and 3B(4).

**(11) Judges § 6—Prejudicial Misconduct—Demeanor—Court Personnel.**—The judge's intemperate public criticisms of court personnel constituted prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 1, 2A, 3B(4), and 3C(1). The judge's conduct included throwing files at a clerk, reducing the clerk to tears, unfairly berating a clerk in open court, and publicly humiliating a new security deputy sheriff.

**(12) Judges § 6—Prejudicial Misconduct—Demeanor—Jurors.**—The judge's condescending comments to a jury, including telling the foreperson, "you could improve on your English," constituted prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 1, 2A, and 3B(4).

**(13) Judges § 6.4—Discipline—Proceedings—Clear and Convincing Evidence Standard—Determining Appropriate Sanction.**—Once the Commission on Judicial Performance has determined that the allegations of misconduct have been demonstrated by clear and convincing evidence, the commission must determine the appropriate discipline. The commission takes as its mandate the California Supreme Court's statement that the purpose of the proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. This is consistent with the Supreme Court's statement that the purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield. The Supreme Court has recognized that in determining the appropriate discipline, each case must be considered on its own facts. Proportionality review based on discipline imposed in other cases is neither required nor determinative. The factual variations from case to case are simply too great to permit a meaningful comparison in many instances. Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar.

**(14) Judges § 6.4—Discipline—Proceedings—Determining Appropriate Sanction—Use of Opinions of California Supreme Court as Guidance.**—Even though each case is considered on its own facts, the Commission on Judicial Performance looks to opinions of the California Supreme Court and its own prior decisions for guidance in exercising its responsibility to determine the appropriate discipline. The commission has identified considerations that are relevant to its determination of the appropriate discipline: (1) the number of acts of misconduct; (2) the effect of any prior discipline on the judge's conduct; (3) whether the judge appreciates the inappropriateness of his or her actions; (4) whether the judge is likely to continue to engage in unethical conduct; and (5) the impact of the judge's misconduct on the judicial system. In addition, the commission considers any mitigating factors that a judge may advance.

**(15) Judges § 6.2—Discipline—Removal—Number of Acts of Misconduct—Prior Discipline.**—In decisions concerning the removal of judges, the California Supreme Court has often noted the number of acts of misconduct. The disposition of a case depends in large measure on the

nature and number of charges found to be true. There does not appear to be any minimal number of acts of misconduct required for removal. Rather, the number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing lack of judicial temperament and ability to perform judicial functions in an evenhanded manner. Although the existence of prior discipline is a relevant factor, the court has removed judges who had not been the subject of prior discipline.

**(16) Judges § 6.2—Discipline—Impact of Misconduct on Judicial System.**—The fifth consideration relevant to a determination of the appropriate discipline for a judge concerns the impact of the judge's misconduct on the judicial system. At issue is how the judge's misconduct has prejudiced the judiciary's reputation or the actual administration of justice.

**(17) Judges § 6.2—Discipline—Mitigating Factors—Totality of Circumstances.**—The California Supreme Court has stated that character evidence and evidence of a judge's contributions to the judicial system do not mitigate or excuse willful misconduct or prejudicial misconduct, but may be considered in determining the appropriate discipline. The commission may, however, and does take these factors into account in considering the totality of the circumstances that are pertinent to its determination of the appropriate discipline.

**(18) Judges § 6.2—Discipline—Mistreatment of Staff and Counsel—Acting in Anger or Frustration.**—The public looks to judges to set the tone of judicial proceedings. When a judge mistreats staff, belittles counsel, or gives vent to his or her anger or frustration, the audience is not only concerned about the result in the specific matter before the court, but worries that other parties, lawyers, jurors, and employees will be subjected to similar mistreatment.

**(19) Judges § 6.2—Discipline—Length of Judicial Career as Mitigating Factor—Pattern of Misconduct.**—The fact that a judge is a seasoned judge might be a mitigating factor if there are only one or two instances of misconduct. Where, however, there is a pattern of misconduct following prior discipline, the judge's persistence suggests that he or she is unlikely to correct his or her behavior.

**(20) Judges § 6.2—Discipline—Removal—Prejudicial Conduct.**—The California Constitution authorizes the Commission on Judicial Performance to remove a judge for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The California

Supreme Court's characterization of one ground for imposing discipline as more or less serious than the other does not imply that in a given case it would regard the ultimate sanction of removal as unjustified solely for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Prejudicial conduct, although less grave than willful misconduct, may nevertheless, by itself, justify removal.

**(21) Judges § 6.2—Discipline—Purpose of Proceedings—Mitigation of Wrongdoing.**—Mitigation of a judge's wrongdoing requires more than an unfulfilled intent to reform. The aim of disciplinary proceedings is not punishment but to protect the judicial system and the public which it serves from judges who are unfit to hold office.

**(22) Judges § 6.2—Discipline—Removal—Purpose of Commission on Judicial Performance.**—The Commission on Judicial Performance's mandate directs it to focus not on punishment, but on the protection of the public, the enforcement of rigorous standards, and maintenance of public confidence in the integrity of the judiciary. The California Supreme Court has removed judges from the bench for conduct that did not rise to the level of moral turpitude, dishonesty, or corruption.

**(23) Judges § 6.2—Discipline—Removal—Willful and Prejudicial Misconduct—Loss of Judicial Temperament—Abuse of Authority—Embroilment—Likelihood of Future Violations.**—Where the record demonstrated a judge's inability to appreciate the importance of, and conform to, the standards of judicial conduct that were essential if justice was to be meted out in every case, the Commission on Judicial Performance could not, consistent with its mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the judiciary, allow the judge to continue on the bench. The judge committed four acts of willful misconduct and seven acts of prejudicial misconduct relating to his comments to prosecutors, a public defender, jurors, and staff members, and although he sought to minimize his misconduct by characterizing it as a demeanor problem, his "demeanor problem" was much more than being impolite, as it included such "demeanor" misconduct as loss of judicial temperament, abuse of authority, and embroilment. Moreover, there was a strong likelihood that if the judge was allowed to remain on the bench, he would commit future violations of the California Code of Judicial Ethics.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 57, 76.]

## OPINION

**PICHON, Chairperson.**—This disciplinary matter concerns Judge Bruce Van Voorhis, a judge of the Contra Costa County Superior Court. The notice of formal proceedings charged Judge Van Voorhis with 11 incidents of unethical conduct.

The commission agrees with the special masters that all 11 charges are supported by clear and convincing evidence. The commission concludes that four of Judge Van Voorhis's acts constitute willful misconduct, that the remaining seven constitute acts of conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and that these proven charges constitute a pattern of misconduct similar in nature to the misconduct for which Judge Van Voorhis was previously publicly reproved. Judge Van Voorhis's misconduct not only brought the judicial office into disrepute, but threatened to interfere with the actual administration of justice. Furthermore, the commission finds that Judge Van Voorhis does not appreciate the inappropriateness of his conduct and the commission concludes that Judge Van Voorhis would again violate the California Code of Judicial Ethics, if allowed to remain on the bench. For the reasons more fully set forth in this decision, the commission hereby removes Judge Bruce Van Voorhis from the bench.

## PROCEDURAL HISTORY

Judge Van Voorhis was elected as a judge of the Contra Costa County Municipal Court and took office on January 5, 1987. On September 8, 1992, the commission publicly reproved Judge Van Voorhis for a number of instances of misconduct including ex parte communications, improper questioning of potential jurors, interrupting the proceedings in an adjoining courtroom, and giving directions to staff in a manner which was perceived as harsh. On February 1, 1994, the commission privately admonished Judge Van Voorhis for issuing subpoenas in his own dissolution case.

Judge Van Voorhis was elevated to the Contra Costa County Superior Court on June 8, 1998, as a result of the consolidation of the courts.

In May 2001, the commission sent a preliminary investigation letter to Judge Van Voorhis. Following his response, a notice of formal proceedings was filed on December 17, 2001. Judge Van Voorhis filed his verified answer on January 2, 2002.

On January 25, 2002, the Supreme Court, in response to the commission's request, appointed three special masters. An evidentiary hearing was held from March 24 through March 27, 2002, in San Francisco, California, before

the special masters: Justice Thomas Hollenhorst of the Court of Appeal, Fourth Appellate District, presiding; Justice Kenneth Yegan of the Court of Appeal, Second Appellate District; and Judge Thompson Hanks of the Superior Court of Riverside County. Mr. Jack Coyle and Mr. Brad Battson of the commission's office of trial counsel presented the case in support of the charges. Judge Van Voorhis was represented by Mr. James A. Murphy and Mr. Harlan B. Watkins of Murphy, Pearson, Bradley & Feeney of San Francisco, California. On September 6, 2002, the masters submitted their 64-page report to the commission.

Following the receipt of objections and briefs from Judge Van Voorhis and the office of trial counsel, the matter was argued before the commission on December 4, 2002. Mr. Coyle presented argument on behalf of trial counsel. Judge Van Voorhis spoke in his own behalf and was represented by Mr. Murphy.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *Count One*

1. *Findings of Fact*

Judge Van Voorhis presided over a jury trial in *People v. Elze* in Walnut Creek from January 30 to February 1, 2001. Mr. Elze was charged with driving under the influence of alcohol. Deputy District Attorney Stacey Brock prosecuted the case and Timothy Gomes, a private attorney, was defense counsel. At the time of the trial, Ms. Brock had been an attorney for approximately three months.

One of the issues in the case concerned statements that Mr. Elze had made to the police. Police officers in a marked patrol car were driving behind Mr. Elze on an on-ramp to a major highway. Mr. Elze stopped very abruptly, and the officers had to slam on their brakes to avoid rear-ending him. The officers found this to be unusual. They followed Mr. Elze for a while and he was driving slowly. They then put on their lights and siren to pull Mr. Elze over. He was very slow to pull over. The officer approached Mr. Elze on the right side to avoid traffic, and asked him some questions such as why he braked so abruptly. The officer smelled alcohol and asked Mr. Elze whether he had been drinking. The questions were asked before the field sobriety tests were administered and while Mr. Elze was still in his car.

Attorney Gomes filed a written motion in limine to exclude Mr. Elze's statements on the theory that they were elicited in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602]. Although the

written motion sought to exclude all statements made from the time of Mr. Elze's "detainment," the pretrial oral argument focused on the admissibility of the pre-field-sobriety-test statements. Ms. Brock sought to introduce these statements. Judge Van Voorhis ruled that the pre-field-sobriety-test statements could not be introduced and warned Ms. Brock that introduction of the statements could lead to reversal, but noted that she could use the statements for impeachment should the defendant testify. Ms. Brock did not introduce the statements, but they were admitted during Mr. Elze's questioning by his own counsel.[1] Mr. Elze was convicted.

After sentencing, Judge Van Voorhis remained on the bench and gave Ms. Brock an assessment of her performance. He told her that she had done well during the trial, but he also told her that as a young lawyer, she had to be prepared for an unanticipated ruling by a judge and that she needed to be able to adjust her strategy of attack. Ms. Brock and two other district attorneys, who were present in the courtroom, testified that Judge Van Voorhis stated that he knew that Mr. Elze's statements were admissible, but that he kept them out to see how Ms. Brock would handle herself. Judge Van Voorhis testified that his statements were taken out of context and denied that he intentionally made a wrong ruling in order to see how Ms. Brock would react.

The masters, having weighed the evidence of all the witnesses, credited the testimony of the district attorneys and found that Judge Van Voorhis, by his comments, gave the appearance of having decided a legal issue to teach a new lawyer how to handle adversity. The masters, however, also found that "[g]iven the poor quality of the briefing by opposing counsel, the poor quality of the record which was not developed in a pretrial evidentiary hearing, and the lack of any intelligent analysis by the parties or Judge Van Voorhis, we cannot find, as of the time of the ruling, he deliberately made an erroneous ruling."

**(1)** The commission adopts the masters' finding that Judge Van Voorhis by his comments gave the appearance of having decided a legal issue to teach a new lawyer how to handle adversity. The commission notes that even at the evidentiary hearing before the masters, Judge Van Voorhis failed to appreciate how his choice of topics, "unexpected results," implicitly suggested that his ruling was questionable, if not wrong. In addition, he testified before the masters: "The other two walked in the room, and I started talking to her about how unexpected results can happen in a trial. And you know, I expressed to

[1] Ms. Brock sought to introduce evidence that Mr. Elze initially stated, "All I had to drink was coffee and water," but then stated he had been drinking "brandy and 7-Up." Mr. Elze later testified that he told the police he had been drinking "brandies and seven" and admitted having had two brandies and an Irish coffee.

her that—and I can't remember the exact words. But on the face of it, she should have expected a victory and that I knew that, in a case of detained motorist, you're not entitled to Miranda warnings and any of the admissions that you make are admissible but that she failed to consider the unexpected result and instead, you know, decided to pursue on this battlefield." This statement by Judge Van Voorhis, like his statement to Ms. Brock, gives the clear appearance that he knew that the defendant's statement was admissible.

2. *Conclusions of Law*

**(2)** Prejudicial conduct is " ' "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." ' "[2] "The provision that the conduct must be that which 'brings the judicial office into disrepute' does not require actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office."[3]

**(3)** The "public esteem for the judicial office" aspect of prejudicial misconduct is measured by an "objective observer" standard. This aspect is established when it would appear to an "objective observer" familiar with the facts and the standards of conduct that the conduct in question is prejudicial to public esteem for the judicial office.[4] The views of actual observers are sufficient, but not necessary, to establish judicial misconduct under an objective observer standard.[5] The judge's intent or motivation "is not a significant factor in assessing whether prejudicial conduct has occurred under this standard."[6]

The commission concludes that Judge Van Voorhis's comments in court after the sentencing violated canons 1 and 2A of the California Code of Judicial Ethics (all references to a canon are to the California Code of Judicial Ethics) and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Judge Van Voorhis, by commenting to the prosecutor on her reaction to his questionable ruling to

[2] *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1092 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*), quoting *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 312 [45 Cal.Rptr.2d 254, 902 P.2d 272] (*Doan*).

[3] *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams*), citing *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284 [110 Cal.Rptr. 201, 515 P.2d 1] (*Geiler*).

[4] *Doan, supra,* 11 Cal.4th 294, 312.

[5] *Doan, supra,* 11 Cal.4th at page 325.

[6] *Adams, supra,* 10 Cal.4th at page 878, citing *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 376 [188 Cal.Rptr. 880, 657 P.2d 372] (*Gonzalez*).

exclude Mr. Elze's pre-field-sobriety-test statements,[7] violated canon 1 by failing to observe "high standards of conduct . . . so that the integrity and independence of the judiciary will be preserved." The judge also violated canon 2A by failing to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. As noted by the masters, to the "objective observer," Judge Van Voorhis's statement "that he made a ruling for the purpose of seeing how the prosecutor would handle it, was prejudicial to public esteem for the judicial office."

B. *Count Two A(1)*

1. *Findings of Fact*

Judge Van Voorhis presided over *People v. Silva*, a criminal case tried before a jury on June 1 and 2, 1999. Ms. Silva was charged with possession of methamphetamine with intent to sell. The prosecutor was Deputy District Attorney Dana Filkowski and Ms. Silva was represented by William Gardner, a private attorney. The masters found that Mr. Gardner was physically unkempt and did not appear ready for trial. He had no paper on which to take notes during the trial and had to borrow a tablet from the prosecutor.

During the course of trial, Mr. Gardner attempted to present a third party culpability defense based on the arrest of another person the day before the search warrant was executed at Ms. Silva's residence. Mr. Gardner, however, had no witnesses or admissible evidence to present on the issue of third party culpability.

A discussion ensued between Judge Van Voorhis and Mr. Gardner in front of the jury. In a dialogue that extended for 13 pages of transcript, Judge Van Voorhis became increasingly exasperated by counsel's ineptness. The prosecutor serially objected to questions poorly framed by defense counsel. The judge was critical of Mr. Gardner's questions, Mr. Gardner appeared to be confused, and Judge Van Voorhis became increasingly aggressive toward Mr. Gardner. When it became clear that the jury seemed more interested in the exchange between the court and Mr. Gardner, the prosecutor asked the

[7] A review of the transcript of the trial and the transcript of the hearing before the masters suggests that Judge Van Voorhis knew that his ruling was problematic. When the prosecutor cited the leading case, *Berkemer v. McCarty* (1984) 468 U.S. 420 [82 L.Ed.2d 317, 104 S.Ct. 3138], in the argument on defendant's motion in limine, Judge Van Voorhis responded, "I don't have to tell you which case controls or not." Before the masters, Judge Van Voorhis testified that he excluded the testimony because he thought Mr. Elze was subject to arrest for evading the officers and the officer didn't ask Mr. Elze whether he had been drinking. The record, however, indicates that Mr. Elze, either voluntarily or in response to the officer's question, stated that he had "two brandies and an Irish coffee." There is nothing in the record to indicate that the police officer thought Mr. Elze was subject to arrest for evasion.

court to complete the discussion outside the presence of the jury. Judge Van Voorhis responded, "That won't be necessary."

The masters noted that "[d]uring this exchange, the judge interjected a lengthy series of questions and comments about Mr. Gardner's cross-examination that disparaged his professional competence. The prosecutor saw that the judge was making Mr. Gardner look 'somewhat pathetic' and became concerned that the jury might take pity on Mr. Gardner. Partly for that reason, the prosecutor stated, 'Your Honor, please. May we do this outside the presence of the jury?' "

Judge Van Voorhis ignored the prosecutor's request and continued to disparage Mr. Gardner.[8] The masters found that Judge Van Voorhis raised his voice and his tone was condescending, disrespectful and contemptuous. They noted that when "the judge made his statements about law school, his eyes got very wide, he leaned forward in his chair, and gestured with his hand adding to the aggressiveness of the encounter."

**(4)** The exchange took place in front of the jury with the risk of having the jury decide the case based on nonevidentiary reasons. The masters noted "that even when the judge's attention was drawn to the fact that [the] jury was listening to offers of proof and witnessing repeated hostility toward defense counsel, the judge refused to continue the discussions at sidebar thus ignoring the prejudicial effect of his conduct." Judge Van Voorhis's explanation for not excusing the jury was that "they would attach significance to what they weren't hearing as much as they would attach to what they were and . . . start speculating about what they did and didn't hear." The masters noted that the judge admitted that his approach " 'enabled the defense attorney to place in front of the jury inadmissible evidence,' and that 'a skillful judge would have called a recess.' " The commission adopts the masters' findings of fact on count two A(1).

2. *Conclusions of Law*

The masters concluded and the commission agrees that Judge Van Voorhis's comments to Mr. Gardner constitute prejudicial misconduct. It would have appeared to an "objective observer" familiar with the facts and the standards of conduct that the judge's comments to Mr. Gardner about his law school education were prejudicial to public esteem for the judicial office.

[8] Judge Van Voorhis made statements such as, "That's not the way to prove a case in criminal court. Didn't you learn that in law school?"; "You learned what hearsay was in law school"; and "Now you need to ask him the question that you learned in law school is a legitimate question."

C. *Count Two A(2)*

1. *Findings of Fact*

Judge Van Voorhis presided over a jury trial on August 12 and 13, 1999, in *People v. Gotchall*. Mr. Gotchall was charged with driving while under the influence of alcohol, resisting arrest and driving on a suspended driver's license. Deputy District Attorney Kathleen McMurray prosecuted the case and Mr. Gotchall was represented by David Larkin, a private attorney.

During the course of the prosecution's case, Ms. McMurray attempted to introduce evidence of the results of a field sobriety test known as the horizontal gaze nystagmus test. The masters explained that the "theory of this test is that when an officer places a finger in front of a suspect and has the suspect follow the finger with his eyes, the eyes will begin to bounce if there is intoxication." Prior to introducing the results of the test, Ms. McMurray asked the arresting officer to describe the test. Ms. McMurray had tried another driving while under the influence of alcohol case before another judge and believed the evidence to be admissible. No in limine motion had been filed prior to trial to exclude the test.

During Ms. McMurray's preliminary questioning of the arresting officer, Judge Van Voorhis sustained an objection to the admission of evidence of Mr. Gotchall's performance on the test. Judge Van Voorhis told the prosecutor that she needed to be able to lay a foundation for the evidence to be submitted to the jury, and that she would need an expert witness who would testify on the topic. Ms. McMurray told Judge Van Voorhis that she had not subpoenaed an expert. The prosecutor stated that she believed the officer could testify about the administration of the test, and that she did not believe that she needed to produce a separate expert witness.

Judge Van Voorhis did not agree with Ms. McMurray, and he continued, as the masters found, "in a condescending and somewhat hostile tone" to ask: "Now we have opened the door to something that really you have no intention of completing. Do we leave the jury with these half-truths?" Although Judge Van Voorhis told the masters that this statement did not necessarily impugn Ms. McMurray's motives in front of the jury, the masters emphatically disagreed, finding that in the context in which they were spoken, the fair import of the court's comments was that counsel was acting inappropriately and perhaps unethically.

After disparaging counsel, Judge Van Voorhis proceeded to disparage the prosecutor's case by noting that although the officer had seen "a person demonstrate some sort of a symptom," this did not necessarily connect it to

alcohol. The judge continued: "Probably everybody she has ever arrested has a smaller finger on the end of their hand. That doesn't mean that everybody with a small finger is drunk."

When the prosecutor attempted to move the proceedings along, Judge Van Voorhis responded, "That really doesn't solve the problem completely, because you went down a road that you could not complete, and now this jury has heard about gaze nystagmus, and they are supposed to wonder what it all means." Ms. McMurray asked to approach the bench to reach a resolution outside the presence of the jury. The masters found that Judge Van Voorhis "with a smirk on his face, replied, in a condescending and mocking tone," "And what would you tell me up here?" The prosecutor replied that she had questions for the court, and Judge Van Voorhis told her "ask me now."

Judge Van Voorhis then conducted a lengthy colloquy critical of Ms. McMurray.[9] The masters found that the judge's last comments in the

[9] The masters' report cites the following exchange.

"MS. McMURRAY: If this was in the police report, and I indicated there was no motion indicating that this was to be excluded from this trial—

"JUDGE VAN VOORHIS: Let me interrupt. Case law says you can prove gaze nystagmus if you can bring an expert who can show a jury that it has some scientific basis, and you told me you are not prepared to do that.

"MS. McMURRAY: Not at this time.

"JUDGE VAN VOORHIS: So then you have no business even going into the topic because you can't complete it. You can't show that it's reasonable. And so even going down that road is wrong because you know that you're not going to finish going down that road.

"MS. McMURRAY: No, your Honor.

"JUDGE VAN VOORHIS: And you leave the jury with half the information they need in order to use that information.

"MS. McMURRAY: It was not my intention to do that, Your Honor. I have qualified officers in prior trials in different courts to testify on gaze nystagmus, so it wasn't my intention to start something that I could not finish. This is the first time I've had a Court—

"JUDGE VAN VOORHIS: They are usually not in a position to tell us what it means. They can only tell us what their experience has been. But, like I say, it's like the little finger. It doesn't necessarily mean they are right.

"MS. McMURRAY: Fine. [¶] . . . [¶]

"JUDGE VAN VOORHIS: And she is not in a position to know what experts say about this and what the field says about it. She only knows her own opinion about it.

"MS. McMURRAY: If I can ask her her own opinion about it, that's—

"JUDGE VAN VOORHIS: No more admissible than her opinion about a little finger. It could be entirely coincidental, and you need to show it's based upon the logic. How will we ever get there? The eyeballs do something, and this jury is supposed to assume that magically the officer can tell that it means something? [¶] And you are leaving them with the impression that the officer can and that you think this can be done, and I don't—I just don't think you ought to go there unless you are going all the way there.

"MS. McMURRAY: If that's the Court's opinion—

"JUDGE VAN VOORHIS: I've seen this before many times.

"MS. McMURRAY: —I have never heard of it.

colloquy were made in a "sing-song sarcastic, and very condescending tone of voice." They noted that Judge Van Voorhis admitted that he criticized Ms. McMurray's performance as an attorney and that when he queries an attorney in front of the jury—as he did here—it was with the potential of diminishing the attorney's credibility in the eyes of the jury.

The masters further found that Ms. McMurray's perspective on using the officer was reasonable. "In *People v. Leahy* (1994) 8 Cal.4th 587, 611 [34 Cal.Rptr.2d 663, 882 P.2d 321], our Supreme Court held that once the gaze nystagmus test had been shown to be generally accepted in the scientific community and as reflected in a published opinion, no reason would exist to require an independent expert to testify. A trained law enforcement officer could testify as to the results of the test. The following year, in *People v. Joehnk* (1995) 35 Cal.App.4th 1488, 1507–1508 [42 Cal.Rptr.2d 6], the court of appeal concluded that gaze nystagmus testing had been accepted in the scientific community. Thus, it appears that the evidence was admissible without further foundation as claimed by Ms. McMurray. No contrary authority was cited by the court."

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"JUDGE VAN VOORHIS: If you do gaze nystagmus, you have to have an expert. That's what the Court of Appeals [*sic*] has said. [¶] If you don't produce the expert, you can't open the topic because it leaves these people with the impression that it's got some sort of scientific basis and they ought to give it some weight. [¶] I can instruct them to give it no weight whatsoever, just like the little finger—

"MS. McMURRAY: That's fine.

"JUDGE VAN VOORHIS: —and make fun of it and ridicule it to the point they will disregard it. [In a footnote, the masters noted, 'At this point in the proceedings, Ms. McMurray was concerned that the judge's proposal to make fun and ridicule her evidence would result in a devastating blow to her case.']

"But suppose they are not able to do that—

"MS. McMURRAY: If Your Honor wants to instruct them on this one test, that's fine, Your Honor. It was only one piece of the entire field sobriety test she gave the defendant.

"JUDGE VAN VOORHIS: You are not able to offer sufficient scientific evidence to support gaze nystagmus in a court of law?

"MS. McMURRAY: I have this officer present here.

"JUDGE VAN VOORHIS: This officer probably will not qualify. I'll let you go down that road, but if you keep pursuing it and try to qualify her and she doesn't qualify, and you have wasted a lot of time, and I may have to take the jury away from you because you leave them with the impression that it means something. [¶] You can't start off leaving them with the impression that it means something and then never tell them what it means. [¶] This officer probably will not qualify as an expert in the field of gaze nystagmus.

"MS. McMURRAY: So, Your Honor, you have given me two options. One is continue and waste time or, two, is give the jury an instruction, so I'm not going to do something that the Court is telling me not to in a convoluted way.

"JUDGE VAN VOORHIS: Right, you would only waste more time.

"MS. McMURRAY: That's correct.

"JUDGE VAN VOORHIS: You're only asking to waste more time.

"MS. McMURRAY: I don't want to waste the Court's time.

"JUDGE VAN VOORHIS: Exactly. So aren't we ready now to find out whether the jurors can follow my instruction or not and then we will abandon this topic?"

Finally, the masters discounted Mr. Larkin's testimony that Judge Van Voorhis was not overly harsh with Ms. McMurray and that she continued to argue with the court after the court had ruled. The masters explained: "We have independently reviewed the transcript and do not accept Mr. Larkin's version of the events. Clearly, the judge prolonged the argument by asking more questions that were leading nowhere. Moreover, the caustic comments about Ms. McMurray and her case were made in the presence of the jury. Here, there was absolutely no hint of bad faith by the prosecutor as she had tried a case with similar issues before another judge where that court allowed gaze nystagmus evidence before the jury without an expert. Likewise, there was no motion in limine to exclude such testimony. The court's continued discourse in full view of the jury was wholly unnecessary. Ms. McMurray's request to handle the matter outside the presence of the jury was denied leaving the jury to hear this discussion."

In addition to reviewing the transcript, the masters had the benefit of hearing testimony from Judge Van Voorhis, Ms. McMurray, Mr. Larkin and others. The Supreme Court has consistently held that the factual findings of the special masters are accorded "special weight."[10] The commission, having reviewed all the materials before it, including the masters' report and Judge Van Voorhis's objections to the report, adopts the masters' findings on count two A(2).

2. *Conclusions of Law*

**(5)** The masters concluded that Judge Van Voorhis's remarks constituted willful misconduct. The Supreme Court has held that to commit willful misconduct in office, "a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity."[11]

**(6)** Judge Van Voorhis's comments were clearly unjudicial. The masters observed that Judge Van Voorhis impugned the prosecutor "by accusing her of starting something she had no intention of finishing" and that by "making this false accusation, the judge abandoned his role of neutrality." The masters further noted that Judge Van Voorhis "abandoned his role of neutrality by

[10] *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 914 [81 Cal.Rptr.2d 58, 968 P.2d 958] (*Fletcher*). See also *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1304 [240 Cal.Rptr. 859, 743 P.2d 919] (*Furey*) ("We do, however, give special weight to the factual determinations by the masters, who are best able to evaluate the truthfulness of witnesses appearing before them."). The Supreme Court cited its opinions in *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, 34 [207 Cal.Rptr. 171, 688 P.2d 551] and *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 623 [175 Cal.Rptr. 420, 630 P.2d 954] (*Wenger*).

[11] *Broadman, supra,* 18 Cal.4th at page 1091.

interjecting his views and opinions about the gaze nystagmus test."[12] The masters concluded that Judge Van Voorhis "violated Canon 1 by failing to observe 'high standards of conduct . . . so that the integrity and independence of the judiciary will be preserved.' " The judge violated canon 2A by failing to act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and he violated canon 3B(4) by failing to be "patient, dignified and courteous" to Ms. McMurray.

As he was presiding over a criminal jury trial when he uttered his comments, Judge Van Voorhis was acting in his judicial capacity.

Judge Van Voorhis contends that his comments cannot constitute willful misconduct because there is no "bad faith." In his brief, he explains that he felt obligated to advise the jury that it was not to consider the evidence in order to ensure that the criminal defendant received a fair and unbiased trial. In his oral presentation to the commission, Judge Van Voorhis appeared to argue that because his comments arose out of frustration or anger, he did not have a "corrupt purpose" and thus he did not act in "bad faith."

The Supreme Court has indicated that "bad faith" is not limited to matters involving corruption or moral turpitude,[13] but includes intentionally committed acts, which the judge knew, or should have known, were beyond his or her lawful power.[14] The Supreme Court offers the following relevant explanation: "Because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless

[12] The masters explain: " ' "It is fundamental that the trial court, however, must refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias." ' (*Kloepfer v. Commission on Judicial Performance* [(1989)] 49 Cal.3d 826, 845 [264 Cal.Rptr. 100, 782 P.2d 239], quoting *People v. Carlucci* (1979) 23 Cal.3d 249, 258 [152 Cal.Rptr. 439, 590 P.2d 15].) 'A trial judge may not . . . in the course of examining witnesses become an advocate for either party or cast aspersions or ridicule upon a witness.' (*McCartney v. Commission on Judicial Qualifications* [(1974)] 12 Cal.3d 512, 533 [116 Cal.Rptr. 260, 526 P.2d 268].) The same principle applies to judges who are commenting about a witness's testimony. While ' "nothing would prevent the defendant from challenging" ' a police officer's evaluation of an HGN test ' "with expert testimony of his own . . ." ' (*People v. Joehnk, supra,* 35 Cal.App.4th 1488, 1508, quoting *Leahy, supra,* 8 Cal.4th 587, 611), it is not the judge's role to be that expert."

[13] See *Doan, supra,* 11 Cal.4th 294, 340, noting that in *Geiler, supra,* 10 Cal.3d 270, and *Gonzalez, supra,* 33 Cal.3d 359, the Supreme Court removed judges from office but permitted them to resume the practice of law because the Court did not find moral turpitude, dishonesty, or corruption.

[14] *Broadman, supra,* 18 Cal.4th at page 1091.

or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith."[15]

The Supreme Court summarizes its analysis of "bad faith" with the following sentence: "A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority."[16]

Judge Van Voorhis's explanation that he was concerned that the defendant receive a fair trial, if believed, would justify his ruling and his instruction to the jury. The issue in this count, however, as in other counts, is not whether the judge's legal ruling was correct. The issue also is not whether counsel provoked the judge. Rather, the issue is how to characterize the judge's lashing out at counsel.

The judge was clearly authorized to rule and instruct the jury, even if his ruling were ultimately determined to be incorrect. Instead, he engaged in a lengthy colloquy in which he questioned the prosecutor's motives for seeking to introduce the evidence, ridiculed her perspective and threatened to declare a mistrial if she continued. Judge Van Voorhis conducted this dialogue in front of the jury, and disparaged the prosecutor's request that the matter be resolved outside the presence of the jury. Furthermore, Judge Van Voorhis did not make a firm ruling until the end of the colloquy after he had ridiculed the prosecutor and prejudiced her case before the jury.

**(7)** When a judge lashes out in anger or frustration or personally attacks an attorney or becomes embroiled in a matter, the judge abandons his or her judicial role. This is not to suggest that judges do not become frustrated or angry. The California Code of Judicial Ethics, however, restrains the way a judge may manifest anger or frustration. For example, canon 2A states that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and canon 3B(4) provides that a judge "shall be" patient, dignified and courteous. Although any evaluation of a judge's conduct should consider the context in which the conduct took place, the canons apply even when a judge is angry or frustrated.

The masters found that the "judge's statements here could not have been meant for any purpose other than to deliberately ridicule Ms. McMurray and

[15] *Broadman, supra*, 18 Cal.4th at page 1092.
[16] *Broadman, supra*, 18 Cal.4th at page 1092.

prejudice her case in front of the jury" and accordingly Judge Van Voorhis made his comments " 'for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties) . . . .' " The masters, in essence, did not believe Judge Van Voorhis's rationale for his comments. The commission adopts the masters' findings on count two A(2) and has no quarrel with the masters' conclusion of law.

Even if the commission were to accept Judge Van Voorhis's explanation, it would justify only his ruling (and possibly his instructions to the jury). His concern that the defendant receive a fair trial in no way justifies his deprecation of the prosecutor's motives, his ridiculing of her perception or his prejudicing of her case before the jury. In other words, the comments cannot be said to have been made in the "faithful discharge of judicial duties." It is clear that—as he implied in his oral presentation to the commission—Judge Van Voorhis lost his temper and made comments for the corrupt purpose of venting his anger or frustration.

Finally, the commission notes that if bad faith were not apparent under the first of the three tests for "bad faith," it might well be proved under the third test: "performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." Judge Van Voorhis had been publicly reproved by the commission for his demeanor and, just two weeks before his comments, his presiding judge had cautioned Judge Van Voorhis verbally and in writing about his demeanor. Under these circumstances, Judge Van Voorhis's attack on the prosecutor's personal motives and his ridicule of her perspective has the appearance of a "conscious disregard for the limits of the judge's authority."

The commission joins the masters in concluding that Judge Van Voorhis's comments to the prosecutor constituted willful misconduct.[17]

D. *Count Two A(3)*

1. *Findings of Fact*

Estaban Alvear is a deputy public defender in Contra Costa County who represented Mr. Hoye in a criminal trial before Judge Van Voorhis in January 2000. Mr. Alvear was born in Ecuador and had lived in San Francisco for 10 years before the trial. The state was represented by Deputy District Attorney Christine Meade.

[17] In *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 703 [122 Cal.Rptr. 778, 537 P.2d 898] (*Cannon*), the Supreme Court held that the judge's deliberate ridiculing of attorneys constituted willful misconduct in office.

After a guilty verdict and the imposition of judgment, Judge Van Voorhis, while still on the bench, offered a critique of Ms. Meade's performance, possibly at her request. After he completed his critique of Ms. Meade, Judge Van Voorhis turned to Mr. Alvear, who was still at counsel table helping his client fill out forms. Judge Van Voorhis, after generally complimenting Mr. Alvear, stated something to the effect that Mr. Alvear's accent was charming but he should lose it. As noted by the masters, Mr. Alvear did not ask Judge Van Voorhis for a critique of his performance. Mr. Hoye immediately rose to the defense of his attorney saying that he thought Mr. Alvear did a good job.

The masters found that the "comments to Mr. Alvear were hurtful to him personally, and made worse because his client was seated next to him when the remark was made."

**(8)** The masters further found that "[i]n a conversation between Judge Van Voorhis and Assistant Public Defender Susan Hutcher that occurred in the hallway of the courthouse, the judge told Ms. Hutcher that Mr. Alvear performed well as an attorney but that he was concerned about Mr. Alvear's accent. Specifically, the judge said that he needed to lose the accent and suggested that speech therapy might help. Ms. Hutcher explained that Mr. Alvear was from another country and that she thought the accent was charming. Judge Van Voorhis told Ms. Hutcher something to the effect that he thought the accent was annoying or difficult to understand. It was after that conversation that Ms. Hutcher heard about the comments made to Mr. Alvear about his accent."

Judge Van Voorhis testified that he suggested to Mr. Alvear that he "work on" or "lose" his accent in order to better communicate with the jury and witnesses. Judge Van Voorhis stated that there were two reasons for his comment. First, he felt that because he had made positive and negative comments about Ms. Meade's performance, Mr. Alvear "may feel slighted if I don't offer some words of advice." Second, he testified that when Mr. Alvear was cross-examining the police officer, the officer and others in the courtroom momentarily misunderstood Mr. Alvear's statement about "walking around" as an obscenity. Judge Van Voorhis admitted that the advice was "uninvited," "too bluntly stated," and "perhaps inept."

The masters, however, stated: "We do not credit the testimony of Judge Van Voorhis that his comments were motivated by concern that Mr. Alvear's pronunciation of walking was heard by others as cursing. The judge did not mention that to anyone at the time the remarks were made to Mr. Alvear. Secondly, no one else that was present testified to any such concerns. Finally,

our own perceptions of Mr. Alvear's accent compel us to discredit Judge Van Voorhis's alleged concerns."[18]

Judge Van Voorhis never apologized to Mr. Alvear concerning this incident, even after the public defender wrote him a letter.

The commission adopts the masters' findings on count two A(3) concerning Judge Van Voorhis's comment to Mr. Alvear.

2. *Conclusions of Law*

Judge Van Voorhis's comment constitutes prejudicial misconduct because it would have appeared to an "objective observer" familiar with the facts and the standards of conduct that the judge's comment was prejudicial to the public esteem for the judicial office. It is one thing for a judge to respond to a request for advice from a prosecutor who has just won a conviction. This, however, does not justify offering unsolicited criticism from the bench to the losing defense counsel in front of his client. Accordingly, Judge Van Voorhis's gratuitous remark violated canons 1, 2A and 3B(4), regardless of his subjective intent.

The masters further concluded that Judge Van Voorhis also manifested bias or prejudice based on race or national origin in violation of canon 3B(5). They state that the "comment to Mr. Alvear was insensitive and could have been perceived by members of the public as indicative of bias related to Mr. Alvear's ethnicity."

The commission concludes that Judge Van Voorhis's comment to Mr. Alvear gave the appearance of bias or prejudice based on race or national origin in violation of canon 3B(5). The masters, having observed all the witnesses, including Judge Van Voorhis and Mr. Alvear, concluded that the judge's comment could reasonably be perceived by members of the public as indicative of bias. The masters' findings are entitled to special weight,[19] and the commission, having considered the evidence and the judge's arguments, concurs that the comment gave the appearance of bias or prejudice. Judge Van Voorhis's subjective intent is not controlling and the commission makes no determination as to his subjective intent.[20]

[18] The masters noted, "[a]lthough Mr. Alvear speaks with an accent, we had no difficulty understanding him, even in a hearing room where the acoustics were not particularly good. Christine Meade testified that Alvear's accent has not changed since the trial. We find that his accent does not make him difficult to understand."

[19] *Fletcher, supra*, 19 Cal.4th at page 914.

[20] Prejudicial misconduct "does not require the presence of bad faith, but may occur when a judge, though acting in good faith, engages in conduct that adversely would affect the esteem

E. *Count Two A(4)*

1. *Findings of Fact*

Judge Van Voorhis presided over a criminal jury trial in *People v. McDonald* in March 2000. The defendant was represented by James Crew. Deputy District Attorney Christine Meade, who had tried her first case six weeks earlier in front of Judge Van Voorhis, was the prosecutor. This was her first trial on a theft-related offense.

A motion in limine was filed concerning the use of a prior conviction for theft for impeachment and the court ruled that the prior conviction was admissible. At trial, the defendant, while under cross-examination, claimed he did not know whether he had been convicted of embezzlement. Ms. Meade then asked the defendant if he was on probation for that conviction and the defendant asked her to repeat the question. The defendant then agreed that he had been convicted of theft, and the prosecutor asked if he was on probation for that offense. At that point, Judge Van Voorhis interrupted and began to interrogate Ms. Meade in the presence of the jury.[21]

The masters stated that after the exchange, "Ms. Meade left the courtroom in tears. She called her supervisor to tell him that she had been accused of misconduct and thought she could be disbarred."

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in which the judiciary is held by members of the public who become aware of the circumstances of the conduct. [Citations.] The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred under this standard." (*Adams*, *supra*, 10 Cal.4th at p. 878.) In *Gonzalez*, *supra*, 33 Cal.3d 359, 376, the Supreme Court considered several ethnic and sexual remarks and held: "Judge Gonzalez' subjective intent is not at issue. As a judge he is charged with the obligation to conduct himself at all times in a manner that promotes public confidence and esteem for the judiciary."

[21] The Masters note the following excerpt from the trial.

"JUDGE VAN VOORHIS: I want to ask you a question, and I have the power to do that. [¶] I want to know where you learned in law school, or the District Attorney's Office, that his probationary status is admissible in a court of law.

"MS. MEADE: I'm sorry, Your Honor. I did not learn that.

"JUDGE VAN VOORHIS: Yeah. And so were you just guessing what you could get away with in a courtroom?

"MS. MEADE: No, Your Honor.

"JUDGE VAN VOORHIS: Then, tell me, on what basis did you ask that question?

"MS. MEADE: On the basis of having a certified copy of the terms—

"JUDGE VAN VOORHIS: But you know and I know that what I agreed you may do is prove the conviction. [¶] And you remember me, many times, asking you in what form you intended to prove this conviction, and you never mentioned anything about asking him about probation; did you?

"MS. MEADE: No, Your Honor. [¶] . . . [¶]

"JUDGE VAN VOORHIS: You see why I feel a little jilted now?

"MS. MEADE: Yes, Your Honor.

"JUDGE VAN VOORHIS: And then I gave you an opportunity to show me any legal basis that you may have to do it, and you contended there is absolutely none. [¶] So now, I want to

The masters then made the following findings:

"The judge's demeanor during this exchange, which was all in front of the jury, was extremely demeaning, belittling and sarcastic. Several of the judge's statements (e.g., 'And so were you just guessing what you could get away with in a courtroom?' [and] 'So when I asked at the beginning of this trial how you were going to prove it, you thought I was just making conversation?') were sarcastic; the judge admitted that the latter statement had a sarcastic tone.

"The judge's closing threat, 'Abide by my rulings or you'll tangle with me,' and his reference to law school, 'I want to know where you learned in law school, or the District Attorney's Office, that his probationary status is admissible in a court of law' were undignified and discourteous. The judge has admitted that a similar reference to law school made to William Gardner in the *Silva* matter was 'gratuitous,' 'demeaning,' and 'undignified.'

"The judge's questioning of Ms. Meade's motives ('So, now I want to know what your motives are, because they appear to be—to violate my rulings and to break California law in terms of what is permitted in a criminal

know what your motives are, because they appear to be—to violate my rulings and to break California law in terms of what is permitted in a criminal courtroom, and I'm here to stop you.

"MS. MEADE: I understand that, Your Honor. I have a certified copy of the conviction—

"JUDGE VAN VOORHIS: That's not what I'm talking about. [¶] Shall you focus again on what you did? You asked him about his probationary status; didn't you?

"MS. MEADE: Yes, Your Honor.

"JUDGE VAN VOORHIS: Well, you know you can't do that; don't you?

"MS. MEADE: I do now, Your Honor.

"JUDGE VAN VOORHIS: Didn't you know it at the time of the question?

"MS. MEADE: No, Your Honor.

"JUDGE VAN VOORHIS: So when I asked at the beginning of this trial how you were going to prove it, you thought I was just making conversation?

"MS. MEADE: No, Your Honor.

"JUDGE VAN VOORHIS: You knew that you were going to be confined to those for [*sic*] rules of proof because that's why I was asking the question, to find out what you were going to do; right?

"MS. MEADE: I believed I was confined to the certified copy of the probation terms.

"JUDGE VAN VOORHIS: I made that very clear to you now, and now you have gone off in another direction, without any legal basis whatsoever, and you have made a mistake. I won't let you do that."

The masters went on to note that after the above mentioned dialogue, "the court then instructed the jury to disregard the question and proceedings continued":

"JUDGE VAN VOORHIS: . . . You need to be way more careful in my courtroom than you just were—

"MS. MEADE: Yes, Your Honor.

"JUDGE VAN VOORHIS: —or you could be in a lot of trouble.

"MS. MEADE: Yes, your honor.

"JUDGE VAN VOORHIS: Abide by my rulings or you'll tangle with me."

courtroom, and I'm here to stop you.') was discourteous and suggested a lack of impartiality. The phrase 'break the law' carries the connotation of a criminal act and would be interpreted by the jurors as such. The judge admitted that a 'skilled judge just doesn't make those accusations in the presence of the jury . . . .'

"The judge's statement—'You see why I feel a little jilted now?'—was personal and undignified. His cross-examination of Ms. Meade ('Well, you know you can't do that; don't you?'; 'Didn't you know it at the time of the question?'; 'You knew that you were going to be confined to those rules of proof because that's why I was asking the question, to find out what you were going to do; right?'[)] and his personal criticism of her ('I made that very clear to you now, and now you have gone off in another direction, without any legal basis whatsoever, and you have made a mistake. I won't let you do that.'), were also inappropriate, especially when made in front of the jury.

"The judge's conduct toward Ms. Meade was part of a pattern of being undignified, impatient, discourteous and sarcastic to her. When the judge asked Ms. Meade during a colloquy involving another witness, 'What is the point?' and Ms. Meade responded, 'There really isn't,' the judge stated, in front of the jury: 'Congratulations. You are the first lawyer that has ever admitted that in my courtroom.'

"When Ms. Meade objected to a line of questioning on the ground that the matter should have been raised [at] pretrial, the judge asked where she learned that. When Ms. Meade replied that she learned it from the normal practice, the judge replied, in front of the jury: 'You are wrong. Study more.' "

The commission, having reviewed all the materials before it, adopts the masters' findings of fact on count two A(4).

2. *Conclusions of Law*

**(9)** The transcript shows that Judge Van Voorhis, in the masters' words: "interjected himself into the proceedings by engaging in a lengthy, antagonistic critique of Ms. Meade's performance and ethics, in front of the jury, the defendant and opposing counsel. The judge's statements unnecessarily attacked Ms. Meade's legal training, professional competence, and motives, and accused her of breaking the law, when it should have been obvious to the judge that Ms. Meade was simply an inexperienced prosecutor who innocently misunderstood what she could do. The judge's remarks violated his duty to be patient, dignified and courteous, and gave the appearance that he was unable to remain neutral and impartial in the consideration of the matter.

He unnecessarily embroiled himself, as he has shown a propensity to do on other occasions, in a needless and harmful harangue."

The commission agrees with the masters that Judge Van Voorhis's extended remarks to Ms. Meade constitute willful misconduct. They were made in his judicial capacity and were unjudicial as they violated canons 1, 2A and 3B(4).

Judge Van Voorhis defends his comments on the ground that he sought to correct the potential prejudicial effect of the prosecutor's inquiry into whether the defendant was on probation. Judge Van Voorhis's contention, like his contention on count two A(2), might well justify his determination not to allow the prosecutor to inquire into the defendant's probation status, but does not excuse the judge being "undignified, impatient, discourteous and sarcastic" to Ms. Meade in front of the jury. One of the charges against the judge in *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297 [267 Cal.Rptr. 293, 787 P.2d 591] (*Kennick*) alleged that the judge's behavior toward the prosecutor was "demeaning, rude, impatient and abusive." The court agreed with the commission that the judge's actions constituted willful misconduct, even though the judge's underlying ruling was not misconduct.[22]

Similarly, in this case there is no challenge to Judge Van Voorhis's decision to block the prosecutor's line of inquiry. At issue is Judge Van Voorhis's personal attacks on the prosecutor's motives, education and performance. These attacks were not made in the "faithful discharge of judicial duties." Rather, it is clear that Judge Van Voorhis lost his temper and made comments in bad faith for the corrupt purpose of venting his anger or frustration.

F. *Count Two A(5)*

1. *Findings of Fact*

In the *Elze* case (see count one), Deputy District Attorney Stacey Brock attempted to introduce evidence that the defendant was unable to understand or follow the officer's directions when attempting to perform the gaze nystagmus test. Ms. Brock was not attempting to introduce the results, only the fact that the defendant could not follow directions.

When Ms. Brock asked the officer whether the defendant appeared to understand what he was supposed to do, Judge Van Voorhis interrupted and the following colloquy took place:

"JUDGE VAN VOORHIS: You are only going to be able to admit this if you bring an expert that's going to tell us what it means.

[22] *Kennick, supra*, 50 Cal.3d at page 324.

"MS. BROCK: We won't be offering the results of it, Your Honor.

"JUDGE VAN VOORHIS: So why even bring it up?

"MS. BROCK: Inability to follow directions.

"JUDGE VAN VOORHIS: You could ask him about that in general, but you know that if you offer evidence of that, they are liable to think it means something. [¶] Tell them it does not mean anything.

"MS. BROCK: This doesn't mean anything.

"JUDGE VAN VOORHIS: Yeah. So why bother with it?

"MS. BROCK: I would like to proceed, your Honor.

"JUDGE VAN VOORHIS: You can ask him if on other tests he failed to follow directions, and take your answer and go with that.

"MS. BROCK [to the witness]: Q. Did the defendant—

"JUDGE VAN VOORHIS: But, you know, I'm not going to let you offer any evidence of what you referred to as horizontal gaze nystagmus because it means nothing. [¶] If you can't follow that instruction from me, raise your hand now. Great. Then we'll ignore it. Try again. Stay away from that."

The masters found that this exchange took place in open court in front of the jury, Judge Van Voorhis "was red faced, tense and raised his voice," and he "pointed when he told Ms. Brock to instruct the jury that it did not mean anything." They found that Judge Van Voorhis was discourteous and humiliated Ms. Brock in front of the jury. They further noted that Ms. Brock was afraid she was going to be held in contempt by the court.

The masters determined:

"Judge Van Voorhis admitted during the hearing that he had no authority for requiring an attorney to confess mistakes to a jury by requiring the lawyer to speak directly to the jury. The judge testified that he took very serious action because he believed that [he] thought that Deputy District Attorney Brock had jeopardized a fair trial. Judge Van Voorhis stated, '[he] felt that [Ms. Brock] was—there was an attempt on her part to have the jury disregard what I was doing as a judge and—' Judge Van Voorhis testified that Ms. Brock had been trying to undermine his 'power to rule that this was not admissible evidence.' Even though the prosecutor limited her basis for

discussing the gaze nystagmus issue to defendant's inability to follow directions, Judge Van Voorhis testified that Ms. Brock was 'leaving the jury with the implication' that the test could help the jury 'determine sobriety.' The judge also testified that Ms. Brock was 'doing something which she knows she can't do.'

"Based on the record, we find that the judge's explanation for his conduct, that he was protecting the defendant's rights against the prosecutor's attempt to introduce inadmissible evidence, unconvincing. The proffer made by the prosecutor in compliance with the court's questionable understanding of the status of the law on gaze nystagmus was that the evidence was not being introduced for the results of the test, only the inability of the defendant to follow directions. It was the court that ignored the proffer and began his finger-pointing, red-faced tirade. This culminated in the humiliating experience of the prosecutor being forced into making a statement that the evidence meant nothing directly to the jury, thus risking her credibility with the jury as the case progressed to conclusion.

"We find that Ms. Brock had done nothing wrong or inappropriate and the conduct and humiliation imposed on her by Judge Van Voorhis entirely inappropriate."

The commission, having reviewed all the materials before it, adopts the masters' findings of fact on count two A(5).

2. *Conclusions of Law*

**(10)** It is the judge's role to make evidentiary rulings and instruct the jury if necessary. Here, the masters concluded that Judge Van Voorhis "abused his authority by ordering the prosecutor to admit to the jury that relevant evidence, which she in good faith was attempting to introduce, 'does not mean anything.' " The masters concluded that the judge's order "served no proper purpose, violated his duty to be patient, dignified and courteous, and gave the appearance that he was unable to remain neutral and impartial in the consideration of the matter."

The commission agrees with the masters that Judge Van Voorhis's remarks and order to Ms. Brock to admit that the evidence "does not mean anything" constitute willful misconduct. Judge Van Voorhis was acting in his judicial capacity and his statements were unjudicial in that they violated canons 1, 2A and 3B(4).

Judge Van Voorhis's determination to exclude any evidence of the gaze nystagmus test is not in issue. At issue is his belittling of the prosecutor and

his forcing her to make an admission to the jury. These actions and comments were not made in the "faithful discharge of judicial duties." The masters commented that Judge Van Voorhis "admitted that he knew of no authority in California that permitted him to order a lawyer to confess her mistakes to the jury, and must have known there was none." As indicated by Judge Van Voorhis's apparent failure to appreciate that the prosecutor sought only to introduce evidence of the defendant's inability to follow instructions, Judge Van Voorhis lost his temper and made comments before the jury in bad faith for the corrupt purpose of venting his anger or frustration.

G. *Count Two A(6)*

1. *Findings of Fact*

The day following the events described in count two A(5), Mr. Gomes asked his client, Mr. Elze, whether he drank more at home or when he went out. Ms. Brock objected to the question. In the exchange that followed Ms. Brock's objection, Mr. Gomes several times declined Judge Van Voorhis's suggestions that the evidence was admissible character evidence to prove a pattern of behavior and that the defendant had acted consistently with that behavior.[23] Nonetheless, Judge Van Voorhis determined that the evidence

[23] The transcript from the trial shows the following dialogue.
"MR. GOMES [to Mr. Elze, the witness]: Do you ever go out in public and get drunk?
"MS. BROCK: Objection. Relevance.
"THE WITNESS [Mr. Elze]: For what purpose?
"MR. GOMES: I asked you that question. Please answer it.
"JUDGE VAN VOORHIS: What's the relevance?
"MR. GOMES: Well, it's relevant as to the frequency of his drinking.
"THE WITNESS: What purpose? I mean, why should I go out to get drunk?
"JUDGE VAN VOORHIS: You are offering [it] as character evidence?
"MR. GOMES: Okay.
"JUDGE VAN VOORHIS: Are you?
"MR. GOMES: No. No. I'm just—I'll rephrase the question.
"JUDGE VAN VOORHIS: Uh-huh.
"MR. GOMES [to the witness]: Q. Now, I want you to answer my questions 'yes' or 'no.'
"JUDGE VAN VOORHIS: All right. He's not really required to do that, and you are really not supposed to prompt him on how you would like him to answer.
"MR. GOMES: I'm just trying to—okay.
"Q. [to the witness]: So do you go out every week and drink?
"MS. BROCK: Objection. Relevance.
"JUDGE VAN VOORHIS: Are you trying to show a habit or custom on his part and then—
"MR. GOMES: Yes.
"JUDGE VAN VOORHIS: —conduct in conformity with that habit?
"MR. GOMES: Yes.
"JUDGE VAN VOORHIS: That's character evidence. You are offering character evidence?
"THE WITNESS [Mr. Elze]: Are you telling me to answer, your Honor?
"JUDGE VAN VOORHIS: I'm asking him.
"THE WITNESS: Okay.

was relevant and turned to Ms. Brock. The masters' report referred to the following excerpt from the transcript and explanation.

"JUDGE VAN VOORHIS: And so now you see the relevance of it; right? It's character evidence, obviously, and there has been a lot of it already, so it's clearly relevant; isn't it? Isn't it? Tell me.[24]

"MR. GOMES: No.[25]

"JUDGE VAN VOORHIS: You tell me that it's relevant.

"MS. BROCK: Do you want me to say that it's relevant, your Honor?

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"MR. GOMES: I'll withdraw that question.
"Q. [to the witness]: Do you drink at home?
"THE WITNESS: Sometimes.
"MR. GOMES: Yeah?
"THE WITNESS: Yeah. When we have dinner, when we stay at home, I have three tenants, and frequently, they will prepare me—one from Afghanistan, and two from the United States and different parts of the country—so we have dinner, and we have something to drink, yes.
"MR. GOMES: How about when you go out?
"THE WITNESS: The same thing.
"MR. GOMES: Do you drink less or more when you go out?
"MS. BROCK: Objection. Relevance.
"THE WITNESS: It depends on the situation.
"JUDGE VAN VOORHIS: What's the relevance what he does on other occasions?
"MR. GOMES: I think it's—I think it's probative, your Honor.
"JUDGE VAN VOORHIS: I know you think that. Otherwise, you wouldn't be wasting our time. I would just like to have you explain what you're up to. It sounds to me like it's character evidence again; isn't it? [¶] You can do that, if you want to.
"MR. GOMES: I'm—I'm certainly just asking questions within the scope, the same questions that she asked.
"JUDGE VAN VOORHIS: Right. You just need to recognize that if what you're trying to do is show that he has a pattern of behavior, and, therefore, on this occasion, he acted consistent with that behavior, that's character evidence.
"MR. GOMES: Yeah. I'm not using it to show that.
"JUDGE VAN VOORHIS: Well, that's exactly what you are doing, aren't you?
"MR. GOMES: I'm just rehabilitating him.
"JUDGE VAN VOORHIS: That's exactly what you are doing, and if you want to do that, you are welcome to do that.
"MR. GOMES: Okay.
"JUDGE VAN VOORHIS: Just tell me that's what you're doing so she knows, you know, that you are doing that. [¶] You have the right to open up that topic or not. It's already pretty well open; isn't it?"

[24] "The judge paused between each 'isn't it?' and 'tell me,' waiting for the prosecution to respond."

[25] "Curiously, while the judge was looking at Ms. Brock for a response, the proponent of the evidence responded with no, that was not the legal theory for admissibility."

"JUDGE VAN VOORHIS: Sure, it is; isn't it?[26]

"MS. BROCK: Yes."

The masters' findings of fact concluded with the following paragraph. "The remarks made by the judge were in front of the jury and clearly done with the intent of forcing Ms. Brock to agree with him. Ms. Brock felt humiliated by the judge who was angry, loud, short-tempered and red-faced. Our review of the transcript reveals nothing done by Ms. Brock to provoke such a response by Judge Van Voorhis. She replied yes to the judge's question, even though she believed the evidence was not relevant, because she was afraid the judge would hold her in contempt. The judge's testimony on this subject was that he allowed Ms. Brock to be heard because he had to 'give her an opportunity to speak' and argue the evidence was not relevant. This explanation was not credible because the judge clearly badgered Ms. Brock into acquiescence. Ms. Brock's version of the incident is far more credible and is supported by the transcript."

The commission, having reviewed all the materials before it, adopts the masters' findings of fact on count two A(6).

2. *Conclusions of Law*

The masters concluded that Judge Van Voorhis's remarks and order to Ms. Brock constituted willful misconduct as they were unjudicial, were made in bad faith and were made in his judicial capacity. The masters noted that although it is the judge's role to make evidentiary rulings and instruct the jury if necessary, Judge Van Voorhis abused his authority by forcing the prosecutor to agree with his ruling, admit to the jury that evidence to which she was objecting was relevant, and confess to the jury that she made a mistake.

The commission agrees with the masters that Judge Van Voorhis's statements constituted willful misconduct and violated canons 1, 2A and 3B(4) as they "served no proper purpose, violated his duty to be patient, dignified and courteous, and gave the appearance that he was unable to remain neutral and impartial in the consideration of the matter." The evidence shows that Judge Van Voorhis once again lost his composure and made comments before the jury for the corrupt purpose of venting his anger or frustration. The commission agrees with the masters that Judge Van Voorhis's contention that he intended to give the prosecutor an opportunity to register an objection under Evidence Code section 352 is not credible because the judge clearly badgered the prosecutor into acquiescence.

[26] "Ms. Brock testified that the judge actually said, 'Sure. It is. Isn't it?' "

H. *Count Two B*

1. *Findings of Fact on Count Two B(1)*

Ms. Carmichael, a court clerk in the Contra Costa Superior Court, was assigned to work as a fill-in clerk for Judge Van Voorhis on July 13, 1999. The judge asked her to check the jury trial calendar for later in the week and to have the files brought upstairs so he could look at them. Ms. Carmichael called downstairs to the clerk's office and the office responded that they would get the files upstairs as soon as they could. Ms. Carmichael told the judge that there were six jury trials scheduled. When the files were not immediately brought up, Judge Van Voorhis began to get angry. The clerk's office advised that of the six files, they were missing two. When the files were brought to the courtroom, Ms. Carmichael handed them to the judge. The masters found that while court was in session, Judge Van Voorhis angrily told Ms. Carmichael to call and find out where the missing files were. They further found that he pointed his finger at the clerk when he was speaking harshly to her.

Judge Van Voorhis testified that he had no recollection of the incident. He testified that in the morning he had notified the presiding judge that he would be free the following day to handle assignments. Judge Van Voorhis explained that Ms. Carmichael had failed to notify him that there were cases scheduled before him the following day. This prompted Judge Van Voorhis to tell the supervising clerk, Ms. Morgado, that he hoped that his replacement clerk was properly trained to make sure that there were no pending matters on calendar the next day.

During the noon recess, Ms. Morgado told Ms. Carmichael that Judge Van Voorhis was upset with her. When Ms. Carmichael returned to the courtroom after lunch, Judge Van Voorhis told her how important it was for him to have accurate information about his caseload to report to the presiding judge. He further told her that otherwise he looked like he did not know what was going on in his own courthouse. Judge Van Voorhis testified that he noticed that Ms. Carmichael was becoming teary eyed as he spoke to her and that he stopped.

The afternoon calendar included "in custody" defendants and "volaps" (individuals that voluntarily appear on bench warrants or violations of probation). None of the volaps were in the courtroom when the calendar was called.

The masters found that in "an angry tone of voice," the judge said, "I have no bodies. I have these files. What's going on?" As Judge Van Voorhis was saying this, he threw the files over the ledge of the bench. The stack of files was about four inches high. The judge was very, very angry when he threw the files. The judge never apologized for throwing the files.

Ms. Carmichael was shocked and started to tear up as she picked up the files. Ultimately, she telephoned a neighboring courtroom and found the defendants who had been sent to the wrong courtroom.

Judge Van Voorhis denies that he threw the files at Ms. Carmichael. He testified that he put the files on a tabletop next to his computer and directed Ms. Carmichael to go and get the missing defendants. He stated, "If it fell, it was accidental. Believe me." The judge testified that he did not remember if the files spilled over to the other side.

Judge Van Voorhis attributed his lack of memory to the delay in informing him of the accusation. The masters commented: "Indeed, the judge went to great lengths to claim that no one ever told him that 'it was the throwing of the files that was the problem.' He even wrote a letter to Presiding Judge Mark Simons, after meeting with him on August 4, 1999, and stated that they had not discussed the 'details relating to the incident,' and that Judge Van Voorhis had never been told what Ms. Carmichael had reported to the presiding judge. Judge Van Voorhis testified that because the presiding judge never wrote back to tell him 'what this was all about,' he was 'in a worse position to defend' himself in front of the masters."

The masters found that "despite his denials, the truth slipped out during cross-examination." When discussing his lack of memory, Judge Van Voorhis testified: "Because I know at the instant I threw the files—human beings looking in that direction are going to have, you know, the ability to perceive it."

After completing the calendar Ms. Carmichael began to cry. She went to Ms. Morgado's office. As a result of her report, Ms. Carmichael was not sent back to Judge Van Voorhis's courtroom and a complaint was filed with Paul Kunkel, the human resources officer.

Presiding Judge (now Justice) Mark Simon drove to Walnut Creek to meet with Judge Van Voorhis to discuss the incident and to make sure the conduct did not occur again. Judge Simon thought that Judge Van Voorhis clearly recognized that "his demeanor may have been such that it was viewed as

harsh and rude." Judge Simon indicated that he was interested in making sure that the behavior did not recur and recommended that Judge Van Voorhis enroll in a counseling or anger management program. Judge Van Voorhis replied that he was not interested in either program, but that he had private resources if he decided it was necessary. Judge Simons told Judge Van Voorhis that the incident could not be repeated and Judge Van Voorhis accepted that the conduct needed to be avoided in the future. Judge Simons sent a letter to Judge Van Voorhis memorializing the conversation and his advice that the conduct must not be repeated.

The commission, having reviewed all the materials before it, adopts the above recitation of the masters' findings as its findings of fact on count two B(1).

2. *Findings of Fact on Count Two B(2)*

Ms. Van Horn has been a courtroom clerk in Contra Costa County for 20 years. She filled in for Judge Van Voorhis's court clerk on April 19, 2000. When she arrived in the courtroom, the lawyers were completing their closing arguments in a jury trial.

It is the clerk's job at the end of the proceedings to swear the bailiff to take charge of the jury. After the judge gave closing instructions, the bailiff walked over to Ms. Van Horn and both raised their right hands and the oath was given. Ms. Van Horn administered the oath in the same way she had administered it in every other case, including cases in which Judge Van Voorhis had presided.

The masters found that after "she swore the bailiff, the judge stood up and told Ms. Van Horn that she had wasted 20 seconds of the court's time by swearing the bailiff on the record. He was red faced, tense and upset with her." They found that he also told her that there was a manual in the courtroom that would explain the correct procedures. The masters noted that jurors, the district attorney, defense counsel, members of the audience and the defendant were present in the courtroom.

Ms. Van Horn was shaken and experienced shortness of breath. She felt embarrassed and humiliated. After composing herself, Ms. Van Horn went with another clerk back into the courtroom, retrieved the manual and found that it made no reference to swearing the bailiff off the record.

Both Michael Markowitz, an experienced defense attorney, and Ms. Christine Meade, the prosecutor in the case, agreed that the method used by Ms. Van Horn to swear in the bailiff was the same they had seen in all other jury trials.

Judge Van Voorhis stated in his verified answer that he "expressed a desire to Ms. Van Horn to dispose of cases in a more timely manner." He testified that he told her "in [a] conversational tone"—"the way I often do with clerks"—that within the previous couple of months, they had started swearing in the bailiff off the record and that the law does not require that the bailiff be sworn in on the record. He testified that he indicated that it saved only about 30 seconds, and that it did not matter to him if she wanted to swear in the bailiff on or off the record. He denied that he told her she had wasted 20 seconds of time or that there was a folder with written instructions on how to swear in the bailiff.

The masters credited "the testimony of Ms. Van Horn and Mr. Markowitz who corroborated her testimony." They rejected "the testimony of Judge Van Voorhis. Ms. Meade testified that the judge demanded to know of Ms. Van Horn how much of the court's time she had wasted to which Ms. Van Horn responded about 10 seconds. We find that the comments of Judge Van Voorhis were uncalled for, belittling and sarcastic." "We conclude that the criticism of Ms. Van Horn was inappropriate and unjust. She had followed the directions contained in the courtroom manual and Judge Van Voorhis failed to explain any policy changes in his courtroom. His characteristic overreaction was so distressful to the clerk that she requested not to be assigned to Judge Van Voorhis's courtroom in the future."

The commission, having reviewed all the materials before it, adopts the masters' findings of fact on count two B(2).

3. *Findings of Fact on Count Two B(3)*

Ms. Brown is a deputy sheriff in Contra Costa County and is assigned to the Court Services Bureau. On December 26, 2000, she filled in as a security deputy in Judge Van Voorhis's courtroom. Her responsibilities included "the maintenance of inmates and getting them into the courtroom assuring that the proper inmates appeared in court." She had never worked in Judge Van Voorhis's court before.

At around 7:00 a.m., Deputy Brown compared the list of inmates being transported to court with a list of inmates needed by the court. She noticed that there was an inmate, Ms. Johnson, who was not being transported, but was listed on the court calendar. Deputy Brown called the transportation unit and the main detention facility and was told that the records showed that the court date had been vacated and that Ms. Johnson did not need to appear. When Judge Van Voorhis's bailiff, Deputy La Fortune, came to work around 8:15 a.m., Deputy Brown advised him of the fact that Ms. Johnson was not

being transported because jail records showed that her court date had been vacated.

Deputy Brown then reported to the courtroom because the "in custody" calendar was starting. Her task was to get each inmate defendant and bring the person into the courtroom. During the course of the morning, Deputy Public Defender Quandt asked Deputy Brown to have Ms. Johnson brought out so he could speak with her. The request was made in the courtroom in the presence of Judge Van Voorhis, Deputy La Fortune and several attorneys.

The masters found that Deputy Brown informed Mr. Quandt that Ms. Johnson "had not been transported because her court date was shown to be vacated."[27] Mr. Quandt told Deputy Brown that there was a mistake and that Ms. Johnson needed to be in court that day. Judge Van Voorhis testified that when he overheard this conversation, he spoke up immediately. "I started off with, 'You need to learn how to do your job,' and I stopped myself. And I started that sentence over. [¶] And I said, 'You need to learn how to do your job in my courtroom.' And I said, 'Steve is going to teach you how to do your job in my courtroom, aren't you, Steve?' Steve was standing right there. [¶] And then I believe I repeated, 'Steve is going to teach you' or 'help you to learn how to do your job in my courtroom.' "

The masters found that Judge Van Voorhis further stated that Deputy Brown needed to learn how to do her job so he did not blow his top in open court and that Deputy La Fortune was going to show her how to do her job. The masters found that when the judge made those remarks, he was angry, agitated and irritated. He was pointing his finger at Deputy Brown and he had a clenched jaw.

Deputy Brown was embarrassed by the remarks that were made in open court. She felt she was doing her job and had done nothing wrong. One of the inmates found the judge's remarks amusing. Judge Van Voorhis never asked her why the inmate was not there and never apologized for his remarks.

Judge Van Voorhis testified that Deputy Brown should have directly communicated to him the fact that Ms. Johnson was not being transported. He testified that he was concerned how the public would perceive Deputy Brown's statement in open court that the inmate was not coming to court.

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[27] Deputy Brown told the masters, "I believe I said that she was not transported because her court date had shown to be vacated." Judge Van Voorhis testified concerning Deputy Brown's response to Mr. Quandt, "I believe she said either 'she' or the person's name—'She's not coming to court.' She did not use the word[s] 'going to be transported.' She said, 'She's not coming to court.' "

The masters found the charge that the judge chastised Deputy Brown in a belittling tone to be sustained by clear and convincing evidence. Judge Van Voorhis stated there had been a long history of inmates not being transported to court by the sheriff's department, but he admitted that he did not know whether Deputy Brown was at fault and her conduct was not disrespectful to the court.

The commission adopts the masters' findings of fact on count two B(3).

4. *Conclusions of Law on Count Two B*

**(11)** The commission agrees with the masters' conclusion that Judge Van Voorhis's "public criticisms of court personnel were harsh, rude and intemperate, and continued despite a 1992 public reproval for conduct that included twice giving directions to his staff in a manner that was perceived to be harsh and despite a warning from the presiding judge following the [Ms.] Carmichael incident."

The masters noted: (a) "In the incident involving [Ms.] Carmichael, the judge had a temper tantrum that included throwing files, and reduced a temporary clerk to tears"; (b) "In the incident involving [Ms.] Van Horn, the judge unfairly berated an experienced clerk in open court for swearing in a bailiff in the customary manner" and "also told the clerk that she would have known better if she had read his courtroom manual, even though the manual contained nothing that indicated that the clerk had done anything wrong"; and (c) "In the incident involving Deputy Brown, the judge took out his frustration with the sheriff's department by publicly humiliating a new security deputy who had never before performed those duties, and who was not at fault."

The judge's conduct in each of the three instances constituted prejudicial misconduct as it would have appeared to an "objective observer" familiar with the facts and the standards of conduct that the judge's comments were prejudicial to the public esteem for the judicial office. Similar conduct by other judges toward personnel has been found to be prejudicial misconduct.[28] Judge Van Voorhis's conduct violated canons 1, 2A, 3B(4) and 3C(1).[29]

[28] See *Kloepfer v. Commission on Judicial Performance*, *supra*, 49 Cal.3d 826 (*Kloepfer*) (judge angrily berated a court reporter, reducing her to tears) and *McCartney v. Commission on Judicial Qualifications*, *supra*, 12 Cal.3d 512 (*McCartney*) (judge threatened to hold his clerk in contempt, shouted at her to apologize, discharging the clerk in a violent manner, speaking to an assistant clerk in a loud voice and pounding his fist loudly on her desk).

[29] The masters explained: "In each instance, the judge violated Canon 1 by failing to observe 'high standards of conduct . . . so that the integrity and independence of the judiciary will be preserved.' The judge violated Canon 2A by failing to act 'in a manner that promotes

I. *Count Two C*

1. *Findings of Fact*

*People v. Sowande* was a jury trial before Judge Van Voorhis on August 17 and 18, 2000. The charge was driving under the influence of alcohol and driving with an invalid license. The issue was whether the defendant, at the time that he was drunk, was actually driving.

Mr. Lewis, a defense witness, testified that he drove the defendant to the place where the defendant was later arrested, exited the car and left the keys in the ignition. The defendant testified that after Mr. Lewis left, he moved to the driver's seat, but did not go anywhere because he did not feel well and he fell asleep until a police officer woke him. The police officer testified that when he shook the defendant to consciousness, the defendant reached for the keys in the ignition to start the car. The defense contended that a conviction could not be based on the defendant fumbling for his keys and attempting to start the car. Rather, a conviction could only be based on the defendant actually driving the car.

During deliberations, the jury sent several written questions to the judge. The last of these questions was: "Could the intent of the defendant, the act of reaching for the keys to start the car, be considered driving under the influence of alcohol?" After a discussion with counsel, Judge Van Voorhis decided that the answer to the jury's question was no. The judge then asked counsel if they wanted the jury brought back into the courtroom to receive the answer, and defense counsel opted to have the jury brought back.

**(12)** When the jury was assembled, Judge Van Voorhis, while looking directly at the jury foreman, addressed the jury as follows: "Mr. Foreperson, I'll give the answer to my question [*sic*], the parties and jurors are present, and you'll be able to take it with you to the deliberating room. [¶] I normally correspond in writing, but this time I've decided to answer your question orally, because I want you to look at the question you gave me. And you'll see that you could improve on your English, and therefore your question could be way more precise for me. [¶] And one of the things you can help me to do is to make your questions as precise as possible, which means look

public confidence in the integrity and impartiality of the judiciary.' The judge violated Canon 3B(4) by failing to be 'patient, dignified and courteous' to persons with whom the judge dealt in an official capacity. In addition, by ignoring a warning from his presiding judge that his conduct should not be repeated, Judge Van Voorhis failed to cooperate with the presiding judge in the administration of court business in violation of Canon 3C(1)."

them over several times, because an English teacher would object to the wording of that question. But I'll read it to you and then you'll see my answer." The masters found that "Judge Van Voorhis's voice was condescending, arrogant, belittling, very nasty and derogatory." There was a wide variety of educational backgrounds among the jurors. One juror had a third grade education, others had college degrees. All of the jurors seemed upset by the judge's remarks.

Mr. M., a registered nurse, was the foreperson of the jury. He felt it was an honor to be on the jury and sought to do the best he could as a citizen. He was astounded by the judge's comments and felt that he was being questioned in front of the rest of the jury. The masters found that "the judge's comment almost affected the outcome of the case because Mr. M. was so upset that he considered deciding the case on grounds other than the evidence. But in an effort to be fair, he based his decision in the case on the evidence, not his anger at the judge."

Judge Van Voorhis "testified that he wanted to explain to the jurors that they were coming into the courtroom to hear his answer when, on previous occasions, he had responded to their questions in writing." When defense counsel requested that the jury be brought in, the "first thing" that came through the judge's mind was that, because he had "given her an adverse ruling, maybe this was payback or something." It also occurred to Judge Van Voorhis that defense counsel might be trying to "attract attention to this as a particular issue and try to emphasize it for the jury in hopes that they would continue to focus on that . . . ." The judge testified that he did not want the jurors to speculate why they were being brought into the courtroom, or to draw any inference from it. He also testified that he anticipated additional questions from the jurors and he wanted them to be precise in their questions. Once he brought the jurors in, he decided that he would say something about the imprecision of the question.

The commission adopts the masters' findings of fact on count two C.

2. *Conclusions of Law*

The commission agrees with the masters that Judge Van Voorhis's comments constituted prejudicial misconduct and violated canons 1, 2A and 3B(4). As noted by the masters, the comments "were unnecessarily disparaging and embarrassing to the jury foreperson, as well as to the other members of the jury whose thought processes were represented in the question. The judge made his comments after receiving a public reproval in 1992 for conduct that included questioning a potential juror in each of two criminal cases in such a way that each person perceived a 'lack of sensitivity' and felt 'intimidated.' "

## DISCIPLINE

A. *Criteria*

**(13)** Once the commission has determined that the allegations of misconduct have been demonstrated by clear and convincing evidence, the commission must determine the appropriate discipline. The commission takes as its mandate the Supreme Court's statement that the purpose of the proceeding " 'is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' "[30] This is consistent with the Supreme Court's prior statement that the purpose of these proceedings "is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield."[31]

The Supreme Court has recognized that in determining the appropriate discipline, each case must be considered on its own facts. "Proportionality review based on discipline imposed in other cases, however, is neither required nor determinative. The factual variations from case to case are simply too great to permit a meaningful comparison in many instances. 'Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar.' "[32]

**(14)** Even though each case is considered on its own facts, the commission looks to opinions of the Supreme Court and its own prior decisions for guidance in exercising its responsibility to determine the appropriate discipline. The commission has identified five considerations that are relevant to its determination of the appropriate discipline in this case: (1) the number of acts of misconduct; (2) the effect of any prior discipline on the judge's conduct; (3) whether the judge appreciates the inappropriateness of his or her actions; (4) whether the judge is likely to continue to engage in unethical conduct; and (5) the impact of the judge's misconduct on the judicial system.[33]

In addition, the commission considers any mitigating factors that a judge may advance.

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[30] *Broadman, supra*, 18 Cal.4th at pages 1111–1112, citing *Adams, supra*, 10 Cal.4th 866, 912.

[31] *Furey, supra*, 43 Cal.3d 1297, 1320, citing *Wenger, supra*, 29 Cal.3d at page 654.

[32] *Broadman, supra*, 18 Cal.4th at page 1112, citing *Furey, supra*, 43 Cal.3d at page 1318.

[33] This is not an exhaustive list of possible considerations and no one consideration should be considered critical to the commission's determination of the appropriate level of discipline.

1. *The Number of Acts of Misconduct*

**(15)** In decisions concerning the removal of judges, the Supreme Court has often noted the number of acts of misconduct.[34] In *Furey*, the court explained that "the disposition of a case depends in large measure on the nature and number of charges found to be true . . . ."[35] There does not appear to be any minimal number of acts of misconduct required for removal. Rather, as noted by the Supreme Court in *Fletcher*: " 'The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing "lack of temperament and ability to perform judicial functions in an even-handed manner." [Citation.]' (*Wenger, supra*, 29 Cal.3d at p. 653.) We have determined that petitioner twice committed willful misconduct and committed prejudicial misconduct on multiple occasions. 'Together these incidents reflect a continuing, pervasive pattern of' misconduct. (*Kloepfer, supra*, 49 Cal.3d at p. 849.)"[36]

Similarly, in *Adams* the Supreme Court noted: "[T]he misconduct that we have determined justified this most severe of disciplinary sanctions generally has involved a pattern of arbitrary, irrational and inappropriate conduct of the judge while acting on the bench in dealings with litigants, attorneys, witnesses, and other persons, or while otherwise performing his or her judicial functions, and an abuse of his or her judicial powers and authority."[37]

Most recently, the commission ordered Judge Platt's removal from the bench based on five acts of willful misconduct and two acts of conduct prejudicial to the administration of justice that brings the judicial office into disrepute.[38]

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[34] See, for example, *Adams, supra*, 10 Cal.4th 866 (Judge Adams was removed from office for engaging "in successive extrajudicial transactions that extended over a significant period of time, creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary—a consequence petitioner either deliberately ignored or was unable to appreciate." (*Id.* at p. 914.)); *Kloepfer, supra*, 49 Cal.3d 826 (Judge Kloepfer was removed for a continuing, pervasive pattern of misconduct—four acts of willful misconduct and 21 acts of prejudicial conduct); and *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186 [260 Cal.Rptr. 557, 776 P.2d 259] (*McCullough*) (Judge McCullough was removed for committing four acts of willful misconduct and one act of persistent failure to perform his judicial duties and his failure to respond to a prior public censure evidenced a lack of regard for the commission, the court and his obligations as a judge).

[35] *Furey, supra*, 43 Cal.3d 1297, 1307, footnote 2.

[36] *Fletcher, supra*, 19 Cal.4th at page 918.

[37] *Adams, supra*, 10 Cal.4th at pages 912–913.

[38] *Inquiry Concerning Platt* (2002) No. 162, Decision and Order Removing Judge Platt from Office [48 Cal.4th CJP Supp. 227]. Platt's petition to review the commission's decision was denied on February 19, 2003, by the California Supreme Court.

2. *Prior Discipline*

The second consideration is the effect of any prior discipline on the judge's conduct. In *Doan, supra*, 11 Cal.4th 294, 339, the Supreme Court removed a judge for willful and prejudicial conduct that displayed moral turpitude, dishonesty and corruption, but noted that it "would hesitate to remove a judge who showed himself ready, willing, and able to reform under a less severe sanction."[39] The Supreme Court, in removing Judge Doan, noted:

"Lastly, Doan did not learn from her public reproval in 1990 for lending the prestige of her office to advance the private interest of others. She again lent the prestige of her office to advance the private interest of others, even though she had promised not to do so in connection with the 1990 public reproval, in the matters relating to Darlene's nephew Darren Powell in 1992, Meneses in 1993, and Darlene herself in 1993.

"In sum, Doan has had three opportunities for reformation. She will have no more."[40]

Similarly, the Supreme Court in *McCullough, supra*, 49 Cal.3d 186, 199, in removing the judge from office noted: ". . . his failure to respond to our public censure evidences a lack of regard for the Commission, this court and his obligations as a judge."

In its decision ordering the removal of Judge Platt from the bench, the commission noted that "the failure of past sanctions to effect a change in conduct also suggests a lack of ability to reform and unsuitability for judicial office."[41]

Although the existence of prior discipline is a relevant factor, the Supreme Court has removed judges who had not been the subjects of prior discipline.[42]

3. *Appreciation of Misconduct*

The third consideration is whether the judge appreciates the inappropriateness of his or her conduct. In *Fletcher*, the Supreme Court noted that

[39] See also *Kennick, supra*, 50 Cal.3d 297. The Supreme Court declined to remove Judge Kennick from office because of misconduct noting that "it seems likely that our public censure of each of petitioner's misdeeds would have led him to correct and improve his judicial behavior." (*Id.* at p. 341.) The court did remove the judge from office for his persistent failure or inability to perform judicial duties.

[40] *Doan, supra*, 11 Cal.4th at page 340.

[41] *Inquiry Concerning Platt, supra*, No. 162 at page 15 [48 Cal.4th CJP Supp. at page 248].

[42] See *Fletcher, supra*, 19 Cal.4th 865; *Kloepfer, supra*, 49 Cal.3d 826; and *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518 [247 Cal.Rptr. 378, 754 P.2d 724].

"contrary to the contrite tone he sounds in this court, petitioner's primary response to the misconduct allegations during the Commission proceedings was to allege a conspiracy against him."[43] The court concluded as to Judge Fletcher that: "[T]he record 'belies petitioner's claim that he has learned from past experience and has modified his courtroom behavior. It demonstrates instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in *every* case.' (*Kloepfer, supra*, 49 Cal.3d at p. 866, fn. omitted, original italics.)"[44]

4. *Likelihood of Future Violations*

The fourth consideration is whether the judge is likely to continue to violate the California Code of Judicial Ethics. The Supreme Court in its opinion removing Judge Fletcher from the bench concluded that the judge's perspective did not suggest that he had overcome his demonstrated lack of judicial temperament and, accordingly, similar incidents were likely to recur.[45]

In *Kloepfer*, the Supreme Court in removing the judge noted that his "lack of judicial temperament is manifest" and stated: "The record does not suggest that petitioner has, or will be able to, overcome this trait and that similar incidents will not recur. For this reason comparison of the discipline imposed in other cases, as petitioner suggests, is not fruitful. Our role is to determine, in the individual case, the action necessary to protect the public and the reputation of the judiciary. The evidence fully supports the conclusion of the Commission that this purpose requires that petitioner be removed from the bench."[46]

In its decision to remove Judge Platt, the commission concluded that Judge Platt was "unlikely to conform his future conduct to the canons."[47] However, the commission issued a public censure of Judge Willoughby, rather than ordering removal, in part because it could not conclude that the judge's pattern of inappropriate conduct was "so continuing or pervasive as to preclude his reformation."[48]

[43] *Fletcher, supra*, 19 Cal.4th at page 919.
[44] *Fletcher, supra*, 19 Cal.4th at pages 920–921.
[45] *Fletcher, supra*, 19 Cal.4th at page 921, citing *Kloepfer, supra*, 49 Cal.3d at page 866.
[46] *Kloepfer, supra*, 49 Cal.3d at pages 866–867.
[47] *Inquiry Concerning Platt, supra*, No. 162 at page 19 [48 Cal.4th CJP Supp. at page 253].
[48] *Inquiry Concerning Willoughby* (2000) No. 154, Decision and Order Imposing Public Censure, page 16 [48 Cal.4th CJP Supp. 145, 165].

5. *Impact of Misconduct on the Judicial System*

**(16)** The fifth consideration concerns the impact of the judge's misconduct on the judicial system. How has the judge's misconduct prejudiced the judiciary's reputation or the actual administration of justice? This concern with the effect of the misconduct upon the integrity of and respect for the judiciary is inherent in the Supreme Court's determination in *Fletcher* that Judge Fletcher's removal was "necessary to protect the public and the judiciary's reputation."[49]

In *Adams*, the Supreme Court removed Judge Adams from the bench, noting that he had "engaged in successive extrajudicial transactions . . . creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary—a consequence petitioner either deliberately ignored or was unable to appreciate."[50] The importance the court gave to the impact of the misconduct on the judicial system becomes evident when contrasted with the considerable character evidence in support of Judge Adams[51] and Justice Mosk's strong dissent.[52]

The impact of the misconduct on the judiciary also has been recognized in other states as a factor in determining the appropriate level of judicial discipline. The Michigan Supreme Court has indicated that among the criteria to be used in evaluating judicial misconduct is that "misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety . . . ."[53] The Washington Supreme Court has listed as a factor in determining the appropriate discipline "the effect the misconduct has upon the integrity of and respect for the judiciary."[54] The Arizona Commission on Judicial Conduct has adopted a rule which lists factors that may be considered in determining

[49] *Fletcher, supra,* 19 Cal.4th at pages 918 and 921.

[50] *Adams, supra,* 10 Cal.4th at page 914.

[51] The court noted: "Several judges and numerous attorneys testified to their perception of petitioner's outstanding legal and administrative skills, noting his significant contributions toward streamlining the court system and implementing a 'fast-track' system." (*Adams, supra,* 10 Cal.4th at p. 911.)

[52] Justice Mosk wrote: "All that the majority can say in support of removal is that, in their view, Judge Adams's 'extrajudicial transactions' have 'creat[ed] an appearance of serious impropriety' and have 'thereby tend[ed] to diminish the public esteem of the judiciary . . . .' (Maj. opn. *ante*, at p. 914.) In so many words, they announce that he must be removed because of certain of his acts and omissions off the bench, even though he has in fact properly performed his judicial functions during his long tenure and, as the record shows, has actually increased his community's confidence in its judges. No reasonable person could agree. I surely cannot." (*Adams, supra*, 10 Cal.4th at p. 919 (dis. opn. of Mosk, J.).)

[53] *In re Brown* (2001) 464 Mich. 135 [626 N.W.2d 403, 405].

[54] *In re Deming* (1987) 108 Wn.2d 82 [736 P.2d 639, 659].

appropriate disciplinary action including, "the nature and extent to which the acts of misconduct injured other persons or respect for the judiciary."[55]

6. *Mitigating Factors*

**(17)** The Supreme Court has stated that character evidence and evidence of a judge's contributions to the judicial system do not mitigate or excuse misconduct, but may be considered in determining the appropriate discipline. In *Adams*, the Supreme Court noted: "The foregoing evidence of petitioner's qualifications for and contribution to the judicial system, during the course of a lengthy judicial career, does not mitigate or excuse petitioner's wilful misconduct or prejudicial conduct. (*Spruance* v. *Commission on Judicial Performance* [(1975)] 13 Cal.3d 778, 800 [119 Cal.Rptr. 841, 532 P.2d 1209].) We may, however, and do take these factors into account in considering the totality of the circumstances that are pertinent to our determination of the appropriate discipline. (See *McCartney* v. *Commission on Judicial Qualifications*[, *supra*,] 12 Cal.3d 512, 539–540 . . . .)"[56]

In *Broadman*, the Supreme Court reiterated that evidence that a judge is industrious and innovative does not mitigate or excuse willful or prejudicial conduct, and indicated that the commission had properly considered evidence in mitigation in the determination of the appropriate discipline.[57]

B. *Applying the Criteria to Judge Van Voorhis*

1. *The Number of Acts of Misconduct*

The commission and the masters conclude that Judge Van Voorhis had engaged in four acts of willful misconduct and seven instances of conduct prejudicial to the administration of justice that brings the judicial office into disrepute. These 11 incidents of misconduct took place between June 1999 and December 2000. The masters described the situation as follows: "We conclude from the evidence that Judge Van Voorhis has a serious problem with judicial temperament and self-control. Witness after witness has come forward with believable testimony concerning abusive conduct by Judge Van Voorhis. The witnesses have run the gamut from public lawyers, privately retained counsel, new court staff, a member of law enforcement, a veteran court staffer and members of a jury. Unfortunately, Judge Van Voorhis

[55] Rules of the Arizona Commission on Judicial Conduct (eff. Jan. 1, 2002), rule 19 (Mitigating and Aggravating Factors), subsection (d).

[56] *Adams, supra,* 10 Cal.4th at pages 911–912.

[57] *Broadman, supra,* 18 Cal.4th at page 1112.

allowed his impatience and seeming compulsion to display his judicial authority to embarrass, humiliate or simply humble those who cross him. Sadly, he has done this to lawyers in front of jurors creating the risk of having cases decided on other than the merits. On one occasion, Judge Van Voorhis embarrassed a lawyer with an accent in front of the client."

The masters also stated that the instances of misconduct were not isolated occurrences, but were indicative of a lack of judicial temperament. The masters wrote: "The record establishes by clear and convincing evidence that Judge Van Voorhis's actions 'cannot be characterized as occasional lapses or isolated instances of misconduct.' Rather, there has been 'a persistent pattern of abuse and arbitrary conduct . . . .' (*Kloepfer, supra*, 49 Cal.3d 826, 833.) In Judge Van Voorhis's case, the instances of misconduct have been 'too numerous to permit us to speculate that [the judge] was guilty of misconduct only in isolated occasions which might be individually explained and excused.' (*Cannon v. Commission on Judicial Qualifications, supra*, 14 Cal.3d 678, 705.)"

2. *Prior Discipline*

Judge Van Voorhis was publicly reproved in 1992, received a private admonishment in 1994, and was advised orally and in writing by his presiding judge in early August 1999 that he still had a demeanor problem that needed to be addressed.

The 1992 public reproval included the following instances of unethical conduct by Judge Van Voorhis:

"In two criminal cases in May 1989 and April 1990, your conduct during questioning of a potential juror in each case caused that person to perceive a lack of sensitivity and to feel intimidated by your questioning.

"In October 1991, when arrangements for the loaning of the neighboring court reporter faltered, you entered the adjoining courtroom through a side door wearing your judicial robe and immediately directed that the court reporter be sent to your courtroom. Your inappropriate interruption of the proceedings was an abuse of authority.

"On two occasions, you gave directions to your court staff in a manner which was perceived as harsh.

"In two criminal cases in December 1989 and December 1990, you used a sarcastic and intimidating tone toward the attorneys appearing before you when they requested continuances."

The public reproval states that in determining that a public reproval "would be adequate discipline," the commission considered "the absence of prior discipline, your recognition that you should have handled the incidents differently, and your assurance that this conduct will not be repeated."

The 1994 private admonishment states that Judge Van Voorhis "issued Contra Costa subpoenas and signed them using his official judicial title in his own dissolution case in Solano County." Judge Van Voorhis's defense was that, although doing anything as a judge in his own case initially struck him as improper, he thought his act was a "mandatory ministerial act" and therefore, he could perform it even in his own case.

On August 4, 1999, as a result of Judge Van Voorhis's treatment of Ms. Carmichael (see count two B(1)), Presiding Judge Simons traveled to the Walnut Creek courthouse to meet with Judge Van Voorhis. The presiding judge memorialized the meeting in an August 5, 1999 letter to Judge Van Voorhis. The letter noted: "Primarily, we discussed the incident involving Kim Carmichael on July 13. Before I mentioned any details relating to the incident, you indicated you were aware of my concern because you had been informed that an investigator was talking to individuals at the courthouse. You expressed great regret at the incident and described in some detail the many different efforts you have made since the CJP public reproval in 1992 to modify the ways you interact with staff."

Presiding Judge Simons indicated that he was impressed with Judge Van Voorhis's "obvious sincerity in recognizing the problem raised by the incident with Ms. Carmichael and the need to resolve it." He explained that he believed "the issues I was aware of required me to bring them to your attention and to discuss ways to avoid repetition." The presiding judge mentioned two programs that Judge Van Voorhis might take, including a course on anger management. The letter noted that Judge Van Voorhis indicated that he would not follow up on the suggestions, "not because [he] rejected the need for such assistance, but that [he] felt [he] had adequate private resources to draw on for this assistance." The presiding judge's letter concluded: "I very much appreciated your attitude during the meeting, but must underscore my insistence that there be no repetition of these incidents."

Despite his reassurances to his presiding judge, within two weeks of the meeting, Judge Van Voorhis engaged in misconduct in the *Gotchall* trial by questioning the prosecutor's motives for seeking to introduce evidence, ridiculing her perspective in front of the jury and threatening to declare a mistrial if she continued. (See count two A(2).) With the exception of Judge

Van Voorhis's comments in the *Silva* trial (count two A(1)) and his comments to Ms. Carmichael, all of the charged incidents of unethical conduct occurred after Judge Van Voorhis met with Presiding Judge Simons. Whatever the effect of the public reproval and private admonishment on Judge Van Voorhis's conduct prior to the summer of 1999, his meeting with Presiding Judge Simons with its reference to his prior public reproval did not deter Judge Van Voorhis—in the words of the masters—from continuing "with the same issues of judicial temperament that have previously brought him to the attention of the Commission."

3. *Appreciation of Misconduct*

Judge Van Voorhis "acknowledges" that he should not have made some of the comments he did, but this is at best a conditional admission. In addition to challenging the masters' findings, Judge Van Voorhis in his briefs argued that "the conduct at issue here usually arose from an argument over a disputed evidentiary issue (or jury instruction) in the heat of the moment during trial, or it was the result of a failure of the court staff to adequately perform their duties."

In *Cannon*, Judge Cannon proffered a similar defense when she sought to mitigate her misconduct on the basis of frustrations provoked by " 'inexperienced and sometimes disrespectful lawyers.' " The Supreme Court first found that the record did not support the judge's "claim that the numerous deputy public defenders involved in the misconduct charged and found to be true were disrespectful or that their inexperience reasonably could have frustrated petitioner or have provoked her unwarranted conduct." The court noted that " '[E]ven assuming arguendo that the evidence was clear and convincing, disrespect on the part of the public defender cannot serve to justify petitioner's injudicious response.' "[58]

In *Gonzalez*, the Supreme Court rejected the judge's attempt to blame the disciplinary proceedings on his detractors. The court noted: "In the final analysis Judge Gonzalez utterly fails to grasp either the substance or the seriousness of the numerous charges levelled against him by the Commission. Despite multiple admonitions and the normal evidentiary limitations of the hearing process, Judge Gonzalez has treated this investigation as an attack on his character. Thus he boasts he is opinionated, outspoken, hardworking, and extroverted, but never prejudiced and always impartial. He persists in his

[58] *Cannon, supra*, 14 Cal.3d at pages 706–707, quoting *McCartney, supra*, 12 Cal.3d 512, 538.

theory that his adversaries conspired to record his every misdeed and regards virtually every allegation as personally motivated. Rather than respond affirmatively and convincingly to the specific charges, he expends most of his defense effort in attacking the character and credibility of the adverse witnesses. While he concedes there may be certain minor irregularities in his judicial manner and procedures, he denies that he has ever deliberately abused his judicial office and generally refuses to admit he has done anything improper."[59]

The record here does not support Judge Van Voorhis's suggestion that his unethical conduct can be justified on the basis of "the heat of the moment" or by actions on the part of attorneys or court employees. To the contrary, the record indicates that Judge Van Voorhis fails to appreciate the inappropriateness of his conduct.

Ms. Brock did not provoke the conduct charged in count one. Judge Van Voorhis chose to comment on his controversial ruling and to do so in such a way that it was reasonably perceived as indicating that he kept the evidence out to see how the prosecutor reacted. As previously noted, Judge Van Voorhis continued to give this impression in his testimony before the masters.

In his brief to the commission, Judge Van Voorhis stated that he regrets his comments to Mr. Gardner (count two A(1)) and suggests that this is a "significant fact in mitigation." The judge's testimony, however, was somewhat equivocal[60] and there is no indication that the judge ever apologized to Mr. Gardner.

There is little in the transcript to suggest that Ms. McMurray provoked Judge Van Voorhis's comments (count two A(2)). She honestly and reasonably believed that the evidence was admissible. When Judge Van Voorhis indicated that Ms. McMurray could not qualify the police officer as an expert, Ms. McMurray twice offered to move on and then asked to approach the bench.[61] There was no provocation for Judge Van Voorhis's response.

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[59] *Gonzalez*, *supra*, 33 Cal.3d at page 377.

[60] On the third day of the hearing before the masters, Judge Van Voorhis's counsel asked him, "Do you acknowledge that you said to Mr. Gardner words to the effect, 'Where did you learn that in law school?' " Judge Van Voorhis's response was: "I do. It's, again, something that I regret and that I could say it better now. You know, I should have directed it in connection with having a colorable basis for asking the question, and I should have made that comment outside the presence of the jury."

[61] The transcript records the following exchange:

"MS. McMURRAY: If—I wasn't aware that the Court wouldn't qualify her, based on her training and the times that she had administered the test, so if you would like me to move on, I am more than—

There is no indication that Judge Van Voorhis recognizes the impropriety of his comment to Mr. Alvear (count two A(3)). The masters explained that their conclusion of prejudicial conduct was based on how an "objective observer" would perceive the comment, and not on the judge's intent or motivation. Judge Van Voorhis's response, however, focused solely on his intent. His obliviousness toward appearances is also reflected in his letter of April 11, 2000, to the Contra Costa Public Defender in response to his letter complaining about the comment to Mr. Alvear. Despite knowing that the matter had been referred to the commission, Judge Van Voorhis commenced his letter with the sentence, "Why does it seem that whenever I go on vacation, the first day back at work is particularly difficult, wiping out the benefits of my relaxing time?" This opening, as well as his closing,[62] suggests that Judge Van Voorhis has little awareness of how his statements are reasonably perceived.

The inexperienced prosecutor in the *McDonald* case (count two A(4)) did nothing to provoke Judge Van Voorhis. She asked about the defendant's probation status after the defendant denied that he had been convicted and after the defendant requested that the prosecutor repeat her question. When Judge Van Voorhis asked Ms. Meade where she had learned that a defendant's probationary status was admissible, she apologized. Rather than accept the apology, Judge Van Voorhis impugned her motives ("And so were you just guessing what you could get away with in a courtroom?").

Judge Van Voorhis does not admit that his comments were unethical. He argues that the potential prejudice from the prosecutor's inquiry into the defendant's probationary status was great and required the court's immediate

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"JUDGE VAN VOORHIS: Many times, she has seen a person demonstrate some sort of symptom. That doesn't necessarily connect it with alcohol. [¶] Probably everybody she has ever arrested has a smaller finger on the end of their hand. That doesn't mean that everybody with a small finger is drunk.

"MS. McMURRAY: So if this Court is not willing to qualify officers as experts, I will move on.

"JUDGE VAN VOORHIS: That doesn't really solve the problem completely, because you went down a road that you could not complete, and now this jury has heard about gaze nystagmus, and they are supposed to wonder what it all means.

"MS. McMURRAY: If we could approach the bench, I think that's probably appropriate.

"JUDGE VAN VOORHIS: And what would you tell me up here?

"MS. McMURRAY: I have questions of the Court.

"JUDGE VAN VOORHIS: Ask me now."

[62] The letter concludes with the following paragraph: "I know that another meaning of 'maturity' has to do with aging and the ripening of character that comes with the passage of time and the accumulation of experience. Being expected to be almost without imperfections has a way of aging a person. Hopefully, I can make it through the few years of my legal career which remain and make it to retirement in one piece. Thank you for your letter encouraging me to do better."

intervention. The judge's misconduct, however, was not his determination not to allow the inquiry, but his demeaning, rude and abusive behavior toward the prosecutor. Judge Van Voorhis's failure to address the manner in which he acts suggests that he believes that as long as his subjective intent is proper there are no ethical limits on how he expresses himself.

Judge Van Voorhis also does not admit to any unethical conduct in his order that Ms. Brock admit to the jury that certain evidence "does not mean anything" (count two A(5)). He contends that he was protecting the defendant's constitutional right to a fair trial. Again, the misconduct is not Judge Van Voorhis's decision to exclude evidence of the gaze nystagmus test, but his demeanor and insistence that the prosecutor admit to the jury that she was wrong. By focusing solely on his subjective motive, Judge Van Voorhis fails to indicate any appreciation for ethical constraints on the manner in which he acts.

The gap between Judge Van Voorhis's subjective intent and his actions also is reflected in his comments in the *Elze* matter concerning the relevance of evidence of the defendant's drinking habits (count two A(6)). Although the defense counsel who initially proffered the evidence was not sure the evidence was really relevant, Judge Van Voorhis insisted that it was, and then insisted that the prosecutor, who had objected, admit that it was relevant. Before the masters and the commission, Judge Van Voorhis contended that he had sought to give the prosecutor an opportunity to object under Evidence Code section 352. There is nothing in the record to suggest that anyone in the courtroom, other than Judge Van Voorhis, could have been aware of the judge's purported intent.

Although Judge Van Voorhis honestly may not recall throwing the files down, he might still have apologized for his demeanor toward Ms. Carmichael (count two B(1)). Instead, he has offered as defenses that Ms. Carmichael, a fill-in clerk, did not properly check his calendar for jury trials later in the week and that in the afternoon certain defendants were not properly directed to his court. He also argues that he did not know that the throwing of the files was the problem. However the testimony before the masters and Presiding Judge Simon's letter indicate that when Judge Simon met with him, Judge Van Voorhis immediately provided him with his version of the events. Again, the issue was not Judge Van Voorhis's intent, but his demeanor.

Judge Van Voorhis's obliviousness to his demeanor is apparent in his response to the allegations in count two B(2) concerning his comments to Ms. Van Horn about swearing in the bailiff. After hearing all the testimony

concerning his demeanor, Judge Van Voorhis testified that he spoke to Ms. Van Horn in a "conversational tone." In addition, Ms. Van Horn testified that when she and another clerk went back into the courtroom to show Judge Van Voorhis that the manual did not indicate how the bailiff should be sworn in, Judge Van Voorhis ignored them for approximately 15 minutes until they left, preferring to focus on an extended conversation he was having with a student. Judge Van Voorhis denies that he ignored them, but his testimony indicates that he was aware of their presence and chose not to acknowledge it.

Judge Van Voorhis never apologized to Deputy Brown for telling her in open court and before an incarcerated defendant that she needed to learn how to do her job (count two B(3)). Judge Van Voorhis never asked Deputy Brown why the inmate was not transported nor did he inquire why he had not been told that the inmate would not be transported. If he had, he would have learned that Deputy Brown had promptly told Judge Van Voorhis's bailiff, Deputy La Fortune, and that Deputy La Fortune—whom Judge Van Voorhis announced would train Deputy Brown—had failed to tell the judge or to instruct Deputy Brown to tell the judge.

Judge Van Voorhis's failure to appreciate the context in which he presides also is apparent from his comments to the juror in the *Sowande* case (count two C). Judge Van Voorhis carefully worked out his response to the jury's question with counsel and gave counsel the option of having the jury return to the courtroom to hear the answer. He then decided—without consulting the attorneys and prompted apparently by some suspicion of defense counsel's motives (which were never disclosed to counsel)—that he needed to give the jury some reason for being brought back into court and decided to chastise the jury for the lack of clarity in its question.

Finally, Judge Van Voorhis's lack of appreciation of his misconduct is reflected in his testimony concerning his 1992 assurance to the commission that his misconduct would not be repeated. When questioned before the masters, Judge Van Voorhis could not say that he had given any such assurance.[63] This failure to remember his assurance suggests that Judge Van Voorhis either did not consider it important or did not think it was relevant to his more recent misconduct.

[63] In the following exchange during his appearance before the commission, Judge Van Voorhis admitted he had given the commission an assurance.

"COMMISSION CHAIR (Judge Risë Jones Pichon): Judge Van Voorhis, I have a question. [¶] In 1992, you were publicly reproved by the Commission, and in that reproval, Ms. Henley indicated that the Commission determined that a public reproval was adequate discipline for a few reasons, one of which was your assurance that this conduct would not be repeated. [¶] In this case before the hearing before the special masters, you were asked by Mr. Coyle whether you promised the commission that the conduct which caused the reproval would not be

4. *Likelihood of Future Violations*

The commission is of the opinion that it is not only likely, but close to a certainty that Judge Van Voorhis, if allowed to remain on the bench, will continue to violate the California Code of Judicial Ethics. This conclusion is compelled by Judge Van Voorhis's failure to appreciate the inappropriateness and importance of his manner of acting, his defense to the allegations, his statements to the masters, his failure to present any evidence of steps taken to avoid future violations, and his oral presentation to the commission.

It is very difficult for a judge to avoid repeating an ethical violation unless he or she recognizes the act as misconduct. Of course, a judge may not have intended the violation or may not have initially recognized that the act constituted misconduct. In a disciplinary proceeding, however, a judge is well advised to maintain alternate defenses. First, the judge may, and should—if he or she so believes—maintain that the act was not a violation of the California Code of Judicial Ethics. Second, the judge should indicate that despite any lack of improper intent at the time, he or she now recognizes how the act could be perceived as unethical. Otherwise, should it ultimately be determined that the act was unethical, there may be serious concerns that the judge is likely to repeat the violation.

Judge Van Voorhis, while stoutly arguing that he has not engaged in any misconduct, has provided little evidence that he appreciates how the masters and the commission could find 11 instances of misconduct. Judge Van Voorhis does admit that he could have done some things better, but the commission perceives little appreciation of the factors that gave rise to this disciplinary proceeding. For example, Judge Van Voorhis has shown no awareness of how his comments to Ms. Brock (about his ruling to exclude evidence) and to Mr. Alvear (to lose the accent) could be perceived as unethical (even assuming his good intent). Instead of indicating that he will try to improve how he addresses staff, Judge Van Voorhis maintains that he

repeated. And you said, 'I can't tell you what assurance I gave them.' And you were asked many questions about this, but you never agreed that you made such an assurance. [¶] If you were asked this question today, what would your answer be?

"JUDGE VAN VOORHIS: I gave that testimony under oath, and I was in no position to tell you with 100 percent certainty what happened.

"COMMISSION CHAIR: But you can tell us today—

"JUDGE VAN VOORHIS: If you will notice that—

"COMMISSION CHAIR: But can you tell us today what your assurance was?

"JUDGE VAN VOORHIS: Since the testimony, I have researched and I did give such an assurance. And I'm able now to say with 100 percent certainty, yes, I did. But at the time, I was not able to give that testimony."

spoke to Ms. Van Horn in a "conversational tone." Although Judge Van Voorhis maintains that he did not consciously belittle an attorney in front of the jury, there is little to suggest that in the future he would refrain from making comments in front of a jury.

The commission's concern is supported by Judge Van Voorhis's comments to the masters. While Judge Van Voorhis was being questioned concerning his comments to Ms. McMurray before the jury (count two A(2)), the following colloquy took place:

"JUSTICE HOLLENHORST: That position is also undermined however by the fact that, when you decide to query an attorney, that you do so in front of the trier of fact, which has the potential for diminishing this lawyer's value or credibility in front of the trier of fact or the client. Isn't that true?

"JUDGE VAN VOORHIS: It is. And again, what I feel has happened in the course of my career is that I think I show more of my feelings the longer I stay on bench. And I have to now factor that into my decision as to whether or not to conduct these discussions in open court in the presence of a jury. [¶] Whether or not I simply fooled myself earlier in my career that these things weren't being seen or whether I was oblivious to it or whether or not I really did at that time have better skills than I did at this phase—but what I hope to present to the Commission, to you folks, is that these experiences for me were pretty unusual. I was pretty astonished at the approach that's being taken by these lawyers. [¶] It's not that I hadn't ever seen it before, but it—I think it caused an unusual reaction. Not unusual for a human being, but I have expressed it the best I can."

Judge Van Voorhis's honest statement is tantamount to an admission that the longer he stays on the bench the more likely it is that he will lose control.[64] Furthermore, contrary to Judge Van Voorhis's perception of the situation as "unusual," both the masters and the commission found that Ms. McMurray did nothing to justify Judge Van Voorhis's conduct.

Later in the proceedings, while trial counsel was examining Judge Van Voorhis concerning his meeting with Presiding Judge Simon, the following dialogue took place:

"MR. COYLE: I believe your response to Judge Simon, you said, 'I recognize the need to resolve this problem'; correct?

[64] It might be noted that Judge Van Voorhis's response brief to the commission states, "Judge Van Voorhis has been working to control his demeanor and was successful for approximately eight years."

"JUDGE VAN VOORHIS: Yes.

"MR. COYLE: What problem?

"JUDGE VAN VOORHIS: The problem he and I discussed is that people often misunderstand me. They don't perceive really where I'm coming from, what I'm about, and what it means when I do what I do.

"MR. COYLE: So that's the problem, people don't understand you?

"JUDGE VAN VOORHIS: I think it would be easier for people to deal with me if they did understand me.

"MR. COYLE: But you don't have a problem?

"JUDGE VAN VOORHIS: Understanding me?

"MR. COYLE: You don't have a demeanor problem?

"JUDGE VAN VOORHIS: Are you asking me my opinion of whether I have a demeanor problem?

"MR. COYLE: Yes. Yes, I am.

"JUDGE VAN VOORHIS: I think that I'm special compared to other people in that category. And I—I don't think it's nice to use the word 'special' because it means that I'm not like other—the average person, not like the average person or other people in general in that category.

"MR. COYLE: Can you expound on how you're special in that regard?

"JUDGE VAN VOORHIS: Well, I referenced my sleeve, I think.

"MR. COYLE: I'm sorry. You referenced what?

"JUDGE VAN VOORHIS: My sleeve. I think that my emotions are closer to the surface, so to speak, than other people's are.

"JUSTICE HOLLENHORST: What does that mean?

"JUDGE VAN VOORHIS: That I don't think that the behavior means the same for me as it does for you.

"JUSTICE HOLLENHORST: Then you misunderstand or mistake signals from other people?

"JUDGE VAN VOORHIS: No. I think they mistake them—I think they mistake them from me. Because if they were to say to themselves, take what he is showing you and divide it by some number—say, two or ten—and then consider that's what he's displaying. And if you do that, maybe you understand better what it is that I'm trying to portray, what feeling I'm trying to portray in what I do because—you've heard of the phrase 110 percent. I think most of my life people have said that I try too hard and that, if I aimed at 80 percent, I would look pretty optimistic."

Again, while Judge Van Voorhis is frank, his perspective suggests that further incidents will arise as he admits that he is emotional and that people misunderstand him, but he fails to take responsibility for controlling his emotions or being concerned with how he is perceived.

In light of Judge Van Voorhis's admissions, one might have expected him to present some evidence of steps he had taken to control his feelings. However, the record contains only Judge Simon's letter suggesting that Judge Van Voorhis take an anger management program for executives and indicating that Judge Van Voorhis declined the suggestion because he had "adequate private resources to draw on for this assistance." There is no evidence that Judge Van Voorhis took any judicial education classes. There was no evidence, other than Judge Van Voorhis's self-serving argument,[65] that he had changed his manner of addressing counsel or staff.

Any doubts that the commission may have had as to the likelihood of repetition were dispelled by Judge Van Voorhis's oral presentation to the commission. Judge Van Voorhis argued that he was not like the commission members and was afraid of being "misjudged."[66] He went on to argue that as long as he had a "good" subjective intent, the commission could not find that

[65] In his oral presentation to the commission Judge Van Voorhis spoke of handling 64 jury trials in the last 18 months and opined that he "handled things better," but there is nothing in the record to support these representations.

[66] Judge Van Voorhis stated: "In your evaluation of me, I'm worried about being misjudged. I'm not like you. If I seem completely different than you are, would that by itself make you dislike me? It sounds silly doesn't it? Being different can ignite a special tension if you let it. Conformity feels secure, so most people are naturally attracted to being part of the group, to blending in. And it's easier to understand and communicate with someone who sounds like you, so we're comfortable with people from our own group. [¶] But differences between people shouldn't bother anyone. People from different parts of the world with different patterns of speech and ways of thinking shouldn't be poorly treated because they're different. Ethnic bias is unjustifiable. [¶] Isn't the phenomenon a ridiculous paranoia that we should all try to eliminate. Please nod with me."

he had proceeded in "bad faith," and could not remove him from office.[67] Regardless of the legal merits of his argument, Judge Van Voorhis left the impression that he believed his good faith so mitigated his misconduct that he would not hesitate to commit similar ethical violations in the future as long as he was convinced in his own mind that he had a good intent.

5. *Impact of Misconduct on the Judicial System*

The fifth consideration concerns the impact of the judge's misconduct on the judicial system. The commission agrees with the masters that Judge Van Voorhis's misconduct not only compromises the appearance of the integrity of the judiciary, but actually interferes with the administration of justice. The masters noted that Judge Van Voorhis "in the various hostile exchanges with counsel not only demonstrated a lack of judicial temperament to counsel but jeopardized the parties' right to a fair and impartial verdict based on only the evidence and not on sympathy for the attorney victim of the judge's wrath or the offers of proof and speaking objections that the court routinely entertained in front of the jury." The masters also noted that Judge Van Voorhis's criticism of the jury's question (count two C) "almost affected the outcome of the case because [the jury foreman] was so upset that he considered deciding the case on grounds other than the evidence."

**(18)** The commission further notes that Judge Van Voorhis's misconduct, however it is characterized, seriously undermines the public's confidence in and respect for the judicial system. The public looks to judges to set the tone of judicial proceedings. When a judge mistreats staff, belittles counsel or gives vent to his or her anger or frustration, the audience is not only

[67] Judge Van Voorhis engaged in the following dialogue.

"COMMISSIONER KAHN: Following your logic, so long as you have a good purpose in mind, do you think that you can behave in any way that you feel is appropriate under the circumstances and you have immunity from removal so long as you're acting with good purpose?

"JUDGE VAN VOORHIS: The Supreme Court has not decided whether reckless disregard of a judge's duty would constitute bad faith.

"COMMISSIONER KAHN: So in other words, you think that you can make as many demeanor mistakes as can happen and there's no limit to the number of demeanor mistakes you make, and you can't be removed because they were just done with the good purpose? Is that your position?

"JUDGE VAN VOORHIS: Are you asking if it's my position legally or are you asking me my own personal opinion?

"COMMISSIONER KAHN: As I understood it, you were suggesting that removal was inappropriate. And I'm asking you whether you think you are immune from removal regardless of how many mistakes you make so long as those mistakes are made in good faith.

"JUDGE VAN VOORHIS: Without bad faith, a judge cannot be removed from office for demeanor purposes. That is the legal position that I asked my advocate to take. I have not ever stated what I think personally, and I don't think it's appropriate for me to do that."

concerned about the result in the specific matter before the court, but worries that other parties, lawyers, jurors and employees will be subjected to similar mistreatment.

6. *Mitigating Factors*

In his briefs to the commission, Judge Van Voorhis offered as a mitigating factor his good judicial character as attested to by the attorneys who came forward on his behalf. Other possible mitigating factors are Judge Van Voorhis's industriousness and efficiency as a judge, his intensity and his years on the bench.

The commission respectfully finds little weight in these factors. Of the eight attorneys who came forward on Judge Van Voorhis's behalf only five had tried more than one case before the judge. These five related that Judge Van Voorhis was extremely hard working and efficient.[68] They did not volunteer their opinions as to the judge's demeanor, and when asked, their responses were qualified.[69] The testimony of the only judge other than Judge Van Voorhis to appear in the proceedings did not support Judge Van Voorhis.[70]

**(19)** Judge Van Voorhis's intensity and his years on the bench weigh against him as much as in his favor. His intensity may have contributed to his reputation for being hard working and efficient, but it also appears to have contributed to his impatience and his inability to appreciate the perspectives of others. The fact that Judge Van Voorhis is a seasoned judge might be a mitigating factor were there only one or two instances of misconduct. Where, however, there is a pattern of misconduct following prior discipline, the judge's persistence suggests that he is unlikely to correct his behavior.

C. *Removal Is the Appropriate Discipline*

Judge Van Voorhis contends that because his intent was always to do justice, the commission cannot make a finding of "bad faith" and hence his

[68] In *Cannon, supra*, 14 Cal.3d at page 706, the Supreme Court noted: "It is manifest in any event that a lack in the quality of justice cannot be balanced by the fact that justice, such as it is, is administered in large quantities."

[69] One attorney testified that he once had a case in which he thought the jury was "swinging away" from him because of the interaction Judge Van Voorhis was having with the prosecutor. Another lawyer testified that if an attorney was not prepared, Judge Van Voorhis would call the attorney on it and scold the attorney.

[70] Justice Simons (the presiding judge in 1999) testified that he used Judge Van Voorhis less and less in Martinez as time went on because "the benefits began to be outweighed by the problem-solving [that] was required after he helped out."

misconduct cannot be characterized as "willful misconduct" and the commission cannot remove him from office.

**(20)** As a matter of law, this argument is incorrect. The California Constitution clearly authorizes the commission to remove a judge for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[71] In 1973, when the Supreme Court was first flushing out the differences between "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," it noted: "It should be emphasized that our characterization of one ground for imposing discipline as more or less serious than the other does not imply that in a given case we would regard the ultimate sanction of removal as unjustified solely for 'conduct prejudicial to the administration of justice which brings the judicial office into disrepute.' "[72] In *McCullough*, the Supreme Court, citing *Geiler*, reiterated that prejudicial conduct, although "less grave" than willful misconduct, "may nevertheless, by itself, justify removal."[73]

The more difficult question is whether Judge Van Voorhis should be removed from office for what he calls violations of demeanor. The commission concludes that Judge Van Voorhis should be removed from office.

First, it may well be that Judge Van Voorhis did not set out to violate the California Code of Judicial Ethics. Nonetheless, the record shows that on at least four instances he lost his temper and vented his anger or frustration in ways that compromised the administration of justice and the integrity of the judiciary. The "fact" that a judge does not intend to lose his or her temper does not excuse the judge from taking responsibility for what the judge says or does when angry or frustrated.

Second, the four instances of bad faith and seven instances of prejudicial misconduct are much more than just poor demeanor. They present a pattern of abuse of authority, embroilment and appearances of impropriety. In addition, in several instances the masters found witnesses' testimony more credible than Judge Van Voorhis's contrary testimony.

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[71] Article VI, section 18, subdivision (d) of the California Constitution states that the commission may "censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term or of the former judge's last term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

[72] *Geiler, supra*, 10 Cal.3d at page 284, footnote 11.

[73] *McCullough, supra*, 49 Cal.3d at page 191.

Third, prior discipline and warnings have not resulted in Judge Van Voorhis modifying his behavior. Judge Van Voorhis was previously publicly reprimanded for similar misconduct and was again warned verbally and in writing by his presiding judge that he continued to have a demeanor problem.

Fourth, Judge Van Voorhis's misconduct not only compromises confidence in the integrity of the judicial system, but also potentially interferes with the administration of justice and hurts people. Jurors heard inadmissible evidence, attorneys' credibility was improperly compromised in front of juries, and at least one juror considered not deciding a case on the evidence because of the judge's insult. Also attorneys, staff members and jurors were humiliated.

Fifth, as noted, Judge Van Voorhis does not appear to recognize how the way he speaks and acts violates the California Code of Judicial Ethics. The thrust of his defense in this proceeding has been that he meant no harm and that others misunderstand him.

Sixth, (1) because Judge Van Voorhis does not understand his misconduct, (2) because he has not presented any evidence of steps taken to learn about his misconduct or to control it, (3) and because he frankly admitted that the longer he is a judge the more likely it is that he will "show his emotions," the commission is convinced that Judge Van Voorhis will continue to violate the California Code of Judicial Ethics if he is allowed to remain on the bench.

**(21)** In its opinion removing Judge Wenger from office, the Supreme Court noted: "There is no evidence that he neglected his work or used his office for illicit gain. As the master observed, 'his fault lay more in his over-zealous performance of his duties.' Petitioner candidly admitted he had a 'bull headed approach' and was 'more concerned about substantiating [his] contentions in a matter than being correct.' "[74] The court further noted that in his final testimony before the masters, Judge Wenger was "laudably contrite." "At last he saw that the reasons for his making and repeating many mistakes lay in himself and in 'that part of my personality that has blinded me to the realization that I'm not right. I've striven to support my position without realizing that there is more to it.' "[75] The court, however, determined that mitigation of wrongdoing "requires more than an unfulfilled intent to reform," and concluded that as the aim of the disciplinary proceeding was not

[74] *Wenger, supra*, 29 Cal.3d at page 653.
[75] *Wenger, supra*, 29 Cal.3d at page 654.

punishment but " 'to protect the judicial system and the public which it serves from judges who are unfit to hold office,' " faithfulness to that aim required removal.[76]

There is no evidence that Judge Van Voorhis "neglected his work or used his office for illicit gain." Judge Van Voorhis's own testimony before the masters and the commission suggests a zealous, if not overzealous, performance of his duties. However, unlike Judge Wenger, Judge Van Voorhis has failed to explicitly accept responsibility for his misconduct.

The commission concludes that the record in this case—as did the records in *Kloepfer* and *Fletcher*—demonstrates " 'an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in every case,' " and does not suggest that Judge Van Voorhis " 'has, or will be able to, overcome [his demonstrated lack of judicial temperament] and that similar incidents will not recur.' "[77]

**(22)** The commission is mindful of the impact of its determination on Judge Van Voorhis, but its mandate directs the commission not to focus on punishment, but on the protection of the public, the enforcement of rigorous standards and maintenance of public confidence in the integrity of the judiciary.[78] In light of the evidence of misconduct, the judge's prior discipline, the judge's lack of appreciation of his misconduct and the likelihood of repetition, faithful adherence to this mandate compels that future parties, staff employees and attorneys not be subjected to Judge Van Voorhis's misconduct. In reaching this conclusion the commission notes that the Supreme Court has removed judges from the bench for conduct that did not rise to the level of moral turpitude, dishonesty or corruption.[79]

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[76] *Wenger, supra*, 29 Cal.3d at page 654, citing *McComb v. Commission on Judicial Performance* (1977) 19 Cal.3d Spec. Trib. Supp. 1, 9 [138 Cal.Rptr. 459, 564 P.2d 1].

[77] *Fletcher, supra*, 19 Cal.4th at page 921 (original brackets), quoting *Kloepfer, supra*, 49 Cal.3d at page 866.

[78] In *Geiler, supra*, 10 Cal.3d at page 287 the Supreme Court noted that the judge's "removal from office is required more by the high standards of judicial office than by his personal failings."

[79] See *Gonzalez, supra*, 33 Cal.3d at page 378. ("Because we do not find that Judge Gonzalez' misconduct rises to the level of moral turpitude, dishonesty, or corruption, we order that despite his removal from office he be permitted to practice law in California, on condition that he pass the Professional Responsibility Examination required of applicants seeking readmission or reinstatement to the bar.") Also *Geiler, supra*, 10 Cal.3d at page 287. ("Much evidence was adduced before the Commission of petitioner's diligence in the work of the law, and his unjudicial conduct cannot be said to amount to moral turpitude, dishonesty or corruption.")

## CONCLUSION

**(23)** The commission has found that Judge Van Voorhis committed four acts of willful misconduct and seven acts of prejudicial misconduct. Judge Van Voorhis seeks to minimize his misconduct by characterizing it as a demeanor problem, but his "demeanor problem" is much more than being impolite. It includes such "demeanor" misconduct as loss of judicial temperament, abuse of authority and embroilment. The commission has found that this misconduct occurred after the judge had been publicly reproved for similar conduct, and had received a separate private admonishment. Furthermore, all but two of the incidents occurred after an incident which reminded Judge Van Voorhis of his public reproval and caused his presiding judge to meet with Judge Van Voorhis and warn him that his misconduct must not be repeated. The commission has also found that Judge Van Voorhis does not appreciate the inappropriateness of his misconduct and that there is a strong likelihood that if he is allowed to remain on the bench he will commit future violations of the California Code of Judicial Ethics. These conclusions are compelled by Judge Van Voorhis's frank admission that the longer he is on the bench the more difficult it is for him not to lose his temper, and by his failure to recognize that his subjective good intent does not allow him to abuse his authority, become embroiled in matters or lash out at employees or attorneys. Finally, the commission finds that Judge Van Voorhis's misconduct not only brings the judicial office into disrepute, but has also interfered with the administration of justice in particular cases. In sum, the record demonstrates " 'an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in *every* case.' "[80] Accordingly, the commission cannot, consistent with its mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the judiciary, allow Judge Van Voorhis to continue on the bench.

This decision shall constitute the order of removal of Judge Bruce Van Voorhis and, pursuant to the provisions of article VI, section 18 of the California Constitution and rule 120(a) of the Rules of the Commission on Judicial Performance, Judge Bruce Van Voorhis is hereby disqualified from acting as a judge.

Commission members Judge Risë Jones Pichon, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Michael A. Kahn, Mrs. Crystal Lui, Mrs. Penny Perez, Ms. Barbara Schraeger, and Dr. Betty L. Wyman voted in favor of all the

[80] *Fletcher, supra*, 19 Cal.4th at page 921, quoting *Kloepfer, supra*, 49 Cal.3d at page 866, footnote omitted, original italics.

findings and conclusions expressed herein and in the removal of Judge Bruce Van Voorhis from judicial office. Commission members Justice Vance Raye and Ms. Ramona Ripston dissent in part from the commission's decision. Commission member Mr. Marshall Grossman did not participate in this matter.

Commission member Justice Vance W. Raye expresses the following opinion.

I concur with my colleagues on the essential principles of judicial decorum that should guide our decision in this case. Rudeness, arrogance, and nastiness have no place in the courtroom. The increasing lack of civility among lawyers is a frequent topic of legal commentaries; judicial incivility is no less reprehensible. A judicial appointment is not a license to insult and demean. Indeed, judges, who are shielded from intemperate attorneys by rules of attorney discipline and the contempt power, should set the standard for courtroom demeanor and conduct. On those principles there can be little disagreement. Our task, however, is not to compose ethical maxims but to apply them. Ultimately, we must determine whether respondent's actions can be properly characterized as misconduct and, if so, must decide on an appropriate sanction.

Clearly, not every discourteous act constitutes willful misconduct, and not every act of misconduct warrants the ultimate sanction of removal. Indeed, the extreme sanction of removal is appropriate only if essential to public protection. I differ with the majority's characterization of certain acts committed by Judge Van Voorhis. Those differences, however, are of relatively minor significance. Of greater importance is my conviction that respondent's actions, no matter how characterized, do not warrant the extreme sanction of removal from office. For that reason, I must respectfully dissent.

Despite our disagreements, my colleagues and I share a common perception of respondent based on the record and his presentation to the commission: Judge Van Voorhis is not a warm and fuzzy individual. His sharp edges are plain and visible and he makes no effort to conceal them. He speaks his mind with bluntness and candor and appears to be neither ingratiating nor endearing. This should not matter. Affability is not a qualification of judicial office. We have not been empowered to cull the judiciary of persons who lack congeniality; that discretion is left to the appointing power, in the first instance, or the voters who may express a preference for a more likeable candidate. Our power is tethered to the judge's conduct, not his personality.

The judge's conduct here can be summarized thusly. Following trial in *People v. Elze*, respondent made comments to a young prosecutor that created the impression his earlier decision on a legal issue was not based on the merits but was calculated to teach the new lawyer how to handle adversity. During trial in *People v. Silva*, respondent excoriated an inept attorney in a voice that was condescending, disrespectful, and contemptuous. In *People v. Gotchall*, he again adopted a hostile and condescending tone in reprimanding a young district attorney for what he perceived to be an effort to circumvent his evidentiary ruling concerning the horizontal gaze nystagmus test.[81] The judge's understanding of the evidentiary foundation necessary for introduction of the horizontal gaze nystagmus test was also the source of friction in *People v. Elze*.[82] Again, the judge made a ruling and perceived an effort by the prosecutor to circumvent the ruling. He angrily objected to the prosecutor's questioning and instructed her to tell the jury to disregard the answer. In a separate case involving the same prosecutor, he disagreed with the prosecutor's objection on an evidentiary matter and instructed her, in front of the jury, to agree with his ruling. In *People v. McDonald*, respondent again undertook to teach a young prosecutor rules of evidence, interrupting and questioning her in front of the jury in a manner that could only be described as demeaning and sarcastic. Following the trial of *People v. Hoye* in January 2000, respondent volunteered to the young public defender trial deputy that his accent was charming but he should "lose it."

In three other matters involving court staff, respondent is accused of throwing files in a fit of anger, with some of the files landing on a clerk's workspace; castigating a clerk in front of a jury for wasting the court's time; and chastising a deputy sheriff for not knowing her job, though his criticism was not warranted and her conduct could have been explained had he only asked. In a single matter involving a jury, he criticized members of the jury for the wording of a question they submitted, telling them, "you could improve on your English, and therefore your question could be way more precise for me." Some jurors felt insulted by the comment.

[81] I note, however, defense counsel observed he did not believe that Judge Van Voorhis raised his voice or was harsh or discourteous, contrary to the deputy district attorney's observation of a "smirk" on respondent's face. The masters "independently reviewed the transcript" and sided with the deputy district attorney. Regrettably, an independent review of a written record cannot discern smirks or vocal intonations. Nevertheless, for purposes of this dissent, I accept the masters' finding.

[82] The judge appears to have been wrong in his rulings on the test. It is difficult to disregard this legal error in assessing his conduct. However, for purposes of my analysis, I have assumed that his ruling was correct, in which case his righteous indignation with the prosecutor's response to his rulings may have been warranted. Nonetheless, respondent was still under an obligation to act courteously and to treat the participants with dignity and respect. He did neither.

There is no doubt that respondent was intemperate in his remarks and his actions, that the objects of his tirades were embarrassed and humiliated, and that many of his words should have best been left unsaid. Respondent's regrettable conduct speaks for itself. For that reason, I offer a mild dissent from efforts to amplify the seriousness of respondent's lapses in regard to his angry outbursts at counsel by labeling them as "willful misconduct." According to the majority, a judge's "lashing out at counsel" constitutes bad faith under two of the three tests for bad faith articulated by the Supreme Court: First, according to the majority, comments made to vent anger or frustration cannot be said to have been made in the "faithful discharge of judicial duties" and thus were made for a "corrupt purpose." Second, because respondent had recently been cautioned about his demeanor, his subsequent loss of poise evinced a "conscious disregard for the limits of the judge's authority."

I am not persuaded by either of these justifications. Certainly the conduct here is no worse than the judge's conduct in *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297 [267 Cal.Rptr. 293, 787 P.2d 591] (*Kennick*). There, the commission found the judge screamed in an abusive manner at an attorney in open court when she attempted to make a bail motion and screamed at her again in chambers when she suggested the court reassign counsel in certain cases to expedite the calendar. Further, the commission found that the yelling so intimidated the attorney that she felt she could never make another bail motion before petitioner, and the yelling in chambers frightened her and reduced her to tears. The masters concluded this conduct constituted prejudicial conduct; the commission concluded it constituted willful misconduct. The Supreme Court concluded it was only prejudicial conduct, declaring, "The evidence does not establish clearly and convincingly that the acts in question were committed for a purpose other than the faithful discharge of judicial duties and thus amounted to more than spontaneous outbursts." (*Kennick*, *supra*, 50 Cal.3d at p. 326.) Perhaps our respondent's outbursts were more protracted, but they were spontaneous in origin and derived from the same motivation—anger and frustration.[83]

I also do not agree that respondent's comments to the jury constituted misconduct. As our Supreme Court has suggested, "It is sometimes difficult to determine the line between 'extremely poor taste' and 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute.' "[84] Jurors are the lifeblood of the court system. Performing a civic duty for a pittance, they should be praised, not ridiculed. Nevertheless, I do not

[83] The allegations against respondent are unlike another angry judicial outburst examined in *Kennick* where the judge verbally abused an attorney and later joked about the deed, suggesting the episode was instigated, in whole or part, for the judge's amusement.

[84] *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 545 [247 Cal.Rptr. 378, 754 P.2d 724].

believe respondent crossed the line. He lacks courtside manners, but his request of the jury to be careful in crafting their questions is not an actionable offense. The fact the jury foreman "was so upset that he considered deciding the case on grounds other than the evidence" is regrettable—jurors are sworn to render a verdict according to the evidence—but it does not support a finding of misconduct.

I will make no further effort to defend respondent's conduct. It is largely indefensible. The ultimate question—the question that really matters—is whether respondent's conduct, no matter the labels affixed to it, warrants removal from office. Regrettably, questions of penalty cannot be answered with scientific precision. There are no sentencing guidelines for us to follow, no mandatory sentencing laws or three strikes laws applicable to judges. But we are not without guidance. According to the Supreme Court, the sanction of removal is invoked when necessary for "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system."[85] Our task is not to punish but " 'to determine the nature of the discipline, if any, that is necessary to achieve these goals.' "[86]

Obviously, what is necessary to protect the public from boorish behavior is different from what may be necessary to protect the public from corrupt decisionmaking based on friendship,[87] a persistent pattern of ex parte contacts and alteration of court records,[88] persistent failures to perform duties in a diligent fashion,[89] accepting gifts from litigants,[90] abuse of the contempt power,[91] prejudgment of cases,[92] or interfering with the conduct of a commission investigation.[93]

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[85] *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams*).

[86] *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239] (*Kloepfer*).

[87] *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778 [119 Cal.Rptr. 841, 532 P.2d 1209] (*Spruance*); *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359 [188 Cal.Rptr. 880, 657 P.2d 372].

[88] *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958] (*Fletcher*).

[89] *Kennick, supra*, 50 Cal.3d 297.

[90] *Adams, supra*, 10 Cal.4th 866.

[91] *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678 [122 Cal.Rptr. 778, 537 P.2d 898] (*Cannon*); *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615 [175 Cal.Rptr. 420, 630 P.2d 954].

[92] *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186 [260 Cal.Rptr. 557, 776 P.2d 259].

[93] *Fletcher, supra*, 19 Cal.4th 865.

Certain conduct is so egregious that even a single instance warrants the severest of sanctions. For example, a judge who accepts a single bribe arguably poses too great a risk to the public and to public confidence in the integrity and independence of the judiciary to be permitted to continue in office. The same cannot be said of intemperance because intemperance can take so many forms and vary in degree. Perhaps that explains why there are no cases removing a judge from office based solely on demeanor violations.[94] This is not to suggest that there will never be a case warranting removal based on outrageous demeanor. This is simply not an appropriate one.

A review of the 14 removal cases published since 1960 confirms this assessment. Of those 14 cases, eight included allegations of intemperate conduct. In *Fletcher, supra*, 19 Cal.4th 865, the judge engaged in a pattern of ex parte contacts (six counts), prejudged evidence, altered court documents, entered judgment without notice to the parties, and used a photograph of staff for campaign purposes without their consent. The accusation also included a demeanor allegation (berating an attorney in open court: " 'She shouldn't be handling criminal cases' "; " '[She] probably had something more important to do today, like go to a PTA meeting' "; " 'She has a whole bunch of kids. She's been having kids ever since I've known her,' "[95] but it hardly mattered given the weight of the other misconduct.

*Kennick, supra*, 50 Cal.3d 297 is an interesting case where the judge was removed from office for failure to perform the duties of office. However, he was charged with a multitude of other violations. Among other things, he was found to have been rude and abusive to officers who arrested him for driving under the influence (DUI) and thereafter sought preferential treatment in the investigation of the DUI charge. It was also alleged that he treated attorneys with disrespect. In addition to yelling at a prosecutor, detailed *ante*, the judge also argued with another deputy district attorney who objected to being addressed as "ma'am" and ordered her " 'not to come in here again,' " to which she responded, " 'Thank you very much. That's a privilege.' " Given the mutual nature of the combat, the Supreme Court disagreed with the determination of prejudicial conduct and ordered the charge dismissed. However, the court concluded the judge had committed prejudicial conduct in addressing female attorneys and others appearing before him as "sweetie," "sweetheart," "honey," or "dear" and in treating both criminal defendants and

[94] The majority decision appears to treat respondent's reference to his difficulty as a "demeanor problem" as an effort to minimize the seriousness of his conduct. My use of the term is not so intended; it is a convenient shorthand description of the various allegations at issue in this proceeding.

[95] *Fletcher, supra*, 19 Cal.4th at page 880.

witnesses rudely and with disrespect—interrupting them, yelling at them, and speaking in demeaning tones. Multiple examples were given.[96]

Nevertheless, while the court found multiple instances of prejudicial conduct and one of willful misconduct based on demeanor and other allegations, in determining whether removal was appropriate, the court concluded: "All this judicial misbehavior by petitioner, though deplorable and clearly calling for censure, falls significantly short of the showings of willful misconduct and prejudicial conduct on which we have based orders removing judges."[97] In brief, the fact that the judge was "demeaning, rude, impatient, and abusive," "addressed women in the courthouse . . . with undue and demeaning familiarity" and "[t]wice . . . yelled at and unjustly intimidated a deputy city attorney, and on another occasion . . . imparted similar treatment to a deputy district attorney" did not warrant removal. (*Kennick, supra*, 50 Cal.3d at p. 339.)[98]

*Kloepfer, supra*, 49 Cal.3d 826 is another case in which allegations of poor demeanor are part of a mix of findings that include four acts of willful misconduct and 21 acts of prejudicial conduct. In addition to a "persistent pattern of rude, abusive, and hostile behavior" that makes Judge Van Voorhis seem angelic, Judge Kloepfer persistently abused the contempt power, threatening and finding attorneys and parties in contempt with reckless abandon, and became embroiled in the cases to the point of refusing to dismiss prosecutions on the People's motion based on his personal perception of the defendants' guilt and raising bail in another case based on his view the defendant was " 'fraudulent, a liar, and deceitful.' "[99] There is no comparison between the scope and nature of the charges in *Kloepfer* and those involved here. The 18 charges of willful misconduct and two of prejudicial conduct in *Gonzalez, supra*, 33 Cal.3d 359 also do not resemble the charges in the present proceeding. Judge Gonzalez used his judicial office to intercede in criminal matters on behalf of friends, acted improperly on bail releases, impugned the character of his judicial colleagues, made ethnic and racial slurs, and generally conducted himself and his courtroom in a manner befitting a television comedian. Even more egregious than *Gonzalez* was the case of *Cannon, supra*, 14 Cal.3d 678, where the judge engaged in 21 acts of willful misconduct and eight acts of prejudicial conduct involving actions that the Supreme Court has described as "bizarre." In *Wenger, supra*, 29 Cal.3d 615, the court sustained 10 charges of willful misconduct in nine separate

[96] *Kennick, supra*, 50 Cal.3d at pages 322–324.

[97] *Kennick, supra*, 50 Cal.3d at page 339.

[98] The court ultimately upheld the removal recommendation but based "on the sole ground of persistent failure or inability to perform his judicial duties." (*Kennick, supra*, 50 Cal.3d at pp. 342–343.)

[99] *Kloepfer, supra*, 49 Cal.3d at pages 839, 861.

incidents, including failure of the judge to disqualify himself, abuse of the contempt power, and retaliating against a prosecutor by banishing her from his courtroom because he suspected she had spoken with the commission regarding his judicial performance. *Spruance, supra*, 13 Cal.3d 778, like *Wenger*, is another case in which findings of intemperance are overshadowed by findings the judge attempted to influence the disposition of a case against a friend, acquitted a defendant who was the son of a friend and political supporter, reduced a traffic charge against the nephew of a friend and later, in another case involving the same defendant, ordered his own recognizance release to prevent him from being arrested on an outstanding warrant. The judge also solicited another judge to dismiss a traffic citation against him and altered the records to create the impression the dismissal was based on attendance at traffic school.

The one removal case that seems faintly comparable to the present one is *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270 [110 Cal.Rptr. 201, 515 P.2d 1], in which a judge was removed for bringing the judicial office into disrepute. Judge Geiler, however, did not confine his misconduct to words. He invited a deputy public defender into chambers, produced a battery-powered dildo, and proceeded to thrust the object in the area of the attorney's buttocks. Later, during the attorney's cross-examination of a witness in open court, the judge suggested the dildo might be used to speed up the public defender's cross-examination, a suggestion that the Supreme Court concluded was made with the intent of curtailing cross-examination. Judge Geiler appeared obsessed with sex and public defenders. He used crude, vulgar, and profane language in conversations with court personnel and female attorneys. As to the public defender, the court concluded he arbitrarily and capriciously removed the public defender from cases.

I cite previous removal cases with a full understanding of their limited utility. While some light is shed by precedent, each case we consider is singular and must be decided on the unique facts presented. Still, the fact respondent's conduct in this case is so much less egregious than the conduct in other cases in which demeanor served as the basis for removal should give us pause.

So also a review of cases in which we have imposed censure is instructive. In *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739 [190 Cal.Rptr. 910, 661 P.2d 1064] (*Roberts*), Judge Roberts was censured after he became visibly angry when told by an attorney that the attorney intended to petition the Court of Appeal for review of the judge's ruling, telling the attorney that he was " 'chicken to take the case to trial.' " He poked the attorney in the chest with his finger and told him, " 'Buddy boy, you're not

going to get away with this,' " further stating, " 'I'm going to see that you lose this case big.' " When the attorney protested the threat, petitioner replied, " 'I'll threaten you anytime I feel like it.' " He later had ex parte conversations with the attorney on the other side and, after the Court of Appeal reversed his ruling, called the presiding justice and engaged in an angry diatribe. Further, the commission found that in a child neglect proceeding, Judge Roberts " 'improperly acted as an advocate, prejudged issues, abusively curtailed the presentation of evidence, and treated witnesses, litigants and an attorney in a rude, intimidating and demeaning manner.' " The Supreme Court did not review the evidence in detail but noted some examples: In response to an objection by counsel, the judge replied, " 'I don't care whether you object to it or not . . . . I will hear no further objections of this kind, do you understand, Miss [M.]?' " In response to a statement by a minor's mother, he admonished: " 'If you have anything to offer you are going to be sworn. You have no credibility with this court. When you are sworn, let alone volunteer statements, . . . I don't believe a word you have testified to in this courtroom.' " He demonstrated similar impatience towards another witness, interrupting testimony in midsentence and stating: " 'You may step down. I wouldn't believe you under oath. I don't want any more testimony like this. This witness doesn't know in one breath, and in the next breath it makes no difference. She would have [the mother], who had abused her own child, baby sit hers. Now, I don't have to listen to that kind of evidence.' "[100]

And that is not all. Judge Roberts also displayed impatience with a young, inexperienced counsel. During a recess, "he accused her of being incompetent to represent the defendant, and rudely quizzed her regarding her legal experience. As a result of petitioner's loud and angry manner, Miss A. began to cry and left the conference . . . ."[101] Finally, Judge Roberts was convicted of violating section 148 of the Penal Code (resisting, delaying, or obstructing a public officer) based on his interference with uniformed California Highway Patrol officers who stopped a car being driven erratically by the judge's son.

Censure was also considered an appropriate sanction in *In re Stevens* (1982) 31 Cal.3d 403 [183 Cal.Rptr. 48, 645 P.2d 99] (*Stevens*), which involved the conduct of a judge who remarked to counsel that Black persons have to learn how to live in their own neighborhoods and that it was "typical" of Black persons to fight unfairly. During his term in office, the judge frequently referred to Black persons as " 'Jig, dark boy, colored boy, nigger, coon, Amos and Andy, and jungle bunny.' "[102] The commission recommended censure in *In re Gordon* (1996) 13 Cal.4th 472 [53 Cal.Rptr.2d 788, 917 P.2d 627].

[100] *Roberts, supra*, 33 Cal.3d at pages 743–745.
[101] *Roberts, supra*, 33 Cal.3d at page 745.
[102] *Stevens, supra*, 31 Cal.3d at page 404.

There, the judge had repeatedly made sexually suggestive remarks to and asked sexually explicit questions of female staff members, referred to a staff member using crude and demeaning names and descriptions and an ethnic slur, referred to a fellow jurist's physical attributes in a demeaning manner, and mailed a sexually suggestive postcard to a staff member.

*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*) is another censure case worthy of mention. Judge Dodds was found to have failed to report a law violation by a colleague and to have suggested to his staff that they also refuse to cooperate. More relevant to the present case, it was also determined that Judge Dodds on several occasions engaged in rudeness and prejudgment in the handling of cases and on one occasion spoke insultingly of two lawyers who had appeared before him. His rudeness included interrupting and yelling loudly and angrily at counsel and a litigant, as well as telling a joke that suggested bias. The Supreme Court concluded one of the offensive remarks was outside the statute of limitations and could not be considered and determined the remaining allegations did not support censure. Noting the judge had won praise from the bar and approval of the electorate, the court concluded public censure would not further the purpose of judicial discipline. The commission's recommendation thus was rejected. Declaring, "Cases in which we have publicly censured judges involve conduct more serious than that involved here,"[103] the court cited a long list of censure cases, some of which in my estimation involved conduct more serious than the conduct here under consideration. Thus, in *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552, 556 [37 Cal.Rptr.2d 581, 887 P.2d 937] the judge told a court reporter, " 'Your butt looks good in that dress,' " and also said, " 'I certainly hope you're not that frigid at home with your husband.' " For good measure, the judge slapped or patted a court reporter and a court trainee on their buttocks.

Another factor in deciding an appropriate sanction is our assessment of the likelihood that the judge will reoffend. The majority decision indicates it is not merely likely, it is "close to a certainty." The near certainty is inspired by respondent's testimony before the masters and before the commission. The import of his testimony, according to the majority decision, is that respondent presents himself as well meaning but "misunderstood" and refuses to take responsibility for his actions or the problems created by them. The decision quotes liberally from colloquies between respondent and participants in these proceedings to make the point that respondent remains unremorseful; inasmuch as reform begins with repentance, Judge Van Voorhis is incapable of reform.

[103] *Dodds, supra,* 12 Cal.4th at page 178.

I would be persuaded by this logic had the evidence against the respondent been undisputed and the heinousness of his conduct conceded. Certainly, in all cases, respondents before the commission would be well advised of the value of contrition. However, a respondent is entitled to present a defense notwithstanding the unfavorable findings of the masters. Judge Van Voorhis appeared before the commission to dispute certain evidence and to explain his conduct. I do not regard his statement that he is often misunderstood as the ranting of a petulant adolescent attempting to evade responsibility for his actions. Respondent is simply acknowledging that he is hard and tough and crusty and becomes more so with age—but that beneath that exterior he attempts to be fair and compassionate. Despite his best efforts, he at times crosses the line. We have correctly rejected this plea as a defense. But it should not be viewed as a matter in aggravation. I do not begrudge respondent for his clumsy and ultimately unsuccessful effort to persuade us that he should be forgiven. He is simply explaining why conduct that comes naturally to some of us can be an effort for him.

I respect the opinions of my colleagues. Their assessment of respondent is probably correct in certain respects. Judge Van Voorhis will likely always be testy and somewhat ill humored. Perhaps charm and geniality will not be his hallmark. But that is not an appropriate measure of his prospects for reform and future judicial temperance. Judicial temperance is not the ability to ingratiate but the ability to keep the pressures of the moment from overpowering judicial composure. The question is whether he can conform his conduct to what is expected of him by the California Code of Judicial Ethics as construed and applied by this commission and by the Supreme Court. I am persuaded that he can. It would be nice if we had a greater array of sanction options—suspension, probation, compulsory education programs—to provide greater assurance.[104] I understand that my colleagues believe censure is too weak a sanction. I believe removal is too great.

Commission member Ms. Ramona Ripston expresses the following opinion.

Like Justice Raye, I believe that the removal of Judge Van Voorhis from his judicial office is too harsh an action. I, too, would find censure more than adequate for his misdeeds. Judge Van Voorhis's conduct does not, as Justice Raye so ably points out, represent the type of behavior for which the ultimate sanction is warranted. In short, I fully join in Justice Raye's separate statement dissenting from the commission's decision and order.

[104] Regrettably, we are without the authority conferred on judicial commissions in other states to impose discipline greater than reprimand or censure but less than removal. Suspension and training might be appropriate in this matter.

I write separately only to note that, while the precedent Justice Raye cites makes it clear that the discipline imposed on Judge Van Voorhis is excessive, we have come a long way from some of the attitudes reflected in several of the earlier cases and I would not want our examination of them to suggest an endorsement of each and every result. Times have changed and so have our standards. For example, I believe that the conduct that led the California Supreme Court to censure Judge Stevens a generation ago would today unquestionably demand his removal. In my view, in a number of areas including race and gender bias, we should hold our judiciary to a higher level of conduct than we did on some occasions in the past. (I hasten to add that Judge Van Voorhis was guilty of no such offense.) Still, all in all, our precedent retains a certain value and wisdom, and I would not abandon it as completely as my colleagues in the majority appear willing to do. More particularly, I would reserve the sanction of removal for jurists whose misconduct is more willful and egregious, and constitutes a more central affront to the judicial function.

The judge's petition for review was denied September 10, 2003.

[No. 166. Sept. 23, 2003.]

# INQUIRY CONCERNING JUDGE D. RONALD HYDE

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The commission on Judicial Performance ordered the judge removed from office. The commission found that the judge had used his judicial position to obtain confidential information from restricted Department of Motor Vehicles records that pertained to a matter of personal interest to him, not to business before the court. He also told a sexual story to a new court executive officer and a member of the clerk's office. The judge prevented a continuance of his daughter's small claims case and selected his replacement for the case. He failed to provide the prosecutor or the defense attorney with a copy of his letter to a criminal defendant and failed to give the prosecutor notice of his letter or an opportunity to respond. The judge also failed to disclose his telephone conversation with another criminal defendant and his relationship to her family. He improperly acted as a domestic violence victim's advocate. Finally, after being disqualified from a case, the judge initiated an ex parte substantive discussion with his successor judge.

The commission observed that the judge had previously received three advisory letters, a private admonishment, and a severe public censure. In the instant proceeding, the commission determined that the judge had committed two acts of willful misconduct, four acts of conduct prejudicial to the administration of justice that brought the judicial office into disrepute, and one act of improper action. The commission further determined that at least four of the judge's most recent acts of misconduct were for unethical conduct for which he had been previously disciplined. In addition, the judge's lack of candor in his filings with the commission raised serious questions about his integrity. The judge's persistence in violating the standards of judicial conduct, his inability or unwillingness to learn from prior discipline, and his general approach to the commission and to the disciplinary proceeding precluded the commission from having any confidence that he would not continue to violate the California Code of Judicial Ethics if allowed to remain on the bench. The commission concluded that, despite the judge's contributions to his community and his court, the totality of the circumstances

mandated the judge's removal for the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. (Opinion by Risë Jones Pichon, Chairperson.)

HEADNOTES

(1) **Judges § 6—Willful Misconduct—Accessing DMV Records for Personal Use.**—The judge who used his judicial position to obtain confidential information from restricted Department of Motor Vehicles records for his personal use engaged in willful misconduct and violated Cal. Code Jud. Ethics, canons 1, 2A, 2B(2) and 3B(11).

(2) **Judges § 6—Discipline—Canons.**—Cal. Code Jud. Ethics, canon 1, provides that a judge shall uphold the integrity and independence of the judiciary. Cal. Code Jud. Ethics, canon 2A, provides that a judge shall avoid impropriety and the appearance of impropriety. Cal. Code Jud. Ethics, canon 2B(2) provides that a judge shall not lend the prestige of judicial office to advance the personal interests of the judge. Cal. Code Jud. Ethics, canon 3B(11), provides that a judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(3) **Judges § 6—Discipline—Willful Misconduct—Elements.**—Willful misconduct by a judge is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), (2) performing a judicial act with knowledge that the act is beyond the judge's lawful power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

(4) **Judges § 6—Discipline—Prejudicial Conduct.**—Unjudicial conduct by a judge performed in bad faith but not committed in a judicial capacity may constitute prejudicial conduct.

(5) **Judges § 6—Discipline—Prejudicial Misconduct.**—Prejudicial misconduct does not require actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office. The judge's intent or motivation is not a significant factor in assessing whether prejudicial misconduct has occurred. Prejudicial misconduct includes conduct that a judge undertakes

in good faith but that nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office.

(6) **Judges § 6—Prejudicial Misconduct—Telling Story of Sexual Nature to Court Employees.**—The judge who told a story concerning a former court employee engaging in oral sex in the courthouse parking lot to the new court executive officer and a member of the clerk's office, in a manner that could be overheard by other court employees, engaged in prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 1, 2A and 3B(4).

(7) **Judges § 6—Prejudicial Misconduct—Interfering in Daughter's Small Claims Case.**—The judge who prevented the continuance of his daughter's small claims case and selected a pro tem judge to hear the case violated Cal. Code Jud. Ethics, canons 1, 2A, 3B(2) and 3E(1), and engaged in prejudicial misconduct.

(8) **Judges § 6—Improper Action—Ex Parte Communication.**—The judge committed improper action by failing to provide the prosecutor or the defense attorney with a copy of a letter sent to him by a criminal defendant, and violated Cal. Code Jud. Ethics, canons 1, 2A and 3B(7).

(9) **Judges § 6—Prejudicial Misconduct—Ex Parte Communication.**—The judge who failed to disclose an ex parte discussion with a probationer and his relationship to her family when the probationer appeared before him to request a waiver of her probation engaged in prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 2A and 3E(2). Even in a small town, an objective observer would view a judge's failure to disclose a prior relationship and an ex parte communication as prejudicial to the administration of justice.

(10) **Judges § 6—Prejudicial Misconduct—Ex Parte Communication—Embroilment.**—The judge who had an ex parte conversation with the wife of a criminal defendant after presiding over the defendant's domestic violence case and intervened on the wife's behalf in her efforts to serve marital dissolution papers on the defendant and receive a fee waiver engaged in prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 2A, 2B(1), 2B(2) and 3B(7). The conversation concerned much more than ministerial matters, and the judge became embroiled in the matter.

(11) **Judges § 6—Willful Misconduct—Disqualification—Communication with Successor Judge.**—The judge engaged in willful misconduct and violated Cal. Code Jud. Ethics, canons 1, 2A, 2B(2) and 3B(7) by, after

being disqualified, assigning a case to another judge, communicating with the successor judge about his reasons for increasing the defendant's bail, and asking the successor judge to "back me up" on his bail increase. A disqualified judge cannot have a proper judicial purpose in initiating an ex parte substantive discussion with his or her successor judge.

(12) **Judges § 6.4—Discipline—Proceedings—Duty to Cooperate—Judge's Responses.**—The Rules of the Commission on Judicial Performance spell out the requirements that a judge be forthright and cooperate with the Commission on Judicial Performance. Rules of Com. on Jud. Performance, rule 104(a), requires that a judge shall cooperate with the commission and provides that a judge's cooperation or lack of cooperation may be considered by the commission in determining the appropriate disciplinary sanction or disposition. Rules of Com. on Jud. Performance, rule 119, requires that a judge's answer to a notice of formal proceedings be as complete and straightforward as the information reasonably available to the respondent judge permits. In addition, Rules of Com. on Jud. Performance, rule 106, provides that written communications by a respondent judge's attorney shall be deemed to be the written communication of the judge. The signing of any document or statement warrants that the signer has personal knowledge of the matter contained in the document or statement or has investigated the matter and has a good faith belief in the accuracy of the representations contained in the document.

(13) **Judges § 6.4—Discipline—Proceedings—Credibility.**—The Commission on Judicial Performance, following the Supreme Court's guidance, gives considerable weight to the masters' comments on credibility.

(14) **Judges § 6.4—Discipline—Proceedings—Factors.**—Once the Commission on Judicial Performance has determined that allegations of misconduct have been demonstrated by clear and convincing evidence, the commission must determine the appropriate discipline. The purpose of a disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. In determining the appropriate discipline, each case must be considered on its own facts. Nonetheless, the commission looks to opinions of the Supreme Court and its own prior decisions for guidance in exercising its responsibility to determine the appropriate discipline in a particular case. The commission has identified five factors that are particularly relevant to its determination of discipline: (1) the number of acts of misconduct; (2) the effect of prior discipline on

the judge's conduct; (3) concerns regarding the judge's integrity; (4) whether the judge is likely to continue to engage in unethical conduct; and (5) the impact of this matter on the judicial system. In addition, the commission considers the mitigating evidence offered by the judge.

**(15) Judges § 6.4—Discipline—Proceedings—Number of Wrongful Acts.**—The number of a judge's wrongful acts is relevant to determining whether they were isolated occurrences or part of a course of conduct that reflects a lack of temperament and ability to perform judicial functions in an evenhanded manner.

**(16) Judges § 6.4—Discipline—Proceedings—Prior Discipline.**—The California Supreme Court has often looked at whether a judge has received prior discipline and the effect of such discipline in determining the appropriate discipline for wrongful conduct. The Supreme Court has noted that it would hesitate to remove a judge who showed himself or herself ready, willing, and able to reform under a less severe sanction.

**(17) Judges § 1—Honesty.**—Honesty is a minimal qualification that is expected of every judge.

**(18) Judges § 6.4—Discipline—Proceedings—Likelihood of Future Violations.**—In determining whether a judge is likely to again violate the California Code of Judicial Ethics, the Commission on Judicial Performance reviews a judge's approach to the current proceedings and other indicia of the judge's recognition of, and ability to conform to, the standards of judicial conduct.

**(19) Judges § 6.4—Discipline—Proceedings—Mitigating Factors.**—Character evidence and evidence of a judge's contributions to the judicial system do not mitigate or excuse willful misconduct, but may be considered in determining the appropriate discipline.

**(20) Judges § 6.2—Discipline—Grounds—Willful and Prejudicial Misconduct—Lack of Candor—Removal from Office.**—After having received three advisory letters, a private admonishment, and a severe public censure, the judge was again before the Commission on Judicial Performance. The commission determined that the judge had committed two acts of willful misconduct, four acts of conduct prejudicial to the administration of justice that brought the judicial office into disrepute, and one act of improper action. The commission further determined that at least four of the judge's most recent acts of misconduct were for unethical conduct for which he had been previously disciplined. In addition, the judge's lack of candor in his filings with the commission and the masters'

concerns with the judge's credibility raised serious questions about his integrity. Those factors compelled the removal of the judge from office.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 57, 76.]

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**OPINION**

**PICHON, Chairperson.**—This disciplinary matter concerns Judge D. Ronald Hyde, a judge of the Alameda County Superior Court. The notice of formal proceedings charged Judge Hyde with seven incidents of unethical conduct.

The Commission on Judicial Performance agrees with the special masters that the seven charges are supported by clear and convincing evidence and that Judge Hyde committed two acts of willful misconduct, four acts of conduct prejudicial to the administration of justice that bring the judicial office into disrepute, and one act of improper action. In determining the appropriate discipline the commission also must consider Judge Hyde's five prior disciplines, the close relationship between his current misconduct and the prior misconduct for which he was disciplined, Judge Hyde's lack of candor in his filings with the commission, and concerns about his credibility. For the reasons more fully set forth in this decision, the commission hereby removes Judge D. Ronald Hyde from the bench.

## PROCEDURAL HISTORY

Judge Hyde was appointed to the Livermore-Pleasanton-Dublin Municipal Court in 1982 and elevated to the Alameda County Superior Court on July 31, 1998, as a result of the consolidation of the courts.

On October 23, 2001, the commission sent a preliminary investigation letter to Judge Hyde. Following Judge Hyde's response, a further investigation letter was sent to Judge Hyde on December 18, 2001, and Judge Hyde filed a response.

A notice of formal proceedings was filed on June 17, 2002, and Judge Hyde filed his verified answer on July 31, 2002. Meanwhile, on July 12, 2002, a supplemental preliminary investigation letter was sent to Judge Hyde. Judge Hyde's response to the letter was received on August 14, 2002. On October 17, 2002, a first amended notice of formal proceedings was filed, and Judge Hyde filed his verified answer to the first amended notice on November 4, 2002.

On August 2, 2002, the Supreme Court, in response to the commission's request, appointed three special masters. An evidentiary hearing was held from March 24 through March 27, 2003, in San Francisco, California, before the special masters: Judge Joseph F. Biafore of the Superior Court of Santa Clara County, presiding; Judge Bradley L. Boeckman of the Superior Court of Shasta County; and Judge Talmadge R. Jones of the Superior Court of Sacramento County. Mr. Jack Coyle and Mr. Andrew Blum of the commission's office of trial counsel presented the case in support of the charges. Judge Hyde was represented by Mr. James A. Murphy and Mr. Harlan B. Watkins of Murphy, Pearson, Bradley & Feeney of San Francisco, California. On June 13, 2003, the masters submitted their 54-page report to the commission.

Following the receipt of objections and briefs from Judge Hyde and the office of trial counsel, the matter was heard by the commission on August 27, 2003. Mr. Coyle presented argument on behalf of trial counsel. Judge Hyde was represented by Mr. Murphy and Mr. Watkins. Judge Hyde presented argument on his own behalf and answered questions from commission members.

## REQUESTS TO TAKE ADDITIONAL EVIDENCE

Two weeks before argument, Judge Hyde's counsel submitted a letter requesting a continuance to allow further evidence to be taken. The letter alleged that "it would have been prejudicial to respondent to present the evidence during the Rule 123 hearing before the special masters." On August 18, 2003, trial counsel submitted a letter opposing the request. On August 19, 2003, the commission denied the letter request for a continuance.[1]

In the days immediately preceding the hearing, Judge Hyde requested that the commission consider four additional letters from attorneys and a judge in support of Judge Hyde. At the hearing, Judge Hyde requested that the commission take additional evidence, and he proffered a package of materials which were described as his resume, the results of a survey form filled out by attorneys and court staff concerning Judge Hyde's performance over the last several months, and additional letters in support of Judge Hyde. The commission took the requests under submission.

The commission now denies the request to consider the four letters and the request to take additional evidence. The commission's rules contemplate that

[1] The commission's order noted that there had been "no proffer of the proposed 'further evidence,' and no showing of why the evidence was not provided to the special masters or why it would have been 'prejudicial' to have done so." At the hearing, when asked by a commission member, Judge Hyde's counsel was unable to explain why it would have been "prejudicial" to have presented the evidence to the special masters.

all evidence, including mitigation evidence, be presented at the evidentiary hearing before the masters.[2] Nonetheless, rule 133 provides that the commission may order the taking of additional evidence.

Judge Hyde has failed to present good cause for the commission to reopen the record. The letters in support of Judge Hyde could have been, and should have been, obtained prior to the evidentiary hearing before the masters and offered into the record at that time. Absent exceptional circumstances (and none has been alleged), evidence of a judge's performance subsequent to the masters' hearing and report is not appropriate for inclusion in the record. There must always be some passage of time between the filing of the masters' report and the judge's appearance before the commission. If evidence of the judge's performance during this period of time was routinely admitted, the record could never be closed. Furthermore, Judge Hyde had not shown the materials proffered at the hearing to trial counsel. Finally, it should be noted that due process concerns would arise were the commission to consider in a formal proceeding a new complaint against the judge (that had not been included in an amended notice of formal proceedings and proved by evidence submitted at a public evidentiary hearing).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *Count One*

1. *Findings of Fact*

One workday morning before September 2001, Judge Hyde walked into the traffic clerk's area of the courthouse, approached clerk Denise Silva, told her that a driver had "cut him off" on the way to work, gave her a vehicle license plate number, and asked her to obtain the Department of Motor Vehicles (DMV) records for the driver. Ms. Silva used her computer to obtain the DMV information and gave it to Judge Hyde.

There was no case pending before the Pleasanton court to which these DMV records related. The records accessed are part of the California Law Enforcement Telecommunications System (CLETS) which is not available to the general public. The court clerks are trained regarding the confidentiality of DMV records, including the basic restriction that the records may be accessed only for court business. The clerks are required to sign acknowledgements that violations of confidentiality may result in dismissal from employment and criminal or civil action.

[2] See rules 121 and 123 of the Rules of the Commission on Judicial Performance. The provision in rule 121 allowing the commission to hold the hearing before itself has not been used since 1995.

Judges are generally aware that access to DMV records is restricted to court business. Judge Hyde was specifically on notice because in 1996 he was publicly censured for, among other things, having court personnel access DMV records for matters "not related to court business." Judge Hyde was also on notice that clerks were required to sign acknowledgements of the confidentiality of DMV records.

After reviewing the DMV records, Judge Hyde telephoned the Pleasanton police to report the driver to a police officer. The judge either identified himself as a judge or the officer recognized him as a judge. In any event, the judge did not indicate that he was calling as a private citizen. Judge Hyde told the officer he had checked the driver's record and did not want a complaint filed, but wanted the police to "issue a cautionary warning." Judge Hyde's decision to request a cautionary warning was based on his review of the DMV record, which showed that the driver had a "pretty good record." Judge Hyde testified that, if the DMV record had revealed that the driver had a bad record, he would have filed a complaint.

Judge Hyde asserted that his actions were motivated by a concern for public safety. The masters, however, found, and the commission agrees, that Judge Hyde's primary motivation was anger at the driver. During his testimony before the masters, Judge Hyde stated that he told Ms. Silva "some idiot cut me off." The masters noted that Judge Hyde did not call the police while the driver was still on the road, purportedly endangering others, even though he had a cell phone in the car. Instead, he stopped for coffee and drove on to the courthouse. He then went to his chambers and approached Ms. Silva while on his way to his courtroom.

2. *Conclusions of Law*

**(1)** The masters concluded, and the commission agrees, that Judge Hyde's use of his judicial position to obtain confidential information from restricted DMV records that pertained to a matter of personal interest to him, not to business before the court, constitutes willful misconduct.[3] **(2)** Judge Hyde's conduct violated California Code of Judicial Ethics (further references to a canon are to this code) canons 1 (a judge shall uphold the integrity and independence of the judiciary), 2A (a judge shall avoid impropriety and the appearance of impropriety), 2B(2) (a judge shall not lend the prestige of judicial office to advance the personal interests of the judge),

[3] Willful misconduct as a matter of law includes the lesser offense of prejudicial misconduct.

and 3B(11) (a judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity).[4]

**(3)** Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity.[5] A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.[6]

The masters concluded, and the commission agrees, that Judge Hyde acted in bad faith as his purpose in accessing DMV records was personal and not the faithful discharge of judicial duties. The masters properly rejected Judge Hyde's claim that he could review the DMV records because of his concern for public safety.[7]

The commission also agrees with the masters' conclusion that the bad faith element of willful misconduct was independently satisfied because Judge Hyde knew that he was acting beyond his lawful judicial power when he accessed the restricted DMV records. Judge Hyde was publicly censured in 1996 for conduct that included asking court employees to access DMV records "for the purpose of obtaining information regarding motorists that was not related to court business." In negotiating the censure, Judge Hyde signed a statement that he was "aware of the inappropriateness" of his actions and he represented that he had "taken steps to ensure that neither court personnel nor county equipment is utilized in any manner or any activity that is not strictly court related."

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[4] Judge Hyde misinterprets canon 3B(11) when in his brief he argues that he did not violate the canon because there was no evidence that he used nonpublic information for any "personal advantage." The canon states that a judge shall not use nonpublic information "for any purpose unrelated to judicial duties."

[5] *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260].

[6] *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1092 [77 Cal.Rptr.2d 408, 959 P.2d 715].

[7] The masters noted: "The penal code is patently irrelevant to the conduct at issue. Judge Hyde cannot seriously contend that he was consciously acting pursuant to the penal code when he accessed the DMV records, nor that the penal code provides a justification for his actions. There was no case pending involving the driver and even if there had been, Judge Hyde would be disqualified from taking any judicial action because he was a percipient witness."

When Judge Hyde asked Ms. Silva to access the DMV records, he was "acting in his judicial capacity."[8] Judge Hyde did not give Ms. Silva advice, but made a request as a judge to a clerk to perform a task that was a normal duty for a clerk. Ms. Silva could not reasonably have been expected to refuse. In his testimony before the masters, Judge Hyde conceded that he was acting as a judge when he asked Ms. Silva to access the DMV records.

**(4)** Judge Hyde's contention that the commission is collaterally estopped from finding that he acted in his judicial capacity is without merit. The first requirement of the doctrine of collateral estoppel is that "the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated . . . ."[9] One of the findings in Judge Hyde's May 10, 1996 public censure is that between "1991 and 1995, Judge Hyde asked various court employees to access DMV records for the purpose of obtaining information regarding motorists that was not related to court business." The public censure notes that the "stipulated facts establish repeated instances of conduct prejudicial to the administration of justice," and in a footnote states: "The use of DMV records for personal purposes comes very close to willful misconduct in office. The stipulated facts do not afford, however, clear and convincing evidence that Judge Hyde's actions were performed in a judicial capacity. *Dodds v. Commission on Judicial Performance*[, *supra*,] 12 Cal.4th 163." The commission's finding of repeated instances of prejudicial conduct did not require a determination of whether Judge Hyde had acted in his judicial capacity because actions by a judge not committed in a judicial capacity may constitute prejudicial conduct.[10] The commission's footnote, rather than adjudicating a necessary basis for the commission's action, was a warning—not heeded by Judge Hyde—that accessing DMV materials for personal purposes might well constitute willful misconduct. In sum, the commission is not estopped from concluding that Judge Hyde acted in a judicial capacity when he directed Ms. Silva to access DMV records.

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[8] This phrase is defined by the Supreme Court in *Dodds v. Commission on Judicial Performance, supra,* 12 Cal.4th at page 172.

[9] *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910 [226 Cal.Rptr. 558, 718 P.2d 920].

[10] In *Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th at pages 1092–1093, the court explained: "Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is '*either* "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" [citation] *or* "willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity" [citation].' (*Doan* v. *Commission on Judicial Performance* [(1995)] 11 Cal.4th [294,] 312 [45 Cal.Rptr.2d 254, 902 P.2d 272], original italics.)"

B. *Count Two*

1. *Findings of Fact*

On November 1, 2000, Arthur Sims, the new Alameda County Court Executive Officer, made an initial visit to the Pleasanton courthouse. He was given a tour of the facilities by two members of the clerk's office, Michelle Sunseri and Sue Stewart. Following the tour, Mr. Sims was taken by them to a break room in the civil clerk's area to meet court staff.

Judge Hyde, who had been on the bench when Mr. Sims stopped by his department, came to the break room to meet Mr. Sims, whom he had not met before. Judge Hyde started telling anecdotes and stories about the history of the court, which had been located in Livermore until the late 1980's. Staff members[11] were entering and leaving the room and Ms. Stewart was seated within a few feet of Mr. Sims.

One of the stories Judge Hyde related to Mr. Sims and Ms. Stewart was about two people in a car engaged in oral sex in the courthouse parking lot, one of whom was a former court employee. Judge Hyde did not have an intimate conversation with Mr. Sims, but spoke in a manner that could be heard by the employees who were in the break room. Mr. Sims and Ms. Stewart heard Judge Hyde tell this story and use the term "blow job." Ms. Stewart was "completely embarrassed" that the judge related this story and used this language in the presence of the new court executive officer. Mr. Sims testified that he found Judge Hyde's statement "kind of strange, kind of weird." The masters found, and the commission agrees, that Judge Hyde's purpose in telling anecdotes and stories about the old courthouse was to be entertaining.

2. *Conclusions of Law*

**(5)** Judge Hyde's conduct constitutes "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) Prejudicial misconduct does not require actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office.[12] The judge's intent or motivation is not a significant factor in assessing whether prejudicial misconduct has occurred.[13] Prejudicial misconduct includes " ' "conduct which a judge undertakes in good faith but which nevertheless would appear

[11] There was testimony that at this time all the employees of the clerk's office were female.

[12] *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams*).

[13] *Adams, supra,* 10 Cal.4th at page 878.

to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office . . . .' "[14]

**(6)** Under the circumstances, Judge Hyde, by telling a sexual story using the particular language, violated canons 1, 2A, and 3B(4).[15] The commission agrees with the masters that: "It is irrelevant whether or not the anecdote or story was true, as the judge asserts; its veracity is not at issue. And the judge's contention that he was merely repeating a story that had been told to him using the term 'blow job' is not a defense; repetition of such an offensive, sexual story in these circumstances demeans the judiciary."

C. *Count Three*

1. *Findings of Fact*

In December 1999, the judge's daughter, Suzanne Hyde, was involved in a minor car accident in a Pleasanton shopping mall. Ms. Hyde decided to sue the other driver in small claims court in Pleasanton. On December 21, 2000, Judge Hyde brought the paperwork for his daughter's small claims case to the clerk's area to be filed. He gave the paperwork to a clerk and asked for the case to be set for night court. The case was set for the night of January 23, 2001.

Small claims cases were heard in the Pleasanton court during the day and on one evening per month. Judges were assigned to the night calendars, and the daytime small claims matters were usually heard by attorneys sitting as pro tempore (pro tem) judges. The judges sometimes switched their night court calendars with each other, and pro tems were occasionally used.

When the January 23 hearing date was set for Ms. Hyde's case, the judges' assignments to the night court calendars had not been made. On January 3, 2001, the administrator sent a memorandum to the judges and clerical staff setting forth the judges' night court assignments for 2001. On this schedule, Judge Hyde was assigned to hear night court on January 23.

On January 8, 2001, clerk Maria Mateo, having noticed that Judge Hyde was scheduled to preside over the January 23 evening small claims calendar,

[14] *Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th 1079, 1104, citing *Doan v. Commission on Judicial Performance, supra,* 11 Cal.4th 294, 312.

[15] Canon 3B(4) states that a judge "shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." Judge Hyde met with Mr. Sims in his "judicial capacity . . . ." The commission rejects the argument in Judge Hyde's brief that because canon 3B is entitled "Adjudicative Responsibilities," canon 3B(4) does not apply when a judge is acting in his or her judicial capacity, but is not exercising an adjudicative responsibility.

called Ms. Hyde and left a message that her court date would need to be rescheduled. The next day, Judge Hyde approached Ms. Mateo and told her to keep Ms. Hyde's case on the January 23 calendar.[16]

Around midafternoon on January 23, 2001, a clerk reminded Judge Hyde that he was scheduled to preside in night court that evening and that his daughter's case was on the calendar. Judge Hyde testified before the masters that he had forgotten that he was scheduled to preside that evening.

Judge Hyde then called longtime pro tem, John Harding, and asked him to cover the January 23 night court because he had an unspecified conflict. Judge Hyde contacted Mr. Harding because he lived nearby, was well liked and respected by the court clerks and had a reputation for honesty and integrity. Judge Hyde had been acquainted with Mr. Harding since he was a child. He knew Mr. Harding as an adult through their mutual service as directors in the local Rotary Club.

Mr. Harding agreed to handle the January 23 night court calendar. When he saw the Suzanne Hyde case file that night, he realized that the conflict involved a family member of the judge's, and disclosed to the defendant that he knew Judge Hyde. The defendant waived the conflict, and both parties and Ms. Hyde's sister testified. Mr. Harding rendered judgment in Ms. Hyde's favor, but he awarded her less than the full amount of damages she sought.

In January 2001, the assignment of pro tems for small claims calendars was the responsibility of Michelle Sunseri, the secretary to the administrator, Ms. Norcup. Ms. Sunseri kept an organized list of more than 50 pro tems. A certain group of pro tems could be counted on to fill in at the last minute.

Judge Hyde did not ask anyone to find a pro tem for the evening's calendar. The masters found that there was no reason that court staff could not have obtained a pro tem for that evening. The commission concurs with the masters' rejection of Judge Hyde's claim that his call to Mr. Harding was

[16] The masters rejected Judge Hyde's suggestion that the clerk approached him. They explained: "We find no reason to doubt Ms. Mateo's testimony that it was the judge who approached her. Ms. Mateo discussed the conflict issue with her supervisor before leaving the message for Suzanne Hyde, had no contact with Judge Hyde *before* leaving the message (even under the judge's version of the facts), had chosen to leave a message for the litigant, not her father, and had done so only the day before. It would not make sense that Ms. Mateo, an experienced clerk who was promoted to supervisor shortly thereafter, would the next day choose to initiate a conversation with Judge Hyde and ask him what *he* wanted to do about scheduling, as Judge Hyde claims. On the other hand, it does make sense that the judge would approach Ms. Mateo—a message for his daughter had been left the day before, the judge admits generally that he discussed the status of the case with his daughter, and most significant, he clearly had a definite opinion that the case should not be continued."

not unusual. Ms. Norcup, Ms. Sunseri, Ms. Stewart and Judge Hugh Walker all testified that judges did not help in obtaining pro tems. Mr. Harding testified that other than on January 23, he has never been called directly by a judge to serve as a pro tem.

2. *Conclusions of Law*

a. *Telling Clerk to Keep the Date*

**(7)** Judge Hyde's prevention of the continuance of his daughter's small claims case constituted prejudicial misconduct and violated canons 1, 2A, 2B(2) and 3E(1) (a judge shall disqualify himself in any proceeding in which disqualification is required by law).

Judge Hyde acknowledged that he was disqualified by law from any proceeding in which his daughter is a party. Yet he continued to be involved in his daughter's case by telling the clerk to keep the January 23 date, solely for the admitted reason of his daughter's convenience. Judge Hyde used the authority of his position to confer a benefit on his daughter.

The masters concluded that Judge Hyde's intervention constituted prejudicial misconduct rather than willful misconduct because there was evidence that "Judge Hyde would have made efforts to maintain a trial date in order to avoid the inconvenience to a litigant in any case where a conflict existed." Accordingly, the masters declined to find that Judge Hyde acted in "bad faith." The commission questions whether a "corrupt purpose" of knowingly benefiting a relative should be ameliorated by a finding that the judge would have extended a similar benefit to any other litigant, but, in this particular case, the commission accedes to the masters' conclusion that Judge Hyde's intervention with the clerk constituted only prejudicial misconduct.

b. *Picking the Pro Tem*

Judge Hyde's selection of his replacement also constituted prejudicial misconduct and violated canons 1, 2A and 3E(1). By selecting the pro tem who would hear his daughter's case, Judge Hyde at a minimum created the appearance of using his position to gain an advantage for his daughter. The appearance of attempting to help was exacerbated by the fact that he did not call a randomly selected pro tem, but someone with whom he had a social relationship. Judge Hyde contends that Mr. Harding was one of the most respected pro tems and that any pro tem would have ruled as Mr. Harding did. The commission agrees with the masters that even if these contentions are true, they are irrelevant. As the masters explained, the "issue is not

whether the judge's conduct affected the case outcome (which was not alleged), but the propriety of the judge's involvement in his daughter's case."

When reminded of the conflict on the evening calendar, Judge Hyde should have allowed the clerk to select a pro tem. However, the commission agrees with the masters that Judge Hyde did not act in "bad faith" when he immediately called Mr. Harding.

D. *Count Four*

1. *Findings of Fact*

On June 14, 2000, Judge Hyde sentenced Eddie Streeter on a charge of misdemeanor injury to a child. The sentence included three years of probation.

A year later, while Judge Hyde was on vacation, a letter from Mr. Streeter to Judge Hyde arrived at the Pleasanton courthouse. In the letter, Mr. Streeter requested that his probation be considered fully satisfied because he and his family were relocating out of state and he had completed the court-ordered program of counseling. Mr. Streeter's letter also thanked Judge Hyde for getting directly involved in pulling his family together and perhaps saving him and his son from further self-destruction.

In Judge Hyde's absence, Judge Walker held a hearing on Mr. Streeter's request. Judge Walker granted his request for early termination of probation and dismissed the action pursuant to Penal Code section 1203.4.

On the minute order of Judge Walker's ruling, a clerk noted, "Judge Hyde to see the letter." Judge Hyde testified that when he returned from vacation the letter and court file were on his desk. Judge Hyde wrote Mr. Streeter a letter dated July 5, 2001, which read in part: "There is no problem with you leaving the state. And, not only can you leave, but I am terminating your probation on an early basis, if for no other reason than you have truly earned it. . . . I am further enclosing a 1203.4 form for you to sign and submit to the Court. You need not be present at the hearing, but may if you wish. This allows the plea of guilty to be withdrawn and the matter dismissed and thus be off your record for most purposes."

Judge Hyde did not send a copy of the letter to the district attorney's office or to the defense attorney. Judge Hyde testified that within a relatively short time he told the prosecutor and the defense attorney that he had sent the letter to Mr. Streeter.

The commission accepts the masters finding that Judge Hyde knew that Judge Walker had already terminated Mr. Streeter's probation when he wrote his July 5 letter to Mr. Streeter. Judge Hyde admitted that the letter was "inarticulately written" and explained that the purpose of the letter was to ensure that Mr. Streeter's file contained a completed Penal Code section 1203.4 form. In response to Judge Hyde's letter, Mr. Streeter submitted a written petition under Penal Code section 1203.4. At a hearing on July 11, 2001, Judge Hyde gave Mr. Streeter a copy of the filed section 1203.4 form.[17]

2. *Conclusions of Law*

**(8)** Judge Hyde committed improper action in failing to provide the prosecutor or the defense attorney with a copy of his letter to Mr. Streeter and failing to give the prosecutor notice of his letter or an opportunity to respond. Judge Hyde's action violated canons 1, 2A and 3B(7) (prohibiting certain ex parte communications).

E. *Count Five*

1. *Findings of Fact*

In July 2000, Judge Walker sentenced Karissa Kernan on a misdemeanor charge of alcohol-related reckless driving (reduced from driving under the influence). Her sentence included three years of court probation.

In June 2001, Ms. Kernan filed an application to join the Air Force National Guard to pursue a nursing degree. The enlistment was to be a part-time position requiring attendance every other weekend. Ms. Kernan was told that the only factor preventing her enlistment into the military was her probation.

Although Judge Walker had sentenced her, Ms. Kernan called Judge Hyde around October 23, 2001, because she knew him. When she identified herself, Judge Hyde knew who she was immediately. She is the daughter of Patrick Kernan, an attorney and president of the school board. Judge Hyde had known Mr. Kernan and his children for many years. He had worked with Ms. Kernan when she was in high school on a community volunteer project serving Thanksgiving dinner.

The masters noted that Ms. Kernan's memory of what was said during the telephone conversation was not totally reliable. However, based on Judge

[17] Judge Hyde's actions in accepting the written Penal Code section 1203.4 form, holding a hearing, and giving Mr. Streeter a copy of the filed form, belie the argument in Judge Hyde's brief that he could not violate canon 3B(7) because there was no pending or impending matter.

Hyde's admissions and the commonality of their testimony, the masters found that: "Ms. Kernan told Judge Hyde she was on probation for driving under the influence of alcohol. She told him she intended to join the military, but she was still on probation. She asked whether probation is ever terminated early so the defendant can get into the service. Judge Hyde told her that 'we do it all the time.' Judge Hyde instructed Ms. Kernan to go to the clerk's office and have her case added to the calendar, the usual practice."

After the telephone conversation, Ms. Kernan went to the criminal clerk's window and told clerk Beth Duarte that she had had a "personal conversation" with Judge Hyde and wanted her matter added to the calendar. At that time in the Pleasanton court, defendants could have their matters added to the calendar by asking at the clerk's window. The clerk's first choice of department was the judge who last heard the case. Based on Ms. Kernan's comments, Ms. Duarte added her case to Judge Hyde's calendar even though Judge Walker had last heard the case.

In court, Judge Hyde called the case by saying, "Karissa Marie Kernan. What can I do for you?" This gave the impression that Judge Hyde did not know what Ms. Kernan wanted, and was therefore misleading. Judge Hyde testified before the masters that he already knew what Ms. Kernan wanted when she came into court that day. Nonetheless, Judge Hyde did not disclose to the prosecutor that he had had the ex parte telephone conversation with the defendant. Nor did he disclose his relationship with the defendant and her family.

Ms. Kernan told Judge Hyde in court that she needed to have her probation waived to go into the military. Ms. Kernan offered no proof that she was enlisting and Judge Hyde did not request any. As a result, it was never revealed that the contemplated military service would only be part time. Judge Hyde asked the prosecutor if he had any objection to Ms. Kernan's request; he did not. Judge Hyde granted Ms. Kernan's request and terminated her probation.[18]

2. *Conclusions of Law*

**(9)** Judge Hyde's failure to disclose his discussion with Ms. Kernan and his relationship to her family constituted prejudicial misconduct and violated

[18] The masters noted that a veteran prosecutor testified that he has never agreed to an early termination of probation based on a part-time enlistment. They also commented: "Judge Hyde has attempted to rely on the prosecutor's non-objection to the termination of probation in order to minimize this charge. However, the decision to grant or deny the defendant's request was Judge Hyde's. Moreover, because the prosecutor was totally unaware of the ex parte conversation and the judge's relationship with the defendant and her family, he was not in an informed position to make an objection."

canons 2A and 3E(2).[19] Judge Hyde was aware of the requirements of canon 3E as he received a private admonishment in 1997 for failing to disclose a telephone conversation from a friend of a litigant. Judge Hyde suggested that disclosure was not required because he has "lots of friends" in the small community of Pleasanton. The masters observed, however, that the Supreme Court has noted that even in a small town, an objective observer would view failure to disclose a prior relationship and an ex parte communication as prejudicial to the administration of justice.[20]

F. *Count Six*

1. *Findings of Fact*

On Friday, August 24, 2001, Judge Hyde presided over an arraignment calendar. Beau Dempsey appeared for arraignment on a misdemeanor domestic violence charge. Mr. Dempsey, who was in custody, was disruptive in court and made threatening throat-slashing gestures toward his wife, who was in the front row of the audience. Judge Hyde told Mr. Dempsey: "You're already in deep trouble. Write a report on him. Intimidating a witness. Felony. State Prison. . . . Shut up. . . . [H]is bail just went up to one million dollars. . . . Isolate him. Lock him down and get a new report. . . . I want him next time in chains." Mr. Dempsey's arraignment was continued until Monday, August 27. On August 27, Mr. Dempsey again appeared before Judge Hyde. He was arraigned on the misdemeanor, told of the possible addition of felony charges, and referred to the public defender. Judge Hyde told him: "[I]f you ever come into this court and make noise like you did the other day, I'm going to hold you in contempt of court. Every time I hear a noise out of you, it will be a consecutive year in jail. You're looking at a lot of felony state prison time." The next appearance was set for August 29, and Mr. Dempsey remained in custody.

After the August 27 afternoon arraignment calendar concluded, Judge Hyde had a conversation with Mr. Dempsey's wife, Dana Wagner, in the courthouse hallway, close to the civil clerk's window. Ms. Wagner told the judge that she wanted to serve marital dissolution papers on the defendant before he was transported from the courthouse back to the jail, which was located away from the courthouse. Judge Hyde agreed that she should do so.

[19] Canon 3E(2) reads: "In all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification."

[20] *Doan v. Commission on Judicial Performance, supra,* 11 Cal.4th at page 324.

The masters made the following findings, which the commission adopts[21]:

"Judge Hyde accompanied Ms. Wagner to the civil clerk's window and spoke to Ms. Wells on Ms. Wagner's behalf. Judge Hyde told Ms. Wells that defendant Dempsey was in custody, that the defendant had beaten Ms. Wagner, and that they had been married only briefly. The judge also told Ms. Wells that during the defendant's earlier arraignment appearance, the defendant had made a motion as if he were going to slit someone's throat. Judge Hyde imitated the gesture on himself to demonstrate to Ms. Wells what the defendant had done.

"Ms. Wagner had already prepared the marital dissolution papers. The judge told Ms. Wells that Ms. Wagner needed to obtain a fee waiver order for the dissolution papers. He conveyed that the fee waiver process had to happen fast because Ms. Wagner needed to serve the defendant that day, before he was transported back to the jail. Judge Hyde did all the talking while he and Ms. Wagner were at Ms. Wells' window.

"Ms. Wells gave a fee waiver application form to Ms. Wagner. Ms. Wagner and the judge walked to a table in the center of the hallway, in view of and immediately opposite the clerk's window where Ms. Wells was sitting. The judge remained at the table talking with Ms. Wagner for five or ten minutes while she was filling out the form. As they stood at the table, Ms. Wagner's side was to Ms. Wells and Judge Hyde was facing Ms. Wells; although Ms. Wells could not hear them from behind her window, she could see their mouths moving as they talked.

"Either the judge or Ms. Wagner gave the completed fee waiver application back to Ms. Wells. She immediately stamped the completed application with the date and time, which was August 27, 2001, at 3:37 p.m. It and the dissolution papers (which at the time were not stamped until filed, either with the fee or a waiver order) were quickly routed to Commissioner Foland, who heard family law matters.

"Less than an hour later, Judge Hyde went to Commissioner Foland's chambers to check on the status of the fee waiver application. Judge Hyde asked the commissioner if he had reviewed Ms. Wagner's application yet. The judge explained that he was asking because Ms. Wagner was trying to get her in-custody husband served, and the jail van was waiting to transport the defendants from court. Commissioner Foland pulled Ms. Wagner's application out of a basket containing other applications, reviewed it and signed it. Judge Hyde said that he would return it to the clerk himself, so that Ms. Wagner could get the dissolution papers filed and served.

[21] The masters' citations to the record have been omitted.

"Judge Hyde then carried the signed fee waiver order and accompanying dissolution paperwork back to Ms. Wells and handed it to her. Ms. Wells filed and time-stamped the dissolution papers at 4:23 p.m. She filed and time-stamped the signed fee waiver order at 4:28 p.m., which was only fifty-one minutes after the application was filed. This was an unusually fast turnaround time, and was due to Judge Hyde's intervention. Ms. Wells explained that it normally takes 24 hours (and can take up to 48 hours) for the family law commissioner to sign a fee waiver order and return it, and that the clerks' practice is to advise litigants to call the court in a day or two to see if their paperwork is ready."

Judge Hyde and Ms. Wagner then advised the judge's deputy of the situation and the deputy took the dissolution papers to serve them on Mr. Dempsey. Mr. Dempsey was served at 4:40 p.m., while he was still at the courthouse.

2. *Conclusions of Law*

**(10)** Judge Hyde's conduct constitutes prejudicial misconduct. He improperly acted as Ms. Wagner's advocate and violated the basic tenets of canons 1, 2A, 2B(1), 2B(2) and 3B(7). Judge Hyde's conversation with Ms. Wagner concerned much more than ministerial matters such as giving her directions; he became embroiled in the matter. His conduct lessens public esteem for the judiciary and underscores the need for the judiciary to remain impartial. The commission agrees with the masters that Judge Hyde "became angry with the defendant" and that: "[A]n objective observer would conclude that his evident desire to help Ms. Wagner was motivated at least in part by that anger. It is also exacerbated by the fact that Judge Hyde did not recognize that he was embroiled, as he apparently still intended to preside over Mr. Dempsey's case as of August 29 . . . ."

The masters recognized that there can be some degree of informality when dealing with the public in a smaller courthouse such as Pleasanton. They noted, however, that Judge Hyde is an experienced judge, and that he had received an advisory letter in 1998 for assisting a propria persona (pro per) litigant. The masters chastised Judge Hyde for not recognizing "the impropriety of acting as an advocate for someone who was a victim/witness in a case over which he was presiding," and for attempting to justify his action "on the basis that [Ms. Wagner] was somehow morally or rightfully deserving of his assistance."[22]

[22] The masters comment: "However charitable or kind, or however well intentioned, Judge Hyde's conduct ignores his own embroilment with defendant Dempsey. It is not the 'right thing' (as the respondent's attorney argued) for a judge to choose to act as an advocate for a

G. *Count Seven*

1. *Findings of Fact*

On November 14, 2001, Judge Hyde presided over the arraignment of Christopher Plute on felony drug charges. Codefendant Nicole Araiza, who was scheduled for arraignment on the same charges at a later date, was present in the audience. When the case was called, Mr. Plute's attorney mentioned that Ms. Araiza was in the courtroom and she was called forward. Judge Hyde read the charges filed against her, increased her bail from $60,000 to $350,000, referred her to the public defender's office, and remanded her into custody. Deputy Public Defender Ray Keller then became Ms. Araiza's attorney.

The next day, Ms. Araiza filed a peremptory challenge requesting that Judge Hyde be disqualified. Mr. Keller appeared briefly in court. Judge Hyde acknowledged his disqualification and sent the *Araiza* case up to Judge Walker. Judge Hyde made the decision himself that Judge Walker would be his successor judge. Judge Hyde and Judge Walker are longtime friends.

While still on the bench after sending the *Araiza* case to Judge Walker, Judge Hyde telephoned Judge Walker, who was on the bench in his own courtroom. In the phone conversation, Judge Hyde explained his reasons for increasing Ms. Araiza's bail (the substantial quantity of methamphetamine involved, approximately 300 grams, and that a loaded firearm was found in association with the drugs) and asked Judge Walker to "back me up" on his bail increase.

Judge Hyde denied any memory of the exact words, but testified that if Judge Walker recalled the words "back me up," then he must have said so. Judge Hyde admitted that backing him up was the concept of his telephone call. He added, "I had raised the bail, I was concerned, and I wanted it kept that way, and I was upset for being challenged."

Mr. Keller took his file on *Araiza* upstairs to Judge Walker's courtroom. Mr. Keller saw that Judge Walker was on the telephone and correctly suspected that Judge Hyde had called about the *Araiza* case. Mr. Keller confronted Judge Walker, who acknowledged that it was Judge Hyde on the telephone and offered to recuse himself from the *Araiza* case. Mr. Keller declined Judge Walker's offer because he believed Judge Walker would "be bending over backwards to be fair" to Ms. Araiza as a result of the improper

litigant, regardless of the circumstances. There was also no urgency as contended by Judge Hyde. When Judge Hyde assisted Ms. Wagner, defendant Dempsey was scheduled to appear again only two days later."

communication. After a hearing, Judge Walker granted Mr. Keller's motion to reduce Ms. Araiza's bail back to $60,000. The motion was not opposed by the prosecutor.

Although he did not let Judge Hyde know this during the telephone conversation, Judge Walker was very upset by Judge Hyde's call. Later that day, Judge Walker went into Judge Hyde's chambers and confronted him. Judge Walker told Judge Hyde that his telephone call was something that "you just don't do" and that it had "put him [Judge Walker] in jeopardy." Judge Hyde was apologetic and said that it would not happen again. The masters found that Judge Walker initiated the apology and "rejected as self-serving" Judge Hyde's claim that he initiated the apology. The next day, Judge Hyde called Mr. Keller into chambers and apologized to him for having called Judge Walker.[23]

At the hearing before the masters, Judge Hyde claimed for the first time that on November 15, 2001, he was under stress from a particularly difficult court session and that he was "woozy" from Indocin, an anti-inflammatory medication he took for gout. The masters noted that Judge Hyde provided no specific case or event in court that morning that caused him stress and that Mr. Keller did not recall the calendar being busier or more stressful than usual. Judge Hyde provided no corroboration that the medication affected his behavior and he did not mention "wooziness" to either Judge Walker or Mr. Keller when he apologized to them. The commission, as did the masters, "decline[s] to find that Judge Hyde was suffering stress or experiencing the side effects of medication that had any bearing on the conduct at issue."

2. *Conclusions of Law*

**(11)** Judge Hyde committed willful misconduct. Judge Hyde's conduct was unjudicial because it violated canons 1, 2A, 2B(2) and 3B(7), constituted embroilment and was an improper reaction to being disqualified. Judge Hyde clearly acted in a judicial capacity. While still on the bench after being disqualified, Judge Hyde had his clerk telephone Judge Walker, and continued to preside over cases until his clerk was able to get Judge Walker on the phone. When Judge Hyde talked to Judge Walker on the phone, it was "kind of at sidebar," with court still in session and with attorneys and litigants

[23] The masters commented in a footnote: "It is likely that this apology, which Mr. Keller described as emotional, was made in hopes of avoiding a complaint to the commission by Mr. Keller. At the time, Judge Hyde was under investigation by the commission for other conduct now at issue. He had received the commission's first letter just three weeks before. . . . With his prior discipline, including the severe public censure, it is very reasonable to assume that Judge Hyde recognized the grave danger that this misconduct posed to his judicial career if the commission learned of it."

present. Judge Hyde acted in bad faith because his purpose was not the faithful discharge of his judicial duties. A disqualified judge cannot have a proper judicial purpose in initiating an ex parte substantive discussion with his successor judge. A second independent basis for finding bad faith is that Judge Hyde knew he was acting beyond his lawful authority. Judge Hyde, although claiming that he did not "think of it" at the time, admitted in his testimony before the masters that he "knew" at the time that he was acting without authority.

## PRIOR DISCIPLINE

Judge Hyde's present misconduct must be evaluated against the background of his prior discipline.[24] Judge Hyde has previously received three advisory letters, a private admonishment and a severe public censure.

A. *The October 27, 1992 Advisory Letter*

The second paragraph of this two-paragraph letter states that in closing the matter with a confidential advisory letter: "[T]he commission expressed its agreement with your evaluation that a reference to yourself as the 'vacuum cleaner for the court' was clearly inappropriate. The commission also expressed its concern about the appearance of possible bias created by inquiring at the beginning of a proceeding which party has refused to stipulate to a pro tem judge."

B. *The April 25, 1996 Advisory Letter*

The letter addressed four distinct types of misconduct. The first section recited that between January 1991 and December 1995, Judge Hyde "personally participated in the solicitation of funds or in-kind donations from persons other than judges on behalf of charitable organizations and used or permitted the use of the prestige of judicial office for fund-raising." The letter noted that before selling raffle tickets in December 1995, "the presiding judge of [Judge Hyde's] court told [Judge Hyde] orally and in writing that he believed participation in the fund-raising event as described would violate the Code of Judicial Conduct," but that Judge Hyde nonetheless participated in the fund-raising event.

The second section indicated that around April 5, 1995, Judge Hyde "told a female visitor to the court, 'I can get you a job,' took her to lunch and gave

[24] Rule 125(b) of the Rules of the Commission on Judicial Performance states that any "prior disciplinary action may be received in evidence to prove that conduct is persistent or habitual or to determine what action should be taken regarding discipline." Judge Hyde's five prior disciplines were admitted into evidence before the masters.

her a rose from the rose garden [he] cultivate[d] on court property." The letter goes on to state that Judge Hyde later told a reporter from the local newspaper that his "comment about getting the woman a job 'was just an off-hand remark made in an effort to be friendly. I certainly never followed it up, nor did I intend to.' "

The third section noted that over the years, Judge Hyde "used nicknames for female employees that are or appeared to be demeaning or have sexual connotations, and which were offensive either to those who were the subject of such nicknames or to others who heard them. Examples of such nicknames are 'Boom Boom,' 'Breath,' 'Chubbs,' 'Legs,' and 'Mousemeat.' "

The fourth section noted the appearance of embroilment arising out of comments Judge Hyde made to a defendant involved with drugs. The letter recited the following comment by Judge Hyde:

"This is a dope dealer. He keeps coming back. He's scum in our society. He doesn't belong here. I want him in state prison. I want him out of here as fast as he can go. . . .

"Reid, I don't like it, but I'll tell you what, you show up in this court with anything, if I hear about a PV, I'm personally going to call Judge Goodman up and plead with him to give you the maximum time in state prison. . . .

"I hate dope dealers. You want to screw up your own life and blow your brains out, fine. Leave the rest of the people out there alone."

C. *The May 1996 Public Censure*

This severe public censure concluded proceedings that commenced with a seven-count notice of formal proceedings "all generally concerning misuse of the judicial office." Prior to filing an answer, Judge Hyde submitted a proposed disposition with a stipulated statement of facts. Based on that submission, the commission made findings of fact, including the following:

(1) "In the fall of 1990, Judge Hyde asked certain court employees to access DMV records for the purpose of obtaining the addresses of former classmates in connection with a class reunion."

(2) "Between 1991 and 1995, Judge Hyde asked various court employees to access DMV records for the purpose of obtaining information regarding motorists that was not related to court business."

(3) "In 1991, 1993 and 1994, a court secretary performed typing, photo-copying, and other services in connection with a paralegal class which Judge

Hyde taught at a local college. This included typing a lengthy lesson plan, typing mid-term and final examinations, photocopying class materials, mailing out graded final examinations using court envelopes and postage, and typing correspondence."

(4) "On January 14, 1991, Judge Hyde requested that the court secretary type an 'affidavit in lieu of appearance' that he submitted in connection with a complaint regarding a neighbor's dog, which he filed in his personal capacity."

(5) "In 1992, Judge Hyde requested that the court secretary type up his application for a federal judgeship. Judge Hyde then had a discussion with the clerk/administrator regarding the best way to get the application to San Francisco on short notice, and the application was ultimately driven to San Francisco by a court attendant utilizing a county vehicle."

(6) "In 1993 and 1994 there were occasions when Judge Hyde brought his elementary school-aged daughter to work and the court secretary and other court employees assisted in watching her activities. On one occasion in 1993, during her break, a court employee picked up Judge Hyde's daughter from a dental appointment during what would be considered work hours."

(7) "Between 1990 and 1995, the court secretary performed work for Judge Hyde that benefited a particular club, an organization of which Judge Hyde was a member and past president."

(8) "During 1991 and 1992, Judge Hyde requested that the court secretary create a 94-page mailing list for a particular charity; whereupon she also generated copies of a fund-raising letter addressed to those on the mailing list. Additionally, she typed labels, envelopes, by-laws, and personnel policies relating to the charity. The court secretary spent the equivalent of approximately 24 work days on such tasks."

(9) "In November 1991, Judge Hyde and a clerk/administrator had a conversation regarding utilization of the court secretary's time, during which the clerk/administrator formed the impression that Judge Hyde was attempting to intimidate him regarding his job security."

(10) "Between 1991 and 1995, Judge Hyde made sexually related comments toward female court employees which were deemed to be offensive by some court employees who overheard the statements. For example, during the week of October 23, 1995, Presiding Judge Hugh Walker and two division chiefs were having a conversation regarding court policies and procedures when Judge Hyde commented to a female division chief, 'Are we having a PMS day?' "

The commission noted that none of the judge's misconduct concerned "the manner in which Judge Hyde conducted his courtroom proceedings or deported himself while on the bench." The commission further noted that in a signed separate statement, Judge Hyde represented that he was "aware of the inappropriateness of the actions reflected by the Agreed Statement of Facts and assure[d] the Commission that these actions will not be repeated in the future." The commission concluded that in view of Judge Hyde's response to the notice and his assurances that the challenged conduct has ceased and will not resume, "discipline less than removal from office would be appropriate." The commission therefore accepted "the proposed disposition and agree[d] that it will not order that Judge Hyde be removed from office."

D. *The June 25, 1997 Private Admonishment*[25]

The private admonishment concerned Judge Hyde's action in *People v. Pamela Keane*. In December 1995, Ms. Keane pled guilty to driving under the influence of alcohol and was sentenced by Judge Walker to probation on the condition that she serve two days in jail through the sheriff's weekend work program. Ms. Keane served one day in the weekend work program and, on February 29, 1996, Judge Hyde issued an order revoking Ms. Keane's probation for her failure to comply with the weekend work program condition. On March 14, 1996, Ms. Keane appeared before Judge Walker and admitted to the probation violation. Judge Walker ordered Ms. Keane's probation revoked and reinstated on the same terms and conditions, with the exception of increasing her jail sentence to five days.

The notice of intended private admonishment then states the following facts:

"On May 6, 1996 [Judge Hyde] received a telephone call from Robert Rossi concerning the *Keane* case. Rossi is a close friend of [Judge Hyde's] and is also Keane's employer. Rossi told [Judge Hyde] of concerns he had regarding Keane's case and he asked for [Judge Hyde's] advice regarding what she should do. [Judge Hyde] told Rossi to tell Keane to prepare a letter setting forth the details of the incident that led to her probation violation and to appear in [Judge Hyde's] court the next day with the letter.

"On May 7, 1996, Keane appeared in [Judge Hyde's] courtroom and her case was added to that day's calendar. [Judge Hyde] called the *Keane* case later that day, but [Judge Hyde] did not disqualify [himself] or disclose [his] communication with Rossi of the previous day. Keane appeared in propria

[25] The notice of intended private admonishment issued on June 25, 1997. Judge Hyde did not contest the admonishment and, pursuant to rule 114(a) of the Rules of the Commission on Judicial Performance, the admonishment became final 30 days after its issuance.

persona and submitted the letter that Rossi told her [Judge Hyde] had said to prepare. Keane also explained why she had not completed the initial two-day jail sentence and admitted violating her probation. [Judge Hyde] revoked and reinstated Keane's probation on the same terms and conditions, with the exception of modifying the jail sentence imposed by Judge Walker on March 14, 1996 by reducing it from five days to one."

The commission unanimously found that Judge Hyde's failure to disqualify himself or to disclose his discussion with Mr. Rossi violated canon 3E (disqualification) and gave rise to an appearance of impropriety in violation of canon 2A. The commission also found that the discussion with Mr. Rossi was an improper ex parte communication in violation of canon 3B(7).

E. *The February 4, 1998 Advisory Letter*

This advisory letter expressed disapproval of Judge Hyde's "involvement in a pro per defendant's case including [Judge Hyde's] reading an inmate's letter addressed to [him] at the courthouse regarding her receipt of a complaint and summons in an unlawful detainer case, [Judge Hyde's] direction to the clerk's office to send her an 'answer packet' so she could respond to the unlawful detainer complaint and summons and [Judge Hyde's] direction to a clerk to prepare a fee waiver order, which [Judge Hyde] signed." The commission noted that the "inmate/defendant was given additional time in which to respond, without notice to the other side."

The commission viewed Judge Hyde's actions "as providing legal and judicial assistance not available to other pro per litigants," and cited canons 2B (use of the prestige of judicial office) and 3B(7) (as regards ex parte communications).

## LACK OF CANDOR IN FILINGS WITH THE COMMISSION

**(12)** The Rules of the Commission on Judicial Performance spell out the requirements that a judge be forthright and cooperate with the commission. Rule 104 is entitled "Duty to Cooperate; Response by Respondent Judge." Subdivision (a) requires that a judge "shall cooperate with the commission" and provides that a "judge's cooperation or lack of cooperation may be considered by the commission in determining the appropriate disciplinary sanction or disposition."[26] Rule 119 requires that a judge's answer to a notice

[26] Subdivision (a) reads: "A respondent judge shall cooperate with the commission in all proceedings in accordance with Government Code section 68725. The judge's cooperation or lack of cooperation may be considered by the commission in determining the appropriate

of formal proceedings be "as complete and straightforward as the information reasonably available to the respondent judge permits."[27] In addition, rule 106 provides that written communications by a respondent judge's attorney "shall be deemed to be the written communications of the judge." The rule further provides that the signing of any document or statement "warrants that the signer has personal knowledge of the matter contained in the document or statement or has investigated the matter and has a good faith belief in the accuracy of the representations contained in the document."[28]

Although Judge Hyde should have been well acquainted with the commission's rules and procedures, his filings in this discipline proceeding have not complied with the spirit or letter of the commission's rules.

A. *Count One*

Before the masters, Judge Hyde testified that when he arrived at the court, he went to his chambers, probably spent some time in his chambers, and then on his way to his courtroom went through the clerk's office and approached Ms. Silva. This differed from his response to the commission's preliminary

disciplinary sanction or disposition as well as further proceedings to be taken by the commission but may not be considered in making evidentiary determinations."

[27] Subdivision (c) reads: "The answer shall be as complete and straightforward as the information reasonably available to the respondent judge permits. The answer shall (1) admit each allegation which is true, (2) deny each allegation which is untrue, and (3) specify each allegation as to the truth of which the judge lacks sufficient information or knowledge. If a respondent judge gives lack of information or knowledge as a reason for a failure to admit or deny any allegation, the respondent judge shall state in the answer that a reasonable inquiry concerning the matter in the particular allegation has been made, and that the information known or readily obtainable is insufficient to enable the respondent judge to admit or deny the matter."

[28] Rule 106 reads:

"A judge may be represented by counsel in all commission proceedings. The written communications of counsel shall be deemed to be the written communications of the judge. Counsel has the authority to bind the judge as to all matters except a stipulation as to discipline.

"Any paper filed with the commission and any written statement made to the commission or to its staff must be signed by the judge or the judge's counsel. A stipulation as to discipline must be signed by the judge. The signing of any document or statement warrants that the signer has personal knowledge of the matter contained in the document or statement or has investigated the matter and has a good faith belief in the accuracy of the representations contained in the document or statement.

"This rule applies to the filing of responses to staff inquiry letters and preliminary investigation letters under rules 110 and 111, to the filing of answers in formal proceedings under rule 119, and to all other filings with the commission and the masters and all other correspondence with the commission."

investigation letter as well as his verified answers[29] which read: "[I]mmediately upon arriving at the courthouse, Judge Hyde walked to the clerk's office and reported the incident to a clerk in the traffic department."

Also, Judge Hyde's verified answer "specifically denie[d] the allegation in Count One that he 'asked a traffic clerk to obtain information from the Department of Motor Vehicles (DMV) regarding the identity of a driver that [Judge Hyde] said had cut [him] off.' " However, Judge Hyde testified before the masters: "I just said, Nise, will you run this guy's record? He cut me off. I think that's all I told her. I didn't have time to go into a big explanation."

B. *Count Two*

Before the masters, Judge Hyde admitted that to be entertaining he initiated the story about the sex act during his conversation with Mr. Sims in the break room. In his answer, Judge Hyde had asserted that "at a holiday party at the end of the day in the courthouse lunchroom . . . several strange and wild incidents regarding the old Livermore courthouse were being told." The answer goes on to state: "One of the true stories that was discussed by several of the individuals attending the party was that a certain unnamed court administrator was caught once with another individual in a male-male act of fellatio in the parking lot of the old courthouse. Judge Hyde confirmed that the story was not just a rumor floating around about the old courthouse, but was a true story. It was related that one judge wanted to fire the individual while another judge did not. Ultimately the individual was not fired. The story was just one of many that day that was being recounted. The story was not told in a malicious fashion nor was it meant to be offensive and at the time it did not appear that anyone was offended."

During the hearing before the masters, trial counsel asked Judge Hyde about this answer and he admitted that the answer was incorrect, that he told the story, and that he used the term "blow job."

C. *Count Three*

In his answer, Judge Hyde stated that he intended to call a pro tem for the January 23 small clams night court when he first learned in early January that he was scheduled to preside at that session, "but he became busy and forgot about the matter, totally." Before the masters, Judge Hyde testified that he had intended to trade the calendar with some other judge and it was only on the afternoon of January 23—when his oversight was brought to his attention—that he decided to seek a pro tem to cover the calendar.

[29] Judge Hyde's representations on count one in his verified answers to the notice of formal proceedings and the amended notice of formal proceedings are identical.

D. *Count Five*

In his verified answer to count five, Judge Hyde wrote: "Judge Hyde has never had a business or professional relationship of any kind with Ms. Kernan. Judge Hyde does not recall ever meeting Ms. Kernan prior to the incident."

Before the masters, Judge Hyde testified that when he received a phone call from Ms. Kernan, he immediately knew who she was. He stated that she was the daughter of the school board president and that he had known Mr. Kernan and his kids for years.

When the denial of knowledge in his answer was brought to his attention, Judge Hyde stated: "I didn't see that. That's not correct. I mean, I have known Karissa for a long time. I've known all the Kernan kids for a long time. Not real well, but they know me, and I know them."

E. *Count Six*

In his response to the preliminary investigation letter, Judge Hyde stated that he "did recognize that he became upset with Mr. Dempsey's conduct during the proceedings." Judge Hyde continued that he "appreciated that this could potentially affect his impartiality at the next hearing," and accordingly, he "recused himself from the case prior to the hearing." Judge Hyde's verified answer denied the allegation in the notice of formal proceedings that he became angry with Mr. Dempsey. Before the masters, Judge Hyde testified that his answer to the preliminary investigation letter was wrong. "It's an instance where I explained the situation to my lawyer and wrote it down wrong and I didn't catch that."

F. *Count Seven*

On October 17, 2002, the first amended notice of formal proceedings included count seven and alleged that on November 15, 2001, Judge Hyde telephoned Judge Walker and asked him to back him up on the bail increase. Judge Hyde's verified answer was filed on November 4, 2002, less than a year following the incident, and states: "However, after being disqualified, Judge Hyde has no recollection of making any statement to Judge Walker that Judge Walker should back him up on the case as alleged in the First Amended Notice of Formal Proceedings."

At the hearing before the masters, Judge Hyde admitted to making the statement, but claimed that he did not recall the incident until several months

after he had filed his answer, when the defense attorney, Mr. Keller, mentioned that the commission had called him.[30]

## THE MASTERS' COMMENTS ON JUDGE HYDE'S CREDIBILITY

**(13)** The lack of candor indicated by Judge Hyde's filings is consistent with the masters' observations about the judge's testimony before them. The commission, following the Supreme Court's guidance, gives considerable weight to the masters' comments on credibility.[31]

A. *Count One*

The masters found Judge Hyde's "various explanations" to be "less than uniform." They noted the differences between representations made in Judge Hyde's letters and answers and his testimony, and concluded that the "conflicting responses to the Commission's inquiry, and to questions at the hearing, cast doubt upon Judge Hyde's professed motive to simply protect the public."

B. *Count Two*

The masters found that Judge Hyde was not credible with regard to the specifics of this allegation, "in light of his prior inconsistent statements

[30] When trial counsel started to question Judge Hyde about calling Judge Walker, Judge Hyde responded:

"Initially, in my response, I said I didn't remember this at all. You're going to ask me about that, I presume.

"And the reason is, when my lawyer presented it to me, presented that I went to Judge Walker to talk to him about this case.

"I said, I never went to Judge Walker. I couldn't remember it.

"Much later than that, after this was progressing, I had an occasion to talk with Mr. Keller, who came to talk to me about some other matters. And he said, I got a call from the Commission, or I've talked to them. And I said, about what? And he goes, the phone call.

"And all of a sudden, it was like a slap in the head, I remembered exactly what it was. And I remember the morning was the very high—high-volume, lots of stuff going on, stressful morning. And I remember about that time, and at that time, I was taking the gout medicine, which causes me sometimes to be a little woozy. That doesn't excuse what happened.

"I don't recall the total colloquy between Mr. Keller and I with regard to the raising of bail. But because of the amount of dope and the weapons involved, I was—when I was challenged, I did something that I don't do. I got angry. I was ticked, because this was a real danger to the community, I felt."

[31] *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1304 [240 Cal.Rptr. 859, 743 P.2d 919] ("We do, however, give special weight to the factual determinations by the masters, who are best able to evaluate the truthfulness of witnesses appearing before them."); see also *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 914 [81 Cal.Rptr.2d 58, 968 P.2d 958]; *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27 [207 Cal.Rptr. 171, 688 P.2d 551]; *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 623 [175 Cal.Rptr. 420, 630 P.2d 954].

denying it." They rejected "Judge Hyde's assertion that he was sitting 'fairly close to' or 'right next to' Mr. Sims at the break room table when the story was told, and the implication that he intended his comments only to be heard by Mr. Sims and not by anyone else."

C. *Count Three*

As previously noted, the masters rejected Judge Hyde's testimony that it was Ms. Mateo who initiated the conversation with him. They commented that Judge Hyde "has given completely inconsistent and irreconcilable accounts of his intentions between January 9, when he realized the conflict, and January 23, when he called Mr. Harding."[32] The masters also rejected Judge Hyde's "claim that his call to Mr. Harding was not unusual, and that he has been asked to secure the services of a pro tem many times in the past."

D. *Count Four*

The masters noted that Judge Hyde's "testimony as to this matter" was credible.

E. *Count Six*

The masters were very critical of Judge Hyde's testimony on this count. They characterized his testimony regarding his contact with Ms. Wells as "both inconsistent and vague."[33] The masters noted that, although Judge

[32] The masters explain: "He has moved from: (1) implying that he always intended that the case be heard by a pro tem, stating that he called one himself because he heard from a clerk at the last minute that the clerk had not located one and because it was not unusual for judges to call pro tems (Response, exh. 2, p. 2); to (2) explicitly stating that it was his intention on January 9 to 'call for a pro tem but he forgot about the matter, totally,' until reminded by one of the clerks on the afternoon of January 23 (Answer pp. 3–7); to, finally, (3) admitting that no clerk ever tried to contact a pro tem, claiming that he believed he was trading calendars with Judge Walker, and claiming that he *never* contemplated even the idea of a pro tem until the moment on January 23 when the clerk reminded him of the case (Hyde RT 87:20-99:24)."

[33] The masters wrote:

"We see no reason to doubt Ms. Wells' rather detailed recollection of events leading up to the point where Judge Hyde admittedly handed her the signed waiver form. This was the first and only time that a judge ever approached Ms. Wells' window with a litigant, or asked for a form on behalf of a litigant. (Wells RT 485:7-24.) For the judge to speak with a clerk on Ms. Wagner's behalf is entirely consistent with his admitted willingness to speak with another judicial officer, Commissioner Foland, on her behalf.

"Moreover, in his response to the first preliminary investigation letter and his answer, the judge never directly addresses the allegation that he accompanied Ms. Wagner to the window and spoke to a clerk on her behalf regarding a fee waiver. (Virtually all of the details of that conversation—including mention of the fee waiver—were set forth in the investigation letter, which is dated only two months after the events in question.) In the response, Judge Hyde states without explanation that he 'merely assisted Ms. Dempsey in *obtaining the forms* she

Hyde testified that "he did not recall any further contact with Ms. Wagner after returning the signed paperwork to Ms. Wells, other than to wish her luck," "according to the judge's response, the judge and Ms. Wagner advised the judge's deputy of the situation, and the deputy then took the dissolution papers and had the defendant served, which we find to be true." The masters also rejected Judge Hyde's testimony that he did not become angry with Mr. Dempsey.[34]

F. *Count Seven*

The masters are very skeptical of Judge Hyde's claim that he did not remember his telephone conversation with Judge Walker.[35] They "find that Judge Walker initiated the apology, and reject as self-serving Judge Hyde's claim that he initiated it." They also question Judge Hyde's motivation for

requested to file her dissolution.' He does not specifically deny the details contained in the investigation letter. (Exh. 1, p. 5, Exh. 2, p. 9, emphasis added.) The Answer states only that he denies asking for an expedited fee waiver. (Answer, p. 15.)

"That denial in the Answer not only contradicts the very detailed testimony of Ms. Wells, but also is inconsistent with the gist of the judge's testimony at the hearing. Judge Hyde believed that time was of the essence, and acted accordingly in order to help Ms. Wagner. For example, he testified that he was unaware of the normal turnaround time, but that it would not have mattered under the circumstances because this was an 'abnormal situation.' (Hyde RT 128:9-14.)

"Judge Hyde's testimony at the hearing regarding his contact with Ms. Wells was both inconsistent and vague, including the potential that Mrs. Dempsey did not yet have a fee waiver application at the time of her hallway encounter with the judge. [Fn. omitted.]

"In sum, to reject Ms. Wells' detailed testimony (which included a visual memory of the judge imitating the throat slashing gesture) would require us to conclude that it was fabricated. No reason was offered to support such a conclusion. [Fn. omitted.]"

[34] The masters wrote:

"The August 24 and August 27 transcripts indicate otherwise. Moreover, Judge Hyde in response to the first preliminary investigation letter stated that he 'did recognize that he became upset with Mr. Dempsey's conduct during the proceedings,' 'appreciated that this could potentially affect his impartiality,' and 'for that reason recused himself.'

"The judge disavowed his response at the hearing and claimed that he recused himself on August 29 solely because of his status as a potential witness. Whether or not anger was the reason for the judge's recusal, he later told Ms. Norcup that he had become angry with the defendant when he made the throat slashing gesture, and we so find."

[35] The masters comment in a footnote:

"Up until the hearing, Judge Hyde had claimed in his response to investigation (Exh. 6), his verified answer, and his prehearing brief, that he had no memory of the alleged telephone conversation with Judge Walker. He concludes each document by stating, 'Judge Hyde has no recollection of making any statement to Judge Walker that Judge Walker should back him up on the case as alleged. . . .' There is no mention of *any conversation* with Judge Walker about the case.

"Judge Hyde exhibited a detailed memory of the *Araiza* case in his response letter and his answer in an effort to show that his increase in bail was warranted. Yet he alleges that he had forgotten calling Judge Walker about it. It is difficult to reconcile Judge Hyde's excellent recall about the bail enhancement with his memory lapse about the phone call by an angry Judge

apologizing to Mr. Keller.[36] The masters decline to accept Judge Hyde's claim that the drug he was taking for gout had some bearing on his conduct. Finally, the masters suggest that Judge Hyde's conduct in *Araiza* reflects the lack of objectivity toward a drug defendant for which Judge Hyde received an advisory letter in 1996.

## DISCIPLINE

**(14)** Once the commission has determined that the allegations of misconduct have been demonstrated by clear and convincing evidence, the commission must determine the appropriate discipline. The Supreme Court has held that the purpose of a disciplinary proceeding "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system."[37]

The Supreme Court has recognized that in determining the appropriate discipline, each case must be considered on its own facts.[38] Nonetheless, the commission looks to opinions of the Supreme Court and its own prior decisions for guidance in exercising its responsibility to determine the appropriate discipline in a particular case.

The commission has identified five factors that are particularly relevant to its determination of discipline in this matter: (1) the number of acts of misconduct; (2) the effect of prior discipline on the judge's conduct; (3) concerns regarding the judge's integrity; (4) whether the judge is likely to continue to engage in unethical conduct; and (5) the impact of this matter on the judicial system.

In addition, the commission considers the mitigating evidence offered by the judge.

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Walker and his emotional apology to Mr. Keller about the whole incident (discussed below). We hasten to add that Judge Hyde had been under investigation by the commission at the time all of this occurred."

[36] In a footnote, the masters state: "It is likely that this apology, which Mr. Keller described as emotional, was made in hopes of avoiding a complaint to the commission by Mr. Keller. At the time, Judge Hyde was under investigation by the commission for other conduct now at issue. He had received the commission's first letter just three weeks before. (Exh. 1.) With his prior discipline, including the severe public censure, it is very reasonable to assume that Judge Hyde recognized the grave danger that this misconduct posed to his judicial career if the commission learned of it."

[37] *Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th at page 1112, citing *Adams, supra,* 10 Cal.4th at page 912.

[38] *Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th at page 1112, citing *Furey v. Commission on Judicial Performance, supra,* 43 Cal.3d at page 1318.

(1) *The Number of Acts of Misconduct*

**(15)** The Supreme Court has noted that the number of wrongful acts is relevant to determining whether they were isolated occurrences or part of a course of conduct that reflects a lack of temperament and ability to perform judicial functions in an evenhanded manner.[39]

In this proceeding, the commission finds that Judge Hyde engaged in two acts of willful misconduct, four instances of conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and one instance of improper action. This misconduct took place over a 15-month period between September 2000 and the middle of November 2001. Furthermore, these acts of misconduct follow five prior disciplines for over 20 other acts of misconduct.

(2) *Prior Discipline*

**(16)** The Supreme Court has often looked at whether a judge has received prior discipline and the effect of such discipline in determining the appropriate discipline for wrongful conduct. In one case, the Supreme Court removed a judge for willful and prejudicial misconduct, but noted that it "would hesitate to remove a judge who showed himself ready, willing, and able to reform under a less severe sanction."[40] The Supreme Court nonetheless removed Judge Doan, noting:

"Lastly, Doan did not learn from her public reproval in 1990 for lending the prestige of her office to advance the private interest of others. She again lent the prestige of her office to advance the private interest of others, even though she had promised not to do so in connection with the 1990 public reproval, in the matters relating to Darlene's nephew Darren Powell in 1992, Meneses in 1993, and Darlene herself in 1993.

"In sum, Doan has had three opportunities for reformation. She will have no more."[41]

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[39] *Fletcher v. Commission on Judicial Performance, supra,* 19 Cal.4th at page 918.

[40] *Doan v. Commission on Judicial Performance, supra,* 11 Cal.4th at page 339; see also *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297 [267 Cal.Rptr. 293, 787 P.2d 591]. The Supreme Court declined to remove Judge Kennick from office because of misconduct noting that "it seems likely that our public censure of each of petitioner's misdeeds would have led him to correct and improve his judicial behavior." (*Kennick*, at p. 341.) The court did remove the judge from office for his persistent failure or inability to perform judicial duties.

[41] *Doan v. Commission on Judicial Performance, supra,* 11 Cal.4th at page 340.

Judge Hyde has received three advisory letters, a private admonishment and a severe public censure. Moreover, most of his present misconduct is repetitious of, or similar to, wrongful acts for which he was disciplined.

The first three counts concern wrongful acts that were previously addressed in Judge Hyde's 1996 censure. The censure found that on numerous occasions Judge Hyde accessed "DMV records for the purpose of obtaining information regarding motorists that was not related to court business." Nonetheless, Judge Hyde subsequently asked a clerk to access DMV records of a person who cut him off in traffic. The censure also criticized Judge Hyde for making sexually related comments. In November 2000, Judge Hyde repeated the offense by reciting, on his own volition, an inappropriate sexual story in front of the new court administrator (whom he had not previously met) and clerk's office employees. In addition, the 1996 censure found that Judge Hyde had requested that a secretary prepare a document that he then filed in a personal lawsuit and had brought his daughter to the court causing court staff to assist in watching over her. This discipline, however, did not sensitize Judge Hyde to the impropriety of intervening in his daughter's small claims case and then personally selecting the pro tem to hear her case.

In June 1997, Judge Hyde was admonished for failing to disqualify himself from a case in which he had received an ex parte telephone call from a friend and for failing to disclose the phone call. Three years later, Judge Hyde talked to Ms. Kernan on the telephone about terminating her probation, but again failed to disqualify himself from subsequently presiding over her case and failed to disclose the telephone call.

In February 1998, Judge Hyde received an advisory letter for providing a pro per litigant with legal and judicial advice. In August 2001, he again became embroiled in a pro per litigant's case, assisting Ms. Wagner with filing her papers and then making sure that the commissioner immediately considered her request.

Judge Hyde's April 1996 advisory letter noted that his comments to a criminal defendant who was involved with drugs were not patient, dignified or courteous. The advisory letter also stated that the comments, which included threatening to call another judge, gave the appearance of embroilment. In 2001, Judge Hyde again became angry with a criminal defendant involved with drugs and this time he called another judge, despite having been disqualified from the matter.

This repetition of wrongful acts identical to, or similar to, the previously disciplined misconduct indicates that the prior discipline failed to motivate Judge Hyde to study the California Code of Judicial Ethics or to change his

behavior. This conclusion finds support in Judge Hyde's testimony before the masters. When asked about his 1996 censure for improperly accessing DMV records, Judge Hyde first tried to distinguish the censure on the grounds that it concerned accessing the names of high school classmates for a reunion. When pressed, Judge Hyde admitted that the censure also covered other incidents of accessing DMV records, but asserted that count one was the only time he had improperly accessed DMV records since the censure. Judge Hyde also admitted that in 1996 he had assured the commission that his offenses would not be repeated and that he had taken measures to ensure that they were not repeated, but before the masters, Judge Hyde could not say whether he had read the code to make sure he knew what he could and could not do. Moreover, during his testimony concerning Ms. Kernan, Judge Hyde only remembered his 1997 private admonishment after he had reread it.

(3) *Judge Hyde's Integrity*

**(17)** It is generally accepted that honesty is a minimal qualification that is expected of every judge.[42] In this case, substantial questions concerning Judge Hyde's integrity are raised by (1) the discrepancies between Judge Hyde's filings and his testimony, and (2) the masters' comments concerning Judge Hyde's credibility. These questions remain despite the commission's review of the record and its consideration of Judge Hyde's oral argument.

Judge Hyde's approach to the final two counts is particularly problematic. Judge Hyde first admitted in his response to the preliminary investigation letter that he became angry with Mr. Dempsey. Then in his verified answer he denied that he had become angry. Before the masters, Judge Hyde testified that when he explained the situation to his lawyer, his lawyer "wrote it down wrong" and Judge Hyde did not catch the mistake. Although this explanation cannot be totally discounted,[43] it seems more likely that Judge Hyde denied becoming angry because (1) his anger would suggest an improper motive for his embroilment with Ms. Wagner's case, and (2) if he admitted to being angry with Mr. Dempsey, he might have to attempt to explain why he did not immediately recuse himself when Mr. Dempsey next appeared before him.[44]

[42] *Fletcher v. Commission on Judicial Performance, supra*, 19 Cal.4th 865, 919, footnote 24; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239].

[43] In his argument before the commission, Judge Hyde stated that he had not read the briefs his attorneys had submitted on his behalf.

[44] Trial counsel did ask Judge Hyde why he recused himself, and Judge Hyde testified:

"Very honestly, when he came on for counsel and plea with the Public Defender, I called the case, and said, what's your plea. And Mr. Ulfelder says, I don't think you can hear this, Judge.

Judge Hyde's representations concerning his activities on behalf of Ms. Wagner are also troublesome. Without directly denying Ms. Wells's account, Judge Hyde attempts to minimize the assistance he provided Ms. Wagner. Judge Hyde, nonetheless, admits that he went to Commissioner Foland's office and inquired as to the status of Ms. Wagner's request for a fee waiver. Judge Hyde's admitted visit to Commissioner Foland supports Ms. Wells's version of Judge Hyde's involvement. Judge Hyde explains his visit as motivated by his concern that Mr. Dempsey be served before he was transported back to the jail. Judge Hyde, however, told the masters that after Commissioner Foland signed the order, he gave it to the clerk or Ms. Wagner, wished Ms. Wagner good luck, and had no further dealings with her. The masters disagree, finding that Judge Hyde advised his deputy of the situation. They further note that the signed fee waiver order was time-stamped at 4:28 p.m. and Mr. Dempsey was served at 4:40 p.m. It seems unlikely that Mr. Dempsey would have been served so quickly without Judge Hyde's encouragement, if not participation.

Judge Hyde's insistence that he did not recall his telephone call to Judge Walker in the *Araiza* matter strains credulity. As noted by the masters, Judge Hyde at all times had a clear recollection of the facts in the underlying case. He insists, however, that when he filed his verified answer, less than a year after the events, he did not remember his telephone call to Judge Walker from the bench, his confrontation that afternoon with an angry Judge Walker, or his emotional apology to Mr. Keller the next morning. Then, at the hearing before the masters, Judge Hyde, for the first time, suggests that on November 15, 2001, he had a particularly stressful calendar and that he was "woozy" as a result of taking medicine for his gout. Judge Hyde offered no medical evidence to support this claim and Judge Walker and Mr. Keller testified that Judge Hyde had not mentioned that he took medication or that he suffered from any side effects from his medicine.

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"I'm like, why? I mean, I just didn't think it through, and a busy morning. He said, you're a percipient witness. I said, you're right, I am. I saw him make the slashing throat thing across his throat to her.

"So I recused myself. And I had no idea what happened to that case. I didn't touch it again."

Trial counsel then asked Judge Hyde if he recused himself in part because he had become upset with Mr. Dempsey and Judge Hyde responded:

"No. I mean, when you're used to dealing with criminal people and they act out, you get upset, and sometimes they get removed. And I think, that's what happened to him.

"I don't get upset very often, but sometimes you get upset. But that's no reason to recuse yourself, unless I really have some strong personal feelings against him, which I didn't at that time. Other than observing him, because I knew—I wouldn't keep the case. It would probably go upstairs for a preliminary hearing."

(4) *Likelihood of Future Violations*

**(18)** In determining whether a judge is likely to again violate the California Code of Judicial Ethics, the commission reviews a judge's approach to the current proceedings and other indicia of the judge's recognition of, and ability to conform to, the standards of judicial conduct. In *Fletcher* the Supreme Court noted: "[T]he record 'belies petitioner's claim that he has learned from past experience and has modified his courtroom behavior. It demonstrates instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in *every* case.' "[45]

In *Kloepfer* the Supreme Court noted that the record did not "suggest that petitioner has, or will be able to, overcome" his lack of judicial temperament.[46]

In its decision to remove Judge Platt, the commission concluded that Judge Platt was "unlikely to conform his future conduct to the canons."[47] Similarly, in its decision to remove Judge Van Voorhis, the commission concluded that it was "close to a certainty" that the judge would continue to violate the California Code of Judicial Ethics if he remained on the bench.[48]

Judge Hyde's repetition of misconduct for which he has been previously disciplined suggests that he cannot, or will not, conform his behavior to the standards of judicial conduct. For example, he argues that his concern for public safety justified his request that a clerk access DMV records on a driver who cut him off in traffic. As has been noted, this defense is not supported by the findings of fact (concerning the timing of his request) and is not legally sound.[49] Thus, a determination that Judge Hyde sincerely believed in this defense would raise concerns that he would always be able to rationalize departures from the standards of judicial conduct.

A similar dilemma is presented by Judge Hyde's defense to count two. Although he had been previously disciplined for making sexually related

[45] *Fletcher v. Commission on Judicial Performance, supra,* 19 Cal.4th 865, 920–921, quoting *Kloepfer v. Commission on Judicial Performance, supra,* 49 Cal.3d at page 866.

[46] *Kloepfer v. Commission on Judicial Performance, supra,* 49 Cal.3d at page 866.

[47] *Inquiry Concerning Platt* (2002) No. 162, Decision and Order Removing Judge Platt from Office, page 19 [48 Cal.4th CJP Supp. 227, 253].

[48] *Inquiry Concerning Van Voorhis* (2003) No. 165, Decision and Order Removing Judge Van Voorhis from Office, page 44 [48 Cal.4th CJP Supp. 257, 308].

[49] Moreover, the defense conveniently overlooks that the 1996 public censure states: "Judge Hyde represents (and the Commission accepts as true) that he has taken measures to ensure that neither court personnel nor county equipment is utilized in any manner or in any activity that is not strictly court-related."

comments, he claims that he was entitled to tell Mr. Sims about a past incident of an employee engaging in oral sex in a car in the court parking lot because it was a true story. The commission questions whether any judge with 20 years of experience really believes that an otherwise inappropriate recitation of a sexual story is justified solely because the story is true. Accordingly, Judge Hyde either does not really believe in his defense or has questionable judgment, or both.

Judge Hyde's willingness to ignore the standards of judicial conduct is further demonstrated by his assistance of Ms. Wagner. Although he received an advisory letter in 1998 for providing assistance to a pro per litigant, Judge Hyde justified assisting Ms. Wagner because Mr. Dempsey, her husband, was dangerous.[50] Contrary to the implication of Judge Hyde's argument, there was no apparent emergency. Judge Hyde knew that Mr. Dempsey was incarcerated and was not due back in court for a couple of days.

Judge Hyde's actions in Ms. Kernan's case demonstrate his inability or unwillingness to appreciate the underlying principles of the California Code of Judicial Ethics. Despite his 1997 private admonishment, Judge Hyde felt that there was no need to disclose his telephone conversation with Ms. Kernan or to recuse himself from the case. He explained to the masters that, although Ms. Kernan kept trying to explain her case and ask questions, he kept reiterating that she should go to the clerk's window. He further stated that disclosure was not required because he knows half the defendants by their first names and it is not "necessary to disclose unless there's some sort of relationship that the law requires." Following his admonishment, Judge Hyde should have known that canon 3E(2) states that a trial judge "shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification."

Judge Hyde's telephone call to Judge Walker in the *Araiza* matter is the most recent demonstration of his inability to conform to the standards of judicial conduct. Judge Hyde was warned in 1996 about a lack of objectivity with drug defendants and for threatening to call another judge. Furthermore, in November 2001, Judge Hyde had just received a preliminary investigation letter from the commission. Accordingly, Judge Hyde had every reason to scrupulously observe the standards of judicial conduct. Instead, Judge Hyde became angry at being disqualified and called Judge Walker, although he

[50] Judge Hyde testified that he volunteered to help Ms. Wagner because "This was a young man that could kill someone. His anger was such. And I was concerned about her. And she had already taken a pretty good beating from this guy, and so she wanted to get him served."

knew that this was unethical.[51] Even when the commission's attention was focused on him, Judge Hyde could not resist repeating an act of misconduct.

(5) *Impact of Misconduct on the Judicial System*

The effect of the misconduct upon the integrity of and respect for the judiciary is a concern inherent in the Supreme Court's determination that Judge Fletcher's removal was "necessary to protect the public and the judiciary's reputation."[52] Similarly, when the Supreme Court removed Judge Adams from the bench, it noted that he had "engaged in successive extrajudicial transactions . . . creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary—a consequence petitioner either deliberately ignored or was unable to appreciate."[53] The importance the court gave to the impact of the misconduct on the judicial system becomes evident when contrasted with the considerable character evidence in support of Judge Adams[54] and Justice Mosk's strong dissent.[55]

This is the sixth time that the commission has had to discipline Judge Hyde. He has already received three advisory letters, a private admonishment and a severe public censure. How could the commission meet its mandate to

[51] Before the masters, trial counsel (Mr. Coyle) and Judge Hyde engaged in the following exchange:

"Q: When you apologized to Judge Walker, as you testified, and to Mr. Keller, weren't you worried that the Commission on Judicial Performance would find out about this incident where you had called Judge Walker on this case?

"A: No. That did not cross my mind. It crossed my mind that I had done something that I shouldn't have done in a fit of anger.

"Q: Well, you recognized it to be unethical, didn't you, what you had done?

"A: I didn't put it in those terms. I just knew it was improper.

"Q: What impropriety did you recognize?

"A: Once you're challenged from a case, you shouldn't be talking to another judge.

"Q: You did not recognize that as an ethical issue?

"A: At the moment, I acted in anger. In the afternoon, I knew it was wrong, and the next morning with Mr. Keller, and I admitted it to both of them."

[52] *Fletcher v. Commission on Judicial Performance, supra,* 19 Cal.4th at pages 921 and 918.

[53] *Adams, supra,* 10 Cal.4th at page 914.

[54] The court noted: "Several judges and numerous attorneys testified to their perception of petitioner's outstanding legal and administrative skills, noting his significant contributions toward streamlining the court system and implementing a 'fast-track' system." (*Adams, supra,* 10 Cal.4th at p. 911.)

[55] Justice Mosk wrote: "All that the majority can say in support of removal is that, in their view, Judge Adams's 'extrajudicial transactions' have 'creat[ed] an appearance of serious impropriety' and have 'thereby tend[ed] to diminish the public esteem of the judiciary . . . .' (Maj. opn., *ante,* at p. 914.) In so many words, they announce that he must be removed because of certain of his acts and omissions off the bench, even though he has in fact properly performed his judicial functions during his long tenure and, as the record shows, has actually increased his community's confidence in its judges. No reasonable person could agree. I surely cannot." (*Adams, supra,* 10 Cal.4th at p. 919 (dis. opn. of Mosk, J.).)

enforce rigorous standards of judicial conduct and to maintain public confidence in the integrity of the judicial system if it does not remove Judge Hyde from office when it finds that he has repeated acts of misconduct for which he has been previously censured and admonished?

When it publicly censured Judge Hyde in 1996, the commission noted that none of Judge Hyde's acts of misconduct concerned "the manner in which Judge Hyde conducted his courtroom proceedings or deported himself while on the bench." Here, Judge Hyde's prejudicial conduct concerning Ms. Kernan and his willful misconduct in the *Araiza* matter concern his deportment on the bench.

When it publicly admonished Judge Hyde in 1996, the commission accepted Judge Hyde's assurances that he was aware of the inappropriateness of his actions and had taken steps to ensure that they would not be repeated. The record before the commission shows that these assurances were hollow. Not only did Judge Hyde repeat some of the very acts of misconduct for which he was disciplined, but it appears that he did not review the California Code of Judicial Ethics to determine what he could and could not do.

In addition, Judge Hyde's repeated acts of misconduct have a deleterious impact on court staff. The clerks have to handle Judge Hyde's improper requests for DMV records, accept his interference with the normal procedures for small claims cases, listen to his sexual stories, and facilitate his assistance to litigants. They know that litigants talk to Judge Hyde on the telephone and that he neither discloses the conversations nor disqualifies himself from the cases. The staff knows that these acts of misconduct have continued despite Judge Hyde's prior discipline.

(6) *Mitigating Factors*

**(19)** The Supreme Court has stated that character evidence and evidence of a judge's contributions to the judicial system do not mitigate or excuse misconduct, but may be considered in determining the appropriate discipline. In *Adams*, the Supreme Court noted: "The foregoing evidence of petitioner's qualifications for and contribution to the judicial system, during the course of a lengthy judicial career, does not mitigate or excuse petitioner's wilful misconduct or prejudicial conduct. (*Spruance* v. *Commission on Judicial Performance* [(1975)] 13 Cal.3d 778, 800 [119 Cal.Rptr. 841, 532 P.2d 1209].) We may, however, and do take these factors into account in considering the totality of the circumstances that are pertinent to our determination of

the appropriate discipline. (See *McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 539–540 [116 Cal.Rptr. 260, 526 P.2d 268].)"[56]

In *Broadman* the Supreme Court reiterated that evidence that a judge is industrious and innovative does not mitigate or excuse willful or prejudicial misconduct, and indicated that the commission had properly considered evidence in mitigation in the determination of the appropriate discipline.[57]

Judge Hyde expressed genuine concern for his community and there is evidence that Judge Hyde was an innovative judge. In addition, the commission recognizes that a number of attorneys testified as to Judge Hyde's contributions to his community, his good character and his good judicial performance. The weight accorded Judge Hyde's concern for his community as a mitigating factor, however, is lessened by the fact that Judge Hyde's 1996 advisory letter and his 1996 public censure chastised him for not keeping his community and judicial activities separate.

## CONCLUSION

**(20)** After having received three advisory letters, a private admonishment and a severe public censure, Judge Hyde is again before the commission. This time the commission has determined that Judge Hyde has committed two acts of willful misconduct, four acts of conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and one act of improper action. The commission has further determined that at least four of Judge Hyde's most recent acts of misconduct were for unethical conduct for which he had been previously disciplined. In addition, Judge Hyde's lack of candor in his filings with the commission and the masters' concerns with Judge Hyde's credibility raise serious questions about his integrity.

The commission has determined that these factors compel the removal of Judge Hyde from office.[58] Judge Hyde's persistence in violating the standards of judicial conduct, his inability or unwillingness to learn from prior discipline, and his general approach to the commission and to this proceeding preclude the commission from having any confidence that he will not continue to violate the California Code of Judicial Ethics if allowed to remain

[56] *Adams, supra,* 10 Cal.4th at pages 911–912.

[57] *Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th at page 1112.

[58] This discipline is based on the commission's findings and conclusions on counts one, two, three, five, six and seven. Although the commission finds that the conduct alleged in count four constituted improper action, the discipline would be the same even if count four were dismissed.

on the bench. The commission concludes that, despite Judge Hyde's contributions to his community and his court, the totality of the circumstances mandates Judge Hyde's removal for "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system."[59]

This decision shall constitute the order of removal of Judge D. Ronald Hyde and, pursuant to the provisions of article VI, section 18 of the California Constitution and rule 120(a) of the Rules of the Commission on Judicial Performance, Judge D. Ronald Hyde is hereby disqualified from acting as a judge.

Commission members Judge Risë Jones Pichon, Justice Vance W. Raye, Judge Madeleine I. Flier, Mr. Marshall B. Grossman, Mr. Michael A. Kahn, Mrs. Crystal Lui, Mr. Jose C. Miramontes, Mrs. Penny Perez, Ms. Ramona Ripston, and Ms. Barbara Schraeger voted in favor of all the findings and conclusions expressed herein and the removal of Judge D. Ronald Hyde from judicial office. Commission member Dr. Betty L. Wyman did not participate in this matter.

[59] *Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th at pages 1111–1112, citing *Adams, supra,* 10 Cal.4th 866, 912.

[No. 174. Nov. 16, 2005.]

INQUIRY CONCERNING JUDGE KEVIN A. ROSS

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance ordered the judge's removal from judicial office, determining that there were four instances of willful misconduct, two instances of prejudicial misconduct, and one instance of improper action under Cal. Const., art. VI, § 18, subd. (d). Through his actions in four unrelated criminal cases, the judge violated Cal. Code Jud. Ethics, canons 1, 2A, 3B. He added new criminal charges against a defendant, thereby intruding into the charging authority of the prosecutor, and incarcerated the defendant summarily, without any pretense of due process, based on the faulty new charges; he called and spoke on the telephone with a defendant in a drug case; he questioned an unrepresented defendant and accused the defendant of lying until the defendant admitted to the alleged facts, despite the defendant's request for counsel; and he accused a defendant of being a pathological liar, proceeded with the hearing in the absence of counsel, and denied the defendant the opportunity for a hearing and the right to present evidence. In addition, the judge violated Cal. Code Jud. Ethics, canons 1, 2A, 3B(9), by discussing details of a pending juvenile case on a general public affairs television program and violated Cal. Code Jud. Ethics, canons 1, 2A, 2B(2), 4A(2), 4D(1)(a), 4D(2), and 4F, by acting as a private arbitrator during filming of a pilot television program for a possible reality series. As to the appropriate discipline, the commission concluded that the judge's manifest and pervasive lack of honesty and accountability throughout the disciplinary proceedings compelled his removal from office, despite testimony that he was a role model and community leader. (Opinion by Marshall B. Grossman, Chairperson.)

## HEADNOTES

(1) **Judges § 6.2—Discipline—Removal—Willful and Prejudicial Misconduct—Pervasive Lack of Honesty Before Commission.**—A judge was removed from office based on four instances of willful misconduct, two

instances of prejudicial misconduct, and one instance of improper action, together with his manifest and pervasive lack of honesty and accountability throughout the disciplinary proceedings. The mandate of the Commission on Judicial Performance to protect the public required nothing short of that ultimate sanction. Although the judge was presented as a role model and community leader, the commission nonetheless was constrained to conclude that he should not remain on the bench.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85.]

(2) **Judges § 6.2—Discipline—Willful Misconduct—Definition.**—The most serious form of judicial misconduct is willful misconduct, defined as consisting of (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. In order to determine whether a judge's conduct is unjudicial under the first prong of the foregoing standard, the conduct is measured with reference to the California Code of Judicial Ethics. The bad faith requirement for willful misconduct is satisfied when a judge is (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority. The judicial capacity prong of the willfulness test has been defined as follows: A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose.

(3) **Judges § 6.2—Discipline—Prejudicial Misconduct—Definition.**—The Supreme Court of California has defined prejudicial misconduct, the second most serious category of judicial misconduct, as follows: Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is either conduct that a judge undertakes in good faith, but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office, or willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's

actions must bring the judicial office into disrepute, that is, the conduct would appear to an objective observer to be prejudicial to public esteem for the judicial office.

(4) **Judges § 6.2—Discipline—Improper Action—Definition.**—The least serious type of judicial misconduct is improper action. It consists of conduct that violates the California Code of Judicial Ethics, but that does not rise to the level of prejudicial misconduct. Improper conduct includes conduct that an objective observer aware of the circumstances would not deem to have an adverse effect on the reputation of the judiciary.

(5) **Judges § 6.2—Discipline—Mitigation—Dishonesty.**—Honesty is a minimum qualification for every judge. If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental. Moreover, a judge who is willing to fabricate justifications for a challenged ruling demonstrates misconduct of the worst kind, evidencing moral turpitude and dishonesty. Lack of candor toward the Commission on Judicial Performance is uniquely and exceptionally egregious.

(6) **Judges § 6.2—Discipline—Failure to Comply with Canons.**—The failure of a judge to comply with the canons suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.

(7) **Judges § 6—Discipline—Willful Misconduct—Disregard of Fundamental Rights—Embroilment.**—The judge engaged in willful misconduct by adding a new charge against a defendant who appeared before him and remanding her to custody without advising her of her constitutional rights. By doing so, the judge intruded into the charging authority of the prosecutor, became embroiled, and deprived the defendant of an impartial judge.

(8) **Judges § 6.2—Discipline—Improper Action—Ex Parte Communications.**—The judge's ex parte telephone contact with Prop. 36 defendant violated Cal. Code Jud. Ethics, canon 3B(7), which prohibits ex parte communication, and constituted improper action.

(9) **Judges § 6—Discipline—Willfull Misconduct—Denial of Right to Counsel—Embroilment.**—The judge engaged in willful misconduct by continuing to question a probationer concerning violation of probation after the probationer requested an attorney.

(10) **Judges § 6—Discipline—Willfull Misconduct—Disregard of Fundamental Rights—Embroilment.**—The judge engaged in willful misconduct and demonstrated embroilment and lack of partiality by refusing defendant's request for a formal probation violation hearing.

(11) **Judges § 6—Discipline—Willfull Misconduct—Demeanor—Embroilment.**—The judge's conduct in accusing the defendant of being a pathological liar and evicting defense counsel from the proceedings violated Cal. Code Jud. Ethics, canon 3B(4), reflected embroilment and constituted willful misconduct.

(12) **Judges § 6—Discipline—Mitigation—Malicious Conduct.**—There can be no mitigation for maliciously motivated unjudicial conduct.

(13) **Judges § 6—Discipline—Political Activity—Measures to Improve the Law, Legal System, or the Administration of Justice—Judicial Outreach.**—The judge's comments on a radio program concerning state proposition which proposed substantial changes to juvenile court law was not prohibited by Cal. Code Jud. Ethics, canon 5D.

(14) **Judges § 6—Discipline—Precedence of Courtroom Activities—Tardiness.**—The judge's arrival at court 10 minutes late because he was speaking on a radio program about a matter concerning the administration of justice did not violate Cal. Code Jud. Ethics, canons 3 and 4A, which require that a judge's courtroom activities take precedence over all other activities.

(15) **Judges § 6—Discipline—Public Outreach.**—The judge's participation in two different, but appropriate, judicial outreach activities, prior to attending a specifically approved program, did not violate the canons.

(16) **Judges § 6—Discipline—Public Comment on Pending Case—Constitutionality of Prohibition.**—A First Amendment challenge to the limits on speech imposed by the canons has been rejected by the California Supreme Court. The state has a strong interest in regulating public comments by a judge on a pending case.

(17) **Judges § 6.4—Discipline—Constitutionality of Canons.**—It is not the prerogative of the Commission on Judicial Performance to decide the constitutionality of a canon promulgated by the California Supreme Court. An administrative agency created by the Constitution, and granted judicial or quasi-judicial authority, lacks authority to refuse to enforce a statute on grounds of unconstitutionality unless an appellate court has determined the statute to be unconstitutional.

**(18) Judges § 6.4—Discipline—Constitutionality of Canons.**—Cal. Code Jud. Ethics, canon 3B(9), which prohibits public comment by judges on a pending or impending proceeding, serves the compelling public interest in maintaining a fair and impartial system of justice.

**(19) Judges § 6—Discipline—Prejudicial Misconduct—Public Comment on Pending Case—Prejudgment.**—The judge's public comments about a confidential juvenile case pending before him, including a discussion of the juvenile's family background, the nature of the charges, and the judge's intention regarding disposition, violated Cal. Code Jud. Ethics, canon 3B(9) and constituted prejudicial misconduct. The judge's comments were improper even though he did not disclose the minor's name. Discussion of the judge's intended disposition of the juvenile gave the appearance of prejudgment.

**(20) Judges § 6.2—Discipline—Canons—Public Comment—Legal Education.**—The concept of legal education in Cal. Code Jud. Ethics, canon 3B(9), refers to education of legal professionals. In the immediately preceding sentence of canon 3B(9), there is an express provision allowing for judges to explain for public information the procedures of the court. Thus, in the canon itself, there is a distinction between discussing issues pending in appellate courts in legal education programs and materials and informing the public about procedures of the court. The legal educational exemption of Cal. Code Jud. Ethics, canon 3B(9), allows only limited comment on pending appellate cases and does not extend to general public outreach activities by a judge.

**(21) Judges § 6—Discipline—Prejudicial Misconduct—Public Comment on Pending Case.**—The judge's televised comments about a case pending in the California Supreme Court about the defendant's family's wealth, the defendant's charisma, the fact that people were watching, and the reckless suggestion that politics may drive the outcome of the case were both unseemly and potentially prejudicial to the litigants. The comments also risked undermining public respect for the court's ultimate decision in the case. The judge committed prejudicial misconduct with his unwarranted and inappropriate comments.

**(22) Judges § 6—Discipline—Prohibition on Public Comment—Exception—Explaining Court Procedures.**—The judge's explanation in a media interview of the role of the various entities involved in a pending criminal prosecution and of general concepts of criminal law did not violate Cal. Code Jud. Ethics, canon 3B(9), as the comments fell within the exception for comments "explaining for public information the procedures of the court."

(23) **Judges § 6.2—Discipline—Arbitration.**—With exceptions, Cal. Code Jud. Ethics, canon 4F, prohibits a judge from acting as a private arbitrator.

(24) **Judges § 6.2—Discipline—Prejudicial Misconduct—Judicial Capacity.**—The California Supreme Court has included a variety of activities within the definition of "judicial capacity," in the context of the three-pronged *Broadman* standard for prejudicial misconduct. Generally speaking, it refers to a judge performing judicial functions, that is, one of the varied functions generally associated with his or her position as a judge. Additionally, however, it also is defined to include the following: If a judge uses, or attempts to use, his or her authority as a judge for improper ends, regardless of location, the court considers the judge to be acting in a judicial capacity.

(25) **Judges § 6—Discipline—Willful Misconduct—Acting as Private Arbitrator—Use of Prestige of Office.**—The judge was acting in a judicial capacity when he attempted to leverage the prestige of his judicial office for his financial and personal gain by appearing as a private arbitrator in a pilot television show. By serving as a private arbitrator during filming of the program and in allowing the use of his judicial title to engage in a commercial or business enterprise, the judge violated Cal. Code Jud. Ethics, canons 2B(2), 4D(1)(a), 4D(2) and 4F, and engaged in willful misconduct.

(26) **Judges § 6.2—Discipline—Purpose.**—The purpose of judicial discipline is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

(27) **Judges § 6.2—Discipline—Appropriate Level—Factors.**—The Commission on Judicial Performance has identified several factors that are relevant to determining appropriate discipline: the number of acts of misconduct; the existence of prior discipline; whether the judge appreciates that he or she committed misconduct; the judge's integrity; the likelihood of future misconduct; and the impact of the misconduct on the judicial system. In addition, court decisions make clear that it is also relevant that the misconduct involves moral turpitude and corrupt intentions.

(28) **Judges § 6.2—Discipline—Factors—Number of Acts.**—The number of acts of judicial misconduct is relevant to the question of discipline, but not according to any rigid formula. The number of wrongful acts by

a judge is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing lack of temperament and ability to perform judicial functions in an evenhanded manner.

(29) **Judges § 6.2—Discipline—Factors—Improper Action.**—Under the California Constitution, improper action is not a basis for a judge's censure or removal (Cal. Const., art. VI, § 18, subd. (d)).

(30) **Judges § 6.2—Discipline—Factors—Appreciation of Misconduct.**—A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform.

(31) **Judges § 6.2—Discipline—Factors—Integrity.**—There are few judicial actions that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission on Judicial Performance in the course of its investigation into charges of wilful misconduct on the part of the judge.

(32) **Judges § 6.2—Discipline—Factors—Likelihood of Future Violations.**—Repeat misconduct by a judge indicates an inability to reform. Implicit in the lack of reform is the risk of yet further violations in the future.

(33) **Judges § 6.2—Discipline—Factors—Positive Qualities.**—The positive qualities of a judge are properly considered as part of the totality of circumstances pertinent to determining appropriate discipline, but do not mitigate willful or prejudicial misconduct.

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**OPINION**

**GROSSMAN, Chairperson.**—

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Kevin A. Ross of the Los Angeles County Superior Court. On August 30, 2004, the commission filed its first amended notice of formal proceedings against Judge Ross in which it charges Judge Ross with the following misconduct:

Count 1 charges that Judge Ross committed a variety of misconduct while presiding over four unrelated criminal cases between August 2001 and April 2003, including that he interfered with and abridged the defendants' constitutional rights to counsel and to fair hearings and against self-incrimination, abused his judicial authority, and became embroiled in two of the pending cases.

Count 2 charges Judge Ross with unapproved absences from court on two different days in connection with community outreach activities.

Count 3 charges that the judge made improper comments about pending cases during appearances he made on *Life & Times Tonight*, a television program produced by and shown on KCET, a public broadcasting station in Los Angeles.

Count 4 charges Judge Ross with acting as a private arbitrator during the filming of a pilot television program that was intended to be and was used to market and promote a proposed new syndicated "reality" series. The tentative name of the show was *Mobile Court*; the television pilot featured Judge Ross adjudicating actual private disputes at the scenes of the controversies.

The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters are Hon. Judith L. Haller, Associate Justice of the Court of Appeal, Fourth Appellate District, Division One; Hon. Vincent J. O'Neill, Jr., Judge of the Ventura County Superior Court; and Hon. Michael A. Smith, Judge of the San Bernardino County Superior Court. The hearing before the masters took place in Pasadena over four days, November 15 through 18, 2004, followed by oral argument before them on February 10, 2005. The masters presented their detailed 77-page report to the commission on April 18, 2005.

The masters concluded that Judge Ross committed one instance of willful misconduct, four instances of prejudicial misconduct, and one instance of improper action. They concluded that the commission had failed to prove any misconduct in five of the subcounts.

For reasons we explain, we determine there were four instances of willful misconduct, two instances of prejudicial misconduct, one instance of improper action, and that no misconduct was proven respecting four subcounts. In addition, there is clear and convincing evidence of a pervasive lack of

candor and accountability on Judge Ross's part during the proceedings, compelling the conclusion that he is fundamentally unsuited to be a judge.

Based on the testimony and evidence adduced at the hearing before them, the masters repeatedly stated in their report that they disbelieved Judge Ross's testimony and claimed defenses. We have the same reaction to that testimony and evidence. Moreover, subsequent to the masters' hearing, Judge Ross has confirmed by his arguments and conduct before this commission that his lack of veracity and refusal or inability to be accountable for his actions are persistent and profound.

Subsequent to the masters' hearing, Judge Ross submitted three briefs to the commission pursuant to Rules of the Commission on Judicial Performance, rule 130. We have studied those briefs, and they are discussed in this decision. We also have had the opportunity to listen to Judge Ross and observe him during his personal hour-long oral argument before us on August 24, 2005. (Selected excerpts from the transcript of the oral argument are set forth and discussed in this decision.) Following the oral argument before the commission, we requested a supplemental brief from the parties on the subject of whether removal was the appropriate remedy in this matter. We have reviewed that fourth brief from Judge Ross.

**(1)** Cumulatively, these presentations that follow the masters' hearing and report move us beyond the masters' expressed doubts concerning Judge Ross's capacity for truth telling. Judge Ross's manifest and pervasive lack of honesty and accountability throughout these proceedings compels our unanimous conclusion that we must remove him from office. Our mandate to protect the public requires nothing short of that ultimate sanction. While Judge Ross is presented as a role model and community leader, we nonetheless are constrained to conclude that he should not remain on the bench.

Judge Ross is represented by Edward P. George, Jr., of Long Beach. The examiners for the commission are commission trial counsel Jack Coyle and commission assistant trial counsel Valerie Marchant.

## II. GENERALLY APPLICABLE LEGAL PRINCIPLES

### A. BURDEN OF PROOF

The commission has the burden of proving the charges against Judge Ross by clear and convincing evidence. (*Doan v. Commission on Judicial*

*Performance* (1995) 11 Cal.4th 294, 313 [45 Cal.Rptr.2d 254, 902 P.2d 272] (*Doan*); *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.] The evidence need not establish the fact beyond a reasonable doubt." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).)

## B. LEVELS OF MISCONDUCT

The levels or types of judicial misconduct that may subject a judge to discipline by the commission are described in article VI, section 18, subdivision (d), of the California Constitution. We summarize each of them.

### 1. Willful Misconduct

**(2)** The most serious form of wrongdoing is willful misconduct, defined as consisting of (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. (*Broadman, supra*, 18 Cal.4th at p. 1091; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*).)

In order to determine whether a judge's conduct is "unjudicial" under the first prong of the foregoing standard, the conduct is measured with reference to the California Code of Judicial Ethics. (*Dodds, supra*, 12 Cal.4th at p. 172; accord, *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 395 [84 Cal.Rptr.2d 466, 975 P.2d 663] (*Oberholzer*).)

The "bad faith" requirement for willful misconduct is satisfied when a judge is "(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, 18 Cal.4th at p. 1092.)

The "judicial capacity" prong of the willfulness test has been defined as follows: "A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated

with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose." (*Broadman, supra*, 18 Cal.4th at p. 1104, citing *Dodds, supra*, 12 Cal.4th at p. 172.)

### 2. Prejudicial Misconduct

**(3)** The Supreme Court has defined prejudicial misconduct, the second most serious category of judicial misconduct, as follows: "Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is '*either* "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" [citation] *or* "willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity" [citation].' [Citation.] In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring 'the judicial office into disrepute,' that is, the conduct would appear to an objective observer to be prejudicial to ' "public esteem for the judicial office." ' [Citation.]" (*Broadman, supra*, 18 Cal.4th at pp. 1092–1093.)

### 3. Improper Action

**(4)** The least serious type of judicial misconduct is improper action. It consists of conduct that violates the California Code of Judicial Ethics, but that does not rise to the level of prejudicial misconduct. (Rothman, Cal. Jud. Conduct Handbook (2d ed. 1999) § 13.29, pp. 386–387.) Improper conduct includes conduct that an objective observer aware of the circumstances would not deem to have an adverse effect on the reputation of the judiciary. (See *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 897–899 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams II*) [judge's acceptance of gifts violated canons but in and of itself did not jeopardize the judge's objective appearance of independence and impartiality and thus was improper action, not prejudicial misconduct].)

## C. JUDICIAL VERACITY

**(5)** The Supreme Court has stated unequivocally that honesty is a minimum qualification for every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239]

(*Kloepfer*).) If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental. (*Ibid.*)

Moreover, a judge who is willing to fabricate justifications for a challenged ruling demonstrates "misconduct of the worst kind, evidencing moral turpitude and dishonesty." (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 535 [247 Cal.Rptr. 378, 754 P.2d 724] (*Ryan*).) Lack of candor toward the commission is uniquely and exceptionally egregious. (*Adams II, supra*, 10 Cal.4th at p. 914; see also *Doan, supra*, 11 Cal.4th at p. 338 [by urging witnesses to conceal information from commission, judge commits willful misconduct]; *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 888–891 [81 Cal.Rptr.2d 58, 968 P.2d 958] (*Fletcher*) [by forwarding copy of altered court record to commission, judge commits willful misconduct].)

In *Adams II*, the California Supreme Court concluded that Judge Adams had engaged in a variety of misconduct, including four instances of willful misconduct in "making material misstatements or omissions to the Commission." (*Adams II, supra*, 10 Cal.4th at p. 914.) The court held that misleading the commission "in particular" warranted the removal of the judge from office. (*Ibid.*) The highest courts in Michigan and in New York also have upheld the removal of a judge based particularly on lack of veracity, including toward the judicial conduct board in each state.

In *Michigan Judicial Tenure Commission v. Ferrara* (1998) 458 Mich. 350 [582 N.W.2d 817], the Michigan Supreme Court ordered Judge Ferrara removed solely for fraud and lying to the press, the master and the commission. The court did not determine whether the initial charges of misconduct had been proven.

Similarly, in *In re Collazo* (1998) 91 N.Y.2d 251 [668 N.Y.S.2d 997, 691 N.E.2d 1021], New York's highest court ordered Judge Collazo removed based on his deceitful conduct during the investigation of the initial wrongdoing, noting that the original misconduct alone would not warrant removal. Commenting on the "lack of candor" and upholding the New York commission's recommended removal, the Court of Appeals stated, "Particularly relevant here is our conviction that 'deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth' [citations]." (668 N.Y.S.2d at p. 999.)

## III. COUNT 1: MISCONDUCT TOWARD CRIMINAL DEFENDANTS

There are four subparts to count 1, each alleging misconduct by Judge Ross in a separate criminal matter over which he presided. Count 1D involves defendant Debra Fuentes. We discuss it first because it shows a shocking abuse of power and disregard of fundamental rights, as well as clear examples of lack of candor and accountability by Judge Ross. The judge's response to the charges and the evidence demonstrate clearly his failure or refusal to acknowledge the implications of his wrongdoing. The *Fuentes* matter, thus, presents an important framework for viewing the remainder of the wrongdoing.

### A. COUNT 1D—*PEOPLE V. DEBRA FUENTES*

#### 1. Findings of Fact

We paraphrase and adopt the following basic findings of the masters. The *Fuentes* hearing occurred during a busy traffic arraignment calendar over which Judge Ross presided on the morning of April 21, 2003. Ms. Fuentes had two old outstanding traffic citations, and the description of her differed on each citation. On the citation from May 1995 (for violating the seatbelt law), she was described as five feet four inches, 250 pounds, and born April 25, 1967. On the other citation from February 1996 (for no driver's license and violating the seatbelt law), she was described as five feet seven inches, 180 pounds, and born April 25, 1965. The signatures on each citation also appear to differ.

At the hearing, Ms. Fuentes presented Judge Ross with a "Wrong Defendant" declaration to assert she was not the person actually cited. Her self-description on the declaration matched the height-weight-birth information on the 1995 citation, but not the other citation. She also gave Judge Ross a grocery store identification card.

Judge Ross examined the Wrong Defendant declaration, the citations and grocery ID card, and then told the defendant, "I believe you're lying to me. I believe all [*sic*] these tickets are yours." He unilaterally added a misdemeanor count to the charges in both cases, and summarily sentenced the defendant to jail for 30 days; Ms. Fuentes was taken into custody immediately. The new charge, noted in Judge Ross's handwriting as "Count 3" in each case, was stated to be a violation of a statute making it a misdemeanor knowingly to

provide false evidence of automobile insurance to a peace officer or court clerk in connection with financial responsibility laws. Judge Ross also wrote on Ms. Fuentes's Wrong Defendant declaration "Don't Return ID card."

The judge entered a "not guilty" plea for the defendant. However, she was never arraigned in the sense of being advised either of the charges against her or of her other constitutional rights, including her rights to counsel and to a hearing. Judge Ross did not notify either the prosecutor or the public defender that he had added misdemeanor charges.

Ms. Fuentes remained in jail until she was released on bail on the evening of April 23—two and one-half days after Judge Ross ordered her incarcerated. She testified before the masters that she was not told the nature of the charges against her, had no idea why she was jailed, and apparently never has learned why Judge Ross ordered her jailed.

In their report, the masters note Judge Ross's testimony that his handling of the *Fuentes* matter "was a complete error" and a "screw-up," and a total "mess." They go on to describe in detail what they call his "troubling statements" that he made in an effort to minimize his "mess," as follows:

a. Taking Immediate Steps to Rectify Error: The masters disbelieved the judge's claim that he "took immediate steps" and did "everything in [his] power to rectify a terrible wrong." We also reject the claim because the clear evidence is to the contrary.

The judge testified that the day after he incarcerated Ms. Fuentes, he told his clerk, Mary Wechter, to contact Commissioner Michael Levanas, the master calendar judge, to have Ms. Fuentes released. The masters found, and we concur, that the judge's testimony is inconsistent with and undermined by the more credible testimony of Commissioner Levanas and Judge David Sotelo (the "site judge," that is, the supervising judge of the court facility where Judge Ross was assigned at the time) concerning when they learned of the *Fuentes* matter. Judge Sotelo testified that he did not learn of the *Fuentes* matter until three days later, on April 24, and that he immediately contacted Commissioner Levanas. The commissioner testified his first knowledge of the case came during that telephone call from Judge Sotelo.

The testimony of these two credible witnesses thoroughly undermines Judge Ross's claim of taking "immediate" remedial action. Nonetheless, and

notwithstanding that the masters had rejected Judge Ross's claim—because it was discredited by the other bench officers—the judge still persisted in arguing before the commission that he promptly took remedial action.

Judge Ross's testimony before the masters that he directed his clerk to contact the commissioner also is inconsistent with the judge's response of September 26, 2003, to the commission's second preliminary investigation letter. There, he represented that he personally made the call to Commissioner Levanas. The masters justifiably disbelieved Judge Ross when he tried to reconcile the two responses by saying that the earlier reference to himself was, in effect, an "imperial I" that included his clerk. Also, in his answer,[1] Judge Ross again stated under oath that he "told Ms. Wechter to contact [Commissioner Levanas]." In any case, Commissioner Levanas's testimony that he first learned of the *Fuentes* matter from Judge Sotelo on April 24 negates an earlier call from either Judge Ross or his clerk.

As noted by the masters, at the time of the *Fuentes* case, Judge Ross knew he was under investigation by the commission concerning his handling of the *Carrillo, Aka* and *Salcido* cases (counts 1A, 1B and 1C, discussed *post*). In fact, Judge Ross testified that the reason he notified Judge Sotelo was that he thought the *Fuentes* case would become part of the commission's pending investigation. By his own admission then, he was worried that his "mess" in the *Fuentes* matter would not just disappear, and was concerned about this commission. We conclude Judge Ross reported himself to his supervising judge to improve his own position later in these proceedings. He was not trying to rectify his errors by minimizing the harm to Ms. Fuentes.

b. Fuentes's Alleged Persistent Arguing: Judge Ross testified he remembered feeling " 'very frustrated' because Fuentes kept insisting that she was not the person on the citations." Even assuming Ms. Fuentes did persist in asserting her innocence, there was no reasonable basis for Judge Ross to have become so "frustrated" in response that he would usurp the function of the prosecutor to add additional charges, and then summarily incarcerate her on the new charges. In fact, the more persuasive evidence shows the defendant was not being persistent. Ms. Fuentes testified before the masters that the proceedings were handled in a summary manner, with little or no opportunity for her even to speak. Previously, she told commission staff that the judge sounded "mad," and that she did not say anything.[2]

[1] The answer to which we refer in this decision is Judge Ross's answer to the first amended notice of formal proceedings, verified by him on September 17, 2004, and filed on September 20, 2004.

[2] All exhibits to which we refer in this decision were admitted into evidence by stipulation.

c. Fuentes's Alleged Presentation of "Insurance Documents": The masters also questioned Judge Ross's claim that he added the charges of providing false evidence of insurance against the defendant because she gave him insurance documents. In our view the claim is fabricated.

Ms. Fuentes specifically denied bringing insurance papers with her to court. Also, when Judge Ross reported the *Fuentes* matter to Judge Sotelo, he made no mention that the defendant presented false insurance documents. Further, if such documents were the basis of charging a new crime, it strains credulity that Judge Ross, a former prosecutor, would have returned them. They were the evidence of the alleged new crime. Finally, the judge's note in the file is "Don't Return ID card"; he did not direct the retention of insurance papers.

Even if insurance papers somehow were involved, Judge Ross has never satisfactorily explained how that fact figured into his decision to charge the defendant with any new crimes. He did testify that a bailiff once told him a judge could add charges concerning false insurance papers. The judge could not recall the name of the bailiff and we disbelieve the story. Additionally, we do not believe Judge Ross, an eight-year veteran prosecutor, in fact thought that as a judge he could make charging decisions, let alone because a bailiff said he could. The entire "insurance papers" story is incredible and we reject it.

As the masters correctly noted, the story about insurance papers is a diversion from the egregious act of the judge adding *any* charges—and his failure to appreciate the latter as serious misconduct. When Judge Ross reported on the *Fuentes* matter to Judge Sotelo on April 24, he mentioned only that he added a "wrong charge"—not that he was *wrong* in adding a *new* charge. Judge Sotelo confirmed that Judge Ross reported he had made a mistake concerning the nature of the charge he had added. Combined, these statements show that three days after he made his mistakes in the *Fuentes* matter, Judge Ross still did not appreciate that his real error was to have usurped the prosecutorial function of adding new charges—not merely charging the wrong offense—and incarcerating the defendant on the spot, in the absence of any due process, based on his newly added charges. (*Ibid.*)

d. Claimed Referral to Another Court for Arraignment and Counsel: The masters rejected Judge Ross's additional claim during his testimony and at oral argument before them that he thought that before Ms. Fuentes was incarcerated, she would be sent to another courtroom, where counsel would

be provided in connection with a proper arraignment. As described by the masters, there was no expectation of such an occurrence in the absence of some action by Judge Ross to bring about such a result. Indeed, by his order, she was to go directly to jail, and that is exactly what happened. We find this claim, too, is fabricated.

e. Claimed Automatic Release on Bail: The masters also found unpersuasive Judge Ross's claim that he had a "reasonable expectation" Ms. Fuentes would be released as a matter of standard court or jail policy. According to the judge, because of overcrowding in the jail, anyone with bail under $26,000 in a misdemeanor or infraction case is automatically released. There is no evidence of such a policy beyond the judge's claim. The fact that Ms. Fuentes was not automatically released raises doubts whether the policy in fact exists at all and, if so, whether it is as Judge Ross describes it.[3]

If in fact Judge Ross realized the true nature of his wrongdoing, or if he truly were concerned about rectifying his mistakes, we are convinced he could and would have taken affirmative and effective steps to *ensure* Ms. Fuentes's prompt release by issuing an order to that effect, rather than leave it to claimed assumptions. (This latter issue is discussed further (*post*, pp. 96–99) in connection with Judge Ross's oral argument before the commission.)

f. Claimed Admission of "Screw-up": A few weeks after the *Fuentes* case, Judge Sotelo reminded various traffic court judges assembled at a meeting that they should not incarcerate defendants for traffic infractions. When one of the other judges expressed surprise at the idea of anyone doing such a thing, Judge Ross stated that he had "screwed up." The masters viewed Judge Ross's "admission" in front of his colleagues as mitigating behavior. However, in light of all the indicators that show Judge Ross neither understands nor accepts the true extent or ramifications of what he did, his "admission" was superficial, at most. Further, mitigation does not operate to counteract basic dishonesty (*Kloepfer, supra*, 49 Cal.3d at p. 865) or maliciously motivated misconduct (*Adams II, supra*, 10 Cal.4th at pp. 911–912, citing *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 800 [119 Cal.Rptr. 841, 532 P.2d 1209] (*Spruance*)).

[3] At oral argument before the commission, Judge Ross made a passing reference that "the bail amounts were incorrectly set" as a seeming explanation for the defendant's nonrelease. It is unclear who he claims allegedly set those wrong amounts, but he appears to suggest it was someone else's fault the defendant remained in jail for two and one-half days.

g. The Realization of Mistake "Trigger Case": In Judge Ross's verified answer to the charges, he stated that his concern that he had made a mistake in the *Fuentes* matter was triggered the following day by a similar case that he handled differently. The judge told a similar story to the masters; he testified that he first became concerned about what he had done in the *Fuentes* matter that same evening, and that the next morning, he had an "immediate" reaction when he handled an "identical" case. However, Judge Ross could remember *no* details at the masters' hearing concerning the supposed "trigger case." The inescapable conclusion is that there was no such case and that the story is made up.

The examiner asserts the story was engendered by the judge's concern about the pending commission investigation and his intent to have this commission believe that he quickly realized his mistake and promptly undertook to rectify it. The judge accuses the examiner of unreasonably expecting the judge to remember the details of the one case from among the estimated 10,000 to 20,000 cases he had handled between the time of "that case" in April 2003 and the time of the masters' hearing in November 2004.

The judge's argument illustrates he is quick to blame someone else—this time, the examiner—and he twists the facts, to adjust them to the moment. The issue here is not the time lapse between April 2003 and November 2004. Judge Ross first raised the issue of the "trigger case" in his answer in September 2004, just two months before the master's hearing. By the time of the hearing, he allegedly had forgotten all details of the alleged "trigger." We believe the judge invented the "trigger case" as part of his discredited claim that he quickly realized his mistake, hoping to minimize his problems later with the commission. Even if that was not his motivation, we do not believe the story that there was a second case that caused an awakening. When Judge Ross called Judge Sotelo three days later, he still did not appreciate what he had done.

h. Claimed "Inability to Find" the Defendant to Release Her: Judge Ross's inability or refusal to be forthright concerning the *Fuentes* matter was driven home during oral argument before the commission. Commission member Judge Risë Pichon asked Judge Ross, in light of his claim that he realized his mistake the morning after he jailed Ms. Fuentes, why he did not simply order her released at once. In his evasive response, Judge Ross contradicted himself repeatedly. The complete series of questions by the three judge members of the commission on this issue, and Judge Ross's comments, are set forth here:

"JUDGE PICHON: Judge Ross, you indicated you were very concerned about your actions in remanding Ms. Fuentes, so you asked your clerk to pull the file for you. [¶] When you had the file pulled, why didn't you immediately release her at that time?

"JUDGE ROSS: In downtown Los Angeles, where we are, we are at the Metropolitan courthouse, individuals who are in custody are sent to another location downtown, called the Twin Tower Jail Facility. At that point, when I realized there had been an error, Ms. Fuentes was not in the building in which we reside. [¶] I contacted my clerk. My first question was, I made a mistake. We need to do something about this. I said, [f]ind out what the status is of the case. She then advised me, to my surprise, that the defendant had not been released. The reason I say it was a surprise to me was because in Los Angeles on misdemeanor cases, especially infractions, if an individual has bail of under $26,000 they are automatically released. It's just how—because the jails are overcrowded. [¶] In her particular case, the bail amounts were incorrectly set. So in my mind, given when I sentence someone to 30 days in jail, usually they are out the next day. So in my mind, she had already been released and was going to be coming back to court.

"JUDGE PICHON: Even though your clerk said she was still in?

"JUDGE ROSS: Well, what happened was, over the lunch hour I told her to give me the case. We went through the entire afternoon calendar, which took some time. Then I said, [f]ind out what happened in this case. [¶] So at the end of the day I said to her, okay, what's the status? And she said, well, she's still in custody. My response was, oh, we have to get her out because she shouldn't be in there and I clearly erred. [¶] What then happened was, my clerk indicated that she called the other courtroom. Because my mindset was she should have been sent to what's called Division 61. Division 61 is the arraignment court. [¶] Now, handling these traffic matters, typically, if one went to trial it went to Division 67. I knew that. All my cases, when they had trials, went to Division 67. [¶] If you look at the documentation that I provided, I wrote down Division 61, with the understanding that she would immediately go to that courtroom. And then once she would be arraigned—and, again, knowing that my actions now were wrong, but at the time thinking that that would happen, she would be released and then she would come back to court. And I relied on that because just a week prior—

"JUSTICE McCONNELL: The question is, why didn't you order her released immediately, when you found out she was still in custody?

"JUDGE ROSS: Because at that point we couldn't find her. We didn't know where she was in terms of being in the system. [¶] So the next day when—this happened on Monday. Tuesday afternoon—

"JUDGE HORN: I'm sorry. You say you couldn't find her?

"JUDGE ROSS: That's what I'm getting ready to explain.

"JUDGE HORN: I don't know what you mean by that.

"JUDGE ROSS: Okay. The incident happened on Monday. Tuesday afternoon is when I indicated we need to have her removed. [¶] When the clerk, based on her representation to me, contacted the jail facility, they didn't have a record of her, based on what my clerk told me.

"JUSTICE McCONNELL: How would the clerk then know she was still in jail?

"JUDGE ROSS: Because it had not showed any type of release. Although, it had indicated that she was still in custody, but for whatever reason she could not be found.

"JUDGE HORN: Doesn't your bailiff usually do this? Doesn't the bailiff usually handle those issues?

"JUDGE ROSS: In this particular instance for me, I typically will rely on my clerk. If it's something that's not worked out, if I need to go to a bailiff, I will do so. [¶] But it had been my experience that in relying on my clerk that things would be handled properly. Which is why I still work with her. [¶] That takes us to, now, Wednesday.

"JUSTICE McCONNELL: No, but she found out that this person was still in jail and you couldn't just order her released?

"JUDGE ROSS: The issue at that point was, she had not been released. They were not clear as to whether or not she had posted bail or not.

"JUSTICE McCONNELL: You just told us they couldn't find her.

"JUDGE ROSS: Right. And that was one of the reasons. Because they didn't know, had she been released? Was she just lost in the system? There was no knowledge of that. [¶] So then Wednesday morning we said, okay, what is the status of this case? My clerk advised me the reason why they can't find her was because she had posted bail, and so she was no longer in custody. And that's why they couldn't locate her. And as it turned out, she had, in fact, posted bail.

"JUDGE HORN: Wasn't that three days later?

"JUDGE ROSS: No, that was two days later. [¶] So at that point I said, okay, it's horrible that she ended up spending these two days in custody. I know that she's now out of custody. The only thing that I can do at this point

is to notify the others that when her case comes back it should be dismissed, that I erred, I know I erred, I have no explanation as to what I was thinking at the time, and I won't make any excuses for it. But that was the scenario of the events."

The foregoing reflects Judge Ross's inability or refusal to confront the reality of his wrongdoing and the seeming ease with which he makes things up. Alternatively, or additionally, it demonstrates he is intentionally trying to mislead the commission. When Judge Ross reported himself to Judge Sotelo on April 24—three days after he incarcerated Ms. Fuentes—he still thought his mistake was to have charged her with submitting false insurance evidence. He still did not realize the gravity of his error in usurping the prosecutor's function. The claims of what he did, or assumed, during the days Ms. Fuentes was behind bars are concoctions. As the masters stated, "Judge Ross's claim that he took immediate steps to rectify his error is belied by the record . . . ."

Although the masters disbelieved and discredited all of Judge Ross's stories related to the *Fuentes* matter, he persists. Whatever the basis for his tales, Judge Ross's lack of candor before the masters and this commission is apparent. He concluded the quoted exchange with the three judge commission members with the statement, "I know I erred, I have no explanation as to what I was thinking at the time, and I won't make any excuses for it." Nonetheless, Judge Ross made a number of unconvincing excuses that are clear and convincing evidence of his efforts to mislead the masters and this commission.

### 2. Conclusions of Law

We agree with the masters that Judge Ross's actions in connection with the *Fuentes* matter constitute willful misconduct. The three elements of that most serious form of misconduct, specified in *Broadman, supra*, 18 Cal.4th at page 1091, are present here. There is (1) unjudicial conduct that is (2) committed in bad faith (3) by Judge Ross acting in his judicial capacity.

**(6)** The masters concluded, as do we, that Judge Ross violated California Code of Judicial Ethics canons 1 and 2A (all further references to a canon are to the California Code of Judicial Ethics) (by creating an appearance of impropriety and undermining the integrity and independence of the judiciary), canon 3B(4) (by failing to be patient, dignified and courteous to persons with whom the judge deals in his or her official capacity), canon 3B(7) (by failing to afford litigant full right to be heard) and 3B(8) (by failing to dispose of all matters fairly). His conduct therefore was unjudicial under the *Broadman* test. (Accord, *Dodds, supra*, 12 Cal.4th at p. 172; *Oberholzer, supra*, 20 Cal.4th at

p. 395.) " 'The failure of a judge to comply with the canons "suggests performance below the minimum level necessary to maintain public confidence in the administration of justice." ' " (*Adams II, supra*, 10 Cal.4th at p. 878, citing *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662 [34 Cal.Rptr.2d 641, 882 P.2d 358].)

(7) Judge Ross was acting in his judicial capacity. He also acted in bad faith because he acted out of pique, irritation or impatience, any of which is a purpose other than the faithful discharge of his judicial duties. Alternatively or additionally, he acted beyond his lawful authority, either with knowledge that it was beyond his authority or with a conscious disregard for the limits of his authority.

The judge clearly lacked authority to add new criminal charges against Ms. Fuentes. In doing so, he intruded into the charging authority of the prosecutor, became embroiled, and deprived the defendant of an impartial judge. (Cf. *Fletcher, supra*, 19 Cal.4th at pp. 907–910 [willful misconduct for judge to have ordered district attorney to add new charges]; *Ryan, supra*, 45 Cal.3d at pp. 535–536 [willful misconduct for judge to have urged district attorney, ex parte, to pursue felony, not misdemeanor, charges].)

Judge Ross testified "it was clear" that he should not have added charges, and he admitted he "*should have known* that, having been a former prosecutor myself." He then added, "having been a former prosecutor, *I knew* that that authority rested with the prosecutorial agency." However, he reverted to the following: "And I had been on the bench long enough to where, in that particular instance, *I should have known* that that was something that I should not have done." When asked to clarify between the two "should have known" assertions and the clear statement "I knew," Judge Ross declined to respond, stating instead, "I'm very comfortable with the answer that I already indicated."

The judge's unwillingness to clarify whether he in fact knew manifests a consciousness of wrongdoing. Further, his experience as an eight-year veteran prosecutor, and his experience on the criminal bench at the time of the *Fuentes* matter, combine to convince us he in fact knew he lacked the authority to add charges. By a parity of reasoning, we also are convinced he knew he lacked the authority to incarcerate the defendant summarily, without any pretense of due process, based on the faulty new charges.

In *Kloepfer*, the judge also had substantial prebench experience as a prosecutor (11 years), from which the Supreme Court deduced that he was "well acquainted with the constitutional and procedural rights of criminal defendants." (*Kloepfer, supra*, 49 Cal.3d at p. 865.) Judge Kloepfer's failure

to use his knowledge and experience to ensure the rights of persons appearing before him suggested an improper motive, according to the court. (*Id.* at pp. 865–866.) We likewise conclude that Judge Ross's failure to use his knowledge suggests that he violated Ms. Fuentes's rights for an improper motive. He acted in bad faith.

We are fortified in the conviction that Judge Ross acted in bad faith in the *Fuentes* matter by the fact that there is equally clear evidence of malicious intent—bad faith—in two of the other counts. In both the *Aka* case (discussed *post*, pp. 110–112) and the *Salcido* matter (*post*, pp. 112–118), Judge Ross trampled on the defendants' rights also while angry or vexed. His knowing disregard of fundamental rights and abuse of judicial authority in *Fuentes* was not an aberration, but rather, part of a pattern that renders Judge Ross unsuited for the bench.

## B. COUNT 1A—*PEOPLE V. LENORE CARRILLO*

### 1. Findings of Fact and Conclusions of Law Concerning Basic Charges

**(8)** The defendant, a long-term heroin user who was seven months pregnant, appeared before Judge Ross on Thursday, August 23, 2001, on three drug charges in one of the earliest cases brought under new laws enacted under Proposition 36.[4] As a condition of probation, Ms. Carrillo was ordered to report for an assessment at the Community Assessment Service Center (CASC) the next day, Friday, August 24, and to return to court the following Wednesday, August 29. She failed to appear on either occasion. Judge Ross concedes he called and spoke with the defendant on the telephone. The commission charges that the telephone communication violated canon 3B(7) which, generally speaking, and as applicable here, prohibits ex parte communications.

The parties dispute the timing and circumstances of the judge's call to the defendant. The masters accepted Judge Ross's basic version of the events. According to the judge, the defendant called the court and left a voice message on a recording system, crying and sounding desperate because she had failed to return to court on August 29 as ordered, and requesting that someone call her. Judge Ross testified that he was working late on August 30, heard the message, and returned the call around 5:30 or 6:00 p.m. that evening.

[4] Proposition 36, the "Substance Abuse and Crime Prevention Act of 2000," was passed by the voters in November 2000 and became effective July 1, 2001. Under it, defendants convicted of nonviolent drug possession charges must be sentenced to probation and drug treatment, rather than incarcerated.

We decline to adopt Judge Ross's version because, as will be discussed, he created a self-serving after-the-fact record of his call that he misrepresented to the commission as having been contemporaneously created. This subsequent action is described more fully (*post*, pp. 104–109), and at a minimum, casts doubt on his claim of what happened.

The timing and circumstances of the call are not critical in terms of analyzing the basic impropriety of the ex parte contact with the defendant. The significant fact is that the masters find, and the judge admits, that he had a private telephone conversation with the defendant in a case then pending before him. We adopt this basic finding. The masters concluded the call was in violation of canon 3B(7), and we concur in that as well.

The commission charges that Judge Ross's ex parte communication also created an appearance of impropriety and undermined the integrity and independence of the judiciary in violation of canons 1 and 2A. The masters rejected this further charge based on the finding that in the setting of a Proposition 36 case, members of the public would approve of a judge being sufficiently concerned about this particular defendant's welfare to make such a call. Based on that reasoning, they concluded that the public would not question the judge's integrity or impartiality because of the telephone contact. Continuing with the analysis, the masters concluded that the phone conversation constituted improper action, not prejudicial misconduct, because an element of the latter is the adverse effect on public esteem for the judiciary that is missing here.

We adopt the masters' analyses and conclusion, and agree that in the unique setting of this early Proposition 36 case, the telephone contact with the defendant constituted improper action, for the reasons described.

### 2. Findings of Fact and Conclusions of Law Concerning Judge Ross's Defenses and Subsequent Actions

a. Judge Ross's Claimed "Emergency" Under Canon 3B(7)(d): Judge Ross asserted before the masters that his ex parte telephone conversation did not violate canon 3B(7) because the situation fell within the exception of subdivision (d) of that canon, allowing ex parte communication "where circumstances require" because of an "emergenc[y]."[5] The masters rejected

[5] In "Respondent's Opening Brief," Judge Ross argues that the telephone call was *proper* and was not prohibited by canon 3B(7). In effect, he urges that there is, or should be, an exception to the prohibition against ex parte communications in a Proposition 36 case. There is no such exception.

the judge's argument on two grounds—that there was no "emergency" within the meaning of the exception, and that the judge failed to promptly notify the parties of the substance of the conversation, an additional requirement for the exception to be available under subdivision (d).

(1) Lack of Emergency: We adopt the masters' finding that the record does not support the judge's claim that the alleged voice mail message triggered an emergency within the meaning of subdivision (d) of canon 3B(7). According to Judge Ross's description of the recording, the defendant was upset and frightened because she *failed to return to court.* That does not suggest an emergency. Further, and again according to the judge's version of his call, he merely told Ms. Carrillo to come to court *the next day* to deal with the issues. That instruction also does not suggest any emergency.

(2) Failure to Promptly Notify the Parties: We also adopt the masters' finding that Judge Ross did not "promptly notify the parties." Judge Ross claimed that he told both the prosecutor and defense counsel of the phone call on August 31—the day after he claims he returned the voice mail message. However, he made no contemporaneous record of the call and there is no evidence both counsel were in his courtroom that day.

Further, both counsel testified that they first learned of the call later. Defense counsel, deputy alternate public defender (DAPD) Charlean Hartsfield, testified that Judge Ross first told her about the call in early October 2001. The prosecutor, Deputy City Attorney Bryan Bowers, has no recollection of knowing of the call until he was contacted by an investigator for the commission.

The masters stated they were "not persuaded Judge Ross accurately recalled when he made this disclosure." Nonetheless, Judge Ross persists in asserting that he gave prompt notice to counsel even though the evidence belies the claim. In both his opening brief and in "Respondent's Response" brief, he repeats the discredited claim of prompt notice, with no new argument or supporting evidence.

In "Respondent's Reply" brief, Judge Ross resorts to out-of-context excerpts from the testimony of the defendant's counsel in a misleading attempt to buttress his argument that he gave prompt notice. In fact, the two excerpts directly contradict the judge's claim. In the first quotation from DAPD Hartsfield, she testified that *her client, not Judge Ross,* told her of the judge's

call. In the second quote, DAPD Hartsfield is repeating something the judge said earlier—"You know I called Ms. Carrillo at home"—to which Hartsfield testified she responded, "Yes, I know *because she had told me*." (Italics added.) Thus, in this second excerpt, it was again *the client, not the judge*, who had told Ms. Hartsfield of the call.

We determine that Judge Ross's claim that he promptly notified counsel of his ex parte telephone contact with the defendant is false.

Judge Ross makes two additional assertions that again demonstrate his penchant for blaming others to divert attention from his own wrongdoing. First, he criticizes DAPD Hartsfield because she delayed disclosing the ex parte communication "to any court officials" until October 2001. The pertinent inquiry is whether Judge Ross had an improper ex parte communication, not whether or when DAPD Hartsfield notified court officials of it.

Second, DAPD Hartsfield did report Judge Ross's ex parte telephone call to Commissioner Jeffrey Harkavy, the acting site judge of the facility where Judge Ross was assigned, who promptly ordered the *Carrillo* case transferred to his own department. Judge Ross attempts to deflect responsibility for his own misconduct by complaining that Commissioner Harkavy thereby had an improper ex parte conversation with Hartsfield. The judge also criticizes Commissioner Harkavy, using strident language, for transferring the case from Judge Ross. Judge Ross also suggests something nefarious on the part of the examiner in not calling Commissioner Harkavy as a witness. The subject of this inquiry is Judge Ross, not others.[6]

b. Judge Ross's Alteration of the Record to Buttress His Version of Telephone Call: Judge Ross also altered a court docket sheet in an attempt to buttress his defense. He then used that altered document, first, to attempt to mislead his supervising judges so they would not report his ex parte communication to this commission. Then, after charges were filed against him by the commission, Judge Ross relied on the same altered document as the basis for a false defense he asserted under oath in his answer to the charges. The developments unfolded as follows:

(1) Judge Ross Learns That Defense Counsel Knows of Ex Parte Conversation; Counsel Reports It: As mentioned, several weeks after the ex parte telephone conversation, Judge Ross learned that the defendant's attorney,

[6] It seems clear that when Commissioner Harkavy spoke with Hartsfield about Judge Ross's improper telephone call, the commissioner was performing legitimate administrative duties, pursuant to canon 3C(3), and was not having an ex parte conversation that was improper under canon 3B(7). Further, the matter pending before the commission concerns formal charges against Judge Ross, not allegations against Commissioner Harkavy.

DAPD Hartsfield, knew about it. DAPD Hartsfield met with Judge Ross in his chambers on or about October 4, 2001, to discuss the fact that she had begun to file selective peremptory challenges (Code Civ. Proc., § 170.6) to disqualify him from her cases. During that meeting, Hartsfield acknowledged that Ms. Carrillo had told her of the judge's phone call. According to a memo dated that same day by Commissioner Harkavy, DAPD Hartsfield reported the phone call to him (the commissioner) on October 4; he in turn reported it to Judge Dan Oki, the supervising judge of the criminal law division of the Los Angeles County Superior Court.

(2) Judge Ross Learns That Defendant's Version of Call Differs from His: By November 8, 2001, word of the ex parte contact had reached Presiding Judge James A. Bascue, who, in a memo on that date, directed Judge Oki to investigate and report back to him. Judge Ross testified that he was contacted by Judge Oki on November 8, and met with him the following day, November 9. Assistant Supervising Judge C.H. Rehm also attended the meeting.

Judge Oki prepared a memorandum on November 9 memorializing the meeting. Judge Ross agreed at oral argument before the commission that Judge Oki's memo was a fair summary of the meeting. According to Judge Oki's memo, the following transpired when the three judges met:

Judge Ross described the telephone call to his supervising judges basically as he describes it in these proceedings, namely, that he responded to the defendant's voice mail message after she had called the court because she had missed a court date. Judge Ross also told his supervising judges that he told Ms. Carrillo to return to court, but that she never reappeared.

Judge Oki responded to Judge Ross at the meeting that the defendant's version differed from Judge Ross's in that she claimed the judge called her at her father's house in the early evening of August 23—the same day as the initial Proposition 36 hearing—and not on August 30. According to Judge Oki's memo, Judge Ross denied to Judges Oki and Rehm that he initiated the first call.

Apart from the discrepancy concerning who initiated the call, the timing of it is crucial to the judge's version of the events. If one were to accept Ms. Carrillo's version that the judge called her on the 23rd, the conversation would have occurred before she was due to report to the CASC on the 24th, and before she was due back in court on the 29th. Thus, there would have been no basis for her to have called the court upset and crying; she would not yet have failed to satisfy the terms of probation. Judge Ross's claim concerning the alleged voice mail message thereby would have been exposed as false.

Continuing, Judge Oki wrote in his memo as follows: "I asked [Judge Ross] to review the files, check the dates, and reconstruct what happened as accurately as he could in a letter to me by November 16 which could be forwarded to Judge Bascue. I indicated that if what he represented is accurate, I would be inclined to recommend to Judge Bascue that the incident not be reported to the [Commission on Judicial Performance]."

(3) Judge Ross Creates After-the-fact Notes of Telephone Call: On November 9, the same day as the judges' meeting, three sets of computer-generated records of court minutes—one for each of the three pending *Carrillo* cases—were printed. During oral argument before the commission, Judge Ross denied that he had printed out the minutes and denied knowing who had done so. Judge Ross admits, though, that he made handwritten notes on one of the printouts of the minutes for August 29, 2001. In the handwritten notes, Judge Ross wrote: "Case Wednesday & BW [bench warrant] called Thursday & said she'd be in on Friday & never showed." The computer-generated records, including the page on which Judge Ross wrote, show that they were *printed on November 9, 2001*.

The import and meaning of the notes is clear: they buttress the judge's version of what he claims occurred back in August. "Case Wednesday" refers to the date, Wednesday, August 29, that Carrillo was ordered to return to court; upon her failure to do so, a bench warrant issued. Judge Ross allegedly then "called [her on] Thursday," and she "said she'd be in on Friday," the next day, "& never showed."[7]

Judge Ross's motivation to make the notes is equally clear. He had just learned on November 9 that his supervising judges knew of the ex parte call. At that time, he also learned that the defendant claimed that Judge Ross made the first call—that is, that she disputed that he was responding to any message from her—and that she placed the timing of the call a week earlier than he claimed. His immediate supervising judge, Judge Oki, had directed Judge Ross to reconstruct what happened, and told him that if he, Judge Oki, was convinced by Judge Ross's version of the events, he was "inclined to recommend" to the presiding judge that the matter not be reported to this commission.[8] Judge Ross had a clear and strong incentive to fortify his version of the events.

[7] Judge Ross used language in the notes that would be consistent with contemporaneous entry—referring to "Wednesday," "Thursday" and "Friday." Normally, given that the entries in fact were made subsequent to the actual events, the language more likely would have been "Wednesday, August 29," "Thursday, August 30," and "Friday, August 31."

[8] The record of these formal proceedings does not reflect whether any of Judge Ross's supervising judges reported the incident to this commission.

Judge Ross stated at oral argument before the commission that "someone" gave him the November 9 computer printouts. He confirmed, however, that he added the notes and gave them to Judge Oki along with a letter dated November 15. The letter contained Judge Ross's version of the events, pursuant to Judge Oki's instructions from the November 9 meeting. In other words, Judge Ross buttressed his explanation to Judge Oki by including his altered docket record. That altered version of the court record bearing Judge Ross's notes is part of the official court file.

(4) Judge Ross Files False Answer to Commission Charges Based on the Altered Record: On September 17, 2004, Judge Ross signed his verified answer to the commission's charges against him, and the answer was filed with the commission on September 20, 2004. In it, the judge purports to describe the proceedings in the *Carrillo* matter on Friday, August 31; according to his chronology, this would have been the day after his phone call. He states in the answer that "the court was anticipating defendant Carrillo's presence."

Continuing, Judge Ross states as follows: "Ms. Carrillo, however, never reappeared in court on her own volition. Because the bench warrants had already issued, nothing additional was noted or transcribed *that day* on the record. *Respondent, however, jotted down in the court's minute order for future reference what had actually occurred concerning the telephone call and Ms. Carrillo's actions.* After adjourning *that day,* Respondent had no further contact with the defendant."

The clear inference in the foregoing sworn statement is that Judge Ross "jotted down" the notes at issue contemporaneously with the August 31 hearing. The reference to the note-making is immediately preceded and followed in the quoted text by descriptions of events of "that day," August 31.

Quite obviously, Judge Ross did not realize, either when he made the notes or when he filed his verified answer, that he had written on a document that showed it was not printed until November 9. By the time of the masters' hearing, however, the judge had received the commission's discovery documents (containing the annotated Nov. 9 printout) and the examiner's prehearing brief. In the brief, the examiner demonstrated the impossibility that the judge made the notes in August, given the November print date of the document on which the judge had written them. Accordingly, during his testimony before the masters, Judge Ross was constrained to concede that it was impossible for him to have made the notes contemporaneously with the events in August.

Judge Ross's verified answer was false in a material respect and we conclude it was knowingly false. By his own testimonial admission, it was not until after signing and filing his answer that he realized he was trapped by the print date on the computer printout. He knew the notes were not contemporaneous, but he did not realize there was irrefutable evidence of the after-the-fact alteration, and of his sworn misrepresentation built on the altered court record.

(5) Judge Ross's Subsequent Assertions Concerning His Conduct: Even after being confronted with his deception, Judge Ross has continued to search for ways to avoid responsibility.

First, as noted, Judge Ross conceded before the masters that his answer could not be correct, given the recorded computer print date. Prior to that full admission, however, he attempted to dodge the issue, at least partially, in the following exchange with the examiner before the masters concerning his annotation on the printout:

"Q. When did you make that note?

"A. I made the representation in my verified answer *that my memory was* that I had made it in August of 2001. When I read the information, as well as your pre-examiner's [*sic*] brief and you pointed out 'you couldn't have done it then, because this document wasn't printed until November 9,' then I had to stop and go, okay, I guess I didn't do it on August 31st. . . ."

There was, in fact, no qualification in his verified answer that the judge's memory was that he made the notes contemporaneously in August. Rather, there was a carefully written statement that the notes were contemporaneous, with no qualification whatsoever.

Second, in Judge Ross's reply brief, he refers to his note on the computer printout, and to his answer as follows: "Respondent admitted to returning Carrillo's phone call when she initially contacted the court by voicemail after warrants were issued on her three cases. If the Special Masters found these facts to be true and the examiner is now conceding the truthfulness of the statement, then the notation made in November 2001 inside the court file accurately reflects the circumstances that occurred."

We reject this explanation. The assertion skirts the obvious—that the alteration was made for the improper purpose of trying to short-circuit a report to this commission; the judge's answer then compounded the deception. Further, the examiner did not concede the truthfulness of the judge's

claim. In the examiner's opening brief (EOB), he stated only that he did not object to the masters' findings and conclusions regarding the *Carrillo* matter.

Finally, when asked during oral argument before the commission about his verified answer as respects the timing of the notes, the judge responded to questioning by the chairperson as follows:

"COMMISSIONER GROSSMAN: Why did you represent in your defense before this commission that you made these notes contemporaneously with the events back in late August 2001?

"JUDGE ROSS: The reason that I initially made that representation was because I recall that I didn't have any particular notes about that event, but it was very vivid in my mind. And so when I actually saw the documents from the examiner, that was really the first time that I had seen that document. And this would have occurred in 2004.

"COMMISSIONER GROSSMAN: You mean the first time since you wrote on the document?

"JUDGE ROSS: Right. So we're talking about three years later, and I'm looking at documents. [¶] And I have a very clear memory of what took place with respect to Mr. [*sic*] Carrillo. So when I saw that document from the examiner, it appeared to me, oh, I guess I actually did write a note indicating what took place. [¶] When the examiner then pointed out that it was stamped November 9, 2001, and so it would not have been possible for me to have actually recorded that, in my subsequent answer I acknowledged that.

"COMMISSIONER GROSSMAN: You had no choice.

"JUDGE ROSS: I could have said, no, that's incorrect. I mean, yes, I had a choice. And my choice was to say, yes, this could not have happened prior to November the 9th.

"COMMISSIONER GROSSMAN: Thank you. . . ."

In this exchange, Judge Ross's evasiveness is apparent and troublesome. His concluding remark also is telling. "I could have said, no, that's incorrect." We understand this to be an assertion, in the face of proof that his notes could not have been contemporaneous, that he still had a choice to assert the contrary, that is, he could have lied. Catching himself, he switched position, and conceded, in effect, that his answer was false. He never explained why he made a materially false representation to the commission.

## C. COUNT 1B—*PEOPLE V. WILFRED AKA*

### 1. Findings of Fact

The relevant proceedings before Judge Ross in the *Aka* case were recorded and the facts are not in dispute. We adopt the findings of the masters, which we summarize.

Mr. Aka was charged in October 2001 with zoning and other violations in connection with holding religious services in his home. He entered into a diversion agreement with the city attorney (the prosecutor in the case) for dismissal of the case if Mr. Aka moved the services elsewhere.

On September 26, 2002, Judge Ross presided over the case for the first time; the purpose of the hearing was a "progress report." Mr. Aka had not been arraigned, and appeared without counsel. The deputy city attorney (DCA) announced at the outset that Mr. Aka had not complied with the diversion agreement; the DCA said he wanted to proceed with the criminal charges. The DCA told Judge Ross that neighbors had signed petitions against Mr. Aka; he asked that Judge Ross enter a plea, schedule a trial, and issue a "cease and desist" order—in effect, a temporary restraining order to prohibit Mr. Aka from holding services pending trial.

Judge Ross informed Mr. Aka of his right to legal representation, to which Aka responded directly, *"I would need to seek legal representation."* (Original italics.) Notwithstanding the defendant's unambiguous request for counsel, Judge Ross immediately asked Mr. Aka questions bearing on the requested restraining order. Many of the defendant's neighbors were in court and loudly disagreed when Mr. Aka stated that only 20 to 25 people attended services. Noting the spectators' vocal reactions, Judge Ross said to Mr. Aka: "Well, we've got a choir over here that's disagreeing with you. Let the church say Amen, okay?" After suggesting that someone—either Mr. Aka or the neighbors were "not telling . . . the truth"—Judge Ross told Mr. Aka to "be straight" with him.

Continuing, Judge Ross told Mr. Aka—in the presence of the neighbors in the courtroom—that if the neighbors took pictures that came into evidence, Mr. Aka would be in a "bad" position, perhaps facing jail time and civil liability. The DCA then handed the judge photographs of Mr. Aka's home, showing an altar and 12 benches. After viewing the photos, Judge Ross began accusing Mr. Aka of lying to him. The judge continued to press the defendant, and continued to accuse him further of lying, until Mr. Aka admitted that as many as 60 people had come to his house, and that he "officiated" at services. After having obtained these incriminating admissions,

Judge Ross entered a not guilty plea on Mr. Aka's behalf and *then* told Mr. Aka that he needed to get a lawyer.

### 2. Conclusions of Law

The masters concluded that Judge Ross's conduct at the September 26 hearing was in violation of canons 1 and 2A (by creating an appearance of impropriety and undermining the integrity and independence of the judiciary), 3B(4) (by failing to be patient, dignified and courteous) and 3B(8) (by failing to dispose of the matter fairly). They also concluded Judge Ross became embroiled in the controversy, abandoned his role as an independent arbiter, and exceeded his judicial authority through deliberate violations of the defendant's constitutional rights to counsel and against self-incrimination. The masters rejected Judge Ross's proffered defenses, and determined he committed prejudicial misconduct. We concur in all of the foregoing except we determine that the wrongdoing constitutes willful misconduct.

**(9)** Given the canon violations, the conduct was unjudicial under the threefold *Broadman* test. It is also clear that Judge Ross was acting in his judicial capacity. On the third issue—bad faith—we find that Judge Ross intentionally violated Mr. Aka's constitutional rights. No other conclusion is reasonable based on the sequence of events: (1) Judge Ross told Mr. Aka "it may be in your best interest to secure legal representation . . . . *You have by law the right to do that* or you can represent yourself. What would you like to do, sir?" (Italics added.) (2) Mr. Aka responded directly, "*I would need to seek legal representation.*" (Italics added.) (3) Judge Ross ignored Mr. Aka's invocation of that constitutional right, and further violated the defendant's right to basic due process by his prearraignment badgering of Mr. Aka until he incriminated himself.

There can be no question that Judge Ross knew of Mr. Aka's right to counsel; the judge advised him of the right. Additionally, given Judge Ross's prebench and on-bench experience and practice in the area of criminal law, we entertain no doubt that Judge Ross also knew of the defendant's right to a hearing, with counsel, and of his right against self-incrimination. We are likewise convinced the judge was aware he was abusing his authority by violating those rights through his determined extraction of incriminating admissions from the defendant in the absence of counsel; alternatively, he did not care about the limits of his authority or about Mr. Aka's fundamental rights.

Judge Ross manifestly was swayed by the audible protests from Mr. Aka's neighbors in the courtroom. Prodded on by that spectator reaction, the judge sided with the neighbors, became annoyed with Mr. Aka and chastised him

for not being "straight" with him, and then progressed to the repeated accusations that the defendant was a liar. The embroilment and lack of impartiality are clear.

As in *Kloepfer*, *supra*, 49 Cal.3d at pages 865–866, Judge Ross's failure to use his knowledge and experience to ensure Mr. Aka's rights suggests an improper motive. We conclude there was manifest embroilment, a loss of impartiality, abuse of judicial authority and resulting violation of fundamental rights, and willful misconduct.

## D. COUNT 1C—*PEOPLE V. HECTOR SALCIDO*

### 1. Findings of Fact Concerning Basic Charges

There is general agreement concerning the basic facts of the relevant proceedings before Judge Ross in the *Salcido* case. We adopt and summarize the masters' findings.

Mr. Salcido was placed on probation by Judge Ross on September 30, 2002, in connection with three domestic violence offenses; the defendant admitted to long-term drug abuse problems but indicated willingness to reform. Mr. Salcido was represented at the September 30 hearing by Deputy Public Defender (DPD) Lisa Gordon. One of the conditions of probation was that the defendant was required to appear before Judge Ross on October 18 to show proof that he was attending required 12-step meetings.

When Mr. Salcido failed to appear on October 18 as ordered, a bench warrant issued. He was arrested on October 22, and brought before Judge Ross the following day, with different defense counsel, for a probation violation hearing. Mr. Salcido claimed he had not appeared on the 18th because he was in a rehabilitation facility. Judge Ross continued the hearing to permit the defendant to appear with DPD Gordon. The judge testified before the masters that he thought it was important for Ms. Gordon to appear with the defendant because of her familiarity with the case.

The continued hearing took place a week later, on October 29, with DPD Gordon appearing with Mr. Salcido. Although the issue to be determined was *whether* the defendant had violated the terms of probation, Judge Ross made clear that he already had determined there was a violation, given that the defendant had failed to appear on the 18th. The judge stated that he intended to sentence the defendant to 90 days in jail.

When DPD Gordon protested Judge Ross's determination of the probation violation and announced sentence, the judge asked Mr. Salcido directly if he

wanted to admit the probation violation, stating, "I've already found him in violation . . . ." Ms. Gordon again protested and stated that her client was not admitting the violation; she demanded a hearing and the right to subpoena witnesses. Judge Ross reiterated that he had already determined the probation violation. DPD Gordon again asserted that her client had a right to a hearing, and she asked to make a record. Judge Ross refused both requests and announced he was sentencing Mr. Salcido to jail for 90 days. Witnesses describe the exchange between the judge and Ms. Gordon as having "escalated," with both of them speaking in "raised voices," and that Ms. Gordon was "out of control" and "disrespectful" and "out of line."

The heated exchange culminated with Judge Ross evicting Ms. Gordon from the courtroom. Thereafter, without taking a break, the judge immediately proceeded with the sentencing of Mr. Salcido, addressing the defendant directly. At that point, another defense attorney who happened to be in the courtroom stated his name for the record. According to the transcript, this sequence of events unfolded as follows:

"MS. GORDON: May I make—I'm making a record.

"THE COURT: No. Now you need—if you need to go outside and cool off, then you need to do that, but I don't want to hear anything else. That's it.

"MS. GORDON: Is the court not allowing me to make a record?

"THE COURT: Deputy Robinson, take her outside. Go outside, Ms. Gordon.

"[Bailiff Robinson escorted Ms. Gordon out of the courtroom.]

"THE COURT: All right, Mr. Salcido. Regarding the 1SF015342 matter, your probation will be revoked and reinstated under the following modifications: the 12-step meetings are deleted for that matter.

"MR. BERRY: For the record, Michael Berry for the defendant since his attorney has left.

"THE COURT: That's fine."

Michael Berry, who stated his name for the record, was an experienced civil attorney, but was a trainee deputy public defender. He happened to be in Judge Ross's courtroom when Judge Ross had the bailiff remove DPD Gordon. DPD Berry had not been paying attention to the *Salcido* proceedings, knew nothing about the pending issue, and had never reviewed the file or spoken with the defendant or anyone else about the case. When Mr. Berry

stated his name, he was standing by the glass enclosure for in-custody defendants at the side of the courtroom.

After Judge Ross stated "That's fine," he continued with the sentencing proceedings. He ignored DPD Berry and continued to address Mr. Salcido directly, questioning him about the rehabilitation center he claimed to have attended. After examining some documents provided by the defendant, Judge Ross accused the defendant of lying to him: "See you are lying to me. You keep lying. See, *you are making me mad* again. *You are a pathological liar.* You don't get it. You don't get it. I don't know about—I think we are setting him up for failure. We're setting him up for failure." After DPD Berry interrupted to inquire "[a]re we finished?," there were further discussions on and off the record. Judge Ross put the matter over until the afternoon.

Judge Ross met with Ms. Gordon in chambers on the afternoon of the day he had ordered her removed. The judge explained the circumstances of the meeting as follows: "The public defenders left me no choice. Because, that afternoon, they decided that they were going to boycott the court and that they wouldn't interview anyone in custody, that they wouldn't appear in court. . . . At 4:00, there are no attorneys, none have checked in. . . ."

According to the judge, Ms. Gordon's supervisor and a deputy city attorney also attended the afternoon meeting in chambers. Judge Ross testified that he apologized to Ms. Gordon in chambers, but told her that "she couldn't be arguing with him in open court." The judge said at the meeting that he needed some time to think about what he would do in the case. At a hearing the next day, Judge Ross granted DPD Gordon's request for a formal probation violation hearing, at which she could present evidence to substantiate Mr. Salcido's claim he was in a residential program when he failed to appear on October 18.

Ultimately, on November 5, 2002, Mr. Salcido appeared with DPD Gordon and admitted the probation violation. Judge Ross revoked and then reinstated probation and stayed jail time.

### 2. Findings of Fact Concerning Judge Ross's Defenses

The judge claimed before the masters, and continues to assert in his briefs to the commission, that he committed *no* wrongdoing in his handling of the *Salcido* matter. We, like the masters, reject his claims.

a. Judge Ross's Claim That the October 29 Hearing Was a Formal Probation Violation Hearing: The underlying disagreement between Judge Ross and DPD Gordon was whether the hearing on October 29 was a *formal*

probation violation hearing, where the parties would be expected to put on evidence of *whether there was a violation*, or whether it was an informal proceeding, more akin to a pretrial conference. The argument Ms. Gordon was pressing was that her client did not admit the probation violation and that she wanted a formal hearing at which to present evidence. Because the client refused to admit the violation, formal proceedings were required by law. (See *In re Wagner* (2005) 127 Cal.App.4th 138, 146 [25 Cal.Rptr.3d 201].)

Judge Ross testified before the masters that the subject hearing was a formal one, claiming that *all* probation hearings in his court were formal. The masters rejected the judge's latter claim, finding it "inconsistent" with the clear evidence that the "long-established" procedure followed by judges in Los Angeles—including Judge Ross personally—was that the initial probation violation hearing would be an informal pretrial conference. We agree with the masters' assessment of the evidence.

Judge Ross's assertion that all probation hearings in his court were formal is knowingly false. We, like the masters, are convinced from the evidence that the judge knew that all probation violation hearings in his court were not formal ones.

As a subtheme of the judge's assertion the hearing was a formal one, he casts blame on DPD Gordon because she allegedly should have been prepared to present evidence at the October 29 hearing. Since she "should have been ready," her insistence on a later hearing was a disguised motion for a continuance, according to the judge. We agree with the masters' rejection of the claim. As they correctly note, the judge's assertion is invalid because of the following: "[It] ignores the defendant's absolute right to a hearing, the prosecution's obligation to present evidence of the defendant's probation violations, the accused's right to challenge that evidence, and the deputy city attorney's acknowledgement he was not prepared to present evidence of Salcido's probation violation. (R.T. 641.) (See *Morrissey v. Brewer* (1972) 408 U.S. 471, 487–488 [33 L.Ed.2d 484, 92 S.Ct. 2593]; *People v. Vickers* (1972) 8 Cal.3d 451, 457–458 [105 Cal.Rptr. 305, 503 P.2d 1313]; *In re Wagner*[, *supra*,] 127 Cal.App.4th 138, 146.)"

Judge Ross again uses a scapegoat—in this instance, unjustifiably blaming DPD Gordon for her alleged unpreparedness—in an attempt to divert focus from his own wrongdoing.

b. Judge Ross's Justification for Proceeding After Evicting Counsel: Judge Ross contends that it was appropriate for him to continue with the hearing "with another attorney" after he ordered DPD Gordon removed. The judge claims, in effect, that he was justified in proceeding because DPD Michael

Berry happened to be present in the courtroom and announced his appearance in Ms. Gordon's absence. This justification is in marked contrast to his testimony that he specifically continued the first hearing after Mr. Salcido's arrest because it was important that DPD Gordon be present because of her familiarity with the case.

Judge Ross's assertion that he was justified in proceeding because of DPD Berry's presence was soundly rejected by the masters. We also reject it. As noted, even before Mr. Berry announced his presence, the judge addressed the defendant directly, announcing his sentence. Additionally, and as the masters correctly note, there is no indication that DPD Berry was prepared to adequately represent Mr. Salcido, and Judge Ross did nothing to determine that issue. In fact, DPD Berry testified that he was not prepared. Beyond that, however, the judge questioned the defendant directly on the substantive issues for which Ms. Gordon had been demanding a hearing, requiring him to answer—ignoring Ms. Gordon's absence, Mr. Berry's lack of preparation, and Mr. Salcido's constitutional rights.

In response, Judge Ross now argues in a brief to the commission that he was justified in proceeding in DPD Berry's presence because Berry did *not* say that he was *not* prepared to represent the defendant. This time Berry is the scapegoat; because of Berry's silence Judge Ross proceeded to deny the defendant's constitutional rights. However, the judge has no one to blame for his own actions *before* Mr. Berry announced his presence.

Judge Ross also contends that when Berry announced his appearance, Berry thereby demonstrated "Berry was aware that [Judge Ross] saw him as being Salcido's legal representative for the limited purpose of imposing sentence." (Italics added.) The judge claims that when he said "That's fine," in response to Berry's stating his name for the record, the judge thereby was "acknowledging [the] understanding" that both of them were clear that *Judge Ross viewed* Berry as representing Salcido. The convoluted explanation is unreasonable and, in any event, Judge Ross's actions belie that either he or Mr. Berry understood Berry to have replaced Gordon or to have been in a position to provide effective representation of Mr. Salcido. The judge ignored DPD Berry and proceeded to examine the defendant directly.

### 3. Conclusions of Law

The masters concluded that Judge Ross violated canons 1 and 2A (by creating an appearance of impropriety and undermining the integrity and independence of the judiciary), 3B(4) (by failing to be patient, dignified and courteous), 3B(7) (by failing to afford the defendant a full right to be heard) and 3B(8) (by failing to dispose of the matter fairly). The judge became

angry, accusing the defendant of being a pathological liar; he demonstrated embroilment and a lack of impartiality and failed to act as a neutral arbiter, according to the masters. We concur in all of the foregoing and adopt the masters' foregoing conclusions as our own.

The masters also concluded that Judge Ross caused serious infringements of the defendant's constitutional rights to due process by denying him the opportunity for a hearing and the right to present evidence, and by proceeding with the hearing in the absence of his counsel. They concluded that the judge properly had Ms. Gordon removed from the courtroom; the record showed that she was loud and discourteous. We adopt all of these conclusions of the masters as well.

**(10)** The masters concluded that Judge Ross committed prejudicial misconduct in his mishandling of the *Salcido* case. We determine that Judge Ross acted in bad faith and that he committed willful misconduct. As noted in our conclusions in the *Fuentes* and *Aka* matters, and again guided by the Supreme Court in *Kloepfer*, we attribute to Judge Ross, based on his many years as a prosecutor and a criminal law judge, a presumptive knowledge of fundamental constitutional rights of criminal defendants in connection with determining a probation violation.

Given the combination of Gordon's persistent arguments that her client denied the violation and insisted on his right to a hearing, with counsel, and the judge's presumed experience-based knowledge of those rights, we conclude that Judge Ross intentionally disregarded the defendant's fundamental rights or knowingly acted beyond his judicial power or with a conscious disregard for the limits of his authority.

**(11)** Alternatively or additionally, it appears that the judge, fresh from his heated exchanges with Ms. Gordon, directed his residual agitation or anger at her client. (See *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 196 [260 Cal.Rptr. 557, 776 P.2d 259] (*McCullough*) [judge allowed his impatience with defense counsel to outweigh the client's right to a fair trial and an attorney of her choice; resulting constitutional violations constituted willful misconduct].) In any case, directly after removing the lawyer, the judge turned to abusing Mr. Salcido and denying his rights, angrily calling him a pathological liar. This embroilment is evidence of anger, pique, revenge or other improper purpose. Judge Ross's alarming violation of Mr. Salcido's rights clearly evinces a judge motivated by an improper purpose. There was bad faith and willful misconduct.

**(12)** The masters found Judge Ross's wrongdoing was mitigated by the fact that he, "on his own initiative, quickly vacated his rulings, eliminating

any prejudice to Salcido." We respectfully disagree for a number of reasons. Primarily, there can be no mitigation for maliciously motivated unjudicial conduct. (*Kloepfer, supra*, 49 Cal.3d at p. 865, citing *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 377 [188 Cal.Rptr. 880, 657 P.2d 372]; accord, *Spruance, supra*, 13 Cal.3d at p. 800.)

It is true that Judge Ross relented and scheduled a formal probation violation hearing following the boycott of his courtroom. However, it does not follow that the defendant thereby suffered no prejudice. Judge Ross became angry and humiliated Mr. Salcido by calling him a pathological liar in open court. This unjudicial behavior manifested embroilment and had the further prejudicial effect of depriving Mr. Salcido of an impartial judge. None of these prejudices to the defendant was undone by the subsequent events. We see no mitigating circumstances in the foregoing.

At no time did Judge Ross give any indication that he comprehended any of his serious misconduct. Indeed, in his posthearing briefs, he still asserts he committed *no* misconduct in connection with his handling of the *Salcido* matter. These facts also militate against a conclusion there was mitigation.

## IV. COUNT 2: ABSENCES FROM COURT

In count 2, the commission charges Judge Ross with misconduct in connection with two absences from court. We adopt and summarize the masters' findings and conclusions that there was no proven ethical violation on either occasion.

### A. COUNT 2A: MARCH 6 RADIO SHOW

#### 1. Findings of Fact

On March 6, 2000, Judge Ross arrived at the Inglewood courthouse where he was assigned, and went directly across the street to the studio of radio station KJLH. The station has a public interest/community focus, serving a largely Latino and African-American audience. The topic of discussion that morning was Proposition 21 which was on the ballot for the election the following day; the measure proposed substantial changes to the juvenile court law and was opposed by the California Judges Association and a number of judges.

Judge Ross began speaking on radio KJLH about 9:10 a.m. He mentioned once or twice on the air that he had people waiting for him in his courtroom, but that he had chosen to take time away because the ballot measure posed issues of importance and would have a disproportional effect on the particular

listener audience. The comment about people waiting in court may have been part of a "humorous" exchange.

The judge completed his radio appearance at 9:30 and was on the bench in his courtroom approximately 10 minutes later. There were 50 or 60 matters on calendar and the courtroom was full. Given typical preliminaries, the 9:40 a.m. start time for the general calendar was not a substantial deviation from the normal morning schedule. Despite the slight delay, Judge Ross completed the calendar in a timely manner without assistance from other judges. The judge had not notified court personnel in advance of his scheduled radio appearance.

### 2. Conclusions of Law

**(13)** The parties agree that Judge Ross's subject appearance on KJLH constituted legitimate judicial outreach activity. The masters concluded that because Proposition 21 concerned improvement of the law, the legal system and administration of justice, the activity was permissible under canon 5D. We concur. **(14)** Canons 3 and 4A require that a judge's courtroom activities take precedence over all other activities, but the masters conclude and we agree that the slight delay in the calendar did not conflict with these canons. The fact that Judge Ross mentioned on the air that he had people waiting for him did not cause a diminution of public respect for the judiciary or cast it into disrepute. The comment was made in the context of his explanation that Proposition 21 was sufficiently important that he had prioritized it over beginning his morning calendar. Thus, there was no violation of canon 1 or 2A. There was only one incident of minor tardiness, and it does not constitute misconduct.

## B. COUNT 2B: APRIL 2002 CONFERENCE

On March 20, 2002, Judge Ross submitted a request for time off to attend and serve on a panel at a conference of the California Association of Black Lawyers (CABL) in Palm Springs from Thursday, April 18 through Sunday, April 21. The two-day absence from work was requested as a court-related absence. The request was approved and coverage was arranged for another bench officer to preside over Judge Ross's calendar while he was at the conference.

Prior to the beginning of the conference, Judge Ross learned there would be no formal conference activities until Thursday evening, and he agreed to participate that day in an economic conference sponsored by Operation HOPE, a nonprofit organization that provides " 'economic tools and services' to 'empower . . . underserved communities.' (R.T. 295-296; exh. 45.)"

On April 17, 2002, the day before his approved absence, Judge Ross sent an e-mail to the acting site judge, Commissioner Kristi Lousteau, with a subject line "CABL conference" and text confirming his absence the following two days. On the morning of April 18, Judge Ross participated on a panel at the Operation HOPE conference, and that afternoon, he taped a segment for a television program, *Life & Times Tonight.* (We discuss Judge Ross's broader involvement in that program immediately following in pt. V, *post.*)

**(15)** All of Judge Ross's activities on April 18 concededly involved appropriate judicial outreach. While the subject line on the e-mail technically was partially inaccurate because Judge Ross knew he would not be at the CABL conference until Friday the 19th, there is no misconduct. The absence had been approved for judicial outreach activities, and courtroom coverage had been arranged. The fact that the judge participated in two different, but appropriate, judicial outreach activities on Thursday, prior to attending the specifically approved program on Friday, does not violate the canons.

## V. COUNT 3: COMMENT ON PENDING CASES

The charges in this count arise out of four appearances by Judge Ross on *Life & Times Tonight*, a general public affairs program produced by, and broadcast on, PBS station KCET in Los Angeles. Judge Ross is charged with making improper public comments about three pending cases, in violation of canons 1 and 2A, which prohibit a judge from creating an appearance of impropriety and undermining the integrity and independence of the judiciary, and canon 3B(9), which generally prohibits a judge from commenting publicly on pending cases. We adopt and summarize the masters' findings.

Judge Ross has been a regular participant on numerous *Life & Times Tonight* programs since 1999, with encouragement by a former presiding judge of the Los Angeles Superior Court, and support from responsible persons in the court's public information office. Numerous other judges and legal professionals have appeared with Judge Ross on the show, and the program has included a wide range of public interest topics concerning the law, the courts, and the administration of justice.

Judge Ross testified that prior to his first appearance on the show, he consulted with the judicial ethics hotline and other judges. He has been aware throughout that the judicial canons prohibited him from discussing pending cases.

We agree with the masters that Judge Ross's participation in the program "was consistent with the strong public policy encouraging California judges to promote public awareness of the judiciary and the judicial system. (See

California Standards of Judicial Administration § 39.)" We also agree with them that the issue is whether, in discharging his judicial outreach activities, Judge Ross violated the canons. We now turn to that topic.

## A. COUNT 3A: COMMENT ON PENDING JUVENILE CASE

### 1. Findings of Fact

On January 15, 2001, Judge Ross appeared on *Life & Times Tonight* and spoke about his new assignment to a juvenile delinquency department of the court in Compton. During the program, he discussed a specific case over which he was presiding and that was still pending; the judge had yet to announce his disposition of the matter in court. From the program transcript, the masters and we verify that the judge openly discussed the young man's difficult family background, the nature of the current offenses and the judge's intentions regarding disposition.

### 2. Conclusions of Law

We adopt the following conclusion of the masters concerning Judge Ross's discussion of the juvenile case: ". . . Judge Ross's remarks violate Canon 3B(9). Judge Ross discussed—in a very public forum—a case that was pending before him and one that, by law, is confidential. Canon 3B(9) prohibits a judge from commenting on pending proceedings, and specifically prohibits a judge from discussing cases—even for an educational purpose—in which the judge has 'personally participated.' "

In his testimony, Judge Ross conceded that he "may have divulged too much information." He argues, nonetheless, that because the court proceedings remained confidential, there was no ethical impropriety. The masters and we do not agree. Numerous persons familiar with the juvenile or his case likely could have recognized his identity from the public discussion of the young man's biographical information. The disclosure violated the minor's right to strict confidentiality. "The strong public policy of confidentiality of juvenile proceedings and records has long been recognized." (*In re Keisha T.* (1995) 38 Cal.App.4th 220, 231 [44 Cal.Rptr.2d 822]; see *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, 778 [94 Cal.Rptr. 813, 484 P.2d 981]; *Foster v. Superior Court* (1980) 107 Cal.App.3d 218, 228 [165 Cal.Rptr. 701].) Further, it appeared from the judge's discussion during the program of his intended disposition of the matter that he had prejudged the case.

The judge's assertions that his comments were directed primarily at explaining the juvenile system and the difficult issue of rehabilitation of

troubled youth ignore and do not overcome the impropriety of his discussion of the case specifics. The masters rejected this claim for that reason, as do we.

Alternatively, the judge contended before the masters that canon 3B(9) is unconstitutional as applied to this charge because its application causes a chilling effect on judicial speech in violation of the First Amendment. During his appearance before the commission, Judge Ross appeared to disclaim that assertion, relying instead on his claim (rejected by the masters and us) that his television comments were about general process and thus *not in violation* of the canon.

"JUSTICE McCONNELL: You are now claiming that you are allowed to speak out publicly about [juvenile proceedings]; is that correct?

"JUDGE ROSS: *No*. What I am saying is, I understand these proceedings are confidential and private. To the extent that I did not indicate who this person was by name, or where they lived, or this wasn't a case in the news, so anybody would necessarily know who this individual was.

"I felt as though I had taken sufficient prophylactic measures to keep that juvenile's identity from not [*sic*] being revealed. . . .

"JUSTICE McCONNELL: So it's your position that you do not believe the First Amendment gives you the right to speak publicly about these confidential proceedings?

"JUDGE ROSS: No. And thank you for bringing that up. [¶] *My whole point was, in this particular case, based on these circumstances, I did not feel as though the canon was violated . . . .*" (Italics added.)

**(16)** The masters rejected the First Amendment argument, and to the extent the judge may still assert it, we reject it as well, including for the following reasons explained by the masters: The California Supreme Court has upheld the constitutionality of the limits imposed by the canons on judicial speech concerning pending cases. (*Broadman, supra*, 18 Cal.4th at pp. 1100–1103.)[9] As the court explained in *Broadman*, the compelling public interest in maintaining a judicial system that is fair and impartial, both in fact and in appearance, justifies the restriction on judicial speech to the extent it prohibits comments on pending cases. Judge Ross also acknowledges that the "state has [a] strong interest in regulating the public commentary by a judge during the pendency of a proceeding." (Italics omitted.)

[9] The court in *Broadman* was concerned with former canon 3A(6), the pertinent substance of which is carried over to the current canon 3B(9).

Judge Ross also argued that in order for the canon's speech restriction to be applied constitutionally, there had to be a proven nexus between the purposes of protecting the appearance and reality of a fair system, and the challenged judicial comment. The court in *Broadman* specifically pointed out the danger posed to the public perception of judicial impartiality when a judge makes *comments indicating prejudgment* of a case. This is precisely the situation we confront with Judge Ross's public statement of his *intended* disposition of the pending juvenile case. Thus, there is the direct nexus that Judge Ross claims is necessary.

We are, of course, bound by the Supreme Court's holding in *Broadman.* Further, the United States Supreme Court decision in *Republican Party of Minn. v. White* (2002) 536 U.S. 765 [153 L.Ed.2d 694, 122 S.Ct. 2528], does not affect the continued validity of the state high court's ruling, as suggested by Judge Ross. The *Republican Party* case, at the Supreme Court level, involved issues of judicial candidates' free speech under the Minnesota canons. The Supreme Court remanded the case to the Court of Appeals for the Eighth Circuit; in a deeply divided en banc decision, the circuit court recently expanded the ruling to invalidate other Minnesota canon limitations on judges' and judicial candidates' political association and activities. (*Republican Party of Minn. v. White* (8th Cir. 2005) 416 F.3d 738.) The matter now before us does not concern either candidates' rights or issues of political association or activities.

**(17)** Additionally, it is not our prerogative to decide the constitutionality of a canon promulgated by our Supreme Court (and see Cal. Const., art. III, § 3.5; *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1092–1095 [17 Cal.Rptr.3d 225, 95 P.3d 459] [administrative agency created by Constitution, and granted judicial or quasi-judicial authority, lacks authority to refuse to enforce statute on grounds of unconstitutionality unless appellate court has determined statute to be unconstitutional (dictum)]). **(18)** Further, in our view, canon 3B(9) does serve the compelling public interest in maintaining a fair and impartial system of justice.

**(19)** We adopt the masters' reasoning and conclusion that Judge Ross committed prejudicial misconduct. He revealed confidential information on *Life & Times Tonight,* including that the juvenile in question was dealing drugs from a hotel room and that his mother had a drug problem. Judge Ross's improper public revelation of his intended disposition created the appearance of prejudgment. Although the public may have thought Judge Ross appeared compassionate, his televised disclosure of confidential information and his apparent abandonment of his status as a neutral arbiter combine to undermine public confidence in the integrity and impartiality of the judiciary. He violated canons 1, 2A and 3B(9).

## B. COUNT 3B: COMMENT ON PENDING *GHILOTTI* CASE

### 1. Findings of Fact

*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888 [119 Cal.Rptr.2d 1, 44 P.3d 949], involved issues regarding the release of violent sexual offender Patrick Ghilotti. The case was pending before the California Supreme Court on March 4, 2002, when Judge Ross discussed it on *Life & Times Tonight.* (The court issued its decision on Apr. 25, 2002.) During the program on March 4, the judge discussed the general legal issues raised in the *Ghilotti* case; he provided neutral and public background information concerning the case and the specific issue before the court. As the masters correctly note, "these comments were likely to give the public a better understanding of the legal issues" involved in the case.

However, Judge Ross also moved beyond generalities during his appearance on the program, most notably with the following comments: "What's interesting about this case, in Southern California, we don't know a lot about this individual, but up north, his family is very wealthy. Ghilotti Construction Company. He married a woman who worked at the Atascadero State Hospital. He's somewhat charismatic. They've been following this case, so some feel there are some political overtones to his particular case."

The masters characterized the foregoing statements as "peripheral" in the sense of not constituting an expression on the merits of the case. They also observed that Judge Ross did not advocate a particular outcome and that the remarks were not likely to interfere with a fair hearing on the case. We concur.

Nonetheless, we determine that the comments cannot be squared with the language or purpose of canon 3B(9). The statements about the defendant's wealthy family, his charisma, and the suggestion that the case "is being watched" by some who felt it might have political overtones, all combine to suggest that the case had significance beyond the legal issues. Judge Rothman sums up the policy considerations that make such comments improper: "In regard to public comment on cases pending in another court, judges must avoid the *unseemly spectacle* of commenting on others' cases. Such comments could affect the result, or be seen by the judge before whom the case is pending as public judicial pressure to decide the case in a certain way. *It also undermines public confidence in the decisions of the court.* [Fn. omitted.]" (Rothman, Cal. Jud. Conduct Handbook, *supra*, § 5.32, p. 142, italics added.)

This commission has disciplined a judge for commenting to the media about a case pending on appeal. (Com. on Jud. Performance, Ann. Rep.

(1997) Advisory Letter No. 32, p. 23.) Judge Ross's public media comments about the pending *Ghilotti* appeal were improper.

### 2. Conclusions of Law

The primary legal issue concerning Judge Ross's comments on the *Ghilotti* case is whether an exemption under canon 3B(9) applies. It provides in pertinent part as follows: "Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in *legal education programs and materials,* cases and issues pending in appellate courts. This educational exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case." (Canon 3B(9), italics added.)

**(20)** The masters construed "legal education programs and materials" broadly and found that it encompasses legal education of the public; they concluded that Judge Ross's explanations on the March 4 program came within the exemption. As we explain, we have reached a different conclusion. The concept of "legal education" is more limited; it refers to education of legal professionals. In the immediately preceding sentence of canon 3B(9), there is an express provision allowing for judges to explain "for public information the procedures of the court." Thus, in the canon itself, there is a distinction between discussing issues pending in appellate courts in "legal education programs and materials" and informing the public about "procedures of the court."

The history of canon 3B(9) is instructive. It derives from the American Bar Association (ABA) Model Code of Judicial Conduct. In the 1972 version of the model code, there was the following blanket restriction: "A judge should abstain from public comment about a pending or impending proceeding in any court." Prior to 1992, the California Code of Judicial Conduct was only slightly less restrictive: canon 3A(6), as it existed then, included the same basic ABA model code prohibition for judges and required them to demand similar abstention by subordinate court staff. The predecessor of the current "public information" exception of canon 3B(9) also was part of the pre-1992 canon 3A(6): "This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

In 1990, the ABA culminated a three-year review process with the promulgation of a revised model code. The prohibition against comment on pending cases was relaxed slightly to provide: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make

any non-public comment that might substantially interfere with a fair trial or hearing." (1990 ABA Model Code Jud. Conduct, canon 3B(9).)

The change was adopted following substantial debate among both commentators and ABA members. (See Moser, *The 1990 ABA Code of Judicial Conduct: A Model for the Future* (1991) 4 Geo. J. Legal Ethics 731, 732–735.) Among the criticisms at the time of the 1972 rule was that "it was over-broad and its literal terms were frequently violated by judges making perfectly proper comments about cases when teaching law, explaining procedure, and addressing judicial conferences." (*Id.* at p. 749.) Indeed, among the specific comments included in a compendium that was part of the final submission to the ABA House of Delegates meeting in August 1990 (at which the new model code was adopted), was the following comment, referring to what became the 1990 ABA Model Code of Judicial Conduct version of canon 3B(9): "The section as presently worded is simply too restrictive. 'Any public comment' clearly includes law teaching and law writing. The second to the last sentence should be amended as follows: 'This section does not prohibit judges from making public statements in the course of their official duties, or from commenting publicly about proceedings pending in courts other than the judge's own court while engaged in law teaching or law review or text writing, or from explaining . . . .' " (ABA Standing Com. on Ethics and Prof. Responsibility, *Rep. to the House of Delegates No. 112* (Aug. 1990), appen. D, com. 31, p. 14, original underscoring.)

Although the issue of a "legal education" exception was raised in the ABA deliberations, as noted, it was *not* adopted as part of the 1990 ABA Model Code of Judicial Conduct. However, in California, "the California Judges Association began review of the 1990 Model Code later that year, culminating in the adoption of a revised California Code of Judicial Conduct on October 5, 1992." (Cal. Code Jud. Conduct (1992) preface, ¶ 4.) For the first time, the following appeared in the "Commentary" to the newly numbered canon 3B(9)—the former canon 3A(6)—in the 1992 California code: "Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials cases and issues pending in appellate courts."[10]

The "legal education" exemption in California derives from the comments on the 1990 ABA Model Code of Judicial Conduct. Based on the historical

[10] Proposition 190 (amending Cal. Const., art. VI, § 18, subd. (m), eff. Mar. 1, 1995), created a new constitutional provision transferring to the Supreme Court the authority for issuing a code of judicial ethics. In March 1995, the Supreme Court formally adopted the California Judges Association's 1992 California Code of Judicial Conduct as a transitional measure. The high court then formally adopted the California Code of Judicial Ethics effective January 15, 1996, with amendments effective April 15, 1996. As a result of the amendments, the "legal education" exemption became part of the text of canon 3B(9) as it now exists.

development, we are convinced that the exemption arises out of the desire to clarify judges' right to engage in up-to-the-minute discussions among themselves or with lawyers of pending appellate cases. Indeed, one commentator, in discussing the unusual "education exception" of the California canon, discusses it under the heading "Scholarly Teaching and Writing." (Gray, *Commenting on Pending Cases* in Key Issues in Judicial Ethics (American Judicature Society 2001) pp. 15–16.) Judge Rothman discusses the provision in the section of his treatise entitled Legal Education Programs (Rothman, Cal. Jud. Conduct Handbook, *supra*, § 5.35, pp. 144–145); he has a separate subdivision, Communicating with the Media (ch. 5, pt. II, subd. B) that includes the section entitled Making Television Appearances (*id.*, § 5.38, p. 146). Judge Rothman's delineation suggests the distinction that we determine to be applicable.

Thus, we conclude that the "legal education" exemption of canon 3B(9) allows only limited comment on pending appellate cases, as described, and does not extend to general public outreach activities by a judge. Judge Ross's comments about the *Ghilotti* appeal on the March 4 segment of *Life & Times Tonight* were not permitted under canon 3B(9).

**(21)** The masters viewed Judge Ross's televised comments on *Ghilotti* as a technical violation, at most, and one that was not sufficiently serious to have brought the judiciary into disrepute. We cannot agree. The judge's comments about the Ghilotti family wealth, the defendant's charisma, the fact that people were watching, and the reckless suggestion that politics may drive the outcome of the case were both unseemly and potentially prejudicial to the litigants. The comments also risked undermining public respect for the court's ultimate decision in *Ghilotti* and for the court in general. We determine that Judge Ross committed prejudicial misconduct with his unwarranted and inappropriate comments.[11]

## C. COUNTS 3C & 3D: COMMENT ON INGLEWOOD POLICE OFFICERS CASE

### 1. Findings of Fact

During the summer of 2002, a criminal case was pending in the Los Angeles Superior Court against two Inglewood police officers charged with assaulting a minor during an arrest that was videotaped. The arrest and

[11] Because the masters concluded the exemption applied, they found that there was no violation of canon 3B(9), and thus they did not need to reach the issue of the constitutionality of the canon. We conclude that Judge Ross's First Amendment arguments concerning count 3B fail for the same reasons as we discussed in connection with count 3A concerning the juvenile case, discussed in the text, *ante*, at pages 121–123.

alleged police misconduct had generated widespread media coverage and substantial local controversy. Judge Ross had no judicial responsibilities concerning the case, but made comments concerning it during two appearances on *Life & Times Tonight* while the case was pending.

We adopt and summarize the masters' findings. During the program segment broadcast on July 22, 2002 (the subject of count 3C), Judge Ross responded to the host's questions about "confusing" layers of prosecuting agencies and courts. He explained the roles of the various entities in the prosecution of a criminal case against a police officer. He emphasized the concept of presumption of innocence and cautioned against prejudgment notwithstanding the videotape. The judge also commented on a potential effect of the charges against the officers on other criminal cases in which the officers had been involved.

On the program of August 15, 2002 (the subject of count 3D), the host expressed concerns whether the officers' case was being transferred to a less racially diverse jurisdiction in order to benefit the officers. Judge Ross responded with an objective explanation concerning the distinction between changes of venue and transfers within the same court district. He explained the authority of a trial judge to order a change of venue based on statutory factors, pointing out that the key determination concerning venue was whether the defendant would receive a fair trial. The judge also described geographical areas from which jury pools are drawn after court unification, and the concept of juror challenges.

### 2. Conclusions of Law

**(22)** As noted previously, canon 3B(9) permits a judge to comment publicly on a pending case for purposes of "explaining for public information the procedures of the court." The masters conclude, based on their review of the program transcripts, that Judge Ross's comments during the two program segments fit within the exception. We concur, based on our review of the transcripts, that the comments were permissible under the "public procedural information" exemption to canon 3B(9). We conclude that no misconduct was proven under counts 3C or 3D.

## VI. COUNT 4: *MOBILE COURT* PRIVATE ARBITRATIONS

The final count charges Judge Ross with misconduct in acting as a private arbitrator during filming of a pilot television program for a possible new series, tentatively known as *Mobile Court.* He is alleged to have violated canons 1 and 2A (by creating an appearance of impropriety and undermining

the integrity and independence of the judiciary), 2B(2) (by using the prestige of office to advance his and others' pecuniary interests), 4A(2) (by engaging in off-bench activities that demeaned the judicial office), 4D(1)(a) (by engaging in financial and business dealings that may reasonably be perceived as exploiting the judicial position), 4D(2) (by participating in a business venture or commercial advertising, or permitting others to use the judge's title, or otherwise lending the prestige of office to promote a commercial venture) and 4F (by acting as a private arbitrator).

The masters concluded that Judge Ross violated all of the foregoing canons in connection with arbitrating the *Mobile Court* cases, and that he committed prejudicial misconduct. We agree as to the canon violations, but determine that he committed willful misconduct. Additionally, the masters suggested Judge Ross was not telling the truth in parts of his testimony concerning *Mobile Court*. We conclude that Judge Ross's pervasive lack of candor and accountability throughout these proceedings was especially pronounced as respects the charges of court 4.

### 1. Findings of Fact Concerning Basic Charges

We adopt and summarize the findings of the masters concerning the basic facts. During the summer of 2002, a television producer contacted Judge Ross and ultimately invited him to audition for the role as a judge/host for a proposed reality television series. The tentative name for the series was *Mobile Court*, reflecting the theme of the show, which was for an actual judge to resolve actual cases, but in "court on location," taking "justice from the courtroom to the streets."

Judge Ross agreed to audition for the position of judge/host of the program. Following the audition and numerous discussions with the producer's agent, the judge signed a contract with the producer in mid-July 2002. Judge Ross utilized the services of a talent agent, and also was assisted in the contract negotiations by an attorney agent whom he knew from his tenure in the district attorney's office. The contract gave the producer the "exclusive, independent irrevocable option . . . to engage [Judge Ross] to render on-camera judge/host services in connection with [the] television series . . . ," and obligated Judge Ross to provide these services after February 1, 2003, if the television pilot was purchased. Judge Ross warranted in the agreement that he was "free to enter into this Agreement" and that he was "*not subject to any conflicting obligation. . . .*" (Original italics.)

Judge Ross testified that he knew he would need to resign from the bench if he was chosen to host the series. He also testified that a television career was very appealing to him because it would "only require [him] to work six

months out of the year." The masters presumed, as do we, that Judge Ross was aware, further, of the "potential monetary and other substantial benefits of a successful television career."

The pilot show was filmed on the weekend of July 27 and July 28, 2002. The producers intended to use the pilot solely for marketing the show to television producers. In the pilot, Judge Ross arbitrated two actual pending cases that had been filed as small claims matters. A videotape of the pilot was submitted into evidence and both the masters and we have viewed it. Judge Ross is identified in the pilot as "Judge Kevin Ross." He appears in each case in a dark suit with a uniformed bailiff who announces that the witnesses have been sworn, that Judge Kevin Ross is "presiding," and that "Mobile Court is now in session." Judge Ross testified that the bailiffs were off-duty deputies from the sheriff's department, hired by the producer.

The first case, entitled on the film as "Revenge and Rotten Eggs," involved cross-claims of a teenage boy and two teenage girls for damage to two vehicles, allegedly caused by rotten eggs having been thrown on the vehicles. The filming took place on a residential street with numerous spectators. During the show—or the "hearing"—the parties engaged in nasty name calling, personal insults and derogatory language; they generally ignored Judge Ross's repeated admonitions that they were required to follow his "rules." Judge Ross held several "side-bar" discussions during which he questioned the respective parties, and then issued his decision on camera in favor of the teenage boy.

The second program case is entitled "Beauty and the Beast." An "erotic model" using the stage name Angel Cassidy sued the "Dream Girls" adult club in San Diego, claiming that the club cheated her out of prize money because the security guard (identified on film as "Wolverine") disqualified her from the final round of a "Miss Wet on the Net" contest. The filming took place inside a Los Angeles strip club—described as such on the video. The parties again engaged in substantial name calling and exchanged derogatory and insulting remarks that Judge Ross was unable to control.

Prior to the filming, the parties to the two actual small claims cases (and show participants) signed arbitration agreements in which they consented to submit their disputes to "Judge Kevin Ross" for binding arbitration and to dismiss their small claims court cases. The producer agreed to pay any monetary judgments that were awarded. Judge Ross was given written summaries of "evidence" and witness statements for each case; the summaries stated the cases had been filed in the court as small claims actions. The judge was not told how to decide the cases; rather, his decisions were based on the written summaries, as well as the on-camera assertions of the claimants and other "witnesses."

After the filming, each party signed a form letter printed on *Mobile Court* letterhead, stating that the case had been resolved in private arbitration, and formally asking the small claims division of the respective courts to dismiss the case with prejudice. Judge Ross signed a document for each case, again on *Mobile Court* stationery, entitled in large capital black letters, "ARBITRATOR'S AWARD." Next to his signature on each award is the date "7/29/02," the Monday following the weekend filming. The date appears to have been written with the same pen as Judge Ross's signature on each respective document. The documents state the amount of money awarded to the prevailing party in each respective case. Judge Ross received $5,000 in compensation for his work on the pilot, which he turned over to the Judicial Resources Office, net of taxes. He paid his talent agent her percentage of his earnings from his personal funds.

The producer then used the pilot to make sales presentations to several groups of executives in the broadcasting field. The presentation included marketing the fact that Judge Ross "was an actual legitimate judge in Los Angeles" because the promoters thought that would "lend . . . credibility to the show" and increase the opportunity to sell the series to an interested buyer.

On August 4, 2002, articles about the proposed *Mobile Court* show appeared in online and print versions of a leading entertainment industry trade publication, Variety. The articles included the statement that the proposed syndicated series would be "hosted by *Judge Kevin Ross*, who gets dispatched into the streets by car with his bailiff . . . ." (Original italics.)

Judge Ross testified that he "did go out and actually go get a copy" of Variety. He described his reaction as follows: "And at that point, I was like, 'Okay, I'm going to end up being kicked off the bench' because I know that this is something that can't be done. So that was something that I was—I was very upset." The judge testified that the producers and their agents had assured him orally that they would not use his judicial position for marketing purposes. However, neither the judge nor his agent nor his attorney ensured that the alleged assurance was reduced to writing, either as part of the general contract between the judge and the producer, or otherwise. Ultimately, the show was not purchased or developed into a series.

### 2. Findings of Fact Concerning Judge Ross's Defenses

**(23)** a. Judge's Assertion That He Did Not Know He Was Acting As an Arbitrator: With exceptions not applicable here, canon 4F prohibits a judge from acting as a private arbitrator. By the time of the masters' hearing, Judge Ross conceded that he then realized he had violated canon 4F by arbitrating

the small claims cases he decided during the filming of the pilot. He testified, though, that as of the time of the filming, he was unaware he arbitrated the cases. The masters rejected this claim as false, as follows: "Based on the evidence presented, we find that when Judge Ross was participating in the *Mobile Court* project he had to have known and understood that he was retained to serve as a private arbitrator and, in fact, did so. Most important, Judge Ross signed two documents, each entitled 'ARBITRATOR'S AWARD,' that awarded money to each plaintiff according to Judge Ross's stated findings. . . ."

Not only did Judge Ross sign the two awards, but his testimony concerning the signing is false. Judge Ross claims that he signed the arbitration awards during a very hectic period while having makeup applied prior to the actual filming that took place on Saturday, July 27, and Sunday, July 28, 2002. The documents bearing the judge's signature, however, are dated Monday, July 29, *after* the filming was complete. Clearly, Judge Ross was not in the process of having makeup applied while getting ready for the camera on Monday.

Judge Ross's signature and date on each arbitration award appear to be written with the same pen on each respective document. This is particularly apparent on exhibit 75, the award for the "Beauty and the Beast" case. Although there was no specific testimony on the subject, Judge Ross has never asserted, either to the masters or to the commission, that he did not sign and accurately date both awards. We are confident the awards were signed on Monday the 29th, and not while makeup was being applied prior to filming on Saturday or Sunday.

As noted by the masters, it "does not make sense" that Judge Ross signed the awards before the filming. The awards are just that—the arbitrator's decision *after* the "hearing." Further, by Judge Ross's own admission those decisions did not occur before filming: he made his decision during the filming and was not told what decision to reach. Additionally, the basic premise of the show was that the judge was going to decide actual disputes, a fact that further undermines the judge's claim that he did not know he was acting as an arbitrator when he was doing so.

The judge's testimony concerning the circumstance of the signing of the awards was preceded by a question from the examiner, "Did you actually think at the time that judges were allowed to act as arbitrators privately?" The question clearly sought to elicit the judge's understanding as of the time of the filming concerning the ethical propriety of his engaging in private arbitration.

Judge Ross's initial reply to the question was that he "really did not see it as what would be considered officially arbitration and mediation" and that until he received copies of the awards through discovery, he did not recall signing the arbitration awards. This was followed by his description of the hectic scene, prefilming, when makeup was being applied.

The following exchanges then took place between the examiner and Judge Ross:

"Q. Are you saying that you were never told by anyone involved with Mobile Court that these cases were going to be arbitrated by you?

"A. I'm not saying that.

"Q. Who told you they were going to be arbitrated?

"A. I don't recall.

"Q. But someone did tell you that you were going to be doing arbitration?"

Judge Ross gave a lengthy and evasive response concerning whether "someone" had told him, the essence of which was summed up in the following: "And it was—again, it was this performance. So that's really what I went into it thinking, that I was kind of going through this role-playing performance situation." Continuing, the judge claimed that he thought the only difference between his audition for the role and the actual filming was that in the latter situation, "we were actually going to make it look as real as possible," to enhance marketing potential.

The examiner then showed Judge Ross copies of the arbitration awards and asked him whether his position was that he did not know he had arbitrated the cases until he received those documents in discovery. The judge gave another rambling and evasive reply that included a repetition of his claim that he was distracted while "I'm in a trailer, and I'm having someone applying makeup . . . ."

The examiner's exchange with Judge Ross on this subject concluded with the following:

"Q. My question goes to your state of mind at the time you participated in all the Mobile Court dealings. In your mind, you had not engaged in arbitration. Is that right?

"A. I think I've already indicated what my state of mind was, Mr. Coyle. I'm comfortable with that.

"Q. Can you answer that question yes or no?

"A. I don't think—that's not really a question I can answer yes or no. I'm not trying to be evasive, but I indicated, again, that at the particular moment when this came up, had I been sitting in a lawyer's office and/or sitting in a courtroom, that the circumstances would reflect one of, well, you really should have known this. That wasn't the situation. I'm in a trailer, and I'm having someone applying makeup, and I'm having someone say, 'Okay, let's try this tie. And by the way, what about the W-2 forms? Judge Ross, have you eaten yet? Oh, by the way could you look at this other piece of paper. You know, you didn't sign this document here.' So all these things were going on. They don't excuse the fact that I signed an arbitrator's award. It doesn't excuse the fact that that's a direct violation of the canon. And so I accepted responsibility from day one."

The patent attempts at avoidance, mixed with the false story about the makeup and other confusion prefilming, demonstrate serious lack of candor and accountability. They also highlight the hollowness of the final claim by the judge in the just-quoted excerpt that he "accepted responsibility from day one."

Judge Ross continues in his efforts to avoid admitting conscious knowledge of wrongdoing. In his findings that he proposed to the masters following the hearing, he suggested that they should find that he "unintentionally" engaged in arbitration.

In his posthearing briefs to the commission, Judge Ross glosses over the details of the arbitrations, although he does "concede" wrongdoing. In his recitation of the facts in his opening brief, the judge omits any mention of the arbitrator's award documents that he signed. Later, he makes a passing and misleading reference to those documents, as follows: "Respondent realizes he was *unclear* as to when he signed the documents but does not dispute these actions." (Italics added.) To the contrary, he was quite clear, repeatedly and falsely, that he signed the awards while makeup was being applied.

In the judge's reply brief, he accuses the examiner of being "intentionally misleading" in asserting that Judge Ross was unwilling to admit that he knew he was acting as an arbitrator. Again, the judge points the finger of blame at someone else—unjustifiably so, in that what the examiner asserted is precisely what the masters expressly found, namely, that "Judge Ross has been unwilling to admit that he knew he was acting as an arbitrator when the pilots were filmed." The judge has been and is unwilling to acknowledge his true state of mind.

Judge Ross states that he now "understands" that private arbitration is prohibited, and that he "fully understands" that he acted as an arbitrator. The

belated concessions, however, miss the point that Judge Ross has repeatedly refused to concede in the face of compelling evidence that he had to have known at the time of the filming that he was engaging in arbitration.

b. Judge Ross's Claim That He Asked and Expected the Producer Not to Use His Title in Promoting the Show: The masters correctly concluded that Judge Ross violated several canons because he used his judicial position for financial advantage, and used the prestige of office to engage in a commercial or business enterprise. In an attempt to avoid this conclusion, Judge Ross testified that he asked the producer not to use his judicial title in marketing the show and that he expected his request would be respected. The masters concluded that since the judge failed to have this limitation reduced to writing, his efforts were inadequate to ensure that a violation of the canons would not ensue.

Beyond the foregoing, with which we agree, the claim is inherently unbelievable. Judge Ross was selected as the host because his judicial position enhanced the show's credibility, reliability and marketability. There was an underlying premise of marketing him as a judge as a way of selling the program. The judge was willing to allow himself to be marketed *as a judge* in hopes that he then could leave the bench for a more lucrative career in television. His claims that he directed and expected that he would not be marketed as a judge are not credible.

c. Judge's "Contract" Claim: Judge Ross urges that it was acceptable for him to participate in the pilot filming because he "never made a final decision to do the show." The masters rejected the claim based on the contract, under the terms of which Judge Ross did not have the right to withdraw. We agree with the masters. Furthermore, the contractual formalities are irrelevant to the ethical violations that occurred.

### 3. Conclusions of Law

The masters' summary legal conclusions were that Judge Ross's participation in the *Mobile Court* arbitrations "violated judicial canons prohibiting judges from: (1) serving as private arbitrators; (2) using their positions to obtain benefits for themselves and others; and (3) conducting themselves in a manner that is undignified and brings disrepute to the judiciary." We concur and adopt these summary conclusions; we also summarize and adopt the following reasoning of the masters respecting these conclusions.

Judge Ross violated canon 4F which prohibits a judge from acting as a private arbitrator. Notwithstanding the judge's evasion of the question of

whether he knew at the time that he was violating the canon, he concedes now that he in fact did violate it.[12]

The judge's participation in the *Mobile Court* program also conflicted with three canons prohibiting judges from using their judicial positions for financial advantage for themselves or others, and from using the prestige of office to engage in a commercial or business enterprise. (Canons 2B(2), 4D(1)(a), 4D(2).) As noted previously, the underlying premise of the proposed new "reality" series was to have a "real judge" as host. Authenticity of the judge, and the concept of taking justice to the street—resolving actual cases "at the scene"—were core themes of the show and key underlying marketing strategies. The judge was among those who stood to realize substantial financial benefits if the pilot had been purchased and aired. The judge admitted that he understood these facts, at least as pertained to his own potential to benefit, and that he would be required to leave the bench if the project succeeded.

The videotape of the "judicial" proceedings is degrading to Judge Ross and to the judiciary. In the "Revenge and Rotten Eggs" installment, the "trial" was held in the middle of a street, with a substantial public gathered around, as the parties called each other names and disrespected Judge Ross and "his rules." The "courtroom" for the "Beauty and the Beast" case was a strip club, which Judge Ross described on the program as a location with "zebra carpet, neon, mirrors, pole front and center. . . ." The garish surroundings were apparent on screen; it was inappropriate for the judge to draw attention to props that were created for a striptease act, not for the dispensing of justice. Similarly, it was inappropriate for Judge Ross repeatedly to ask the plaintiff (the "erotic model") to detail the components of a "wet T-shirt contest." The judge knew his conduct was unjudicial; upon seeing even a benign description of the show and the use of his title in Variety, he thought he would be "kicked off the bench."

The videotape was not shown to the general public. It was, however, seen by broadcast executives, and the unjudicial activities were witnessed by those who participated in and attended each filming. That is sufficient opportunity for disrespect to be brought upon the judiciary. "It is enough that the conduct be known to those members of the public who observed it." (*Dodds, supra*, 12 Cal.4th at p. 173.)

The masters concluded that Judge Ross's involvement in the *Mobile Court* venture constituted prejudicial misconduct. They reached this conclusion based on the determination that one element of willful misconduct under the three-pronged *Broadman* standard—that the judge be acting in a judicial

[12] The masters twice refer in their report to canon 4F as canon 3F.

capacity—was lacking. (*Broadman, supra*, 18 Cal.4th at p. 1091.) We conclude that he was acting in a judicial capacity and, thus, that there was willful misconduct.

**(24)** The Supreme Court has included a variety of activities within the definition of "judicial capacity." (*Dodds, supra*, 12 Cal.4th at p. 172.) Generally speaking, it has reference to a judge performing "judicial functions," that is, "one of the varied functions generally associated with his position as a judge . . . ." (*Ibid.*; see *Adams II, supra*, 10 Cal.4th at p. 910.) Additionally, however, and as pertinent here, it also is defined to include the following: "[I]f a judge uses, or attempts to use, his authority as a judge for improper ends, regardless of location, we consider the judge to be acting in his judicial capacity." (*Dodds, supra*, 12 Cal.4th at p. 172, citing *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 319 [267 Cal.Rptr. 293, 787 P.2d 591]; accord, *Broadman, supra*, 18 Cal.4th at p. 1104.)

**(25)** Arbitration is not necessarily a "judicial function" in that persons other than judges frequently act as arbitrators. Also, the prohibition of canon 4F against a judge performing arbitration in a "private capacity" suggests that a sitting judge who improperly acts as an arbitrator is not acting in a judicial capacity. In other words, Judge Ross could have done private arbitration in his capacity as attorney or private citizen, in which case there arguably would have been no involvement of "judicial function." In such instance and under this theory, the wrongdoing would have amounted to prejudicial, not willful, misconduct.

Judge Ross, however, was not acting in his capacity as attorney or private citizen during the *Mobile Court* arbitrations. He was required to be a judge and act as a judge in order to get the job and perform the role of onscreen arbitrator. It was a key premise of the reality TV show and a condition for the marketing scheme that Judge Ross be, and perform the role of arbitrator as, an actual judge. It was a program requirement that Judge Ross act in a *judicial capacity*. While acting as a private arbitrator, the judge also engaged in the improper end of using the prestige of his office and his authority as a judge, in an attempt to leverage his status as a bench officer for financial gain. He was acting in a judicial capacity, and the underlying venal purpose constitutes willful misconduct.

## VII. DISCIPLINE

### A. PURPOSES OF JUDICIAL DISCIPLINE

**(26)** The starting point for our decision concerning the appropriate level of discipline to impose on Judge Ross is the Supreme Court's admonition that

the purpose of judicial discipline " 'is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman, supra*, 18 Cal.4th at pp. 1111–1112, citing *Adams II, supra*, 10 Cal.4th at p. 912.)

## B. RELEVANT STANDARDS FOR DETERMINING DISCIPLINE

**(27)** Based on Supreme Court decisions, the commission has identified several factors that are relevant to determining appropriate discipline: the number of acts of misconduct; the existence of prior discipline; whether the judge appreciates that he or she committed misconduct; the judge's integrity; the likelihood of future misconduct; and the impact of the misconduct on the judicial system. (*Inquiry Concerning Van Voorhis* (2003) No. 165, Decision and Order Removing Judge Van Voorhis from Office, p. 31 [48 Cal.4th CJP Supp. 257, 295]; *Inquiry Concerning Hyde* (2003) No. 166, Decision and Order Removing Judge Hyde from Office, p. 27 [48 Cal.4th CJP Supp. 329, 363].) In addition, court decisions (e.g., *Adams II, supra*, 10 Cal.4th at pp. 908–911; *Doan, supra*, 11 Cal.4th at pp. 338–339) make clear that it is also relevant here that the misconduct involves moral turpitude and corrupt intentions. And, as noted at the outset, honesty is a minimum qualification for every judge. (*Kloepfer, supra*, 49 Cal.3d at p. 865.) We apply these standards to the facts here; in many respects, the various considerations overlap one another.

### 1. Number of Acts of Misconduct

**(28)** The Supreme Court has stated that the number of acts of misconduct is relevant to the question of discipline, but not according to any rigid formula. (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307 [240 Cal.Rptr. 859, 743 P.2d 919].) Judge Ross engaged in four acts of willful misconduct, two acts of prejudicial misconduct and one act of improper action. **(29)** Under the California Constitution, improper action is not a basis for censure or removal (Cal. Const., art. VI, § 18, subd. (d)); accordingly, we do not consider the judge's improper action, that is, the basic underlying misconduct of talking by telephone with Ms. Carrillo in count 1A, in reaching our determination to remove Judge Ross from office. " 'The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing "lack of temperament and ability to perform judicial functions in an even-handed manner." [Citation.]' " (*Fletcher, supra*, 19 Cal.4th at p. 918.)

Based on our determination of repeated wrongdoing by Judge Ross, compounded by his pervasive lack of candor and accountability and the fact

that he has prior discipline for misconduct similar to certain of the wrongdoing present in these proceedings (discussed immediately following), we are satisfied that a course of conduct has been clearly established. The evidence we have discussed convinces us beyond any doubt that Judge Ross has demonstrated that he lacks the temperament and ability to perform judicial functions in an evenhanded manner.

### 2. Prior Discipline

The commission previously disciplined Judge Ross with an advisory letter issued on February 14, 2001. The misconduct that was the subject of the earlier discipline was similar to that involved here, as found by the masters. It involved abuse of authority, acting in derogation of the attorney-client relationship and the right against self-incrimination, and conducting proceedings that lacked decorum and were demeaning and humiliating to defendants. The wrongdoing that has been proven in these proceedings began on January 15, 2001—four months prior to the advisory letter—with the improper comment on the juvenile case on *Life & Times Tonight*—followed six months after the advisory letter with the *Carrillo* hearing on August 23, 2001.

### 3. Appreciation of Misconduct

**(30)** "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) No. 162, Decision and Order Removing Judge Platt from Office, p. 15 [48 Cal.4th CJP Supp. 227].) We have documented in detail Judge Ross's unceasing attempts to distance himself from his actions, including by casting blame and aspersions on others. Indeed, his lack of acceptance and accountability is ever present.

During his testimony before the masters, Judge Ross made the following assertions that demonstrate his denial of wrongdoing:

Judge Ross maintained that he was neutral and detached in questioning Mr. Aka, and he did not think he was demeaning toward him, despite cross-examining him like a prosecutor and repeatedly calling him a liar.

The judge denied that he derogated the attorney-client relationship in the *Salcido* matter, or that he proceeded improperly after evicting DPD Gordon, or that removing counsel from the courtroom affected the attorney-client relationship. The judge asserts he was patient and dignified, despite having called Mr. Salcido a pathological liar in open court.

The judge recognized no wrongdoing in revealing on television facts he learned in a confidential juvenile hearing and announcing his intended decision on screen, while the case was still pending before him.[13]

Judge Ross was unwilling to admit that he knew he was acting as an arbitrator for *Mobile Court*.

When commission member Michael Kahn asked Judge Ross at oral argument "what [he] has learned from this, and how [he] will apply it to individual cases in the future," the judge was unable to provide a cogent or convincing response that he has learned anything pertinent—despite being invited twice by the chairperson to please answer the question.

Following oral argument before the commission, we asked for supplemental briefs from the parties on the subject of the propriety, or lack thereof, of removal in this case; the parties were asked to *assume* for purposes of the brief that the commission would adopt the basic findings and conclusions of the masters, and that it had determined that Judge Ross displayed serious lack of candor before the masters and the commission. In response, Judge Ross filed a 24-page brief that again highlights the judge's inability or refusal to acknowledge what he has done.

At the outset of the brief, under the heading "Summary of Proceedings," Judge Ross states as follows: "In affirming all the findings made by the Special Masters with respect to these charges, it is clear that the Commission believes that respondent failed to demonstrate strict adherence to the Code of Judicial Ethics. It is also clear that the Commission is deeply concerned that respondent failed to display the utmost candor during appearances before both the Special Masters and the Commission."

The judge's choice of modifiers—*strict* adherence to the canons, and *utmost* candor—qualifies even his basic description of the issues at hand. They suggest that there were only technical ethical violations and slight deviations from absolute honesty. This same refusal or inability to acknowledge the gravity of the wrongdoing permeates the judge's brief.

Following the introduction, he sets forth in a series each of the subcounts in which the masters found misconduct. There is an introductory subheading to each subcount in which Judge Ross sets forth what we call a "concession of error." For example, he begins with the *Carrillo* case, concerning which he "acknowledges" his misconduct as follows: "Respondent's [*sic*] recognizes that his sense of compassion cannot override ethical obligations to handle

[13] Judge Ross persisted in this position even during oral argument before the commission.

cases in a manner consistent with the Code of Judicial Ethics." Notably, the judge's "concession" is enveloped in a self-serving comment about his compassion.

In each instance of misconduct, then, the judge includes a purported summary of the facts that constitute the wrongdoing. The descriptions are self-serving and omit the most egregious portions of the wrongful conduct. For example, the judge's summary heading, or "admission of error," concerning the *Salcido* case is as follows: "Respondent recognizes that he failed to show Mr. Salcido the proper respect he was entitled to, demonstrating embroilment and lack of impartiality by accusing him of 'lying' and being a 'pathological liar.' " Neither in that heading, nor in the ensuing discussion of the facts, does Judge Ross make any mention of his egregious violations of Mr. Salcido's fundamental constitutional rights.

Judge Ross continues a similar process with each of the subcounts—offering concessions, the lack of sincerity and depth of which are exposed by the superficial factual descriptions that follow. His attempts to minimize his wrongdoing fail because they are hollow.

In another part of the supplemental brief, the judge also discusses his prior advisory letter. The masters found that the conduct that was the subject of the earlier discipline repeats itself here. Judge Ross does not argue against that observation. Instead, describing the circumstances underlying the discipline, he suggests that *his intentions were good*, even though he violated defendants' constitutional rights and otherwise demeaned them. Judge Ross demonstrates again that he is incapable of just admitting his wrongdoing.

### 4. The Judge's Integrity

Honesty is a "minimum qualification[]" expected of every judge. (*Kloepfer, supra*, 49 Cal.3d at p. 865.) A person cannot be a judge if he or she is not honest; other positive qualities cannot redeem or compensate for the missing fundamental. (*Ibid.*) Judge Ross's lack of candor is another demonstrated and predominant theme of these proceedings; it is pervasive.

In the *Fuentes* matter, the judge fabricated stories that the defendant gave him insurance papers, that an unnamed bailiff told him a judge could add charges for false insurance information, that another "identical" case triggered him into realizing he had made a "mess" of the *Fuentes* matter, that he took prompt action to remedy the prejudice, that he thought the defendant would appear in another court for arraignment even though he had just sent her to jail, that she would be "automatically" released on bail, and that he did not

just order her released from jail because, even though his clerk told him the defendant was still in jail, "they could not find her."

In the *Carrillo* matter, he persists in the false claim that he gave prompt notice to counsel of his ex parte conversation with the defendant. He admits that he made an after-the-fact addition to the court minutes that he gave to his supervising judge, and that he then filed an answer based on the alteration that concededly cannot be true.

In the *Aka* matter, Judge Ross testified that all probation violation hearings in his courtroom were formal ones. He knew that was not true.

Throughout these proceedings, Judge Ross has refused to admit that at the time he arbitrated the *Mobile Court* cases, he knew then that he was acting as an arbitrator. The assertion is defeated by overwhelming evidence to the contrary. He persists in his position that he signed the arbitration awards while distracted as makeup was being applied prior to filming, even after the impossibility of that being true—given the postfilming date on the awards—has been pointed out to him repeatedly. The judge's further assertion that he requested and expected the producer not to promote him and his position is without merit since real-life Judge Ross was the premise of the program and the key to the marketability of the new reality show.

The Supreme Court has denounced conduct such as Judge Ross repeatedly displays here. As to fabricating stories, the court stated in *Ryan*: "The misconduct in this matter is especially serious because it indicates that the judge was willing to fabricate justifications for a challenged ruling. This is misconduct of the worst kind, evidencing moral turpitude and dishonesty." (*Ryan, supra*, 45 Cal.3d at p. 535.)

As to altering documents, the court commented as follows in *Wenger* where the judge had backdated an affidavit: Judge Wenger "knew or should have known that it would create a false impression that he had signed on the earlier date." (*Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 644 [175 Cal.Rptr. 420, 630 P.2d 954].) Even though the affidavit was not submitted to the commission, and it was not clear why the judge had altered the date, the court denounced it as corrupt, based on an inference that *whatever the purpose*, it was "not the faithful discharge of judicial duties." (*Id.* at pp. 644–645.)

**(31)** As to attempts to mislead the commission, the court has denounced the practice as especially egregious. In *Adams II*, the court determined that the judge made "material misstatements or omissions" to the commission, concerning which it stated: "There are few judicial actions in our view that

provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission in the course of its investigation into charges of wilful misconduct on the part of the judge." (*Adams II, supra*, 10 Cal.4th at p. 914; accord, *Fletcher, supra*, 19 Cal.4th at pp. 887–891.)

### 5. Likelihood of Future Violations

**(32)** Repeat misconduct, such as is present here, indicates an inability to reform. (*Doan, supra*, 11 Cal.4th at pp. 339–340; *McCullough, supra*, 49 Cal.3d at p. 199.) Implicit in the lack of reform is the risk of yet further violations in the future.

We are convinced that Judge Ross's behavior suggests a strong likelihood of future violations. Judge Ross's misconduct here began before his prior discipline, repeats it in many respects, and becomes far more serious. Furthermore, the judge committed his willful misconduct in the *Fuentes* matter when he knew he was under investigation by the commission for his wrongdoing in the *Carrillo*, *Aka* and *Salcido* matters. In a previous removal case, the commission noted that the judge "had just received a preliminary investigation letter from the commission. Accordingly, [he] had every reason to scrupulously observe the standards of judicial conduct. Instead, [he committed willful misconduct]. . . . Even when the commission's attention was focused on him, [the judge] could not resist repeating an act of misconduct." (*Inquiry Concerning Hyde*, *supra*, No. 166, Decision and Order Removing Judge Hyde from Office, p. 32 [48 Cal.4th CJP Supp. at pp. 369–370].) The same can be said about Judge Ross.

In a similar vein, during Judge Ross's oral argument before the commission, faced with the masters' extensive negative credibility findings, Judge Ross resorted to the same type of evasive answers that led to those findings. Reviewing the questioning by the three judge members of the commission as to why he had not just ordered Ms. Fuentes released from jail (*ante*, pp. 96–99), the only conclusion one can draw from Judge Ross's "responses" is that he was actively fabricating.

It is obvious that the prior private discipline did not have its desired deterrent effect. We are convinced that there is a strong likelihood that Judge Ross will commit further misconduct if we do not protect the public and the judiciary by removing him.

### 6. Impact on Judicial System

We have detailed Judge Ross's serious infringements of criminal defendants' constitutional rights, including the multiday deprivation of Ms. Fuentes's

liberty without any pretense of due process of law. Beyond the cloud these violations cast over Judge Ross personally, there has been a vicarious besmirching of the reputation of the judiciary in general. The judge has made unseemly suggestions concerning political considerations in the dispensing of justice by our Supreme Court, thus risking that the public will accord the court's decisions less respect than they rightfully deserve. The protected right of a juvenile to confidentiality was sacrificed on television and the premature on-air announcement of the intended disposition of the juvenile matter demonstrated prejudgment. His attacks on criminal defendants show an uneven temperament, a manifest embroilment and a lack of impartiality.

We are dismayed by Judge Ross's conduct in and out of the courtroom, culminating in his willingness to be filmed as a judge in a strip club in hopes of being able to market himself off the bench into a more lucrative career. Last but certainly not least, Judge Ross's pervasive lack of candor is utterly incompatible with the role of judge and impacts on the administration of justice, and the public's image of it. The adverse consequences of Judge Ross's conduct are undeniable, and demand that we redress them as best we can.

## C. ORDER REMOVING JUDGE ROSS FROM OFFICE

**(33)** Numerous witnesses testified before the masters concerning Judge Ross's dedication and talents as a community leader and role model. He is gifted and dedicated to important judicial outreach activities. He brought to the bench excellent credentials by way of schooling and prior work experience. These factors make our task all the more difficult. They have caused us considerable pause and reflection in the time and detail of our deliberations, and in our ultimate decision. However, they do not and cannot mitigate the totality of the wrongdoing or the conclusion that removal from office is required. (See *Adams II, supra*, 10 Cal.4th at p. 912 [positive qualities of a judge are properly considered as part of the totality of circumstances pertinent to determining appropriate discipline, but do not mitigate willful or prejudicial misconduct].)

Pursuant to the provisions of article VI, section 18 of the California Constitution, Judge Kevin A. Ross hereby is ordered removed from his judicial office; pursuant to that section of the Constitution and rules 120(a) and 136 of the Rules of the Commission on Judicial Performance, Judge Ross hereby is disqualified from acting as a judge.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Justice Judith D. McConnell, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted in favor of all the findings and conclusions expressed herein and in the foregoing order of removal and disqualification of Judge Ross. Commission member Patricia Miller is recused and commission member Lawrence Simi did not participate in this matter.

The judge's petition for review by the Supreme Court was denied on May 10, 2006.

[No. 175. Dec. 12, 2006.]

# INQUIRY CONCERNING JUDGE DIANA R. HALL.

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance ordered the judge removed from office. The commission found that the judge's inappropriate political activity, signing four campaign disclosure statements under penalty of perjury listing herself as the source of a $20,000 contribution from her romantic partner knowing that information to be false, was prejudicial misconduct within the meaning of Cal. Const., art. VI, § 18, subd. (d), and violated Cal. Code Jud. Ethics, canons 1, 2A, and 5. A judge who engages in materially deceitful and lawless conduct that undermines the electoral process, and thereafter attempts to explain it away with specious arguments and misleading testimony, should not continue in judicial office. In addition, the judge committed prejudicial misconduct by driving under the influence of alcohol, for which she had two misdemeanor convictions, and she committed willful misconduct by improperly questioning a prosecutor concerning his reasons for exercising an unqualified right to disqualify her in a judicial proceeding. The judge also committed the misconduct underlying a prior private admonishment when she knew that the commission was investigating her in connection with the current charges, thus showing an inability to control her behavior and a likelihood of future misconduct. (Opinion by Marshall B. Grossman, Chairperson.)

## HEADNOTES

(1) **Judges § 6.2—Discipline—Standard of Personal Conduct.**—Cal. Code Jud. Ethics, canon 1, requires a judge to uphold and preserve the integrity of the judiciary and to do so by maintaining high standards of personal conduct.

(2) **Judges § 6.2—Discipline—Compliance with Law.**—Cal. Code Jud. Ethics, canon 2A, requires a judge to respect and comply with the law

and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(3) **Judges § 6.2—Discipline—Prejudicial Misconduct—Driving Under the Influence.**—Prejudicial misconduct within the meaning of Cal. Const., art. VI, § 18, subd. (d), arises out of conduct which is not done in bad faith, but which nevertheless would appear to an objective observer to be not only unjudicial conduct but also conduct prejudicial to public esteem for the judicial office. When a judge is arrested and convicted of DUI, it is prejudicial to public esteem for the judicial office.

(4) **Elections § 14—Campaign Financing—Statements—Commingling Funds.**—Campaign statements are mandated by the Political Reform Act of 1974 (Gov. Code, §§ 84200–84216.5) and require disclosure of detailed information about receipts and disbursements of money by a campaign committee. They are the primary means of providing transparency in connection with election finances; they directly implement one of the primary purposes of the act—to ensure that receipts and expenditures in election campaigns be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited (Gov. Code, § 81002, subd. (a)). Gov. Code, § 84307, prohibits commingling of a contributor's investment funds with a candidate's own funds in the candidate's own personal checking account. Cal. Code Jud. Ethics, canon 5, requires judges to refrain from inappropriate political activity. By commingling funds, intentionally concealing the source of nearly half of all the judge's campaign contributions, and signing four declarations under penalty of perjury knowing they were false, the judge violated five sections of the Political Reform Act and canon 5.

(5) **Judges § 6—Discipline—Grounds—Maintain High Standards—Promote Public Confidence.**—The judge also violated Cal. Code Jud. Ethics, canon 1, by failing to maintain a high standard of conduct when she failed to read the law governing her reelection and then violated it. She also violated the provision of Cal. Code Jud. Ethics, canon 2A requiring judges to promote public confidence in the judiciary. The public can have no confidence in a judge, and hence a judiciary, that is required to know and respect the law but does neither.

(6) **Judges § 6.2—Discipline—Elections—Ignorance of Law.**—Any candidate for judicial office must know and strictly adhere to all applicable election laws; utmost integrity is required of every candidate for judicial office. A claim by a judicial candidate of ignorance of the law as a defense to a wide-ranging violation of the law aggravates the violation itself.

(7) **Judges § 6.2—Discipline—Grounds—Prejudicial Misconduct—Judical Capacity—Campaign Misconduct.**—A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose. The judge was not acting in a judicial capacity when she signed false campaign statements under penalty of perjury, as a candidate. The judge's campaign violations constitute prejudicial misconduct.

(8) **Judges § 6.2—Discipline—Grounds—Prejudicial Misconduct—Bad Faith.**—In the context of a judicial disciplinary matter, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring the judicial office into disrepute, that is, the conduct would appear to an objective observer to be prejudicial to public esteem for the judicial office. The judge's campaign misconduct was unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity.

(9) **Judges § 6—Discipline—Grounds—Willful Misconduct—Response to Disqualification.**—When the judge asked the prosecutor why he was challenging her from a case, she violated Cal. Code Jud. Ethics, canons 1 and 2A by failing to maintain the high standard of conduct required by a judge, and acted without integrity. All three elements of willful misconduct within the meaning of Cal. Const., art. VI, § 18, subd. (d) are met. The judge's conduct was (1) unjudicial and (2) committed in her judicial capacity, and (3) she committed an act she knew was beyond her lawful power and thus acted in bad faith.

(10) **Judges § 6.3—Discipline—Prior Proceedings—Admissibility.**—There is no prohibition in the Constitution, statute or any Supreme Court case against a private sanction becoming public. Furthermore, Rules of Com. on Jud. Performance, rule 125(b), by expressly making prior discipline admissible in formal proceedings, gives advance notice of the possibility of such an occurrence. The consideration by the Commission on Judicial Performance of prior private discipline also is consistent with the established policy and practice of escalating discipline for successive misconduct. When the commission relies on prior private discipline, it is important that the commission explain that its disciplinary decision is informed or influenced by the fact the judge has committed other misconduct, and its nature.

(11) **Judges § 6.2—Discipline—Grounds—Prior Proceedings.**—Prior discipline is relevant to a judicial disciplinary determination, irrespective of when the underlying misconduct occurred. Rules of Com. on Jud. Performance, rule 125(b), defines prior discipline as any disciplinary action that is in effect before the conclusion of a commission proceeding, including review by the California Supreme Court. The determining consideration is not when the other misconduct occurred, but rather, that it resulted in discipline that had taken effect before the conclusion of the current proceeding. Rule 125(b) further provides that prior discipline is admissible to determine what action should be taken regarding discipline. That a judge committed misconduct subsequent to the events underlying formal proceedings is a highly relevant factor in determining the appropriate discipline to impose. That the judge committed misconduct when she knew she was under investigation by the commission, a time when one would expect her to be on her very best behavior, is highly relevant to the decision concerning the appropriate level of discipline.

(12) **Judges § 6.2—Discipline—Grounds—Violation of Campaign Finance Laws—Deceit—Removal from Office.**—A judge who engages in materially deceitful and lawless conduct that undermines the electoral process, and thereafter attempts to explain it away with specious arguments and misleading testimony, should not continue in judicial office. Her misconduct is fundamentally at odds with the core qualities and role of a judge in our society.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.86.]

(13) **Judges § 6.2—Discipline—Dishonesty.**—Honesty is a minimum qualification for every judge. If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental. The deception practiced by the judge during her reelection campaign, as well as her specious arguments before the special masters and the commission are equally antithetical to, and inherently incompatible with, her duties to uphold the law and the search for truth.

(14) **Judges § 6—Discipline—Determining Appropriate Sanction—Mitigation—Character Evidence.**—Testimony that the judge was a beloved, loyal and respected friend, a mentor and role model, and positive testimony about the judge's integrity, honesty, demeanor and impartiality were taken into account by the commission in considering the totality of the circumstances. However, the testimony could not mitigate or excuse willful or prejudicial misconduct.

(15) **Judges § 6—Discipline—Determining Appropriate Sanction—Removal from Office.**—The judge's election fraud overwhelmed other considerations and compelled removal of her from office. She engaged in deceit and misrepresentation to keep her position as a judge. She also dissembled before the masters and the commission with excuses to minimize fault, thereby demonstrating a lack of acceptance of, and accountability for, her wrongdoing. She demonstrated extreme lack of judgment when she drove drunk. She questioned an attorney's disqualification of her, knowing the impropriety of doing so. Finally, her conduct during a hearing involving a high-profile celebrity demonstrated an alarming disrespect for the authority of the judge presiding over that case, the presiding judge of the court, and other court personnel. Her actions show the serious degree to which she is unable to control her behavior. That inability to exercise self-restraint is a convincing indicator of the strong likelihood that she will reoffend in the future. The commission's constitutional mandate to protect the public and the reputation of the judiciary does not allow its running that risk.

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**OPINION**

**GROSSMAN, Chairperson.—**

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Diana R. Hall, a judge of the Santa Barbara County Superior Court, whose current term began in 2002 after she won reelection in the contested election that is a subject of these proceedings. At the time of the election, the judge lived in a romantic relationship with Deidre Dykeman and did not want that fact generally known. Ms. Dykeman gave the judge $20,000 for the reelection campaign—approximately half of the total amount of contributions. Concerned that the contribution might raise questions about the relationship, the judge deposited the $20,000 into her own personal checking account to conceal its source. During the campaign, she signed four campaign disclosure statements under penalty of perjury listing herself as the source of the $20,000, knowing that to be false. She undermined the fair electoral process with her deceit and misrepresentations. At a minimum, there is an appearance Judge Hall holds her judicial office as the result of election fraud.

Judge Hall claims she violated campaign finance and disclosure laws inadvertently, as the result of not reading them. She further asserts she had a legitimate belief her partner's separate funds belonged to the two of them. We regard these attempts to minimize the wrongdoing as aggravating the underlying campaign violations.

Additionally, Judge Hall has two misdemeanor convictions by a jury for driving under the influence of alcohol (DUI). She also improperly questioned a prosecutor concerning his reasons for exercising an unqualified right to disqualify her in a judicial proceeding, knowing that doing so was improper.

We order Judge Hall removed from office because of the seriousness and breadth of her misconduct. Further, we issued a private admonishment against Judge Hall last year for conduct that shows an alarming disrespect for authority. The judge committed the misconduct underlying the private admonishment when she knew this commission was investigating her in connection with the current charges. She thereby also has shown an inability to control her behavior, demonstrating the strong likelihood she will continue to commit misconduct in the future.

The commission commenced this inquiry with the filing of its notice of formal proceedings (Notice) on July 25, 2005, setting forth the charges against Judge Hall in three counts. We discuss the charges beginning at page 152, *post*. The judge filed her amended answer (Answer) on October 26, 2005. At the request of the commission, the Supreme Court appointed three special masters to hear and take evidence and report to the commission under Rules of the Commission on Judicial Performance, rule 129. (All references to a rule are to the Rules of the Commission on Judicial Performance.) The three masters held a three-day hearing during November 2005.

Immediately following the conclusion of the November hearing, the commission received information that caused it to conclude that, at a minimum, the appearance of the fundamental fairness of the proceedings had been irreparably compromised. We immediately issued a stay, and on December 23, 2005, we petitioned the Supreme Court to appoint a successor panel of special masters to hear the matter de novo. (*In re Judicial Disciplinary Proceeding Concerning Judge Diana R. Hall* (Jan. 4, 2006, S139619).) The court granted the commission's petition on January 4, 2006 (*ibid.*), and appointed new special masters on February 9, 2006. At the request of Judge Hall, on February 6, 2006, the commission ordered all transcripts of proceedings before the original panel of masters sealed. We have not seen those transcripts.

The presiding special master appointed by the Supreme Court in 2006 is Hon. Dennis A. Cornell, Associate Justice of the Court of Appeal, Fifth Appellate District. The other two special masters are Hon. Tani G. Cantil-Sakauye, Associate Justice of the Court of Appeal, Third Appellate District; and Judge Desiree A. Bruce-Lyle, Judge of the San Diego County Superior Court. They held an evidentiary hearing in Ventura April 24 through 26, 2006, followed by oral argument in Sacramento on June 14, 2006. The

masters' 51-page report to the commission, containing their detailed findings of fact and conclusions of law, was filed with the commission on July 26, 2006.

We base our decision to remove Judge Hall from office on the masters' factual findings and legal conclusions, with which we agree in their entirety and which we adopt as our own in all respects. They resolved numerous credibility issues and factual disputes. We adopt their determinations in all instances.

Judge Hall is represented by Attorney Rebecca D. Lizarraga of Studio City, California. The examiners for the commission are Commission Trial Counsel Andrew Blum and Commission Assistant Trial Counsel Valerie Marchant.

## II. ANALYSIS OF THE CHARGES AND EVIDENCE

The charges against Judge Hall appear in the Notice in three separate counts, which we discuss separately. Count 1 involves the judge's misdemeanor drunk driving convictions, discussed at pages 152–153, *post*. Count 2 relates to campaign finance and disclosure violations (pp. 154–165, *post*), and count 3 concerns the judge's improper questioning of a prosecutor as to why he was exercising a statutory right to assert a peremptory challenge against her (pp. 165–167, *post*).

The commission, through its examiner, has the burden of proving the charges against Judge Hall by clear and convincing evidence. (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 313 [45 Cal.Rptr.2d 254, 902 P.2d 272] (*Doan*); *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].) " '[C]lear and convincing' evidence [is] ' " 'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " ' " (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.] The evidence need not establish the fact beyond a reasonable doubt." (*Ibid.*)

### A. COUNT 1—FINDINGS OF FACT

Judge Hall admitted in her verified Answer, during her testimony, and in written stipulations, the charges in count 1 concerning her drunk driving. Based thereon, the masters and we find the judge committed the DUI violations. Paraphrasing the masters' findings, the pertinent details follow.

On December 21, 2002, in Santa Ynez, California, Judge Hall committed the misdemeanor offenses of driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a), and of driving while having a blood-alcohol level of 0.08 percent or higher in violation of section 23152, subdivision (b). A jury convicted her of the two DUI offenses and acquitted her of other charges the district attorney brought against her as part of the same proceedings.

In December 2002, Judge Hall was in a romantic relationship with Deidre Dykeman. The two had met in 1998 and had bought a house together in 1999 in which they both resided on December 21, 2002. They owned the property as tenants in common. They were not registered domestic partners under California law.

On December 21, the judge had a beer with lunch, and wine during the afternoon. She and Ms. Dykeman had an argument. Judge Hall left the house in her car after Ms. Dykeman called 911 to complain of domestic violence by the judge. The judge intended to drive to her office to phone someone.

While driving, Judge Hall saw a patrol car traveling at a high speed. She stopped; the officer turned on his lights and stopped behind her. A second patrol vehicle arrived. The judge was placed under arrest; her blood-alcohol level was 0.18 percent, or more than twice the legal limit.

The judge's counsel notified the district attorney of the judge's willingness to plead guilty to DUI charges. The judge changed her mind, however, when the district attorney filed additional charges against her, including a felony that carried a mandatory state prison sentence upon conviction. She went to trial on all the charges; the jury acquitted her of all charges, except for the two DUI misdemeanors which she admitted at trial and of which she was convicted.

Judge Hall testified she has ceased drinking alcohol since November 2005. In her Answer, the judge expressed deep remorse for driving while intoxicated. She also states she regrets that her impaired judgment led her to drive while under the influence of alcohol.

## B. COUNT 1—CONCLUSIONS OF LAW

### 1. Violations of the Code of Judicial Ethics

(1) Count 1 charges Judge Hall with violating California Code of Judicial Ethics canon 1 (all references to a canon are to the California Code of Judicial Ethics), which requires a judge to uphold and preserve the integrity

of the judiciary and to do so by maintaining high standards of personal conduct. **(2)** We adopt the following conclusions of the masters that Judge Hall violated this canon as well as canon 2A, which requires a judge to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary: "By driving a car when impaired by alcohol with a blood-alcohol level of more than two times the legal limit, Hall failed to observe high standards of conduct. Her conduct exhibited a complete lack of concern for the safety of others, an inability to control her impulses and poor judgment, thereby seriously injuring the integrity of the judiciary in the eyes of the public. This same conduct reflects her lack of respect for and compliance with the law in violation of canon 2A."

### 2. Prejudicial Misconduct

**(3)** The masters and we conclude the DUI violations and convictions constitute prejudicial misconduct within the meaning of article VI, section 18, subdivision (d) of the California Constitution. The Supreme Court has defined this category of misconduct by a judge as arising out of conduct which is not done in bad faith, " ' "but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" . . . .' " (*Broadman, supra*, 18 Cal.4th at p. 1092, citing *Doan, supra*, 11 Cal.4th at p. 312.) We adopt the masters' apt summation of why drunk driving by a judge fits within this definition: "The offenses, driving under the influence of alcohol and driving with a blood-alcohol level above 0.08 percent are high profile, heavily legislated crimes. This is so because these types of crimes, while having the potential for serious and fatal injuries to the innocent public on the roadways, are preventable and yet not uncommon. When an elected official, especially a judge, is arrested for DUI, the arrest can often inflame the emotions of a community and often makes front page news. Thus, when a judge is arrested and convicted for DUI, it is prejudicial to public esteem for the judicial office."

## C. COUNT 2—FINDINGS OF FACT

Count 2 charges Judge Hall with election law violations, including that she illegally commingled campaign and personal funds, and filed four sworn false campaign finance statements, thereby engaging in improper political activity. We summarize the facts, again paraphrasing the masters. As we discuss, the judge disputes key facts and their significance.

### 1. Ms. Dykeman's $20,000 Contribution to Judge Hall's Reelection Campaign

In the fall of 2001, Judge Hall learned she would have a challenger in her bid for reelection to the bench in March 2002. She formed a reelection committee consisting of herself and an acquaintance as treasurer. She also retained an election consultant.

The judge had no experience in fundraising or running a campaign, and she loathed asking people for money. She did not want to accept contributions either from friends or from anyone else, including attorneys appearing before her, who might believe they would gain influence or advantage in her court.

In the fall of 2001, Judge Hall was given, and signed a receipt for, a copy of the Fair Political Practices Commission (FPPC) "Manual A" containing election information for candidates, including judges, and their campaign committees. The judge "went through" the manual, but did not "review" the portion of it outlining the duties of officeholders, candidates and campaign treasurers, prior to giving the pamphlet to her campaign treasurer. She did not review the Government Code sections applicable to campaigns. The judge testified, though, that at the time of her campaign, she knew she was required to disclose campaign contributions. She also knew then that the filing of various campaign statements required her signature and verification.

In early 2002, Judge Hall believed her campaign needed more money. She discussed with Ms. Dykeman the amount of money needed and the options for sources of funds. The two women then lived together in a romantic relationship, although only family members and a few of the judge's close friends knew that fact. Ms. Dykeman wanted to help with the campaign, but the judge discouraged it because she did not want members of the public to know of the relationship. The judge and Ms. Dykeman discussed holding a fundraiser at their home, but the judge did not want to do that, again because of her desire to keep the relationship confidential. They also discussed borrowing against the equity value of their house. Ms. Dykeman opposed that option. There was conflicting testimony whether the judge's sister was in a position to loan the judge money for the campaign.

Ms. Dykeman proposed using money from her personal mutual fund investment accounts to build up the judge's campaign coffers. Ms. Dykeman had the investment accounts before she met the judge, and the judge had not contributed any money to them. Ms. Dykeman testified the two of them discussed using funds from her investment accounts for the campaign and that she would go online and transfer the funds on an expedited basis. Judge Hall denied any such discussion. The masters accepted Ms. Dykeman's

testimony on this point because they found it credible. We adopt their credibility assessment and finding because both appear reasonable and correct.

Ms. Dykeman withdrew approximately $20,000 from several of her investment accounts and wire-transferred them to her personal checking account. She promptly wrote a $20,000 check, dated February 3, 2002, drawn on that same account, payable to "Diana Hall" for the reelection campaign. Ms. Dykeman testified she asked the judge to whom she should write the check and the judge said to write it to her and she (the judge) would take care of it. The judge denied this conversation, but the masters and we adopt Ms. Dykeman's version—primarily because, as the masters found, Ms. Dykeman was credible and without any motive to fabricate this portion of her testimony. Additionally, the masters found Ms. Dykeman's inquiry concerning the payee comports with common experience of asking the recipient of a check to whom it should be made payable. We agree, particularly under the rather unusual circumstances present here, that the person writing such a check likely would ask to whom it should be made payable.

It is undisputed that when Ms. Dykeman gave her check to the judge, the two of them did not discuss whether the funds were to be repaid or otherwise reallocated between them. Ms. Dykeman testified that when she wrote the check and gave it to the judge, she did not expect the judge to return the $20,000, but there was no discussion whether it was a gift or a loan. From Ms. Dykeman's perspective at the time, she wanted the judge to be happy and she considered her $20,000 to be an investment in their happiness and future. She did not expect the judge to return the money, in part because their relationship was fine at the time.

Judge Hall admits she never advised Ms. Dykeman that Ms. Dykeman might be required to file a campaign report under Government Code section 84105 because of the check. (All code section citations are to the Government Code unless otherwise indicated. All of the subject Government Code sections are part of the Political Reform Act of 1974 (§ 81000 et seq.; the Act).)

On February 12, 2002, Judge Hall wrote a check for $25,000 to her campaign from her personal checking account, to which she had deposited Ms. Dykeman's $20,000 check. The source of funds for the judge's check was Ms. Dykeman's $20,000 and an additional $5,000 of the judge's own money. The judge testified she was not aware at the time that the Act prohibited such commingling of funds. She gave her check to her campaign treasurer, who deposited it into the campaign account. She did not tell the treasurer that $20,000 of the funds came from Ms. Dykeman.

### 2. The Four Campaign Statements

**(4)** During the reelection campaign, on four separate occasions Judge Hall signed an FPPC Form 460 campaign report with attached schedules, including a monetary contributions received schedule and a campaign disclosure statement. (The masters and we refer to the 460 forms as "the campaign statements.") Campaign statements, such as those signed by Judge Hall, are mandated by the Act (§§ 84200–84216.5) and require disclosure of detailed information about receipts and disbursements of money by a campaign committee. They are the primary means of providing transparency in connection with election finances; they directly implement one of the primary purposes of the Act—to ensure that "[r]eceipts and expenditures in election campaigns . . . be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." (§ 81002, subd. (a).)

The four campaign statements Judge Hall signed cover the period January 20 through October 26, 2002. They consist of a preelection statement, an amended preelection statement, a semiannual statement and a termination statement. The judge signed all four statements under penalty of perjury, verifying pursuant to the preprinted text on each form, that she had "used all reasonable diligence in preparing and reviewing" each statement, and attesting to "the best of [her] knowledge" that the information on the forms and attached schedules is "true and complete."

In contrast to the verification on each of the campaign statements, Judge Hall testified concerning the first one, the preelection statement, that she did not "review it to see that all the contributors were listed there." There is no testimony concerning whether or the extent to which she reviewed the second, or amended preelection, statement. As to the third, the semiannual statement, she testified she did not read it before signing the verification. The judge "glanced over" but "did not read" the fourth, the termination statement. "There is no mention in any of Hall's campaign statements that Dykeman contributed to Hall's campaign. Hall did not list Dykeman's $20,000 contribution as coming from Dykeman. [Citation.] In all of her campaign statements, under penalty of perjury, Hall listed herself as the sole source of the $25,000 knowing that Dykeman contributed $20,000 of the $25,000 from [Dykeman's] own funds. [Citations.]"

The judge testified that when she filed her campaign statements, she did not know the Act required her to report the $20,000 from Ms. Dykeman as either a contribution or a loan.

After the election, Judge Hall learned there was campaign money left over, which she returned to Ms. Dykeman, even though Ms. Dykeman did not

believe that was the preferable disposition of the unused funds. In addition to returning those excess campaign funds, the judge began the process of repaying Ms. Dykeman the balance of the $20,000 by paying the entire mortgage installment payment for several months and paying for substantial home improvements and other items. Ms. Dykeman testified she felt the judge repaid the $20,000 contribution in full.

Judge Hall testified that Ms. Dykeman's $20,000 constituted roughly half of the total combined contributions to her campaign. She admits she did not report Ms. Dykeman's $20,000 on any campaign statement—as either a loan or a contribution—even after she began repaying the money. We discuss her explanations for these repeated nondisclosures next.

### 3. Judge's Explanation for Nondisclosure of Ms. Dykeman's $20,000

Judge Hall did not want it known that Ms. Dykeman contributed to the judge's campaign. The judge testified that her relationship with Ms. Dykeman was her first same-sex relationship. In the judge's view, disclosure of the relationship would have made her job very difficult in the conservative area in which she was running for reelection. She also testified she told Ms. Dykeman that although as a judge she was a public official, their relationship would need to remain nonpublic.

In response to questioning by the examiner whether the judge was concerned about the relationship becoming known if Ms. Dykeman's name appeared on her campaign statements, Judge Hall testified, "the honest answer is I never really thought about it." However, in earlier testimony under oath in her drunk driving trial, the judge testified she claimed the money as her own because she did not want people to know Ms. Dykeman had given her money and did not want Ms. Dykeman's name on reporting records. She admitted before the masters she was telling the truth in that DUI trial testimony.

The masters' reaction to the foregoing, with which we concur, was the following strong rejection of the judge's claim: "Based on this evidence, we find Hall intentionally evaded the reporting requirements. We reject Hall's 'honest answer that she never really thought about it' and her feigned ignorance of the reporting requirement."

The judge also testified she considered Ms. Dykeman's $20,000 to be jointly owned. Allegedly, she therefore believed she did not need to disclose the source of those funds. She testified she considered the $20,000 "our

money" because of a combination of factors, including the intimate relationship, the partners' co-ownership of the house in which they lived, and their practice of sharing household expenses. The judge's claim is irreconcilable with Ms. Dykeman's testimony that she, Dykeman, had wanted to merge finances, but the judge refused. Ms. Dykeman testified the judge said, "her money was her money, and my money was my money; and she wanted us to keep our financial documents separate."

Further, all the evidence clearly showed the two partners divided expenses and regularly made certain on an ongoing basis their respective contributions to the household were roughly equal. "Together, they lived in a romantic partnership, maintaining their separate accounts, sharing expenses by equalizing costs of the mortgage, property taxes, home improvements, groceries and entertainment. [Citations.]" As the masters summarized the issue, "based on the history and financial practices of the relationship, we find no basis in fact or law for Hall's position that the $20,000 was 'our money.' " We concur.

### 4. Violations of the Political Reform Act

In her Answer, Judge Hall admits violating the Act in that she did not comply with the terms of sections 84105 and 84211, subdivisions (f), (g). She also admits that under section 84216, subdivision (b)(3), reporting of Ms. Dykeman's $20,000 was required under section 84211, subdivision (g). In summary terms, section 84105 requires a candidate or committee receiving contributions of $5,000 or more from any person to inform the person he or she may be required to file campaign reports. Section 84211, subdivision (f) specifies details regarding reporting of cumulative contributions, including loans of $100 or more; section 84211, subdivision (g) specifies the reporting details in the case of cumulative amounts of loans of $100 or more. Under section 84216, subdivision (b)(3), certain loans must be reported at the time of receipt if the money is used for political purposes.

Additionally, the judge admits commingling the funds from Ms. Dykeman's investment funds with her own funds in her own personal checking account, and then writing her own $25,000 check consisting of funds from the two different sources. Section 84307 prohibits such commingling.

Although Judge Hall admits the foregoing violations of the Act, she claims she did not willfully violate the law because she was ignorant of its requirements at the time of the violations. The masters, and we, reject the judge's claim. "Simply put, Hall is attempting to diminish the severity of her actions by using her self-imposed ignorance to defeat a knowledge requirement. She fails."

We also agree with the masters, for the reasons they and we explain, that Judge Hall intentionally failed to report Ms. Dykeman as a contributor. Most importantly, she admitted as much under cross-examination under oath in her DUI trial. The judge admitted before the masters she was telling the truth in her earlier testimony, which was as follows: "[Prosecutor]: And, I mean, you even went to the extent that when [Ms. Dykeman] gave you this $20,000 for your campaign, that you actually claimed it as your own money, didn't you, because you didn't want to report Ms. Dykeman's name on the reporting records? You didn't want people to know that Ms. Dykeman had given you any money; isn't that right?

"[Judge Hall]: That's correct."

Second, clear and convincing circumstantial evidence supports the finding of the judge's intentional nondisclosure of Ms. Dykeman's $20,000 contribution. As described by the masters, the combination of the following five considerations leads inexorably to such finding.

(1) The judge admitted she knew she had a duty to disclose campaign contributions. In fact, her campaign statements list many contributors.

(2) The judge did not want to include Ms. Dykeman's name in the reporting because of concern that the largely secret relationship would not remain confidential.

(3) The judge feared that if her relationship became known, the knowledge would negatively affect her reelection.

(4) The judge in fact did not disclose Ms. Dykeman's name.

(5) The judge accomplished her goal of hiding Ms. Dykeman's identity by orchestrating the transfer of funds in a manner to camouflage the source. The judge told Ms. Dykeman to write the check to her personally; she then put the money in her own personal account, and did not tell her treasurer that 80 percent of her $25,000 personal check was Ms. Dykeman's money. There is no evidence the judge directed anyone else to write a check to her personally, or that she ran any other check for the campaign through her personal checking account en route to the campaign account.

The masters rejected Judge Hall's assertion that her close relationship with Ms. Dykeman justified the nondisclosure of her partner's contribution. We also reject the claim. The two women were not registered domestic partners. Furthermore, they in fact kept their finances strictly separate, constantly ensuring roughly equal sharing of joint costs and disbursements, at the

judge's insistence. The judge's claim that her relationship with Ms. Dykeman cloaked Ms. Dykeman's $20,000 with a special status, somehow insulating it from disclosure requirements, is evidence of a "further irresponsible ignorance of the law," rendering the defense "specious at best," according to the masters. We agree.

### 5. Stipulated Dismissal of Charges of Additional Violations of Political Reform Act

The charges against Judge Hall include that she also violated sections 84301, 84302, 87207, subdivision (a)(5) and 87461, subdivision (a), all of which are part of the Act. The examiner stipulates there were no violations of these provisions, and we now dismiss those charges both because the stipulation is well founded and because there is no evidence Judge Hall violated any of these sections.

Section 84301 states that no person may contribute to a campaign other than in the contributor's legal name. This section appears to be directed at the person who contributes the money. Ms. Dykeman was the source of the $20,000. By listing herself as the contributor, the judge did not provide the correct legal name. However, the masters accepted the examiner's concession that this section is inapplicable, and we do the same. To the extent the section may apply to these facts, it does so only in a technical, tangential way. The violations of the sections discussed previously in part 2.A.4. (beginning at p. 159, *ante*) more appropriately apply to the gravamen of the wrongdoing that occurred. This charge is dismissed.

Section 84302 prohibits a person from contributing as an agent or on behalf of another person without making specified identifying information. There is no evidence of any violation of this section. This charge is dismissed.

Under section 87207, subdivision (a)(5), certain information must be provided concerning campaign income, including in the case of a loan, the annual interest rate, any security, and the terms of the loan. As the masters note, there is no evidence Ms. Dykeman loaned the $20,000 to the judge. Ms. Dykeman testified that when she gave the money to the judge, she had no expectation of seeing the money again. She was surprised when the campaign ended with a surplus and argued in favor of doing something other than returning the excess funds to her. The contribution did not originate as a loan and there is no evidence there ever were any loan negotiations. There is no evidence of a violation of section 87207, subdivision (a)(5). This charge is dismissed.

Section 87461, subdivision (a) prohibits any specified elected government official from receiving a personal loan of $500 or more, absent a written lending agreement subject to certain requirements. Again, there is no evidence that when Ms. Dykeman gave the judge $20,000 she intended it to be a loan. That the judge later voluntarily decided to repay the $20,000 does not change the fact that when given, it was a contribution, not a loan. This code section thus is inapplicable and this charge is dismissed.

### 6. False Sworn Declarations

Count 2 charges Judge Hall signed each of the four campaign statements under penalty of perjury knowing they were false because they incorrectly list the judge as the source of the $20,000. The judge testified she signed all four campaign statements under penalty of perjury and they all bear her signature. All four statements falsely identify the judge as the sole source of the $25,000 represented by her personal check to her campaign when she knew $20,000 of that amount came from Ms. Dykeman.

The judge admits she did not disclose Ms. Dykeman as a campaign contributor and admits she did not disclose Ms. Dykeman as the source of the $20,000. As a result, the masters found that Judge Hall signed all four campaign statements under penalty of perjury knowing each of them contained false information. We agree. The judge's nondisclosure of Ms. Dykeman as the true source, and the concomitant false representation of the judge as the source, are highly material because her misconduct subverts a core purpose of the Act—that "the voters may be fully informed and improper practices may be inhibited." (Gov. Code, § 81002, subd. (a).)

## D. COUNT 2—CONCLUSIONS OF LAW

### 1. Violations of the Code of Judicial Ethics

Judge Hall violated five sections of the Act; she commingled funds, intentionally concealed Ms. Dykeman as the source of nearly half of all of her campaign contributions, and signed four declarations under penalty of perjury knowing they were false. The charges against her are that this behavior constitutes inappropriate political activity in violation of canons 1, 2A and 5. We have noted the dictates of canons 1 and 2A on pages 153–154, *ante*. Canon 5 requires judges to refrain from inappropriate political activity. The masters and we conclude the judge violated each of those canons. Their summary statement, which we adopt, is as follows: "[W]e conclude that all three canons are violated when an incumbent judge running in a contested election violates the applicable law, and then attempts to excuse her conduct by claiming ignorance of the applicable law. This is a strict standard of liability."

**(5)** Judge Hall violated canon 1 by failing to maintain a high standard of conduct when she failed to read the law governing her reelection and then violated it. She also violated the provision of canon 2A requiring judges to promote public confidence in the judiciary. Public confidence in the judiciary is seriously impacted when the public learns a judge, one who is entrusted to apply the rule of law, does not read, and therefore does not abide by, the law. The public can have no confidence in a judge, and hence a judiciary, that is required to know and respect the law but does neither.

**(6)** The judge also violated the directive of canon 5 that a judge refrain from inappropriate political activity. The masters stated, "we can think of no greater inappropriate political activity than an incumbent judge ignoring then violating the law applicable to a judicial campaign." We agree. Any candidate for judicial office must know and strictly adhere to all applicable election laws; utmost integrity is required of every candidate for judicial office.

As the masters noted, there is strict liability for violations of the Political Reform Act. One may violate the reporting requirements of the Act through negligence or inadvertence, exposing the candidate to administrative penalties or civil liability. (§§ 83116.5, 91004.) The FPPC takes into consideration whether the violation was "deliberate, negligent or inadvertent," in determining the appropriate penalty. (Cal. Code Regs., tit. 2, § 18361.5, subd. (d)(3).)

It is a misdemeanor for a person to violate the Act knowingly or willfully. (§ 91000, subd. (a).) Criminal charges were brought against Judge Hall for these violations. She entered into a diversion agreement with the prosecutor under which the criminal charges were suspended pending resolution of these commission proceedings. The agreement provides that upon resolution of this matter, the prosecutor will dismiss the criminal case provided the judge has no intervening criminal conviction and commits no interim campaign violations.

The FPPC has primary responsibility for enforcing the Act, including as to candidates for judicial office. That agency may consider it mitigating when a candidate violates the Act through inadvertence due to lack of familiarity with the intricacies of the law. However, because of the additional constraints imposed by the canons on a candidate for judicial office, we consider a claim by a judicial candidate of "ignorance of the law" as a defense to a wide-ranging violation of the law, such as here, to aggravate the violation itself. It is axiomatic that candidates for judicial office are obligated to know the requirements of the law and to conduct their election campaigns in strict accordance with it.

## 2. Prejudicial Misconduct

**(7)** We agree with the masters that Judge Hall's campaign violations constitute prejudicial misconduct. One of the requirements for willful misconduct—that the misconduct occur while the judge is acting in a judicial capacity—is lacking. She violated the Act, including by knowingly signing false campaign statements under penalty of perjury, as a candidate and not in her judicial capacity. "A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose." (*Broadman, supra*, 18 Cal.4th at p. 1104, citing *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260].)

We are not aware of any California case that directly considers the issue of whether an incumbent judge running for reelection is acting in a judicial capacity while campaigning. However, the Pennsylvania Supreme Court has considered the issue. It held that a judge's signing false campaign statements did not constitute misconduct in office because the judge did not execute the reports in the course of official duties, that is, as part of "the judicial decision-making process." (*In re Cicchetti* (2000) 560 Pa. 183 [743 A.2d 431, 438–441].) This highly analogous holding persuades us Judge Hall was not acting in a "judicial capacity" when she committed the violations at issue. The labeling of the misconduct does not diminish its seriousness or affect the level of appropriate discipline.

**(8)** Judge Hall's campaign misconduct is prejudicial misconduct within the meaning of the California Constitution. As concluded by the masters, it is "unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity." (Citing *Broadman, supra*, 18 Cal.4th at pp. 1092–1093 and *Doan, supra*, 11 Cal.4th at p. 312.) "In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring 'the judicial office into disrepute,' that is, the conduct would appear to an objective observer to be prejudicial to ' "public esteem for the judicial office." ' [Citation.]" (*Broadman, supra*, 18 Cal.4th at p. 1093.)

In our previous explanation that Judge Hall's campaign violations also violated the canons of judicial ethics (pp. 162–163, *ante*), we concurred in the masters' conclusions that the judge has brought the judiciary into disrepute and that her conduct is prejudicial to public esteem for the judiciary. The

masters also concluded that Judge Hall's irresponsible failure as a judge running for election to read the applicable campaign laws "goes beyond mere negligence" within the meaning of *Broadman*. We agree. We conclude, as did the masters, based on the quoted legal standards, that Judge Hall committed prejudicial misconduct when she violated the Act as described here, including when she swore to the accuracy of the four campaign statements she knew were false.

## E. COUNT 3—FINDINGS OF FACT

Count 3 charges that Judge Hall asked Deputy District Attorney (DDA) Kevin Duffy to explain why he had filed a peremptory challenge against her under Code of Civil Procedure section 170.6 (170.6), and threatened to report him to the district attorney. The charges assert such behavior violated canons 1 and 2A. As we discuss, there is not clear and convincing evidence Judge Hall threatened to report Mr. Duffy to his ultimate supervisor, the district attorney, and that portion of the charge is dismissed.

When a 170.6 challenge is properly and timely filed, a judge must accept the disqualification without inquiry. (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531–532 [116 Cal.Rptr. 260, 526 P.2d 268].) Judge Hall does not dispute the validity of DDA Duffy's 170.6.

The judge admits she knew she could not question Duffy's challenge of her, and she consistently and absolutely denies she did so. However, Duffy and his opposing counsel on the case in question, Deputy Public Defender (DPD) Mary Johnston, both testified Judge Hall did question Duffy. The masters resolved this fact dispute against the judge. Their determination rests on an assessment of the credibility of the various witnesses whom they observed and heard. There is no evidentiary basis or other reason for us to second-guess their evaluation of the situation, and we adopt their finding that Judge Hall did ask Duffy why he was challenging her.

When the commission filed its charges against Judge Hall, it provided discovery to her that included a copy of a memo Duffy wrote, dated June 25, 2001, in which, among other topics, he described the 170.6 incident he asserts occurred earlier that day in a case named *People v. Hernandez*. Upon receipt of that discovery document, the judge located Duffy's 170.6 declaration in the *Hernandez* file and obtained the transcript of the *Hernandez* case and of her entire morning calendar for June 25, 2001. She testified she reviewed the transcript several times, which refreshed her recollection of the 170.6. She recalled the *Hernandez* hearing.

The transcript of June 25, 2001, shows the *Hernandez* case was one of numerous matters on Judge Hall's morning calendar. The attorneys and the

judge discussed scheduling issues in *Hernandez*. For some reason, the 170.6 that Duffy filed on June 22 was not in the file; he still had the original document on June 25. Duffy advised the judge of the 170.6, whereupon she reassigned the case to a different judge.

Duffy testified Judge Hall heard other cases after *Hernandez*, and then, during a lull called him to the bench to discuss the 170.6. He asserts the judge said during the ensuing sidebar conversation that she knew she was not supposed to ask him why he had challenged her, but she wanted to know "why did you do this?" He also claims Judge Hall said she was going to report him through the presiding judge to his ultimate supervisor, Santa Barbara County District Attorney Thomas Sneddon, and that Duffy would be in Sneddon's office to explain himself. Finally, Duffy testified the judge threatened to have domestic violence cases reassigned to a judge whom prosecutors frequently disqualified, which Duffy interpreted as a threat. His observation was that Judge Hall appeared quite angry, although she spoke quietly.

Duffy testified defense counsel frequently challenged Judge Hall while the prosecutor rarely did so. Judge Hall's counsel agreed with Duffy on these points in her opening brief to the commission pursuant to rule 130(a). Duffy was surprised and shocked Judge Hall called him to the bench because he had never seen her question a defense lawyer who challenged her. He reported the incident widely in his office, including to his immediate supervisor, Christy Stanley Schultze. Ms. Schultze told Duffy to write up the incident so she could alert District Attorney Sneddon, in case Judge Hall or the presiding judge called Sneddon.

Duffy testified he wrote down his 170.6 experience in a memo on the same day it happened, June 25, 2001; his recollection was he sent the memo as an attachment to an email to Ms. Schultze. The memo contained information on the *Hernandez* matter, other cases Duffy had prosecuted before Judge Hall, and his personal opinions of Judge Hall.

Judge Hall testified to having very different recollections of all of the subject matters in Duffy's memo. The judge's counsel vigorously cross-examined Duffy about many of the assertions in his memo and succeeded in our view in impeaching him on many of the collateral matters in that document. Further, the masters found the judge refuted Duffy's opinions of any prejudices she allegedly holds against victims of domestic violence. Based on our reading of the transcript of the hearing before the masters, we agree with this latter point and adopt the masters' finding concerning it.

DPD Mary Johnston was Duffy's opposing counsel on the *Hernandez* matter and was in court with him before Judge Hall on June 25, 2001. She

does not remember many of the details of what happened in connection with a 170.6 incident between the judge and Duffy. She testified clearly, however, that she remembered one occasion when Duffy motioned for her to accompany him to the bench after Judge Hall had summoned him to approach. At the sidebar, she heard the judge ask Duffy "why are you papering me?"—a colloquialism for a 170.6 challenge—or words to that effect. She did not want to be involved in the exchange between the prosecutor and the judge, and backed away from the bench entirely.

Based solely on the testimony of DPD Johnston, the masters found that on June 25, 2001, Judge Hall did ask DDA Duffy why he had filed a 170.6 against her in the *Hernandez* case. They found a lack of clear and convincing evidence of the remainder of the charges of count 3. We agree in both respects.

## F. COUNT 3—CONCLUSIONS OF LAW

### 1. Violations of the Code of Judicial Ethics

**(9)** The masters concluded that when Judge Hall asked the prosecutor why he was challenging her in the *Hernandez* case, she again violated canons 1 and 2A. She failed to maintain the high standard of conduct required of a judge and acted without integrity. We agree.

### 2. Willful Misconduct

All three elements of willful misconduct within the meaning of article VI, section 18, subdivision (d) of the California Constitution are present. Judge Hall's conduct was (1) unjudicial and (2) committed in her judicial capacity, and (3) she committed an act she knew was beyond her lawful power and thus acted in bad faith. (See *Broadman, supra,* 18 Cal.4th at p. 1091.) The masters concluded there was willful misconduct under the *Broadman* standard, as do we.

## G. PRIOR DISCIPLINE

### 1. Admissibility of Prior Private Admonishment

The masters overruled Judge Hall's objection and admitted into evidence the examiner's exhibit 29, a private admonishment this commission issued against Judge Hall in 2005. The masters did not consider the prior discipline; they admitted it in response to the examiner's assertion it was relevant to the commission's determination of the appropriate sanction.

The admissibility question is governed by rule 125(b), which provides as follows: "*Any* prior disciplinary action may be received in evidence to prove that conduct is persistent or habitual *or to determine what action should be taken regarding discipline.* Prior disciplinary action includes *any disciplinary action which is in effect before the conclusion* of a commission proceeding, including review by the Supreme Court." (Rule 125(b), italics added.)

The judge's two-fold argument against the admissibility of the admonishment was set forth in her "Objection to Admission of Examiner's Exhibit, No. 29" (Objection or Obj.). We discuss each point separately.

**(10)** Turning Private Discipline into Public: Judge Hall argued that admitting the admonishment "impermissibly and automatically" makes private discipline public. There is no prohibition in the Constitution, statute or any Supreme Court case against a private sanction becoming public. Furthermore, rule 125(b), by expressly making prior discipline admissible in formal proceedings, gives advance notice of the possibility of such an occurrence. The commission's consideration of prior private discipline also is consistent with the established policy and practice of escalating discipline for successive misconduct. When, as here, we rely on prior private discipline, it is important that we explain that our disciplinary decision is informed or influenced by the fact the judge has committed other misconduct, and its nature.

In *Doan, supra*, 11 Cal.4th at page 340, the Supreme Court referred to the judge's prior private admonishment in determining the appropriate level of discipline to be imposed. The commission also has considered prior private discipline in its public decisions in a number of recent inquiries. (E.g., *Inquiry Concerning Ross* (2005) No. 174, Decision and Order Removing Judge Ross from Office, p. 65 [49 Cal.4th CJP Supp. 79, 139] [advisory letter]; *Inquiry Concerning Wasilenko* (2005) No. 170, Decision and Order Imposing Censure and Bar, p. 33 [49 Cal.4th CJP Supp. 26, 58] [private admonishment]; *Inquiry Concerning Hyde* (2003) No. 166, Decision and Order Removing Judge Hyde From Office, pp. 16–20 [48 Cal.4th CJP Supp. 329, 352–356] [private admonishment and three advisory letters].)

**(11)** Allowing Subsequent Misconduct to Exacerbate the Effect of Earlier Wrongdoing: All of the misconduct that is the subject of the formal charges occurred in 2001 and 2002. The incident that is the subject of the private admonishment occurred later, in January 2004. Judge Hall objects that consideration of the subsequent conduct violates the letter and spirit of the commission's own rules and case law interpreting the rules. This latter assertion rests on *Doan*, where the Supreme Court noted that Judge Doan had failed to heed the warning that prior similar discipline represented. However, there is nothing in the court's opinion suggesting that consideration of prior

discipline is *limited* to whether the judge heeded an earlier commission warning. Prior discipline is relevant to our disciplinary determination, irrespective of when the underlying misconduct occurred.

The express language of rule 125(b) defeats the judge's assertion the commission cannot consider prior discipline based on subsequent conduct. The rule defines prior discipline as "any disciplinary action which is in effect before the conclusion of a commission proceeding, including review by the Supreme Court." The determining consideration is not when the other misconduct occurred, but rather, that it resulted in discipline that had taken effect before the conclusion of the current proceeding.

Rule 125(b) further provides that prior discipline is admissible "to determine what action should be taken regarding discipline." That a judge committed misconduct subsequent to the events underlying formal proceedings is a highly relevant factor in determining the appropriate discipline to impose. Indeed, Judge Hall committed the misconduct underlying the admonishment when she knew she was under investigation by the commission. She has shown her inability to control her behavior at a time one would expect her to be on her very best behavior. This fact is highly relevant to our decision concerning the appropriate level of discipline, as we discuss at page 173, *post*.

Judge Hall accepted the admonishment, allowing it to go into effect by operation of law (see rule 114(a)), with knowledge there were other serious allegations then pending against her—that is, those that form the formal charges here. Rule 125(b) put her on notice that the private admonishment would be admissible in the formal proceedings that likely would, and did, ensue. The masters correctly applied rule 125(b) and admitted the prior admonishment. We consider it in connection with determining the appropriate sanction.

### 2. Facts Underlying Admonishment

The following is a summary of the facts underlying the commission's 2005 private admonishment of Judge Hall, as set forth in the admonishment.

On or about January 16, 2004, Judge Hall spoke with Judge Rodney Melville in his chambers, requesting that she have a seat in his courtroom for the arraignment and argument on a "gag order" before Judge Melville that day in the high profile criminal case against Michael Jackson. All the seats in the courtroom had been assigned either to members of the press or the public. Judge Melville initially agreed Judge Hall could sit near the bench area where his clerk and research attorney had assigned seats, but later suggested she

should sit in an overflow courtroom where she could watch the proceedings on closed circuit television. Judge Hall declined the latter suggestion.

In correspondence with the commission concerning the foregoing, Judge Hall stated she wanted to have District Attorney Thomas Sneddon "see me no worse off than before he had occasioned the wrath of his office to come down upon me following my irresponsible and unlawful act of driving under the influence of alcohol." (Underscoring in judge's correspondence.)

Judge Melville directed Judge Hall not to enter the main courtroom. In response to her reply that she would take a seat there, he said he would be required to call a bailiff if she disobeyed his order. In correspondence with the commission, Judge Hall admitted she defied Judge Melville's directive and that she told him to do whatever he deemed necessary.

Judge Hall entered Judge Melville's courtroom and took a seat assigned to the press. Assistant Court Administrator Darrel Parker came to the courtroom and asked Judge Hall to accompany him into chambers because Presiding Judge Clifford Anderson wished to speak with her on the telephone. She refused to do so without her attorney present, and refused to vacate her seat. A bailiff inquired if she was sitting in a seat assigned to her, to which she responded, "It is now." At Mr. Parker's suggestion, a chair was procured and placed in the back of the courtroom and Judge Hall was escorted to it.

## III. APPROPRIATE SANCTION

### 1. Precedent

**(12)** This case requires that we decide whether a judge who engages in materially deceitful and lawless conduct that undermines the electoral process, and thereafter attempts to explain it away with specious arguments and misleading testimony, should continue in judicial office. Our decision is that she should not. We order Judge Hall removed from office. Her misconduct is fundamentally at odds with the core qualities and role of a judge in our society.

In 2001, we ordered Judge Patrick Couwenberg removed from office because of his dishonesty in connection with his seeking appointment to the bench. He provided materially false information concerning his educational, professional and military background to various persons, including Governor Wilson. We concluded that " 'Judge Couwenberg's falsehoods create the appearance that he obtained his judicial office by deceit.' " (*Inquiry Concerning Couwenberg* (2001) No. 158, Decision and Order Removing Judge Couwenberg from Office, p. 12 [48 Cal.4th CJP Supp. 205, 221].) At a

minimum, Judge Hall's election-related nondisclosures and misrepresentations are of the same import and create a similar appearance; they also require the same result.

**(13)** Honesty is a minimum qualification for every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239] (*Kloepfer*).) If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental. (*Ibid.*) Applying this principle enunciated by our Supreme Court, we removed Judge Patrick Murphy from office in 2001 based on his dishonesty.[1] Judge Murphy lied about claimed ill health, which we denounced as malingering, for the purpose of remaining on payroll while attending medical school in the Caribbean, among other activities, instead of working as a judge. (*Inquiry Concerning Murphy* (2001) No. 157, Decision and Order Removing Judge Murphy from Office [48 Cal.4th CJP Supp. 179].) We also removed Judge Ross from office last year, based in large part on his lack of honesty, candor and accountability. (*Inquiry Concerning Ross*, *supra*, No. 174 [49 Cal.4th CJP Supp. 79].)

In *Michigan Judicial Tenure Com. v. Ferrara* (1998) 458 Mich. 350 [582 N.W.2d 817], the Michigan Supreme Court ordered Judge Ferrara removed solely for fraud and lying to the press, the master and the commission. The court did not even reach the question of whether there was evidence supporting the underlying charges of misconduct.

Similarly, in *In re Collazo* (1998) 91 N.Y.2d 251 [668 N.Y.S.2d 997, 691 N.E.2d 1021], New York's highest court ordered Judge Collazo removed based on his deceitful conduct during the investigation of the initial wrongdoing, noting that the original misconduct alone would not warrant removal. Commenting on the judge's "lack of candor" and upholding the New York commission's recommended removal, the Court of Appeals stated, "Particularly relevant here is our conviction that 'deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth' [citations]." (668 N.Y.S.2d at p. 999.) The deception practiced by Judge Hall during her reelection campaign, as well as her specious arguments before the masters and us, are equally antithetical to, and inherently incompatible with, her duties to uphold the law and the search for truth.

The Florida Supreme Court removed a judge from office earlier this year for campaign misconduct very similar to that in which Judge Hall engaged. (*Inquiry Concerning Renke* (Fla. 2006) 933 So.2d 482.) The Florida Judicial

[1] Judge Murphy resigned from office just prior to the commission's decision; the actual decision therefore became a public censure and bar against the judge, which appears to be the maximum sanction we may impose on a former judge. (Cal. Const., art. VI, § 18, subd. (d).)

Qualifications Commission had recommended a public reprimand and $40,000 fine based on its findings that Judge Renke's father had made very substantial campaign contributions that the judge disguised as earned income from which he then made loans to his campaign fund. In addition to the election fraud itself, Judge Renke—similar to Judge Hall—dissembled before the commission, arguing that the payments from his father were his share of a settlement to which he was entitled. Judge Renke claimed it was mere coincidence that he received the money at a time he was in need of campaign funds. The court upheld the commission's rejection of this defense and removed the judge from office.[2]

In 2004, the judicial conduct board in Illinois removed a judge from office for false campaign statements, other election fraud and dissembling before the board when called to explain his conduct. (*In re Golniewicz*, Order (Ill. Cts. Com., Nov. 14, 2004).) Judge Golniewicz used his parents' address within the subcircuit in which he was running for judicial office, concealing his actual residence in the suburbs. He also sent out deceptive advertising to the voters, telling them he was their "neighbor" and a lifelong resident of the subcircuit. Additionally, the judge violated state residency laws by residing outside the subcircuit from which he was elected, and by maintaining his voter registration and voting within a subcircuit in which he did not live. He gave dishonest testimony and evasive answers before the conduct board. (The judge also exhibited improper demeanor in three cases over which he presided.)

In a case involving one false sworn affidavit, the South Carolina Supreme Court recently approved a stipulated one-year suspension of a judge from office without pay. (*In re Augustus* (2006) 367 S.C. 364 [626 S.E.2d 346].) Judge Augustus claimed on a notarized continuing education compliance report that he had attended all three days of a seminar when he only had attended one day. He repeated the same misrepresentation to disciplinary counsel. Subsequently, the judge amended his compliance report by making a pen and ink change to the number of hours reported, without having the amended report renotarized or the change initialed by the notary. He also filed an amended, true response with disciplinary counsel. We observe that in many instances, financial realities may cause the suspension of a judge without pay for a year to have the same practical effect as removal.

### 2. Aggravating, Mitigating, and Other Considerations

**(14)** In the masters' report, they list factors in aggravation and mitigation as part of their discussion of each separate count. To a considerable degree,

[2] Two justices dissented concerning the sanction; they would have accepted the Florida commission's recommendation, or remanded for the commission to consider a harsher penalty short of removal.

the listed factors derive from testimony given by numerous character witnesses the judge called to testify before the masters. These witnesses, from many walks of life, described the judge as a beloved, respected and loyal friend, a mentor and role model. Five experienced attorneys who have appeared before her testified positively about her integrity, honesty, demeanor and impartiality. We have taken this evidence " 'into account in considering the totality of the circumstances.' " (*Broadman, supra,* 18 Cal.4th at p. 1112, quoting *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].) However, it does not mitigate or excuse willful or prejudicial misconduct. (*Broadman*, at p. 1112; accord, *Kloepfer, supra*, 49 Cal.3d at p. 865 [lack of honesty cannot be mitigated or excused by other positive characteristics].)

Several witnesses described Judge Hall as a hard-working, conscientious and well-prepared jurist. The masters generally viewed these asserted character traits as mitigating considerations. We view such attributes as descriptive of a good judge. To the extent Judge Hall is possessed of these traits, it makes more unbelievable her claim that she somehow failed to read and follow the law governing her campaign. The masters described that alleged failure as an "appalling lack of common sense" and something the judge never satisfactorily explained. They also found her claimed ignorance to be feigned. That she *was* fully aware of the campaign law is more consistent with the character witnesses' description of the judge as a jurist who was thoroughly versed in the law. Moreover, "a good reputation for legal knowledge and administrative skills," although relevant to discipline, does not mitigate willful or prejudicial misconduct. (*Kloepfer, supra*, 49 Cal.3d at p. 865.)

**(15)** The judge's election fraud overwhelms other considerations and compels our removal decision. Judge Hall engaged in deceit and misrepresentations to keep her position as a judge. She also has dissembled before the masters and us with excuses to minimize fault, thereby demonstrating a lack of acceptance of, and accountability for, her wrongdoing. She demonstrated extreme lack of judgment when she drove drunk. She questioned an attorney's disqualification of her, knowing the impropriety of doing so. Finally, her conduct during the Michael Jackson hearing last year demonstrates an alarming disrespect for the authority of the judge presiding over the case, the presiding judge of the Santa Barbara courts, and other court personnel. Her actions show the serious degree to which she is unable to control her behavior. That inability to exercise self-restraint, including when she knew she was under investigation by this commission, convinces us there is a strong likelihood she will reoffend in the future. We cannot run that risk and still fulfill our constitutional mandate to protect the public and the reputation of the judiciary.

## IV. ORDER REMOVING JUDGE HALL FROM OFFICE

Pursuant to the provisions of article VI, section 18 of the California Constitution, Judge Diana R. Hall hereby is ordered removed from her judicial office; pursuant to that section of the Constitution and rules 120(a) and 136 of the Rules of the Commission on Judicial Performance, Judge Hall hereby is disqualified from acting as a judge.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Justice Judith D. McConnell, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted in favor of all the findings and conclusions expressed herein and in the foregoing order of removal and disqualification of Judge Hall. Commission member Patricia Miller did not participate in this matter.

[No. 180. Apr. 25, 2007.]

# INQUIRY CONCERNING JUDGE JOSÉ A. VELASQUEZ

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance ordered the judge removed from office. The commission concluded that the judge engaged in an egregious pattern of misconduct that infringed the constitutional rights of numerous defendants and transgressed the limits of his authority, often in a capricious and malicious manner. The judge incarcerated several defendants without respect for their constitutional rights; he increased sentences and showed irritation when defendants asked him straightforward and respectful questions about their sentences; he interfered with defendants' exercise of the right to trial by jury and coerced defendants into diversion; he expressed his unhappiness with attorneys by not recalling bench warrants for the arrest of their clients and by making disparaging remarks regarding attorneys; and he used inappropriate humor about incarceration at the expense of persons whose constitutional rights he had sworn to uphold. These incidents were not isolated; rather, they reflected a disturbing and persistent pattern of conduct that was at odds with the standard of conduct expected of the judiciary. The judge had engaged in prior misconduct resulting in a censure. The breadth and seriousness of the judge's present and past misconduct compelled the commission to conclude that removal was required. (Opinion by Frederick P. Horn, Chairperson.)

## HEADNOTES

(1) **Judges § 6—Discipline—Removal from Office—Egregious Pattern of Misconduct.**—A judge was ordered removed from office, where the judge, who had engaged in prior misconduct resulting in a censure, engaged in an egregious pattern of misconduct that infringed the constitutional rights of numerous defendants and transgressed the limits of his authority, often in a capricious and malicious manner. These incidents were not isolated; rather, they reflected a disturbing and persistent pattern of conduct that was completely at odds with the standard of

conduct expected of the judiciary. The breadth and seriousness of the judge's present and past misconduct compelled the conclusion that removal was required.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85.]

(2) **Judges § 6—Disciplinary Proceeding—Clear and Convincing Evidence.**—The Commission on Judicial Performance has the burden of proving the charges against a judge by clear and convincing evidence. Evidence of a charge is clear and convincing so long as there is a high probability that the charge is true. The evidence need not establish the fact beyond a reasonable doubt.

(3) **Judges § 6—Discipline—Willful Misconduct—Bad Faith—Judicial Capacity.**—The most serious form of wrongdoing committed by a judge is willful misconduct, defined as (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity.

(4) **Judges § 6—Discipline—Unjudicial Misconduct—Code of Judicial Ethics.**—Failure to comply with the California Code of Judicial Ethics is generally considered to constitute unjudicial conduct.

(5) **Judges § 6—Discipline—Willful Misconduct—Bad Faith.**—The bad faith requirement for willful misconduct is satisfied when a judge is (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority. A judge who performs acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith.

(6) **Judges § 6—Discipline—Willful Misconduct—Judicial Capacity.**—The judicial capacity prong of the willfulness test has been defined as follows: A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose.

(7) **Judges § 6—Discipline—Prejudicial Conduct—Disrepute.**—Prejudicial conduct by a judge is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is either conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office or willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring the judicial office into disrepute, that is, the conduct would appear to an objective observer to be prejudicial to public esteem for the judicial office.

(8) **Judges § 6—Discipline—Improper Action.**—The least serious type of judicial misconduct is improper action. It consists of conduct that violates the California Code of Judicial Ethics, but that does not rise to the level of prejudicial misconduct. Improper conduct includes conduct that an objective observer aware of the circumstances would not deem to have an adverse effect on the reputation of the judiciary.

(9) **Judges § 6—Discipline—Unjudicial Conduct—Violation of Defendants' Rights.**—By conducting probation violation hearings and ordering immediate incarceration without affording the defendant notice that such a hearing would be taking place and the basis for the alleged violation, and without advising the defendant of his constitutional rights, including the right to counsel and to a formal hearing, the judge failed to comply with minimum due process requirements.

(10) **Judges § 6—Discipline—Legal Error.**—Legal error alone does not constitute judicial misconduct subject to discipline. However, a judge who commits legal error which, in addition, clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard for the law, or any purpose other than the faithful discharge of judicial duty is subject to sanctions.

(11) **Judges § 6—Discipline—Legal Error—Exceptions—Disregard of Fundamental Legal Right.**—The judge's actions in conducting probation violation hearings without notice and immediately incarcerating the defendants after the hearing went beyond mere legal error; they reflected disregard of the defendants' fundamental right to due process.

(12) **Judges § 6—Discipline—Embroilment—Lack of Impartiality.**—By becoming embroiled with defendants, the judge surrendered his role as an impartial jurist and was acting for a purpose other than the faithful discharge of his duties. In various cases, the judge independently investigated the facts, refused to consider the documents the defendant had brought to court, engaged in a contest with the defendant to determine who was lying, and increased sentences out of impatience and pique when a defendant attempted to explain his failure to comply with a court order or to question a sentence. The judge engaged in unjudicial conduct in a judicial capacity.

(13) **Judges § 6—Discipline—Willful Misconduct—Bad Faith.**—The judge acted in bad faith, the third element of willful misconduct. He acted beyond his lawful authority, either knowingly or with a conscious disregard for the limits of his authority. The judge was aware that a defendant cannot be found in violation of probation and sentenced unless he or she either has a formal hearing or waives hearing. Nevertheless, the judge did just that. He also acted out of pique, irritation or impatience, any of which is a purpose other than the faithful discharge of judicial duties.

(14) **Judges § 6—Discipline—Proceedings—Defenses—Practices of Other Judges.**—The judge's contention that he was acting on the good faith belief that he was following the practices of other judges in the county was rejected by the commission. The judge has an obligation to ensure the rights of defendants irrespective of the practices of other judges.

(15) **Judges § 6—Discipline—Willful Misconduct—Unjudicial Conduct—Judicial Capacity.**—The judge threatened to impose jail time, and in some instances actually imposed jail time, in response to a legitimate question from the defendant. The judge admitted he was trying to discourage defendants from questioning their sentences. By so doing, he disregarded the defendants' rights to be heard as to matters that might influence the decisionmaking process and as to sentencing. By infringing upon the defendants' right to be heard and becoming embroiled with the defendants, the judge violated the canons of California Code Judicial Ethics and engaged in unjudicial conduct while acting in a judicial capacity.

(16) **Judges § 6—Discipline—Willful Misconduct—Bad Faith.**—By increasing or threatening to increase a sentence when a defendant merely questioned the sentence or offered a defense or explanation in response to an accusation, the judge was performing a judicial act that seriously transgressed his lawful authority, and was acting in bad faith. As an

experienced judge, he either knowingly violated or consciously disregarded his obligation to assure those in his courtroom of their right to be heard. He was also performing a judicial act for the "corrupt purpose" of venting his anger. In one matter, he also knew or was recklessly indifferent to the law prohibiting incarceration for failure to pay attorney fees. In another matter, he in effect held the defendant in contempt without following proper contempt procedures, which in itself constitutes bad faith.

(17) **Judges § 6—Discipline—Willful Misconduct—Mitigation—Bad Faith.**—There can be no mitigation for maliciously motivated judicial misconduct. Neither lack of prejudice to the defendant nor a judge's subsequent corrective action mitigates willful misconduct. With regard to the denial of a criminal defendant's fundamental rights, it is immaterial whether the judge's abuse of power results in just or unjust treatment for any given defendant. A judge's bad faith is directed towards the legal system itself.

(18) **Judges § 6—Discipline—Willful Misconduct—Threatening Increased Sentence.**—The judge's conduct in threatening to impose jail time for offering a defense or questioning a sentence is no less willful because the jail time was never imposed or because he later apologized. The judge engaged in willful misconduct in each instance.

(19) **Judges § 6—Discipline—Prejudicial Misconduct—Questioning Defendants.**—The judge's question to defendants charged with excessive speed—whether it felt good to "peel out"—was prejudicial to public esteem for the judiciary and constituted prejudicial misconduct. The judge made prejudgments regarding the defendants' credibility based on the judge's own experiences as a young man. The judge also became embroiled with the defendants, unreasonably accusing some of lying, and acting in a way that manifested prejudgment. His questions turned the proceedings into a game show with each defendant trying to guess the right answer in order to obtain the lower fine. Additionally, the judge's announcement in court that he had engaged in the same criminal conduct as the defendant detracted from the dignity of the proceedings.

(20) **Judges § 6—Discipline—Prejudicial Misconduct—Interference with Rights.**—After receiving a mass advisement, when defendants charged with misdemeanor alcohol or marijuana charges came before the judge individually, the judge presented them with a choice of diversion or jail time; he did not tell them that they had the option of pleading not guilty and having a trial. The judge interfered with the most basic and important of constitutional rights, the right to a jury trial. Rather than

ensuring constitutional rights, which he was obligated to do, he created an environment in which the full exercise of those rights was unlikely. His conduct constituted prejudicial misconduct.

(21) **Judges § 6—Discipline—Willful Misconduct—Bench Warrants.**—The judge issued bench warrants for misdemeanor defendants who had authorized counsel to appear for them under Pen. Code, § 977, when neither the attorney nor the defendant appeared for a scheduled appearance. When the judge learned that the failure to appear was the result of the attorney's mistake and not the client's, the judge refused to recall the warrant. Both the issuance of the warrants and the failure to recall them constituted willful misconduct. The judge disregarded the defendants' fundamental due process right to notice and seriously undermined the attorney-client relationship. In addition, he abused his authority and acted in bad faith with utter and conscious disregard for the limits of his authority by issuing warrants for defendants who were not required to appear. Further, he was performing a judicial act for a purpose other than the faithful discharge of judicial duties—to punish errant lawyers.

(22) **Judges § 6—Discipline—Willful Misconduct—Postdisqualification Conduct.**—After being disqualified from two cases, the judge ordered the attorney in both cases to produce copies of his letter of complaint about the judge to the presiding judge. The judge's conduct constituted willful misconduct.

(23) **Judges § 9—Disqualification—Taking Further Action.**—A judge is prohibited from taking any further action in a case once disqualified, including questioning or criticizing the attorney who filed an affidavit of disqualification. Moreover, a judge is expected to know the proper procedure for handling a motion to disqualify.

(24) **Judges § 8—Powers and Duties—Incarceration of Individuals.**—The authority vested in the judiciary to incarcerate individuals carries with it a solemn responsibility that should never be taken lightly. A judge must be sensitive to the anxiety inherently associated with the possibility of serving time in custody.

(25) **Judges § 6—Discipline—Prejudicial Misconduct—Joking About Incarceration.**—The judge's "joking" with defendants about incarceration was undignified, out of place, and prejudicial to public esteem for the judiciary. The remarks constituted prejudicial misconduct.

(26) **Judges § 6—Discipline—Conduct Prejudicial—Disparaging Remarks Regarding Attorneys.**—Disparaging and demeaning comments addressed to attorneys in open court have repeatedly been considered

indicative of a lack of appropriate judicial temperament. Belittling an attorney violates the ethical obligation in Cal. Code Jud. Ethics, canon 3B(4), to be dignified and courteous to all persons who come before the court, and expressly includes attorneys. The judge's comments were prejudicial to public esteem for the judiciary and constituted prejudicial misconduct.

(27) **Judges § 6—Discipline—Appropriate Sanction—Factors.**—In making its determination of the appropriate disciplinary sanction, the Commission on Judicial Performance considers that the purpose of a judicial disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. Various factors are relevant in determining the appropriate discipline, including (1) the number of acts of misconduct; (2) the existence of prior discipline; (3) whether the judge appreciates the inappropriateness of his or her conduct; (4) the judge's integrity; (5) the likelihood of future misconduct; and (6) the impact on the judicial system.

(28) **Judges § 6—Discipline—Number of Wrongful Acts—Isolated Occurrences—Course of Conduct.**—The number of wrongful acts committed by a judge is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing lack of temperament and ability to perform judicial functions in an evenhanded manner.

(29) **Judges § 6—Discipline—Prior Discipline.**—In addition to receiving a prior censure, the judge had also received an advisory letter. Given the entirety of his disciplinary history and the misconduct at issue, a second censure was clearly insufficient and contrary to the commission's established policy and practice of escalating discipline for successive misconduct.

(30) **Judges § 6—Discipline—Appreciation of Misconduct.**—A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform.

(31) **Judges § 6—Discipline—Integrity.**—Integrity as it relates to a determination of the appropriate discipline in a judicial disciplinary proceeding has generally focused on honesty. Integrity may concern not the misconduct itself, but a judge's candor in testimony before the masters.

(32) **Judges § 6—Discipline—Likelihood of Future Misconduct.**—The judge's repetition of misconduct after being publicly censured, and his unwillingness or inability to appreciate the principles underlying his

current misconduct, led to the conclusion that there was a very strong likelihood, if not a certainty, of future misconduct if the judge was not removed.

(33) **Judges § 6—Discipline—Impact on Judicial System.**—A pattern of misconduct reflecting abuse of authority and serious infringement of criminal defendants' constitutional rights necessarily has a negative impact on the judicial system. Such misconduct undermines the integrity of and respect for the judiciary and weakens the constitutional foundation of our system of justice.

(34) **Judges § 6—Discipline—Character Evidence.**—In a judicial disciplinary proceeding, character evidence is taken into account in considering the totality of the circumstances that are pertinent to the determination of the appropriate discipline.

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**OPINION**

**HORN, Chairperson.**—

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge José A. Velasquez of the Monterey County Superior Court. On April 25, 2006, the commission filed a notice of formal proceedings against Judge Velasquez in which it charges Judge Velasquez with the following misconduct:

Count I charges that in eight criminal cases Judge Velasquez violated the probation of unrepresented defendants who appeared to request a modification of probation and imposed time in custody without complying with minimal due process requirements, including notice and a formal hearing.

Count II charges that in six criminal cases Judge Velasquez improperly increased or threatened to increase the defendant's sentence for asking legitimate questions regarding his or her sentence or offering a defense.

Count III charges that in five criminal cases Judge Velasquez asked defendants convicted of misdemeanor exhibition of speed if it felt good to "peel out" and improperly conditioned their sentence on the response given. Judge Velasquez is charged with having predetermined that there was only one truthful answer based on his personal experience.

Count IV charges that in seven criminal cases Judge Velasquez informed unrepresented defendants at arraignment that their only choices were to plead guilty or accept diversion, which required they attend Alcoholics Anonymous (AA) meetings, without advising the defendants of their constitutional right to plead not guilty and have a trial.

Count V charges Judge Velasquez with improperly issuing bench warrants for absent defendants (whose absence had been excused pursuant to Pen. Code, § 977) because the defense attorney was not present when the case was called; refusing to recall the warrant when the attorney later appeared and explained his or her absence; and, in one case, after knowing that he had been disqualified pursuant to Code of Civil Procedure section 170.6, ordering an attorney to produce the letters he had filed with another judge regarding the disqualification.

Count VI charges Judge Velasquez with making inappropriate comments in 14 instances that disparaged counsel, or suggested, as a "joke," that a person appearing before him was about to be remanded to custody.

Count VII charges Judge Velasquez with improperly allowing his children in the bench area while court was in session and in chambers during case discussions.

The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters are Justice Laurence D. Rubin of the Court of Appeal, Second Appellate District, Division Eight, Judge Kevin M. McCarthy of the San Francisco County Superior Court, and Judge Eleanor Provost of the Tuolumne County Superior Court. The hearing before the masters took place in San Jose over three days commencing August 21, 2006, followed by oral argument before them on November 3, 2006. The masters presented their report to the commission on December 22, 2006.

The factual findings of the masters are largely undisputed. Although Judge Velasquez objects to some of the masters' legal conclusions, he concedes numerous incidents of serious misconduct. Judge Velasquez also concedes that he has engaged in prior misconduct resulting in a censure in 1997, the second most serious form of discipline available to the commission, and in an advisory letter in 2006. Nevertheless, Judge Velasquez contends that he should not be removed. We disagree and order Judge Velasquez removed from office.

(1) Judge Velasquez has engaged in an egregious pattern of misconduct that infringed the constitutional rights of numerous defendants and transgressed the limits of his authority, often in a capricious and malicious

manner. The masters concluded as do we that "Judge Velasquez incarcerated several defendants without respect for their constitutional rights; he showed irritation when defendants asked him straightforward and respectful questions about their sentences; he coerced defendants into attending AA meetings; he expressed his unhappiness with attorneys by not recalling warrants for the arrest of their clients and by making disparaging remarks; and he used humor inappropriately at the expense of persons whose constitutional rights he has sworn to uphold." These incidents are not isolated; rather, they reflect a disturbing and persistent pattern of conduct that is completely at odds with the standard of conduct expected of the judiciary.

Judge Velasquez presented evidence in mitigation of his conduct, mostly in the form of testimony and declarations from character witnesses. However, the image portrayed of Judge Velasquez as a respected member of the community and role model outside the courtroom stands in sharp contrast to his egregious pattern of past and present misconduct in the courtroom. The breadth and seriousness of the judge's present and past misconduct overwhelms other considerations and compels our conclusion that removal is required.

Judge Velasquez is represented by James A. Murphy and Harlan B. Watkins, of San Francisco. The examiners for the commission are Trial Counsel Jack Coyle and Assistant Trial Counsel Valerie Marchant.

## II. GENERALLY APPLICABLE LEGAL PRINCIPLES

### A. *Burden of Proof*

**(2)** The commission has the burden of proving the charges against Judge Velasquez by clear and convincing evidence. (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 313 [45 Cal.Rptr.2d 254, 902 P.2d 272]; *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.] The evidence need not establish the fact beyond a reasonable doubt." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).)

### B. *Levels of Misconduct*

The levels or types of judicial misconduct that may subject a judge to discipline by the commission are described in article VI, section 18, subdivision (d), of the California Constitution. We summarize each of them.

1. *Willful Misconduct*

**(3)** The most serious form of wrongdoing is willful misconduct, defined as consisting of (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. (*Broadman, supra*, 18 Cal.4th at p. 1091; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*).)

**(4)** Failure to comply with the California Code of Judicial Ethics is generally considered to constitute unjudicial conduct. (*Dodds, supra,* 12 Cal.4th at p. 172.)

**(5)** The "bad faith" requirement for willful misconduct is satisfied when a judge is "(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra,* 18 Cal.4th at p. 1092.) The Supreme Court has described "conscious disregard" in this context as follows: "Because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith." (*Ibid.*)

**(6)** The "judicial capacity" prong of the willfulness test has been defined as follows: "A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose." (*Broadman, supra*, 18 Cal.4th at p. 1104, citing *Dodds, supra*, 12 Cal.4th at p. 172.)

2. *Prejudicial Misconduct*

**(7)** The Supreme Court has defined prejudicial misconduct, the second most serious category of judicial misconduct, as follows: "Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is '*either* "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial

conduct but conduct prejudicial to public esteem for the judicial office" [citation] *or* "willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity" [citation].' [Citation.] In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring 'the judicial office into disrepute,' that is, the conduct would appear to an objective observer to be prejudicial to ' "public esteem for the judicial office." ' [Citation.]" (*Broadman, supra,* 18 Cal.4th at pp. 1092–1093, original italics.)

3. *Improper Action*

**(8)** The least serious type of judicial misconduct is improper action. It consists of conduct that violates the California Code of Judicial Ethics, but that does not rise to the level of prejudicial misconduct. (Rothman, Cal. Jud. Conduct Handbook (2d ed. 1999) § 13.29, pp. 386–387.) Improper conduct includes conduct that an objective observer aware of the circumstances would not deem to have an adverse effect on the reputation of the judiciary. (See *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 897–899 [42 Cal.Rptr.2d 606, 897 P.2d 544].)

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are adopted from the factual findings of the masters, unless otherwise indicated. We find the masters' factual findings adopted herein to be supported by the record and worthy of deference. (See *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878 [81 Cal.Rptr.2d 58, 968 P.2d 958] (*Fletcher*) ["special weight" given to the special masters' factual determinations].) We reach our own legal conclusions based on our independent review of the record and the law. (See *ibid.*)

### A. *Count I: Denial of Due Process at Probation Modification Hearings*

#### 1. *Findings of Fact*

##### a. *Common Findings*

Each of the eight instances of misconduct charged in count I involves a criminal defendant who appeared before Judge Velasquez to request a modification of the terms of probation; by the end of each proceeding, Judge

Velasquez found the defendant to be in violation of probation and remanded him to serve a jail sentence in addition to the sentence imposed on the original charge. The defendants were on probation for either driving under the influence (DUI) or public intoxication, and most were requesting more time to complete the requirements of their probation (i.e., AA meetings, installing interlock devices, surrendering to serve time). With the exception of defendant Gonzales (I C), each defendant appeared voluntarily and not by court order. Each defendant arranged to have his case placed on the court's calendar by filing an application for modification of probation with the clerk's office. Neither the district attorney nor a defense attorney appeared in any of the cases. The defendants were not advised of their rights, including their right to a formal hearing and counsel, nor did the defendants waive their rights.

Judge Velasquez has handled probation violation matters throughout his 11 years on the bench. He is aware that a defendant cannot be found in violation of probation and sentenced unless he or she either has a formal hearing or waives hearing. In some of the cases in count I, Judge Velasquez was handling more than one calendar and felt under unusual pressure.

Practice of Other Judges in Monterey County

Judge Velasquez testified that when he was a practicing attorney over 11 years ago, he observed other judges in Monterey County handle the probation modification calendar in the same manner—immediately remanding defendants to custody based on a violation of probation without a waiver of rights. The masters found this testimony to be "unconvincing." We agree and adopt this finding.

In making their factual findings on this issue, the masters also considered the testimony of Linda Chavez, Judge Velasquez's courtroom clerk. She testified that over the last 18 years she has been a clerk in Monterey County, and that she has seen judges other than Judge Velasquez remand a defendant who appears on the probation modification hearing and impose additional fines for willful failure to comply with the terms and conditions of probation, without an advisement of rights. The masters considered Ms. Chavez to be credible, but found her testimony to be "of only limited significance" since she testified only in generalities and without regard to specific cases, judges or time periods. We concur and adopt this finding as our own.

Based on their evaluation of the testimony on this issue, the masters concluded that the evidence was insufficient to find that other judges in Monterey County either did or did not engage in the same probation modification practices as alleged in count I. In his brief to the commission,

Judge Velasquez objects to this factual finding and maintains that there was sufficient evidence presented to establish that Judge Velasquez was following the practice of other judges in the county. We have carefully reviewed the evidence submitted on this issue and agree with the finding of the masters.

b. *Count I A*—People v. Ortega

On March 24, 2004, Adolfo Ortega submitted an application for modification of probation at the clerk's office. As a condition of his probation, Mr. Ortega had been ordered to either enroll in the work alternative program or surrender to serve five days in jail by January 15, 2004. Having done neither, he requested an extension to enroll in the work alternative program.

On March 26, 2004, Mr. Ortega, without an attorney, appeared before Judge Velasquez on the probation modification calendar. Mr. Ortega told Judge Velasquez that, subsequent to his original surrender date, he had left for a family emergency in Mexico. Judge Velasquez determined that Mr. Ortega had intentionally violated his order to surrender to begin serving his sentence. Mr. Ortega was remanded to serve his sentence. Without advisement or waiver of rights, Judge Velasquez imposed an additional five days of jail for a willful failure to comply with probation.

c. *Count I B*—People v. Manzo

As a condition of his probation, José Manzo was ordered to either enroll in the work alternative program or surrender to serve five days in jail by May 13, 2004. On July 9, 2004, the court was notified that Mr. Manzo had only completed four of the required 24 hours in the work alternative program.

On July 19, 2004, Mr. Manzo came to the clerk's office and requested that his case be placed on the modification calendar to request a restricted license. When Mr. Manzo appeared in court on July 30th, unrepresented by counsel, Judge Velasquez questioned him about his failure to complete the work hours. Mr. Manzo referred to information he had from "Jaime." A business card from Jaime Prieto was in the court file with confusing entries suggesting that Mr. Manzo may have completed up to 18 1/2 hours. Judge Velasquez characterized these entries as "not legitimate" and ordered Mr. Manzo to surrender to serve out the rest of his time. When Mr. Manzo persisted that he had proof from Jaime that he had completed his hours, Judge Velasquez turned the proceedings into an evidentiary hearing. Judge Velasquez left the bench and called the program ex parte. Someone named Ophelia told Judge Velasquez that Mr. Manzo had not completed his hours.

After talking to Ophelia, Judge Velasquez ordered Mr. Manzo to serve 15 additional days in jail for his willful failure to comply with the terms of his probation.

Judge Velasquez does not consider the conversation with Ophelia to be an improper ex parte communication. The masters disagreed because the "conversation was held for the purpose of obtaining information that could be used in connection with Mr. Manzo's court proceedings." We concur. (See *Fletcher, supra*, 19 Cal.4th at pp. 896–897 [judge committed misconduct by conducting an ex parte phone conversation from the bench with the park ranger who arrested the defendant for purposes of deciding whether to accept a plea bargain].)

d. *Count I C*—People v. Gonzalez

As a condition of his DUI probation, Guillermo Gonzalez was ordered to attend 30 AA meetings. When he appeared before Judge Velasquez, unrepresented by an attorney, for a review hearing on October 29, 2004, he brought proof of having attended 27 meetings. He explained that work obligations prevented him from attending the remaining three meetings. Judge Velasquez reminded Mr. Gonzalez that he had previously been told that he would receive two days of custody for each AA meeting he did not complete. Without an advisement or waiver of rights, Judge Velasquez found a willful violation of probation and sentenced Mr. Gonzales to six days in jail and 10 additional AA meetings.

e. *Count I D*—People v. Narez

In October 2004, Sigifredo Narez submitted an application for modification of his DUI probation. The court had previously received information that Mr. Narez had not installed a court-ordered interlock device or shown proof of the 30 AA meetings he was required to attend. On October 29th, Mr. Narez appeared on the probation modification calendar without a lawyer. Mr. Narez explained to Judge Velasquez that the DUI school told him to install the interlock device after completing his DUI classes. Judge Velasquez told Mr. Narez that he would be immediately taken into custody for a willful failure to comply with the court order to install the interlock device.

Then Judge Velasquez asked about the AA meetings. Mr. Narez replied: "I am doing that. I bring some proof here." Without looking at the AA materials that Mr. Narez offered, Judge Velasquez said: "Did the school tell you not to go to them (the AA meetings)?" As Judge Velasquez was ordering Mr. Narez remanded to custody, Mr. Narez started to say something. Before the interpreter could translate, Judge Velasquez said: "Hold on. . . . You continue to interrupt me, you'll be at 45 in a hurry." When Mr. Narez again tried to explain what the school had told him, Judge Velasquez warned: "I told you you're at 20 days, you insist, you'll be at 45 and you'll get to 60 in a hurry." Judge Velasquez then imposed 20 days in custody for a "willful failure to comply" and ordered Mr. Narez to attend 30 new AA meetings by January.

As he was being sentenced, Mr. Narez asked if he could say something. After being granted permission to speak, Mr. Narez attempted to explain that he had been going to AA meetings and already had been given a completion date. Judge Velasquez interrupted him and increased his sentence to 30 days, while warning, "If you'd like to take more of the court's time, and you'll be at 60." When Mr. Narez said that he "just wanted to explain," Judge Velasquez increased the sentence to 60 days. Mr. Narez started to speak, but before the interpreter could translate, Judge Velasquez increased his sentence to 75 days and threatened to increase the time to 120 days if he continued to speak.

Judge Velasquez was asked at the proceedings before the special masters, "Wasn't [Mr. Narez] entitled to present evidence and argument that he attended the [AA] meetings?" The judge responded, "That's what the hearing was for." Judge Velasquez admitted that he threatened to increase and did increase Mr. Narez's sentence for trying to offer a defense and for taking up the court's time.

The masters concluded: "Despite repeated efforts, Mr. Narez was not given any meaningful opportunity to explain his position before Judge Velasquez summarily found him in violation of probation and remanded him. [Citation.] Mr. Narez did not interfere with the court proceedings and at all times was respectful to the court. Judge Velasquez understands that a defendant is entitled to speak and to inquire about sentencing. [Citation.] Judge Velasquez became fully embroiled with the defendant, increasing his time in custody for reasons unrelated to criminal punishment purposes." We concur.

In his testimony before the special masters, Judge Velasquez acknowledged that he did not handle the matter properly; however, he did not believe that he violated Mr. Narez's due process rights.

f. *Count I E*—People v. Nunez

Angel Nunez was placed on DUI probation and ordered to serve 60 days in jail, with a surrender date of October 12, 2004, and to install an interlock device. On October 29, 2004, Mr. Nunez appeared before Judge Velasquez on his application for a new surrender date, unrepresented by counsel. The court had been previously notified that Mr. Nunez had not installed the interlock device as ordered.

When Mr. Nunez appeared, unrepresented, he explained that he had lost the paperwork for his surrender and that his sick child was in court with him. Judge Velasquez gave him a new surrender date and asked if Mr. Nunez had any questions. Mr. Nunez made a general reference to the interlock device

and, in response to questioning by Judge Velasquez, admitted that it had not been installed. Judge Velasquez ordered Mr. Nunez remanded immediately for failing to surrender, for lying, and "[f]or trying to use his family as a shield." An additional 30 days was imposed for willful failure to install the interlock device.

The masters found: "Mr. Nunez did not interfere with the court proceedings and at all times was respectful to the court. Judge Velasquez became fully embroiled with the defendant, increasing his time in custody for reasons unrelated to criminal punishment purposes." We agree.

g. *Count I F*—People v. Hernandez

As a condition of his probation, Barnabee Hernandez had been ordered to attend 30 AA meetings by December 15, 2004. Mr. Hernandez filed an application for an extension of time to complete his AA meetings. When Mr. Hernandez appeared before Judge Velasquez unrepresented by counsel on December 10, 2004, five days before his December 15th AA completion date, he had attended 16 of the 30 meetings. Mr. Hernandez offered various reasons why he had not completed more meetings. Judge Velasquez stated that he had "little confidence" that the 30 meetings would be completed in the remaining five days.

Mr. Hernandez was immediately remanded to serve three days and ordered to attend 30 AA meetings by January 21st for his willful failure to comply with probation.

h. *Count I G*—People v. Huitron

On December 10, 2004, Prescilliano Huitron appeared, unrepresented by counsel, before Judge Velasquez on his application for a modification of probation. Mr. Huitron had been ordered to either enroll in the work alternative program or surrender to serve 20 days in jail by November 5, 2004, as a condition of his probation. He failed to do either.

After Mr. Huitron offered his excuse for failing to enroll in the work alternative program, he was immediately remanded to serve the original 20-day sentence, and an additional five days for willful failure to comply with the terms of probation.

At the proceedings before the special masters, Judge Velasquez testified that he believed at the time that he was complying with due process, but now believes that the "best procedure" would be to give an advisement of rights.

i. *Count I H*—People v. Narciso

Donato Narciso was ordered to either enroll in the work alternative program or surrender to serve seven days in jail by November 30, 2004. He failed to do either.

On December 10, 2004, Mr. Narciso appeared, without a lawyer, before Judge Velasquez on his application for a modification of probation and asked for a new program date. Mr. Narciso insisted that he did not understand that he had to surrender for jail if he did not enroll in the work program. Judge Velasquez accused Mr. Narciso of lying and implied that Mr. Narciso was accusing Judge Velasquez of lying. At the conclusion of the hearing, Judge Velasquez remanded Mr. Narciso to serve the original seven-day sentence and imposed an additional three days for violating probation.

2. *Conclusions of Law*

The masters concluded that Judge Velasquez engaged in willful misconduct in each of the eight cases that comprise count I. We reach the same conclusion.

**(9)** The masters found, as do we, that Judge Velasquez was conducting probation violation hearings and ordering immediate incarceration "without affording the defendant notice that such a hearing would be taking place and the basis for the alleged violation, and without advising the defendant of his constitutional rights, including the right to counsel and to a formal hearing." These hearings failed to comply with minimum due process requirements as specified by the California Supreme Court in *People v. Vickers* (1972) 8 Cal.3d 451, 457–458 [105 Cal.Rptr. 305, 503 P.2d 1313] (*Vickers*). Before a defendant can be found to be in violation of probation, the defendant has a right to notice of the basis of the alleged probation violation, and a formal hearing which affords an opportunity to cross-examine the witnesses and to present evidence rebutting the allegations. (*Ibid.*) As observed by the masters, the violations of the defendants' rights in these cases "were neither minor nor of a technical nature, as in each instance, the defendant was immediately incarcerated."

**(10)** In his written briefing before the commission, Judge Velasquez contends that at most his conduct constitutes legal error and, as such, is not subject to discipline under *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 395 [84 Cal.Rptr.2d 466, 975 P.2d 663] (*Oberholzer*). The California Supreme Court in *Oberholzer* held that legal error *alone* does not constitute judicial misconduct subject to discipline. (*Id.* at pp. 395–398.) However, a judge who commits legal error which, in *addition,* clearly and

convincingly reflects "bad faith," "bias," "abuse of authority," "disregard for fundamental rights," "intentional disregard of the law," "or any purpose other than the faithful discharge of judicial duty" is subject to sanctions. (*Id.* at p. 398.)

**(11)** The masters concluded, as do we, that Judge Velasquez's actions went well beyond mere legal error; they reflected a disregard of the defendant's fundamental right to due process. (See *Vickers, supra,* 8 Cal.3d at p. 457.) As the masters correctly concluded, Judge Velasquez "engaged in intentional conduct that diminished or virtually eliminated those rights."

**(12)** In addition, Judge Velasquez acted for a purpose other than the faithful discharge of his duties by becoming embroiled with the defendants, thereby surrendering his role as an impartial jurist. In various cases, Judge Velasquez independently investigated facts, refused to consider documents the defendant had brought to court, engaged in a contest with the defendant to determine who was lying, and increased sentences out of impatience and pique when a defendant attempted to explain his failure to comply with a court order or questioned a sentence. The masters concluded that this "conduct suggests embroilment and abandonment of the role of neutral magistrate." We agree and adopt this conclusion as our own.

We conclude that Judge Velasquez engaged in unjudicial conduct in a judicial capacity that violated California Code of Judicial Ethics canons 1 and 2A (judge shall uphold integrity of the judiciary, shall comply with the law and avoid impropriety and appearance of impropriety), as well as canons 3B(2) (judge shall maintain professional competence in the law), 3B(4) (judge shall be patient, dignified, and courteous to litigants and others with whom the judge deals in an official capacity), 3B(7) (judge shall accord every person with legal interest in proceeding the full right to be heard and shall not initiate, permit, or consider ex parte communications), and 3B(8) (judge shall dispose of all judicial matters fairly, promptly, and efficiently). (All references to a canon are to the California Code of Judicial Ethics.) This constitutes the first two components of willful misconduct. (*Broadman, supra*, 18 Cal.4th at p. 1091.)

**(13)** Judge Velasquez also acted in bad faith, the third element of willful misconduct. (*Broadman, supra*, 18 Cal.4th at p. 1091.) He acted beyond his lawful authority, either knowingly or with a conscious disregard for the limits of his authority. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 849–850 [264 Cal.Rptr. 100, 782 P.2d 239] (*Kloepfer*) [judge engaged in willful misconduct by accepting guilty plea and admission of a probation violation without an advisement of rights or informing counsel].) We have adopted the masters' finding that Judge Velasquez is aware that a

defendant cannot be found in violation of probation and sentenced unless he or she either has a formal hearing or waives hearing. Nevertheless, Judge Velasquez did just that; he sentenced the defendants in count I for being in willful violation of probation without providing the defendants with the opportunity for formal hearing. (See *Inquiry Concerning Ross* (2005) No. 174, Decision and Order Removing Judge Ross from Office, pp. 32–39 [49 Cal.4th CJP Supp. 79, 112–118] (*Ross*) [judge committed willful misconduct by finding the defendant had violated the terms of his probation without providing the opportunity for a formal hearing and by proceeding without counsel].)

Additionally, "he acted out of pique, irritation or impatience, any of which is a purpose other than the faithful discharge of his judicial duties" constituting bad faith. (*Ross, supra*, No. 174 at pp. 17–18 [49 Cal.4th CJP Supp. at p. 100].)

**(14)** Judge Velasquez maintains that he was acting on the good faith belief that he was following the practices of other judges in Monterey County. We reject this contention for the same reason offered by the masters: "Even if other judges in Monterey County may have on some prior occasions conducted their modification calendars in a similar fashion, or did so when Judge Velasquez was an attorney 11 years ago, this fact does not excuse Judge Velasquez's behavior; nor does the fact that some attorneys may not have complained." Judge Velasquez has an obligation to ensure the rights of defendants irrespective of the practices of other judges. (See *Kloepfer, supra*, 49 Cal.3d at pp. 849–854.)

We also reject Judge Velasquez's suggestion that he acted on the good faith belief that his practice of incarcerating defendants for violating probation without complying with due process was proper because these were probation modification hearings, as opposed to probation violation hearings. Insofar as the demands of due process are concerned, it makes no difference what the proceedings are called—if in the end the defendant is found in violation of probation and incarcerated, the defendant is entitled, at minimum, to notice and a formal hearing. (*Vickers, supra,* 8 Cal.3d at pp. 457–458.) Moreover, we have adopted the masters' factual finding that Judge Velasquez is aware of the difference between violation of probation and modification of probation.

Nor are we persuaded by Judge Velasquez's suggestion that he was entitled to find the defendant in violation of probation based on the defendant's factual admission in court. Before a defendant can be found in violation of probation and sentenced based on a factual admission, the defendant must be advised of and make a knowing and intelligent waiver of his or her constitutional rights. (*Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d

274, 89 S.Ct. 1709]; *In re Tahl* (1969) 1 Cal.3d 122 [81 Cal.Rptr. 577, 460 P.2d 449]; *Vickers, supra,* 8 Cal.3d 451.)

We determine that Judge Velasquez committed willful misconduct in each of the eight cases charged in count I.

B. *Count II: Threatening to Increase and Increasing Sentences When Defendants Questioned a Sentence or Otherwise Commented at Sentencing*

1. *Findings of Fact*

a. *Common Findings*

The masters found: "In each of the cases identified in Count II, Judge Velasquez became embroiled with the defendant at the time of sentencing, and threatened to increase time in custody—and in some instances actually increased time in custody. . . . In each instance, Judge Velasquez acted with anger." We concur and adopt this finding as our own.

b. *Count II A*—People v. Merwin

As Judge Velasquez was sentencing Toni Merwin to 10 days in jail on a misdemeanor, Merwin asked "is there a way you can make the time less?" Judge Velasquez responded, "I can make it more." In the end, Ms. Merwin's sentence was not increased. The masters found that Judge Velasquez did not like Merwin questioning her sentence (which the judge characterized as "nickel and diming me") and that his remark was designed to make her stop questioning the sentence and deter others in the courtroom from doing the same. We concur.

c. *Count II B*—People v. Gawf

When David Gawf appeared for arraignment, unrepresented by counsel, on a charge of possession of alcohol by a minor, Judge Velasquez offered him the choice of jail or 30 AA meetings, the successful completion of which would result in dismissal of the charges (diversion). Mr. Gawf chose AA meetings. When he asked if the number of AA meetings could be reduced, the judge threatened to take Mr. Gawf's driver's license and give him jail time instead:

"Defendant: I was—sorry to interrupt you. I was wondering if I can get that reduced even more because I work full time.

"Judge: I'll take your license if you keep talking that way.

"Defendant: Yes, Your Honor.

"Judge: Zero tolerance.

"Female voice: He's going to dismiss the case if you go to 30 AA meetings.

"Defendant: Oh, okay. Yes, Your Honor.

"Judge: What—how many days in jail do you want?

"Defendant: None, Your Honor."

At the hearing before the special masters, Judge Velasquez acknowledged that he did not have authority to impose jail time or take Mr. Gawf's license at that point in the proceedings because the defendant had not pled guilty or been convicted.

d. *Count II C*—People v. Narez

The factual findings in this case were made in conjunction with count I D.

e. *Count II D*—People v. Maya

After Erik Maya pled no contest and was sentenced for trespassing, Judge Velasquez asked whether he had paid a $250 fee for public defender services that had been ordered on previous cases.[1] When Mr. Maya offered various reasons why he had not paid the fee, Judge Velasquez suggested he was lying and ordered him to pay the fee by the following Tuesday. When Mr. Maya questioned the date, the judge told him to pay a day earlier. As Mr. Maya again began to speak, Judge Velasquez ordered him immediately remanded into custody. Mr. Maya's lawyer then spoke with his client and the following exchange occurred:

"DPD [Mr. Maya's deputy public defender]: Your Honor, he can do it by Monday.

"Judge: Well, you just told me no.

[1] A defendant can be ordered to pay a fee for the services of a public defender (Pen. Code, § 987.5, subd. (a)), but cannot be incarcerated for failure to pay the fee—it is only enforceable as a civil judgment (*People v. Amor* (1974) 12 Cal.3d 20 [114 Cal.Rptr. 765, 523 P.2d 1173]).

"Defendant: Yeah, yeah. I can do it by Monday.

"Judge: How am I supposed to believe in you?

"Defendant: Yeah—

"Judge: You can't have it—you don't have the money you told me.

"Defendant: Okay. I do—I'll find a way to come up with it.

"Judge: Then what were you—then why were you lying to me? Why didn't you come up with the money when you were supposed to?

"Defendant: Because I didn't want to go back to my mom and ask her for, to borrow money, she's been helping me out a lot.

"Judge: Well, then you're going to be remanded—

"Defendant: But I'll do that again—

"DPD: Your Honor.

"Defendant: But I'll do that—I'll (unintelligible) do it—

"Judge: Excuse me. Mr. Maya, you're going to be quiet, okay. You were told to pay your fine—your $25 registration fee for a lawyer by a certain date. You chose not to do that. Okay. That was your choice. *I just asked you if you could do it by Monday, and you're there crying like a kid that you can't do it by Monday. Okay. Until your lawyer butts in and tries to help you and encourages you, all of a sudden you're creative.* I'm talking to you as a man, okay, not as a kid. So you're going to be remanded. You'll be released Monday.

"DPD: Your Honor, Your Honor—

"Defendant: My baby's in the back—

"DPD: Your Honor,—

"Judge: I'm going—okay, you want 30 days? I'll give you 30 days.

"Defendant: No, I don't want 30 days.

"Judge: Okay. *So then you're going to be remanded to the custody of the sheriffs effective immediately.*

"Defendant: *But my baby's in the back—what about my baby?*

"Judge: *We'll get CPS to come and get somebody for you.*

"Defendant: Oh, god.

"Judge: Okay.

"Defendant: I have to go to the school today, too, you know, you'll make me lose all my—

"Judge: Right. Okay. You gotta learn to pay attention." (Italics added.)

Judge Velasquez eventually agreed to the public defender's request for an extension to pay the fee until that afternoon, but stated that Mr. Maya would receive an additional 45 days in custody if he failed to pay.

In his testimony before the special masters, Judge Velasquez denied that Mr. Maya's failure to pay the fee was the basis for his threat to remand Mr. Maya. He claimed that incarceration was threatened as part of the trespass sentence in the case Mr. Maya was appearing on that day. The masters concluded that "[t]his testimony is not credible." We agree and adopt that finding as our own.

f. *Count II E*—People v. Herrero

While being sentenced pursuant to a plea bargain, Modesto Herrero stated that Judge Velasquez had not told him about the $750 fine that was being imposed. Judge Velasquez explained that the fine had been discussed in chambers (apparently in Mr. Herrero's absence). When Mr. Herrero asked why the fine had to be so high, Judge Velasquez threatened to increase the fine to $2,000. Then, when Mr. Herrero attempted to question Judge Velasquez further about the fine, Judge Velasquez threatened to impose an additional year of jail time. Ultimately, Judge Velasquez did not impose the threatened jail time, but did impose the additional $2,000 fine.

Judge Velasquez testified that he both increased the fine and threatened to increase the jail time because he believed Mr. Herrero was accusing him of not honoring the indicated sentence and calling him a liar. He acknowledged that he did not handle the matter properly and that he owed Mr. Herrero an apology.

g. *Count II F*—People v. Martinez

As Juan Martinez was being sentenced to 10 days in jail and ordered to pay a fine following his misdemeanor no contest plea, he made bizarre statements that indicated he might have mental problems. When Judge Velasquez asked if he wanted to pay the $250 fine or "serve it out," Mr. Martinez responded, "I will give you $500." When Judge Velasquez told him he would "serve out the fine," the defendant replied "I will give you $500 for being an asshole." Judge Velasquez then ordered Mr. Martinez to serve 180 days in jail. Mr. Martinez responded by stating "Your Honor, even a month or two—." Judge Velasquez interrupted: "I'm listening to his comments. I don't think he's out of his mind."

The public defender then requested that the matter be put over for "further evaluation" (apparently referring to a mental evaluation). After the public defender interceded, Judge Velasquez allowed the defendant to withdraw his plea.

Judge Velasquez testified that he threatened to impose 180 days for comments suggestive of contempt of court, but acknowledged that he did not follow contempt procedures.

2. *Conclusions of Law*

The masters reached different legal conclusions on individual subcounts of count II—finding two instances of willful misconduct, two instances of prejudicial misconduct, one instance of improper action and no misconduct in one instance. We have concluded that Judge Velasquez committed willful misconduct in all of the cases that comprise count II.

**(15)** In each case, Judge Velasquez threatened to impose jail time, and in some instances actually imposed jail time, in response to a legitimate comment or question from the defendant. In addition, Judge Velasquez admitted he was attempting to discourage the defendant before him and others in the courtroom from questioning their sentences. By so doing, he disregarded the defendant's right to be heard. Due process affords litigants the right to speak regarding matters which might influence the decisionmaking process. (*Dodds, supra,* 12 Cal.4th at pp. 176–177.) In addition, a criminal defendant has a statutory right to address the court at sentencing. (Pen. Code, § 1200; *In re Shannon B.* (1994) 22 Cal.App.4th 1235, 1245 [27 Cal.Rptr.2d 800].)

We are also troubled by the manner in which Judge Velasquez interfered with the defendants' right to be heard. In every case, with the exception of

Martinez (who apparently had mental problems), the defendants were respectful to the court and did nothing more than attempt to offer an explanation or ask a legitimate question concerning their sentences. The masters concluded, as do we, that Judge Velasquez responded out of anger and became embroiled with the defendants. As the masters concluded regarding the *Maya* matter, "rather than acting as a neutral magistrate handling a rather perfunctory fee matter, [Judge Velasquez] vented his anger and flaunted his power in response to what he unreasonably believed to be an attack on his power and authority." In the *Herrero* matter, we concur with the masters that Judge Velasquez "became unnecessarily embroiled with the defendant based on his perception that the defendant was essentially accusing Judge Velasquez of lying," when the defendant was at most honestly confused about the imposition of the second fine. As a result of his inability to maintain a judicial distance and composure in the *Narez* matter, Judge Velasquez escalated the defendant's sentence from 20 to 75 days and failed to accept evidence offered by Mr. Narez which may have resolved the question of how many AA meetings he had attended.

By infringing upon the defendants' right to be heard and becoming embroiled with the defendants, Judge Velasquez violated canons 1, 2A, 3B(4), 3B(7), and 3B(8). Therefore, Judge Velasquez engaged in unjudicial conduct while acting in a judicial capacity.

**(16)** We also conclude that Judge Velasquez was acting in bad faith. He was performing a judicial act that seriously transgressed his lawful authority by increasing or threatening to increase a sentence when a defendant merely questioned the sentence or offered a defense or explanation in response to an accusation. As an experienced judge, he either knowingly violated or consciously disregarded his obligation to assure those in his courtroom of their right to be heard. Judge Velasquez was also performing a judicial act for the "corrupt purpose" of venting his anger. (See *Broadman, supra,* 18 Cal.4th at p. 1092; *Ross, supra*, No. 174 at p. 4 [49 Cal.4th CJP Supp. at p. 88]; *Inquiry Concerning Van Voorhis* (2003) No. 165, Decision and Order Removing Judge Van Voorhis from Office (2003) pp. 12, 18, 21, 23 [48 Cal.4th CJP Supp. 257, 275, 281, 284, 286] (*Van Voorhis*) [willful misconduct where judge acted for "corrupt purpose of venting his anger or frustration"].) In addition, in the *Maya* matter, Judge Velasquez knew or was recklessly indifferent to the law prohibiting incarceration for failure to pay attorney fees. (*People v. Amor* (1974) 12 Cal.3d 20 [114 Cal.Rptr. 765, 523 P.2d 1173]; see also *Kloepfer, supra,* 49 Cal.3d at pp. 863–864.) In the *Martinez* matter, Judge Velasquez was in effect holding the defendant in contempt without following proper contempt procedures, which in itself constitutes bad faith. (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533 [247 Cal.Rptr. 378, 754 P.2d 724]; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 694 [122 Cal.Rptr. 778, 537 P.2d 898].)

**(17)** In a number of instances, the masters gave deference to mitigating factors in determining that Judge Velasquez did not engage in willful misconduct. For instance, in the *Gawf* (II B), *Herrero* (II E), and *Martinez* (II F) matters, the masters considered that Judge Velasquez did not actually impose the threatened jail time and that he apologized for his conduct in the proceedings before the special masters. We do not consider these factors as being relevant on the issue of bad faith. It is well established that there can be no mitigation for maliciously motivated judicial misconduct. (*Kloepfer, supra,* 49 Cal.3d at p. 865; *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 377 [188 Cal.Rptr. 880, 657 P.2d 372]; *Ross, supra*, No. 174 at p. 39 [49 Cal.4th CJP Supp. at pp. 117–118] [fact that judge quickly vacated his bad faith ruling, eliminating any prejudice to the defendant, does not reduce willful misconduct to prejudicial misconduct].) Neither lack of prejudice to the defendant nor a judge's subsequent corrective action mitigates willful misconduct. (*Broadman, supra,* 18 Cal.4th at pp. 1095–1096.) With regard to the denial of a criminal defendant's fundamental rights, the Supreme Court held: "It is immaterial whether [the judge's] abuse of power resulted in just or unjust treatment for any given defendant. . . . [The judge's] bad faith was directed towards our legal system itself . . . ." (*Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d at p. 286.) **(18)** Thus, Judge Velasquez's conduct in threatening to impose jail time for offering a defense or questioning a sentence is no less willful because the jail time was never imposed or because he later apologized for his conduct. We conclude that Judge Velasquez engaged in willful misconduct in each instance charged in count II.

### C. *Count III—Conditioning Sentence on the Defendant's Response to Whether It Felt Good To "Peel Out"*

#### 1. *Findings of Fact*

##### a. *Common Findings*

In each of the five cases that comprise count III, Judge Velasquez asked a defendant who was being sentenced on a misdemeanor charge of exhibition of speed if it "felt good" to "peel out." The masters found that in each instance Judge Velasquez equated an affirmative answer with taking responsibility for the defendant's actions, and a negative answer with a failure to accept responsibility. Further, the masters found that "Judge Velasquez to some degree became embroiled in the process, acted in a way that might have suggested he had prejudged the case, and used his own experience as a young man as a factor in the ultimate sentence given." We adopt these findings and further find, based on our independent review of the record, that Judge Velasquez used his experience as a young man in determining the "correct" answer to the question.

b. *Count III A*—People v. Herrera

After Nicholas Herrera entered a guilty plea to exhibition of speed, Judge Velasquez questioned him concerning whether it felt good to "peel out" in the following exchange:

"Judge: Listen to the question and I want you to be honest. That's whether you pay $200 or $800 depends on your honesty. When you peel out tires, because that's what you did, you spin your wheels? Did it feel good?

"Defendant: Did it feel good?

"Judge: Yeah. Yes or no?

"Defendant: Yes.

"Judge: Are you sure?

"Defendant: I mean it didn't feel good because I was in the water.

"Judge: Well no. The reason for peeling out is because there's a thrill to it. Right?

"Defendant: Yes.

"Judge: So are you sure it feels good or it doesn't?

"Defendant: No, it doesn't feel good.

"Judge: Okay. Now you're starting to lie.

"Defendant: No, I don't like it.

"Judge: I do. And if I ever peel out, I do it for a reason. But anyways. You answered straight. This will be your sentence.

"You'll be placed—and I just questioned you a little more, and then you weakened and went the other way."

Judge Velasquez imposed a $200 fine and wished the defendant good luck.

c. *Count III B*—People v. Lopez

Prior to accepting Leonard Lopez's plea to exhibition of speed, Judge Velasquez informed him that his fine would be between $200 and $1,000

"depending on your answer." After Mr. Lopez pled guilty, Judge Velasquez asked him "does it feel good" to peel out. When the defendant replied "no," Judge Velasquez accused him of lying. As Mr. Lopez began to speak, Judge Velasquez interrupted: "I didn't ask you if it was an accident, I just asked you a straightforward question. When we do that stuff, and I've done it, you peel out, you're just—you're showing off. You do it for a reason. Some girls are passing by, you wanted to get their attention."

When Judge Velasquez again asked Mr. Lopez if it felt good, Mr. Lopez replied "not when you get pulled over." Judge Velasquez imposed a fine of $800.

d. *Count III C*—People v. Lynch

Aaron Lynch was told that he would be fined between $200 and $1,000 depending on his answer to the question of whether it felt good to "peel out." When the defendant answered "yes," Judge Velasquez imposed a $200 fine and told Mr. Lynch "[t]hat's the answer I wanted."

e. *Count III D*—People v. Lopez, Jr.

Joe Lopez, Jr., answered "yes" when Judge Velasquez asked him if it felt good to peel out. Judge Velasquez responded: "That's why we do it."

f. *Count III E*—People v. Martinez

At sentencing Judge Velasquez said to Samuel Martinez: "When you do it [peel out], whether by accident or by mistake or because you don't know—you're familiar with the truck—the vehicle. But when it happens does it feel good?" When Mr. Martinez replied "yes," Judge Velasquez said, "That's why we do it, right? . . . That's why we do it sometimes—to show off?"

2. *Conclusions of Law*

The masters concluded that accusing the defendants in the *Herrera* (III A) and *Lopez* (III B) matters of lying was improper action, but otherwise found no misconduct in count III. We, however, determine that Judge Velasquez engaged in prejudicial misconduct in each of the five cases in count III.

**(19)** In the proceedings before the special masters, Judge Velasquez maintained that determining whether a defendant is willing to "own up" to having intentionally engaged in exhibition of speed is within his sentencing discretion. Whether a defendant accepts responsibility for committing the offense is a proper factor for a judge to take into consideration in sentencing.

However, whether it feels good to "peel out" does not equate with accepting responsibility for the offense of exhibition of speed. The offense does not include a requirement that the defendant "feel good." (Veh. Code, § 23109, subd. (a).)

Moreover, the record reflects that Judge Velasquez was not really concerned with whether the defendants were accepting responsibility for intentionally committing the offense, but with whether they would admit that it felt good. When Leonard Lopez tried to explain that his peeling out was an accident, Judge Velasquez responded: "I didn't ask you if it was an accident, I just asked you a straightforward question." Similarly, Judge Velasquez told Samuel Martinez that it did not matter whether he peeled out by accident or by mistake, the only question was whether it felt good.

The record further reflects that Judge Velasquez made prejudgments regarding the defendant's credibility based on his own personal experiences as a young man. We conclude that Judge Velasquez violated canons 1, 2A, 3B(4), and 3B(8) by becoming embroiled with the defendants, unreasonably accusing some defendants of lying, and acting in a way that manifested prejudgment.

Judge Velasquez's conduct was prejudicial to public esteem for the judiciary. His questions turned the proceedings into a game show with the defendant attempting to guess the correct answer in order to obtain the lower fine. As Special Master Provost put it during argument, "[D]on't you think, though, the perception of the public was that this was a setup?" Additionally, Judge Velasquez detracted from the dignity of the proceedings by announcing in court that he has engaged in the same criminal conduct as the defendant. As such, we determine that Judge Velasquez engaged in five instances of prejudicial misconduct in count III.

### D. *Count IV: Giving Defendants the Choice of Diversion or Jail Time, Without Advisement of the Right To Plead Not Guilty and, In Some Cases, Suggesting That the Consequence of Failure to Successfully Complete Diversion Was Immediate Incarceration*

#### 1. *Findings of Fact*

In each of the seven cases in count IV, the defendant appeared for arraignment on misdemeanor alcohol or marijuana charges. Before each case was called individually, Judge Velasquez gave a mass advisement of constitutional rights to those seated in the courtroom that included the right to plead not guilty and go to trial. However, when the defendants appeared before the judge individually, Judge Velasquez presented them with a choice of diversion (attending AA meetings after which the charges would be dismissed) or

jail time. ("Would you like to go to jail or go to 30 AA meetings?" (count IV A, *Gawf*); "Do you want to plead guilty or do you want to go to 20 AA meetings?" (count IV B, *Guerrero*).) Judge Velasquez did not tell them that they had the option of pleading not guilty and having a trial. Further, although the consequence of failing to successfully complete the AA meetings (diversion) is resumption of the proceedings, including the right to a trial, in certain cases the judge told the defendants they would go to jail. ("Don't come back short of the meetings because then the deal is off and you'll go to jail." (Count IV D, *McEwan*.))

The masters found that Judge Velasquez "did not appear to understand that his statements suggested to the defendants that the adverse consequences would be automatically imposed on the defendants if they failed to complete the AA meetings, even though they had not entered a plea." We agree.

2. *Conclusions of Law*

**(20)** The masters concluded that in each of the seven cases, Judge Velasquez engaged in prejudicial misconduct. We reach the same conclusion. Judge Velasquez's conduct interfered with the defendants' exercise of one of the most basic and important of constitutional rights, the right to jury trial. As stated by the masters: "When the individual case was called, defendant was given a Hobson-like choice that did not include the right to plead not guilty and have a trial. Rather than ensuring constitutional rights, which Judge Velasquez was obliged to do (see *Kloepfer, supra,* 49 Cal.3d 826, 850–851), Judge Velasquez created an environment in which the full exercise of those rights was unlikely."

Judge Velasquez violated canons 1, 2A, and 3B(7). As Judge Velasquez concedes, his conduct in each instance in count IV constitutes prejudicial misconduct.

E. *Count V: Issuance of Bench Warrants When the Defendant Was Not Legally Required To Appear and Ordering Attorney To Produce Letter Related to Judge Velasquez's Disqualification*

1. *Findings of Fact*

a. *Common Findings*

In seven of the eight cases in count V (in one case, count V B, no evidence was presented), the defendants had authorized counsel to appear for them in misdemeanor proceedings pursuant to Penal Code section 977 (section 977). That section authorizes an attorney to appear on the defendant's behalf in

misdemeanor cases and excuses the defendant from appearing. When neither the attorney nor the defendant appeared for a scheduled appearance, Judge Velasquez issued a bench warrant for the defendant's arrest.

In his testimony before the masters, Judge Velasquez insisted that he was legally entitled to issue the warrants because a lawyer has a responsibility to be present or inform the court of his or her absence. He denied that his actions had the effect of punishing the defendants for their attorney's conduct. When asked whether he considered sanctioning the lawyer instead of issuing a warrant for the defendant, Judge Velasquez responded that he has never sanctioned a lawyer.

b. *Count V A*—People v. Kitchen

Attorney Shawn Mills represented Douglas Kitchen. On the date set for a plea "without the defendant's presence," there was no response when the case was called at 9:03 a.m. on the 8:15 a.m. calendar. Judge Velasquez understood that the defendant was not expected to be present, but nevertheless issued a $15,000 bench warrant for the defendant's arrest.

A few minutes after the warrant issued, Mr. Mills can be heard on the tape asking Judge Velasquez to call his case. Judge Velasquez neither called the case nor informed Mr. Mills that a warrant had been issued for his client's arrest. Later during a recess, Mr. Mills spoke to the judge and the prosecutor in chambers regarding a condition of Mr. Kitchen's probation—again, the judge did not tell Mr. Mills that he had issued a warrant.

When court resumed, Mr. Mills waited for his case to be called. As the court started to take another recess approximately 25 minutes later, Mr. Mills inquired about why his case had not been called. At that point, Judge Velasquez informed him that a warrant had been issued. Mr. Mills explained that he had been delayed in another courtroom, but had been in Judge Velasquez's courtroom five times that morning to see if his case had been called. Judge Velasquez refused to recall the warrant and told Mr. Mills "it isn't, not my responsibility to baby-sit attorneys' offices or manage their calendars."

Mr. Mills wrote the judge a letter later that day, noting that the bailiff had seen him several times that day and that he had once told the bailiff he was in another department. He asked that his client not be punished for his actions. The next day, Judge Velasquez recalled the warrant.

c. *Count V C*—People v. Hoffman

Judge Velasquez issued a warrant for Scott Hoffman when he missed his arraignment. Attorney Peter Leeming wrote the calendar clerk and explained

that Mr. Hoffman had not received notice of the arraignment because he had moved. Mr. Leeming requested that the matter be set for November 17, 2004. When Judge Velasquez called the case on November 17, neither the attorney nor the defendant was present—the clerk had apparently failed to inform Mr. Leeming that his request had been granted. Judge Velasquez knew from Mr. Leeming's letter that Mr. Leeming intended to appear on Mr. Hoffman's behalf and the defendant would not be present. Another attorney in court offered to appear on Mr. Leeming's behalf. Judge Velasquez refused the request and issued a $15,000 warrant for the defendant (having recalled the original $6,000 warrant).

The next day Attorney George Gigarjian wrote Judge Velasquez and explained that he was handling Mr. Leeming's cases while he was out of town and that Mr. Leeming had not been informed of the November 17 date. Judge Velasquez denied Mr. Gigarjian's request to withdraw the warrant.

On December 7, 2004, Mr. Gigarjian spoke to Judge Velasquez regarding the warrant, but again the judge refused to withdraw the warrant. The defendant filed a peremptory challenge against Judge Velasquez and the case was reassigned. On December 20, 2004, Presiding Judge Sillman ordered the warrant recalled.

d. *Count V D*—People v. Holt

Attorney Shawn Mills represented Dustin Holt. When neither appeared at a pretrial hearing, Judge Velasquez issued a $15,000 warrant for the defendant's arrest.

A week later, Mr. Mills wrote Judge Velasquez and explained that he had mistakenly set the matter for a different date and asked that the warrant be withdrawn. He explained that Mr. Holt was in the military and could be charged with AWOL if he surrendered or was arrested on the warrant. Judge Velasquez made handwritten comments on the letter including, "As an attorney, you have an obligation to represent your client effectively. Your lack of responsibility is your own fault." The letter with the comments was placed in the file but not sent to Mr. Mills. Judge Velasquez denied the request to recall the warrant and Mr. Holt was arrested on the warrant.

e. *Count V E*—People v. Holder

Attorney Mills also represented Ronald Holder. When neither appeared at the pretrial conference, Judge Velasquez issued a $15,000 warrant for the defendant's arrest. The next day, Mr. Mills wrote to the court clerk and asked

that the matter be recalendared. Judge Velasquez denied the request. Mr. Holder was arrested on the warrant.

f. *Count V F*—People v. Huggins

Attorney Frank Dice represented Demetrious Huggins. When neither appeared at a scheduled court appearance on January 5, 2005, Judge Velasquez issued a bench warrant for the defendant.

On February 7, 2005, Mr. Dice sent a letter to the Monterey County Superior Court in which he explained that he had missed the court date because of a failure in the office calendaring system. He said that his attempts to have the matter recalendared had not been processed. Mr. Dice stated that Mr. Huggins's case did not fall within any of the provisions of Penal Code section 978.5, which specifies when warrants may be issued, and attached a copy of the statute. The letter further stated, "Sanctions under Civil Code are appropriate . . . against counsel. [¶] Mr. Huggins should not suffer because counsel missed a court appearance."

Judge Velasquez reset the matter and recalled the bench warrant. However, Mr. Dice failed to appear again at a subsequent court appearance and another warrant was issued. At Attorney Dice's request, the matter was recalendared and the warrant was recalled.

g. *Count V G*—People v. Huerta/People v. Kammer

Attorney Steve Liner was appearing for the defendants Huerta and Kammer. The record does not reflect whether Mr. Liner had previously appeared for either defendant or whether a section 977 authorization was noted in the court file.

When the calendar was first called in the morning, Mr. Liner asked that his two cases be called but did not identify them by name. Judge Velasquez responded "just a minute," and called another case. When Judge Velasquez called the *Huerta* and *Kammer* matters, there was no appearance and bench warrants were issued for each defendant.

When Mr. Liner returned to the courtroom, he reminded Judge Velasquez that he had been in court earlier that morning and that Judge Velasquez had "refused to call my case." Judge Velasquez told Mr. Liner that he did not want to put Mr. Liner's cases "in front of other people," because "[y]ou're nothing special." Judge Velasquez further informed Mr. Liner that it was his responsibility to "come here on time" and if he did not "that's your problem."

The same day, Judge Velasquez was disqualified pursuant to an affidavit of disqualification under Code of Civil Procedure section 170.6. Also, on the same day, the presiding judge recalled the warrants for defendants Huerta and Kammer.

Over three weeks later, Attorney Steve Liner appeared before Judge Velasquez on an unrelated matter. By this time, Judge Velasquez knew he had been disqualified in the *Kammer* and *Huerta* matters. Despite that, he mentioned the cases by name and demanded that Mr. Liner provide him with copies of letters of complaint that Mr. Liner had submitted to the presiding judge. He told Mr. Liner that he expected the letters by 5:00 p.m. that day. Judge Velasquez also warned Mr. Liner, "[i]f [the letters] are incorrect, you will be dealing with the Bar . . . ."

Judge Velasquez acknowledged that he was not aware of any authority that permitted him to order production of the letters.

h. *Count V H*—People v. Gonzalez

Miguel Gonzalez's case was placed on the court's calendar at his public defender's (DPD) request to ask for a re-referral to a court-ordered program; a warrant had previously been issued for failure to enroll in the program. The DPD was not present when the case was called because she thought it was on a later calendar. Judge Velasquez was told that the DPD would be right back and he fully expected that she would return, as she was the assigned public defender in his courtroom. Nevertheless, he issued a warrant for the defendant's arrest.

Later that morning, the DPD asked about the *Gonzalez* warrant and told the judge that she thought the matter was on later in the morning. Judge Velasquez knew that the DPD wanted him to recall the warrant, but it was not recalled until over two months later.

2. *Conclusions of Law*

The masters concluded that Judge Velasquez did not commit misconduct in issuing the warrants, but did engage in misconduct in failing to recall them when he learned that the failure to appear was the result of the attorney's mistake and not the client's. We conclude that Judge Velasquez engaged in willful misconduct both by issuing the warrants when he knew that the defendants were not present because they were proceeding under section 977 *and* by subsequently refusing to recall the warrants upon the attorneys' requests. We further determine that Judge Velasquez engaged in willful misconduct by ordering an attorney to produce letters that had been submitted

to the presiding judge when Judge Velasquez knew that he had been disqualified in the cases that were the subject of the letters.

Issuing Bench Warrants

In his briefs to the commission, Judge Velasquez maintained that his conduct in issuing the warrants constitutes at most legal error citing *Oberholzer, supra,* 20 Cal.4th 371. In his oral presentation before the commission, Judge Velasquez conceded that he had improperly penalized defendants for their attorney's failure to appear. We conclude that Judge Velasquez manifested a callous indifference to the bounds of his authority by issuing bench warrants for defendants when he knew they were not required to appear, and did so for the improper purpose of teaching the defendants' attorneys a lesson. The judge's misconduct resulted in the incarceration of at least two defendants in violation of due process.

The masters made a factual finding, which we have adopted, that in each of the cases "the defendant had authorized counsel to appear for him" pursuant to section 977. Section 977 provides that a misdemeanor defendant may "appear by counsel only," except in specified circumstances that are not applicable here. This section "confers upon a defendant in a misdemeanor proceeding a 'statutory right to be absent under the Penal Code.' " (*Simmons v. Superior Court* (1988) 203 Cal.App.3d 71, 76 [249 Cal.Rptr. 721], quoting *People v. Kriss* (1979) 96 Cal.App.3d 913, 916 [158 Cal.Rptr. 420]; see *Olney v. Municipal Court* (1982) 133 Cal.App.3d 455, 459 [184 Cal.Rptr. 78].)

Penal Code section 978.5, subdivision (a), provides that a bench warrant may be issued whenever a defendant "fails to appear in court as *required by law*" (italics added). Since a misdemeanor defendant who has authorized an attorney to appear on his or her behalf is not required to appear (*ibid.*), a warrant cannot issue. Section 978.5 sets forth a nonexclusive list of circumstances where a bench warrant may issue, none of which applies in these cases. In *Kloepfer, supra,* 49 Cal.3d at page 851, the judge's removal was based in part on issuing a warrant for a misdemeanor defendant when counsel represented that he was appearing on the defendant's behalf. The Supreme Court stated: "Issuance of the warrant was proper only if the defendant had been ordered to appear and failed to do so. (See Pen. Code, § 978.5.)" (*Ibid.*) As we stated in the public admonishment of Judge Stephen Gildner, "[n]o reasonable or reasonably competent judge would assume or conclude" that a bench warrant could be issued when the defendant had not been ordered

to appear or otherwise been given notice that his or her appearance was required. (*In re Gildner* (2005) Decision and Order Imposing Public Admonishment, p. 4.)[2]

**(21)** Issuance of the warrants constitutes more than mere legal error under *Oberholzer, supra*, 20 Cal.4th at page 398. Judge Velasquez disregarded the defendant's fundamental due process right to notice and seriously undermined the attorney-client relationship. In addition, he abused his authority and acted in bad faith with utter and conscious disregard for the limits of his authority by issuing warrants for defendants who were not required to appear. (*Broadman, supra,* 18 Cal.4th at p. 1092.) Further, he was performing a judicial act for a purpose other than the faithful discharge of his duties—to punish errant lawyers. (See *Ross, supra*, No. 174 at pp. 17–18, 32 [49 Cal.4th CJP Supp. at pp. 100, 111]; *Van Voorhis, supra*, No. 165 at pp. 9, 11, 18 [48 Cal.4th CJP Supp. at pp. 271, 273–274, 280–281].)

In each of these cases, there is clear and convincing evidence that Judge Velasquez knew at the time he issued the warrant that the failure to appear was the fault of the attorney and not the defendant. In the proceedings before the special masters, Judge Velasquez testified: "I was issuing a warrant because that defendant's lawyer was not present." The appropriate remedy would have been to sanction the lawyer, rather than penalizing the defendant by issuing a bench warrant.

We conclude that the judge's conduct in issuing the warrants violated canons 1, 2A, 3B(2), 3B(4), 3B(7) and 3B(8). Having determined that Judge Velasquez performed these judicial acts in bad faith (with conscious disregard for the limits of his authority and for a corrupt purpose), we conclude that he engaged in willful misconduct with regard to the issuance of the bench warrants in counts V A (*Kitchen*), V C (*Hoffman*), V D (*Holt*), V E (*Holder*), and V F (*Huggins*).

The misconduct in issuing the warrant was exacerbated by Judge Velasquez's refusal to withdraw the warrant when the lawyer subsequently explained his absence and requested that the warrant be withdrawn. The handwritten note on Mr. Mill's letter in the *Holt* matter admonishing the attorney's "lack

[2] The masters concluded that the law on this issue is "not so settled" based on dictum from one sentence in *Beasley v. Municipal Court* (1973) 32 Cal.App.3d 1020, 1026 [108 Cal.Rptr. 637], which suggested that a bench warrant may issue when a defendant, who does not appear for *trial* and is represented by counsel, "appears neither in person nor by counsel." We conclude that this dictum does not undermine well-established legal precedent that issuance of a bench warrant is only proper when an absent defendant is required by law to appear and has been provided notice. (*Ibid.*; *People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301, 1304 [8 Cal.Rptr.2d 464]; *Kloepfer, supra,* 49 Cal.3d at p. 851; Pen. Code, § 978.5.)

of responsibility" manifests the extent to which Judge Velasquez became embroiled with the attorneys. Punishing a defendant for the actions of his or her attorney is callous and punitive.

There is not clear and convincing evidence that Judge Velasquez was aware that the defendants in the *Huerta* and *Kammer* (count V G) matters were proceeding under section 977 at the time he issued the warrants. As such, we conclude that there is no misconduct in the issuance of the warrants in those cases. However, Judge Velasquez did commit willful misconduct in refusing to recall the warrant when Attorney Liner arrived later that morning. Further, as we explain next, Judge Velasquez's subsequent actions in those cases constitute additional willful misconduct.

Ordering Attorney to Produce Letters

**(22)** The masters found that Judge Velasquez ordered Attorney Liner to deliver the letters to him when he "had no authority to make such an order, as he was disqualified from acting in the only case to which those letters had any arguable relevance." This conduct, the masters concluded, violated Code of Civil Procedure section 170.4 (which delineates the power of a disqualified judge) and canons 1, 2A, 3B(2) and 3B(4). We concur and adopt these findings and conclusions as our own. However, we decline to adopt the legal conclusion of the masters that this conduct constitutes only improper action; instead, we conclude that it constitutes willful misconduct.

**(23)** It is well established that a judge is prohibited from taking any further action in a case once disqualified, including questioning or criticizing the attorney who filed an affidavit of disqualification. (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531–532 [116 Cal.Rptr. 260, 526 P.2d 268]; *Inquiry Concerning Hall*, No. 175, Decision and Order Removing Judge Hall from Office (2006) p. 22 [49 Cal.4th CJP Supp. 146, 167] (*Hall*).) Moreover, a judge is expected to know the proper procedure for handling a motion to disqualify. (*Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 797 [119 Cal.Rptr. 841, 532 P.2d 1209].) Judge Velasquez knew he had been disqualified in the case and conceded that he was not aware of any authority that permitted him to order Mr. Liner to produce the letters. As such, he acted with knowledge of, or a conscious disregard for, the limits of his authority.

Finally, Judge Velasquez not only exceeded his authority, but did so to pursue a personal interest in proving that Mr. Liner had lied to the presiding judge about the events in the *Huerta* and *Kammer* matters. As such, he was performing a judicial act for a purpose other than the faithful discharge of his

judicial duties, providing a further basis for our conclusion that he acted in bad faith. (See *Ross, supra,* No. 174 at pp. 17–18 [49 Cal.4th CJP Supp. at pp. 99–100].)

F. *Count VI: Inappropriate Humor and Disparaging Remarks*

1. *Findings of Fact*

In the 14 instances charged in count VI, Judge Velasquez is alleged to have made inappropriate comments in the courtroom, including joking about imposing jail time and disparaging attorneys. We reach the following findings of fact from our own independent review of the record.

The following are the judge's "jokes" about imposing jail time:

Count VI A, *People v. Martinez*: In response to the defendant's asking if he could work off the fine, Judge Velasquez said: "I wasn't going to give you any jail time, but if you want some, I'll give you some. How many days would you like? You have 180 to pick from."

Count VI B, *People v. Oksen*: In response to the defendant's asking if he could do home confinement instead of 10 days' jail, Judge Velasquez said, "I'll give you a full year if you want it."

Count VI C, *People v. Lutz*: In response to the defendant's asking if he had to worry about the warrant that had just been recalled, Judge Velasquez said: "Unless, you want us to execute it?"

Count VI D, *People v. McGill*: In response to the defendant's asking if jail time would be imposed, Judge Velasquez said: "If you want some, I'll give you some."

Count VI E, *People v. Flores*: In response to the defendant's asking a question about his fine, Judge Velasquez said: "Would you like some jail?"

Count VI G, *People v. Lainez*: At sentencing, Judge Velasquez said to the defendant: "You're only going to be locked up for one year unless you want two years, I'll give them to you. Do you want one year or two?"

Count VI H, *People v. Kadjevich*: While looking through the files of Mr. Kadjevich's old cases, Judge Velasquez *pretended* to find information that the defendant "owed" 35 days of jail time on a previous case. When the defendant objected that he had already served that time, Judge Velasquez

said: "No, but new—new—new days, 35 new days." Eventually, Judge Velasquez told the defendant that he was "[j]ust kidding."

Count VI I, *People v. Hildago*: When the defendant's friend appeared for the defendant, Judge Velasquez asked who he was and then said: "Okay. We'll take you to jail. Come on in. No, I'm kidding."

Count VI J, *People v. Narez*: The defendant pled guilty after having been advised that he would not be sentenced to jail time. During sentencing, Judge Velasquez said: "Were you taken to jail at all? . . . [W]ould you like to be taken to jail?"

Count VI K, *People v. McDonald*: The defendant asked if he could say something after being told that he would be "put away" for a full year if he did not come back to court with $5,000 in child support. Judge Velasquez replied: "Before you go to jail for the full year or after?"

Count VI L, *People v. James*: A defendant who appeared to have mental problems, asked the judge if he had watched the presidential debate where the president "overturned the weapon charge and suggested that I pack a side-arm." Judge Velasquez asked him if that was "on cable or on local?"

Count VI M, *People v. Lopez*: After the defendant tried to correct the judge's pronunciation of his first name, Judge Velasquez said: "Oh, the minutes says Leonard. Leonardo is the one that's going to jail. Leonard is staying home. [¶] Which do you prefer? . . . I'm just kidding."

The following are the judge's remarks disparaging attorneys:

Count VI F, *People v. Bowen*: After the defendant's attorney made a two-and-a-half-minute plea that his client not be incarcerated, Judge Velasquez responded, "Let me wake up."

Count VI N, *People v. LeBow*: The defendant appeared without her attorney who had allegedly failed to file proof of acknowledgment of the terms of probation. After asking the name of the attorney, Judge Velasquez said in a crowded courtroom, "[T]his is the second case he blows it for his client." Later, the judge said: "You can bill him at $300 bucks an hour, charge him two hours."

2. *Conclusions of Law*

We conclude that Judge Velasquez engaged in prejudicial misconduct in each instance charged in count VI, except subcount L, *James*. Having adopted

the masters' finding that the judge's comment about "cable or local" television in the *James* matter may have been intended to appease a defendant who apparently had mental problems, we conclude that there is not clear and convincing evidence of misconduct in that instance.

"Joking" About Incarceration

**(24)** The authority vested in the judiciary to incarcerate individuals carries with it a solemn responsibility that should never be taken lightly. A judge must be sensitive to the anxiety inherently associated with the possibility of serving time in custody. Judge Velasquez contends that he was attempting in good faith to interject humor into the courtroom. We fail to see how suggesting that a person is going to be incarcerated can ever be considered appropriate humor in the courtroom. Judge Velasquez was not trying to motivate the defendants to accept responsibility or succeed at probation—he was joking at the expense of the defendants and a person who appeared in court only as a favor to a friend.

**(25)** The people to whom Judge Velasquez addressed his jail comments were being respectful and appropriate and were often asking legitimate questions about their sentences. The fact that some of the judge's remarks were brief does not make them any less offensive or inappropriate. The comments most likely caused stress and concern to the defendants, even if for a brief moment. With regard to the remark to the defendant's friend in *Hildago,* the masters correctly observe that Judge Velasquez "appeared to have no appreciation for what may have been an anxious situation for the friend who may have been unfamiliar with the court system . . . ." In addition, Judge Velasquez's attempts at humor in a public courtroom under the circumstances were undignified, out of place, and prejudicial to public esteem for the judiciary. As such, the remarks violated canons 1, 2A, and 3B(4), and constitute prejudicial misconduct.

Disparaging Remarks Regarding Attorneys

**(26)** Disparaging and demeaning comments addressed to attorneys in open court have repeatedly been considered indicative of a lack of appropriate judicial temperament. (*Van Voorhis, supra,* No. 165 at pp. 5–23 [48 Cal.4th CJP Supp. at pp. 267–286]; *Fletcher, supra,* 19 Cal.4th at pp. 879–880; *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 326–327 [267 Cal.Rptr. 293, 787 P.2d 591]; *Kloepfer, supra,* 49 Cal.3d at pp. 841–844, 849.) Such comments are inappropriate irrespective of the judge's personal opinion of the attorney's competence. (*Van Voorhis,* No. 165 at pp. 5–23 [48 Cal.4th CJP Supp. at pp. 267–286]; *Fletcher,* at pp. 879–880; *Kennick,* at pp. 326–327; *Kloepfer,* at pp. 841–844, 849.) As the

masters concluded: "Belittling an attorney violates the ethical obligation in Canon 3B(4) to be dignified and courteous to all persons who come before the court, expressly attorneys. When inappropriate conduct occurs in front of the attorney's client, it may actually interfere with the attorney-client relationship."

As the masters observed, in *Bowen,* the defendant's attorney was making "a passionate but reasonable plea that his client, who was suffering from a disabling disease, not be placed in custody, even if the client herself had intimated otherwise." Judge Velasquez's response, "Let me wake up," was rude and disrespectful in violation of canons 1, 2A, and 3B(4). Judge Velasquez violated these same canons by questioning the competence of defendant LeBow's attorney in a crowded courtroom. We conclude that it would appear to an objective observer that the judge's comments in both the *Bowen* and *LeBow* matters were prejudicial to public esteem for the judicial office and as such constitute prejudicial misconduct.

We also note that Judge Velasquez's 1997 censure was based in part on essentially the same conduct—making "public statements disparaging fellow Monterey County judges and certain Monterey County attorneys."

G. *Count VII: Allowing His Children in the Bench Area and in Chambers While Conducting Court Business*

In light of our conclusions in counts I through VI, we take no action with respect to count VII.

## IV. DISCIPLINE

A. *Standards for Determining Appropriate Discipline*

**(27)** In making our determination of the appropriate disciplinary sanction, we consider that the purpose of a judicial disciplinary proceeding is not punishment, " 'but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman, supra,* 18 Cal.4th at p. 1112, quoting *Adams v. Commission on Judicial Performance, supra,* 10 Cal.4th at p. 912.) Based on Supreme Court decisions, the commission has identified various factors that are relevant in determining the appropriate discipline, including (1) the number of acts of misconduct; (2) the existence of prior discipline; (3) whether the judge appreciates the inappropriateness of his or her conduct; (4) the judge's integrity; (5) the likelihood of future misconduct; and (6) the impact on the

judicial system. (*Ross, supra,* No. 174 at pp. 63–64 [49 Cal.4th CJP Supp. at pp. 137–138]; *Van Voorhis, supra,* No. 165 at p. 31 [48 Cal.4th CJP Supp. at p. 295].)

1. *Number of Acts of Misconduct*

By Judge Velasquez's own admission, he has engaged in numerous instances of serious misconduct. We have determined Judge Velasquez engaged in 21 instances of willful misconduct and 25 instances of prejudicial misconduct—a plethora of misconduct by any standard. In addition, the misconduct is wide ranging in both nature and impact. It was directed toward criminal defendants, attorneys, and even a person who appeared in court as a favor for a friend who was having difficulty making his court appearance.

**(28)** The Supreme Court has stated: "The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing 'lack of temperament and ability to perform judicial functions in an even-handed manner.' [Citation.]" (*Fletcher, supra,* 19 Cal.4th at p. 918, quoting *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653 [175 Cal.Rptr. 420, 630 P.2d 954].) The record before us demonstrates a disturbing and persistent pattern of misconduct that not only reflects a lack of judicial temperament, but utterly fails to comply with "the standards of judicial conduct that are essential if justice is to be meted out in *every* case." (*Kloepfer, supra,* 49 Cal.3d at p. 866, original italics.)

2. *Prior Discipline*

Judge Velasquez has already been censured, the most serious form of discipline short of removal available to the commission. The 1997 censure was based on the following misconduct: (1) displaying a crucifix on the wall behind the bench; (2) authorizing a private group to use his name with his judicial title in a newspaper advertisement endorsing one side in the ongoing abortion debate; (3) creating an appearance of prejudgment by publicly announcing a policy of imposing a specific predetermined sentence in all DUI cases; and (4) making statements in court, in newspapers, and on television broadcasts disparaging fellow Monterey County judges and certain attorneys, including accusing attorneys of incompetence and fellow judges of racism and conspiring to "manipulate" his calendar and make him "look bad." (*Inquiry Concerning Velasquez* (1997) No. 139, Decision and Order Imposing Public Censure.)

The commission's decision not to remove Judge Velasquez in 1997 was based in part on the fact that "prior to the time that formal proceedings were

instituted by the Commission, and throughout the past year, Judge Velasquez had refrained from further misconduct." Judge Velasquez's efforts at reform were short lived; he has since continued to engage in serious misconduct, some very similar to the conduct that led to his censure.

**(29)** In addition to the prior censure, Judge Velasquez received an advisory letter in April 2006 for addressing defendants directly in Spanish regarding matters of substance in violation of Code of Civil Procedure section 185, subdivision (a) which provides that all judicial proceedings are to be conducted in English.

Given the entirety of his disciplinary history and the misconduct at issue here, a second censure is clearly insufficient. It also would be contrary to the commission's "established policy and practice of escalating discipline for successive misconduct." (*Hall, supra,* No. 175 at p. 23 [49 Cal.4th CJP Supp. at p. 168].)

3. *Appreciation of Misconduct*

**(30)** "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2003) No. 162, Decision and Order Removing Judge Platt from Office, p. 15 [48 Cal.4th CJP Supp. 227, 248]; see *Ross, supra,* No. 174 at p. 65 [49 Cal.4th CJP Supp. at p. 139].) In his appearance before the commission, Judge Velasquez orally assured the commission that he has learned from his past experiences and will refrain from engaging in future misconduct. However, his responses to the charges throughout these proceedings suggest otherwise. Judge Velasquez rarely displayed any recognition or understanding of the ethical and legal principles underlying the misconduct. Moreover, in many instances he has completely denied any wrongdoing.

In his testimony before the masters, Judge Velasquez conceded that he did not always handle the probation violation proceedings in count I properly, but denied that his procedures violated the defendants' due process rights. Even in the face of these charges, he failed to acknowledge the serious constitutional defects in his practice.

Judge Velasquez testified that he thought it was proper to tell defendants they would go to jail if they did not successfully complete diversion by attending AA meetings because jail could be imposed if they were later convicted. As the masters observed, he "did not appear to understand that his statements suggested to the defendants that the adverse consequences would be automatically imposed on the defendants if they failed to complete the AA meetings even though they had not entered a plea."

In his testimony before the special masters, Judge Velasquez compared "joking" about sending a defendant to jail with the injection of appropriate and good-natured humor during jury selection. There is no comparison between the two situations. Further, he fails to recognize that in the cases before the commission it was the nature of the joke that was inappropriate.

Regarding the ex parte phone call he made to a witness in the *Manzo* matter (count I B), Judge Velasquez testified that he did nothing wrong, because, "I'm trying to find the truth." This statement reflects a serious lack of understanding of basic due process principles, including the right to confront and cross-examine a witness. It also manifests his failure to appreciate that the boundaries of his judicial role prohibit him from engaging in private investigation of material facts of a pending case.

Judge Velasquez offered numerous other justifications and excuses for his conduct as noted in our factual findings. Special Master Justice Rubin aptly observed: "It did seem to me that there was a theme throughout the proceedings that . . . Judge Velasquez did not always articulate—at least did not seem to appreciate in his own mind what he was doing with respect to some of these actions. Calling it penalty, increasing jail time, in really contemptuous situations without using contempt, going from modification to probation violation in a kind of seamless way." Judge Velasquez's repeated failure to grasp the substance or seriousness of his misconduct leaves us with no confidence in his capacity to reform.

4. *Integrity*

**(31)** Integrity as it relates to a determination of the appropriate discipline has generally focused on honesty. (*Ross, supra,* No. 174 at pp. 68–69 [49 Cal.4th CJP Supp. at pp. 141–142]; *Inquiry Concerning Hyde* (2003) No. 166, Decision and Order Removing Judge Hyde from Office, pp. 29–30 [48 Cal.4th CJP Supp. 329, 366–367].) In this case, the misconduct itself does not involve dishonesty. However, Judge Velasquez was less than candid in his testimony before the special masters regarding one of the charges. He attempted to deflect responsibility for his misconduct in count II D (*Maya*) by falsely testifying that he threatened to impose jail time as part of the defendant's sentence for the underlying offense of trespass. The record, however, establishes that the threatened jail time was for the defendant's failure to pay attorney fees, which was patently improper.

5. *Likelihood of Future Misconduct*

**(32)** Judge Velasquez's repetition of misconduct after being publicly censured, and his unwillingness or inability to appreciate the principles

underlying his current misconduct combine to lead us to the conclusion that there is a very strong likelihood, if not a certainty, of future misconduct if he is not removed. His repeated failure to comply with basic due process requirements and well-established legal authority after 11 years on the bench in a criminal assignment leaves us with no reasonable assurance that more time and the best of intentions would prevent future misconduct. Further, we concur with the following assessment by the masters: "The breadth of the previous and current misconduct suggests to us that Judge Velasquez does not appreciate the limits of his authority and the unique role a judge plays in our system of government."

Judge Velasquez points to the testimony of Attorney Lawrence Biegel as evidence of his capacity to reform. Mr. Biegel testified that he and the judge have recreated a professional relationship after Mr. Biegel was the target of disparaging remarks that were included in Judge Velasquez's 1997 censure. He also offered his opinion that Judge Velasquez has grown as a jurist. We reach the opposite conclusion. Despite having been censured for publicly accusing Mr. Biegel of malpractice, Judge Velasquez again engaged in the exact same conduct directed at a different attorney in *LeBow*.

6. *Impact on Judicial System*

**(33)** A pattern of misconduct reflecting abuse of authority and serious infringement of criminal defendants' constitutional rights necessarily has a negative impact on the judicial system. Such misconduct undermines the integrity of and respect for the judiciary and weakens the constitutional foundation of our system of justice. We are dismayed by the capricious and often callous manner in which Judge Velasquez treated criminal defendants and others who appeared before him. He manifested a blatant disrespect for the constitutional rights he has sworn to uphold by increasing sentences when a defendant dared to ask an appropriate and respectful question, incarcerating defendants without notice or a hearing, and issuing bench warrants for defendants when he knew they were not required to appear. Additionally, he set an undignified tone in his courtroom that demeaned the judiciary by quizzing defendants about how it felt to "peel out" based on his own youthful indiscretion, using humor inappropriately, and disparaging counsel and defendants.

B. *Mitigating Evidence*

Judge Velasquez presented evidence in mitigation consisting of testimony and declarations from character witnesses. For the most part, these witnesses testified to the judge's positive contributions to the community outside of his judicial capacity and his reputation as a role model in the Latino community.

Four Monterey County attorneys testified that they have found Judge Velasquez to be hard working, courteous, and appropriate in court. There is no evidence that any of the character witnesses were present in Judge Velasquez's court when any of the misconduct occurred.

**(34)** We take this character evidence into account in considering "the totality of the circumstances that are pertinent to our determination of the appropriate discipline." (*Adams v. Commission on Judicial Performance, supra,* 10 Cal.4th at p. 912; see *Kloepfer, supra,* 49 Cal.3d at pp. 865–866; *Ross, supra,* No. 174 at p. 71 [49 Cal.4th CJP Supp. at p. 144].) The contributions Judge Velasquez has made to the community are laudable. We are also mindful of the challenges Judge Velasquez has faced in life as the son of migrant farmworkers. Nevertheless, these considerations are overwhelmed by the breadth and severity of the judge's past and present misconduct. Members of the community who appear before Judge Velasquez inside the courtroom are entitled to the same respect and dignity he accords those who consider him to be a role model outside the courtroom.

### C. *Order Removing Judge Velasquez From Office*

Judge Velasquez urges the commission to impose a second censure rather than removal. Another censure would be woefully inadequate to address the egregious and persistent pattern of misconduct before us. Conscientious discharge of our duty to protect the public and maintain public confidence in the integrity and independence of the judiciary mandates that we remove Judge Velasquez from office.

Pursuant to the provisions of article VI, section 18 of the California Constitution, Judge José A. Velasquez hereby is ordered removed from his judicial office; pursuant to that section of the Constitution and rules 120(a) and 136 of the Rules of the Commission on Judicial Performance, Judge Velasquez is disqualified from acting as a judge.

Commission members Hon. Frederick P. Horn, Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Marshall B. Grossman, Mr. Michael A. Kahn, Ms. Patricia Miller, Mr. Jose C. Miramontes, Ms. Barbara Schraeger, and Mr. Lawrence Simi voted in favor of all the findings and conclusions expressed herein and in the foregoing order of removal and disqualification of Judge Velasquez. There are two vacancies on the commission.

The judge's petition for review by the Supreme Court was denied on October 10, 2007.

[No. 182. Oct. 2, 2007.]

INQUIRY CONCERNING JUDGE ROBERT G. SPITZER

## SUMMARY

A disciplinary action was brought concerning a superior court judge for judicial misconduct involving inexcusable delays and inaction, false salary affidavits, embroilment, and ex parte communications. The judge often failed to give signed orders to his clerk and to make prompt rulings. He signed salary affidavits pursuant to Gov. Code, § 68210, and Cal. Const., art. VI, § 19, declaring that he had no matters pending for more than 90 days after submission, although he had been informed he had such matters. He engaged in ex parte communications regarding witnesses and the filing of a murder charge. He failed to respond to a preliminary investigation letter.

The Commission on Judicial Performance ordered that the judge be removed from his judicial office. The delays violated Cal. Code Jud. Ethics, canons 1, 2A, 3B, 3C, and constituted prejudicial misconduct and persistent failure to perform judicial duties. Submitting false salary affidavits, even if recklessly rather than knowingly, was willful misconduct. The ex parte communications violated canons 1, 2A, 3B, and constituted prejudicial misconduct as to some acts and willful misconduct and embroilment as to others. In light of the judge's lack of veracity, his failure to cooperate in the investigation under Gov. Code, § 68725, and the strong likelihood of future misconduct, removal under Cal. Const., art. VI, § 18, subd. (b), was appropriate. (Opinion by Frederick P. Horn, Chairperson.)

## HEADNOTES

(1) **Judges § 6.2—Removal—Grounds—Prejudicial or Willful Misconduct or Persistent Nonperformance of Duties.**—A judge may be removed from office for prejudicial misconduct, willful misconduct, or persistent failure to perform judicial duties (Cal. Const., art. VI, § 18, subd. (b)).

(2) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Misconduct.**—Prejudicial misconduct is conduct which a

judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but also conduct prejudicial to public esteem for the judicial office.

(3) **Judges § 8—Duties—Cooperation with Other Judges and Court Officials.**—Judges have a duty to cooperate with other judges and court officials in the administration of court business (Cal. Code Jud. Ethics, canon 3C(1)).

(4) **Judges § 6.2—Removal—Grounds—Persistent Nonperformance of Duties.**—Persistent nonperformance of duties, an independent ground for removal, entails a pattern of legal or administrative omissions or inadequacies in the performance of a judge's duties.

(5) **Judges § 8—Duties—Timely Deciding Submitted Matters—Salary Affidavit.**—Under California law, judges are expected to decide matters submitted to them within 90 days of submission, and are prohibited from receiving their salaries during times when they have undecided matters under submission for more than 90 days (Cal. Const., art. VI, § 19). To be paid, the judge must sign an affidavit affirming he or she has no overdue cases (Gov. Code, § 68210).

(6) **Judges § 6.2—Willful Misconduct—Elements.**—Willful misconduct, the most serious form of judicial misconduct, consists of (1) unjudicial conduct (2) that is committed in bad faith (3) by a judge acting in his or her judicial capacity. Failure to comply with the California Code of Judicial Ethics is generally considered to constitute unjudicial conduct. The bad faith requirement for willful misconduct is satisfied when a judge is (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority. A judge who transgresses the limits of a judge's lawful authority, with no regard for whether his or her acts are legally permitted, cannot be said to be acting with the purpose of faithfully discharging judicial duties. Rather, a judge's reckless disregard for, or utter indifference to, whether his or her judicial acts exceed the bounds of a judge's prescribed powers is a state of mind properly characterized as bad faith.

(7) **Judges § 6.2—Willful Misconduct—Knowingly Signing False Salary Affidavits.**—A judge who signs salary affidavits declaring that he has no cases under submission for over 90 days after having been informed that

he has cases that are at least 90 days delayed acts in utter and reckless disregard for the truth and engages in willful misconduct.

(8) **Judges § 8—Duties—Timely Deciding Submitted Matters—Salary Affidavit—Truthfulness.**—A judge who executes a salary affidavit affirming he or she has no overdue rulings should take care to ensure that the statement is true when it is made. It is unjudicial and damaging to the public esteem for judicial office for a judge to submit false statements to obtain salary to which the judge is not then entitled.

(9) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Failure to Promptly Decide Submitted Matters.**—The judge's failure to promptly decide submitted matters constituted prejudicial misconduct and a violation of the judge's duty to promptly and efficiently hear and decide all matters assigned to the judge (Cal. Code Jud. Ethics, canon 3B) and to act in a manner that promotes and preserves the integrity of the judiciary (Cal. Code Jud. Ethics, canons 1, 2A). The delays also constituted a persistent failure to perform judicial duties. Litigants and the public have a right to expect judges to take action on matters assigned to them in an expeditious and efficient manner. A judge's failure to act deprives litigants of resolution of their disputes and grievances through the court system. Litigants who are not represented by counsel, as is the case in all small claims actions, are especially vulnerable when a judge fails to take prompt action in their cases. This is particularly true when the judge fails to respond to litigants' inquiries concerning the status of their cases.

(10) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Misconduct—Inexcusable Delay and Inaction.**—The judge's inexcusable judicial delay and inaction undermined public confidence in the judiciary, and therefore constituted prejudicial misconduct. The delays also demonstrated a continuing pattern of persistent failure to perform judicial duties.

(11) **Judges § 6.2—Willful Misconduct—Ex Parte Communication.**—The judge, who made an ex parte phone call to determine the availability of a witness and granted a defense motion to dismiss based on the information he obtained during the phone call without informing the parties of the ex parte communication, engaged in willful misconduct. Cal. Code Jud. Ethics, canon 3B(7), prohibits a judge from initiating, permitting or considering an ex parte communication outside the presence of the parties concerning a pending case. The canon provides an exception for ex parte communication intended for scheduling if the judge reasonably

believes no party will gain an advantage as a result of the communication and the judge promptly notifies all parties of the substance of the communication (canon 3B(7)(d)).

(12) **Judges § 6.2—Prejudicial Misconduct—Ex Parte Communication—Embroilment.**—The judge, who took it upon himself to make an ex parte phone call to locate a witness and had an ex parte conversation with the witness, exhibited embroilment and engaged in prejudicial misconduct. The conduct violated Cal. Code Jud. Ethics, canons 1, 2, 3B(5), 3B(7), and 3B(8).

(13) **Judges § 6.2—Prejudicial Misconduct—Embroilment.**—Cal. Code Jud. Ethics, canon 3B(5), requires a judge to refrain from speech that could reasonably be perceived as reflecting bias or prejudice. The judge engaged in prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 3B(4) and 3B(5) by making gratuitous public remarks demeaning the integrity of a deputy sheriff and suggesting that his negative impression of the deputy would be shared by other judges.

(14) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Misconduct—Embroilment.**—Embroilment is the process by which the judge surrenders the role of impartial fact finder/decision maker, and joins the fray. The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred.

(15) **Judges § 6.2—Willful Misconduct—Ex Parte Communication—Embroilment.**—The judge, who had an ex parte communication with the mother of a murder victim in an attempt to persuade her to acquiesce in a manslaughter disposition and to enlist her in his efforts to persuade the district attorney to drop the murder charge, became embroiled, engaged in willful misconduct and violated Cal. Code Jud. Ethics, canons 1, 2A, 3B(5), 3B(7), and 3B(8).

(16) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Judicial Capacity.**—"Judicial capacity" within the definition of willful misconduct is not limited to actions taken from the bench. A judge acts in a judicial capacity when the judge is performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses the authority of the judicial office for an improper purpose.

(17) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Duty to Cooperate.**—Gov. Code, § 68725, requires judges to cooperate with and give reasonable assistance and information to the Commission on Judicial Performance in connection with its investigations.

(18) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Misconduct—Objective Observer Standard.**—Prejudicial misconduct does not require that a judge act in bad faith; rather, it is conduct which would appear to an objective observer to be prejudicial to public esteem for the judiciary. The public expects judges to comply with the law.

(19) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Determining Appropriate Discipline.**—In determining the appropriate level of discipline, the ultimate objective of the Commission on Judicial Performance is to protect the judicial system and the public which it serves from judges who are unfit to hold office. The purpose of a commission disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

(20) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Determining Appropriate Discipline—Factors—Number of Acts of Misconduct.**—The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern of misbehavior that demonstrates the judge lacks judicial temperament and the ability to perform judicial functions in an evenhanded manner.

(21) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Determining Appropriate Discipline—Factors—Failure to Appreciate or Admit Impropriety.**—A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform.

(22) **Judges § 8—Duties—Diligently Discharging Administrative Responsibilities.**—Faithful discharge of judicial responsibilities requires the ability to multitask. In addition to handling the cases that come before them, judges are expected to diligently discharge their administrative responsibilities and to cooperate with other judges and court officials in the administration of court business (Cal. Code Jud. Ethics, canon 3C(1)).

(23) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Determining Appropriate Discipline—Factors—Lack of Veracity.**—Honesty is a minimum qualification for every judge. If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental.

(24) **Judges § 6.2—Removal—Grounds—Providing False Information During Investigation.**—There are few judicial actions that provide greater justification for removal from office than the action of a judge in

deliberately providing false information to the Commission on Judicial Performance in the course of its investigation into charges of wilful misconduct on the part of the judge.

**(25) Judges § 6.2—Removal—Grounds—Embroilment and Persistent Non-performance of Duties.**—The impact of the judge's misconduct and persistent failure to perform his judicial duties was significant. A pattern of misconduct consisting of delays, indecision, signing false salary affidavits, ex parte communication, embroilment, and failure to co-operate with his presiding judge and the Commission on Judicial Performance inevitably lowered public esteem for the judiciary. His indifference toward his obligation to promptly and efficiently decide matters had an adverse impact on the litigants who appeared before him and his fellow judges. A judge who is not competent to handle a civil calendar and who has a history of embroilment which at various times has resulted in his being disqualified from hearing criminal cases does not serve the public and cannot remain on the bench.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85.]

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**OPINION**

**HORN, Chairperson.**—

## I.

## INTRODUCTION AND PROCEDURAL HISTORY

This disciplinary matter concerns Judge Robert G. Spitzer, a judge of the Riverside County Superior Court. He was appointed to the municipal court in 1990 and became a superior court judge in 1998. The notice of formal proceedings, filed July 31, 2006, charges Judge Spitzer with eight counts of judicial misconduct.

Count I charges Judge Spitzer with backdating orders and failing to dispose of matters promptly and efficiently.

Count II charges Judge Spitzer with failing to decide matters that were under submission for decision for over 90 days and executing false salary affidavits in four cases.

Count III charges Judge Spitzer with failing to take action on pending matters in two cases.

Count IV charges Judge Spitzer with failing to timely decide matters submitted to him for decision in two cases.

Count V charges Judge Spitzer with improperly initiating an ex parte communication with a prosecution witness in a criminal case, considering information he obtained during the ex parte communication in dismissing the case, and making comments in open court reflecting bias against the prosecution witness.

Count VI charges Judge Spitzer with initiating an ex parte communication with a potential witness in a criminal case, improperly investigating the facts of the case, and arranging for the witness to give sworn testimony over the telephone, reflecting embroilment and bias.

Count VII charges Judge Spitzer with putting pressure on the district attorney's office to charge the defendant in a murder case with manslaughter, engaging in an ex parte communication with the decedent's mother in an attempt to persuade her to ask the district attorney's office to agree to a manslaughter plea, and suggesting to the decedent's family that the case would be dismissed if the jury was not able to reach a verdict on the murder charge after a retrial.

Count VIII charges Judge Spitzer with failing to cooperate with the commission during its preliminary investigation as required by law.

A panel of three special masters appointed by the California Supreme Court heard evidence in this disciplinary proceeding, made factual findings and issued their conclusions of law. The masters are the Hon. Fred K. Morrison, Associate Justice of the Court of Appeal, Third Appellate District, the Hon. Mary Jo Levinger, Judge of the Superior Court of Santa Clara County, and the Hon. Mark H. Tansil, Judge of the Superior Court of Sonoma County. The masters held an evidentiary hearing and filed a report with the commission on April 16, 2007. Judge Spitzer made an oral argument before the commission on August 29, 2007. Judge Spitzer is represented in this proceeding by Reginald A. Vitek and Heather L. Rosing of San Diego. The examiners for the commission are Andrew Blum and Bradford L. Battson.

The masters found the charges were proven by clear and convincing evidence, except for the charge in count I that Judge Spitzer backdated orders. Our review of the record leads us to the same conclusion. We adopt most of the masters' factual findings. We reach our own independent legal conclusions, which at times diverge from those of the masters. For reasons set forth in this decision, we conclude that Judge Spitzer engaged in willful misconduct by signing false salary affidavits with an utter disregard for the

truth in two cases charged in count II, and through his embroilment and ex parte communications in two criminal cases charged in counts V and VII. With regard to the remaining proven charges, we conclude Judge Spitzer engaged in prejudicial misconduct. In addition, we conclude Judge Spitzer persistently failed to perform his judicial duties through his derelict practices which resulted in inexplicable delays and in some cases a complete failure to decide matters assigned to him, and by his failure to abide by his obligation to cooperate with the commission.

**(1)** A judge may be removed from office for prejudicial misconduct, willful misconduct, or persistent failure to perform judicial duties. (Cal. Const., art. VI, § 18, subd. (b).) Judge Spitzer has engaged in a course of conduct over a significant period of time within each of these categories. The pattern of misconduct before us involving inexcusable delays, failure to act, and gross neglect of court orders demonstrates an unwillingness or inability to perform judicial functions which are essential to the fair and efficient administration of justice. Judge Spitzer also has engaged in willful misconduct involving the execution of false salary affidavits, embroilment, and ex parte communications which is fundamentally at odds with the integrity and restraint expected of the judiciary. Further, the lack of candor and accountability manifested by Judge Spitzer in these proceedings raises substantial concerns regarding his suitability to remain on the bench. For these and other reasons expressed in this decision, we order Judge Spitzer removed from office.

## II.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The factual findings we make are adopted for the most part from those of the special masters, which we have determined are supported by clear and convincing evidence and worthy of deference. When necessary to our decision, we have made additional factual findings shown by clear and convincing evidence based on our review of the record. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*); *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].)

### A. *Count I—Backdating and Delay*

#### 1. *Findings of Fact and Conclusions of Law Concerning Backdating*

Count I charges Judge Spitzer with delay in deciding matters and backdating orders to make it appear as if they had been decided in a timely fashion.

In each of the four cases charged, the order was given to the clerk for filing and entering into the computer ("processing") months after the date next to the judge's signature. Judge Spitzer testified to a practice of signing orders and placing them somewhere in his cluttered chambers or courtroom rather than giving them to his clerk to be processed. The masters found "[i]t is credible that if Judge Spitzer signed an order and did not put it out for processing it could get lost in chambers that by all accounts were extremely disorganized." As such, the masters concluded that there was not clear and convincing evidence of backdating.

We agree with the masters that the evidence of backdating does not meet the burden of proof by which commission proceedings are governed. The examiner has the burden of proving the charges by clear and convincing evidence. Clear and convincing evidence is " ' " 'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " ' " (*Broadman, supra*, 18 Cal.4th at p. 1090, quoting *In re Angelia P.* (1981) 28 Cal.3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198].) The evidence must establish a "high probability" the charge is true, but need not prove the charge beyond a reasonable doubt. (*Broadman*, at p. 1090.)

Numerous witnesses, including Justice Douglas Miller, the former presiding judge,[1] and Tonia Bealer, Judge Spitzer's longtime courtroom clerk, testified that the judge's courtroom and chambers were in shambles. Files and loose documents were strewn about without any discernable organization. As a result, court records were routinely lost or misplaced.

Sometime between 2001 and 2002, the presiding judge was informed that Judge Spitzer was not taking care of routine matters in a timely fashion. As a result, routine matters that should have been assigned to Judge Spitzer had to be spread out among the other judges.

Missing documents and daily inquiries from attorneys and litigants regarding the status of cases pending before Judge Spitzer prompted the supervising judge to direct the court services director to conduct a housecleaning or inventory of the judge's courtroom and chambers. At least two inventories took place in late 2002 and early 2003, with Judge Spitzer's consent.

The masters found that Judge Spitzer has been "plagued" by organizational issues since "the beginning of his career in the district attorney's office." Based on the uncontested evidence supporting this finding and the complete

[1] Justice Miller has since been appointed to the California Court of Appeal, Fourth Appellate District, Division Two.

state of disarray in the judge's courtroom and chambers, we concur with the masters that it is plausible signed orders were misplaced. Nevertheless, we do not consider Judge Spitzer's chronic state of disorganization and gross neglect of court records to be mitigating in any sense. While his dysfunctional practices may raise substantial doubts regarding backdating, as we discuss later in relation to the appropriate discipline, these practices raise serious concerns regarding his fitness to hold judicial office.

2. *Findings of Fact Concerning Delays*

The masters found Judge Spitzer's "practice of signing orders and not sending them to be entered and processed is inexplicable and amounts to a dereliction of duty . . . ." We agree.

In each of the four cases charged in count I, Judge Spitzer admitted significant delays in giving signed orders to his clerk for processing. The periods of delay were as follows:

1. Count I A (*Hubbard v. Madia*). The orders were dated August 30, 2002, but not processed until February 2003.

2. Count I B (*City of Moreno Valley v. Southern Cal. Assn. of Governments* (*SCAG*)). The judgment and writ were dated July 3, 2003, and file stamped July 7, 2003, but not processed until June 2004. SCAG's appeal, filed August 16, 2004, was dismissed as untimely because over thirteen months had elapsed since the "entry of judgment."

3. Count I C (*California Casualty Insurance v. Methany* (*CCI*)). The order was dated December 31, 2003, but not processed until June 2004.

4. Count I D (*Sharp v. Betelli, S.P.A.*). The order was dated May 10, 2004, but not processed until June 2004.

During the periods of delay in the last three cases, Judge Spitzer failed to cooperate with his presiding judge's repeated inquiries regarding the status of the cases and directives to resolve all outstanding matters. In early June, Judge Spitzer received an e-mail from Judge Miller informing him his paycheck would be withheld because the *Sharp* matter had been under submission for over 90 days. Within days of receiving this e-mail, the matters in count I B through D were processed.

Judge Spitzer suggested the *Sharp* matter (count I D) had not been timely processed because his clerk, Ms. Bealer, was on vacation and matters had piled up at her workstation while she was gone. The testimony of Ms. Bealer

and her replacement clerk refutes this claim. Judge Spitzer testified that the signed document in the *CCI* matter (count I C) sat on Ms. Bealer's workstation for months waiting to be processed. However, Ms. Bealer testified that she kept up-to-date in processing documents because she did not have enough work to do during that time.

3. *Conclusions of Law Concerning Delay*

We conclude that these delays constitute a violation of the judge's duty (1) to dispose of matters promptly and efficiently (Cal. Code Jud. Ethics, canon 3B(8); all references to a canon are to the California Code of Judicial Ethics), (2) to uphold the integrity of the judiciary (canon 1), and (3) to act in a manner that promotes public confidence in the judiciary (canon 2A). The masters concluded, as do we, Judge Spitzer engaged in prejudicial misconduct, and persistently failed to perform judicial duties in each of the four cases charged.

**(2)** Prejudicial misconduct is " ' "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." ' " (*Broadman, supra*, 18 Cal.4th at p. 1092.) Judge Spitzer's imprudent and inexcusable delays prejudiced parties and were detrimental to the fair, orderly, and efficient administration of the court. SCAG's appeal was dismissed as untimely as a result of the judge's delay in processing the judgment. By allowing judicial orders to sit unprocessed in his cluttered chambers for months, Judge Spitzer showed a complete indifference to the rights of litigants and his judicial responsibilities. Limited court resources had to be expended conducting inventories of his courtroom and files searching for missing documents, responding to persistent complaints from attorneys and litigants, and corresponding with Judge Spitzer concerning his overdue cases.

**(3)** Moreover, we agree with the masters that the delays in this and subsequent counts were aggravated by Judge Spitzer's failure to cooperate with his presiding judge. Judges have a duty to "cooperate with other judges and court officials in the administration of court business." (Canon 3C(1); see also canon 3C(3) [presiding judges have duty to ensure the prompt disposition of matters before judges they supervise].) Rather than cooperating with his presiding judge, who made repeated attempts to get Judge Spitzer to resolve delayed matters, Judge Spitzer resented being "micro-managed." As a result, in the words of the masters, "Judge Spitzer became passive-aggressive and actually ignored some of the directions he received from Judge Miller (for example, an order to not start a new trial until all overdue matters were decided) . . . . The failure to cooperate with the presiding judge was foolish and unhelpful, since the presiding judge was seeking to assist him."

**(4)** These delays, when combined with similar derelict conduct in counts II through IV and count VIII, constitute a persistent failure to perform judicial duties. Persistent nonperformance of duties, an independent ground for removal, "entails a pattern of legal or administrative omissions or inadequacies in the performance of a judge's duties." (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 312 [45 Cal.Rptr.2d 254, 902 P.2d 272] (*Doan*); see *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 197 [260 Cal.Rptr. 557, 776 P.2d 259] [judge delayed signing judgment for six years].) The evidence clearly and convincingly establishes such a pattern.

B. *Count II—Delay and False Salary Affidavits*

**(5)** In the four cases included in this count, Judge Spitzer is charged with delaying decisions and signing salary affidavits falsely declaring he had no causes pending and undecided that had been under submission for more than 90 days. Under California law, judges are expected to decide matters submitted to them within 90 days of submission, and are prohibited from receiving their salaries during times when they have undecided matters under submission for more than 90 days. (Cal. Const., art. VI, § 19; *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4 [220 Cal.Rptr. 833, 709 P.2d 852].) To be paid, the judge must sign an affidavit to that effect. (Gov. Code, § 68210.)

1. *Findings of Fact*

As all judges are required to do, Judge Spitzer signed monthly affidavits declaring that he had no matters pending for more than 90 days after submission prior to receiving his paycheck.[2] The masters found that Judge Spitzer delayed making decisions for more than 90 days after submission in each case charged in count II and signed erroneous salary affidavits during those delayed periods.

Judge Spitzer denied ever knowingly signing false salary affidavits. The masters found the evidence did not clearly and convincingly prove Judge Spitzer knowingly signed false salary affidavits. We defer to this finding. (See *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878 [81 Cal.Rptr.2d 58, 968 P.2d 958] (*Fletcher*) ["special weight" given to the special masters' factual determinations]; *Inquiry Concerning Freedman* (2007)

[2] Judge Spitzer testified that there were occasions over the years when he did not sign salary affidavits because he knew he had matters under submission for more than 90 days. He was not specific as to which months or cases he was referring to and did not testify that he refrained from executing salary affidavits as a result of his delays in any of the cases charged in this count.

No. 179, Decision and Order Imposing Public Censure, p. 20 [49 Cal.4th CJP Supp. 223, 243] (*Freedman*).) However, as we discuss in relation to our legal conclusions, we reach our own determination that Judge Spitzer signed false salary affidavits with a reckless disregard for the truth in those instances where the evidence clearly and convincingly proves he continued to execute salary affidavits after being informed he had delayed matters[3] pending. (See *Fletcher, supra*, at p. 878 [commission has "expertise" with regard to legal conclusions].)

We make the following findings as to each case charged in count II, which are for the most part adopted from the masters' factual findings and are supported by clear and convincing evidence.

*Count II A*—McGuire v. L.M. Jones Roofing (McGuire)

On June 21, 1996, Judge Spitzer presided over a small claims trial de novo and took the matter under submission. Judge Spitzer testified he made a decision sometime in 1996, but did not sign an order. The masters rejected this testimony, finding clear and convincing evidence Judge Spitzer failed "to timely decide the *McGuire* matter for nearly six years, after inquiry from the parties and the plaintiff's family . . . ." We concur in this finding.

A few weeks after the trial, the plaintiff, Timothy McGuire, contacted Judge Spitzer's clerk and was told the file was missing. Mr. McGuire's wife contacted the court clerk numerous times after the trial and was told there was no ruling. Stella Provencio, Judge Spitzer's clerk from 1996 until 2001, received complaints from parties, and gave the messages to Judge Spitzer who had no response. The register of actions shows a call from the defendant on April 4, 2001, inquiring about the decision.

By Judge Spitzer's own account, he became aware a decision was never issued when he received a communication from the clerk's office regarding an inquiry from a party and again when the plaintiff's mother, who was a prospective juror, told him her son had not received a decision. These contacts were in 2001 and early 2002.

On May 17, 2002, Judge Spitzer conducted a second de novo trial and rendered a decision in favor of the plaintiff.

Judge Spitzer signed 39 false salary affidavits between August 1998 and April 2002 when the *McGuire* matter had been under submission for over 90 days and a decision had not been rendered.

[3] The term "delayed matters" refers to matters that were under submission to Judge Spitzer but undecided for more than 90 days.

*Count II B*—Pownall v. American City Mortgage Corp.

On July 30, 2001, Judge Spitzer heard the plaintiff's discovery motion which was under submission as of August 15, 2001. Judge Spitzer never issued a ruling on the discovery motion. The case was settled on December 21, 2001, and dismissed on January 22, 2002. Judge Spitzer signed a false salary affidavit on December 11, 2001, while the motion was pending for over 90 days.

*Count II C*—Lindsay v. City of Riverside (Lindsay)

The plaintiff's motion to tax or strike costs (objection to the defendant's request for costs) was submitted to Judge Spitzer on May 21, 2003. Judge Spitzer never ruled on the motion.

In July 2005, the commission sent Judge Spitzer a letter stating he "never issued a ruling on the plaintiff's Motion to Tax Costs and Fees" in this case. After receiving that letter, Judge Spitzer still did not resolve the matter and continued to sign salary affidavits.

Judge Spitzer signed false salary affidavits between September 2003, when the matter had been under submission for more than 90 days, and July 2006, when the notice of formal proceeding was filed, with the exception of February 2004.

*Count II D*—Cervantes v. Riverside Community Hosp.

In March 2004, Judge Spitzer took the defense discovery motion under submission. Judge Spitzer never ruled on the motion but continued to sign salary affidavits after the matter had been under submission for over 90 days.[4]

We defer to the masters' finding that Judge Spitzer "mistakenly thought Cervantes was not his case" after he was transferred to a criminal assignment on June 11, 2004. However, we question the reasonableness of this "mistake." As an experienced judge he should have been aware that a matter remains his to decide once it is under submission to him regardless of his present assignment, unless specifically told the matter has been assigned to another judge. Moreover, the presiding judge informed Judge Spitzer when he was transferred to criminal that he was to continue to work on those civil matters that were under submission.

[4] The false salary affidavits in this case are the same as those signed during part of the delay period in the *Lindsay* matter (count II C). Fewer false salary affidavits were executed in this case because the delay period was shorter than in the *Lindsay* matter.

2. *Conclusions of Law*

*False Salary Affidavits*

We conclude Judge Spitzer engaged in willful misconduct when he signed false salary affidavits after having been informed that he had delayed matters in the *McGuire* (count II A) and *Lindsay* matters (count II C), and engaged in prejudicial misconduct in executing the remaining false salary affidavits as charged in count II.

**(6)** Willful misconduct, the most serious form of judicial misconduct, consists of (1) unjudicial conduct (2) that is committed in bad faith (3) by a judge acting in his or her judicial capacity. (*Broadman, supra*, 18 Cal.4th at p. 1091; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*).)

Failure to comply with the California Code of Judicial Ethics is generally considered to constitute unjudicial conduct. (*Dodds, supra*, 12 Cal.4th at p. 172.) By signing false salary affidavits, Judge Spitzer violated his duty to comply with the law and act in a manner that upholds the integrity of the judiciary (canons 1, 2A).

The "bad faith" requirement for willful misconduct is satisfied when a judge is "(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, 18 Cal.4th at p. 1092.) The Supreme Court has described "conscious disregard" in this context as follows: "Because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith." (*Ibid.*)

**(7)** In our recent decision censuring Judge Freedman, we concluded the judge acted with an utter and reckless disregard for the truth when he continued to sign salary affidavits after being informed that he had delayed matters pending and without deciding the matters. In those instances, we determined he engaged in willful misconduct. (*Freedman, supra*, No. 179 at p. 21 [49 Cal.4th CJP Supp. at p. 244].) Applying this same standard to the

present case, we conclude Judge Spitzer engaged in willful misconduct by executing false salary affidavits in the *McGuire* (count II A) and *Lindsay* matters (count II C).

Judge Spitzer acknowledged he had been informed in 2001 and early 2002 that a decision had not been issued in the *McGuire* matter. Nevertheless, he failed to rule on the matter until May 2002 and continued to execute salary affidavits stating he had no delayed matters under submission.

In the *Lindsay* matter, Judge Spitzer testified he thought he ruled on the matter. However, in July 2005 he was expressly told in a letter from the commission that the plaintiff's motion to tax costs was undecided. At that point, Judge Spitzer's persistence in signing salary affidavits without even looking into whether the matter had been resolved constituted a reckless indifference to the truth.[5] We reject the judge's argument he did not have to decide the plaintiff's motion to tax costs because the case was concluded. The plaintiff was entitled to resolution of the motion regarding reimbursement of court costs and fees even if other issues in the case had been resolved.

**(8)** There is not clear and convincing evidence that Judge Spitzer executed other false salary affidavits charged in count II in bad faith. In those instances, we conclude that Judge Spitzer engaged in prejudicial misconduct by failing to ensure he did not have delayed matters pending before executing his salary affidavits. Judge Spitzer had no reliable system for keeping track of cases under submission. In determining that Judge Freedman engaged in prejudicial misconduct by executing false salary affidavits even when there was not clear and convincing evidence of bad faith, we stated: "A judge who executes a salary affidavit affirming he or she has no overdue rulings should take care to ensure that the statement is true when it is made. There is no question Judge Freedman knew the law, for he signed the state and county affidavits for the express purpose of receiving his salary. It is unjudicial and damaging to the public esteem for judicial office for a judge to submit false statements to obtain salary to which the judge is not then entitled." (*Freedman, supra*, No. 179 at p. 24 [49 Cal.4th CJP Supp. at p. 246].)

Judge Spitzer has similarly compromised public confidence in the judiciary by executing erroneous salary affidavits without ensuring their truthfulness.

*Delays*

**(9)** Judge Spitzer's failure to promptly decide the matters charged in count II constitutes prejudicial misconduct, separate and in addition to the

[5] Twelve erroneous salary affidavits were executed between August 2005 and July 2006.

misconduct associated with executing false salary affidavits. In the *McGuire* matter, he failed to rule for six years, and in the other three matters he never issued a ruling. These failures constitute a violation of the judge's duty to promptly and efficiently hear and decide all matters assigned to him (canons 3B(1), 3B(8)) and to act in a manner that promotes and preserves the integrity of the judiciary (canons 1 & 2A). Litigants and the public have a right to expect judges to take action on matters assigned to them in an expeditious and efficient manner. A judge's failure to act deprives litigants of resolution of their disputes and grievances through the court system. Litigants who are not represented by counsel, as is the case in all small claims actions, are especially vulnerable when a judge fails to take prompt action in their cases. This is particularly true when the judge fails to respond to litigants' inquiries concerning the status of their cases, as occurred in the *McGuire* matter.

The masters concluded that the failure to promptly rule on submitted matters in count II constitutes prejudicial misconduct and a persistent failure to perform judicial duties, and we adopt these conclusions as our own. (*In re McCullough* (1987) 43 Cal.3d 534, 535 [236 Cal.Rptr. 151, 734 P.2d 987]; *In re Creede* (1986) 42 Cal.3d 1098, 1099 [233 Cal.Rptr. 1, 729 P.2d 79] ["protracted delays served to damage the esteem of the public for the judiciary . . ."]; *Mardikian v. Commission on Judicial Performance, supra*, 40 Cal.3d at pp. 482, 485; see also *Freedman, supra*, No. 179 at p. 17 [49 Cal.4th CJP Supp. at pp. 240–241].)

C. *Counts III and IV—Delay and Inaction*

1. *Findings of Fact*

In count III, Judge Spitzer is charged with failing to take necessary action in two civil cases. In *Robinson v. Brighton Lake Hills Associates* (count III A), a construction defects case, the parties submitted proposed case management orders in April 2003. Judge Spitzer conducted a case management conference in June 2003 but failed to issue a case management order. As the masters explain, a case management order in a construction defects case is "mandatory" and "important"; it "can help organize such complex, expensive litigation, facilitating the parties' consideration of alternative dispute resolution, and orchestrating streamlined, economical trial preparation."

In *Portofino Development, L.P. v. Van Daele Development Corp.* (count III B), Judge Spitzer failed to issue orders on the defendants' motions for summary judgment filed in April 2003 despite reminders from counsel. The masters accurately described motions for summary judgment as "a significant aspect of civil litigation," which need to be promptly ruled on "[i]n order for civil litigants to efficiently litigate or resolve their cases."

In count IV, Judge Spitzer is charged with failing to timely decide two matters. In a criminal case, *People v. Gorton* (count IV A), the defendant filed a request with Judge Spitzer for a certificate of probable cause in March 2002. The defendant, who had pled guilty and was sentenced by Judge Spitzer, was required to obtain this certificate in order to appeal certain issues in his case. (Cal. Rules of Court, rule 8.304(b).) Judge Spitzer was aware of the requirement that he act on the request within 20 days. Nevertheless, he did not rule on the request until directed to do so by the supervising judge of the criminal division almost 10 months later.

In *Horst v. Del Webb Corp.* (count IV B), Judge Spitzer took a matter involving an order to show cause under submission on April 11, 2003. He did not issue an order until four months later after receiving an e-mail inquiry concerning the case from the presiding judge. Judge Spitzer testified he prepared the order in his computer in June 2003, at which point he thought the matter was no longer under submission. We adopt the masters' finding that "[r]egardless whether Judge Spitzer believed that typing an order and leaving it in the computer was equivalent to making a decision in a submitted matter, this case was not decided until August 11, 2003."

2. *Conclusions of Law*

In each of the cases charged in counts III and IV, the masters concluded Judge Spitzer engaged in prejudicial misconduct and a persistent failure to perform judicial duties. We concur. By failing to take action on the matters in count III, Judge Spitzer violated his duty to decide "all matters assigned to him," in violation of canon 3B(1). His inaction in count III and his delays in deciding the matters in count IV, also constitute a violation of his duty pursuant to canon 3B(8) to dispose of all matters promptly and efficiently. Moreover, Judge Spitzer failed to act in a manner which promotes the integrity of the judiciary in violation of canons 1 and 2A.

**(10)** In the cases included in these counts, as in the delayed cases in counts I and II, Judge Spitzer gave little consideration to the interests of litigants whose matters had been under submission for prolonged periods of time. The criminal defendant in *Gorton* had to wait 10 months while incarcerated to determine whether he could appeal certain issues in his case as a result of Judge Spitzer's delay. Inexcusable judicial delay and inaction undermine public confidence in the judiciary, and, as such, constitute prejudicial misconduct. (*In re McCullough, supra*, 43 Cal.3d at p. 535.) The evidence clearly and convincingly establishes a continuing pattern of persistent failure to perform judicial duties (in conjunction with counts I and II). (See *ibid.*)

D. *Count V—Ex Parte Communication and Embroilment* (People v. Johnson)

1. *Findings of Fact*

During the criminal trial in *People v. Johnson,* Judge Spitzer became suspicious that the deputy district attorney (DDA) did not have all his witnesses for the trial, including the arresting officer, Deputy Villalobos. Based on that suspicion, on the evening of September 8, 1999, the judge called the watch commander where Deputy Villalobos worked and was told the deputy was on medical leave.

The next afternoon, Deputy Villalobos, the only remaining witness, was not present. Judge Spitzer granted the defense motion to dismiss the case. He took the information he received from the watch commander into consideration, but did not inform either counsel or the defendant of the ex parte communication.

In dismissing the case, Judge Spitzer commented: "It's not been without cost to Mr. Villalobos who, if he had a measure of credibility in the court, now walks into the court with a certain negative impression which will not be confined to this courtroom, but to every courtroom in western Riverside County." Judge Spitzer seemed upset and annoyed when he made this comment and refused to let the DDA address the court on the issue.

Later that day, the DDA and his supervisor, Chief DDA Soccio, went to Judge Spitzer's chambers and asked the judge why he felt compelled to dismiss the case. Judge Spitzer told them he called the watch commander the night before and was told Deputy Villalobos was on medical leave. The DDA told Judge Spitzer he felt it was unfair of the judge to dismiss the case without giving him an opportunity to explain that the deputy was on medical leave but still available to testify. At that point, according to the DDA, Judge Spitzer "kind of took a step back and responded that although he had made that call, that had not been the reason or played a role in the dismissal of the case."

The next day, after receiving a call from Deputy Villalobos explaining why he failed to appear at the trial, the DDA went back to Judge Spitzer's chambers to try to "salvage the deputy's reputation." During the conversation, Judge Spitzer indicated he felt the DDA had misunderstood what he said the day before. He explained the watch commander had called him for some other reason, and it occurred to him to ask about Deputy Villalobos's availability.

In his testimony before the special masters, Judge Spitzer denied initiating the phone call with the watch commander and stated the watch commander called him at home while he was the on-call magistrate.[6] We agree with the masters that this testimony is not credible. Both the DDA and Chief DDA Soccio testified Judge Spitzer told them the same day he dismissed the case that he called the watch commander. The judge's recantation the next day to the DDA reflects a consciousness of the inappropriateness of his having initiated the communication. Judge Spitzer's acknowledged suspicion that the witness was unavailable and concern that the trial was not proceeding in a timely manner provided motivation for him to make the call. We also agree with the masters that it is highly improbable, given the size of Riverside County, that Deputy Villalobos's watch commander would happen to call Judge Spitzer for an order and, if he did, that Judge Spitzer would know the officer calling was Deputy Villalobos's watch commander.

Judge Spitzer also denied that he considered his communication with the watch commander in making his decision to dismiss the matter. The masters rejected this testimony, as do we. When the DDA and the DDA supervisor asked why he dismissed the case, Judge Spitzer told them Deputy Villalobos was on medical leave.

2. *Conclusions of Law*

Judge Spitzer engaged in multiple instances of misconduct in this one case. As the masters concluded: "The initiation of the ex parte communication is the beginning of Judge Spitzer's embroilment in this case. He considered the information to the advantage of the defense, without allowing the prosecution to address his concerns. He made an intemperate comment about Deputy Villalobos's credibility. The comment showed a bias as to the officer's credibility and an indication that he would communicate bias to other judges on the bench." We conclude that Judge Spitzer engaged in willful misconduct by failing to promptly reveal the ex parte communication to the parties and by considering information obtained during the ex parte communication in his decision to dismiss the case. The judge's public comments questioning the deputy's credibility constitute prejudicial misconduct.

Judge Spitzer's conduct related to the ex parte communication violated canons 1 and 2A (duty to uphold integrity of judiciary and avoid impropriety and appearance of impropriety), and 3B(7) (prohibiting ex parte communications). As such, the conduct was unjudicial under the three-prong *Broadman* test. He was also acting in a judicial capacity.

[6] No evidence was admitted confirming or refuting that Judge Spitzer was an on-call magistrate that night.

**(11)** Judge Spitzer contends that the bad faith element of willful misconduct is not satisfied because he was acting in a good faith, but misguided, attempt to move the trial along by determining the availability of a witness for scheduling purposes. Canon 3B(7) prohibits a judge from initiating, permitting or considering an ex parte communication outside the presence of the parties concerning a pending case. The canon provides an exception for ex parte communication intended for scheduling if the judge reasonably believes no party will gain an advantage as a result of the communication and the judge promptly notifies all parties of the substance of the communication. (Canon 3B(7)(d).) We agree with and adopt the masters' conclusion that the ex parte communication did not fall within this exception.

**(12)** As an experienced jurist, Judge Spitzer should have realized that determining the availability of a prosecution witness could give one side an advantage if a motion to continue or dismiss was made during the trial. However, even if Judge Spitzer did not believe any party would gain an advantage at the time he initiated the communication, he knew by the next day the information he obtained from the watch commander gave the defense an advantage in its motion to dismiss. Nevertheless, Judge Spitzer did not inform the parties of the communication before dismissing the case. His own explanation for failing to disclose establishes he acted in bad faith: "I was put in the Hobson's [*sic*] choice kind of situation of . . . [¶] . . . now saying, 'Well, should I tell the parties about this?' If I inform the parties at that point in time, then I violate the Canon of Ethics which indicates that I shouldn't engage or communicate things to the parties which would give an advantage, a tactical advantage to one side over the other. And so that's the conduct that I would do differently."

Thus, by his own admission, Judge Spitzer made a conscious decision not to reveal the ex parte communication to the parties for a purpose other than the faithful discharge of his duties—so the parties would not know he violated the canons. (See *Broadman, supra,* 18 Cal.4th at p. 1092.) Further, by considering an ex parte communication he knew was a violation of the canons in reaching a judicial decision, Judge Spitzer knowingly exceeded the bounds of his authority, and thus acted in bad faith. (See *ibid.*)

**(13)** Judge Spitzer's gratuitous public remarks demeaning the integrity of Deputy Villalobos and suggesting that his negative impression of the deputy would be shared with other judges constitute a serious violation of the judge's duty to be patient, dignified and courteous (canon 3B(4)). Further, these comments reflect bias against a deputy who could appear in future cases. (Canon 3B(5) [judge to refrain from speech that could reasonably be perceived as bias or prejudice].) We agree with and adopt the masters' conclusion that the judge's strong statements about the deputy's credibility

"are the polar opposites of promoting public confidence in the integrity and impartiality of the judiciary." As such, the conduct violates canons 1 and 2A and constitutes prejudicial misconduct. (See *Fletcher, supra,* 19 Cal.4th at p. 899 [prejudicial misconduct when judge expressed prejudgment on the credibility of a potential witness who, according to the judge, had " 'broken many promises to this court' " and whose " 'credibility is not too high' "]; *Dodds, supra,* 12 Cal.4th at p. 176.)

E. *Count VI—Ex Parte Communication and Embroilment* (People v. Cobarruvias)

1. *Findings of Fact*

In March 2000, Judge Spitzer presided over the attempted murder trial in *People v. Cobarruvias.* During the trial, the defense attempted to call a police officer to testify about a statement made by the victim at the scene of the crime (an elementary school) that was inconsistent with the victim's trial testimony. Because the victim spoke Spanish, the officer used Margaret Herrera, the school principal, as a translator. In order to admit the prior inconsistent statement, the defense first needed to establish through Ms. Herrera that she was competent to interpret and the statement was accurately translated. However, Ms. Herrera, who was not under subpoena, was reportedly out of the state. The prosecution had completed its case, and the trial was close to conclusion.

Judge Spitzer took it upon himself to call Ms. Herrera's employer in an attempt to locate her. He did not consult with or inform either counsel or the defendant before making the call. Later the same day, the judge received a return call from Ms. Herrera. He spoke to her about her "observations" on the day she translated the victim's statement and whether she was fluent in Spanish, prerequisite facts to the admissibility of her testimony.

The next day, Judge Spitzer informed both counsel of his conversation with Ms. Herrera, and announced he had arranged for an immediate conference call with her. He then proceeded to conduct a hearing in chambers on the admissibility of the victim's prior inconsistent statement. Based on Ms. Herrera's telephone testimony, Judge Spitzer ruled the prior inconsistent statement was admissible.

Judge Spitzer testified he called Ms. Herrera to expedite the trial, but acknowledged the conversation exceeded the topic of scheduling.

2. *Conclusions of Law*

**(14)** Judge Spitzer's conduct in this case violates canons 1 and 2A (duty to uphold integrity of judiciary and avoid impropriety and appearance of

impropriety), 3B(5) (judge to refrain from conduct that reasonably could be perceived as bias or prejudice), 3B(7) (prohibiting ex parte communications), and 3B(8) (duty to dispose of all judicial matters fairly). As the masters concluded, Judge Spitzer "abandoned his role as a neutral arbiter and became embroiled." "Embroilment is the process by which the judge surrenders the role of impartial factfinder/decisionmaker, and joins the fray." (Rothman, Cal. Jud. Conduct Handbook (3d ed. 2007) § 2.01, p. 37.) The judge's embroilment manifested through his improper ex parte communication with Ms. Herrera constitutes prejudicial misconduct.

Even if Judge Spitzer called Ms. Herrera in a good faith attempt to expedite the trial, his actions were " ' "prejudicial to public esteem for the judicial office." ' " (*Broadman, supra*, 18 Cal.4th at p. 1104, quoting *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314 [267 Cal.Rptr. 293, 787 P.2d 591].) "The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred . . . ." (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 [42 Cal.Rptr.2d 606, 897 P.2d 544].) Judge Spitzer took on the role of the defense attorney by locating a defense witness and making arrangements for her testimony. Once again, Judge Spitzer improperly engaged in an ex parte communication that had the potential to benefit one side. (See, e.g., *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 631–632 [175 Cal.Rptr. 420, 630 P.2d 954] [prejudicial misconduct for judge to conduct an investigation into defense raised in unlawful detainer case]; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 536–537 [247 Cal.Rptr. 378, 754 P.2d 724] (*Ryan*); *Fletcher, supra*, 19 Cal.4th at pp. 898–899.) By so doing, he crossed the line between a neutral arbitrator and an advocate.

F. *Count VII—Ex Parte Communication and Embroilment* (People v. Carr)

1. *Findings of Fact*

While presiding over the jury trial in *People v. Carr* in May 2004, Judge Spitzer engaged in his third and most egregious course of conduct involving embroilment and ex parte communications. The defendant was charged with the murder of a child stemming from a driving under the influence automobile accident. During a discussion with counsel concerning jury instructions, the judge urged the DDA to charge gross vehicular manslaughter as an alternative to murder. When the DDA declined, Judge Spitzer questioned the DDA's qualifications and requested that he speak with his supervisor to determine whether "the district attorney's office is not seeking to amend" the murder charge to add an alternative charge of gross vehicular manslaughter.

Judge Spitzer then requested a meeting with the DDA's supervisor. As a result, Chief DDA Cregor Datig appeared in front of Judge Spitzer that afternoon to explain his office's filing decision.

After the jury deadlocked 11 to one in favor of guilt on the murder charge and convicted the defendant of lesser offenses, Judge Spitzer addressed several members of the decedent's family who were present in the courtroom. He told them the case should be settled with a plea to vehicular manslaughter and even suggested he would dismiss the murder charge if a second jury did not reach a verdict.

The decedent's mother, Kathleen Kavanagh, arrived with her five-year-old son and 16-year-old daughter after court had recessed. Judge Spitzer saw her in the hallway and directed her into his office to talk. The office door was closed, with Ms. Kavanagh's children left in the hallway. According to Judge Spitzer, he only informed Ms. Kavanagh of what he had stated in open court earlier. However, contrary to Judge Spitzer's testimony, the record amply supports the masters' finding that "the judge's comments to Ms. Kavanagh went beyond what he said in open court." He read her sections of the Penal Code, explained the difference between second degree murder and manslaughter, and told her it would be difficult for the prosecution to prove murder. According to Ms. Kavanagh, Judge Spitzer said words to the effect of "Look, basically the charge should have never been murder in any degree; [i]t was a crime that should only have held a manslaughter charge. . . . Mr. Carr did not intentionally plan to kill your son, with all due respect, Ms. Kavanagh, for you and your son it was an accident." Judge Spitzer also told Ms. Kavanagh the defendant faced a "substantial amount of time" if convicted of manslaughter. Ms. Kavanagh replied: "Well, my son isn't never getting to come home; so why should he [the defendant] ever get to come home?"

Judge Spitzer also suggested Ms. Kavanagh should try to influence the DDA to charge the defendant with manslaughter so there would not have to be a second trial. He warned he would have to dismiss the murder charge if the second jury did not reach a verdict. Ms. Kavanagh testified he said words to the effect of "This is my house; and when you get your house, you can do things your way. And this is my house, and we're going to do things my way."[7] As a result of these and other comments, Ms. Kavanagh felt very intimidated by Judge Spitzer.

Judge Spitzer admitted his comments to Ms. Kavanagh gave the appearance he was trying to influence her to consent to a reduction of the murder

[7] Although the masters did not include this testimony in their report, we find Judge Spitzer made a remark to this effect. The masters' findings and conclusions in this count manifest they found Ms. Kavanagh to be a credible witness, as do we.

charge to manslaughter, but denied that was his intention. The masters rejected the judge's testimony that his only intention was to "comfort" Ms. Kavanagh and provide her with the same information he had given those who appeared in court that day. We similarly reject this claim which the judge repeated at his oral argument before the commission. The testimony of Ms. Kavanagh clearly and convincingly proves that Judge Spitzer attempted to enlist her in his efforts to convince the district attorney's office to agree to a manslaughter disposition.

At a subsequent court appearance, Judge Spitzer continued to pressure the DDA for a manslaughter disposition. He told the DDA and defense attorney he had a conversation with Ms. Kavanagh and his impression was she was "not hostile" to a manslaughter plea bargain.

During a trial readiness conference the following week, after the defendant rejected an offer to plead guilty to manslaughter with a 44-year sentence, Judge Spitzer called Chief DDA Datig. Judge Spitzer inquired whether there was the possibility of further negotiations. He also told Mr. Datig he had talked to Ms. Kavanagh who was not opposed to a manslaughter plea. Mr. Datig informed the judge that further negotiation would not occur.

Judge Spitzer was disqualified from presiding over the second trial in the case. The district attorney's office subsequently disqualified him from all felony cases for a period of time.

The defendant was convicted of second degree murder at a second trial before a different judge.

2. *Legal Conclusions*

**(15)** The masters and we conclude that Judge Spitzer engaged in willful misconduct when "he met with Kathleen Kavanagh outside the presence of the parties, attempted to persuade her to acquiesce in a manslaughter disposition, and attempted to enlist her in his efforts to persuade the DA's office to drop the murder charge and charge the defendant with vehicular manslaughter." His willful misconduct also included pressuring the district attorney's office to amend the charges and his public statement in court attempting to persuade the decedent's family to agree to a manslaughter disposition. This conduct was unjudicial, the first element of willful misconduct, in that it violated canons 1, 2A (duty to uphold integrity of judiciary and avoid appearance of impropriety), 3B(5) (duty to perform judicial duties without bias or prejudice), 3B(7) (prohibiting ex parte communications), and 3B(8) (duty to dispose of all judicial matters fairly). The prohibition against ex parte communications concerning pending or impending cases applies to Judge

Spitzer's conversation with Ms. Kavanagh because she was a potential witness at the retrial. In addition, it was improper for Judge Spitzer to enlist Ms. Kavanagh as his agent in communicating his desire to have the case resolved with a manslaughter plea, since canon 3B(7) prohibited ex parte communication with the prosecutor.

Judge Spitzer acted in bad faith, the second element of willful misconduct. He acted for a purpose other than the faithful discharge of his judicial duties (*Broadman, supra*, 18 Cal.4th at p. 1092); he was improperly attempting to intrude on the functions of another branch of government. In *Ryan, supra*, 45 Cal.3d at pages 535–536, the Supreme Court determined the judge engaged in willful misconduct when, after conducting a preliminary hearing, he called the district attorney ex parte and urged him to pursue the matter as a felony.[8] (See also *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 369 [188 Cal.Rptr. 880, 657 P.2d 372].)

We agree with the masters' conclusion that, as he had in the previous two counts, Judge Spitzer once again "abandoned his role as a neutral arbiter and became embroiled in the case." Judge Spitzer disputes this and maintains he was acting in good faith for the purpose of providing Ms. Kavanagh with comfort and clarification of the legal issues. However, as previously discussed, like the masters we have rejected the judge's testimony in this regard. In his testimony before the special masters, Judge Spitzer concurred with the conclusion of the judge who ruled on the motion to disqualify him from the retrial that "Judge Spitzer took unusual steps to try to influence the office of the District Attorney to exercise his discretion to prosecute this defendant for manslaughter," and later "to try to influence the District Attorney to offer the defendant an acceptable plea bargain for manslaughter."

Far from perceiving Judge Spitzer's comments as comforting, Ms. Kavanagh testified that she "took it as he was intimidating me." Attempting to convince a mother whose child was killed by a drunk driver that her child's death was unintentional by reference to Penal Codes, legal terminology, and sentence calculations reflects an alarming lack of sensitivity in addition to being extraordinarily inappropriate and unjudicial.

[8] Judge Spitzer contends the commission did not find willful misconduct under similar factual circumstances in the public admonishments of Judge Susanne Shaw (*Inquiry Concerning Shaw* (2000) No. 156, Decision and Order Imposing Public Admonishment [48 Cal.4th CJP Supp. 125]), Judge Bruce Clayton Mills (2006), and Judge Ronald Maciel (1997). In the *Mills* and *Maciel* matters the commission did not address whether the judge's improper ex parte communications were willful or prejudicial misconduct. In *Shaw*, the commission adopted the masters' conclusion that the judge engaged in prejudicial misconduct when she told the DDA not to undercut the 30-day offer she made to a misdemeanor defendant. Each case turns on its own facts, and the facts in *Shaw* do not present the same degree of embroilment and improper conduct that is present in this case.

**(16)** We reject Judge Spitzer's argument that his conduct cannot be considered willful misconduct because he was not acting in a judicial capacity. "Judicial capacity" within the definition of willful misconduct is not limited to actions taken from the bench. (See *Ryan, supra*, 45 Cal.3d at pp. 535–536.) A judge acts in a "judicial capacity" when the judge is "performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses . . . the authority of the judicial office for an improper purpose." (*Broadman, supra*, 18 Cal.4th at p. 1104, citing *Dodds, supra*, 12 Cal.4th at p. 172.)

The facts of two cases cited by Judge Spitzer in which the Supreme Court held the judge was not acting in a judicial capacity are not analogous to the facts of this case. In *Dodds*, the misconduct did not relate to a case pending before the judge. (*Dodds, supra*, 12 Cal.4th at pp. 170–171, 175–176 [judge failed to report a fellow judge he saw deflating a tire in the court parking lot and suggested to court staff they delay making a statement to the authorities].) In *Broadman*, the judge made comments on a pending case in the course of a press interview. In contrast, Judge Spitzer made statements to a person involved in a case pending before him and used the authority of his judicial office in an attempt to influence the district attorney's office. As such, he was clearly acting in a judicial capacity.

We conclude Judge Spitzer engaged in a course of conduct constituting willful misconduct.

### G. *Count VIII—Failure to Cooperate with the Commission*

#### 1. *Findings of Fact*

In this final count, Judge Spitzer is charged with failing to cooperate with the commission during its preliminary investigation of these proceedings. On July 14, 2005, the commission sent Judge Spitzer a preliminary investigation letter, requesting a response to the allegations set forth in the letter. Through counsel, the judge made three requests for extensions of time to respond. The final extension was granted until November 8, 2005, at which time there was no response from the judge. On January 18, 2006, Judge Spitzer, who was no longer represented by counsel, faxed a letter to the commission indicating he was waiting for transcripts and would endeavor to respond within the next two weeks. Judge Spitzer never responded to the allegations in the preliminary investigation letter.

#### 2. *Conclusions of Law*

**(17)** Government Code section 68725 requires judges to "co-operate with and give reasonable assistance and information" to the commission in

connection with its investigations. The masters concluded, as do we, that Judge Spitzer violated this legal requirement and, in so doing, violated canons 1 and 2A and engaged in prejudicial misconduct. (*Doan, supra*, 11 Cal.4th at pp. 337–338 [prejudicial misconduct when judge asked two friends not to cooperate with commission investigators and refused to cooperate with, or give assistance to the commission during its preliminary investigation].)

**(18)** Judge Spitzer urges the commission to find his conduct to be improper action rather than prejudicial misconduct. He contends his lack of response is attributable to his failure to appropriately prioritize his required work, rather than a willful disregard of his responsibilities. Prejudicial misconduct does not require that the judge act in bad faith; rather, it is conduct which would appear to an objective observer to be prejudicial to public esteem for the judiciary. (*Broadman, supra*, 18 Cal.4th at p. 1092.) The public expects judges to comply with the law. Judge Spitzer was aware of his legal obligation to cooperate with the commission. His explanation for failing to do so, that he placed priority on his caseload, is belied by his persistent failure to attend to his judicial obligations as reflected in the misconduct before us.

We recognize that Judge Spitzer was caring for his ill mother in September and October; however, his response was requested in July and the commission provided him with three extensions of time. Moreover, as the masters found, he never requested time off from his judicial responsibilities to prepare a response.

Judge Spitzer's failure to cooperate with the commission, when combined with the delays and failure to take action in counts I through IV, constitutes a persistent failure to perform judicial duties. (*Doan, supra*, 11 Cal.4th at p. 312.)

## III.

## DISCIPLINE

### A. *Introduction*

**(19)** In determining the appropriate level of discipline, our "ultimate objective is to protect the judicial system and the public which it serves from judges who are unfit to hold office." (*McComb v. Commission on Judicial Performance* (1977) 19 Cal.3d Spec. Trib. Supp. 1, 9 [138 Cal.Rptr. 459, 564 P.2d 1]; see *Doan, supra*, 11 Cal.4th at p. 314.) The purpose of a commission disciplinary proceeding " 'is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial

conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman, supra*, 18 Cal.4th at pp. 1111–1112, quoting *Adams v. Commission on Judicial Performance, supra*, 10 Cal.4th at p. 912.) After careful consideration, we have concluded that these objectives can only be met through removal from office. As we explain below, Judge Spitzer has engaged in a course of conduct which seriously undermines public confidence in the fair and competent administration of justice and demonstrates a lack of ability and temperament to perform judicial functions. We are left with no confidence in his ability to refrain from future misconduct.

B. *Analysis*

In our analysis, we address those factors which we have previously considered relevant when determining what discipline is appropriate in a given case. (*Inquiry Concerning Ross* (2005) No. 174, Decision and Order Removing Judge Ross from Office, pp. 63–64 [49 Cal.4th CJP Supp. 79, 137–138]; *Inquiry Concerning Van Voorhis* (2003) No. 165, Decision and Order Removing Judge Van Voorhis from Office, p. 31 [48 Cal.4th CJP Supp. 257, 295].) Within our discussion of these standards, we also address factors in aggravation and mitigation listed in the masters' report.

1. *Number of Acts of Misconduct*

**(20)** The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern of misbehavior that demonstrates the judge lacks judicial temperament and the " ' "ability to perform judicial functions in an even-handed manner." ' " (*Fletcher, supra*, 19 Cal.4th at p. 918 [pervasiveness of misconduct over the judge's entire career demonstrated unfitness for office].) Judge Spitzer has engaged in numerous instances of willful and prejudicial misconduct over a period of 10 years. The misconduct involves dereliction of judicial duties, embroilment, ex parte communications, and executing at least 70 false salary affidavits, some of which were signed with utter disregard for the truth. This pattern of repeated wrongdoing leaves us with no doubt that Judge Spitzer lacks the temperament and ability to perform judicial functions with the competence, temperament, and impartiality expected of the judiciary.

2. *Appreciation of Misconduct*

**(21)** "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) No. 162, Decision and Order Removing Judge Platt from Office, p. 15 [48 Cal.4th CJP Supp. 227, 248]; see *Inquiry Concerning Ross, supra*, No. 174

at p. 65 [49 Cal.4th CJP Supp. at p. 139].) In his testimony before the special masters and at his oral argument before the commission, Judge Spitzer repeatedly avoided taking full responsibility for his actions.

Judge Spitzer blamed his persistent delays and failure to decide matters on the overburdened courts, and, in some instances, on court staff. The Riverside County Superior Court is clearly overburdened. However, by the judge's own account, he had no more cases than other judges in the county. Judge Spitzer also suggests that he is more backlogged than other judges because he presides over more trials, and therefore did not have time to handle submitted matters and administrative tasks. We do not disagree with the masters and the character witnesses who testified that Judge Spitzer is a hard-working judge. However, as one of the special masters suggested, it appears that "to some degree, [he was] . . . escaping to trial" where he was most comfortable as a judge. We concur with the masters that Judge Spitzer's failure to give his other judicial responsibilities his prompt attention "added insult to existing disadvantage and did nothing to improve public confidence in an increasingly inaccessible system of civil justice." In the words of a fellow judge and former presiding judge, "Judge Spitzer was in a state of denial for a long time that he wasn't able to control his caseload."

In his testimony before the special masters, Judge Spitzer suggested that his clerk let signed orders sit unprocessed on her desk for significant periods of time, a claim refuted by his clerk. In his oral presentation before the commission, Judge Spitzer implied that court staff shared responsibility for his delays and missing documents because they refused to come into his cluttered chambers and because they failed to locate files and documents he had misplaced. He also blamed staff for failing to bring inquiries about cases to his attention, a claim contradicted by the testimony of court staff. We emphatically reject any implication that staff were at fault—Judge Spitzer, not his staff, was responsible for his misconduct.

Judge Spitzer attempted to deflect responsibility for his six-year delay in deciding the *McGuire* (count II A) small claims case by testifying he had decided the matter but simply failed to sign the order, a claim we and the masters have rejected. He also took the position that he was not responsible for deciding matters under submission after he was transferred to a criminal assignment, despite receiving e-mails from his presiding judge informing him he was still responsible for civil matters under submission.

**(22)** At the hearing before the special masters and in his oral presentation to the commission, Judge Spitzer portrayed his failure to perform judicial duties, including his failure to cooperate with the commission, as being the result of his diligence in focusing on cases currently before him. We find

Judge Spitzer's conduct demonstrates an inability to properly attend to and prioritize his judicial obligations. Faithful discharge of judicial responsibilities requires the ability to multitask. In addition to handling the cases that come before them, judges are expected to diligently discharge their administrative responsibilities and to "cooperate with other judges and court officials in the administration of court business." (Canon 3C(1); see also canon 3B [adjudicative responsibilities]; Rothman, Cal. Jud. Conduct Handbook, *supra*, § 6.10, p. 262.)

Judge Spitzer also engaged in denials regarding his misconduct in the criminal cases. He insisted that he was attempting to comfort Ms. Kavanagh and denied attempting to influence her to consent to a reduction of the murder charge despite overwhelming evidence to the contrary. He persisted in his refusal to accept responsibility for the full extent of his misconduct in his oral argument before the commission where he stated: "I thought that I was communicating well with Kathleen Cavanaugh [*sic*] saying exactly to her what I had said in open court."

Judge Spitzer denied initiating the ex parte communication with the watch commander in *People v. Johnson* (count V). In response to the charges in count VI (*People v. Cobarruvias*), he testified that he still does not see "anything particularly wrong" about contacting Ms. Herrera and discussing the facts of the case with her.

Significantly, Judge Spitzer expressed little recognition or understanding of the impact his misconduct had on the litigants in the criminal or civil cases. Furthermore, his failure to respond to the commission's investigation reflects a lack of appreciation for the seriousness of the charges.

3. *Likelihood of Future Misconduct*

The likelihood of future misconduct is a key factor in our decision to remove Judge Spitzer from judicial office. The masters accepted Judge Spitzer's assurance that he has taken steps to ensure timely performance of his judicial duties, including therapy and making procedural changes in his courtroom. We are not similarly persuaded by the judge's assurances. Judge Spitzer made similar representations in the past, which have subsequently proven to be hollow.

In 2003, the commission issued a notice of intended public admonishment based on Judge Spitzer's failure to timely decide matters in three cases and executing at least one false salary affidavit. The matter was closed without discipline after the judge made an appearance before the commission on December 11, 2003. (Rules of Com. on Jud. Performance, rule 116(b).) At the

appearance, Judge Spitzer assured the commission that he had no cases under submission for more than 90 days, that the problem had not reoccurred since February or March of that year, and that he had set up procedures to "avoid a repetition of this problem." In fact, the evidence in this case establishes that these assurances were false. At the time of his appearance, the *Lindsay* matter (count II C) which was submitted in May 2003 remained undecided and the proposed case management order in the *Robinson* matter (count III A) submitted by the parties in April 2003 remained unsigned. The judge's representation that he had changed his practices to avoid delay is refuted by his conduct in *SCAG* (count I B) and *CCI* (count I C). Judge Spitzer had the unprocessed judgment in *SCAG*, signed July 2003, with him when he came to the commission meeting in San Francisco. Nevertheless, he took no steps to have it processed when he returned to his court. In *CCI*, he signed the order just 20 days after his appearance before the commission, but had no procedures in place to ensure it was timely processed.

When Judge Spitzer was transferred to a civil assignment in 2001, he told Judge Tranbarger that he had a plan to deal with his organizational problems—he would not bring court papers into his chambers. The evidence amply demonstrates that he did not follow through with that plan.

By Judge Spitzer's own account, it would be imprudent to assign him to a civil department because "it would be difficult for me to do the work that's associated with doing justice in a civil courtroom." When asked whether he would give more attention to submitted matters and administrative tasks if returned to civil, Judge Spitzer responded that he did not think his priorities would change. These statements are tantamount to an admission that further misconduct would occur if he were assigned to civil in the future. His long history of disorganization, pervasive pattern of dysfunctional practices resulting in delays and inaction, and failure to appreciate the seriousness or consequences of his misconduct leave us with no doubt that similar misconduct would reoccur if he was assigned to a civil department.

Even the initiation of a preliminary investigation in these proceedings did not spur Judge Spitzer to change his practices. Instead, consistent with his pervasive pattern of failure to attend to his judicial duties, he ignored his duty to cooperate with the commission.

There is also a strong likelihood of future misconduct in a criminal assignment. Judge Spitzer engaged in similar misconduct involving embroilment and ex parte communications in three criminal cases. These cases reflect Judge Spitzer's inability or unwillingness to act within appropriate judicial boundaries. The most egregious misconduct, in *People v. Carr*, occurred just months after his appearance before the commission in 2003 and after he had

been disqualified by the district attorney's office from hearing other criminal cases, in part, because of his past embroilment. We have no confidence in his ability to conform to standards of judicial conduct.

4. *Integrity and Honesty*

**(23)** Judge Spitzer's integrity is called into question by his conduct in executing salary affidavits with reckless disregard for the truth and by his lack of candor in these proceedings. Honesty is a minimum qualification for every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239]; *Inquiry Concerning Ross*, *supra*, No. 174 at p. 68 [49 Cal.4th CJP Supp. at p. 141].) Based on the testimony of Riverside County judges and lawyers, the masters found that Judge Spitzer has a reputation as a knowledgeable and honest judge. We do not question Judge Spitzer's intelligence or knowledge of the law. Nor do we doubt that his character witnesses believe Judge Spitzer to be a man of integrity, albeit with organizational issues. Nevertheless, the record in these proceedings reflects a lack of candor incompatible with the role of a judge. "If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental." (*Inquiry Concerning Hall* (2006) No. 175, Decision and Order Removing Judge Hall from Office at p. 26 [49 Cal.4th CJP Supp. 146, 171].)

On numerous occasions, Judge Spitzer was deceptive in his testimony before the masters and in his oral presentation to the commission. He falsely denied calling the watch commander and considering the ex parte communication in his decision to dismiss the *Johnson* case (count V). In the *Carr* matter (count VII), he attempted to mislead the masters and the commission by claiming that he was only trying to comfort Ms. Kavanagh and was not trying to influence her or the district attorney to agree to a manslaughter disposition. In the *McGuire* matter (count II A), he falsely testified that he made a decision shortly after the first trial, where the evidence established that he delayed rendering a decision for six years. Judge Spitzer also engaged in disingenuous attempts to explain his delays and failure to cooperate with the commission as being the result of his conscientious dedication to the cases at hand and the shortcomings of his staff.

Judge Spitzer testified that he requested a transfer to a civil assignment in 2001 because he wanted a change. However, according to his former presiding judge, Judge Spitzer was transferred to civil because "his [criminal] caseload was virtually nonexistent" as a result of having been disqualified from criminal cases by the district attorney's office, and Judge Spitzer was not pleased with the transfer.

**(24)** The Supreme Court strongly denounced a judge who made material misstatements to the commission in *Adams v. Commission on Judicial Performance, supra*, 10 Cal.4th at page 914, stating: "There are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission in the course of its investigation into charges of wilful misconduct on the part of the judge." (*Ibid.*; accord, *Fletcher, supra*, 19 Cal.4th at pp. 887–891.) Additionally, we are troubled by Judge Spitzer's willingness to impugn the credibility of two district attorneys and Ms. Kavanagh by implying they falsely testified concerning material facts in these proceedings.

The lack of candor we have observed in these proceedings is fundamentally at odds with the role of a judge who is sworn to uphold the law.

5. *Prior Discipline*

Judge Spitzer has not previously been disciplined. Nevertheless, the pattern of willful and prejudicial misconduct and persistent failure to perform judicial duties in this case spanning a period of 10 years overshadows his lack of prior discipline.

6. *Impact on the Judicial System*

**(25)** The impact of Judge Spitzer's misconduct and persistent failure to perform his judicial duties has been significant. A pattern of misconduct consisting of delays, indecision, signing false salary affidavits, ex parte communication, embroilment, and failure to cooperate with his presiding judge and the commission inevitably lowers public esteem for the judiciary.

Judge Spitzer's indifference toward his obligation to promptly and efficiently decide matters had an adverse impact on the litigants who appeared before him and his fellow judges. As the masters recognized, "[w]ith severely overcrowded court dockets, a failure to make timely decisions on these motions exacerbates frustrations felt by civil parties regarding limited trial opportunities." Other judges had to take over his calendar when his presiding judge was forced to relieve him from his assignments so he could get caught up on his cases. Likewise, his fellow judges had to handle his routine matters when he was unable to keep up with them.

A judge who is not competent to handle a civil calendar and who has a history of embroilment which at various times has resulted in his being disqualified from hearing criminal cases does not serve the public and cannot remain on the bench.

## ORDER REMOVING JUDGE SPITZER FROM OFFICE

Pursuant to the provisions of article VI, section 18 of the California Constitution, Judge Robert G. Spitzer is ordered removed from his judicial office; pursuant to that section of the Constitution and rules 120(a) and 136 of the Rules of the Commission on Judicial Performance, Judge Spitzer is hereby disqualified from acting as a judge.

Commission members Hon. Frederick P. Horn, Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Peter E. Flores, Jr., Mr. Marshall B. Grossman, Ms. Patricia Miller, Ms. Barbara Schraeger, Mr. Lawrence Simi, and Ms. Maya Dillard Smith voted in favor of all of the findings and conclusions expressed herein and in the forgoing order of removal and disqualification of Judge Spitzer. Commission member Mr. Samuel A. Hardage did not participate. There is one vacancy on the commission.

The judge's petition for review by the Supreme Court was denied on March 19, 2008.

[No. 184. June 26, 2008.]

INQUIRY CONCERNING JUDGE KELLY A. MACEACHERN

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance ordered that the judge be removed from her judicial office and that she be disqualified from acting as a judge. The judge requested educational leave to attend a one-week seminar but obtained confirmation of admittance into only one half-day class. The court travel coordinator prepared a travel request for the judge that estimated her expenses for five days. The judge signed the travel request without disclosing that she was not enrolled for five days. After her arrival at the seminar venue, the judge attempted to enroll in other courses, but she actually attended only two half-day courses. Upon being told that she could receive reimbursement for only one night, she sent an e-mail to the travel coordinator claiming that she "sat in" on classes two other days. When confronted about it, she denied any intent to mislead and claimed that she had chosen her words carelessly. The judge also lacked candor in response to the commission's investigation and testified falsely under oath during the proceedings. The commission found that the judge engaged in willful misconduct by sending an intentionally deceitful e-mail in an attempt to obtain court funds under false pretense. The judge's intentional dishonesty and her subsequent lack of candor warranted removal, despite a previously good reputation. (Opinion by Judith D. McConnell, Vice-chairperson.)

## HEADNOTES

(1) **Judges § 6.2—Discipline—Grounds—Willful Misconduct—Elements.**—Willful misconduct is the most serious basis for censure or removal of a judge (Cal. Const., art. VI, § 18, subd. (d)). Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. Failure to comply with the California Code of Judicial Ethics is generally considered to constitute unjudicial conduct. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose

other than the faithful discharge of judicial duties), (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority. Making false representations to the court in order to obtain money reflects a corrupt purpose.

(2) **Judges § 6.2—Discipline—Grounds—Willful Misconduct—Judicial Capacity.**—A judge acts in a judicial capacity, for purposes of a determination of willful misconduct, while performing one of the functions, whether adjudicative or administrative in nature, that is associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose. The judge's e-mail was sent in the judge's administrative capacity as a judge, and the judge used her authority as a judge to ask for the claim to be submitted. The judge was acting in a judicial capacity.

(3) **Judges § 6.2—Discipline—Grounds—Willful Misconduct—Attempting to Obtain Money Through False Pretense.**—A judge engaged in willful misconduct by sending an intentionally deceitful e-mail in an attempt to obtain court funds to which she was not entitled.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85.]

(4) **Judges § 6—Removal—When Appropriate.**—Removal may be appropriate even where the factors identified in previous judicial disciplinary proceedings do not each weigh against the judge.

(5) **Judges § 6—Discipline—Factors—Number of Acts of Misconduct.**—The number of acts of misconduct is relevant to judicial discipline to the extent it shows isolated incidents or a pattern that demonstrates that the judge lacks judicial temperament and the ability to perform judicial functions in an evenhanded manner. A level of discipline may be warranted either by the existence of a pattern of misconduct or by the seriousness of a single incident. Consideration of this factor might militate against removal were it not for the corrupt nature of the misconduct and pervasive lack of candor during the commission proceedings.

(6) **Judges § 6—Discipline—Factors—Lack of Veracity.**—Honesty is a minimum qualification for every judge. If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental. Judges have been removed from office for providing false and misleading information in various contexts.

(7) **Judges § 6.4—Discipline—Proceedings—Disciplinary Precedent from Other States.**—Judicial disciplinary decisions from other states in cases involving similar misconduct can provide guidance.

(8) **Judges § 6.4—Discipline—Proceedings—Choosing Proper Sanction.**—In determining the appropriate discipline, each case must be considered on its own facts. Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar.

(9) **Judges § 6.2—Removal—Grounds—Dishonesty During Investigation.**—There are few judicial actions that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission on Judicial Performance in the course of its investigation into charges of willful misconduct on the part of the judge. It is particularly troubling when a judge is willing to lie under oath to the special masters appointed by the California Supreme Court to make factual findings critical to its decision. In seeking the truth, the justice system relies on the integrity of the oath. A judge who does not honor the oath to tell the truth cannot be entrusted with judging the credibility of others.

(10) **Judges § 6—Discipline—Stringent Standard of Conduct.**—The Commission on Judicial Performance has the responsibility of enforcing rigorous standards of judicial conduct. Because judges occupy a position of enormous power and responsibility and pass judgment on the conduct of others, they are held to a more stringent standard of conduct than ordinary citizens and even attorneys.

(11) **Judges § 6—Discipline—Factors—Appreciation of Misconduct.**—Contrition at the last opportunity has limited impact in comparison with well over a year of misrepresentations and excuses. Simply put, the judge's purported acceptance of responsibility was too little too late.

(12) **Judges § 6—Discipline—Factors—Likelihood of Future Misconduct.**—A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform.

(13) **Judges § 6—Discipline—Factors—Prior Discipline.**—The seriousness of the judge's misconduct and subsequent lack of candor overshadow the judge's lack of prior discipline.

(14) **Judges § 6.2—Discipline—Factors—Impact on Judicial System.**—Public faith in the integrity of the judicial system is seriously compromised by a judge who attempts to obtain money from the government

through false pretense. Court staff must be able to rely on the truthfulness of information provided by judicial officers. Judges uphold laws which require citizens to provide truthful information for purposes of obtaining funds from the government. A judge must follow and respect the same laws and standards that apply to the public.

(15) **Judges § 6.2—Discipline—Removal—Grounds—Dishonesty During Investigation.**—A judge who lies under oath when his or her conduct is called into question does grave damage to public respect for the judiciary. Litigants and attorneys can have little confidence in that judge's ability to determine the credibility of witnesses and seek the truth. Any discipline short of removal would not be adequate to fulfill the mandate to uphold public confidence in the integrity and propriety of the judiciary.

(16) **Judges § 6.4—Discipline—Proceedings—Mitigating Evidence.**—Mitigating evidence is not relevant in determining if a judge engaged in bad faith, and thus engaged in willful misconduct, but may be taken into account in determining the totality of the circumstances as pertinent to determining the appropriate discipline.

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**OPINION**

**McCONNELL, Vice-chairperson.**—

## I

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Kelly A. MacEachern, a judge of the Orange County Superior Court since 2003. The commission commenced this inquiry with the filing of its notice of formal proceedings (Notice) on August 13, 2007.

The Notice charges Judge MacEachern in one count with making intentionally false and misleading statements in an e-mail to the superior court travel coordinator in support of her reimbursement claim for hotel expenses associated with her attendance at the Continuing Judicial Studies Program (CJSP) in San Diego the week of July 31, 2006. Judge MacEachern is charged with making the following false and misleading statements: (1) there was a "mix up" in her registration when she arrived at the conference; and (2) she "sat in" on two classes on days for which she sought hotel reimbursement. The

Notice alleges there was not a mixup with her registration—when she arrived at registration, she knew she was only registered for one half-day class later in the week; and, she did not attend the two classes she claimed to have "sat in" on.

The Supreme Court appointed three special masters to hear and take evidence and report to the commission under Rules of the Commission on Judicial Performance, rule 129. (All references to a rule are to the Rules of the Commission on Judicial Performance.) The masters are Hon. Judith Ashmann-Gerst, Associate Justice of the Court of Appeal, Second Appellate District; Hon. Tani G. Cantil-Sakauye, Associate Justice of the Court of Appeal, Third Appellate District; and Judge George J. Abdallah, Jr., Judge of the San Joaquin County Superior Court.

The three masters held a two-day hearing in January 2008, followed by an oral argument in March 2008. The masters' report to the commission, containing their detailed findings of fact and conclusions of law, was filed with the commission on March 17, 2008.

The masters concluded Judge MacEachern engaged in willful misconduct by deliberately making false and misleading representations concerning her registration and attendance at CJSP to obtain court funds to which she was not entitled. They resolved credibility issues and factual disputes, finding Judge MacEachern's testimony was not credible on material issues. We base our decision to remove Judge MacEachern from office on the masters' factual findings and legal conclusions, as adopted and discussed in this decision. The lack of integrity manifested by her misconduct, compounded by her lack of candor in response to the commission's investigation and deceitful testimony under oath before the masters, compels our conclusion that removal is necessary to protect the public and maintain public trust in the integrity of the judiciary.

Judge MacEachern is represented by Attorneys Edward P. George of Long Beach, California, and Paul S. Meyer of Costa Mesa, California. The examiners for the commission are Commission Trial Counsel Jack Coyle and commission assistant trial counsel Valerie Marchant.

## II

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. *Findings of Fact*

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18

Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true." (*Ibid.*) Factual findings of the masters are entitled to great weight because the masters have "the advantage of observing the demeanor of the witnesses." (See *ibid.*; *Inquiry Concerning Freedman* (2007) No. 179, Decision and Order Imposing Public Censure, pp. 7, 20 [49 Cal.4th CJP Supp. 223, 232, 243] (*Freedman*).) The following facts are adopted from the masters' factual findings which we have determined are supported by clear and convincing evidence based on our own review of the record.

*Registration for the Seminar*

During the week of July 31, 2006, through August 4, 2006, the Center for Judicial Education and Research (CJER) of the Administrative Office of the Courts (AOC) sponsored CJSP, a judicial education seminar, in San Diego, California. Because Judge MacEachern was on medical leave, she asked her clerk, Felicia Bicknell (Bicknell), to register her for the seminar, but did not instruct Bicknell to sign her up for any particular classes. On June 16, 2006, the registration deadline, Bicknell applied online for two courses: (1) Excellence in Judging, held Monday, July 31, 2006, through the morning of Wednesday, August 2, 2006; and (2) Statement of Decision, held in the afternoon of Wednesday, August 2, 2006.

An e-mail response was sent from AOC to Judge MacEachern on the same day. It stated, in relevant part: **"This is only a confirmation that your CJSP application has been received by CJER.** [¶] Notification of acceptance into your course choice(s) will be sent via e-mail the week following the June 16 application deadline. You will receive further information regarding travel arrangements with your acceptance confirmation. **We ask that you do not make hotel or airline reservations until you have received your Acceptance Email.**" (Original boldface.)

On June 20, 2006, the day after returning to work, Judge MacEachern submitted a "Judicial Officer's Planned Absence" form, indicating she planned to be away from the court attending CJSP the entire week of July 31, 2006. The next day, Judge MacEachern was informed by AOC Attorney Bonnie Pollard (Pollard) via e-mail that she had been accepted only into the half-day Statement of Decision class on Wednesday afternoon. She was denied admittance into the Excellence in Judging class because it was designed for judges with at least eight years' experience on the bench, and she had been a judge for less than four years at the time.

Pollard's e-mail included an attached participant's manual which provided information on hotel accommodations. The manual stated that AOC would

pay the hotel directly for "lodging only for the nights stated in [the] confirmation email . . ." and only "for judicial officers . . . **who attend the entire course in which they are enrolled**." (Original boldface.) "Attending entire course" was defined as "arriving before the course begins and staying until the course officially ends." Specifically, the e-mail provided: "Those who do not attend the entire course will remain individually responsible for their own lodging expense."

On June 22, 2006, the day after receiving her e-mail confirming admittance into only one half-day class, Judge MacEachern was notified by a court administrative assistant that her educational leave request for the entire week of July 31st had been approved. The same day, court travel coordinator Rick Valadez (Valadez) prepared a travel request for the judge which estimated expenses for meals and incidentals for five days. It did not include hotel costs because they were paid directly by CJER. Judge MacEachern signed the travel request and returned it to Valadez. It was then approved by Presiding Judge Nancy Wieben Stock. Judge MacEachern did not inform Judge Stock or Valadez that she had been admitted only to one half-day class or seek to amend her request for an entire week of educational leave. On June 28, 2006, Judge MacEachern made reservations at one of the hotels approved by the AOC for five nights, Sunday, July 30, 2006, through Friday, August 3, 2006.

Sometime before CJSP began, Judge MacEachern telephoned Pollard to inquire about her registration status. They discussed what classes remained open. Judge MacEachern was not interested in any of the classes that had openings, but did express interest in the Evidence class, which was full. Judge MacEachern was placed on the wait list for the Evidence class.

On the Friday before the start of the program, Judge MacEachern contacted CJSP Education Coordinator Susan Gordon (Gordon) to inquire whether there was an opening in the Evidence course. Gordon told her that there were no openings, but she remained on the wait list.

*Judge MacEachern's Activities During the Week of CJSP*

On Sunday, July 30, 2006, Judge MacEachern went to San Diego with her husband, Michael Bruce McClellan (McClellan), and his twin seven-year-old daughters. This was McClellan's one week of the year to have his daughters for vacation. They checked into one of the hotels approved by AOC for lodging during the program.

Judge MacEachern arrived at registration around 7:45 a.m. on Monday, July 31, 2006, the first day of CJSP. Gordon was surprised to see the judge since she was not enrolled in any course until Wednesday. At the registration

table, Judge MacEachern spoke with Aline Tashjian (Tashjian), the senior conference coordinator for the AOC. Judge MacEachern told Tashjian that she wanted to sit in on a class she was not enrolled in. When told this was not permitted, Judge MacEachern responded that she would sit in the class anyway.

According to Judge MacEachern, despite being denied admission to the class, she went to the Excellence in Judging classroom anyway. She claims that she arrived before 8:30 a.m. to "scope out" whether she could get in. Judge MacEachern testified that she stayed in the classroom for 10 to 15 minutes and left shortly after the class started. Pollard arrived at the Excellence in Judging classroom around 8:00 a.m. to check on the room setup and see if faculty needed assistance. When the class started about 8:30 a.m., the door was closed. During the next five or 10 minutes, the team leaders presented an overview of the class. Pollard testified that no one came in or out of the classroom between the time the door was closed and the end of the overview. No judge approached Pollard about being admitted into the class.

The masters found, "in no uncertain terms" that Judge MacEachern lied about going into the Excellence in Judging classroom. We adopt this credibility finding. Pollard's testimony contradicts Judge MacEachern's testimony that she remained in the classroom after the class started. Moreover, the masters were in a position to listen to the judge and observe her demeanor when she testified about specifics of being in the classroom and did not find her credible.

Judge MacEachern returned to the registration area at around 8:45 a.m. and spoke with Gordon about whether there had been any cancellations in the Evidence class. Gordon told her she would have to wait 30 to 60 minutes to determine if there were openings in the class and urged Judge MacEachern to check back in with her later that morning. Judge MacEachern did not return or make further inquiries about the Evidence class. As it turned out, Judge MacEachern probably would have gotten into the class had she returned because there were two openings in the class.

At her appearance before the commission, Judge MacEachern said she did not hear Gordon tell her to come back because she was so angry about being denied admittance into the Evidence class. We believe Judge MacEachern disregarded Gordon's instruction, just as she disregarded other directions from the AOC staff.

Judge MacEachern admits Gordon specifically told her she could not just "sit in" on a class unless admitted. Despite this clear instruction, Judge MacEachern claims she went to the Evidence classroom after speaking with

Gordon.[1] She testified that she sat in the classroom for 15 or 20 minutes until Gordon "stuck her head" in the room. Judge MacEachern explained that she left because she was afraid she would make Gordon mad. The masters concluded: "We do not believe that she was intimidated by Gordon's momentary entrance into the classroom. In fact, MacEachern should have expected Gordon to appear in the Evidence class to verify attendance, given that Gordon had requested MacEachern check back at registration to see if there were any absences in the class. Rather, MacEachern's actions and statements evince her disrespect for, not fear of, AOC staff." We concur.

At some point on Monday or Tuesday morning, Judge MacEachern enrolled in a half-day Introduction to Microsoft Word and Windows course, scheduled for Tuesday, August 1, 2006. She attended that class in the morning, and joined her husband and his daughters for kayaking and paddle boating in the afternoon.

On Wednesday, August 2, 2006, Judge MacEachern attended the half-day Statement of Decision class.

Judge MacEachern claims to have "sat in" on the Domestic Violence (DV) Workshop on Thursday, August 3, 2006. The two-day workshop started on Wednesday and was an *invitation-only course*, designed to train judges to be instructors on the subject. Judge MacEachern testified she arrived at the classroom between 8:00 a.m. and 8:30 a.m. and stayed for about 15 to 20 minutes, during which time there were small-group discussions. In unequivocal terms, the masters found Judge MacEachern lied about even entering the DV Workshop classroom. We adopt this finding. Two witnesses who know Judge MacEachern and were in the DV Workshop classroom Thursday morning did not recall seeing her. AOC Attorney Bobbie Welling, who was sitting near the door observing the class, testified that she would have noticed if anyone had entered the classroom. Orange County Superior Court Judge Eric Larsh was one of 12 participants in the class. He spoke with Judge MacEachern at a break outside the classroom Thursday morning, but never saw her enter the classroom. In further support of the masters' finding that Judge MacEachern was never in the classroom, we note that Judge MacEachern was uncertain of most of the details concerning her alleged time in the classroom, including what time she arrived, whether class had started, whether the door was open or shut, whom she talked to, and what subject was being discussed.

Judge MacEachern testified that after leaving the DV Workshop, she sat in the back of the Selected Civil Topics class for about 20 to 30 minutes on

[1] We make no finding as to whether Judge MacEachern went into the Evidence or Civil Topics classrooms since she was not charged with making misrepresentations concerning her attendance at these classes.

Thursday morning, but left and returned to her hotel because she could not follow the discussion without the materials.

Judge MacEachern did not go to CJSP at all on Friday, August 4, 2006. According to Judge MacEachern, they drove home after checking out of their hotel in the morning; according to her husband, they spent the day at Sea World. Judge MacEachern made no effort to see if she was needed in court that day or change her day off on Friday from educational leave to vacation time.

McClellan testified that in addition to going to Sea World on Friday, the judge participated in many other activities with him and his children during the week. They visited a mission; they went to the San Diego Zoo; they rented a kayak and a paddle boat; and they visited a nature preserve.

*Judge MacEachern's Travel Reimbursement Request and E-mail*

Shortly after CJSP ended, Judge MacEachern submitted a travel reimbursement claim to Valadez asking the court to reimburse her for three nights of hotel expenses and meals from dinner on Sunday through lunch on Friday. Valadez contacted Judge MacEachern and CJER about the claim, because it was his understanding that CJER directly paid hotel expenses. In his e-mail to the judge, sent the afternoon of August 14, 2006, he wrote:

"Good afternoon your Honor,

"I was reviewing your reimb. claim for the conf. above and I had a few questions.

"I show that you were scheduled to attend Excellence in Judging Mon–Wed. AM and Statements . . . in the PM. It looks like CJER only picked up Tues. night. However, the hotel charged you for 4 other nights? I sent CJER a message to see if they can research if they were supposed to pick up the other nights or if the hotel made a mistake with the registration?

"If you know any other info. please let me know so that I can piece your reimb. claim with the Conf.

"thank you."[2]

[2] Valadez thought Judge MacEachern had attended the Excellence in Judging class because he had the judge's e-mail confirming her registration request with him when he was processing the claim. Judge MacEachern testified that she did not believe she sent this document to Valadez with her reimbursement claim. Valadez testified that he "probably" received it along with the judge's travel reimbursement claim. Based on this record, we find that there is not

Not having received a response from Judge MacEachern, Valadez sent a followup e-mail the next afternoon. In this e-mail, he wrote:

"Good afternoon your Honor,

"I wanted to update you with regards to your claim. I spoke with Susan Gordon (CJER Coord) and she informed me that your class schedule was for a computer class in the AM and a Statements of Decision in the PM Wed. 8/2. Since that was the only class you attended CJER only covered one night (8/1 Tues.). Hence, the charges on your credit card for 7/30–31 and 8/2–4.

"The court will reimb. you for mileage r/t 180 miles and dinner for 8/1+2.

"Please let me know if this looks ok or if I'm missing any other info. to add to your reimb. claim from the court?

"thank you."

Judge MacEachern replied the next morning with the following e-mail, which is the subject of this inquiry:

"Dear Rick,

"When I got to the CJSP it turned out there was a mix up with my registration. SO I just sat in on the judicial excellence class on Monday, They allowed me to attend a Tuesday a.m. computer class, and the Wednesday afternoon S.O.D. class., [*sic*] and I sat in on the Thursday a.m. D.V. class. I attended no classes on Friday. I know they won't cover any other nights, however I was hoping the [cou]nty would. Thank you for your help. JKM"

Valadez e-mailed Gordon inquiring whether CJER would cover hotel expenses for the three nights requested by Judge MacEachern. Gordon responded in an e-mail that CJER would pay for Monday night's hotel stay because Judge MacEachern had attended the Tuesday computer class.[3] However, Gordon informed Valadez that CJER would not cover Sunday and Wednesday night because the judge had not enrolled in or attended entire courses on Monday or Thursday. Gordon added: "I am not sure what she means by 'a mix up with my registration'—I was very clear with her on the Friday before that she was still waitlisted in her first choice course—

clear and convincing evidence that the registration confirmation was sent by Judge MacEachern when she submitted her reimbursement request.

[3] CJER had already paid for Tuesday night's stay based on Judge MacEachern's attendance at the Wednesday Statement of Decision class.

Evidence in Civil and Criminal Cases—so the fact that she showed up on Monday morning was quite a surprise."

Based upon Judge MacEachern's representation in her e-mail that she had "sat in" on classes on Monday and Thursday, Valadez submitted an amended travel reimbursement request form to Judge Stock on August 17, 2006. The amended request sought hotel reimbursement for $220, for two nights, Sunday and Wednesday.

*Judge Stock's Investigation and Meeting with Judge MacEachern*

Presiding Judge Stock had concerns about Judge MacEachern's representation that she had "sat in" on the Excellence in Judging class. Having been on the faculty for the class, Judge Stock knew it was not the type of class a judge can audit. Based on those concerns, she had her executive assistant conduct an investigation into Judge MacEachern's expense reimbursement claim. Judge Stock also asked her assistant to schedule a meeting with Judge MacEachern.

The meeting was held on September 8, 2006. At Judge Stock's request, Judge Thierry Colaw, a member of the court's executive committee, was present. Judge MacEachern appeared surprised when told the purpose of the meeting. Due to the confidential nature of the subject, Judge Stock had not informed her assistant, who arranged the meeting, of its purpose. Judge Stock went through the events of the week with Judge MacEachern who acknowledged that she was registered only for a half-day class on Wednesday when she arrived at CJSP on Monday. Judge MacEachern indicated that she had briefly "sat in" on the Excellence in Judging and DV Workshop courses, but quickly realized they were not appropriate for her and left. Judge Stock told Judge MacEachern that it appeared her statements to Valadez in the August 16 e-mail were misleading. Judge MacEachern acknowledged that her statements could be misleading and convey a false impression. She agreed to withdraw her claim for hotel reimbursement and convert her educational leave to vacation leave for the days that she did not attend any classes.

At the time of her meeting with Judge Stock, Judge MacEachern was exhausted and emotionally drained because her husband had been hospitalized three days earlier and was in dire condition. Judge MacEachern continued to work while her husband was in the hospital and did not mention her husband's condition to Judge Stock.

*Judge MacEachern's Intent*

The masters found Judge MacEachern made intentionally false and misleading statements in her August 16 e-mail to Valadez. Specifically, the

masters found the following statements to be intentionally false and misleading: (1) "When I got to the CJSP it turned out there was a mix up with my registration"; and (2) "I just sat in on the judicial excellence class on Monday" and "I sat in on the Thursday a.m. D.V. class." In her testimony, Judge MacEachern insisted that these statements were not intended to mislead, but were the result of a hastily drafted and carelessly worded e-mail. The masters emphatically rejected this testimony, finding her word choice was "calculated, not careless." We concur and adopt this finding.

First, the evidence is undisputed that there was no mixup with her registration when Judge MacEachern *got to CJSP*. She was registered for the same class when she arrived at CJSP on Monday morning as when she left to drive to San Diego for the conference. In fact, Judge MacEachern was informed on the Friday before the conference began that she was enrolled only in the Wednesday Statement of Decision half-day class and was still on the wait list for the Evidence class. Thus, the statement "When I got to the CJSP . . . there was a mix up with my registration" is false.

Judge MacEachern insists she did not intend to imply that there was any mistake or confusion in her registration when she arrived at the conference. She testified that the "mix up" she was referring to was her clerk's error in signing her up for a class she was not qualified to attend. This explanation is nonsensical when viewed in the context of the antecedent phrase, "[*w*]*hen I got to the CJSP it turned out*" (there was a mixup with my registration). (Italics added.) We agree with the masters that her use of this phrase "constitutes a calculated attempt to suggest that any 'mix up' occurred upon her arrival at the program" to explain why she came to San Diego on Sunday even though her first class was not until Wednesday.

Judge MacEachern's explanations for her use of the phrase "sat in" are equally unconvincing. She testified that she never meant to suggest to Valadez that she attended or participated in the entire Excellence in Judging or DV Workshop classes. Instead, she maintains, she used the phrase "sat in" to signify that she briefly observed the classes or had made "sincere but failed efforts" to get into the classes. The masters found, "her defense of this patently misleading statement not only lacks credibility, but also borders on ludicrous." We concur.

In defense of her statement, Judge MacEachern has offered the masters and the commission no less than three alternate and inconsistent definitions of the phrase "sat in": (1) She physically sat down in a chair. ("I did sit down in the judicial excellence class . . . for about 10–15 minutes. I never intended to say I took the whole class, but I did sit down in it.") (2) She observed the class long enough to get a feel for and objectively examine the class. (3) She made a sincere but failed effort to get into several additional classes.

In our view, there is only one reasonable interpretation of the phrase "sat in" when made in the context of a reimbursement claim related to a judicial educational seminar. As noted by the masters, the commonsense, ordinary definition of the phrase "sat in" "suggests that she participated in or observed a particular class for its duration; she audited the class." Judge MacEachern's parsing of the phrase tortures its ordinary, commonsense meaning. Valadez could not possibly have been expected to understand the judge's representation that she "sat in" on classes to mean anything other than that she attended the classes in their entirety. And, this is precisely what Judge MacEachern wanted him to think.

We concur with the masters' finding that Judge MacEachern offered contrived definitions to explain away misleading statements in her e-mail to Valadez. As an educated woman with over 20 years in the legal profession, Judge MacEachern had to know that a representation that she "sat in" on classes would not be interpreted to mean she literally sat in a chair or made a brief entrance into the classroom without deriving any educational benefit. Notably, Judge MacEachern did not inform Judge Stock or Valadez that she meant anything other than the ordinary meaning of the phrase "sat in" when her reimbursement claim was questioned.

Moreover, Judge MacEachern did not mention that she "sat in" on the Evidence and Civil Topics classes in her e-mail to Valadez, even though she testified to having briefly observed both classes. Of course, by doing so she would have alerted Valadez to the fact that she did not attend the entire Excellence in Judging or DV Workshop courses since she could not be in two places at once (the Evidence and Excellence classes were in session at the same time Monday morning and the DV Workshop and Civil Topics classes were in session at the same time Thursday morning). The masters query why she did not mention these other classes in her e-mail if she really intended the phrase "sat in" to signify a brief entrance into the classroom or a "sincere but failed effort" to attend a class. They conclude: "The answer is obvious: MacEachern lied, got caught, and created a self-serving definition to attempt to escape from her lie. We simply cannot accept her sophistry and manipulation of ordinary words and phrases to circumvent quite obvious wrongdoing." This finding is amply supported by the evidence, and is adopted as our own.

Judge MacEachern attempts to justify her word choice as being the result of a quickly drafted e-mail that she "dashed" back in response to Valadez without thought or deliberation. The masters considered and rejected Judge MacEachern's testimony in this regard, finding her "word choice was calculated, not careless." We adopt the masters' credibility determination. As previously discussed, the precise words used in the e-mail manifest a calculated attempt to mislead. Further, Judge MacEachern had ample time to

consider her response to Valadez's e-mails. Valadez sent two e-mail inquiries concerning the judge's reimbursement claim, one at 3:10 p.m. on August 14, 2006, and when he had not received a response, a second at 4:42 p.m. on August 15, 2006. Judge MacEachern's response was sent at 9:52 a.m. on August 16, 2006.

In her testimony before the masters and for the first time in this inquiry, Judge MacEachern suggested that her word choice was the result of undiagnosed medical conditions, including temporary dyslexia and aphasia she allegedly experienced after a recent surgery. No medical documentation or expert testimony was admitted to substantiate that she suffered from these conditions or that they contributed in any way to her choice of words. As such, we reject any suggestion that there is a medical explanation for her false and misleading statements.

Significantly, none of the justifications proffered by Judge MacEachern explain how she could have "sat in" on classes when she never entered the classrooms. As previously discussed, we have adopted the masters' finding that she did not go into or briefly observe either the Excellence in Judging class or DV Workshop.

In conclusion, we adopt the masters' finding that Judge MacEachern intentionally made deceptive and misleading statements in her August 16 e-mail to Valadez which falsely suggested that she arrived at CJSP on Sunday because of a mixup in her registration and audited the Excellence in Judging class and DV Workshop. She made these statements in an attempt to obtain reimbursement from the government for costs to which she was not entitled.

B. *Conclusions of Law*

**(1)** The masters and we conclude that Judge MacEachern engaged in willful misconduct, the most serious basis for censure or removal. (Cal. Const., art. VI, § 18, subd. (d).) Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. (*Broadman, supra*, 18 Cal.4th at p. 1091.)

First, Judge MacEachern's conduct was manifestly unjudicial. Failure to comply with the California Code of Judicial Ethics is generally considered to constitute unjudicial conduct. (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*).) Judge MacEachern violated fundamental precepts of the canons. She failed to comply with her duty to uphold the integrity of the judiciary (canon 1), avoid impropriety and the appearance of impropriety in all of her activities (canon 2), and comply with the law and act in a manner that promotes public

confidence in the integrity of the judiciary (canon 2A). Further, by fraudulently seeking reimbursement from the court for her own pecuniary or personal interests she violated canon 2B (judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others). Judge MacEachern used her position as a judge to ask the court's travel coordinator to submit a request on her behalf seeking reimbursement for expenses to which she was not entitled.

Second, Judge MacEachern acted in bad faith. A judge acts in bad faith "only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, 18 Cal.4th at p. 1092.) The e-mail statements were made in bad faith because their purpose was improper. As the masters state: "It goes without saying that making false representations to the court in order to obtain money reflects a corrupt purpose."

In her briefs to the commission, Judge MacEachern maintains that she was not motivated by greed, but by an unwarranted sense of entitlement. She thought traveling to San Diego and *attempting* to enroll in additional classes entitled her to reimbursement even though she did not get into or attend those classes. However, this is not what she told Valadez; rather, she falsely suggested that she had attended the additional classes.

The masters concluded that the judge's "haughty sense of entitlement to reimbursement" further evinces her bad faith. We agree. However, we need not decide whether Judge MacEachern's motivation in seeking reimbursement was monetary or an unwarranted sense of entitlement. In either event, she acted for a purpose other than the faithful discharge of her judicial duties. Conference materials clearly informed her that she was entitled only to hotel reimbursement for those days she attended classes in their entirety. Further, common sense and good judgment should have alerted her that her reimbursement request was unjustified under her theory of entitlement. We fail to understand how Judge MacEachern could have thought she was entitled to reimbursement for hotel expenses and meals for appearing at the conference site and making unsuccessful inquiries about enrolling in additional classes or, more importantly, how this provided her license to mislead Valadez. Judge MacEachern acted in bad faith by sending a deceitful e-mail in support of her reimbursement claim, regardless of whether her motivation was monetary or an unjustified sense of entitlement.

**(2)** Third, Judge MacEachern was acting in her judicial capacity, the final element of willful misconduct. A judge acts in a judicial capacity "while

performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose." (*Broadman, supra*, 18 Cal.4th at p. 1104, citing *Dodds, supra*, 12 Cal.4th at p. 172.) The masters concluded and we agree that Judge MacEachern's e-mail meets this test because it was sent in her administrative capacity as a judge and because she used her authority as a judicial officer to ask Valadez to submit a claim for reimbursement to which she knew she was not entitled.

Judge MacEachern contends that she was not acting in a judicial capacity because the e-mail pertained to a personal matter, and did not relate to a case or any matter involving her assignment. The e-mail did not pertain to a personal matter—it concerned *court* reimbursement for attendance at a *judicial conference*. It was sent to the court travel coordinator, during court hours, on the court's e-mail system, from the courthouse. The form she submitted to Valadez is entitled "*Judicial Officers* Travel Reimbursement Worksheet." This was clearly an administrative judicial function.

In removing Judge Hyde from office, the commission concluded that he was acting in his judicial capacity when he asked his clerk to access restricted Department of Motor Vehicles records for personal reasons. (*Inquiry Concerning Hyde* (2003) No. 166, Decision and Order Removing Judge Hyde from Office, p. 5 [48 Cal.4th CJP Supp. 329, 339] (*Hyde*); see also *Inquiry Concerning Murphy* (2001) No. 157, Decision and Order Imposing Censure and Bar, pp. 16–17 [48 Cal.4th CJP Supp. 179, 201] (*Murphy*) [false statements to presiding judge to obtain sick leave rather than taking personal leave made in judicial capacity]; *Inquiry Concerning Couwenberg* (2001) No. 158, Decision and Order Removing Judge Couwenberg from Office, p. 12 [48 Cal.4th CJP Supp. 205, 221–222] [false statements on form used exclusively for judges in connection with public enrobing ceremonies and other administrative purposes made in judicial capacity].) The commission reasoned: "Judge Hyde did not give Ms. Silva advice, but made a request as a judge to a clerk to perform a task that was a normal duty for a clerk. Ms. Silva could not reasonably have been expected to refuse." (*Hyde*, No. 166 at p. 5 [48 Cal.4th CJP Supp. at p. 339].) Similarly, Judge MacEachern made a request for hotel reimbursement to the judicial travel coordinator who was charged with processing judicial travel reimbursement requests. As Judge Stock testified at the hearing concerning Mr. Valadez and other court staff: "They essentially believe what we tell them. They rely upon our integrity . . . ."

Judge MacEachern relies heavily on *Dodds, supra*, 12 Cal.4th 163, in which the Supreme Court held the judge was not acting in a judicial capacity

when he failed to report a colleague whom he observed deflate a van tire in the court parking lot, and initially refused to give a statement to an investigating officer and suggested that his staff also refuse to talk. In reaching this conclusion, the Supreme Court first emphasized that Judge Dodds was not acting as a supervisor when he recommended to staff that they decline to give a statement; rather, he was giving advice to a cowitness concerning an event he witnessed outside of his judicial function. (*Id.* at p. 175.) Second, the court noted that the judge met with the detective at the courthouse only because it was a convenient meeting place that the detective selected. (*Ibid.*) In this case, Valadez was seeking information necessary to perform his job as the travel coordinator for the court. Judge MacEachern was not offering discretionary advice to Valadez, but information required for the purpose of processing her reimbursement claim. Moreover, unlike the detective in *Dodds*, Valadez contacted the judge during work hours over the court's e-mail system not because it was convenient but because his inquiry was related to an administrative judicial function.

**(3)** As did the masters, we conclude Judge MacEachern engaged in willful misconduct by sending an intentionally deceitful e-mail in an attempt to obtain court funds to which she was not entitled.

## III

## DISCIPLINE

### A. *Introduction*

In this case, we face the question of whether a judge who engages in an act of materially deceitful and fraudulent conduct in her judicial capacity and subsequently responds to the commission's investigation by parsing words, and offering disingenuous defenses and false testimony should remain in judicial office. The purpose of a commission disciplinary proceeding " 'is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman, supra*, 18 Cal.4th at p. 1112, quoting *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams*).) Faithful adherence to these objectives compels our decision to remove Judge MacEachern from office. As discussed below, Judge MacEachern engaged in wrongdoing that seriously undermines the integrity of the judiciary and falls far short of the rigorous standards to which the judiciary is held.

B. *Analysis of Disciplinary Factors*

**(4)** In reaching our decision, we have considered those factors previously identified by the commission as relevant to determining the appropriate discipline in a given case. (*Inquiry Concerning Ross* (2005) No. 174, Decision and Order Removing Judge Ross from Office, pp. 63–64 [49 Cal.4th CJP Supp. 79, 137–138] (*Ross*); *Inquiry Concerning Van Voorhis* (2003) No. 165, Decision and Order Removing Judge Van Voorhis from Office, p. 31 [48 Cal.4th CJP Supp. 257, 295].) At the outset, it should be noted that removal may be appropriate even where these factors do not each weigh against the judge. (*Murphy*, *supra*, No. 157 at p. 18 [48 Cal.4th CJP Supp. at p. 202].)

1. *Number of Acts of Misconduct*

**(5)** The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern that demonstrates that the judge lacks judicial temperament and the "ability to perform judicial functions in an even-handed manner." (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958] (*Fletcher*).) "A level of discipline may be warranted either by the existence of a pattern of misconduct or by the seriousness of a single incident." (*Broadman, supra*, 18 Cal.4th at pp. 1112–1113.) Consideration of this factor might militate against removal if it were not for the corrupt nature of the misconduct and pervasive lack of candor during these commission proceedings, which combined demonstrate a temperament lacking the core qualities required of a judge.

2. *Integrity and Honesty*

**(6)** "Honesty is a minimum qualification for every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239] (*Kloepfer*).) If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental. (*Ibid.*)" (*Inquiry Concerning Hall* (2006) No. 175, Decision and Order Removing Judge Hall from Office, p. 26 [49 Cal.4th CJP Supp. 146, 171] (*Hall*).) Judges have been removed from office for providing false and misleading information in other contexts.

Judge Hall was removed from office for violating campaign finance and disclosure laws, including knowingly filing false declarations under penalty of perjury concerning the source of a $20,000 campaign donation. Although Judge Hall engaged in additional incidents of misconduct, it was the election fraud which compelled our removal decision. (*Hall, supra*, No. 175 at p. 29 [49 Cal.4th CJP Supp. at p. 173].)

In 2001, we voted to remove Judge Murphy from office for providing false and misleading information in support of his request for sick leave.[4] Judge Murphy took extensive medical absences from court, providing false information about his health to his presiding judge. While on sick leave, he taught evening law classes and took prerequisite classes for admission to medical school, among other activities. (*Murphy, supra*, No. 157 at pp. 4–15 [48 Cal.4th CJP Supp. at pp. 185–199].) We observed, the "public will not, and should not, respect a judicial officer who has been shown to have repeatedly lied for his own benefit." (*Id.* at p. 18 [48 Cal.4th CJP Supp. at p. 202].)

Judge Couwenberg was ordered removed from office in 2001 for providing materially false information concerning his educational, professional, and military background in seeking appointment to the bench and as a judge. (*Inquiry Concerning Couwenberg, supra*, No. 158, Decision and Order Removing Judge Couwenberg from Office [48 Cal.4th CJP Supp. 205].)

**(7)** Judicial disciplinary decisions from other states in cases involving similar misconduct can also provide guidance. Following the recommendation of the Commission on Judicial Conduct, the Washington Supreme Court removed Judge Ritchie from office for filing false or misleading travel vouchers on four occasions over a five-year period. (*In re Disciplinary Proceedings Against Ritchie* (1994) 123 Wn.2d 725 [870 P.2d 967].) The travel voucher "contained false and misleading statements concerning the nature, purpose, duration and benefit of the court-related business allegedly conducted during the trips." (*Id.*, 870 P.2d at pp. 970–971.)

In a case involving one false sworn affidavit, the South Carolina Supreme Court approved a stipulated one-year suspension of a judge from office without pay. (*In re Augustus* (2006) 367 S.C. 364 [626 S.E.2d 346].)[5] Judge Augustus claimed on a notarized continuing education compliance report that he had attended all three days of a seminar when he only had attended one day. Initially, he told South Carolina's disciplinary counsel that he attended two days of the seminar. Subsequently, the judge sent a letter to the disciplinary counsel admitting that he only attended one day.

**(8)** Judge MacEachern contends that the weight of precedent does not support removal because she engaged in an isolated act of misconduct. The Supreme Court and this commission have recognized that in determining the appropriate discipline, each case must be considered on its own facts. (*Broadman, supra*, 18 Cal.4th at p. 1112; *Hyde, supra*, No. 166 at p. 27 [48

[4] Judge Murphy resigned from office just prior to the commission's decision; the actual decision therefore became a public censure and bar from assignment.

[5] Suspension of a judge is not authorized under the California Constitution. (Cal. Const., art. VI, § 18, subd. (d).)

Cal.4th CJP Supp. at p. 363].) "Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar." (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1318 [240 Cal.Rptr. 859, 743 P.2d 919].)

In this case, Judge MacEachern's honesty and integrity are called into question on multiple levels. Her misconduct involved sending an intentionally false and misleading e-mail to the court's travel coordinator in an attempt to fraudulently obtain money from the court. When confronted with the patently misleading e-mail, she contrived self-serving definitions and specious excuses. In unequivocal terms, the masters found Judge MacEachern's testimony "was anything but credible." In an attempt to cover up her wrongdoing, Judge MacEachern lied not only about the intent of her words, but also about her presence in certain classes.

**(9)** The masters found: "Undoubtedly, MacEachern acted with intent to mislead . . . the Commission." In *Adams*, the Supreme Court strongly denounced a judge who made material misstatements to the commission, stating: "There are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission in the course of its investigation into charges of wilful misconduct on the part of the judge." (*Adams, supra*, 10 Cal.4th at p. 914; accord, *Fletcher, supra*, 19 Cal.4th at pp. 887–891.)

Particularly troubling is Judge MacEachern's willingness to lie under oath to the three special masters appointed by the Supreme Court to make factual findings critical to our decision. In seeking the truth, our justice system relies on the integrity of the oath. A judge who does not honor the oath to tell the truth cannot be entrusted with judging the credibility of others.

Numerous witnesses, including colleagues on the bench and attorneys who appeared before her, testified to Judge MacEachern's reputation for honesty and integrity as a judge and former district attorney. As an example, some witnesses pointed out that she refused to have a "retire-the-debt" fundraiser to pay off her personal debt after being elected to the bench because she did not want to create conflicts with attorneys who may appear before her. We do not doubt that these character witnesses believe Judge MacEachern to be a good and ethical judge. Nevertheless, her reputation cannot disguise the fact that her conduct in this case, exacerbated by her lies throughout these proceedings, portrays a lack of integrity.

**(10)** The commission has the responsibility of enforcing rigorous standards of judicial conduct. (*Broadman, supra*, 18 Cal.4th at pp. 1111–1112;

*Inquiry Concerning Platt* (2002) No. 162, Decision and Order Removing Judge Platt from Office, p. 20 [48 Cal.4th CJP Supp. 227, 253] (*Platt*).) Because judges occupy a position of enormous power and responsibility and pass judgment on the conduct of others, they are held to a more stringent standard of conduct than ordinary citizens and even attorneys. (See *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 287 [110 Cal.Rptr. 201, 515 P.2d 1]; Rothman, Cal. Jud. Conduct Handbook (3d ed. 2007) § 1.11, pp. 6–7.) In addition to the lack of veracity we have observed, other aspects of Judge MacEachern's conduct fail to comport with the high standards to which the judiciary is held. When told she could not audit classes, she attempted to circumvent AOC's rules and flagrantly disregarded staff instructions. The masters found and we agree that she "involved unwitting and innocent persons, such as Valadez, in her misconduct." Additionally, she failed to alter her request for educational leave and meal reimbursement for those days she was not in class until urged to do so by Judge Stock.

3. *Appreciation of Misconduct*

In her response to the commission's investigation and in her testimony before the special masters, Judge MacEachern repeatedly deflected responsibility for her actions. The masters described her arrogance as "unyielding" and her remorse as "limited only to the 'trouble' her false e-mail caused her." Astoundingly, she testified that she would never do it again, not because it was wrong, but because "it's [not] worth this much trouble." Instead of apologizing, the masters note, Judge MacEachern "engaged in scapegoating, blaming her clerk for the 'mix up' on her registration form [citation], blaming Gordon for not letting her into a class when there were open spots [citation], and blaming AOC staff for being uncooperative [citation]."

**(11)** In her recent oral presentation, Judge MacEachern told the commission that she now recognizes that she has been arrogant and slow to appreciate the seriousness of her misconduct. Judge MacEachern has had many opportunities to accept full responsibility for her actions since she was first asked to respond to the commission's preliminary investigation in January 2007. Contrition at her last opportunity has limited impact in comparison with well over a year of misrepresentations and excuses.

Moreover, even now she fails to fully acknowledge the gravamen of her misconduct—her intentional dishonesty. At her appearance before the commission, she acknowledged that she was wrong in seeking reimbursement for days she did not attend classes and that her statements in the e-mail were on their face misleading. Yet, she described her representation that she "sat in" on the DV Workshop as an "overstatement," rather than acknowledging that it

was untrue, and continued to insist that the "mix up" she referred to in the e-mail "was the one where my clerk initially applied." Simply put, Judge MacEachern's purported acceptance of responsibility is too little too late.

4. *Likelihood of Future Misconduct*

**(12)** "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Platt, supra*, No. 162 at p. 15 [48 Cal.4th CJP Supp. at p. 248]; see *Ross, supra*, No. 174 at p. 65 [49 Cal.4th CJP Supp. at p. 139].) With this in mind, it bears repeating that Judge MacEachern fails to acknowledge that the essence of her wrongdoing lies not in her arrogance, but in her dishonesty. Even at her appearance before the commission, she continued to make misrepresentations. This leaves us with no confidence in her ability to reform.

After going through these proceedings, it is unlikely that Judge MacEachern would again jeopardize her career by submitting a false travel voucher if she remained on the bench. However, we are concerned that the traits and lack of judgment that led to the misconduct in this case could lead to future improper actions demeaning to the esteem of the judiciary. This is a risk we cannot run and still fulfill our responsibility to protect the public and the reputation of the judiciary.

5. *Prior Discipline*

**(13)** Judge MacEachern has not previously been disciplined during her five years on the bench. Nevertheless, the seriousness of the judge's misconduct and subsequent lack of candor overshadow her lack of prior discipline.

6. *Impact on Judicial System*

Judge MacEachern attempts to portray her misconduct as personal, having no impact on the judicial system because it did not relate to a case before her. We could not disagree more.

**(14)** Public faith in the integrity of the judicial system is seriously compromised by a judge who attempts to obtain money from the government through false pretense. Court staff must be able to rely on the truthfulness of information provided by judicial officers. Judges uphold laws which require citizens to provide truthful information for purposes of obtaining funds from the government. A judge must follow and respect the same laws and standards that apply to the public.

**(15)** Moreover, a judge who lies under oath when her conduct is called into question does grave damage to public respect for the judiciary. Litigants and attorneys can have little confidence in that judge's ability to determine the credibility of witnesses and seek the truth. Any discipline short of removal would not be adequate to fulfill our mandate to uphold public confidence in the integrity and propriety of the judiciary.

C. *Mitigation*

In testimony and letters admitted at the hearing before the masters, numerous character witnesses, including attorneys and fellow judges, described Judge MacEachern as a conscientious, knowledgeable, and fair jurist. Based on this evidence, the masters found in mitigation that Judge MacEachern "is well-known for being a hardworking and ethical judge." Judge MacEachern argues that the high regard to which she is held in her community weighs heavily against removal.

**(16)** Mitigating evidence is not relevant in determining if the judge engaged in bad faith, and thus engaged in willful misconduct, but may be taken into account in determining the totality of the circumstances as pertinent to determining the appropriate discipline. (*Freedman, supra*, No. 179 at p. 7 [49 Cal.4th CJP Supp. at p. 232]; *Broadman, supra*, 18 Cal.4th at p. 1112.) We have considered the character evidence offered by Judge MacEachern on the question of discipline, which has made our task all the more difficult. However, her reputation in the community cannot redeem the seriousness of her wrongdoing and its negative impact on the reputation of the judiciary.

## ORDER REMOVING JUDGE MacEACHERN FROM OFFICE

Pursuant to the provisions of article VI, section 18 of the California Constitution, Judge Kelly MacEachern is ordered removed from her judicial office; pursuant to that section of the Constitution and rules 120(a) and 136 of the Rules of the Commission on Judicial Performance, Judge MacEachern is hereby disqualified from acting as a judge.

Commission members, Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Marshall B. Grossman, Mr. Samuel A. Hardage, Ms. Barbara Schraeger, Ms. Maya Dillard Smith, and Mr. Nathaniel Trives voted in favor of all of the findings and conclusions expressed herein and in the foregoing

order of removal and disqualification of Judge MacEachern. Commission members Mr. Peter E. Flores, Jr., Mr. Lawrence Simi, and Ms. Sandra Talcott concur as to the factual findings and legal conclusions expressed herein, but dissent as to the order of removal and would have imposed a severe public censure.

Hon. Frederick P. Horn was recused.

## DISSENTING OPINION

Commission members Lawrence Simi, Peter Flores, Jr., Esq., and Sandra Talcott express the following opinion.

We fully concur with the special masters and our colleagues on the commission in the findings of fact and conclusions of law in the case of Judge Kelly MacEachern.

Judge MacEachern, by submitting a false claim for reimbursement, violated the California Code of Judicial Ethics, amounting to willful misconduct within the meaning of article VI, section 18, subdivision (d) of the California Constitution. She then compounded that conduct before the commission, and, under oath, the panel of special masters, by her defensive, disingenuous lack of candor and her misleading attempts to excuse her conduct.

Our difference of opinion with our colleagues rests only with the level of discipline. Judge MacEachern has not previously exhibited patterns of behavior that lead us to believe she would repeat the grave mistakes she made in this case. Based on the special masters' factors in mitigation concerning the judge's reputation in the community, and the many personal letters of support, it is clear to us that Judge MacEachern's integrity and honesty as a jurist and former deputy district attorney are well known in the community and she is known to be a hard-working and ethical judge. Additionally, as the masters also set forth in mitigation, Judge MacEachern has never previously been disciplined. Her conduct in this case, we believe, was an isolated instance of wrongdoing.

At the public hearing before the commission, Judge MacEachern acknowledged her mistakes, took responsibility for them, and expressed remorse. We believe she was sincere. We feel that this experience has made an indelible impression on a judge who, heretofore, has had a good reputation as an honest, hard-working bench officer. The fact that she has demonstrated remorse and contrition, and that this offense does not directly relate to court proceedings, nor affect nor harm litigants, has added weight to our decision.

Removal is the ultimate sanction for a judge. We do not feel this one-time error in judgment and behavior, albeit highly egregious, rises to that level. We therefore voted to impose a severe public censure, rather than remove Judge MacEachern from the bench.

The judge's petition for review by the Supreme Court was denied on December 10, 2008.

[No. 190. Jan. 11, 2012.]

# INQUIRY CONCERNING JUDGE RICHARD W. STANFORD, JR.

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance ordered that the judge be removed from office for willful misconduct involving a pattern of handling traffic tickets for family and friends and providing unusually lenient dispositions. Although he was assigned to a criminal felony department that did not ordinarily handle traffic tickets, he arranged for the citations to be transferred to his department and then directed his clerk to waive all fines except a mandatory county traffic school fee. The judge testified that when he was adjudicating the tickets of friends and family, it did not occur to him that his actions were improper. The commission declined to accept the masters' finding as to the judge's state of mind, concluding the judge could not have failed to recognize the impropriety of using the power of his judicial office to help his friends and family. Moreover, the judge had no reasonable basis for believing that his family and friends would have received the same outcome had they appeared in traffic court. The commission concluded that the judge committed willful misconduct (Cal. Const., art. VI, § 18, subd. (d)) and that he committed multiple ethical violations (Cal. Code Jud. Ethics, canons 1, 2A, 2B(1) 3B(7), 3E(1), 3E(2)). The commission concluded that the judge's exceptional contributions to his court and his community were eclipsed by a pattern of misconduct involving abuse of the power of judicial office by providing benefits to the favored few.

## HEADNOTES

**(1) Judges § 6.4—Discipline—Proceedings—Findings of Masters.**—The examiner has the burden of proving charges against a judge by clear and convincing evidence. Factual findings of the masters are entitled to special weight because the masters have the advantage of observing the demeanor of the witnesses. Nonetheless, the California Constitution vests in the Commission on Judicial Performance the power to impose judicial discipline, subject to review by the California Supreme Court. Thus, the commission may determine that it is appropriate to disregard the findings of fact and conclusions of law made by the special masters and make its own findings and conclusions.

**(2) Judges § 6.2—Discipline—Grounds—Ticket Fixing.**—Members of the public know instinctively that a judge should not handle traffic tickets of family and friends. Common experience and common sense indicate that ticket fixing is a quintessential bad act of a judge. It is an abuse of power that citizens unquestionably understand and are suspicious about. The impropriety of adjudicating the traffic tickets of friends and family is no less transparent when fines and fees are waived than when the ticket is dismissed. The vice in a two-track system of justice does not turn on whether there was a classic ticket fix in the sense of a dismissal of a ticket, but rather, in the damage to the reputation of the judiciary from the double standard.

**(3) Judges § 6.4—Discipline—Proceedings—Findings of Masters.**—The Commission on Judicial Performance retains the authority to override the factual findings of the special masters, even on matters of credibility.

**(4) Judges § 8—Duties—Familiarity with Legal Standards.**—Judges should not issue orders in any cases where they are unfamiliar with the legal standards (Cal. Code Jud. Ethics, canon 3B(2)).

**(5) Judges § 6.4—Discipline—Proceedings—Mitigating Evidence.**—Mitigating evidence is not relevant in determining if a judge acted in bad faith, and thus engaged in willful misconduct, but may be taken into account in determining the totality of the circumstances as pertinent to determining the appropriate discipline.

**(6) Judges § 6.2—Discipline—Grounds—Willful Misconduct—Favoritism.**—Willful misconduct is the most serious type of judicial misconduct. The use of the power of judicial office to benefit a friend is a casebook example of willful misconduct. It is defined by the California Supreme Court as consisting of (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity.

**(7) Judges § 6.2—Discipline—Grounds—Willful Misconduct—Noncompliance with Ethical Canons.**—Failure to comply with the canons of the California Code of Judicial Ethics is generally considered to constitute unjudicial conduct.

**(8) Judges § 6.2—Discipline—Grounds—Favoritism.**—Cal. Code Jud. Ethics, canons 1, 2, 2A, 2B(1), require a judge to uphold the integrity and independence of the judiciary and avoid the appearance of impropriety and favoritism. The integrity and independence of judges depend in turn upon their acting without fear or favor. Where a judge's special attention is conferred only on a favored few, the integrity of the judicial office is thereby seriously impaired. Such actions undermine public confidence in the judiciary and call into question the fundamental fairness of the judicial process.

**(9) Judges § 8—Duties—According Right to Hearing.**—In addition to prohibiting ex parte communications, Cal. Code Jud. Ethics, canon 3B(7), requires a judge to accord to every person who has a legal interest in a proceeding, or the person's lawyer, a full right to be heard according to law.

**(10) Judges § 8—Duties—Avoiding Improper Communications—Absence of Prosecuting Attorney in Traffic Cases.**—Where the district attorney's nonappearance policy in traffic court is limited to matters legitimately before the court, a judge violates canon 3B(7) by failing to accord the district attorney the opportunity to be heard in the disposition of traffic matters for the judge's friends and family outside of the normal course of business. It is not necessary for district attorneys to advise judicial officers that they are not consenting to communications with litigants that by definition are improper, e.g., out of court at a judge's house, or through an intermediary. Even in those cases in which a judge is hearing traffic cases within the normal course of business, the judge must be most circumspect in avoiding an appearance of lack of impartiality. The absence of a prosecuting attorney makes it all the more important that the court at such trials use the utmost care to preserve not only the reality but the appearance of fairness and lack of bias.

**(11) Judges § 6.2—Discipline—Grounds—Willful Misconduct—Bad Faith.**—The second element of willful misconduct is bad faith. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

**(12) Judges § 6.2—Discipline—Grounds—Willful Misconduct—Limitations.**—A judge may be censured or removed for willful misconduct occurring not more than six years before the start of his or her current term (Cal. Const., art. VI, § 18, subd. (d)).

**(13) Judges § 6.2—Discipline—Grounds—Ticket Fixing—Determining Appropriate Discipline.**—Determining the appropriate discipline depends in large measure on the nature and number of charges found to be true. The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern that demonstrates that the judge lacks judicial temperament and the ability to perform judicial functions in an evenhanded manner. Giving preferential treatment to friends and family in traffic matters manifestly demonstrates an inability to perform judicial functions in an evenhanded manner. The gravamen of the wrongdoing is the two-track system of justice—one for those with special access to the judge, and the other for everyone else. The nub of the problem is the appearance or reality that Lady Justice is not blindfolded. Rather than justice being dispensed with an even hand without regard to who is before the court, the judge has lifted the blindfold, and seeing a relative or friend or some person with influence, the judge tips the scale and puts them on a special track for favored handling. This is corruption at the core of our system of impartial equal justice, and is intolerable.

**(14) Judges § 6.2—Discipline—Grounds—Ticket Fixing—Determining Appropriate Discipline.**—The Commission on Judicial Performance recognizes the gravity of the misconduct by imposing the maximum discipline on judges who have engaged in a pattern of providing preferential treatment to family and friends in the adjudication of traffic matters.

**(15) Judges § 6.4—Discipline—Proceedings—Determining Appropriate Discipline—Factors.**—A factor considered in determining the appropriate discipline is whether the judge's conduct and his response to the Commission on Judicial Performance's inquiry reflect a lack of integrity or dishonesty. The commission also considers whether a judge appreciates the impropriety of his actions as being indicative of a capacity to reform.

**(16) Judges § 6.4—Discipline—Proceedings—Determining Appropriate Discipline—Factors—Corrupt State of Mind Not Prerequisite to Removal.**—A judge's state of mind is not the determining factor on the issue of discipline because a failure to recognize the impropriety of obviously unethical conduct necessarily raises the correlated concern that he may continue to miss other such issues in the future. Moreover,

proof of a corrupt state of mind is not a prerequisite to removal. The purpose of the Commission on Judicial Performance's judicial discipline proceedings is not to punish the judge, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. Adherence to these objectives may require removal regardless of the judge's state of mind. The public deserves protection from judges who commit serious misconduct regardless of whether the conduct is the result of malice or ignorance.

**(17) Judges § 6.2—Discipline—Grounds—Ticket Fixing—Removal of Judge Necessary.**—A judge had made exceptional contributions to his court and his community, and his prior discipline over a long tenure on the bench had been limited to one advisory letter. These facts, however, were eclipsed by a pattern of misconduct in which the judge repeatedly abused the power of his judicial office by providing benefits to the favored few not available to other citizens, when the judge adjudicated traffic tickets of his friends and family and waived their fines and fees. His removal was necessary to assure the public that a two-track system of justice and the dispensation of special favors by judges have no place in California.

[Cal. Forms of Pleading and Practice (2011) ch. 317, Judges, § 317.85.]

**(18) Judges § 6.2—Discipline—Grounds—Favoritism—Determining Appropriate Discipline.**—With respect to a pattern of misconduct consisting of a two-track system of justice and the dispensation of special favors by judges, it is the duty of the Commission on Judicial Performance to denounce the misconduct in no uncertain terms and to sanction it as the grave ethical violation that it is, in the commission's best effort to ensure evenhanded justice, starting at the very point of access to the judge.

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## OPINION

**McCONNELL, Chairperson.—**

## I

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Richard W. Stanford, Jr., a judge of the Orange County Superior Court since 1998, and a judge of the Orange County Municipal Court from 1985 to 1998. The Commission on Judicial

Performance commenced this inquiry with the filing of its notice of formal proceedings (Notice) on April 7, 2011.

The Notice charges Judge Stanford with a pattern of diverting to his own court and acting on traffic tickets on behalf of his son-in-law, friends, and a juror over a seven-year period, between 2003 and 2010. It alleges that he improperly waived or suspended all or practically all fines and fees in eight cases and granted a continuance, outside of the ordinary course of business, in one case.

The Supreme Court appointed three special masters to hear and take evidence and report to the commission under commission rule 129. (All references to a rule are to the Rules of the Com. on Jud. Performance.) The masters are Hon. Maria P. Rivera, Associate Justice of the Court of Appeal, First Appellate District; Hon. Donald Cole Byrd, Judge of the Glenn Superior Court; and Hon. Jacqueline A. Connor, Judge of the Los Angeles Superior Court.

The masters held a three-day hearing commencing on July 25, 2011, followed by an oral argument on September 16, 2011. The masters' report to the commission, containing their detailed findings of fact and conclusions of law, was filed with the commission on October 7, 2011. Judge Stanford appeared before the commission pursuant to rule 132 on December 7, 2011.

The masters concluded that Judge Stanford engaged in nine instances of willful misconduct over a seven-year period constituting a common practice of handling traffic tickets for friends and family. We reach the same conclusion, although we base our decision to remove Judge Stanford only on the seven instances of willful misconduct which occurred within six years of the start of the judge's current term. (Cal. Const., art. VI, § 18, subd. (d).) This pattern of misconduct between 2005 and 2010 created both the appearance and the reality of a two-track system of justice—one for his friends and family and another for all others. Removal is necessary to restore public confidence in the integrity and impartiality of the judiciary and honor the commission's mandate to ensure the evenhanded administration of justice.

Judge Stanford is represented by Paul S. Meyer, Esq., of Costa Mesa, California. The examiners for the commission are Gary W. Schons, Esq., and Valerie Marchant, Esq.

## II

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *Findings of Fact*

**(1)** The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).) Factual findings of the masters are entitled to special weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Ibid.*) "Nonetheless, the California Constitution vests in the Commission the power to impose judicial discipline, subject to review by the Supreme Court. Thus, the Commission may determine that it is appropriate to disregard the findings of fact and conclusions of law made by the special masters and make its own findings and conclusions." (*Inquiry Concerning Harris* (2005) 49 Cal.4th CJP Supp. 61, 67; see *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].)

The masters found that each of the nine incidents of misconduct charged in the Notice was proven by clear and convincing evidence. We concur and adopt the masters' findings of fact on the charges, and on the meeting with the presiding judge and subsequent events as stated below. Judge Stanford does not dispute these findings. The masters made certain other findings on matters not charged in the Notice concerning Judge Stanford's state of mind. As discussed below, we reach our own independent factual findings on those issues based on Judge Stanford's appearance before the commission and our review of the entire record of the hearing before the masters. Finally, we adopt the findings of the masters with respect to the judge's contributions to the administration of justice and his community.

### The Traffic Citation Process in Orange County Superior Court

After a person is cited for a moving traffic violation, law enforcement files the citation with the court. A standard courtesy notice is issued within days of the ticket being filed in court. The courtesy notice provides information about the fees and procedures for traffic tickets and lists the total bail amount (the base fine plus any applicable penalty assessments and relevant fees), as well as the traffic school fee if the person is eligible (which is the total bail amount plus an in-county traffic school fee). The courtesy notice also describes the procedure to follow to either pay the ticket or arrange for traffic school. Both can be accomplished without appearing at the courthouse by payment of the full bail amount and, if applicable, the traffic school fee.

A person who does not want to pay the total bail amount can either make a personal appearance in traffic court or write in to request a reduction of the fines and fees, although these options are not explained in the courtesy notice. A person who wants to contest the ticket can either request a court trial or a trial by declaration.[1]

## The Charges

1. *Count 1(A): Pennell*

In 2003, Judge Stanford was presiding over a criminal trial in which George Pennell was a juror. Pennell arrived late one day because he had been stopped and cited for speeding. Judge Stanford had emphasized to the jurors the importance of arriving on time. The judge testified, "I felt bad for the guy and here I am chewing on him. And in his mind, I'm the reason he got his traffic ticket to begin with, which is not really fair . . . . He's doing his civic duty." In open court, Judge Stanford offered to either suspend the fines or order traffic school with payment of only the county fee. Pennell chose traffic school.

Judge Stanford was assigned to a criminal felony department during this and all of the proceedings that are the subject of this inquiry. Traffic tickets are not handled in his department unless they are trailing a criminal proceeding that is set in his department. In this instance, Judge Stanford or his clerk (presumably at his direction) monitored the court's records for the ticket. The judge directed that Pennell's citation be transferred to his department when it entered the system in August 2003. He then directed his clerk to waive all fines except the traffic school fee of $51.50. According to Judge Stanford, the county traffic school fee is mandatory.

In September 2003, Pennell paid the county fee and was provided a traffic school notice. This is in contrast to a ticket he received in 2007, when he attended traffic school and paid the total bail amount of $305. The clerk who processed Pennell's payment in 2003 did not recall ever seeing anyone else attending traffic school who paid only the county fee. Such a circumstance is "extremely rare and out of the ordinary."

Although the minutes describe the proceeding as "Hearing Held for Arraignment," there was no arraignment and Pennell did not appear.

[1] The findings in this paragraph were not included in the masters' report. They are supported by clear and convincing evidence presented at the hearing, particularly the testimony of Cherie Garofalo, the director for criminal operations (including traffic) in Orange County Superior Court.

2. *Count 1(B): Mooney*

Mary Ann Mooney met Judge Stanford and his family when they were neighbors. They attended the same church. The judge's wife socializes with Mooney's daughter-in-law "somewhat." Judge Stanford and Mooney's son were fraternity brothers in college.

Mooney received a ticket in 2005 for impeding traffic. She was upset because she did not think she deserved the ticket. Judge Stanford learned about the ticket through someone other than Mooney, probably from his wife. The judge explained that he felt moved to assist Mooney, who was 82 years old at the time, because he believed she was frail and in ill health. Mooney's family, however, stated Mooney was neither sick nor frail at the time and was generally very capable. Judge Stanford testified that she appeared frail to him when he saw and talked to her at church on Sundays. When asked why he did not advise Mooney to request a trial by declaration to avoid a trip to court, the judge simply answered he "didn't think of it." Judge Stanford conceded that he also was motivated to help her because she was upset about the ticket.

Judge Stanford could not recall if he communicated his offer of assistance to Mooney. The masters found, based on the totality of the testimony, that Judge Stanford handled the ticket based on hearsay information from his wife. We concur.

In December 2005, the ticket was transferred to Judge Stanford's department. At the judge's direction, his clerk entered a disposition of guilty with all fees and fines suspended. Mooney did not appear. The minutes state the court found "compelling and extraordinary circumstances" to waive the $20 security fee. There is not clear and convincing evidence that Judge Stanford made such a finding. Rather, the evidence establishes that it was entered by the clerk to effectuate Judge Stanford's directive that no fines or fees be paid (certain fees cannot be waived without specific findings). Judge Stanford testified that it was possible he consented to the entry when he was told by his clerk that it was necessary. The clerk entered the disposition as "chambers work" because the judge's notes came out of chambers for her to enter.

3. *Count 1(C): Williams*

Edwin Williams has been a pastor at Judge Stanford's church since 2000. He and the judge are good friends. They see each other regularly at church services and in connection with the Good Samaritan Center, a church-run homeless ministry where Judge Stanford volunteers. They also play tennis together regularly at Judge Stanford's home. Williams's daughter held her wedding reception at the judge's home.

(a) *The 2003 Ticket*

In October 2003, Williams received a ticket for failing to stop at a red light. The total bail, excluding the traffic school fee, was $326. Williams discussed the ticket with Judge Stanford who told Williams he would suspend all the fines except the traffic school fee if Williams wanted to plead guilty. Judge Stanford explained that he offered his assistance because Williams was living on a pastor's salary with four children and, "probably could use the money. Nothing specific . . . He could have paid it. I just felt sympathy for him."

In November 2003, a traffic clerk transferred the citation to Judge Stanford's department for arraignment at the request of "a woman" on the telephone. The clerk described this as "very awkward" because Judge Stanford's court was a felony department. Some days after the transfer, Judge Stanford's clerk entered a disposition waiving all fines and fees except the $52 county traffic school fee.

(b) *The 2006 Ticket*[2]

In March 2006, Williams was cited for speeding, driving 54 mph in a 45 mph zone. He was upset because he thought the speed written on the ticket was different from what the officer had told him. Williams wanted to get the judge's opinion regarding his chances of successfully contesting the ticket. When Williams raised the matter, the judge offered to take care of it. Williams could not recall what the judge said about how the ticket would be handled but, as a result of the 2003 experience, his sense was that the fines and fees would be waived. Williams believes he placed a copy of the ticket in the judge's box at the church office.

A courtesy notice was sent to Williams indicating a total bail amount of $216 and a bail-plus-traffic-school-fee amount of $269.50. A week later, Judge Stanford ordered traffic school and waived all fines and fees except the $53.50 county traffic school fee. The clerk entered the disposition as "chambers work." Williams did not appear in court.

The traffic clerk who processed Williams's payment of the traffic school fee could not recall having ever seen another order for traffic school in which all fines and fees, other than the county traffic school fee, had been waived.

[2] In 2005 Williams received a speeding ticket. He did not discuss that ticket with Judge Stanford and paid the fine of $178.50.

4. *Count 1(D): Gonzales*

Gina Gonzales became Judge Stanford's clerk in 1994. She considers the judge and his wife as friends and knows their children and their son-in-law. She has attended church teas with the judge's wife and staff holiday lunches at the judge's home.

In May 2006, Gonzales was cited for failure to stop at a stop sign. She was not eligible for traffic school because of a prior ticket. Gonzales was upset about the ticket because she believed she had stopped and because of the cost of the ticket. When she discussed the matter with Judge Stanford, he offered to suspend her fine if she was willing to plead guilty. Judge Stanford testified that he made the offer because he thought it would be awkward for Gonzales to go downstairs to traffic court, that she might need time off to go down there, and that "it would be easier for me to do it for her."

The courtesy notice, sent in June, listed the total bail of $141. In August, Judge Stanford directed that a guilty plea be entered and all fines and fees suspended. Gonzales asked Jennifer Londo, a fill-in clerk, to enter the disposition because clerks are not permitted to enter minutes in their own case. Londo indicated that she did not interact with Judge Stanford about the matter but was given something in writing indicating the disposition to enter. Judge Stanford testified that he "must have" talked to Londo, or that he was "sure he would have" but he had no specific recollection of the conversation. The masters found there was no conversation between Judge Stanford and Londo. We concur.

Londo thought it would be "weird" to enter the matter as chambers work, so she entered it into the minutes as a "Hearing Held for Arraignment" and indicated that Gonzales had appeared and waived her rights. In fact, the judge never took the bench in this matter and there was no appearance or hearing.

5. *Count 1(E): Neilson Construction*

David Neilson is the owner of Neilson Construction and has been a friend of Judge Stanford for over 30 years.

In December 2006, the driver of a vehicle registered to Neilson Construction was cited for driving an overweight vehicle. The driver signed a promise to appear in court on or before January 31, 2007. Neilson contacted Judge Stanford about obtaining an extension of time to appear on the citation. He told the judge that the driver had not told him about the ticket until the day before the promise-to-appear date and that he was going to be out of town on

January 31. Judge Stanford offered to get an extension for Neilson. After getting the extension, Judge Stanford informed Neilson of the new date.

6. *Count 1(F): Andrews*

Heidi Andrews has known Judge Stanford for nearly 25 years and is a good friend of the judge's wife. In April 2007, Andrews was cited for speeding on the street where the Stanfords live while en route to visit the judge's wife. Neither Andrews nor Judge Stanford could recall whether they spoke about the ticket. The masters found, as do we, that there was no such conversation. It is unclear how it was determined that Judge Stanford would handle Andrews's ticket. Andrews testified, "it was just, for . . . lack of a better word, just sort of this is what happened, and it was able to be taken care of. And I thought, 'Okay,' and I didn't think any more about it." Judge Stanford testified that he wanted to help Andrews because the speed limit on his street had recently changed and he felt bad for her.

The standard courtesy notice was sent to Andrews on May 10, 2007. The total bail amount was $248.50. On May 17, Judge Stanford ordered entry of a guilty plea and suspended sentence, waiving all fees. The minutes state that Andrews "appeared via phone," but neither the judge nor his clerk had any recollection of a telephonic appearance. Cherie Garofalo, the director of criminal operations (which includes traffic), could not recall ever seeing an appearance by telephone in a traffic matter. The masters found there was no telephonic appearance. We concur.

7. *Count 1(G): Habbestad*

Greg Habbestad knows Judge Stanford through the volunteer work they have done together at the Good Samaritan Center for more than 15 years. Habbestad attended annual barbecues for the ministry at the judge's home and once attended a baseball game with him. He is an aerospace engineer at Boeing.

In September 2009, Habbestad received a citation for speeding, going 56 mph in a 40 mph zone. The courtesy notice was sent on November 2, indicating a total bail amount of $332. In November, the judge and Habbestad were working at Good Samaritan Center when other volunteers were having a conversation about traffic tickets. Habbestad mentioned he had received a ticket and expressed surprise about how expensive the fine was. After the center closed and the other volunteers had left, Judge Stanford told Habbestad that he would take care of the ticket so Habbestad did not have to go to court and could pay a lower fine.

Sometime later, Habbestad provided the judge with a copy of the courtesy notice. Judge Stanford thereafter directed his clerk to enter a disposition of

traffic school, with all fines and fees waived other than the $51 county traffic school fee. There was no appearance. The matter was entered in the minutes as "chambers work." The minutes also included a finding of compelling and extraordinary circumstances for waiver of the assessment and security fees. The judge's clerk testified that the entry was not made at the judge's direction; rather, it was a code she entered in order to effectuate the judge's directive to waive those fees.

Judge Stanford delivered the documentation to Habbestad who then went to court and paid the $51. The traffic clerk who took the payment does not recall ever seeing "someone get traffic school without any payment other than the county fee," but she would not have questioned a disposition by a judge. Habbestad told his wife and other friends, including a police officer, that the judge helped him with the ticket.

8. *Count 1(H): McGee*

Michael McGee is Judge Stanford's son-in-law; he is married to the judge's daughter Laurie. In March 2010, McGee received a ticket for running a red light. McGee believed he had entered the intersection on a yellow light. He talked to his wife about getting Judge Stanford's advice about whether he should fight the ticket. Laurie told McGee she would talk to her father or ask her mother to talk to her father. Laurie either left the ticket for her mother with a note or gave it to her mother. Laurie never spoke directly with her father about the ticket.

Sometime later, McGee and Judge Stanford had a conversation about the ticket. They discussed McGee's options of either contesting the ticket or attending traffic school. At some point, Judge Stanford told McGee that he would process the ticket, but he would not be able to help him with future tickets. McGee does not remember the exact words used, but recalled the judge saying he would let McGee know if there was anything else McGee needed to do.

A courtesy notice was sent on April 12, indicating a total bail amount of $456, and a bail-plus-traffic-school-fee amount of $496. On May 3, Judge Stanford provided written directions for his clerk, Gonzales, to enter a disposition for traffic school with all fines suspended except for the county traffic school fee. When Gonzales recognized the defendant as the judge's son-in-law, she went to the judge's chambers and told him she could not enter minutes for someone she knew. She asked Judge Stanford whether he would like her to give it to her supervisor to assign to someone else to enter the minutes and the judge responded "yes."

Gonzales gave the written disposition to her supervisor and explained that she could not enter it into the system because she knew the defendant. The

supervisor asked another clerk to enter the disposition. The supervisor also reported the matter to the deputy court operations manager who determined the clerk should not enter the disposition. Meanwhile, the clerk had independently declined to enter the disposition upon learning that McGee was the judge's son-in-law and reported the interactions to the deputy court operations manager. At this point, the matter was referred to Judge Stanford's superiors.

## Meeting with Presiding Judge and Subsequent Handling of the McGee Ticket

When Presiding Judge Kim Dunning learned that Judge Stanford had attempted to enter a disposition in his son-in-law's traffic matter, she arranged a meeting with him for the following morning. Prior to the meeting, Judge Dunning was provided with a list of traffic infractions handled by Judge Stanford, which included the dispositions at issue in this case. Some of the tickets where fines and fees had been waived were highlighted by staff, but the list was not accompanied by minutes or other information detailing the dispositions.

The meeting which took place in Judge Stanford's chambers was attended by Judge Dunning, Assistant Presiding Judge Thomas Borris, and Judge Stanford. Judge Dunning told Judge Stanford "you can't do this," and explained the need for disqualification and the appearance of impropriety created by the judge's conduct. Judge Stanford explained that he did not think it was unusual for a traffic defendant who came to court to have fines and fees reduced or eliminated. Judge Dunning responded that you "can't handle cases for family members," and further explained that traffic tickets are not as simple as they used to be, and that fiscal issues in 2010 have impacted the collection of fines and fees. During the meeting, Judge Stanford was "receptive and cooperative." He was not defensive or argumentative, but appeared embarrassed and humiliated. It was Judge Dunning's impression that Judge Stanford "missed the issue," and that "a light bulb went on" during the meeting. Judge Stanford admitted his actions in the McGee matter and volunteered that he had taken similar actions in the past. Because of this admission, Judge Dunning did not show Judge Stanford the list of other traffic matters he had handled nor ask him about any of the cases on the list. Judge Stanford did not disclose that he had handled a ticket for his courtroom clerk, nor did he offer specifics about his assistance to other friends.

Judge Dunning informed Judge Stanford that she expected McGee's ticket to be paid in full. Judge Dunning did not articulate how the matter should be resolved other than that there must be an immediate payment of the full fines and fees. She recalls Judge Stanford saying that he would write the check.

After the meeting, Judge Stanford gave Barbara Burns, the deputy court operations manager, a personal check for $456, the total bail amount of McGee's ticket, and the "Court Information Sheet" (CIS) for the ticket. Despite having been counseled about the impropriety of entering a disposition in his son-in-law's case, Judge Stanford crossed out the earlier disposition on the CIS and wrote instead: "T.S. Fines & fees pd Today $456, sign & pay TS fee by 5/28/10. RWS." He asked Burns to enter the new disposition. A traffic clerk subsequently entered the payment and the indicated extension of time to pay the traffic school fee. Burns gave Judge Stanford a receipt and a document which reflected the extension. The judge did not inform McGee of the disposition of his ticket or of the May 28 deadline to pay the county traffic school fee.

Judge Dunning testified that she did not expect Judge Stanford to order a disposition in his son-in-law's matter after their meeting. She decided at the meeting that the ticket had to be handled by someone else. However, she went on to state, "I have to take responsibility for this because I didn't articulate [how the matter was to be handled]."

## Judge Stanford's State of Mind

1. *Did Judge Stanford know his conduct was wrong at the time he acted?*

Judge Stanford testified that when he was adjudicating the tickets of friends and family it did not occur to him that his actions were improper, that he simply "missed" the conflicts and appearance issues, and had a "blind spot" which prevented him from thinking about the impropriety of his actions. Consciousness of wrongdoing is not charged in the Notice and is not an element of willful misconduct in the context of this case. Nevertheless, the judge urged the masters to find that he did not realize his actions were unethical until he was confronted by the presiding judge. While recognizing "[t]hat a seasoned judge would miss the issue does seem implausible," the masters were "not persuaded that he [(Judge Stanford)] *could not have* failed to recognize the conflict of interest and the appearance of impropriety it created. Many who have known Judge Stanford for years have testified that, yes, he could have—and did—miss the issue. We cannot simply disregard this mass of evidence as 'wishful thinking' and conclude it was not possible." (Original italics.) We respectfully decline to adopt this finding and, instead, find that Judge Stanford recognized the impropriety of his conduct when he provided preferential treatment to friends and his son-in-law in traffic matters.

As the masters note, numerous fellow jurists testified and submitted letters attesting to Judge Stanford's integrity and opining that he would not have

handled the tickets of friends and family if he had known it was wrong. During her meeting with Judge Stanford, Judge Dunning was of the impression that the judge had "missed" the issue, and that "a light bulb" had gone on when confronted with the impropriety of his conduct. It is not surprising that those who know and respect Judge Stanford would have difficulty reconciling their view of the judge's integrity with his having knowingly engaged in unethical conduct. However, even if the judge's misconduct was an aberration or motivated by his proclivity to help others, we find it implausible that Judge Stanford was entirely unconscious of the impropriety of his actions when he handled the traffic tickets of family and friends.

Judge Stanford's 26 years on the bench, long career as a prosecutor, and reputation as a "by-the-book" judge who does not "cut corners" and is knowledgeable, diligent and follows the law negates any possibility that he missed the issue. Fellow judges to whom the question was posed on cross-examination acknowledged that they would not have missed the issue. Many of those who submitted letters and testified as to the judge's good character acknowledged the apparent impropriety and gravity of the judge's conduct ("disturbing," "serious breach of ethical duties," "shocks and disappoints me," "indefensible").

Significantly, Gina Gonzales, the judge's clerk, did not "miss the issue" when asked to enter the disposition for Judge Stanford's son-in-law. She knew immediately that she could not handle a case involving someone she knew and told the judge so. Yet, according to Judge Stanford, even this did not alert him to the impropriety of handling his son-in-law's ticket.

**(2)** Members of the public know instinctively that a judge should not handle traffic tickets of family and friends. We have previously noted that common experience and common sense indicate that " 'ticket fixing is a quintessential bad act of a judge. It is an abuse of power that citizens unquestionably understand and are suspicious about.' " (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 233 (*Platt*).) Judge Platt was charged with instructing his clerk in four cases to transfer to his court a speeding ticket issued to a friend or relative of a friend or acquaintance, and then dismissing the ticket without an appearance. The judge testified that, although he later realized that dismissing the tickets was wrong, he did not perceive any legal or ethical problem at the time he handled the tickets. The masters concluded that Judge Platt's explanation for dismissing the ticket and his claim that he did not realize at the time his action was wrong were " 'after-the-fact rationalizations which lack credibility.' " Citing Judge Platt's reputation as a careful decision maker with a good knowledge of the law, the commission concurred with the masters' finding that " 'it is inconceivable he did not know the obvious, that ticket fixing was wrong . . . .' " (*Ibid.*) Judge Platt was removed from office.

The impropriety of adjudicating the traffic tickets of friends and family is no less transparent when fines and fees are waived than when the ticket is dismissed. (*Inquiry Concerning Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 49–50, 51 (*Wasilenko*).) As we stated in *Wasilenko*, the vice in a two-track system of justice does not turn on whether there was a classic ticket "fix" in the sense of a dismissal of a ticket, "but rather, in the damage to the reputation of the judiciary from the double standard." (*Id.* at p. 49.)

**(3)** We are mindful that the masters found Judge Stanford to be a credible witness and that the factual findings of the masters are entitled to special weight. However, this commission retains the authority to override the factual findings of the special masters, even on matters of credibility. (See, e.g., *Broadman, supra*, 18 Cal.4th at p. 1090.) In this case, commission members had the opportunity to question Judge Stanford extensively concerning his state of mind and observe his demeanor at his appearance before the commission. The judge acknowledged that he has attended judicial ethics education programs and has looked at summaries of cases involving ticket fixing. Yet, he was unable to offer any introspection as to how he could have missed the obvious. When asked why he handled tickets for friends and family, he responded, "In an effort to help people that I knew in situations that, at the time, seemed like an appropriate thing to do, to help the individuals." We simply do not believe that Judge Stanford failed to recognize the impropriety of using the power of his judicial office to help his son-in-law and his friends.

When asked if he would have recused if his son-in-law had a case assigned to his courtroom, Judge Stanford stated that the issue would have been obvious in open court with "people standing in front of you." We believe the issue was just as obvious to Judge Stanford in the cases before us, but that his failure to recuse was easier to conceal when people were not standing in front of him. While insisting that he was oblivious to the impropriety of his actions, Judge Stanford acknowledged that he agreed with his character witnesses who testified that the issue was so obvious they did not see how anybody would miss it. Judge Stanford did not miss the issue, he ignored the issue.

2. *Was it reasonable to believe that suspension of all fees and fines was a common practice in traffic court?*[3]

Judge Stanford testified he believed that waiving or suspending all fees and fines was a regular practice in traffic court. His understanding was based on

[3] In our discussion of this issue, we exclude Judge Stanford's action on the Neilson ticket which involved only an extension of time to appear—something Neilson could have obtained in the ordinary course of business.

his own experience in occasionally covering traffic court and night court 15 to 20 years ago. He testified he also based his belief about standard traffic dispositions on occasional conversations with traffic commissioners; however, he could not provide any specifics about those conversations. The judge admitted he did not make inquiries about the current practices in traffic court at the time he was adjudicating the tickets at issue. The masters found "that the judge's belief he was acting within the mainstream of traffic citation outcomes, while falling below professional standards—possibly, a violation of Canon 3B(2)—was not unreasonable." We reach a different conclusion based on our independent review of the record.

In fact, during the period of the subject tickets, waiver or suspension of all fines and fees was an unusually lenient disposition in traffic court. Orange County Superior Court judges who were familiar with traffic court testified that a judge or commissioner would commonly *reduce* fees and fines in traffic court, but a complete waiver of fines and fees was not common and was "the exception to the rule." Presiding Judge Dunning testified that traffic fees are not as simple as they used to be and that fiscal issues in recent years have impacted collection of fees and fines.[4] Further, she testified that Judge Stanford "was not really current on what the traffic ticket situation was."

The examiner introduced a random sample of two weeks of traffic dispositions in 2009 and 2010 for the same violations as those handled by the judge in this case (with the exception of impeding traffic). None of the dispositions included a full waiver of fees and fines.[5]

The director of criminal operations in Orange County Superior Court testified that in her experience as a traffic court clerk she frequently saw fines and fees reduced but infrequently, less than a few times per month, saw a waiver of all fines and fees except for the traffic school fee. Other traffic department clerks made similar observations [(full waiver other than traffic school fee was "extremely rare and out of the ordinary," saw similar dispositions "never" or "every once in a while")].

**(4)** Based on this evidence, we conclude Judge Stanford had no reasonable basis for believing his family and friends would have received the same

[4] The only time fees and fines are routinely waived is when a felony defendant is being sentenced to state prison. In that case, pending traffic tickets are often transferred to the felony department so they can be disposed of by way of dismissal or waiver of fines and fees pursuant to a felony plea bargain or at felony sentencing.

[5] Further, the masters accepted the examiner's representation that there were no dispositions where traffic school was ordered for only the county fee in a compendium of five random-sample weeks of dispositions for the same traffic offenses as those involved in these matters during the years 2003 to 2008. Judge Stanford does not object to this finding.

outcome had they appeared in traffic court. Having handled criminal courts for years, Judge Stanford knows that sentences and fees and fines change over time, yet he never bothered to inquire whether sentencing practices in traffic court had changed in the last 15 to 20 years. Moreover, it has never been proper to waive fees and fines in traffic court for no reason or to benefit friends and family. As noted by the masters, "judges should not issue orders in any cases where they are unfamiliar with the legal standards (Canon 3B(2))." Wearing blinders may have provided Judge Stanford with a rationalization for his conduct, but it did not render his unfounded belief that he was acting within the mainstream of traffic citation dispositions reasonable.

## The Judge's Contributions to the Judiciary and His Community

**(5)** Much of the evidence Judge Stanford presented at the hearing before the masters related to his reputation within the judicial and legal community and his significant charitable contributions outside of court. Judge Stanford understands that mitigating evidence is not relevant in determining if he acted in bad faith, and thus engaged in willful misconduct, but may be taken into account in determining the totality of the circumstances as pertinent to determining the appropriate discipline. (*Inquiry Concerning MacEachern* (2008) 49 Cal.4th CJP Supp. 289, 312 (*MacEachern*); *Broadman, supra*, 18 Cal.4th at p. 1112.)

Fellow judges, lawyers, friends, relatives, members of the community, and law enforcement associations testified or submitted letters on Judge Stanford's behalf. The masters state, "By far the greatest outpouring of support for Judge Stanford relates to his 26 years of ethical, fair and honorable service on the bench and the value of his contributions to the Orange County Superior Court." Judge Stanford is described as "zealously fair," well prepared, honorable, "rock solid" and humble. He is known to be one of the hardest working judges on the Orange County bench. Based on this evidence, the masters found that Judge Stanford is a widely respected jurist. We adopt this finding.

The masters also found "that both the nature and quantity of Judge Stanford's community service is extraordinary." We agree. He is an active member in the First Free Evangelical Church, where he serves as an elder. Judge Stanford volunteers at the church's program for the homeless, the Good Samaritan Center, five days a week. As the administrator of the center, he spends 300 hours per year personally managing the program. In addition to donating his time to the center and other charitable organizations, the judge assists a woman, who was blinded by battery acid in a vicious attack, by driving her to church on Sundays, bringing her food, and helping her with

home maintenance. The judge and his wife spend one week of their vacation every year at a camp for foster children.

B. *Conclusions of Law*

The masters concluded and Judge Stanford concedes that he engaged in nine incidents of willful misconduct. We reach the same conclusion.

**(6)** Willful misconduct is the most serious type of judicial misconduct. "The use of the power of judicial office to benefit a friend is a 'casebook example of wil[l]ful misconduct.' " (*Wasilenko, supra*, 49 Cal.4th CJP Supp. at p. 46, quoting *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 194 [260 Cal.Rptr. 557, 776 P.2d 259].) It is defined by the California Supreme Court as consisting of (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his judicial capacity. (*Broadman, supra*, 18 Cal.4th at p. 1091.)

*Unjudicial Conduct*

**(7)** Failure to comply with the canons of the California Code of Judicial Ethics (all references to a canon are to the California Code of Judicial Ethics) is generally considered to constitute unjudicial conduct. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662 [34 Cal.Rptr.2d 641, 882 P.2d 358].) The masters concluded, as do we, that Judge Stanford's conduct violated canons 1 (a judge shall uphold the integrity and independence of the judiciary); 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and shall avoid the appearance of impropriety); 2B(1) (a judge shall not allow family, social or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge);[6] 3B(7) (a judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties in a pending or impending proceeding); 3E(1) (a judge shall disqualify himself in any proceeding in which disqualification is required by

[6] The Notice charges Judge Stanford with violating canon 2B(2) which provides that a judge "shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the pecuniary or personal interests of the judge or others," except under specified circumstances (e.g., letter of recommendation based on personal knowledge). The masters concluded that this canon was not violated because the "gravamen of this canon is to prohibit the judge's use of his or her title or prestige to influence *others* to act in a manner that advances the interests of the judge or others." (Original italics.) They point out that all of the exceptions in the canon involve the judge offering testimony or communications to third parties. We agree that in the context of this case canon 2B(2) was not violated.

law);[7] and 3E(2) (a judge shall disclose on the record information that is reasonably relevant to the question of disqualification).[8]

**(8)** The masters expound upon the manifest violation of the canons which require a judge to uphold the integrity and independence of the judiciary and avoid the appearance of impropriety and favoritism (canons 1, 2, 2A, 2B(1)): "As noted in the commentary to Canon 1, 'the integrity and independence of judges depend in turn upon their acting without fear *or favor*.' [(Italics added.)] Judge Stanford's special attention was conferred only on a favored few . . . and the integrity of the judicial office was thereby seriously impaired. These are precisely the kinds of actions that undermine public confidence in the judiciary, and call into question the fundamental fairness of the judicial process, a clear violation of Canons 1, 2 and 2A. In taking irregular actions to assist friends and family Judge Stanford abused his power, allowed his special relationships to influence his judicial conduct, and conveyed the impression that such persons were in a position to influence him, in violation of Canon 2 and 2B(1)." We agree.

**(9)** With respect to canon 3B(7), the masters concluded that Judge Stanford engaged in ex parte communications with the individuals who received the traffic tickets. The masters considered these violations to be "particularly egregious because the communications took place, in almost every instance, outside of the courtroom. Gathering information about pending matters by telephone, in the home [McGee], at church [Williams] or at a homeless ministry [Habbestad] as well as through intermediaries [Andrews, Mooney], is an unacceptable departure from judicial norms even apart from the judge's ill-advised decision to personally handle the matters." We agree. We part from the masters, however, on the issue of whether the judge failed to accord the district attorney the right to be heard. (Canon 3B(7).) In addition to prohibiting ex parte communications, canon 3B(7) requires a judge to accord to every person who has a legal interest in a proceeding, or the person's lawyer, a full right to be heard according to law. The masters concluded that Judge Stanford did not violate this portion of the canon because the Orange County District Attorney's Office had a policy of not appearing in traffic court.

[7] A judge's obligation to disqualify from matters involving family members and close friends is undisputed. (See Code Civ. Proc., § 170.1, subd. (a)(1), (4), (6)(A)(iii).)

[8] The masters concluded that the disqualification and disclosure canons were not violated with respect to the Pennell matter. Disqualification was not required, the masters concluded, because the judge's only relationship with Pennell was that he had served as a juror in the judge's courtroom. While disclosure was required, the masters concluded the record demonstrates that the judge discussed and disclosed the relevant facts in open court. We adopt this conclusion.

The Orange County District Attorney's Office has not appeared on traffic infractions for many years because of limited resources. The judge and the examiner stipulated: "The DA's non-appearance policy assumes that the ticket is in traffic court, or otherwise legitimately before the judge. The DA's implied consent to ex parte communications with pro per traffic ticket defendants only exists to the extent that the tickets are being heard in the ordinary course of judicial business. The DA's non-appearance policy does not extend to tickets that are not legitimately pending before the judge."

**(10)** We addressed this issue in *Wasilenko, supra*, 49 Cal.4th CJP Supp. at pages 44–45. Judge Wasilenko was charged with entering dispositions on traffic tickets of friends and relatives after transferring the matters to his own department. The Yuba County District Attorney had a policy of not appearing in traffic court. The masters in that case also concluded that canon 3B(7) was not violated as to district attorneys because the district attorney's office implicitly consented to ex parte communications in traffic court. The commission declined to make any findings or conclusions on this issue because the record was silent as to whether the district attorney's implied consent to ex parte communications in Yuba County included communications in matters that are not legitimately before the judge. (*Wasilenko, supra*, 49 Cal.4th CJP Supp. 26, 29–30.) However, we noted that even in those cases in which the judge is hearing traffic cases within the normal course of business, the judge " 'must be most circumspect in avoiding an appearance of lack of impartiality.' " (*Id.* at p. 45, quoting *People v. Marcroft* (1992) 6 Cal.App.4th Supp. 1, 4 [8 Cal.Rptr.2d 544].) " 'The very absence of a prosecuting attorney makes it all the more important that the court at such trials use the utmost care to preserve not only the reality but also the appearance of fairness and lack of bias.' " (*Ibid.*)

In this case, the evidence establishes that the district attorney's nonappearance policy is limited to matters that are legitimately before the judge. The masters note there was no evidence that Judge Stanford was aware of this limitation on the policy. Even so, Judge Stanford should have realized that the district attorney's nonappearance policy was limited to cases being handled by a judge without a conflict in the normal course of business. Moreover, we do not think it necessary for district attorneys to specifically advise judicial officers that they are not consenting to communications with litigants that by definition are improper, e.g., out of court at a judge's house, or through an intermediary. Thus, we conclude Judge Stanford failed to accord the district attorney the right to be heard in violation of canon 3B(7).

*Bad Faith*

**(11)** The second element of willful misconduct is bad faith. A judge acts in bad faith "only by (1) performing a judicial act for a corrupt purpose

(which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, 18 Cal.4th at p. 1092.) The masters concluded, as do we, that Judge Stanford acted in bad faith under the first definition because he acted for a purpose other than the faithful discharge of judicial duties—to benefit friends and family.

*Judicial Capacity*

As to the third element of willful misconduct, Judge Stanford was acting in a judicial capacity because he was performing a function associated with the position of a judge—entering pleas, imposing sentence and granting a continuance. (*Broadman, supra*, 18 Cal.4th at p. 1104.)

## III

## DISCIPLINE

Judge Stanford has engaged in a pattern of willful misconduct involving the abuse of judicial authority to benefit family and friends—one of the most egregious types of judicial misconduct. Such conduct affronts the very essence of a fair and impartial judiciary.

**(12)** The California Constitution provides that a judge may be censured or removed for willful misconduct occurring not more than six years before the start of his or her current term. (Cal. Const., art. VI, § 18, subd. (d).) The judge's handling of juror Pennell's ticket and Williams's 2003 ticket fall outside of this constitutional time limitation. Therefore, we do not consider those incidents in reaching our disciplinary decision. Setting those incidents aside, Judge Stanford has engaged in seven incidents of willful misconduct over a period of nearly five years.

**(13)** Determining the appropriate discipline "depends in large measure on the nature and number of charges found to be true." (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307, fn. 2 [240 Cal.Rptr. 859, 743 P.2d 919].) The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern that demonstrates that the judge lacks judicial temperament and the " ' "ability to perform judicial functions in an even-handed manner." ' " (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958].) The masters concluded, and we agree, that these were not isolated incidents. Rather, the evidence establishes a common practice of diverting the traffic

tickets of friends and family to his court and, in all but one case, waiving or suspending all or most fines and fees.[9] Such conduct manifestly demonstrates an inability to perform judicial functions in an evenhanded manner. As stated in *Wasilenko*: "[T]he gravamen of the wrongdoing is the two-track system of justice—one for those with special access to the judge, and the other for everyone else. The nub of the problem is the appearance or reality that Lady Justice is not blindfolded. Rather than justice being dispensed with an even hand without regard to who is before the court, the judge has lifted the blindfold, and seeing a relative or friend or some person with influence, the judge tips the scale and puts them on a special track for favored handling. This is corruption at the core of our system of impartial equal justice, and is intolerable." (*Wasilenko, supra*, 49 Cal.4th CJP Supp. at p. 51.)

In six of the seven instances of misconduct on which we base our disciplinary decision, Judge Stanford provided substantial financial breaks to the favored few. As previously discussed, despite the judge's "understanding" to the contrary, waiver or suspension of all or most fees and fines was not a common practice. Most, if not all, of those who benefitted from the judge's assistance did not have a financial hardship that *might* have resulted in a *reduction* of fees and fines had they come to traffic court. Rather, they were given virtually a free ride because of their close relationship to Judge Stanford.

**(14)** Judge Stanford's conduct was wrong on many levels. Not only did he favor those he knew with procedural shortcuts and extraordinarily lenient dispositions, he repeatedly engaged in ex parte communications, entered dispositions based on hearsay information from his wife, failed to recuse when there were obvious conflicts of interest, handled matters not assigned to his court, and waived fees and fines without considering the facts of the offense, the driver's record, or public safety.[10] The commission has previously recognized the gravity of this type of misconduct by imposing the maximum discipline on judges who engaged in a pattern of providing preferential treatment to family and friends in the adjudication of traffic matters. (*Wasilenko, supra*, 49 Cal.4th CJP Supp. 26; *Platt, supra*, 48 Cal.4th CJP Supp. 227; *Censure and Bar of Judge Danser* (2005); *Censure and Bar of Judge Simpson* (2002).)

Our decision to remove Judge Stanford is based not only on the nature and extent of the misconduct but on the consideration of other factors previously

[9] The masters found a pattern of misconduct based on nine incidents of misconduct. We conclude that the seven incidents of misconduct that occurred within six years of the start of the judge's current term constitute a pattern of willful misconduct.

[10] When Williams received his 2006 ticket for speeding, he had three children in the car. He had previously received a speeding ticket in 2005 and a ticket in 2003 for failing to stop at a red light.

identified by the Supreme Court and this commission as relevant to determining the appropriate level of discipline. First and foremost in our consideration of the case before us is the impact of Judge Stanford's conduct on the judicial system. (See, e.g., *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 314 [impact of misconduct on judicial system a factor to consider in determining appropriate level of discipline].) By granting special treatment to friends and family, Judge Stanford engaged in conduct that subverts the impartiality of the judicial system and undermines respect for the judiciary as a whole. In the public's eye, ticket fixing is the quintessential bad act of a judge. We doubt citizens consider the waiving of fines for the preferential few to be any less repellant than the outright dismissal of tickets. The masters conclude their report by observing that this case "is a stark reminder that we each hold in our hands, every day, the power to preserve or to tarnish the integrity of the judicial branch." Unfortunately, Judge Stanford used his judicial power in a manner that gravely tarnished the integrity of the judicial system.

The judge's misconduct also had an adverse impact on court staff. In order to transfer matters to his department, and effectuate and process his dispositions, Judge Stanford directly involved at least four members of court staff. In the matter involving the judge's son-in-law, the clerk who was asked to enter the disposition after Gonzales declined was put in the uncomfortable position of reporting the interactions to her manager. Further, the misconduct resulted in the creation of false court records. Because Judge Stanford's dispositions were made out of the ordinary course of business, clerks were uncertain how to reflect the dispositions in the minutes resulting in inaccurate entries—appearances where there were none, findings that were not made or supported ("compelling and extraordinary circumstances" for waiver of a mandatory security fee), arraignments and pleas that did not occur. While helping friends and family, the judge's conduct had an adverse ripple effect on those within the court system and led to the entry of false records. Judge Stanford's failure to realize that his actions could have serious consequences for others within the court system aggravates rather than mitigates his misconduct.

**(15)** Another factor we consider in determining the appropriate discipline is whether the judge's conduct and his response to the commission's inquiry reflect a lack of integrity or dishonesty. (*MacEachern, supra*, 49 Cal.4th CJP Supp. at p. 306; *Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146, 171; *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 914 [42 Cal.Rptr.2d 606, 897 P.2d 544]; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239].) While we do not doubt that Judge Stanford has a reputation as a person of

honesty and integrity among those who provided character evidence on his behalf, his conduct in this case unquestionably demonstrates a lack of integrity. Additionally, the judge has not been honest with the special masters or the commission about his state of mind. (See *MacEachern, supra*, 49 Cal.4th CJP Supp. at p. 309.)

We also consider whether a judge appreciates the impropriety of his actions as being indicative of a capacity to reform. (E.g., *Platt, supra*, 48 Cal.4th CJP Supp. at p. 248.) Judge Stanford contends this factor weighs against removal because, in the words of the masters, "the evidence presented overwhelmingly supports a finding that Judge Stanford has been remorseful and contrite, that he immediately accepted full responsibility for his actions, and that he can be expected never to engage in *this kind* of misconduct in the future." (Italics added.) We agree that since being confronted with his transgressions, Judge Stanford has been contrite and humble. However, we do not agree that he has accepted full responsibility for his actions. Indeed, he has admitted that he engaged in the acts charged and that those acts constitute misconduct—facts and conclusions that would be difficult to refute. However, he claims he did not recognize that what he was doing was wrong. In other words, he insists that he was acting in good faith. This does not demonstrate a true appreciation of the misconduct; rather, it reflects an effort to minimize his culpability.

Even if Judge Stanford can be expected not to engage in this type of misconduct in the future, we are not convinced that he would not engage in other types of misconduct. The judge's failure to consider the impact of his misconduct on his court staff and the reputation of the judiciary at the time of his actions leaves us with little confidence in his ability to refrain from future misconduct demeaning to the esteem of the judiciary. Moreover, the fact that he personally changed the adjudication on his son-in-law's ticket despite having been counseled by his presiding judge about the obvious conflict raises concerns about his ability to refrain from future misconduct.

**(16)** Judge Stanford attempts to focus the question of discipline on his state of mind at the time he handled the tickets. He contends that removal is not warranted absent proof of a consciousness of wrongdoing. As previously discussed, we find clear and convincing evidence Judge Stanford knew that providing preferential treatment to friends and relatives was wrong at the time he handled each of the tickets in this case. Nonetheless, we address this issue because it has been the crux of the judge's defense to the charges. We agree with the masters that the judge's state of mind is not the determining

factor on the issue of discipline because a failure to recognize the impropriety of such obviously unethical conduct "necessarily raises the correlated concern that he may continue to 'miss' other such issues in the future." Moreover, we have never said proof of a corrupt state of mind is a prerequisite to removal. (See *Inquiry Concerning Van Voorhis, supra*, 48 Cal.4th CJP Supp. 257, 314.) The Supreme Court and this commission have repeatedly stated that the purpose of commission judicial discipline proceedings is not to punish the judge, but rather "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Adams v. Commission on Judicial Performance, supra*, 10 Cal.4th at p. 912; see *MacEachern, supra*, 49 Cal.4th CJP Supp. at p. 306.) As in this case, adherence to these objectives may require removal regardless of the judge's state of mind. The public deserves protection from judges who commit serious misconduct regardless of whether the conduct is the result of malice or ignorance.

**(17)** Finally, we have not ignored Judge Stanford's exceptional contributions to his court and his community or the fact that his prior discipline over a long tenure on the bench is limited to one advisory letter.[11] These facts, however, are eclipsed by a pattern of misconduct in which Judge Stanford repeatedly abused the power of his judicial office by providing benefits to the favored few not available to other citizens.

**(18)** In the end, after consideration of the foregoing guiding factors, we have determined that removal is necessary to assure the public that a two-track system of justice and the dispensation of special favors by judges have no place in this state. As we previously explained with respect to a similar pattern of misconduct: "It is our duty to denounce the misconduct in no uncertain terms and to sanction it as the grave ethical violation that it is, in our best effort to ensure evenhanded justice, starting at the very point of access to the judge." (*Wasilenko, supra*, 49 Cal.4th CJP Supp. at p. 51.) We remove Judge Stanford from office in order to fulfill our mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity of the judiciary and the evenhanded administration of justice.

## ORDER

This decision shall constitute the order of removal of Judge Richard W. Stanford, Jr., pursuant to the provisions of article VI, section 18 of the California Constitution.

[11] Judge Stanford received an advisory letter in 2005 disapproving of the manner in which he issued orders continuing the detention of a material witness.

Commission members Hon. Judith D. McConnell, Ms. Mary Lou Aranguren, Anthony Capozzi, Esq., Nancy E. Nishimura, Esq., Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, Mr. Adam Torres, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted to remove Judge Stanford from office and in favor of all of the findings and conclusions expressed herein. Commission member Hon. Frederick P. Horn was recused.

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COMMISSION ON
JUDICIAL PERFORMANCE

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING JUDGE VALERIANO SAUCEDO**<br><br>**No. 194** | **DECISION AND ORDER REMOVING JUDGE VALERIANO SAUCEDO FROM OFFICE** |

## I.

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Valeriano Saucedo, a judge of the Tulare County Superior Court since 2001. The commission commenced this inquiry with the filing of its Notice of Formal Proceedings ("Notice") on December 19, 2014.

The Notice charged Judge Saucedo with creating and sending to his own home address an unsigned crude letter accusing his courtroom clerk, Priscilla Tovar, of having an affair with a court bailiff; the letter was addressed to Tovar's husband at his place of employment. The judge is further charged with showing the letter to Tovar and using it in an attempt to pressure her to have a "special friend" relationship with him. The Notice alleges that the judge falsely told Tovar that he had called the husband's place of employment and intercepted the letter before it was delivered to her husband. The judge is charged with engaging in a course of conduct during the next two months in which he sent Tovar hundreds of text messages of a personal nature, gave her approximately $26,000 in gifts, including a BMW automobile and a Disneyland trip package for her family, and provided legal advice to her son.

The Supreme Court appointed three special masters to hear and take evidence and to report to the commission under Commission Rule 129. (All references to a rule are to the Rules of the Commission on Judicial Performance.) The masters are Hon. Judith L. Haller, Associate Justice of the Court of Appeal, Fourth Appellate District; Hon. Becky

Lynn Dugan, Judge of the Riverside County Superior Court; and Hon. Louis R. Hanoian, Judge of the San Diego County Superior Court.

The three masters held an evidentiary hearing April 6 through April 10, 2015, followed by oral argument on April 27, 2015. The masters filed their report containing their detailed findings of fact and conclusions of law on July 8, 2015. The commission heard oral argument on October 7, 2015.

The masters concluded that the charges were proven by clear and convincing evidence. The masters rejected Judge Saucedo's testimony that he did not write the anonymous letter and that his actions related to the gifts and text messages reflected only a sincere desire to mentor Tovar through a difficult financial period. The masters found "Judge Saucedo created the unsigned September 2013 letter, used it as a basis to foster a close, personal relationship with Tovar on the pretext he intended to help her, and then inappropriately pressured her to maintain this relationship by giving her valuable gifts knowing she had limited financial resources and was vulnerable to these offers." We adopt the masters' factual findings, which we have determined are supported by clear and convincing evidence.

The masters concluded that Judge Saucedo's conduct violated numerous canons of the Code of Judicial Ethics and brought the judicial office into disrepute. The masters found that the judge's "creation of an embarrassing, sexually explicit letter for the sole purpose of manipulating his courtroom clerk is the essence of an act committed in bad faith," and his "ongoing dishonesty and subterfuge additionally shows bad faith." As discussed in this decision, we conclude the judge engaged in willful misconduct in those instances when he was acting in a judicial capacity and prejudicial misconduct in other instances, each of which is a basis for removal. (Cal. Const., art. VI, § 18, subd. (d).)

The deceitful, calculated, and unseemly nature of the judge's misconduct, compounded by his lack of candor in response to the commission's investigation and untruthful testimony under oath before the masters compels our decision to remove Judge Saucedo from office. We recognize Judge Saucedo is a well-respected jurist who has devoted many hours to giving back to the community. Nonetheless, his reputation cannot

redeem the seriousness of his wrongdoing, nor obviate the need for removal in order to fulfill our mandate to protect the public and maintain public confidence in the integrity of the judiciary.

Judge Saucedo is represented by attorneys Randall A. Miller and Caroline van Oosterom, of Miller Law Associates, APC, Los Angeles, California. The examiners for the commission at the proceedings before the special masters were James F. Harrigan, Esq. and Commission Assistant Trial Counsel Valerie Marchant. At the appearance before the commission, the examiner for the commission was Gary W. Schons, Esq.

## II.

## FINDINGS OF FACT

### A. Legal Principles

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*) Factual findings of the masters are entitled to special weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Ibid*; *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232 (*Freedman*).)

The following facts are adopted from the masters' factual findings, which we have determined are supported by clear and convincing evidence based on our own independent review of the record. Where there were disputes in the testimony, largely between Judge Saucedo and Tovar, we have adopted the credibility determinations of the masters. We find those determinations are supported by a sound and thorough evaluation of the testimony of the witnesses, including their demeanor, responsiveness to questions, and whether their testimony was consistent with documentary evidence and prior statements. This evaluation led the masters to find Tovar's testimony to be credible and her version of events to be true. We reach the same conclusion.

### B. Judge's Courtroom and Staff

In 2013, Judge Saucedo was assigned to Department 6 in the main courthouse in Visalia. His staff included court reporter Kim Werth and court clerks Priscilla Tovar and Theresa ("Tessie") Velasquez. Tovar is married and has four children. Her husband's name is Hilario Tovar; his nickname is Lalo (a common nickname for Hilario). Several years earlier during a marital separation in about 2007 and 2008, Tovar had a romantic involvement with court bailiff Jeremy Knoy. This romantic relationship was well known among court staff. In the fall of 2013, Tovar lived "paycheck to paycheck" and frequently had trouble meeting her financial obligations.

Court reporter Werth has worked for Judge Saucedo since 2001, and was still working for him at the time of the hearing before the special masters.

Judge Saucedo presided over a busy criminal department, where he was regarded as a hardworking and demanding judge who strictly controlled his courtroom. But, Judge Saucedo maintained a comfortable, social, family-like environment for the staff, which included potlucks and birthday celebrations. Judge Saucedo, Werth, and Tovar would occasionally go to lunch and would discuss personal matters.

Tovar and Velasquez had work desks facing each other directly outside the judge's chambers. Judge Saucedo generally left his chambers door open. Tovar and Velasquez frequently talked about personal matters while they were at their desks. In 2013, these conversations included that Tovar previously had a romantic relationship with bailiff Knoy; her husband was having an extramarital affair; she owed bailiff Knoy money pertaining to a vehicle he co-signed for her sister; and her husband had recently started a new job at a nearby medical center.

### C. Gifts to Tovar in Late Summer 2013

In August 2013, Judge Saucedo gave Tovar $50 for her birthday and $50 for her son's athletic fundraiser. This was the first time he had given money for her birthday.

In early September, Judge Saucedo told Werth and Tovar he had purchased a red Mercedes convertible, and wanted them to see the car at lunchtime. Later that day, Judge Saucedo took Tovar on a 15-minute ride in the car. During the ride, Judge Saucedo said

" 'Who knows, maybe one day you can own a car like this,' " or " 'You'll own a car like this.' "

On Friday, September 13, Judge Saucedo gave Tovar about $50 or $100 to buy a new cell phone because her phone screen was broken. Tovar responded she did not need a new phone, but he insisted. Judge Saucedo texted her during the weekend, asking if she had purchased a new phone, which she had not done.

On Monday, September 16, Judge Saucedo gave Tovar more money for a new phone and said she should consider it an additional birthday gift. He told her to text him after she purchased the phone.

Later that evening, Tovar purchased the new phone and stopped by Knoy's house on the way home to visit his dog (a dog previously owned by Tovar's family). Later that night, Tovar and Judge Saucedo exchanged several text messages about the new phone.

**D. The Anonymous Letter**

On September 17, Judge Saucedo's wife, Teresa Saucedo, saw an envelope delivered to their home, addressed to her husband and marked "Personal and Confidential."[1] She did not open the envelope, but Judge Saucedo opened it when he came home and then showed her the following "Anonymous letter":

> "Hilario Tovar
> "c/o Tulare Regional Medical Center
>
> "You probably already know and approve. Your wife Priscilla has been having an affair with Jeremy Knoy the bailiff in Department 5 of the Courthouse. She fucks him after work. He brags that she is a good fuck and you get sloppy seconds. He brags about her tattoos, and big boobs and tight ass. The only thing he complains about is her c-scar.
>
> "Sent this to her judge.
>
> "JK's Friend"

[1] The letter was postmarked September 16, 2013.

Mrs. Saucedo said that someone must be " 'really angry at this woman,' " and Judge Saucedo responded that he would take the letter with him to work and discuss it with Tovar.[2] Judge Saucedo also said, " 'What if her husband gets this and beats her up?' "

The next day, September 18, at about 8:15 a.m., Judge Saucedo called Tovar into his chambers and told her to close the door. Judge Saucedo showed her the Anonymous letter. The letter was attached to Judge Saucedo's typed cover letter stating the unsigned letter would be upsetting and she should remain calm and he would help her if she wanted him to do so.[3] Judge Saucedo pointed out that the Anonymous letter had been sent to her husband's work. Tovar was shocked and began crying. She said she needed to report the letter to court administration or law enforcement and she had no idea who would do this. The judge responded that she could not " 'tell anybody' " about the letter, including court reporter Werth. He said Tovar could get fired if she reported the letter, and that the letter had to be from somebody in law enforcement because law enforcement would be the only possible source for his home address.

When Tovar continued to insist the letter needed to be reported, the judge said he would call Tovar's husband's employer and tell them that it was a jury letter or jury certificate sent in error and he was calling on behalf of the court, and that he would ensure the letter would be intercepted if she trusted him completely. Judge Saucedo kept

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[2] Mrs. Saucedo testified at length about her husband's whereabouts the days before they received the Anonymous letter. She and Judge Saucedo stayed overnight in San Jose on Saturday, September 14, to attend an opera. After returning home together the next morning, they went to Orchard Supply Hardware and then spent several hours together at the courthouse in Visalia. On Monday, September 16, Mrs. Saucedo drove her husband to and from the Visalia courthouse and they had lunch together. Mrs. Saucedo did not testify that her husband never left her presence during these days.

[3] The judge denied giving Tovar a cover letter. We find that there was a cover letter. Our finding is supported by the fact that Tovar reported the existence of a typed cover letter to Human Resources when she reported the judge's conduct in December 2013; the judge had a practice of typing notes to Tovar, many of which were admitted at the hearing; and that the message in the cover letter was consistent with his later notes and texts professing his desire to "help" her.

the letter in his chambers and told Tovar to meet him in a conference room at noon in the court's law library. About one or two hours later, during courtroom proceedings, Judge Saucedo handed Tovar a note stating he had communicated with someone named "John," the human resources manager at the hospital where Mr. Tovar worked and that everything was going to be okay. At noon, Tovar met with Judge Saucedo in the law library conference room he had reserved, located in the basement of the courthouse. Judge Saucedo had reserved the room earlier that morning because it was a "more private setting" than his chambers. During this meeting, Judge Saucedo told Tovar that when he called the hospital, "John" told him the Anonymous letter was sitting on his desk and he was wondering who Hilario Tovar was because the name did not sound familiar to him. Judge Saucedo said that "John" shredded the letter during this phone conversation.

In his testimony and in his verified answer to the Notice ("Answer"), Judge Saucedo acknowledged he had made no attempt to contact the hospital or anyone at Mr. Tovar's place of employment. The judge testified that he made these false statements to make Tovar "feel better," an explanation we reject.

During the noon meeting, Judge Saucedo again showed Tovar the Anonymous letter and suggested that Knoy wrote it, but Tovar denied that he would have done so. He then said that if Tovar wanted him to help her, she needed to be completely honest with him and tell him everything about her relationship with Knoy. Judge Saucedo wanted to know if she was "intimate" with Knoy, and the nature of their relationship. Tovar responded that she and Knoy were just friends and were no longer romantically involved. She said Knoy was assisting with her sister's payments for a Jeep that Tovar sometimes drove. Judge Saucedo asked when she last met with Knoy, and Tovar answered that she went to his house for about 30 or 40 minutes after buying the new phone. The judge asked: " 'Are you sure you weren't intimate with him . . . at that time?' " Tovar said she was not.

Judge Saucedo told Tovar she should no longer take any money from Knoy and that she was to cut off all communication with him. He said he would give her $200 per month to cover the Jeep payments. When Tovar said she did not want him to do this,

Judge Saucedo said she needed to take the money if she wanted his help. At this point in the conversation, both Judge Saucedo and Tovar were crying. When Tovar again said the letter should be turned over to court administration, Judge Saucedo responded that no one was to know about the letter and that Tovar just needed to trust him completely. Judge Saucedo hugged her at the end of the meeting.

### E. Gifts, Favors, and Communications with Tovar: September 19 to November 15

#### 1. Cash and Statement re Assistance from the Judge's Brother

The next day, Judge Saucedo left $200 cash in an envelope on Tovar's desk. Tovar said she did not need the money, but Judge Saucedo insisted.

The following day, Friday, September 20, when Tovar was finished with her work at about 4:45 or 4:50 p.m., Judge Saucedo asked her to come into his chambers and close the door. Judge Saucedo said he wanted to talk to her about what had happened and that he "didn't have anybody else to talk to" about the Anonymous letter. He said he continued to believe Knoy wrote the letter and he could get Knoy fired because he (the judge) was a very powerful man. Judge Saucedo was crying and said he was upset and hurt because he cared about Tovar. Tovar responded that she wished she could just report the letter to court administration and that she did not feel comfortable. Judge Saucedo told her not to do this because she might get in trouble. Tovar said that Judge Saucedo hugged her as she left the chambers, which made her feel uncomfortable.

On Monday morning, Judge Saucedo gave Tovar a typewritten note with his brother's name and phone number. According to Tovar, Judge Saucedo said that over the weekend he had been thinking about his statement to Tovar that he would take care of her, and then started thinking about what if something happened to him. He said he had talked with his brother (a physician), and told his brother everything and that she should call his brother if she ever needed anything.

Judge Saucedo testified that he gave Tovar his brother's contact information to assist her and her son with medical issues. However, he previously told the investigator hired by the Judicial Council, Lisa Buehler, he wanted Tovar " 'to understand in order to

break the financial relationship with J.K. … she could continue with [Judge Saucedo's] brother to help if [Judge Saucedo] couldn't do it.' " We reject the judge's testimony concerning this conversation with Tovar based on his prior inconsistent statements and our general credibility determinations as discussed later in this decision.

**2. Legal Assistance for Tovar's Son**

Later that same Monday, Judge Saucedo gave Tovar a letter written to her teenage son concerning an alcohol-related citation he had received. The lengthy letter was entitled "Privileged and Confidential Communication." The first paragraph states:

> "I am Valeriano Saucedo, a California Superior Court Judge sitting in Department 6 in Tulare County. Your mother, Priscilla, is my clerk and friend. I write for two reasons: One, to give you legal advice at your mother's request on your recent citation alleging a violation of Business and Professions Code section 25667 [minor in possession of alcohol in a public place]. Two, to give you a personal and judicial perspective which hopefully will enable you to gain from this experience and to better exercise leadership in your home, school, baseball team and community."

In the next several pages, Judge Saucedo detailed the potential penalties for the offense, identified several potential defenses to the charge, and said that if a further notice to appear was issued, he would "find out and let [Tovar's son] know how Fresno County handles minor in possession of alcohol cases whether filed as infractions or misdemeanors." Judge Saucedo additionally commented on Tovar's work at the court, stating she is "hardworking" and "brilliant," and he "trust[s] her implicitly and completely." Judge Saucedo concluded the letter by discussing his own background and the importance of working hard to "realize your dreams." He also stated: "You may contact me at my chambers in court or on my personal cell [phone number] to discuss the legal advice in this letter and to arrange to meet."

Judge Saucedo told Tovar she should give the letter to her son that evening, and she should text him back to let him know what her son's thoughts were regarding the letter. There was no follow-up on the letter because Tovar's son never received a notice-

to-appear for the ticketed offense. Although Judge Saucedo initially testified that he wrote "Privileged and Confidential" on the letter because it was meant for the parents, he later acknowledged, "in retrospect," it referred to an attorney-client privilege. He testified that an attorney-client relationship had never been formed, although he ultimately admitted the letter contained legal advice.

**3. Flowers and More Cash Gifts**

On September 25, when Tovar came into work, she found flowers on her desk that had been delivered to her the day before. The card was unsigned and stated "NEW DAY, NEW WEEK, NEW BEGINNING." Tovar had no idea who had sent her the flowers, but later that day Judge Saucedo called her into chambers and said he had sent them to her. Judge Saucedo told her to tell everyone they were from her husband. Judge Saucedo later gave Tovar a typed note stating:

> "As for the flowers, simply say that things are wonderful between you and Lalo and that Lalo sent the flowers. (A little white lie won't hurt anyone.) Word will get out and Jeremy [Knoy] will get the clear message. Remember always operate from a position of strength."

The florist's order form contained Judge Saucedo's request that his identity not be revealed and stated: "Arrangement small and understated. For her desk." (Capitalization omitted.)

Later that day, Tovar told Judge Saucedo she did not feel comfortable with him sending her flowers and helping her financially and that although she appreciated it, she did not need help. Judge Saucedo responded that they did not have anyone else to talk to about the letter, if he told his wife she would ask why he did not report it to court administration, and that he thought of Tovar as a daughter so she should trust him.

Judge Saucedo acknowledged that he told Tovar to lie about who sent the flowers. He testified that he sent the flowers on September 24 in memory of the anniversary of Tovar's brother's death. Tovar testified that her brother passed away on October 8, 1990. In prehearing documents, the judge misidentified the date the flowers were sent as October 1, closer to the anniversary of Tovar's brother's death. We reject the judge's

purported reason for sending the flowers, and instead conclude, as did the masters, that the flowers were sent in furtherance of his efforts to establish a closer personal relationship with Tovar. Had the flowers been sent in memory of Tovar's brother, there would have been no need to conceal that he sent the flowers.

About one or two days later, Judge Saucedo left an envelope with $500 in cash on Tovar's desk. He told her she should go shopping and she needed to change the way she dressed. Judge Saucedo asked her to send him a photograph of herself while she was shopping.

On Friday, September 27, Judge Saucedo sent Tovar an email with the subject line "Cases" stating, "May we spend a few minutes talking before you leave." Tovar responded: "I can[']t today, I am meeting my sisters for dinner." Tovar was not actually meeting her sisters, but she did not want to talk to him because she was feeling uncomfortable with their interactions. Later that evening and over the weekend, Judge Saucedo sent Tovar several texts in which he asked whether she had continuing contact with Knoy and whether she had gone shopping with the money he had given her.

**4. September 30 Note to Tovar**

On Monday, September 30, Judge Saucedo handed Tovar a one-page typewritten note while she was at her clerk's desk in the courtroom ("the September 30 note"). The note stated:

> "I support you completely and unequivocally in all of your endeavors.
>
> "Reflecting back on this last week, I am concerned that I have not yet fully earned your complete trust and confidence. Two examples come to mind. Last week, until I probed, you did not voluntarily tell me that you only had $10.00 in your checking account. Clearly, this was not enough money to make it through the rest of the week and weekend until Tuesday of this week, your payday. You should have voluntarily told me. Once I learned of your financial pressure, I initially gifted you $200 and then $500. I was happy to do so but what concerned me is that you did not voluntarily tell me. The second example is Saturday when I

asked you about Jeremy [Knoy]. I again felt like I probed when we had agreed that you would voluntarily let me know if he contacted you about the loan payment.

"I truly want to earn your trust and feel badly that I have not yet done so. What else do I need to do? I voluntarily took a risk to protect you because you have earned my trust and respect. I have no regrets that I took the risk. It was absolutely the right thing to do. You have my utmost respect and trust and always will. I was upset with myself this weekend, notwithstanding your forgiveness, because sometimes I still feel that I am hurting and not helping you enough.

"This month and every month I will gift you $200 for the loan. However, I am happy to meet your other financial needs. As I've told you, from here on out, you will no longer have any financial worries. However, you must trust me unconditionally and voluntarily tell me everything. Don't be like my former clients. They didn't lie to me. Sometimes they forgot to tell me important things. Don't feel embarrassed or like a burden. I can handle anything.

"Looking at the future, I want to earn your complete trust and have you voluntarily tell me what is going on in your life. I am willing to do anything to earn your trust and confidence. I want to support your every endeavor but I cannot know your endeavors unless you tell me. In this connection, I find texting is fine but I find these notes and form of communication unsatisfying and incomplete. They do not fully inform me on what is going on. I prefer to talk to you and would like to know whether you wish to talk and when. Sometimes I feel like you would prefer to avoid me altogether and not talk to me. Perhaps, you don't even like me, want to talk to me or have me involved. I hope not. Let's work on these issues together, planning for your financial future (including a two seater---although you seem skeptical about this promise). As you know, I do not make promises I cannot keep. Frankly, my biggest concern is how you would explain a two seater gift to Lalo. (By the way, what did you say and what did he say about the flowers? Just curious.)

> "Finally, I, too, am human and have an ego. Feel free, if you wish, to compliment me if you like things I do or wear, or, if you wish, you may treat me like the Maytag repair man.
>
> "Please respond. Always your genuine friend and supporter."

Tovar felt uncomfortable and disgusted by the letter, particularly the portion of the letter where he told her to feel free to compliment him on things he does or wears.

After Tovar read the note, Judge Saucedo asked her to return it to him, but she did not immediately give it back and instead covertly made a copy. When she returned the original to him toward the end of the day, Judge Saucedo asked if she had a response to the letter. She thanked him, but said she did not want any more help from him and she did not want him to give her any more money. Judge Saucedo responded in an angry manner, stating, " 'What do you mean you don't want my help anymore? So you mean the [Anonymous] letter is true? So is it true about you and Jeremy? Maybe your husband does need to know about the [Anonymous] letter.' " Judge Saucedo then left the courtroom and Tovar heard a door slam near the stairwell. Judge Saucedo denied making these statements or slamming the door. As did the masters, we find Tovar's version of the interaction credible.

**5. Tovar Confides in Werth**

Tovar testified that the judge's conduct was scaring her and she decided she needed advice from Werth (the court reporter). After her interaction with Judge Saucedo on September 30, Tovar told Werth about the Anonymous letter and showed her the September 30 note. According to Tovar, Werth responded: " 'This . . . is wrong. This is not right. Something is going on with him.' " Werth told Tovar she needed to get a copy of the Anonymous letter. Tovar said she thought it was in Judge Saucedo's desk and she would attempt to obtain a copy later that day. Werth told Tovar that she would text her when Judge Saucedo left for the day, so Tovar would know it would be safe to search his office for the letter.

At about 6:20 that evening, Tovar texted Werth to let her know she was "snooping" in Judge Saucedo's office, and was worried she was "going to be in big

trouble." After Tovar found the Anonymous letter, she texted Werth with a photograph of the letter and then made a copy of the letter and returned the original to Judge Saucedo's desk. A few hours later, Tovar sent a text to Werth stating that Judge Saucedo had sent a text message to her "apologizing" for his behavior earlier in the day.

The next day, Tovar showed Werth a copy of the Anonymous letter. Tovar testified that Werth immediately responded that Judge Saucedo wrote the letter, and that Werth knew this based on working with him for "all these years, reading his pleadings and his rulings . . . ." When Tovar said she did not believe Judge Saucedo could have written it, Werth said she was " 'positive. I know him too well.' "

At the hearing before the special masters, Werth denied stating or believing that Judge Saucedo was the author of the Anonymous letter. The masters rejected this testimony, noting that Judicial Council investigator Buehler testified that Werth told her she thought the judge wrote the letter, important parts of Werth's testimony were contradicted by her own text messages written as events were unfolding, and that she still worked for Judge Saucedo at the time of her testimony (and worked for him since 2001). We find that Werth told Tovar she believed the judge was the author of the Anonymous letter.

**6. Assistance with Tovar's Car Problems**

On October 1, Judge Saucedo called Tovar into his chambers. Judge Saucedo apologized for his behavior the day before and said it would not happen again. He also indicated he had overheard her talking about car problems and asked why she had not taken her car to a mechanic. The judge offered to take her car to his mechanic. Tovar agreed to meet Judge Saucedo the next day at his mechanic's shop.

That evening, Werth and Tovar had the following text message exchange[4]:

> "[Werth:] You really think it's a good idea to drop your car off tomorrow and be further into debt with him?"
>
> "[Tovar:] I know I've been thinking about it."

[4] Typographical errors in text messages and notes from here on have not been corrected.

"[Werth:] Totally up to you . . . But I think you're sending [some] mixed messages . . . in that you tell him you're good, no more help, then you take it . . . He says why won't you be my friend, etc. . . . See what I mean?"

"[Tovar:] So what do I say . . . . [¶] I should have had you pick me up. I will cancel the [appointment]."

"[Werth:] [Y]ou do what you think is right, I don't want to tell you what to do . . . ."

"[Tovar:] Ugh."

"[Werth:] I'm sorry, I know it's difficult . . . But the thing is, you can't have it both ways . . . . Can't say no, I don't need your help anymore, basically stop bugging me then turn around and say I need help with my car . . . . He's getting mixed signals. . ."

"[Tovar:] I didn't ask for help again he would not take no. I'm going to pay for it. Not going to say anything out loud any more. I'm seriously thinking of [asking] to be moved. Maybe it was meant for me to its time."

"[Werth:] I'm sorry you feel that way and I hope you reconsider that decision . . . . I know you didn't ask for any of this to happen! This is NOT your fault! I hope you KNOW that and BELIEVE it . . . ."

"[Tovar:] I do but I'm having to watch every conversation I have and it's not fair. And I don't like that."

"[Werth:] I can imagine how you must feel, and you're right, it's not fair . . . . Let's brainstorm more tomorrow . . . . We're gonna figure this thing out! . . ."

The next morning, Tovar met Judge Saucedo at his mechanic's shop and dropped off her car. While at work, Judge Saucedo twice emailed Tovar about the car (he titled one of the emails "Case Files"). Judge Saucedo paid the total bill of approximately $533.

### 7. More Notes, Cash Gifts

In early October, Judge Saucedo handed Tovar a note while she was at her clerk's desk in the courtroom stating, "Don't share with anyone any information. I assume you have not told anyone about Jeremy and the letter. Correct?" Tovar indicated that she had not told anyone. She then secretly made a copy of the note. Pursuant to Judge Saucedo's explicit directions, she returned the note to him. She testified that he wanted her to give back every note and letter he gave her so he could shred them.

In mid-October, Judge Saucedo sent Tovar numerous text messages, often during the evening hours. Tovar sometimes responded to the texts. At about this time, Judge Saucedo asked Tovar if she had been shopping and Tovar said she could not afford to buy anything. The judge then asked for her bank account number so he could put money in her savings account. When she said she did not need the money, Judge Saucedo told her she needed to trust him. Tovar gave him her bank account number.

### 8. Disneyland Trip for Tovar's Family

At some point in October, Tovar and Velasquez were talking at their desks and Tovar said she had always wanted to go to Disneyland for Christmas. Judge Saucedo then called Tovar into chambers and asked why Tovar did not plan a trip to Disneyland for Christmas. She said she did not have the time or money to go on that type of a trip. Judge Saucedo responded that she was going and it would be his gift to her. Tovar testified that when she told him she did not want to accept the gift, the judge insisted and said, " 'Do you want your husband to find out about the [Anonymous] letter?' "

According to Judge Saucedo, Tovar asked him to pay for the Disneyland trip and he agreed. As did the masters, we find Tovar to be credible and adopt her version of the conversation.

Soon after, Judge Saucedo and Tovar met at an American Automobile Association ("AAA") office during the lunch hour to discuss arrangements for the Disneyland trip. Judge Saucedo ultimately purchased a Disneyland vacation trip package for Tovar's family ($1,862), and then purchased an additional vacation package for Tovar's sister and her family ($1,340). Judge Saucedo promised to pay for all trip expenses, including

meals and souvenirs. Judge Saucedo told her to tell her family she was paying for the trip with overtime earnings, and not to tell anyone he was paying for the trip. She complied. The AAA trip documentation states Judge Saucedo requested the travel agent "not to have any [additional] contact" with him regarding the trip purchase.

Shortly after this lunch meeting, Judge Saucedo gave Tovar a note ("AAA note") attaching a deposit slip showing he had deposited $500 into her bank account and asking for his "texting privileges" to be "reinstated." The note read:

> "AAA
>
> "Here is your temporary AAA card. You must sign and keep the temporary card. Keep it with you. The hard plastic card along with your free gift, the movie Turbo, will be mailed to your Selma address. We should upgrade the card to a premium level in about 90 days. This will give you better protection. Keep in mind that the card runs with you not your car. This means that it will provide you with personal protection no matter which car you are in.
>
> "CitiBank
>
> "Attached is proof of deposit for $500. The funds are available immediately. The teller said that you simply needed to get on line and confirm that the deposit was made. Please confirm that the deposit was credited. Enjoy!!
>
> "Roseville
>
> "Be careful if you drive to Roseville. It is quite far and you should take appropriate precautions to be safe. You know this already and do not need me to tell you. However, I will worry about you. As always, I am ready to help you with anything. If your car breaks down and AAA is not sufficient or you need to get lodging and cannot afford it, call me. Remember—anything.
>
> "Texting
>
> "With your permission, I would like to have my texting privileges reinstated. I promise to use greater discretion and

> not make you feel as if I am being controlling. As I have explained, that is not my intention. I simply enjoy knowing that you are happy enjoying your new financial freedom. If you feel that this is not a good idea, let me know. I will understand. I appreciate your candor.
>
> "Have a wonderful weekend and I hope you feel better."

Tovar testified she asked him on several different occasions not to text her. She said he was doing it "a lot, all the time" and he would "get upset if [she] wouldn't text him back right away or text him back at all." She repeatedly told him the texting was too much and she did not feel comfortable with it. Judge Saucedo concedes he sent Tovar about 445 texts during the two-month period in question.

**9. Planning Purchase of BMW, Offer to Pay for Body Sculpting, and Further Efforts to Create Closer Relationship**

On October 28, Judge Saucedo texted Tovar numerous times asking whether she and her sister were happy, and mentioned a car that he might be buying for her. Tovar told him she appreciated his offer, but did not need a new car.

On October 29, in the morning before work, Judge Saucedo sent several texts to Tovar. At 7:27 a.m., he wrote:

> "Good morning. Follow up to our conversation. Every morning wake up feeling wonderful and beautiful. No pressure, no worries."

Six minutes later, he wrote:

> "You do not need body sculping. You are gorgeous and in fine shape as you are. However if it would help your self esteem, let's discuss it in March or April. We have lots on our plate right now, Disney, the car, etc."

Three minutes later, he wrote:

> "Lalo [Tovar's husband] should not criticize you unless he is willing to pay for your body sculptng. I am willing to pay."

One minute later, he wrote:

> "I am working on a Disney budget."

Tovar did not initiate or respond to these early morning messages. According to Tovar, the topic of body sculpting was brought up by Judge Saucedo sometime before these text messages were sent. She testified she was having a conversation with other employees in the common area about plastic surgery and a few minutes later the judge called her into his chambers and started talking about body sculpting. She told him that she did not want to do that.

Later on October 29, during working hours, Judge Saucedo sent Tovar several text messages about the Disneyland trip and a possible new car for Tovar. Tovar responded that she told her daughters about Disneyland, and that she "looked" at the car (apparently on the Internet), and that it was "nice," but if "it doesn't work out that's ok."

That same day and into the evening, the two had the following text message exchange:

At 1:15 p.m., Judge Saucedo wrote to Tovar:

> "I am very excited and happy for you. I u[n]derstand about the car but I also do not like failure. Our friendship makes me happy. Seeing you happy and self assured also makes me happy."

Six minutes later, Judge Saucedo wrote to Tovar:

> "Did everything go well at your medical appointment?"

At 4:41 p.m., Judge Saucedo wrote to Tovar:

> "You seemed aloof and unhappy today. Everything okay?"

Thirty minutes later, Tovar responded:

> "A lot of work . . . I'm behind so I'm feeling overwhelmed is all. It was nice not having to be in court is all."

At 5:21 p.m., Judge Saucedo wrote to Tovar:

> "I understand. Is there anything I can do? I try to brighten up your day with positive thoughts. Everyday love, kindness and respect."

Four minutes later, Judge Saucedo wrote to Tovar:

> "I truly appreciate everything you do. Too bad we can't talk very much. I had a wonderful conversation with my brother about you. Just doing financial planning. You don't know how well you are covered."

Fourteen minutes later, Tovar replied:

> "Not to be picky but on the car issue I wouldn't mind a 4 seater sports car. . . I don't mind a 2 door convertible . . . Hope that's not rude."

Nineteen minutes later, Judge Saucedo responded:

> "Not rude at all. BMW makes a beautiful 4 seater convertible. I found one in LA and another in SLO but did not think it would work. It is a rag top. Did you have a particular model in mind?"

Two minutes later, Judge Saucedo wrote:

> "I want you to be happy and I don't want to get a car that won't work for you. I am talking to three dealers. Hope to make this happen soon. As you know, I am serious about everything I do."

Tovar testified that she decided to accept his offer after he repeatedly pressed the issue. Although he wanted to buy her a two-seater, she told him she would prefer a four-door car because of her family.

The next morning, Judge Saucedo sent Tovar text messages about a meeting at the AAA office over the noon hour regarding the Disneyland trip. When Tovar said she did not have much time, Judge Saucedo texted her: "I understand but I detect some attitude. There are a few things I would like to talk to y[o]u about but sounds like you may not want to talk to me. Is everything truly okay?"

As they were leaving one of their AAA appointments, Judge Saucedo told Tovar he wanted to have more contact with her. Tovar responded she did not feel comfortable with that, and asked him to limit his texting.

Later that afternoon, Judge Saucedo sent Tovar several texts about the car he intended to buy for her. The two then exchanged several text messages in the early evening hours (from about 4:10 p.m. to 8:30 p.m.). The messages were as follows:

> "[Judge Saucedo:] It's silly but still feeling under appreciated. It's silly because you don't owe me anything. I am doing this for my own soul because it makes me happy."
>
> "[Tovar:] I'm not doing anything different and I'm not sure why you are feeling that way. . . I truelly do appreciate everything."
>
> "[Judge Saucedo:] I am feeling out of balance. I appreciate you are not doing anything different. Feeling today like a one sided friendship. My feelings are momentary and episodic. I'll be fine. Everything is on line and on course. No change. Just expressing my feelings. Said I am always honest in my feelings and dealings with everyone."
>
> "[Judge Saucedo:] Just a silly man."
>
> "[Judge Saucedo:] I need to refle[c]t and strike a balance. Embarrassed about my feelings."[5]
>
> "[Judge Saucedo:] The sedan is a silver 4 door, sun roof, blue tooth, black interior. Some wear and tear but not bad. 80,000 miles. . . ."
>
> "[Judge Saucedo:] Did you hook up with Lalo in Visalia?"
>
> "[Tovar:] I did not meet Lalo. He decided not to come up so I went home."
>
> "[Judge Saucedo:] Ed [the BMW salesperson] has made a very generous offer on the sedan. $15[,000] out the door. We need to think about this one. If I can forward his email you will see the offer."

[5] When asked at the special masters hearing what he was "embarrassed about," Judge Saucedo said: "My feelings about mortality," and "coming to grips" with the fact that many of his friends and colleagues were suffering from serious health problems.

"[Tovar:] When can I see the car?"

"[Judge Saucedo:] When would you like to see it?"

"[Tovar:] Maybe tomorrow at lunch. . ."

"[Judge Saucedo:] Did y[o]u receive the [emailed] offer [regarding the sedan vehicle]?"

"[Tovar:] Busy with [my youngest son]. So I would have a car payment?"

"[Judge Saucedo:] Absolutely correct. I would make all of the payments. You would be responsible for an increase, if any, for insurance but I would certainly help. Remember this would be my gift to you. We would work out other reasonable accommodations. For example, if you decided you no longer wanted the car or wished to sell it we would decide what to do with the proceeds. It would be yours as long as you and only you owned it."

"[Judge Saucedo]: Have I not taken care of you without asking anything in return? Things would not change. You would just have to put up with my silliness like today."

"[Judge Saucedo:] You could have a new car within days."

When Tovar did not respond to this last text, at about 9:30 p.m., Judge Saucedo sent Tovar a text asking for feedback. The two then had the following text message exchange during the next 30 minutes:

"[Tovar:] Yes was watching the game with my famil[y] and also thinking about the car. The issue with that is the payments I know you said you would take care of it and I trust you but my issue is its not free and clear. something hanging over my head to worry about. Just like today you felt unappreciated I can't always text back immediately, I'm not always going to be in the best mood and that bothers you, I am simply being me. This is unexpected and a lot to think about. Please don't take it the wrong way."

> "[Judge Saucedo:] I understand. As you said, we are human. It is always question of trust. I hope you trust me and that I have done enough to earn your trust. I am a stupid and silly man but I would never hurt you financially or otherwise. I would never exploit you."
>
> "[Judge Saucedo:] I would also not want you to be nice simply because of our financial arrangement. That's why I sometimes ask whether you like me and respect me. It is important to have a friendship that extends b[e]yond a financial connection. I will respect any decision you make."
>
> "[Tovar:] I respect you and our friendship way beyond financial reasons I've never even thought or think about that sorry this has crossed your mind a couple of times I'm hurt because you bring that up often. I've always been respectful to you even before your offer. Good night Lalo is now questioning me about who I'm texting this late."

Early the next morning (before 8:00 a.m.) on October 31, Judge Saucedo sent Tovar three additional messages (there is no indication that Tovar responded to any of these messages):

> "[Judge Saucedo:] True friends forgive each other for their mistakes and failures. I sincerely apologize for everything I said or did yesterday that was offensive or hurtful. I should not have communicated while off balance. Those are my worst moments. I wish to continue our friendship. I hope you will continue on this journey. In good faith, check your savings balance later today. Let me know if our friendship continues."
>
> "[Judge Saucedo:] Texting is imperfect. Like the AAA incident, you do n[o]t know the entire picture. The car offer is part of an overall financial plan annualized over the next year. You will own the car free and clear in one year, not four years as projected. The expenses over the next year are: 2.4 for the jeep, 12 for savings and 12 for the car for a total of $26,400. This does not include other possible special expenses such as trips to see [your son] play [baseball] next summer or to visit him in college, body sculpting, etc."

> "[Judge Saucedo:] In sum, I am committed to helping you financially if you wish. I will make mistakes and so will you including both of us being moody at times. But the test of friendship is overcoming these minor differences and reaching a better understanding. We can not walk away over a simple misunderstanding. My goal is to help you succeed in your marriage and personal and professional life."
>
> "[Judge Saucedo:] Let me know how you wish to proceed."

At noon, Tovar went with Judge Saucedo to the BMW dealership. After Tovar test drove a car, Judge Saucedo asked the salesperson to allow him to have a private conversation with Tovar.

They met in a private staff break room. Judge Saucedo told Tovar to tell her husband that the car was Judge Saucedo's wife's old car. He also asked Tovar what she thought about everything. Tovar told him she appreciated it, and "was in shock." Judge Saucedo said he wanted to have more communication with her, and that he wanted Tovar to "tell him . . . how [she] felt all the time, what [she] was thinking, what [her] plans were." He wanted "to know [her] happiness; he wanted [her] to be emotional with him." Tovar told Judge Saucedo the texting "was becoming too much," and that she was not comfortable with having an emotional relationship with him. Tovar asked whether Judge Saucedo "was asking [her] for an affair, emotional affair, and he said . . . no." At that point, the salesperson came in and said the employees needed to use the break room, and Judge Saucedo became angry stating, " 'I'm not done here.' "

Less than one hour after returning to work, Judge Saucedo sent the following text message to Tovar:

> "This is the most difficult message I have ever written. We will always be friends and my financial commitment to you will continue unchanged. But I'm done. I cannot overcome my embarrassment over my childish, stupid and silly behavior. You owe me nothing, including emotional support. This is my last text. I will also not call you. You may text or call if you like. I am angry with myself."

Six minutes later, Judge Saucedo sent another message to Tovar:

> "Here's the schedule. I will deposit into your account at the beginning of each month and in the middle for the jeep payment. You may also let me know of other needs. I told you I would never hurt you but it is obvious my behavior is negatively impacting you. If you want the car it is yours. We simply need to wor[k] out the details. Please forgive me and continue to be my friend on your terms. Check your account."

Seven minutes later, Tovar responded back:

> "I would love the car, don't be upset, it will all be ok. I will check my account in a few minutes."

Five hundred dollars was deposited into Tovar's bank account at 2:09 p.m. that same day.

Later that evening, Judge Saucedo began a text message exchange with Tovar stating: "I feel stupid for breaking my rule. Critical development on the car. Must talk tonight. Teaching class. Can you call me around 8:15. Critical!!" Tovar responded that she would try to call. About one hour later, Judge Saucedo texted back:

> "Don't call. I have slowed down the process. If we want the car and put down a nonrefundable deposit of 1000, Ed will hold the car for 10 days. This is perfect. We can get everything lined up and not rush through this. We must be certain that we want this car with this deal or, if we don't follow through we lose the $1000. Are you sure you want this car?"

Approximately one hour later, Judge Saucedo sent Tovar another message stating he was "doing this" because he "care[d] about [her] and [her] family" and wanted her "in a safe car." Judge Saucedo then sent another message stating, "This car will be yours," and Tovar responded that she "agree[d]" with the plan.

The next day, Tovar and Judge Saucedo returned to the dealership for Judge Saucedo to make a $1,000 down payment. According to Tovar, as they were walking out

of the dealership in the parking lot, Judge Saucedo brought up the issue of a "romantic relationship." Tovar testified:

> "[Judge Saucedo] said that he had a conversation with his accountant . . . about having to cash stocks in to get the car or something like that, and his accountant asked him . . . who was I. Who buys a car for a person? Who gives them a Disneyland trip? And was he sure I wasn't more than just a special friend; was I his mistress? . . . [¶] And then [Judge Saucedo] said that . . . if my husband didn't find out and his wife didn't find out, if he would consider having a romantic relationship with me. And I looked at him, and I said, 'What?' And he says 'If they wouldn't know about it, would you have a romantic relationship with me?' And I said, 'Is that what this is all about?' I said, 'No I wouldn't.' And he says, 'Why? Because of my age?' I said: 'I've never looked at you like that. . . . I'm married, and you're my judge. I work for you. I would never look at you this way. And if this is what this is all about, then I don't want the car; just forget it.' "

Judge Saucedo responded by hugging her and saying, " 'No. Okay. I'm sorry. I'm sorry. The car is yours.' "

Judge Saucedo denied this conversation occurred. Based on the credibility determinations of the masters, which we have adopted, we find Tovar's recollection of the conversation to be credible.

### 10. Text Messages About Relationship Status, and Judge's Claimed Suicide Attempt

The next day, Saturday, November 2, Tovar and Judge Saucedo texted throughout the day as follows:

> "[Tovar:] Hope your game of golf was good. I had a question about the tint on the car. I called Ed but he's not returning my call. I wanted to make sure it was dark. Sorry to bother"
>
> "[Judge Saucedo:] Tessie [Velasquez] is coming over to my house."
>
> "[Tovar:] How nice."

"[Judge Saucedo:] I was busy with Tessie and did not have a chance to directly respond to your earlier text. She might be next. Thank you for asking about golf. It's always wonderful. I truly enjoy it. . . . Your texts are never a bother. I have information from Ed about the molding and tinting. Your comment begs the question. You are focused on the end result and not the process. The process is more important."

"[Judge Saucedo:] Covered by accountant-client privilege, I spoke with my accountant again. He said I didn't realize I had already been seriously hurt and will only experience more hurt in the future. After I told him about the $5 in savings and the car, he said 'wow and not even a thank you'. No texting, no calls, a few hurried conversations, you initiate all communication, 'what's in it for you' he commented. [¶] Not even a text or a call on whether the car closed. It's [a] friendship in your mind and at most, a one sided friendship he said. Think about it he asked. I spoke to him because I needed an objective assessment. Is his assessment right?"

"[Tovar:] I thought we talked about all this. I'm not sure where your going with this issue. We are friends always were and as far as I see we will be. I'm thankful and appreciate everything. I don't know what you mean when you say hurt I have never hurt you. Really stressing me with all this."

"[Judge Saucedo:] I shared with you the conversation with my accountant. I wanted reassurance everything is fine and he is wrong. It is not a challenge of your values. I appreciate this causes stress but I too stressed. I am about to gift you $15 and he is right in some respects. You texted about the tinting but never asked either yesterday or today whether the deal c[l]osed or any other details. I understand you are thankful but it would be so nice to receive a simple 'thank you' or statement about how this feels or how excited you are. Simple things make a difference. Love, kindness and respect everyday."

"[Judge Saucedo:] Where is this going? You will have a beautiful car before or on or about November 12. That's where this is going. [¶] I promised it and I deliver on my promises. It's that simple."

> "[Tovar:] I thought it was done or closed sorry. . I'm excited but then when I get texts like the one Earlier from you it makes me stress. I didn't know you needed reassurance. . . I was in a great mood all day. You know I'm super excited a car and a trip who gets that. . . ."
>
> "[Judge Saucedo:] How would I know you were in a great mood today without you telling me? How would I know you are super excited without you telling me? T[h]at's the point. You know knowing you are happy makes me happy. It's the mental part that is important to me. Or as you describe it, the emotional part."
>
> "[Judge Saucedo:] Aren't you interested in the final details?"
>
> "[Judge Saucedo:] I want you to savor the moment. It real now. You did not believe me when I first broached the subject. You wrote flowers, a car? Because you did not believe. Now the moment is here and I want you to reflect on the journey and acknowledge it has been great."
>
> "[Judge Saucedo:] Feedback? Comments? My accountant is right---texting is a wholly unsatisfactory way of communicating."

The next day, Judge Saucedo sent two texts to Tovar in which he continued to discuss his relationship with Tovar:

> "[Judge Saucedo:] After reflection, I understand it. You think of me as an ordinary friend like Kim [Werth] or others. Indeed, you have said in the past you want to go back the way it was. But I am not an ordinary friend. As you said 'a car and a trip who gets that'. No other ordinary friend h[a]s in the past given you or will give you in the future a valuable car, a trip for you and your sister and your families or a commitment to support you financially. Is this what an ordinary friend does? No. Only a special friend does this. An ordinary friend would provide only moral support. If you want me to be an ordinary friend like I was before September, I will provide only moral support. But if you want me for a special friend, everything is on line with full financial and moral support going forward. Special friend means you want

> to make time and effort to share thoughts and experiences with me."
>
> "[Judge Saucedo]: These are my feelings. I am always honest and truthful. Am I an ordinary or special friend?"

Less than 10 minutes later, Tovar responded by text stating: "Correct me if I'm wrong, are you once again asking for an emotional affair?" Judge Saucedo responded, "Absolutely not" and "Why do you ask that q[u]estion?" Over the next hour, Judge Saucedo and Tovar had an exchange of texts that began with Tovar's statement that she thought it was "time" to tell her husband "absolutely everything" about Judge Saucedo's conduct and she could not handle it anymore:

> "[Tovar:] That's what you mean when you say special friend? I think it's time I tell Lalo absolutely everything from the letter, financial gifts, the trips, the car, I can't handle it anymore, I'm shaking, I'm sick, I'm an emotional mess and I have not bothered anyone in my life. I can't handle this no longer. The lies to my family and friends its not worth how I'm feeling right now I can't focus on my family since your texts yesterday."
>
> "[Tovar:] And they don't deserve this. I will also seek a therapist tomorrow just so you know. This has gone bad."
>
> "[Judge Saucedo:] Please calm down and think about this. Think before you act. What should I tell Ed [the BMW salesperson]?"
>
> "[Judge Saucedo:] Please think and slow things down."
>
> "[Judge Saucedo:] Please call me."
>
> "[Judge Saucedo:] Based on your text, I will resign as Ju[d]ge tomorrow. My career is toast. We can still save this. Please call."

More than three hours later, Tovar texted Judge Saucedo demanding that he "follow through" with his promised gifts of a Disneyland vacation and a car:

> "I take it that you will follow through with the cost of my family trip and the car, I will not come out of this as a failure without either. I do not want to hear anymore of our relationship status, Not one word. I am an emotional wreck as I text this. I will consider you a friend and nothing else just as I consider 'Kim'. I am still going to seek a therapist as damage has been done. I did not think this was going to end up this way."

Judge Saucedo responded, "Call me please," and Tovar countered with, "No phone calls. No more texts after this. Please." Judge Saucedo wrote: "I understand but I am concerned about my career. It is toast unless you talk to me. In the garage committing suicide. Have the red car running with the door down. Please call." Tovar replied she would call 911, and then she said, "I'm not going to say anything. If you follow through with what I asked."[6] She told him to "stop calling." Judge Saucedo then wrote: "Thank y[o]u for sparing my life and career. Absolutely I will follow through on the car, trip, and not another word as you request. Your text was timely because I was ending my life. Thank you for the gift of life."

### 11. Discussions of Judge's Resignation, Continuation of Gifts, Involvement of Werth, and Tovar's Request for Promised Expense Money for Disneyland Trip

The next day, Monday, November 4, Judge Saucedo called Tovar into his chambers and told her he had given a letter of resignation to the court's executive secretary, Ellen Kennedy.[7]

Two days later, Judge Saucedo paid the remaining purchase price ($14,000) for the BMW automobile, and registered the vehicle in Tovar's name.

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[6] It is not entirely clear from the record whether this statement was made in a text or in a phone call, but it is undisputed Tovar communicated these words to Judge Saucedo. The statement is included in a document prepared by Judge Saucedo reflecting the content of certain text messages previously contained on his phone (that he later deleted).

[7] In her testimony, Kennedy denied Judge Saucedo had given her this letter, or had discussed his resignation or retirement with her. Investigator Buehler testified that Judge Saucedo told her he discussed the possibility of his retirement with Kennedy.

On November 12, Bailiff Eddie Cibrian began talking with Tovar in the courtroom. Judge Saucedo came into the courtroom and told Cibrian to leave and that he needed to speak with Tovar. Judge Saucedo told Tovar her financial privileges were reinstated and that he had made a deposit in her account. Tovar became very upset and responded: " 'Why? Why did you do that? You said you were done.' " Later that day, Judge Saucedo deposited $200 into Tovar's bank account.

Two days later, Tovar sent a text to Werth saying: "I'm sick of all this . . . . [w]hy doesn't he just leave it alone . . . he told Eddie to leave the court room so he could talk . . . why put me in that position and At work . . . . Just leave it alone already ugh . . . . It's sick . . . I'm disgusted . . . I want to so bad file harassment but I know that's bad."

Later that day, Werth met with Judge Saucedo in an attempt to act as a "go-between" to assist Judge Saucedo and Tovar to repair their relationship. In text communications to Tovar shortly before the meeting, Werth said she had "a feeling once [Judge Saucedo] know[s] [the] cats outta the bag, he'll stop," but she said she was not sure he would fully "come clean."

According to Werth, during her ensuing meeting with Judge Saucedo, she told him she knew about the text messages and the gifts, and that Tovar did not want him to send her any more text messages or give her any more money or gifts. Judge Saucedo agreed he would stop texting and there would be no more gifts. Werth learned for the first time that Judge Saucedo had paid for the entire purchase price of the car ($15,000); Tovar had told her he paid only the down payment. Werth had also been unaware Judge Saucedo had been depositing cash directly into Tovar's account. When Werth confronted Tovar about her failure to tell her the truth about the car purchase and the direct deposits, Tovar began crying and said she had not disclosed this information because she had been too embarrassed.

The next day, Friday November 15, Judge Saucedo called Werth, Tovar, and Velasquez into his chambers and said he had decided not to retire or resign. He said he

had been "going through something," and that he was better and everything was going to be okay.

**F. Last Payment and Judge Accuses Tovar of Extortion**

Over the weekend, Tovar was emotionally distraught and decided she could no longer work in Judge Saucedo's department. On Monday, November 18, she went into Judge Saucedo's chambers and told him the Disneyland trip was coming up and she would need the trip expense money by Wednesday, November 20, and that she was going to ask for a transfer. She told him she had previously spoken with her supervisors about a transfer and was told she would have to inform him of her request.[8] Judge Saucedo replied, " 'Okay.' "

Judge Saucedo testified that Tovar came into his chambers and threatened to report him to human resources unless he gave her $8,000 by November 20th. Tovar testified she never threatened Judge Saucedo or asked him for $8,000 or any specific amount. She said she asked him for the Disneyland expense money he had previously promised because without it she would be forced to cancel the trip and explain the situation to her family.

Werth testified that shortly after the judge's meeting in chambers with Tovar, Judge Saucedo told her that Tovar had demanded $8,000 and threatened to report him to human resources.

The next day, during a criminal proceeding, Judge Saucedo handed Tovar a typewritten note in an envelope while she was sitting at her courtroom desk. The note stated:

> "Yesterday, November 18, 2013, you threatened to go to HR unless I deposited $8,000.00 into your savings account by Wednesday. The deposit slip for $8,000.00 is enclosed. Please stop. It is done. Enough is enough. It ends today. No more money will be paid out. Confirm through Kim [Werth].

[8] In October, Tovar had a brief meeting with a court manager. She told the manager that she was overwhelmed with the work in her department and thought it was time for a transfer. Tovar decided not to proceed with her transfer request when the manager told her that Judge Saucedo would have to be informed of Tovar's request.

> "Penal Code 518.
>
> "Extortion is the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.
>
> "Penal Code 519.
>
> "Fear, such as will constitute extortion, may be induced by a threat, either: [¶] 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or, [¶] 2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or, [¶] 3. To expose, or to impute to him or them any deformity, disgrace or crime; or, [¶] 4. To expose any secret affecting him or them."

Attached to the note was a bank deposit slip showing Judge Saucedo had deposited $8,000 into Tovar's bank account at noon that day.

Tovar said she regretted taking and keeping the money, but at the time she thought if she gave back the $8,000, the judge would say she "was guilty of all of this." Tovar never returned any of Judge Saucedo's money or the BMW vehicle.

Regarding Tovar's alleged demand for $8,000, the masters found that Tovar approached Judge Saucedo to inform him of her intention to seek a transfer from his department and also to ask for the Disneyland money that had been promised to her. However, they found the evidence insufficient to determine whether it was Judge Saucedo or Tovar who suggested the specific $8,000 figure. We agree. However, as stated by the masters, regardless of who raised this $8,000 figure, "the Examiner proved by clear and convincing evidence that Judge Saucedo deposited the $8,000 into Tovar's bank account for the specific purpose of seeking to ensure Tovar would stay silent about his past behavior." Judge Saucedo provided no reasonable explanation for his decision not to report the alleged extortion conduct to court administration or law enforcement.

On the issue concerning the circumstances in which Judge Saucedo gave Tovar the "extortion" note, Tovar testified that Judge Saucedo handed the note to her while she was

sitting at her courtroom clerk's desk "in the middle of" a criminal hearing (a factual issue relevant to the legal question of whether the judge was acting in a judicial capacity, as discussed later in this decision). According to Tovar, during the hearing when a public defender, deputy district attorney, an interpreter and Werth were present, Judge Saucedo asked to go off the record, and then handed her the note and asked her to read it. She asked whether he wanted her to read it on the record, and Judge Saucedo said, "No." Judge Saucedo then went back on the record and finished the proceeding.

Judge Saucedo acknowledged he gave the note to Tovar in the courtroom, but said he handed her the note when the afternoon calendar was completed and the attorneys were picking up their materials and leaving.

The masters found Tovar's testimony on this issue "was specific, detailed, and made sense given the entire circumstances." We adopt the masters' finding that Judge Saucedo gave Tovar the "extortion" note during court proceedings while he was on the bench and in his judicial robe. We further adopt the masters finding that Judge Saucedo engaged in this conduct at this time and place for the specific purpose of using his judicial office to intimidate Tovar and ensure her silence.

**G. Tovar Reports Judge Saucedo's Claimed Improper Conduct**

Shortly after she received the November 19 "extortion" note, Tovar filed a request to be transferred out of Department 6. While this request was pending, on December 6, Tovar asked to meet with human resources manager Doreen Vitale and, during a highly emotional meeting, summarized the events of the past two months. Vitale took notes, and then typed the notes into a document, which Tovar reviewed and signed. With minor exceptions, the typed summary is consistent with Tovar's testimony. Tovar told Vitale that Judge Saucedo is very powerful and she was afraid of losing her job and of retaliation. Tovar said she did not report the conduct earlier because she was hoping Judge Saucedo's conduct would "all stop and go away," but it did not.

Tovar later filed two administrative claims, one with the Judicial Council and one with the Department of Fair Employment and Housing, alleging Judge Saucedo engaged in unlawful sexual harassment and seeking damages for the harassment. She also filed

(or was considering filing) a lawsuit, but she testified she was not sure she was going to maintain this action. She said that other than the hugs, Judge Saucedo's conduct was not "sexual" in nature.

### H. Credibility Determinations and Findings on Primary Factual Issues in Dispute

#### 1. Summary

Many of the critical facts underlying the charges are undisputed. Judge Saucedo admits he presented the Anonymous letter to Tovar, falsely told her he had contacted her husband's employer and intercepted the letter, and told her not to tell anyone about the letter. He also admits that between mid-September 2013 and mid-November 2013 he gave Tovar gifts valued in excess of $25,000, sent hundreds of text messages of a personal nature, gave her several notes, and wrote the letter providing legal advice to her son. There are, however, two important factual issues that are strongly disputed. First, Judge Saucedo steadfastly denies he wrote the Anonymous letter. Second, he denies that the gifts were given to Tovar as a means to establish a "close" or romantic relationship. Rather, he maintains he was motivated solely by a sincere desire to mentor Tovar and assist her in resolving marital and financial difficulties he perceived she was experiencing. Judge Saucedo claims Tovar turned on him and manipulated his well-intentioned efforts to assist her, as evidenced by her decision to keep all of the gifts.

In the sections below, we first explain why we adopt the masters' credibility determinations and then address our factual findings on the two major factual issues in dispute.

#### 2. Credibility Findings of Tovar and Judge Saucedo

In those instances where the testimony of Judge Saucedo and Tovar conflicted, the masters found Tovar's testimony to be credible and her version of events to be true. The masters found significant portions of Judge Saucedo's testimony lacked credibility. We adopt these credibility determinations both because the masters were in a position to observe the credibility of the witnesses and because these findings are supported by our own independent evaluation of the evidence.

Tovar's testimony was consistent with, and corroborated by, numerous items of documentary evidence, including her text messages with Judge Saucedo and Werth, and notes and letters given to her by Judge Saucedo. Tovar recalled numerous details of the relevant events, and those details coincided with, and were substantiated by, the content and timing of the documents.

For example, Tovar's description of Judge Saucedo's actions in the car dealership break room (that he wanted to "know [her] happiness" and wanted her to "be emotional with him") was followed one hour later by a text from Judge Saucedo (during the work day) in which he said he was "angry with [him]self"; "[t]his is the most difficult message I have ever written"; and "I cannot overcome my embarrassment over my childish, stupid and silly behavior." Documentary evidence reflects that shortly after this text, Judge Saucedo deposited additional money into Tovar's bank account and assured her he would buy the car for her.

Likewise, Tovar's testimony that Judge Saucedo told her he wanted to have more personal contact with her after one of their AAA office meetings was corroborated by Judge Saucedo's October 30 texts (shortly after a AAA meeting) stating he was "feeling out of balance" and "still feeling under appreciated" and was "embarrassed about [his] feelings," and his text of the next morning stating, "I sincerely apologize for everything I said or did yesterday that was offensive or hurtful. I should not have communicated while off balance."

By contrast, Judge Saucedo's testimony was often disputed by documentary evidence. For example, the judge's testimony that he sent the flowers to Tovar to acknowledge the anniversary of Tovar's brother's death is contradicted both by the fact that the anniversary of her brother's death was the following month and by the florist note indicating that his identity was not to be disclosed. Also, when asked what privilege he was referring to when he marked the letter to Tovar's son as "Privileged and Confidential Communication," he responded that it was directed to the parents, yet the letter was addressed to Tovar's son. Only after being questioned further by a special master did he acknowledge he was referring to an attorney-client privilege.

Judge Saucedo's testimony and prior statements were also at odds with his text messages and notes to Tovar. For example, in his Answer, he denied he offered to provide Tovar with spending money for the Disneyland trip, but his testimony and text messages clearly show he committed to giving her this money. He also denied in his Answer that Tovar had told him to stop texting her, yet his AAA note specifically asks for his "texting privileges to be reinstated." Further, he denied telling Tovar that he planned to give her $26,400, even though his October 31 text message clearly states this fact. He also maintained he did not talk with his brother regarding financial support for Tovar, even though he told her in a text that he had spoken with his brother "about you" and, "You don't know how well you are covered."

Judge Saucedo's testimony was also inconsistent with assertions made in documents he signed and prior statements. For example, in his June 2014 letter to the commission, he stated, "Ms. Tovar has initiated and entertained *all* personal contact we had with one another at all times but one." (Italics added) The statement directly conflicts with the documented facts showing Judge Saucedo frequently initiated the text communications. He also gave conflicting explanations of his statement in the September 30 note that he "voluntarily took a risk" to protect Tovar: he told investigator Buehler that the "risk" referred to was in intercepting the letter at Mr. Tovar's place of employment; in his Answer, he denied that the "risk" was contacting the husband's employer; at the hearing, he testified that he was referring to not reporting the Anonymous letter. If the judge meant to suggest to Tovar that he was taking a risk in intercepting the letter, as he told Buehler, his credibility is further damaged since he knew he had not intercepted the letter.

Significantly undermining Judge Saucedo's credibility is the fact that he admitted lying in the past or telling others to lie. He admitted he did not tell the truth on several occasions, including when he falsely told Tovar he had communicated with her husband's employer. Judge Saucedo not only misrepresented the fact that he had contacted the hospital, he also provided numerous false details to embellish the story (e.g., that he spoke with a person named "John" who was the human resources manager;

John had the letter on his desk; John did not know who Mr. Tovar was; and John said he "shredded" the letter during the phone conversation). Judge Saucedo also acknowledged he encouraged Tovar to lie about the flowers and admitted he previously misidentified the delivery date of the flowers. Additionally, he told Tovar to misrepresent the facts regarding the source of the money for the Disneyland vacation and the BMW automobile.

Because the special masters had the opportunity to observe the demeanor of the witnesses, we give special weight to their assessment of credibility. After observing Tovar testify over two days, the masters found Tovar's testimony to be credible. In support of this finding, the masters stated,

> "[Tovar] freely acknowledged when she was not sure of a particular fact or a specific date. Tovar was forthright in admitting facts that were damaging to her, and made a good faith effort to explain the reasons for her actions. These explanations appeared to be unrehearsed and truthful. Although Tovar has filed claims based on Judge Saucedo's conduct and is represented by counsel, we are satisfied her testimony was trustworthy on the issues before us, notwithstanding any financial motivation associated with litigation. Further, although Tovar did not always use the best judgment in responding to Judge Saucedo's overtures, we are convinced her detailed testimony about Judge Saucedo's conduct is reliable."

After observing Judge Saucedo testify over two days, the masters found that "the manner in which Judge Saucedo testified – failing to answer direct questions, providing nonresponsive and sometimes rambling answers, and answering with irrelevant points – created significant doubts as to the truthfulness of his answers." The masters had to point out to the judge on more than one occasion that his answer to a question was nonresponsive. During one exchange with the examiner, a special master interjected and stated, "Judge, he's asked you three times, and I haven't gotten the answer yet." Later in the proceedings, the presiding master told the parties that "Judge Saucedo's answers have been nonresponsive and gone well beyond." Yet, still in another instance, the judge gave a nonresponsive and nonsensical response to a special master who asked why he wrote in

a text to Tovar that he was in the garage with the red car running. The judge responded, "I was in the garage, and that's where I kept my – my Mercedes."

For all these reasons, we adopt the masters' credibility determinations.

### 3. Judge Saucedo Wrote the Anonymous Letter and Sent it to Himself

Upon initially reviewing the Anonymous letter, the masters were "highly skeptical that Judge Saucedo – a highly regarded, dignified, meticulous judge – could have possibly written the letter and then participated in a convoluted plan to persuade [Tovar] that she needed his help." However, after carefully considering all of the testimony and closely examining the documents, the masters reached "the inescapable conclusion that Judge Saucedo did write the letter and mailed it to himself for this purpose." Our examination of the record leads us to the same conclusion.

Of foremost significance, Judge Saucedo's actions after receiving the letter make sense only if he was the author. He falsely told Tovar that he would speak with her husband's employer and ensure the letter would be intercepted before Mr. Tovar received it. The judge further falsely told Tovar that he had contacted the hospital where Mr. Tovar worked and an official agreed to destroy the letter. The masters disbelieved the judge's testimony that he lied to Tovar because he was concerned with her feelings and wanted to reassure her. Rather, the masters found that he lied to Tovar because he already knew he was the author and no letter had in fact been sent to the hospital. We agree.

If a third party had sent the letter, Judge Saucedo would have known that Mr. Tovar would most likely receive the letter and be very upset with Tovar and Knoy. Under those circumstances, falsely reassuring Tovar that her husband would not receive the letter could have put her in jeopardy and deprived her of an opportunity to explain the situation to her husband before he received the letter. Furthermore, had the husband received the letter, Tovar would have known Judge Saucedo had lied to her. We do not believe the judge would have concocted this false scenario of intercepting the letter at

Mr. Tovar's place of employment had he not been certain that the letter would never be received by Mr. Tovar.

Additionally, there is no evidence that Tovar or her husband or his employer ever received a copy of the letter. If a third party had sent the letter to Judge Saucedo to inform Mr. Tovar of his wife's alleged extramarital affair, it would seem reasonable that this person would also have sent the letter to Tovar's husband. It is not logical that the letter was sent only to Judge Saucedo if it had been written by a third party.

In fact, Judge Saucedo expressed his awareness that the letter was sent only to him. He testified, and told investigator Buehler, it was his understanding there was only one copy of the letter (the one he received). When the examiner asked him why he did not give Tovar a copy of the Anonymous letter, Judge Saucedo responded, "I didn't want multiple copies out there. Only one had been sent. And at the time, I just wanted to hold onto it. And she didn't ask me for a copy." If he had not sent the letter, he would not know that there was only one copy.

Further, Judge Saucedo was aware of possible security and domestic violence concerns that could be triggered if Mr. Tovar received the letter. As a judicial officer, he was aware of his obligation to report this type of correspondence to his presiding judge and law enforcement. He nonetheless took no action to report the matter or to preserve the letter for forensic analysis. Instead, he affirmatively precluded any such actions by demanding that Tovar not tell anyone about the letter. Judge Saucedo was unable to explain these actions, other than to say that "[p]erhaps" he did not "think" about these issues at the time. Given Judge Saucedo's experience and intelligence, the masters found this explanation to be implausible. Instead, the masters concluded "Judge Saucedo did not 'think' about these issues because he was the author of the letter and its only recipient and thus knew there were no security concerns associated with his receiving the letter." We agree.

Judge Saucedo's repeated insistence that Tovar not tell anyone about the letter further supports our finding that he was the author. His explanation that he was trying to protect Tovar from being fired is not plausible. There is no evidence that Tovar would

have been fired or disciplined for having an open romantic relationship with a bailiff. On the other hand, not informing court administration about a letter that raised security concerns might well be the basis for discipline. Judge Saucedo instructed Tovar not to reveal the letter to anyone to protect himself, not her.

The judge's reliance on the letter to create a dependent relationship between himself and Tovar provided additional support for our finding that he wrote the letter. As stated by the masters:

> "Immediately after showing Tovar the Anonymous letter, Judge Saucedo had a specific and defined plan for moving forward, a plan that relied on the contents of the letter and his willingness to 'fix' the problems raised in the letter. Over the next two months, Judge Saucedo continued to use the letter to pressure Tovar when she sought to distance herself from him. For example, after Judge Saucedo gave her the September 30 note and she told him she did not feel comfortable with his help, Judge Saucedo responded in an angry manner, stating ' "What do you mean you don't want my help anymore? So you mean the [Anonymous] letter is true? So is it true about you and Jeremy? Maybe your husband does need to know about the [Anonymous] letter." ' "

Judge Saucedo contends there is insufficient evidence to prove he knew of facts included in the Anonymous letter, specifically of Tovar's prior relationship with Knoy, her cesarean section scar, tattoo, and information about Tovar's husband. We agree with the masters that the examiner proffered clear and convincing evidence that the judge was in fact aware of those details.

Witnesses testified that the prior romantic relationship between Tovar and Knoy was widely known at the courthouse and discussed by Tovar and Velasquez in the clerk's common area directly outside the judge's chambers (he generally kept his door open).

Regarding Tovar's tattoos, the masters had the opportunity to observe that Tovar's tattoos would be clearly visible while wearing her work outfits. Werth testified Tovar's tattoos were visible at work. Tovar testified that she and Judge Saucedo talked about her tattoos on two occasions. During one of those conversations, Judge Saucedo asked Tovar

why she was wearing a band aid on her foot, and Tovar explained that the court policy was that employees must cover their tattoos at work (although Tovar did not always follow this policy). In another conversation, Judge Saucedo told Tovar that his son had tattoos and Tovar discussed her tattoos. In light of this evidence, we reject Judge Saucedo's testimony that he was unaware of the tattoos.

As to the reference to Tovar's "c-scar," the masters credited Tovar's testimony that she had discussed with Judge Saucedo the fact that she had a cesarean section when he saw a photograph of her infant in an incubator. We adopt this finding and also find Judge Saucedo was aware of this fact through the frequent personal discussions among staff in the common area outside his chambers.

Further, although Tovar generally referred to her husband as "Lalo" and the letter was addressed to "Hilario Tovar," Judge Saucedo admitted he was aware that Lalo is a common nickname for Hilario. He also acknowledged he knew Mr. Tovar worked for a healthcare provider in the area. Tovar testified she was excited her husband had recently gotten a job at the medical center and she mentioned that to court staff and the judge. Additionally, when Judge Saucedo first showed Tovar the Anonymous letter, he pointed out that the letter had been sent to her husband's employer, reflecting he was aware that Mr. Tovar worked at the Tulare Regional Medical Center.

Finally, contrary to Judge Saucedo's contentions, the fact that the forensic analysis did not find that the Anonymous letter was written on his court computer is not dispositive because the evidence shows the analyst did not find evidence of the other notes and letters that Judge Saucedo admitted writing. Further, we reject as implausible Judge Saucedo's claim that he did not know how to type an envelope to himself, or that he could not have printed the self-addressed envelope. Additionally, the fact that the examiner did not "prove" the precise location of the mailbox that Judge Saucedo used to mail the letter is not dispositive. The evidence shows the letter was received at a distribution center that processes mail from the area where Judge Saucedo lived and worked, and that Judge Saucedo was in this vicinity at the time the letter was mailed.

This evidence leaves us clearly convinced that Judge Saucedo wrote the Anonymous letter and sent it to his own home address. We see no other reasonable interpretation of the evidence.

#### 4. Judge Saucedo's Actions Were Not for the Purpose of Mentoring Tovar

Judge Saucedo claims he and Tovar jointly agreed to embark on a "mutual venture" to solve the problems raised by the letter, to reconcile her marriage and build her self-esteem. He testified that the "mentoring" relationship fell apart because Tovar improperly focused on details and not "the process." As did the masters, we find by clear and convincing evidence Judge Saucedo wrote the Anonymous letter as part of a predesigned plan to manufacture Tovar's dependence on him, hoping it would lead to a closer personal or "emotional" relationship with Tovar. We reject his claim he intended only to "mentor" her or that his improper actions can be properly blamed on any of Tovar's actions. We agree with the masters that although Tovar "made some poor choices in continuing to accept gifts, and, in one instance, demanded Judge Saucedo make good on his financial 'promises,' these considerations do not excuse the fact it was Judge Saucedo who initiated the relationship through false means and then improperly used his position and financial rewards to pressure his court clerk into maintaining an inappropriate and unwanted personal relationship."

Mentoring involves advice, direction, referrals and encouragement. As stated by the special masters, "Mentoring is not accomplished by providing a subordinate with thousands of dollars in gifts, including a BMW car and vacation," an offer to pay for body sculpting" or expecting a 'special' friendship in exchange."

Further, the overly personal and emotional language the judge used in his text messages and notes to Tovar is far from the type of supportive but professional communication one would expect in a mentoring relationship (i.e., "It's silly but still feeling under appreciated"; "I, too, am human and have an ego. Feel free, if you wish, to compliment me if you like things I do or wear"). Further, the judge repeatedly stated and suggested that he wanted a closer or "special" relationship with Tovar in exchange for his

"gifts," something that would not be expected or appropriate in a mentoring relationship ("If you want me to be an ordinary friend like I was before September, I will provide only moral support. But if you want me for a special friend, everything is on line with full financial and moral support going forward. Special friend means you want to make time and effort to share thoughts and experiences with me"; telling Tovar that his accountant questioned why he was buying her all of these gifts and whether this was a "one sided friendship").

It is undisputed that Judge Saucedo has successfully and enthusiastically mentored numerous individuals out of a sense of compassion and desire to help. But the judge's conduct here does not remotely resemble the conduct described by the many witnesses and declarants who lauded Judge Saucedo's willingness to assist them (mentoring law school graduates to pass the bar exam; supervising and mentoring legal interns and new attorneys; mentoring students in a program bridging high school and college; mentoring members of the community professionally and personally by providing advice and encouragement).

Judge Saucedo testified that he is a highly ordered and structured person who focuses on "framework" and "process" when working with others. In his closing statement, Judge Saucedo's counsel argued that everything that Judge Saucedo "does, he does with vigor and does it in a deliberate and organized way." The evidence establishes that this is precisely how Judge Saucedo approached his desire to have a closer personal relationship with his female clerk. We agree with the masters that Judge Saucedo "devised the plan to send a crude and 'vile' letter accusing her of sexual infidelity and apparently envisioned that Tovar would rely on him to become the person who would protect her and 'fix' her life problems (or what Judge Saucedo perceived to be her life problems)."

**I. Judge Saucedo's Background and Character Witness Evidence**

Judge Saucedo presented evidence about his personal and professional background. His parents were immigrants who worked as farm workers. The judge received financial aid to attend the University of California at Berkeley and worked with

his family in the farm fields on weekends and breaks. After earning his law degree from Stanford, he practiced law for more than 24 years in the Central Valley, primarily with rural legal service agencies and at a private law firm representing plaintiffs in employment class action matters. The judge was on the Lindsay City Council, and was later appointed mayor.

Judge Saucedo presented substantial character evidence, including the testimony of 16 witnesses and more than 100 supporting declarations from judges, community leaders, community members, religious leaders, attorneys, court staff and former mentees.[9] In general, the witnesses described the judge as a fair, generous, honest, respectful, courteous, caring and hardworking judge, attorney and leader. He devotes substantial time to volunteering for organizations and mentoring young professionals. The judge provided bar examination tutoring to a number of recent law school graduates who came from underprivileged backgrounds and who had difficulty passing the bar exam. He also provided mentoring and support to many young lawyers starting out their careers in public interest law and has been a positive influence in the lives of members of his community.

Based on this evidence, we adopt the masters' finding that Judge Saucedo has had a distinguished career as a judge, attorney, and community leader, has very strong support from his colleagues, attorneys, community leaders and community members, and has provided substantial assistance to many individuals in need of his assistance.

[9] On September 29, 2015, prior to the appearance before the commission, the commission chairperson, Hon. Erica R. Yew, sent a letter of disclosure to the parties concerning Dale Minami, an attorney who submitted a supporting declaration on Judge Saucedo's behalf. The letter, which is included in the public file of these formal proceedings, discloses Judge Yew's social and professional contacts with Mr. Minami over the past 12 years, and that he previously made a donation to a nonprofit foundation that her husband founded and in which he serves as president.

## III.

## LEGAL CONCLUSIONS

### A. Violations of the Code of Judicial Ethics

The Notice of Formal Proceedings alleged Judge Saucedo violated several canons of the Code of Judicial Ethics: Canons 1, 2, 2A, 2B(1), 3C(5), and 4G. Those canons, as pertinent here, require a judge to personally observe high standards of conduct "so that the integrity and independence of the judiciary is preserved" (canon 1); "avoid impropriety and the appearance of impropriety in all of the judge's activities" (canon 2); "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (canon 2A); "not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment" nor " convey or permit others to convey the impression that any individual is in a special position to influence the judge" (canon 2B(1)); "avoid nepotism and favoritism" (canon 3C(5)); and to not practice law (canon 4G).

We conclude that Judge Saucedo violated each of these canons through the following conduct. First, Judge Saucedo's authorship of the Anonymous letter violated canons 1, 2, and 2A. This conduct violates the high standards required of a judge, undermines the integrity of the judiciary, and diminishes public confidence in the integrity of the judiciary.

Second, Judge Saucedo's failure to report the Anonymous letter to his presiding judge, court administration or law enforcement violated canons 1, 2 and 2A. This conduct violates the high standards of conduct required of a judge, undermines the integrity of the judiciary, and diminishes public confidence in the integrity of the judiciary.

Third, Judge Saucedo's conduct in using the Anonymous letter as a means to promote a closer personal relationship with Tovar violated canons 1, 2 and 2A. This conduct violates the high standards required of a judge, undermines the integrity of the judiciary, and diminishes public confidence in the integrity of the judiciary.

Fourth, Judge Saucedo's course of conduct during September 18 through November 19 that included giving Tovar, a subordinate employee, substantial monetary and tangible gifts as a means to convince her to become involved in a closer personal relationship violated canons 1, 2, 2A, and 3C(5). This conduct violates the high standards required of a judge, undermines the integrity of the judiciary, diminishes public confidence in the integrity of the judiciary, and manifests favoritism toward a subordinate employee.

Fifth, Judge Saucedo's extortion allegation, and the manner in which he made the accusation, violated canons 1, 2, 2A, and 2B(1). Judge Saucedo interrupted court proceedings to hand Tovar a note accusing her of extortion. By doing so, Judge Saucedo improperly used the power of his judicial office to intimidate Tovar and seek to ensure her silence regarding his conduct during the previous two months. Judge Saucedo also failed to report the claimed extortion demand to law enforcement or court officials. Judge Saucedo's conduct concerning the extortion claim violated the high standards required of a judge, and violates his duties to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Sixth, Judge Saucedo's conduct in providing Tovar's son with legal advice violated canon 4G.[10]

**B. Level of Misconduct**

A judge who violates the Code of Judicial Ethics engages in one of three types of judicial misconduct: (1) willful misconduct, (2) prejudicial misconduct, and (3) improper action. A judge may be removed from office or censured based on the first two, but not the third. (Cal. Const., art. VI, § 18, subd. (d).)

Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in a judicial capacity. (*Broadman, supra,* 18 Cal.4th at p. 1091.)

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[10] The masters also concluded that Judge Saucedo engaged in willful misconduct in providing false information to Tovar's supervisors to justify overtime work and with regard to an incident involving Deputy Scott Ballantyne. As discussed later, we do not adopt the masters' conclusions that the judge engaged in misconduct with respect to these incidents because they were not charged in the Notice.

Failure to comply with the canons of judicial ethics is generally considered to constitute *unjudicial conduct*. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662 [34 Cal.Rptr.2d 641, 882 P.2d 358].)

In the context of willful misconduct in judicial office, a judge acts in *bad faith* "only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman*, *supra*, 18 Cal.4th at p. 1092.)

The third element of willful misconduct – *acting in a judicial capacity* – is discussed below.

Prejudicial misconduct is "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) Prejudicial misconduct occurs when an objective observer would conclude the judge's improper conduct was " ' "prejudicial to [the] public esteem for the judicial office," ' " regardless of the motive or intent of the judge. (*Broadman, supra*, 18 Cal.4th at p. 1092.) Prejudicial misconduct differs "from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith." (*Ibid*.) Unjudicial conduct committed in bad faith by a judge not acting in a judicial capacity constitutes prejudicial misconduct. (*Id.* at pp. 1092-1093.) "In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem." (*Id.* at p. 1093.)

Improper action occurs when the judge's conduct violates the canons, but the circumstances do not rise to the level of willful misconduct and do not bring the judiciary into disrepute. (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 899 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams II*).)

Each of Judge Saucedo's canon violations constitutes, at minimum, prejudicial misconduct. The judge's conduct was improper in myriad ways. He authored the

Anonymous letter containing crude and sexually explicit language, and then used the letter to create a closer "emotional" relationship with his clerk, pressured her with expensive gifts and other benefits to comply with his requests for a closer relationship, and presented her with the extortion note in open court to discourage her from reporting his conduct. We agree with the masters' conclusion that an objective observer would readily conclude the judge's conduct was highly prejudicial to the "public esteem for the judicial office," and that Judge Saucedo brought the judicial office into disrepute.

We also agree with the masters that the judge acted in bad faith with respect to the entire course of conduct as charged in the Notice and as proven by clear and convincing evidence at the hearing before the special masters. His creation of the Anonymous letter for the sole purpose of manipulating his courtroom clerk is the essence of an act committed in bad faith. Further, Judge Saucedo's ongoing efforts to conceal his conduct, and his acknowledgement that his career would be "toast" if his conduct was revealed, show he was aware his conduct was wrong and unjudicial.

With respect to the extortion note, Judge Saucedo testified that Tovar threatened to report him unless he paid her $8,000. Instead of disclosing this conduct to his superiors or law enforcement, he deposited this money into her account *and* engaged in this conduct hoping to intimidate her to adhere to her promise not to report him if he paid the money. Judge Saucedo – who had been a judge for more than 10 years and had been presiding over criminal matters for at least three years – clearly knew his making extortion allegations against Tovar, while he was on the bench, was not within his judicial powers. At the very least, Judge Saucedo engaged in the conduct with a conscious disregard for the limits of his judicial authority.

Having concluded that Judge Saucedo engaged in unjudicial conduct in bad faith, our determination of whether any of his actions constitute willful misconduct, in addition to conduct prejudicial to the administration of justice, turns on whether he was acting in a judicial capacity (the third element of willful misconduct). The judge argues that none of his conduct took place in a judicial capacity. The examiner acknowledges that most of Judge Saucedo's improper activities were performed away from the courtroom and were

not undertaken in connection with his judicial functions or through explicit use of his judicial authority. However, the examiner contends that Judge Saucedo was acting in a judicial capacity and thus engaged in willful misconduct when he: (1) *initiated* the personal relationship with Tovar by meeting with her to show her the letter and create a plan of action; and (2) handed Tovar the letter in the courtroom accusing her of extortion. We agree and conclude that the judge engaged in willful misconduct in those instances and in prejudicial misconduct with respect to his other improper conduct.[11]

A judge is acting in a judicial capacity while performing one of the functions associated with the position of a judge, whether adjudicative or administrative in nature. (*Broadman, supra,* 18 Cal.4th at p. 1104.) When a judge is in chambers or other locations in the courthouse during working hours, the judge is "generally, though not necessarily, acting in a judicial capacity." (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*).) A judge is also acting in a judicial capacity if he or she uses or attempts to use the authority of the judicial office for an improper purpose. (*Ibid.*)

When Judge Saucedo initially called Tovar into chambers and showed her the Anonymous letter, he specifically instructed her not to report the letter to court administration and told her that reporting the letter could result in her being fired. By so doing, the judge was acting in a supervisory capacity. One of the functions associated with judicial authority is supervising staff. (*Dodds, supra,* 12 Cal.4th at p. 175.) We do not believe that any reasonable person would view the judge's comments about being fired as personal advice from a friend. From Tovar's point of view, she was called into chambers and instructed to meet in the law library conference room to discuss a personnel issue. We recognize that not all conduct toward court staff is undertaken in a judicial capacity. In *Dodds,* the Supreme Court held the judge was not acting in a judicial

[11] The masters concluded that Judge Saucedo was acting in a judicial capacity and engaged in willful misconduct concerning the extortion note, but not during the initial communications with Tovar about the Anonymous letter. For reasons discussed below, we reach a different conclusion with respect to the judge's initial communications with Tovar.

capacity when he failed to report a colleague whom he observed deflate a van tire in the court parking lot, and suggested that his staff refuse to talk to the investigating officer. In reaching this conclusion, the Supreme Court first emphasized that Dodds was not acting as a supervisor when he recommended to staff that they decline to give a statement; rather, he was giving advice to a co-witness concerning an event he witnessed outside of his judicial function. In this regard, the Supreme Court stated, "To hold that petitioner acted in a judicial capacity simply because his advice carried with it a degree of authority due to his status as a judge and supervisor would mean that a judge is always acting in a judicial capacity when he talks to staff." (*Ibid*.) Second, the Supreme Court noted that the judge met with the detective at the courthouse only because it was a convenient meeting place the detective selected. The present case is distinguished from *Dodds* because Judge Saucedo was giving Tovar advice about a court personnel matter. Additionally, they met in the private room in the court library not because it was convenient, but because the judge did not want the conversation to be overheard. For these reasons, we conclude that Judge Saucedo used his judicial authority during these initial encounters for the purpose of advancing his plan to entice Tovar into developing a closer, "special" relationship with him.

We also conclude that Judge Saucedo was acting in a judicial capacity, and thus engaged in willful misconduct when he handed Tovar the extortion note in court on November 19.

As the masters concluded, "When he handed Tovar the letter, Judge Saucedo was on the bench presiding over a court case and thus presumptively acting in a judicial capacity. He also specifically attempted to use his authority as a judge for improper ends (silencing Tovar), which necessarily supports a finding of judicial capacity." (See *Dodds, supra*, 12 Cal.4th at p. 172.)

Thus, we conclude that Judge Saucedo engaged in a course of highly improper conduct toward Tovar over a two-month period that constitutes willful misconduct in those instances when he was acting in a judicial capacity and prejudicial misconduct in all other instances. Even if Judge Saucedo had not been acting in a "judicial capacity"

during his initial meetings with Tovar and when he handed her the extortion note, the entirety of his misconduct warrants removal. (A judge may be removed for prejudicial misconduct, as well as willful misconduct. [Cal. Const., art. VI, § 18, subd. (d).])

## IV.

## JUDGE SAUCEDO'S DUE PROCESS AND EVIDENTIARY ARGUMENTS

### A. The Investigation

Judge Saucedo asserts his due process rights were impaired because Buehler, the investigator for the Judicial Council, did not request or preserve any electronic evidence from witnesses other than Tovar. He also complains that he did not have unfettered access to some of the witnesses, including court bailiffs, court clerks and other court staff.

The judge cites no legal authority in support of his due process argument. In response to these same arguments, the masters concluded the judge did not show error or any undue prejudice to his defense. We agree.

Judge Saucedo was given full discovery after the initiation of formal proceedings and the opportunity to call any witnesses. The judge was represented by counsel during both the Judicial Council's investigation and the commission's preliminary investigation.

Judge Saucedo complains that the commission was not able to retrieve all text messages from Tovar's phone over the two-month period at issue. (Some witnesses had already deleted text messages.) He states that Tovar and other witnesses "altered" evidence by deleting text messages, and that the loss of this "critical evidence" impairs his due process rights. The judge does not suggest that the commission had anything to do with this alleged "altering" of evidence or text messages. Nor has he identified how text messages deleted by Tovar or other witnesses were "critical" to his case. (See *Broadman, supra,* 18 Cal.4th at p. 1108 [court rejected judge's argument that judge's due process rights were violated because of delay in interviewing witnesses where judge did not identify the testimony of any material witness whose memory was impaired by the passage of time].) Moreover, the judge has not presented proof that any text messages were deleted for nefarious reasons. In fact, the judge admitted that he regularly deletes messages on his own phone.

The judge also complains that Buehler did not ask to look at the cell phones of certain peripheral witnesses. Once again, the judge has not suggested how this would have been helpful to his case. Further, the commission is not responsible for the investigation conducted by Buehler.

Judge Saucedo also contends that the commission was biased because it only conducted a forensic search of his computer. However, the judge has not shown that there was reliable evidence that anyone else wrote the letter.

Additionally, Judge Saucedo argues that he was not given access to Tovar and Knoy and other witnesses who refused to speak with the judge. The judge was provided with witness statements from commission interviews and had the opportunity to depose up to four witnesses. The judge deposed Tovar for over seven hours, more time than permitted by commission rules. (Rule 122(g).)[12]

In *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 525, 526-529 [247 Cal.Rptr.378, 754 P.2d 724], the Supreme Court rejected the judge's claim that his due process rights were violated because the examiner admonished witnesses during the preliminary investigation that they were not to talk to anyone about the subject of the investigation, and certain witnesses refused to speak with him. The Supreme Court put the burden on the judge to show that the witnesses refused to speak with him because of the witness admonishment and how such refusal prejudiced his preparation for the hearing. Because the judge could not establish either, the Supreme Court rejected his due process argument.

In this case, Judge Saucedo does not claim that the examiner prevented the witnesses from speaking with him through an admonishment or in any other manner. Nor does he identify how his failure to speak with the witnesses prejudiced his

[12] After having deposed Tovar for the full seven hours authorized by commission rule 122(g)(2)(c), Judge Saucedo made a request for an additional two hours to depose Tovar. Upon considering the request, the examiner's opposition, and the judge's reply, the commission denied the request because the judge failed to establish any specific and material area of examination he was unable to complete within the seven allotted hours or that his due process rights were impaired.

preparation for the hearing. In addition to the deposition of Tovar, the judge was provided with the statements Tovar gave to Buehler and commission staff, and cross-examined her extensively at the hearing before the special masters.

We concur with the conclusion of the masters: "Judge Saucedo had the full and fair opportunity to present his defense at the Special Masters' hearing and was at all times represented by experienced and very able counsel. There was no due process violation."

**B. Uncharged Incidents**

The masters found that Judge Saucedo engaged in willful misconduct with respect to two incidents that were not charged in the Notice. The first concerned the judge's meeting in chambers with Tovar to discuss the Anonymous letter on the late afternoon of Friday, September 20. In response to inquiries about why Tovar did not clock out until after 5:00 p.m., Judge Saucedo sent an email to Tovar's supervisor stating he wanted to confirm Tovar worked after 5:00 p.m. at his request and they were working on orders concerning inmate prescriptions. The examiner presented evidence refuting that they were working on prescription orders or other court matters during this after-hours meeting. The judge did not object to the introduction of this evidence at the hearing.

The second incident involved an incident report filed by Sheriff's Deputy Scott Ballantyne, a court bailiff. Judge Saucedo introduced evidence that Tovar was disciplined based on a report submitted by Ballantyne concerning a delayed release of a prisoner as a result of Tovar's clerical error. Upon learning of this report, Judge Saucedo banished Ballantyne from his courtroom during a proceeding and recommended that Ballantyne be terminated.

The examiner requests that the commission not adopt the masters' legal conclusion that the judge engaged in willful misconduct with respect to these incidents because they were not charged in the Notice. We concur and do not reach conclusions as to whether the judge engaged in misconduct with respect to either incident or consider them as a basis for discipline. (See *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 695-696 [122 Cal.Rptr. 778, 537 P.2d 898] (*Cannon*); rule 128(a).)

Judge Saucedo argues that "the Examiner presenting evidence on these topics that were not contained in the Notice cannot be cured by the Examiner now rejecting those findings . . . . [T]he Commission must consider what impact this fundamentally unfair and prejudicial actions had on the entirety of the Special Masters' Findings when deciding on the appropriate level of discipline in this matter." Significantly, Judge Saucedo raised this argument for the first time in his response brief to the commission, *after* the issue of the masters reaching legal conclusions based on conduct not charged in the Notice was *raised by the examiner* in his opening brief.

There is no reasonable possibility that the incidents concerning Ballantyne and overtime pay influenced the masters' findings on the far more serious charges concerning the Anonymous letter and the inappropriate gifts to Tovar. In their 110-page report, the masters gave detailed and distinct support for their findings and conclusions on each charged incident.

Furthermore, it was the judge, not the examiner, who introduced the Ballantyne incident into the proceedings, and he did not object to the introduction of evidence concerning the overtime incident. Thus, we reject the judge's contention that he was prejudiced by the introduction of evidence on these incidents.

## V.

## DISCIPLINE

In determining the appropriate disciplinary sanction, we consider the purpose of commission disciplinary proceedings, which, as stated by the Supreme Court, "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Adams II, supra,* 10 Cal.4th at p. 912.) Adherence to these objectives compels our decision to remove Judge Saucedo from office. He engaged in a calculated course of egregious misconduct involving dishonesty and subterfuge that seriously undermines the integrity of the judiciary and falls exceedingly short of the rigorous standards to which the judiciary is held.

The commission has identified several factors to consider in determining the appropriate sanction, including: the judge's honesty and integrity, the number of acts and seriousness of the misconduct, whether the judge appreciates the impropriety of the conduct, the likelihood of future misconduct, the impact of the misconduct on the judicial system, and the existence of prior discipline. (*Inquiry Concerning McBrien* (2010) 49 Cal.4th CJP Supp. 315, 342-345; see *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 295; see also policy declaration 7.1.)

Foremost in our consideration of these factors is honesty and integrity. The Supreme Court stated that honesty is a "minimum qualification" that is expected of every judge." (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239].) Judge Saucedo's misconduct demonstrates a profound lack of veracity and integrity – he created a false, sexually explicit letter; lied to Tovar about the source of the letter and having intercepted the letter; and told Tovar to lie to her family, friends and court administration, all for the corrupt purpose of manipulating a subordinate employee into having a closer "emotional" relationship with him. Moreover, his deception did not stop when his conduct was reported, but continued throughout these proceedings. The masters stated, "Judge Saucedo was not truthful in the investigation or at the hearing. He refused to admit important documented facts, failed to answer direct questions, and made affirmative misrepresentations." The Supreme Court has said there are few actions that "provide greater justification for removal from office than . . . deliberately providing false information to the Commission in the course of its investigation . . . ." (*Adams II, supra*, 10 Cal.4th at p. 914.)

We take particularly seriously a judge's willingness to lie under oath to the three special masters appointed by the Supreme Court to make factual findings critical to our decision. In removing Judge Kelly MacEachern for misconduct involving dishonesty compounded by untruthful testimony before the special masters, we stated, "In seeking the truth, our justice system relies on the integrity of the oath. A judge who does not honor the oath to tell the truth cannot be entrusted with judging the credibility of others." (*Inquiry Concerning MacEachern* (2008) 49 Cal.4th CJP Supp. 289, 309 (*MacEachern*).)

Judge MacEachern's misconduct involved making misrepresentations about her attendance at a judicial education seminar on her claim for reimbursement and subsequent communications with the court travel coordinator. The masters found that she was untruthful in her response to the commission's investigation and in material portions of her testimony at the hearing. The commission concluded that the lack of integrity reflected in the judge's misconduct, aggravated by her subsequent untruthful statements during the commission investigation and under oath before the special masters compelled the judge's removal from office. (*MacEachern, supra,* 49 Cal.4th CJP Supp. at p. 293.) Other judges have also been removed based, in significant part, on a lack of veracity and integrity. (*Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146 [misconduct included judge signing four campaign statements under oath falsely listing herself as the source of a $20,000 campaign contribution]; *Inquiry Concerning Couwenberg* (2001) 48 Cal.4th CJP Supp. 205 [extensive misrepresentations to governor and commission concerning past educational, career and military history]; *Inquiry Concerning Murphy* (2001) 48 Cal.4th CJP Supp. 179 (*Murphy*) [judge lied about his ill health to remain on payroll while attending medical school in the Caribbean].)

The nature and number of acts of misconduct is another important factor in our determination of the appropriate sanction. (Policy declaration 7.1(1)(a), (b).) The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern that demonstrates the judge lacks judicial temperament and the " ' "ability to perform judicial functions in an even-handed manner." [Citation.]' [Citation.]" (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958].) Judge Saucedo's misconduct involved far more than a single inappropriate text message or gift to a subordinate employee; he engaged in an ongoing course of subterfuge and dishonesty over a two-month period. The deceptive and calculated nature of the judge's conduct is incompatible with the temperament and integrity required of a judge.

Judge Saucedo contends that his conduct is less serious than the conduct of Judge Cory Woodward and Judge Scott Steiner that resulted in censures by the commission in

2014. (*Censure of Judge Cory Woodward* (2014); *Censure of Judge Scott Steiner* (2014).) Both judges were disciplined for engaging in sexual activity in chambers, Judge Woodward with his clerk and Judge Steiner with two former students in his law school class. In addition, Judge Woodward was not forthright with court administration when questioned about the nature of his relationship with his clerk. Those cases were similar to the present case in that they involved serious misconduct that was damaging to the decorum and esteem of the judicial system. However, those cases differ from the present matter in significant ways – the relationships were consensual and did not involve unwelcome advances and pressure to engage in a personal relationship, the judges did not use subterfuge and dishonesty in pursuit of the relationships, and the judges did not lie under oath about their conduct. Moreover, in both *Woodward* and *Steiner*, the commission found in mitigation that the judges acknowledged their wrongdoing and expressed great remorse and contrition. (*Woodward, supra,* at p. 7; *Steiner, supra,* at p. 6.)

Rather than show an appreciation of the serious nature of his misconduct, Judge Saucedo continues to deny the essential facts, blame Tovar for his conduct and minimize the gravity of his misconduct to a brief lapse in judgment. He apologizes for his wrongdoings, but his remorse is limited to appearing too familiar with Tovar in his effort to "mentor" her, and failing to report the Anonymous letter and Tovar's alleged "demand" for $8,000 to court administration. Even at his appearance before the commission, he continued to blame Tovar for his conduct, stating that Tovar "was asking for more and more, and [he] didn't know how to get out of the situation . . . ." This statement reflects the judge's continued denial of the fact that he was the one who offered Tovar gifts and favors for his own manipulative purposes and his failure to appreciate the gravity of *his* misconduct.

"A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248; see policy declaration 7.1(2)(a).) It may be unlikely that Judge Saucedo would again jeopardize his career by engaging in this precise type of conduct; however, we are concerned that the traits and lack of judgment that led to the misconduct in this

case could lead to future improper actions demeaning to the esteem of the judiciary. This is a risk we cannot run and still fulfill our responsibility to protect the public and the reputation of the judiciary.

Whether the misconduct undermines the integrity of the judiciary, respect for the judiciary or the administration of justice is another important factor in our consideration of the appropriate discipline. (Policy declaration 7.1(1)(h).) Judge Saucedo asserts that his conduct had no impact on the judicial system because no case or litigant was affected. This ignores the impact of his conduct on the public's perception of the judiciary. As the commission has previously noted, "The public will not, and should not, respect a judicial officer who has been shown to have repeatedly lied for his own benefit." (*Murphy*, *supra,* 48 Cal.4th CJP Supp. at p. 202.)

Judge Saucedo's plea for censure, rather than removal, focuses on his lack of prior discipline and the strong support he has earned as a judge and community leader. We recognize and appreciate the many contributions Judge Saucedo has made to his community and the legal profession, and to promoting diversity on the bench and in the legal profession. Nonetheless, his lack of prior discipline and distinguished career cannot undo his egregious misconduct in this case. While mitigating evidence may be taken into account in determining the totality of the circumstances as pertinent to determining the appropriate discipline, "[t]here can be no mitigation for maliciously motivated unjudicial conduct." (*Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 800; *Cannon, supra,* 14 Cal.3d at p. 707; *Broadman, supra,* 18 Cal.4th at p. 1112; *Freedman, supra*, 49 Cal.4th CJP Supp. at p. 232.) Certain misconduct is so completely at odds with the core qualities and role of a judge that no amount of mitigation can redeem the seriousness of the wrongdoing or obviate the need for removal in order to fulfill our mandate to protect the public, enforce high standards of judicial conduct, and maintain public confidence in the integrity of the judiciary. This is such a case. As such, we issue the following order removing Judge Saucedo from office.

## ORDER

This decision shall constitute the order of removal of Judge Valeriano Saucedo, pursuant to the provisions of article VI, section 18 of the California Constitution; pursuant to that section of the Constitution and rules 120(a) and 136 of the Rules of the Commission on Judicial Performance, Judge Saucedo is hereby disqualified from acting as a judge.

Commission members Hon. Erica R. Yew; Ms. Mary Lou Aranguren; Hon. Thomas M. Maddock; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Richard Simpson; Ms. Sandra Talcott and Mr. Adam N. Torres voted in favor of all the findings and conclusions expressed herein and in the order of removal and disqualification. Commission member Pattyl A. Kasparian did not participate. Commission member Anthony P. Capozzi, Esq. was recused.

Date: December 1, 2015

Hon. Erica R. Yew
Chairperson

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COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING JUDGE JOHN T. LAETTNER, No. 203 | DECISION AND ORDER REMOVING JUDGE JOHN T. LAETTNER FROM OFFICE |

## I. INTRODUCTION

This disciplinary matter concerns Contra Costa County Superior Court Judge John T. Laettner. The commission commenced this inquiry with the filing of its Notice of Formal Proceedings on September 14, 2018.

Judge Laettner is charged with nine counts of misconduct, which, with subparts, include 28 allegations of misconduct. The allegations involve remanding criminal defendants without notice and the opportunity to be heard in two cases (Counts One and Three); three improper ex parte communications (Counts One and Two); a pattern of undignified and inappropriate comments to women (Counts Two, Four, and Five); making statements that give the appearance of prejudgment and bias (Count Six); improperly instituting a new program to address a backlog of criminal cases (Count Seven); failing to disclose and/or disqualify in some cases involving his son, who is a deputy district attorney (Count Eight); and attempting to persuade certain deputy public defenders not to file peremptory challenges against him (Count Nine).

The California Supreme Court appointed Hon. M. Kathleen Butz, Associate Justice of the Court of Appeal, Third Appellate District; Hon. Douglas Hatchimonji, Judge of the Orange County Superior Court; and Hon. Russell L. Hom, Judge of the Sacramento County Superior Court, as special masters to conduct an evidentiary hearing.

The 10-day hearing took place between February 25 and March 8, 2019, with closing arguments on April 26, 2019. The masters filed a report containing their findings of fact and conclusions of law on June 14, 2019. The commission heard oral argument on October 2, 2019.

The special masters found that the allegations in Counts One (in part), Two (in part), Three, Four (in part), Five (in part), and Nine (in part) were proven by clear and convincing evidence, and that the allegations in Counts Six, Seven, and Eight were not proven. They concluded that Judge Laettner committed willful misconduct as to Counts One (in part) (ex parte communication with a prosecutor), Three (remanding a criminal defendant without notice and an opportunity to be heard), and Nine (discouraging deputy public defenders from filing peremptory challenges); that he committed prejudicial misconduct as to Counts One (in part) (remanding a criminal defendant without notice and an opportunity to be heard), Two, Four, and Five (in part) (gender bias and inappropriate comments to and about women); and that his conduct constituted improper action as to Count Five (in part) (gender bias and inappropriate comments to and about women).

We conclude, based on our independent review of the record, that the masters' factual findings as to all counts are supported by clear and convincing evidence, and we adopt them in their entirety. We include in our decision some additional facts that are supported by clear and convincing evidence.

The masters also found that Judge Laettner was "not credible or not truthful as it relates to his testimony concerning several of the events making up this inquiry," and that "[h]is lack of candor regarding several of the allegations is troubling." We agree with, and adopt, the masters' credibility findings.

We adopt the masters' legal conclusions as to most, but not all, of the allegations. In some instances, we reach our own independent legal conclusions. We base our decision on five acts of willful misconduct and eleven acts of prejudicial misconduct that we find Judge Laettner committed.

Much of Judge Laettner's misconduct reflects a pattern of engaging with attorneys appearing before him in a manner that is governed by his emotions, rather than by the California Code of Judicial Ethics. His desire to have certain attorneys like him and not be upset or "mad at him" about his rulings, and action he has taken when he was angry or upset with them, has, at times, overridden his compliance with the canons of judicial ethics. The factual findings of the special masters suggest that Judge Laettner failed to maintain the necessary professional distance between himself and attorneys appearing before him, or that he became embroiled. "Once a judge becomes embroiled in a matter, fairness, impartiality, and the integrity of decisions leave the courtroom." (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 1:35, p. 27 (hereafter Rothman).)

Judge Laettner has also displayed a pattern of inappropriate treatment of women in his courtroom that reflects bias based on gender, as well as physical appearance. He has taken responsibility for some, but not all, of the improper comments he was found to have made to and about women, but he has not accepted responsibility for the other misconduct that the special masters found was proven (i.e., denying criminal defendants due process, improper ex parte communications, and discussing peremptory challenges against him with the deputy public defenders who were filing them).

There is substantial evidence that, during his 13 years as a judge, Judge Laettner has had an exemplary work ethic and has been a responsible, conscientious judge, and an asset to his court. In light of this evidence, if we were to consider only his acts of willful and prejudicial misconduct, we would impose a censure. But given our mandate to uphold high standards of judicial conduct, protect the public, and preserve the integrity and impartiality of the judiciary, it is Judge Laettner's lack of candor during this proceeding, and his selective and limited acknowledgment of his misconduct, that leads us to conclude that removal from the bench is the appropriate discipline.

Judge Laettner is represented by James A. Murphy, Esq., Janet L. Everson, Esq., and Joseph S. Leveroni, Esq. of Murphy, Pearson, Bradley & Feeney in San Francisco, California. The examiners for the commission are commission trial counsel Mark A. Lizarraga, Esq. and commission assistant trial counsel Bradford Battson, Esq.

## II. LEGAL STANDARDS

### A. Levels of Misconduct

There are three types of judicial misconduct: willful misconduct, prejudicial misconduct, and improper action.

1. Willful Misconduct

Willful misconduct is the most serious type of misconduct. Its elements are (1) unjudicial conduct, (2) committed in bad faith, (3) by a judge acting in a judicial capacity. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091.) Unjudicial conduct occurs when a judge fails to comply with the canons of judicial ethics. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662.) A judge acts in bad faith "by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman*, *supra*, 18 Cal.4th at p. 1092.)

2. Prejudicial Misconduct

The second most serious type of misconduct is "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," also referred to as "prejudicial misconduct." (Cal. Const., art. VI, § 18, subd. (d).) Prejudicial misconduct does not require bad faith; rather, it is conduct that a judge undertakes in good faith, while acting in a judicial capacity, but that nevertheless would appear to an objective observer to be not only unjudicial but prejudicial to

public esteem for the judicial office. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284.)

3. Improper Action

Improper action occurs when the judge's conduct violates the canons, but the circumstances do not rise to the level of prejudicial misconduct and do not bring the judiciary into disrepute. (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89, citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 897-899 (*Adams II)*.) Improper action may be the basis for a public or private admonishment, but not censure or removal. (Cal. Const., art. VI, § 18, subd. (d).)

## B. Burden of Proof

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman, supra,* 18 Cal.4th at p. 1090.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*) Clear and convincing evidence is so clear as to leave no substantial doubt. It is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Ibid*.)

## C. Standard of Deference to Findings and Conclusions of Special Masters

The California Supreme Court has held that factual findings of the special masters are entitled to special weight because the masters were in a position to observe and assess the demeanor of the witnesses, but the legal conclusions of the masters are entitled to less deference because the commission has expertise with respect to the law concerning judicial ethics. (See *Adams II, supra,* 10 Cal.4th at p. 880, citing *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 832.) Thus, if the commission reaches a contrary legal conclusion, it is free to disregard the legal conclusion of the masters. (*Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232.)

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Count One—People v. Imlay

Judge Laettner is charged with (a) an improper ex parte communication with a law enforcement officer; (b) remanding a criminal defendant without exonerating and resetting bail in open court, and then later increasing bail in the defendant's absence and without a hearing on the appropriate bail amount, thereby failing to accord the defendant and her attorney the full right to be heard according to law; and (c) an improper ex parte communication with a prosecutor. The misconduct allegedly occurred while Judge Laettner was presiding over *People v. Stephanie Imlay*.

The special masters found that Judge Laettner committed willful misconduct by engaging in an improper ex parte communication with a prosecutor, but that his ex parte communication with a law enforcement officer was not misconduct. They also found that Judge Laettner committed prejudicial misconduct by failing to afford a criminal defendant and her attorney the right to be heard regarding bail.

We adopt the masters' findings of fact, as summarized below, and their conclusions of law, with one additional canon violation (3B(7)), discussed below.

#### 1. Findings of Fact

In May 2017, Judge Laettner presided over a misdemeanor and felony arraignment courtroom in the Martinez courthouse of the Contra Costa County Superior Court, conducting arraignments and pretrial hearings. His courtroom was one of the busiest in the county, often hearing over 100 cases per day.

##### a. May 18, 2017

On May 18, 2017, Judge Laettner presided over *People v. Stephanie Imlay,* a criminal matter in which Imlay was alleged to have a diversion failure, two probation violations, a misdemeanor drug case, and a felony attempted car theft. Imlay was represented by Deputy Public Defender (DPD) Krista Della-

Piana, and had been released on bail, on all cases. That morning, before her cases were called, Imlay was found sleeping on the floor outside Judge Laettner's department. Imlay was later found asleep inside Judge Laettner's courtroom.

When DPD Della-Piana appeared in Judge Laettner's courtroom on May 18, 2017, she presented to the court an executed waiver of rights form, intending for Imlay to enter a change of plea. Judge Laettner asked DPD Della-Piana about Imlay's condition, stating: "Ms. Della-Piana, your client doesn't look like she feels too well." DPD Della-Piana responded: "She's doing okay. She's ready to proceed." Judge Laettner said he was going to have a law enforcement officer examine Imlay to determine whether she was under the influence, which would affect her ability to competently waive her rights. Operations Sergeant Garrett Schiro volunteered to perform a drug abuse recognition examination of Imlay. DPD Della-Piana was present for some or all of the examination. Sergeant Schiro formed the opinion that Imlay was under the influence of a controlled substance. He then went into Judge Laettner's chambers and told the judge his opinion. DPD Della-Piana was not present during this conversation in chambers. Judge Laettner and Sergeant Schiro returned to the courtroom, where Judge Laettner put on the record that Sergeant Schiro had performed the examination of Imlay and was of the opinion that she was under the influence, so the court was unable to proceed with the change of plea at that time.

After summarizing on the record his conversation with Sergeant Schiro, Judge Laettner remanded Imlay into custody. When Imlay was handcuffed, she became upset, loudly crying and talking directly to Judge Laettner, and protesting her remand and asking to be released. Judge Laettner indicated his belief that Imlay had been released on her own recognizance, but DPD Della-Piana told him that Imlay was out on bail. After some colloquy, Judge Laettner left the bench.

DPD Della-Piana testified that Judge Laettner did not revoke Imlay's prior bail, or raise and reset bail, in her presence, and that he did not give her a chance to be heard about bail.

Judge Laettner testified that, when he returned to the bench a few minutes later, his clerk told him that he needed to set bail in the *Imlay* matter. He testified that he exonerated bail and set new bail in open court, with DPD Della-Piana present. At some point, the judge's clerk prepared minute orders setting bail at $25,000 in each of Imlay's cases.

The masters found that Judge Laettner was "not credible" when he testified that he exonerated and reset Imlay's bail in open court, and in DPD Della-Piana's presence, and that he gave DPD Della-Piana a chance to be heard on bail. He testified that, although the prosecutor was at the counsel table, he called DPD Della-Piana into the well between the counsel table and the bench so that she could receive the minute orders, where he told her that he had reset bail at $25,000 on each case, and she did not object. DPD Della-Piana testified that this did not occur. The bailiff, Deputy Scott Reed, testified that the normal procedure in Judge Laettner's courtroom was to make the orders available to public defenders by putting them in a bin he had for them. The masters said Judge Laettner's stated reason for calling DPD Della-Piana into the well "rings hollow" because there was "no rational reason" for him to want to see that DPD Della-Piana got the paperwork in the well, especially since he must have assumed, at the time, that the court reporter was taking down his open court order to exonerate and reset bail. And it would have been improper for the judge to talk to the public defender in the well while opposing counsel sat at counsel table, as both sides have the right to be heard on bail.

Judge Laettner objects to this finding based on his explanation described above, which the masters found was not credible. We agree with the masters.

The masters also found that Judge Laettner was "not credible" in explaining why his order exonerating and resetting bail, which he said he had issued in open court, was not reflected in the transcript of the proceedings. He testified that he believed his court reporter, Jennifer Michel, was not present when he set bail because she was difficult to locate. But Michel was his court reporter for 11 years and, other than *Imlay* and another case involved in these proceedings (*People v. Ventura*), he could recall only one occasion when he discovered something was not in the transcript that he was sure he had said. He also testified, inconsistently, that things did not appear in the record because Michel *was* present but was not taking things down. The masters found no basis for believing that Judge Laettner's court reporter would not have transcribed a bail order, if he had made one in open court, and that the "only reasonable inference" from the evidence is that he did not exonerate and reset bail in open court, thereby denying the defendant the opportunity to be heard as to bail.

Judge Laettner objects to this finding based on his explanation described above, which the masters found was not credible. We agree with the masters.

b. May 25, 2017

*Imlay* was set for another hearing on May 25, 2017. DPD Della-Piana and another deputy public defender noticed that Imlay had not given an *Arbuckle* waiver[1] on the diversion case, so Judge Laettner could not sentence her on that case. They brought this to the clerk's attention. The clerk went into the judge's chambers and told him this. Judge Laettner said this meant that he could not sentence Imlay on the diversion case, and he needed to get a deputy district attorney to the other judge's courtroom to handle sentencing.

Judge Laettner asked to speak to Deputy District Attorney (DDA) Jun Fernandez in his chambers. DPD Della-Piana testified that she was in the

[1] *People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757, provides that a defendant who enters a guilty plea before one judge is entitled to have the same judge impose sentence, unless the right is waived.

courtroom when this occurred. Judge Laettner testified that he did not see her in the courtroom and did not know where she was. DDA Fernandez testified that DPD Della-Piana was not in the courtroom when Judge Laettner called him into chambers.

Judge Laettner testified that he told DDA Fernandez, "We can't discuss the cases," that he was going to send the diversion case to another judge, and that a deputy district attorney would be needed to cover that appearance.

DDA Fernandez testified that Judge Laettner asked him in chambers, "What do you want to do on these matters?" The court reporter, Michel, testified that she overheard the judge say to DDA Fernandez, " . . . 'so what are we going to do about the time waiver or the *Arbuckle* waiver,' something along those lines."

When DDA Fernandez returned to the courtroom from the judge's chambers, DPD Della-Piana asked him if he and the judge had been discussing the *Imlay* cases. He said that they had and that, because there was no *Arbuckle* waiver in one case, Judge Laettner would be sending the cases to a different judge. DDA Fernandez testified that his conversation with the judge in chambers took 30 seconds to one minute.

When Judge Laettner went back on the record, he said the clerk had brought to his attention the lack of an *Arbuckle* waiver on the diversion case and that he would be sending that case to a different judge. DPD Della-Piana then stated that Imlay had been "illegally detained" and asked that Imlay be released. The following exchange occurred:

> MS. DELLA-PIANA: . . . I would also like to put on the record that the court asked Jun Fernandez, the DA in this case, to go back in chambers without anyone from my office being present, discussed this case and what would happen in this case, and the *Arbuckle* waiver without counsel present for Ms. Imlay. [¶] So Ms. Imlay's rights are being violated multiple ways, and I'm asking that she be released immediately.

> THE COURT: Yes. [¶] Well, you really don't have any idea what I discussed with Mr. Fernandez. First off, you weren't present.
>
> MS. DELLA-PIANA: I do because I asked Mr. Fernandez.
>
> THE COURT: So we—I told Mr. Fernandez that this case was going back to Judge Mills because there was an *Arbuckle* problem.

DPD Della-Piana testified that on June 8, 2017 (about two weeks later), Judge Laettner discussed with her in chambers the *Imlay* matter and his ex parte communication with DDA Fernandez, and that he told her the reason he had not included her in his conversation in chambers with DDA Fernandez: "You want me to tell you why I—why I only brought in Jun Fernandez? I was mad at you. I was mad at you about the *Imlay* case. I was still mad at you that day." The masters found DPD Della-Piana's testimony on this topic to be credible. They also found that Judge Laettner's "petulant" response to DPD Della-Piana's question about the ex parte communication ("Well, you really don't have any idea what I discussed with Mr. Fernandez. First off, you weren't present.") is consistent with him being mad at her. They noted that "expressing his upset with counsel is an established pattern of conduct," which includes admitting that DPD Della-Piana was mad at him, that he "snapped" at DPD Christy Wills-Pierce, and that he was angry or upset with DPD Jermel Thomas (discussed below).

Judge Laettner objects to the masters' findings regarding his ex parte communication with DDA Fernandez. First, Judge Laettner contends that DPD Della-Piana was not present in the courtroom when he called DDA Fernandez into his chambers, which made "her inclusion [in the conversation] impossible." Although the judge, court reporter Michel, and DDA Fernandez testified that DPD Della-Piana was not in the courtroom, DPD Della-Piana testified that she was present.

The masters found it unnecessary to resolve the dispute about whether DPD Della-Piana was in the courtroom when Judge Laettner called DDA Fernandez into his chambers because, even if she had not been present at that moment, there is "no reason to believe that it was impossible or impracticable for Judge Laettner to wait until DPD Della-Piana was present in the courtroom." "Ex parte communications for scheduling, administrative purposes, and emergencies should only be used when it is impossible or impracticable to assemble everyone." (Rothman, *supra*, § 5:5, p. 269.)

The masters found that the evidence was clear that DPD Della-Piana was in the courtroom when the clerk took the *Imlay* files into the judge's chambers to discuss the lack of *Arbuckle* waiver, and she was in the courtroom when DDA Fernandez emerged from the judge's chambers, where he said he spent only 30 seconds to one minute. Judge Laettner could, therefore, have either had DPD Della-Piana summoned to the courtroom or waited for her to return for the impending hearing, at which she was to be present.

Second, the judge argues that the exception under canon 3B(7)(b) for ex parte communications for scheduling purposes applies because there is no evidence that the subject of the ex parte was anything other than scheduling. DDA Fernandez testified that, when the judge called him into chambers, the judge asked him what he wanted to do on the *Imlay* matters. He also testified that he "got the idea that it was just about procedures." Court reporter Michel heard the judge say, ". . . 'so what are we going to do about the time waiver or the *Arbuckle* waiver,' something along those lines." By asking DDA Fernandez, "What do you want to do on these matters?" the judge appears to have been asking how the prosecutor wanted to handle them. The masters found, and we agree, that this was more than just a question about "scheduling." Scheduling pertains to a date or time something will occur; there is no evidence that setting dates or times for anything was discussed.

But even if the ex parte communication with DDA Fernandez had been to discuss "scheduling," the masters found that Judge Laettner did not promptly disclose it, as required by canon 3B(7)(b)(ii). Judge Laettner claims he promptly disclosed the conversation to the parties, but this is inconsistent with the transcript, which reflects that it was DPD Della-Piana who brought up the ex parte communication, which she learned about from DDA Fernandez, and not the judge. And when she brought it up, the judge said: "Well, you really don't have any idea what I discussed with Mr. Fernandez. First off, you weren't present." The judge's response does not constitute prompt disclosure.

Third, Judge Laettner argues that DDA Fernandez was assisting him in his adjudicative responsibility, which is permitted by canon 3B(7)(a). Canon 3B(7)(a), however, specifically excludes the lawyers in a proceeding before the judge. DDA Fernandez was a lawyer in the proceeding.

Fourth, Judge Laettner asserts that there is no reliable evidence, "given its source [DPD Della-Piana]," that he told DPD Della-Piana on June 8, 2017 that he was "mad" at her, and contends that this is contradicted by his and Michel's testimony that his conversation in chambers with DPD Della-Piana was about restoring a good working relationship. The masters, who are in a better position to evaluate credibility, found DPD Della-Piana to be credible on this point. The commission should "give special weight to the special masters' resolution of fact issues that turn on the credibility of testimony taken in their presence." (*Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552, 557.) In addition, Michel testified that she probably heard less than a minute of the conversation between the judge and DPD Della-Piana. Contrary to what the judge contends, having a conversation about a good working relationship is consistent (and not inconsistent) with the judge discussing with DPD Della-Piana why he was upset with her, and she with him, with regard to what occurred in *Imlay*. It is also consistent with the judge's pattern of being overly

concerned about how he is perceived by DPDs and his desire to be liked by them, and by DPD Della-Piana in particular.

Fifth, Judge Laettner says that after DPD Della-Piana accused him of having an ex parte communication with DDA Fernandez, he told Supervising Judge Theresa Canepa about the conversation, and she concluded that, because it related to scheduling only, it was proper. Judge Canepa's opinion is irrelevant, especially because it is based on Judge Laettner's (unsubstantiated) representation that he and DDA Fernandez discussed only scheduling.

We agree with, and adopt, the masters' factual findings.

2. Conclusions of law

a. May 18, 2017

The masters concluded, based on clear and convincing evidence, that Judge Laettner directed his clerk to reflect on minute orders that bail was exonerated and reset at $25,000 per case, without giving Imlay, through her counsel DPD Della-Piana, the opportunity to be heard. They took into account the busy environment of the judge's courtroom and indicated that what occurred could have been a mistake. The masters determined that the judge's action constituted prejudicial misconduct and violated California Code of Judicial Ethics canons 1 (a judge shall uphold the integrity and independence of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities), 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), and 3B(2) (a judge shall be faithful to the law and shall maintain professional competence in the law). We find, in addition, that Judge Laettner's conduct violated canon 3B(7) (a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law).

Judge Laettner objects to the finding of prejudicial misconduct and argues that there was no misconduct. We agree with the masters that there is clear and convincing evidence that the judge remanded Imlay without exonerating and resetting bail in open court, thereby denying her and her attorney the due process right to be heard.

The examiner objects to the masters' finding of prejudicial misconduct and argues that the judge committed willful misconduct based on his knowing or reckless failure to provide defendant Imlay with due process. The examiner submits that the judge was acting in bad faith by acting with "reckless or utter indifference" as to whether his orders exceeded the bounds of his prescribed powers.

The masters found that Judge Laettner had the authority to remand Imlay; his order doing so did not exceed the bounds of his prescribed powers. The issue is whether he failed to give Imlay and her counsel, DPD Della-Piana, notice and the right to be heard on the issue of bail, a denial of due process. We agree with the masters' finding that, by failing to give notice and the right to be heard about bail, Judge Laettner engaged in conduct that was prejudicial to public esteem for the judiciary, but was not in bad faith. Based on our independent review of the record, we do not conclude that there was clear and convincing evidence that Judge Laettner had a corrupt purpose, or acted recklessly, or with utter indifference, when he revoked and reset Imlay's bail without affording Imlay, through DPD Della-Piana, the right to be heard.

The masters found that Judge Laettner did have an ex parte conversation with Sergeant Schiro in chambers, but they did not conclude that it was improper, as charged, because they found that it related to Sergeant Schiro's "aiding Judge Laettner in his adjudicative responsibilities, within the meaning of canon 3B(7)(a)." They concluded it was within Judge Laettner's discretion to have Imlay undergo a drug abuse recognition examination to ascertain her

competency, and that Sergeant Schiro's communication with Judge Laettner related to assisting the judge in his adjudicative responsibilities.

The examiner objects to this conclusion and argues that the communication does not fall within the canon 3B(7) "court personnel" exception because "court personnel" excludes "employees of other governmental entities, such as lawyers, social workers, or representatives of the probation department," and Sergeant Schiro was an employee of the Contra Costa County Sheriff's Department, an "other governmental entity." The examiner asserts that, although Sergeant Schiro was the court security supervisor who oversaw the bailiffs' activities, he was not one of the judge's bailiffs.

Bailiffs are expressly permitted to assist the judge under canon 3B(7). The judge's bailiff during the *Imlay* proceedings, Deputy Scott Reed, was not qualified to conduct the drug examination, so Sergeant Schiro offered to perform it. We find that, because Sergeant Schiro was acting as the court security supervisor overseeing the bailiffs, who are also employees of the Sheriff's Department, he was properly assisting the judge in carrying out his adjudicative responsibilities, which include determining whether a defendant is competent to waive her rights. (Cal. Judges Benchbook: Felony Arraignment and Pleas (CJER revised 2013); Benchguide No. 91, § 91:26.) Further, we find that Sergeant Schiro conveyed information to the judge that was consistent with the proper performance of his duties, and that the judge promptly disclosed his communication with Sergeant Schiro to DPD Della-Piana. We concur with the masters' conclusion that the judge's ex parte communication with Sergeant Schiro does not constitute misconduct.

b. May 25, 2017

The masters concluded that Judge Laettner committed willful misconduct by engaging in an ex parte communication with DDA Fernandez in chambers about the *Imlay* cases, in violations of canons 1, 2, 2A, 3B(2), 3B(4) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in

an official capacity), and 3B(7) (a judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding). They found that there was no reason for the judge to have talked to DDA Fernandez without DPD Della-Piana present. Although Judge Laettner argued that the ex parte communication with DDA Fernandez involved only scheduling, the masters found that the judge and DDA Fernandez talked about more than scheduling because DDA Fernandez testified that the judge asked, "What do you want to do about these matters?" and the court reporter heard the judge say something similar. Judge Laettner also did not promptly notify DPD Della-Piana about the conversation. The masters found that his subsequent statement to DPD Della-Piana that he was "mad at her" demonstrated that he knowingly engaged in the ex parte communication for a corrupt purpose, which is any purpose other than the faithful discharge of judicial duties.

Judge Laettner posits that this ex parte communication is analogous to the ex parte communication he had with Sergeant Schiro, which the masters found was not improper. The difference between the two ex parte communications is that Judge Laettner had the ex parte communication with DDA Fernandez for an improper purpose—because he was mad at DPD Della-Piana. Moreover, Judge Laettner did not initially promptly disclose the ex parte communication with DDA Fernandez; it was DPD Della-Piana who raised it with him. In contrast, the ex parte communication with Sergeant Schiro was for the legitimate purpose of conducting court business, and it was promptly disclosed, as required.

We agree with, and adopt, the masters' legal conclusions.

### B. Count Two—Treatment of Deputy Public Defender Della-Piana

Judge Laettner is charged, in six subcounts, with engaging in a pattern of conduct toward DPD Della-Piana that was unwelcome, undignified, discourteous, and offensive, and that would reasonably be perceived as sexual harassment or sexual discrimination.

The special masters found that five of the six subcounts were proven and that Judge Laettner's conduct toward DPD Della-Piana, taken as a whole, constituted prejudicial misconduct because the incidents involve conduct that is undignified, discourteous, and offensive, and brings disrepute to the bench. They further found that much of Judge Laettner's conduct in Count Two (except subcount 2B), as well as in Counts Four (except subcount 4C) and Five, taken as a whole, constituted gender bias, in violation of canon 3B(5)(a). They did not find sexual harassment.

In response to Judge Laettner's assertion that "maintaining collegial relationships among the criminal justice partners is essential for the orderly administration of justice in criminal courts," the masters stated that it is the relationship between opposing counsel in criminal courts that allows for the efficient and effective administration of court calendars, and it is appropriate for the court to seek to foster that working relationship, but "[d]eputy district attorneys and deputy public defenders are not partners nor are they colleagues of the court, to the extent that these terms imply an equality of relationship." The masters stated:

> The Special Masters are not suggesting that judges must be unsmiling imperious souls. The Special Masters recognize that in these courtrooms judges are witnesses to a wide range of human emotion among the litigants and the attorneys that appear before the court. Judges must view and manage this drama with understanding, empathy, humor, and flexibility, with a calm and steadying hand—but always positionally aware—aware of the proper role of the judge.

The masters found that Judge Laettner's misconduct was "the failure to be aware of and adhere to the boundaries attending with his position as a judge."

We adopt the masters' findings of fact, which are summarized below, in each of the six subcounts. We also agree with the masters' conclusions of law as to the canons violated. We respectfully disagree, however, with the masters' conclusion that all five of the proven subcounts constitute prejudicial misconduct and find that three subcounts (subcounts 2D, 2E and 2F) constitute willful misconduct, for the reasons discussed below.

(a) Count 2A: "Having a teenage daughter"

1. Findings of Fact

Judge Laettner admitted that, in approximately May 2016, he said to DPD Della-Piana words to the effect of, "Sometimes having you in here is like having a teenage daughter—you constantly argue with me and you just keep talk, talk, talking until you get what you want," followed by: "It's a compliment. Take a compliment." This was said outside another judge's chambers. Judge Laettner testified that he made the comment during a "friendly teasing conversation" in which his comment started as a joke, but then he told her it was a compliment because "maybe [he] wasn't getting the response that [he] expected." He testified that he did not think the comment was demeaning because of the context of their interaction and his rapport with DPD Della-Piana at the time.

DPD Della-Piana testified that the "teenage daughter" comment made her feel demeaned and that her "face definitely showed that [she] didn't care for that."

Neither party objects to these factual findings.

2. Conclusions of Law

The masters concluded that Judge Laettner's "teenage daughter" comment was undignified and inconsistent with the judge's obligation to maintain high standards of conduct, but that it would not be reasonably perceived as sexual harassment or discrimination, as charged. They stated that Judge Laettner's

reference to a "teenage daughter" who just "keep[s] talk, talk, talking" "invokes a stereotypical image of a young, immature, adolescent girl," and that it "is inconceivable that a young professional female attorney would interpret such a comparison as a compliment." The masters further found that, intended or not, there is a gender element to the judge's stereotypical statement, as no one would ever say, "You're like a teenage *son.* You just keep talk, talk, talking . . . ." (Italics in masters' report.)

They found that Judge Laettner violated canons 1, 2, 2A, 3B(4), and 3B(5)(a). The masters included this charge in their conclusion that Judge Laettner's conduct in Count Two constituted prejudicial misconduct.

Neither party objects to these legal conclusions, and we adopt them.

(b) Count 2B: Winking

Judge Laettner allegedly winked at DPD Della-Piana during a hearing and called her to the bench to ask her if she saw him winking at her.

The masters found that this allegation was not proven by clear and convincing evidence.

Neither party objects to the factual findings or legal conclusion. We adopt the masters' findings and their conclusion that there is not clear and convincing evidence of the alleged misconduct.

(c) Count 2C: "I want it to be you"

1. Findings of Fact

On August 24, 2016, Judge Laettner presided over *In re Lauryn G.*, a case involving a juvenile. DPD Karen Moghtader represented Lauryn G., but asked DPD Della-Piana to appear for her because she had a meeting. DPD Della-Piana appeared for DPD Moghtader before Judge Laettner. DPD Della-Piana testified that when she told the judge that DPD Moghtader would be able to appear after her meeting, he said, "No, I want it to be you," and when DPD Della-Piana responded, "I don't think you really get to decide that," Judge Laettner sort of smiled at her and said, "Well, I'm telling you I want it to be you."

After the case was called, there was a discussion about setting the date of a contested probation violation hearing. DPD Della-Piana refused to waive Lauryn G.'s right to a speedy hearing. The following exchange occurred:

> THE CLERK: Last day is September 15.
>
> MS. DELLA-PIANA: I don't know if there needs to be a lot of prep since it was already prepped. Can we do it earlier than that? Ms. Moghtader is out the 15th and 16th. Any other day works. [¶] The Monday of that week maybe? No?
>
> THE COURT: No, no, we'll set it for the 15th given my schedule. *Somebody else is going to have to cover*.
>
> THE CLERK: Thursday, September the 15th at 1:30 in Department 25.
> (Italics in masters' report.)

DPD Della-Piana testified that, during this discussion, the judge locked eyes with her, "sort of tilted his head," and said, "Well, I guess someone else is just going to have to appear." She testified that this comment and "No, I want it to be you" made her uncomfortable.

Judge Laettner testified that he believed DPD Della-Piana was Lauryn G.'s assigned attorney, not DPD Moghtader. He said: "Well, there was, in my mind, confusion as to who Lauryn G.'s attorney was. I believed her attorney was Ms. Della-Piana. And then there were [*sic*] Ms. Moghtader got into the mix somehow." He also testified that it was his preference that the assigned attorney appear because a stand-in attorney does not know the case.

Judge Laettner also testified that he set September 15 as the next hearing date because it was the best date on his personal calendar, there was no time waiver, he did not expect DPD Della-Piana to be at the date set, and her testimony about his tone was "fantasy."

The special masters found "not credible" Judge Laettner's testimony that, on August 24, 2016, he was confused about whom Lauryn G.'s attorney was. The transcript reflects that DPD Della-Piana announced that she was "standing in for Karen Moghtader," and that she referred to DPD Moghtader and her unavailability on September 15 and 16 as a reason to set the hearing on a different date. Further, the transcript of the hearing the day before reflects that DPD Moghtader had appeared before Judge Laettner, representing Lauryn G., and had engaged in substantive discussions with him about the case, including the issuance of a warrant. The judge referenced those discussions when DPD Della-Piana appeared in DPD Moghtader's place the next day. Finally, DPD Della-Piana later wrote down what occurred in court that day from memory, without the benefit of a transcript. The masters found that the unexplained contradiction between the judge's stated preference for having the assigned attorney present and then setting the hearing on a date when the assigned attorney was not available corroborates DPD Della-Piana's belief that Judge Laettner wanted her to appear.

Judge Laettner objects to the masters' finding that his testimony that he was confused about who represented Lauryn G. was not credible, and says he was credible.

We agree with, and adopt, the masters' findings, including that Judge Laettner was not credible when he testified that he was confused about who represented Lauryn G. DPD Moghtader had appeared on Lauryn G.'s behalf the previous day and engaged in substantive discussions with the judge about her case. And DPD Della-Piana informed Judge Laettner at the outset of the hearing that she was "standing in" for DPD Moghtader and referred to DPD Moghtader's availability when discussing scheduling with the judge. We agree with the masters that the judge's claim is contradicted by the evidence.

2. Conclusions of Law

The masters concluded that the judge's conduct violated canons 1, 2A, 3B(4), and 3B(5)(a). The masters included this charge in their conclusion that Judge Laettner's conduct in Count Two constituted prejudicial misconduct.

Neither party objects to these legal conclusions, and we adopt them.

(d) Count 2D: Conversation regarding *In re Eric B.*

1. Findings of Fact

Judge Laettner presided over *In re Eric B.,* which involved a mentally ill juvenile. DPD Della-Piana represented Eric B. Juvenile proceedings had been suspended due to Eric B.'s incompetency, and he was receiving treatment or competency restoration services in juvenile hall. A hearing in August 2016 involved whether Judge Laettner would order the involuntary administration of medication to Eric B., to which DPD Della-Piana objected.

On October 6, 2016, Judge Laettner released Eric B. from custody to his mother, deemed his sentence satisfied, and set a future competency review date for January 5, 2017.

On October 12, 2016, while DPD Della-Piana was conversing in the courthouse hallway outside Judge Laettner's courtroom with a prospective juror she knew, Judge Laettner approached them, in what he described as "basically a sea of jurors," and initiated a conversation with DPD Della-Piana. He testified that he spoke to DPD Della-Piana because, in his words: "I wanted to make sure everything was okay, because I knew she had been frustrated with Eric B. being in custody for a long time. And I wanted to say in general terms that I was not insensitive to people who are mentally ill." He denied that he discussed the *Eric B.* case during the conversation and said, "I went to the issue of mental health generally with her."

DPD Della-Piana testified that Judge Laettner did bring up the *Eric B.* case, and said he was aware that she was upset with him about the *Eric B.* case and that she should not be upset with him.

The examiner objects that the masters did not make a finding regarding allegations that the judge commented to DPD Della-Piana that he noticed how happy she was when he ordered Eric B. released from custody, and that he said he could tell by her face that she was happy when he did so. Judge Laettner testified that he did not discuss the *Eric B.* case with DPD Della-Piana and that he only discussed mental health generally. While we agree that Judge Laettner was obviously discussing the *Eric B.* case, we do not find it necessary to amplify the masters' findings here to include DPD Della-Piana's additional testimony regarding this conversation (see Count 2F).

2. Conclusions of Law

The masters concluded that the conversation Judge Laettner initiated with DPD Della-Piana in the courthouse hallway constituted an improper ex parte communication, in violation of canon 3B(7), because the matter was still pending, with a future competency review date that the judge had set six days earlier.

The masters also found that Judge Laettner did specifically reference the *Eric B.* case during the conversation, and, even if he did not say the name of the case, it was apparent that he was talking about that case. They stated that "any reasonable trial lawyer would perceive Judge Laettner's comments under such circumstances as not simply a coincidental happenstance," and that "[a] reasonable attorney would immediately realize that, by bringing up the subject matter of a case the attorney was frustrated about and that had just been heard six days before, the judge is talking about that specific case." The masters said that it "belies common sense to think that Judge Laettner and DPD Della-Piana did not know they were talking about the *Eric B.* case, even if the minor's name was not used."

The masters further found that the conversation was undignified and created the appearance of impropriety because it took place amongst "a sea of jurors," who had been before Judge Laettner and knew he was the judge before whom they were providing their jury service. The masters stated that the judge's

desire to make sure things were "okay" with DPD Della-Piana after the contentious *Eric B.* hearing reflected a "solicitousness for her and their relationship that was inappropriate to express in a public hallway."

They found that the conversation violated canons 1, 2, 2A, 3B(4), 3B(5)(a), and 3B(7). They included this charge in their conclusion that Judge Laettner's conduct as alleged in Count Two constituted prejudicial misconduct.

We respectfully disagree with the conclusion that Judge Laettner's hallway ex parte conversation with DPD Della-Piana in a "sea of jurors" about the *Eric B.* case constituted prejudicial misconduct; instead, we find that it constituted willful misconduct, as urged by the examiner, because Judge Laettner was not acting in the faithful discharge of his judicial duties. In *Inquiry Concerning Kreep* (2017) 3 Cal.5th CJP Supp. 1, the commission found that it was willful misconduct for Judge Kreep to engage in ex parte communications with attorneys about a pending case for the corrupt purpose of venting his frustration about being the subject of peremptory challenges. (See also, *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 275 [comments made for the purpose of venting frustration are for a purpose other than the faithful discharge of judicial duties].) Similarly, in this matter, Judge Laettner engaged in an improper ex parte communication about a pending case with an attorney in that case—DPD Della-Piana—in a public venue for a purpose not related to his judicial duties; i.e., his "solicitousness for her and their relationship" and his excessive concern about how she felt about him, which creates the appearance of a lack of impartiality. We find it aggravating that Judge Laettner indulged in this type of conversation with a DPD in a public hallway in the presence of jurors serving in his courtroom.

(e) Count 2E—"Your parents hadn't spanked you enough"

1. Findings of Fact

On June 8, 2017, Judge Laettner asked his clerk to ask DPD Della-Piana to speak with him. The judge and DPD Della-Piana then had a conversation in his chambers. Judge Laettner admitted that, during this conversation, he called

DPD Della-Piana a “hard one” and told her, “[Y]our parents hadn’t spanked you enough.” At the evidentiary hearing, he acknowledged that it was wrong and apologized because it was something he should not have said.

Judge Laettner said he made the comments because he felt DPD Della-Piana was being “stubborn, unreasonable and petulant,” and he wanted to resolve a misunderstanding and she did not. He testified that, after the *Imlay* hearing on May 18, 2017, his relationship with DPD Della-Piana was strained and that she was upset with him. He said he had seen her the day before, on June 7, and she was ignoring him and “didn’t say hi or didn’t acknowledge [him] on purpose.” He testified that he wanted to “correct her attitude” because he does not want to see people who are upset, and he wants people to be happy. He also said that the purpose of his conversation with DPD Della-Piana was to “try to mend the fences, smooth things over, so she could be comfortable coming back to [his] court if she wanted to.” He also said he was “a little bit exasperated” with her because he wanted a “truce,” but she did not.

DPD Della-Piana testified that, during this conversation, Judge Laettner said a lot of things, including that he did not want things to be bad between them, that he had been thinking a lot about the other day, that she was so mad at him about the *Imlay* case, and that he did not want her to be mad at him anymore. She stated: “I knew he was referring to *Imlay*. And my understanding was that he thought we were in a fight with each other and that we needed to make up. And he sort of wanted to know, did I still care and like him and wanted to kind of pull me back in and make sure I was good with him and close with him.” DPD Della-Piana described Judge Laettner as appearing to be “pretty frantic and emotional” during this conversation.

DPD Brooks Osborne testified that he saw DPD Della-Piana on June 8, 2017, and she told him that Judge Laettner had just told her that her parents did not spank her enough. DPD Osborne said she was “ashen” and “looked horrified.”

Judge Laettner twice denied discussing the *Imlay* cases with DPD Della-Piana during this conversation. The masters, however, found that Judge Laettner's testimony was impeached by his Answer to the Notice of Formal Proceedings, in which he "does not deny a conversation with Ms. Della-Piana regarding the *People v. Imlay* cases." And he testified that, during this conversation, he told DPD Della-Piana that his conversation with DDA Fernandez about *Imlay* was not an impermissible ex parte communication, which is inconsistent with his testimony that he did not talk to her about the *Imlay* cases during their conversation in chambers.

The examiner contends that additional facts regarding what Judge Laettner said to DPD Della-Piana during this conversation, which were alleged in the Notice of Formal Proceedings, should be included in the findings. We find that the masters' description of DPD Della-Piana's testimony regarding what Judge Laettner said adequately conveys her testimony.

2. Conclusions of Law

The masters concluded that Judge Laettner's June 8, 2017 conversation with DPD Della-Piana was "injudicious, inappropriate and undignified," and constituted an improper ex parte communication concerning *Imlay*, in violation of canon 3B(7). They stated that calling an attorney a "hard one" or saying that the attorney's parents did not "spank you enough" is contrary to the judge's ethical obligations. They noted that conveying to an attorney that his or her feelings about a judge's decision are relevant to the judge gives the appearance of partiality, suggests embroilment, and is undignified. They added that Judge Laettner's purpose for calling DPD Della-Piana to his chambers—to "mend fences" over his decision in *Imlay*—demonstrated that her upset over his decision was of significant enough import that he expressed his frustration by calling her a "hard one" and saying she had not been "spanked enough." They found that Judge Laettner's conduct violated canons 1, 2A, 3B(4), 3B(5)(a), and was prejudicial, but they did not find that it could reasonably be perceived as sexual

harassment, as charged, because DPD Della-Piana did not express that the judge's comments were offensive as sexual harassment.

We agree with the masters' conclusion that Judge Laettner initiated a conversation with DPD Della-Piana that constituted an improper ex parte communication, in violation of canon 3B(7), because they discussed the pending *Imlay* cases. We also agree with the other canon violations found. We respectfully disagree with the masters, however, that Judge Laettner's ex parte communication with DPD Della-Piana, in which he discussed the *Imlay* cases, was prejudicial misconduct and find that, because he initiated the conversation for a purpose not related to the faithful discharge of his judicial duties, his actions constituted willful misconduct. As discussed above, Judge Laettner made the improper comments to DPD Della-Piana because he cared excessively about how DPD Della-Piana perceived him, a motive that was personal rather than a part of his judicial duties, and created the appearance of partiality.

(f) Count 2F: "I know you're mad at me"

1. Findings of Fact

DPD Della-Piana testified that, approximately 10 to 15 times in 2016 and 2017, Judge Laettner asked her to approach the bench to check in to see if she was mad at him. She testified:

> But usually when he ruled against me, I would sort of know that that was coming next. And he would want to debrief, almost as if we were having like a relationship fight or something . . . Like a relationship talk. And he wanted reassurance that I wasn't mad at him. Or he would often comment on my facial expressions, the facial expressions I would make during the hearing. 'Say, you know, I noticed that you were really happy when I said this.' Or 'you didn't like when I said this. I could tell from your face,' and comment how well he knew and could read my facial expressions and how that affected him essentially.

Judge Laettner admitted that he understood that DPD Della-Piana was mad at him at times and does not deny that he probably acknowledged that to DPD Della-Piana.

Neither party objects to these factual findings.

2. Conclusions of Law

The masters concluded that Judge Laettner's conduct violated canons 1, 2A, and 3B(4), and was part of a pattern of undignified, discourteous, and offensive conduct toward women, constituting gender bias in breach of canon 3B(5)(a). The masters included this charge in their conclusion that Judge Laettner's conduct in Count Two constituted prejudicial misconduct. They stated that attempting to "smooth over" the anger or upset of counsel resulting from a judge's decision "gives the appearance that counsel's emotional response to a decision matters," which illustrates a solicitousness that suggests embroilment. They noted that the United States Supreme Court has stated that judges are to represent the "impersonal authority of law" and provide "that atmosphere of austerity . . . indispensable for an appropriate sense of responsibility on the part of court, counsel and jury." (*Offutt v. United States* (1954) 348 U.S. 11, 17 [99 L.Ed. 11]; quoted in Rothman, *supra*, § 2:1, pp. 58-59.)

We respectfully conclude that Judge Laettner's repeated summoning of DPD Della-Piana to the bench to discuss their relationship was willful misconduct because it was for a purpose unrelated to his judicial duties, which was to make sure she was happy with how he was discharging his judicial duties. This is improper because it creates the appearance of partiality and is inconsistent with his duty to remain neutral as to those appearing before him. We find it aggravating that Judge Laettner did this frequently in open court, where his preference for DPD Della-Piana could be perceived by others in his courtroom.

### C. Count Four—Treatment of Other Female Attorneys[2]

Judge Laettner is charged, in eight subcounts, with making unwelcome, undignified, discourteous, and offensive comments, some of which would reasonably be perceived as sexual harassment or sexual discrimination, to and about other female attorneys who appeared before him.[3]

The masters found that seven of the eight subcounts in Count Four were proven, except that they did not find sexual harassment or sexual discrimination. Concluding that Judge Laettner's treatment of the various female attorneys involved, taken as a whole, constituted prejudicial misconduct, they stated:

> Lady Justice wears a blindfold. Centuries ago, William Penn explained: "Justice is justly represented Blind, because she sees no Difference in the Parties concerned." (William Penn, *Fruits of Solitude*, The Harvard Classics (1909-14), Part. I, "Impartiality," No. 407.) [¶] Saying that a female attorney is beautiful or otherwise commenting upon her looks lifts Lady Justice's blindfold by suggesting that one of a person's immutable characteristics, her appearance, matters to the judge; suggesting that the judge is partial to the woman he has declared to be beautiful. Even though the judge may have meant the comment to be an innocent courteous compliment, intended to create and maintain a "friendly" and "collegial atmosphere," does not excuse such a statement. Whether the recipient of the comment was offended or made uncomfortable, as in the case of DPD Emi Young, or not, as in the case of DDA Devon Bell, is not the issue upon which the propriety of the statement turns. The reason a judge's declaration that someone is beautiful or attractive is misconduct is due not only to its

[2] We address Counts Four and Five after Count Two because all three concern Judge Laettner's improper treatment of women. Count Three, which involves an unrelated issue, follows the discussion of Count Five.

[3] Some of the subcounts are outside the statute of limitations and cannot be considered for censure or removal, but can be considered in evaluating whether the judge cooperated honestly in the proceeding. (Policy Declarations of the Com. on Jud. Performance, policy 7.1(2)(b).)

> effect on the person to whom the comment was directed, but also because of the potential impact the statement has upon those who may not perceive themselves as attractive or beautiful. If two attorneys appear before a judge, and one attorney perceives herself to be unattractive, and the judge says to the other attorney, "Here is the beautiful Ms. Bell," it is reasonable for the other attorney to question the fairness and impartiality of the judge. [¶] . . . That the attorneys noted and took advantage of Judge Laettner's favoritism is corrosive to the fair and impartial administration of justice.

They also noted, in connection with subcount 4F: "Unprofessional remarks made in the courtroom concerning an attorney's personal appearance, pregnancy, or sexuality, can have an impact on the credibility of women in court; and when addressed to a woman lawyer, such remarks would make it difficult for her to effectively represent her clients." (Rothman, *supra*, § 2:11, p. 75 ["Judges should not make unprofessional remarks concerning an attorney's personal appearance, pregnancy, or sexuality."].)

The masters found it relevant that Judge Laettner's conduct spanned 11 years, from 2006 to 2017, because, after 10 years on the bench, "it can be expected that a judge's words and conduct will have conformed to the demands of the canons." They found that Judge Laettner's words and conduct did not.

We adopt the masters' findings of fact, which are summarized below, and their conclusions of law as to each of the eight subcounts.

(a) Count 4A: Comments to DPD Sarah MonPere

1. Findings of Fact

DPD Sarah MonPere testified that, between October 2007 and June 2008, Judge Laettner made various comments to her and very frequently asked her personal questions, including whether she had a boyfriend. After a colleague appeared in court with a client who had a fussing infant, and DPD MonPere held the baby while the client finished her plea, Judge Laettner commented, on more than one occasion, about how natural DPD MonPere looked holding the baby,

and asked her if she wanted to have children. He also called her his "favorite" and "teacher's pet," and said something to the effect that she "had him on a chain," implying that she controlled him or could get him to do what she wanted.

DPD Nicole Eiland testified that she heard Judge Laettner ask DPD MonPere personal questions and refer to DPD MonPere as his "favorite" more than once. She also testified that he favored DPD MonPere, and she viewed the judge's behavior toward DPD MonPere as "very flirtatious." DPD Osborne testified that he heard Judge Laettner tell DPD MonPere that he "could not say 'no' to her," that it was obvious that DPD MonPere was the judge's favorite, and that it seemed like he treated her and her clients differently. DPD Matthew Cuthbertson testified that Judge Laettner interacted differently with DPD MonPere, in sort of a flirtatious manner.

Judge Laettner denied most of the alleged comments to DPD MonPere, and claimed he had a "purely professional" relationship with her, but he admitted that he would compliment her on occasion for the purpose of "building her confidence" and thinks he did refer to her as his "favorite."

Neither party objects to these factual findings.

2. Conclusions of Law

The masters concluded that Judge Laettner made the statements attributed to him by DPD MonPere, in violation of canons 1, 2A, 2B(1) (a judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge), 3B(4), and 3B(5)(a). They found that his statements were "inappropriate and lacked any appearance of impartiality."

Judge Laettner objects on the ground that this count is barred by the statute of limitations because the comments were made before January 1, 2013, the cut-off date for the statute of limitations (six years before the commencement of the judge's current term, which was January 1, 2019). (Cal. Const., art. VI,

§ 18, subd. (d).) Due to the statute of limitations, we consider this subcount only for purposes of evaluating the judge's honesty during this proceeding (see footnote 3), and we need not address whether we adopt the masters' legal conclusion as to the level of misconduct.

(b) Count 4B: Comment to DPD Kim Mayer about her husband

1. Findings of Fact

DPD Kim Mayer testified that, in 2012 to 2013, Judge Laettner asked her to approach the bench and commented that he had just found out to whom she was married and that he was the same age as her husband, in a tone that was "somewhat suggestive" or "just inappropriate." This made her uncomfortable because her husband is 14 years older than she is, and it felt like Judge Laettner was comparing himself to her husband.

Judge Laettner testified: "I called her up to the bench in one of our slow moments, and I said, 'I just found out that you're married to Oscar Bobrow.' And she said, 'Yes, yes, I am.' And I said something to the effect of, '*He's a little bit older than you.*' Something like that. And she said, 'Yes.' And that was really it. You know, it was just commenting on that. And I had told her also that I did a felony possession trial with him." (Italics in masters' report.)

2. Conclusions of Law

The masters found DPD Mayer's testimony credible and that Judge Laettner indeed made the comment to DPD Mayer that he was the same age as her husband. The comment violated Judge Laettner's duty to be dignified and courteous, and the suggestive nature of the comment was part of a pattern of conduct that would reasonably be perceived as gender bias, in violation of canons 1, 2, 3B(4), and 3B(5)(a).

Judge Laettner objects that this allegation is barred by the statute of limitations because it occurred in 2012, before the January 1, 2013 cut-off date. DPD Mayer testified that she believes Judge Laettner took over the calendar in 2013, but Judge Laettner testified that the comment occurred in 2012. We agree

with the judge that the comment is barred by the statute of limitations. We consider this subcount only for purposes of evaluating the judge's honesty during this proceeding (see footnote 3), and we need not address whether we adopt the masters' legal conclusion as to the level of misconduct.

(c) Count 4C: Poor demeanor toward DPD Kim Mayer

During a March 11, 2013 hearing in *People v. Jacob Pastega,* Judge Laettner allegedly reprimanded DPD Mayer for interrupting him, demeaned her by asking if she knew what a proffer was, and told her not to argue with him.

The masters found that there were interruptions and interjections during the hearing, but that there was not clear and convincing evidence that Judge Laettner committed misconduct.

The examiner argues that the judge's comments constitute prejudicial misconduct because they were sarcastic and belittling, contrary to canon 3B(4). The masters found that the comments do not rise to the level of misconduct because the words on their face seem de minimis at most, and there is no evidence that the tone used by the judge was sarcastic or belittling. We adopt the masters' conclusion and find no misconduct.

(d) Count 4D: Poor demeanor toward DPD Christy Wills-Pierce

1. Findings of Fact

Judge Laettner presided over *People v. Henry Williams* on November 1, 2013. DPD Christy Wills-Pierce represented the defendant. Judge Laettner admitted that, after DPD Wills-Pierce questioned him about the basis for drug testing the defendant, he snapped at her and replied: "Our prior discussions with regard to this case. I know you're coming in late [to the case]. I'm not going to pretry every case all over again because you're here today." After the hearing, he called DPD Wills-Pierce up to the bench and said that he was sorry he was mad earlier, but it was DPD Wills-Pierce's friend who had made him so mad. When DPD Wills-Pierce asked him whom he meant, he said, "Ms. Thomas," referring to her colleague, DPD Jermel Thomas.

DPD Thomas testified that DPD Wills-Pierce told her about this, which embarrassed her, and she went to Judge Laettner's chambers that day to ask him whether he had said, "Ms. Thomas makes me so angry and she makes me so upset and so mad." Judge Laettner told DPD Thomas that he had said that to DPD Wills-Pierce and that she does make him upset.

Judge Laettner testified that, "I think I snapped at her [DPD Wills-Pierce] because I didn't want to spend two hours going over every case we just pre-tried." He admitted calling DPD Wills-Pierce to the bench and apologizing to her, and that he probably told her that he was mad at her friend, DPD Thomas. Yet on cross-examination, Judge Laettner testified that he did not remember making the statement.

Neither party objects to these factual findings.

2. Conclusions of Law

The masters found that Judge Laettner's conduct violated canons 1, 2, 2A, 3B(4), and 3B(5)(a). The masters included this charge in their conclusion that Judge Laettner's conduct in Count Four constituted prejudicial misconduct.

Neither party objects to these legal conclusions.

(e) Count 4E: Comments to DPD Nicole Herron

1. Findings of Fact

Between 2014 and 2017, Judge Laettner repeatedly told DPD Nicole Herron that she looked like an actress named Caroline Catz, who appeared on the television show, "Doc Martin." DPD Herron testified that Judge Laettner referred to Catz and the show about 12 to 20 times during DPD Herron's weekly appearances in his department, often saying, "I saw you on TV last night."

DPD Herron testified that, when Judge Laettner mentioned the show, he seemed "overly excited," and that his comments felt "creepy" to her. The comments made her uncomfortable because they were about her physical appearance and were made in open court, where other people could hear them, including clients who later commented to her about the judge's statements.

The judge's court reporter, Jennifer Michel, testified that she could tell that the judge's questions made DPD Herron uncomfortable.

Judge Laettner also commented in 2014 and 2015 that DPD Herron "was someone I just can't say no to," was the "best attorney" in the public defender's office or the juvenile court, and his "favorite attorney." He said to her, "I just can't say no to you" about five to ten times.

Judge Laettner did not deny offering these "compliments." He admitted telling DPD Herron that she bore a physical resemblance to Caroline Catz and that he talked about the show with her a few times.

Neither party objects to these factual findings.

2. Conclusions of Law

The masters found that Judge Laettner's repeated comments about DPD Herron's physical appearance were undignified and discourteous, would reasonably be perceived as gender bias, and conveyed the impression that DPD Herron was in a special position to influence him, in violation of canons 1, 2, 2A, 2B(1), 3B(4), and 3B(5)(a). The masters included this charge in their determination that Judge Laettner's conduct in Count Four constituted prejudicial misconduct. They concluded, however, that the judge did not commit sexual harassment (canon 3B(5)(b)), as defined in *Hughes v. Pair* (2009) 46 Cal.4th 1035,1042-1043, because sexual harassment requires a finding that the harassing conduct was "severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." The masters found that, given the conflicting testimony about the number of times Judge Laettner made the comments and the lack of evidence that he described the physical appearance of the actress, his "acts of alleged sexual harassment fall short of establishing a pattern of continuous, sufficiently pervasive harassment, necessary to show a hostile working environment under FEHA [Fair Employment and Housing Act]."

Neither party objects to these legal conclusions.

(f) Count 4F: Comments about DDA Devon Bell

1. Findings of Fact

DDA Devon Bell was the grand jury coordinator for the district attorney's (DA's) office. Once Judge Laettner selected a grand jury, DDA Bell would go to his courtroom and take the grand jurors back to the DA's office, where the grand jury hearings took place.

On about five or six occasions, in the presence of grand jurors, Judge Laettner referred to DDA Bell as "beautiful" or "lovely," and said she was a member of the DA's volleyball team. He also referred to her as one of his "favorite" attorneys, and said that because he had married her and her husband, he liked to say, "I married Ms. Bell." Transcripts corroborate these remarks.

Judge Laettner testified that the reason he discussed DDA Bell with the grand jurors was because he wanted to tell them that she was "competent and they were in good hands." He said he joked that she was a member of the DA's volleyball team after a grand juror said that she was very involved in her daughter's traveling volleyball team.

Neither party objects to these factual findings.

2. Conclusions of Law

The masters concluded that Judge Laettner's statements about DDA Bell violated canons 1, 2, 2A, 2B(1), 3B(4), and 3B(5)(a). The masters included this charge in their conclusion that Judge Laettner's conduct in Count Four constituted prejudicial misconduct. They said that even if DDA Bell was not offended by the comments, they were particularly improper because the judge made them in front of other people, including members of the grand jury. And even if the judge intended his references to her playing on the DA's volleyball team (which does not exist) to be a joke, they appear to have been comments about her physical stature or build, which are inappropriate for a courtroom setting and suggested that he evaluated women based on their physical appearance. Further, his comment that

she was "one of [his] favorite attorneys" reflected bias and conveyed the impression that she was in a special position to influence him.

Neither party objects to these legal conclusions.

(g) Count 4G: Comments to DPD Emi Young

1. Findings of Fact

In early 2017, before DPD Emi Young had become a permanent employee of the public defender's office, Judge Laettner began asking her personal questions, including about her ethnicity, her childhood, and her relationship with her father. He also once told her that one of his sons was engaged to an Asian woman, which made him interested in Asian people and culture, and he asked about her background or "what kind of Asian" she was. DPD Young responded that she is part Japanese. Judge Laettner replied that he knew two half-Japanese twins in college and that they were very beautiful. DPD Young testified that she felt incredibly uncomfortable because the judge was singling her out in a way that was not appropriate.

Neither party objects to these factual findings.

2. Conclusions of Law

The masters concluded that Judge Laettner's inquiries about DPD Young's racial background, his comments about the physical appearance of persons who shared her ethnicity, and his intrusive questions about her background violated canons 1, 2, 2A, and 3B(4). The masters included this charge in their conclusion that Judge Laettner's conduct in Count Four constituted prejudicial misconduct.

Neither party objects to these legal conclusions.

(h) Count 4H: Comments about DPD Emi Young

1. Findings of Fact

In approximately May or June 2017, Judge Laettner told an attorney who was looking for DPD Young that, "She's the attractive young Asian woman."

Neither party objects to this factual finding.

2. Conclusions of law

The masters found that the judge's comment about the physical beauty of a female attorney violated canons 1, 2, 2A, and 3B(4). The masters included this charge in their conclusion that Judge Laettner's conduct in Count Four constituted prejudicial misconduct.

Neither party objects to this legal conclusion.

**D. Count Five—Comments to Other Women**

Judge Laettner is charged, in six subcounts, with making unwelcome, undignified, discourteous, and offensive comments to and about other women who appeared or worked in his courtroom, some of which would reasonably be perceived as sexual harassment or sexual discrimination.

The masters found that each of the subcounts was proven. They concluded that the judge's conduct violated canons 1, 2A, and 3B(4), and would be perceived as gender bias in violation of canon 3B(5)(a). As to Count 5B, they also determined that the judge violated canon 2.

We adopt the masters' findings of fact, as summarized below, and their conclusions of law, with the exceptions discussed below.

(a) Count 5A: Court reporter Jennifer Michel

1. Findings of Fact

Jennifer Michel was Judge Laettner's court reporter from March 2006 to June 2017. When she first started working in his department, he made comments about her appearance that made her uncomfortable. In 2006, he said that when he met his wife, she had long, dark hair like Michel, which made Michel uncomfortable because she felt the judge was comparing her to his wife. In 2007, he told her, "You're so pretty. I don't know how you do it."

In 2009, when Michel entered his chambers to report a hearing and asked if the judge wanted the attorneys present, he responded, "You are hot." Judge Laettner substantially corroborated Michel's account of this interaction, but claims

it was a joke and that he said something to the effect of, "Well, you are hot, but let's do it the way we always do and bring in the parties." He acknowledged that he did not have a joking relationship with Michel, and she did not receive his comment as a joke. Inconsistently, in his December 18, 2017 supplemental response to a preliminary investigation letter, he denied making the statement.

Several witnesses testified that Judge Laettner would refer to Michel as "very pretty" or "beautiful" when introducing her to the jury. DPD Cuthbertson testified that the judge occasionally commented to prospective jurors that Michel was "quite tall" and "very pretty," and that they would "enjoy looking at her." Judge Laettner conceded that he may have introduced Michel as his "lovely court reporter," but denied telling jurors that they would enjoy looking at her.

Michel testified that she quit working in Judge Laettner's department in 2017 because she "could not take the years of unwelcome and inappropriate comments toward [herself] and others," his "favoritism towards tall, skinny blondes, young females [and] petite Asian women," and his bias against "heavyset, pudgy, dark-haired public defenders and ones that would argue their case too strenuously in front of him." The masters found that the impact of Judge Laettner's inappropriate comments based on the physical appearance of female attorneys or litigants created an environment that resulted in Michel changing her court reporting assignment.

Neither party objects to these factual findings.

2. Conclusions of Law

The masters concluded that the judge's comments about Michel's physical appearance were undignified and discourteous, would reasonably be perceived as gender bias, and constituted prejudicial misconduct, contrary to canons 1, 2A, 3B(4), and 3B(5)(a).

The examiner objects that there was no finding of sexual harassment and asserts that Michel was exposed to repeated references about the physical appearance of herself and other women that were sufficient to create a hostile

working environment. Canon 3B(5)(b) provides that a judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as sexual harassment.

We adopt the masters' legal conclusions, with the exception of their failure to find that Judge Laettner committed sexual harassment. We find that the judge did commit sexual harassment by creating a hostile work environment that caused Michel to leave his department, based on the course of his conduct between 2006 and 2017.

Judge Laettner objects that this charge is beyond the statute of limitations because the allegations span from 2006 to 2017. We find that the cumulative effect of Judge Laettner's comments over the years on his court reporter, Michel, constitutes sexual harassment. But even if the conduct were limited to remarks he made to women after January 1, 2013, it created a hostile work environment that caused Michel to seek employment elsewhere.

Sexual harassment requires a finding that the harassing conduct was "severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex." (*Hughes, supra,* 46 Cal.4th at pp. 1042-1043.) In our view, there is clear and convincing evidence that Judge Laettner's pattern of conduct toward women, which the masters determined was gender bias, as observed by Michel, created a hostile work environment. Michel testified that she heard Judge Laettner commenting to DPD Herron, three to five times, about how she looks like an actress in his favorite television show and asking DPD Herron about it; telling certain female defendants charged with driving under the influence that she is a "pretty girl" or "pretty woman"; frequently referring to DDA Bell as "beautiful"; and remarking to defendant Thalia Hernandez, "I always wonder what fat people were thinking when they get tattoos."

(b) Count 5B: "Women can drive you crazy"

1. Findings of Fact

Judge Laettner admits that, in 2013, while presiding over a domestic violence case, in response to a defendant explaining what he learned from participating in a domestic violence treatment program, the judge said, "On a lighter note, I can take judicial notice that women can drive you crazy." DPD Wills-Pierce, who was representing the male defendant, believed the statement was demeaning and undermined her ability to represent clients in the judge's courtroom. When she explained this to Judge Laettner, he responded that his wife "would be really upset if she heard about this" and, "You know, a judge could get in trouble for something like this." DPD Wills-Pierce memorialized this meeting at the time in an email to her supervisor.

Although Judge Laettner testified that he immediately recognized that the comment was a mistake and apologized for it, it was not until DPD Wills-Pierce confronted him several days after the comment that he expressed contrition. He acknowledged to his supervising judge, Judge Barry Goode, that he made the remark and said it was a "bone-headed statement." Judge Laettner also testified that he and Judge Goode "had a chuckle" about it. The masters found it notable that this conversation occurred as a result of Judge Goode contacting Judge Laettner ostensibly as a result of a complaint.

Neither party objects to these factual findings.

2. Conclusions of Law

The masters found that the comment was prejudicial misconduct and violated canons 1, 2, 2A, 3B(4), and 3B5(a). They stated that, although Judge Laettner minimizes the severity of his comment by contending that it was a joke, it was nonetheless inappropriate and demeaning. As stated in the California Judicial Conduct Handbook (Rothman, *supra*, § 3:42, pp. 189-190):

> A judge must be mindful not to make jokes at the expense of others. The temptation to get a laugh is even greater when there is an audience of people seeking the judge's favor. A judge must remember that the people in the courtroom are generally there because of some serious event in their lives, and they may not appreciate humorous exchanges between the judge and counsel. A judge must be mindful that the use of humor may not be in the service of the goals and objectives of a judicial proceeding.

The masters found it particularly aggravating that Judge Laettner made the remark while on the bench and in the presence of multiple individuals, and that it had the effect of undermining the effectiveness of experienced counsel appearing before him. They also found that it could be perceived that he was biased based upon gender or sex, and that this erodes public confidence in the integrity and impartiality of the judiciary, and diminishes the dignity of the judicial process.

The masters further noted that the judge's remark cannot be considered in isolation, as it was consistent with many other incidents where his comments to women or about women were inappropriate and undignified.

Neither party objects to these legal conclusions.

(c) Counts 5C-E: Comments re tattoos and scarring

The masters found that Judge Laettner engaged in improper action (as opposed to prejudicial misconduct) and violated canons 1, 2A, 3B(4), and 3B(5)(a) by making various comments about the physical appearance of women. The comments included telling female defendants that they were "pretty" and should avoid drinking and driving, or tattoos. The masters found that, although Judge Laettner was motivated by a genuine desire to foster rehabilitation or to impress upon them the seriousness of their conduct, comments about beauty or physical appearance are inappropriate. They said, "An observer might construe such references to the physical appearance of a litigant to imply that there is a different standard of justice based upon appearance."

The examiner asks the commission to reject the masters' conclusions that the comments were improper action and to find that they were prejudicial misconduct, based on *Kreep*, *supra*, 3 Cal.5th CJP Supp. at pages 30-31. In *Kreep*, the commission determined that a judge's comments on the physical appearance of attorneys appearing in court (e.g., "attractive," "lovely," and "pretty girl") constituted prejudicial misconduct because they "were not relevant to the court proceedings, made others in the courtroom uncomfortable, did not afford proper respect to the individuals, diminished the dignity of the judicial process, and may have created the appearance of bias or impartiality." In this matter, Judge Laettner's remarks had some relevance to the proceedings; they were in the context of him trying to help the defendants by conveying the serious consequences, including disfigurement, that could occur from drinking and driving. There was testimony that he made similar remarks to a few male defendants. The comments also did not convey the same level of disrespect to the individuals involved in Judge Kreep's case. We do not think that an objective observer would conclude that the comments would erode public esteem for the judiciary, a requirement for a finding of prejudicial misconduct.

We adopt the masters' findings of fact and conclusions of law, but, because the conduct constitutes improper action, do not consider these allegations as a basis for the judge's removal.

(d) Count 5F: Comment regarding tattoos and "fat people"

1. Findings of Fact

On June 16, 2017, after Judge Laettner presided over a hearing in *People v. Thalia Hernandez*, he stayed on the bench and engaged in a discussion with Hernandez about her tattoos. Court reporter Jennifer Michel testified that Judge Laettner remarked, "I always wonder what fat people were thinking when they get tattoos." Judge Laettner acknowledged discussing Hernandez's tattoos, but said it was in the context of her efforts to obtain employment, and he provided her with a workforce reentry form and resources for job training.

Neither party objects to these factual findings.

2. Conclusions of Law

The masters found that Judge Laettner engaged in improper action (as opposed to prejudicial misconduct) and violated canons 1, 2A, 3B(4), and 3B(5)(a). We respectfully disagree that Judge Laettner's comment about "fat people" constituted improper action and find that it constituted prejudicial misconduct, as argued by the examiner.

In this matter, like in *Kreep,* we find that Judge Laettner's remark erodes public esteem for the judiciary because it was not relevant to his judicial duties, is disrespectful, and creates the appearance of bias against "fat people" and that there could be a different standard of justice based on someone's physical appearance.

### E. Count Three—People v. Ventura

Judge Laettner is charged with revoking a criminal defendant's own recognizance (OR) release in the defendant's absence without affording him or his attorney notice and the opportunity to be heard, and with giving the appearance that he was retaliating for the filing of a peremptory challenge against him by the defendant's attorney.

The masters found that Judge Laettner committed willful misconduct by failing to give a criminal defendant notice and the opportunity to be heard with respect to the revocation of his OR release and remand, and the rejection of the peremptory challenge.

The masters further found that Judge Laettner was "not credible" when he stated that he revoked the defendant's OR release and remanded him, and denied the peremptory challenge as untimely, in open court.

We adopt the masters' findings of fact, as summarized below, and their conclusions of law, with one exception discussed below.

1. Findings of Fact

On October 31, 2013, Judge Laettner presided over *People v. Harlyn Ventura.* Ventura was represented by DPD Jermel Thomas. Ventura had been arrested for violating probation. He was released on OR, but remained in custody on an immigration hold.

The *Ventura* matter came before Judge Laettner again the next day, November 1, 2013. During an in-chambers discussion between Judge Laettner, DPD Thomas, DDA Catherine DeFerrari, and probation officer Valerie Miramontes, DPD Thomas advised Judge Laettner that she planned to file a peremptory challenge against him pursuant to Code of Civil Procedure section 170.6.[4]

Back in open court, DPD Thomas filed the 170.6 challenge against Judge Laettner and informed him on the record that she had done so. Judge Laettner set the case for a further pretrial hearing in his court on November 8, 2013, and a contested probation violation hearing on December 20, 2013 before a different judge.

Judge Laettner testified that, in open court at the November 1, 2013 hearing, he (1) revoked Ventura's OR release and remanded him into custody, and (2) found DPD Thomas's 170.6 challenge to be untimely.

Regarding his revocation of Ventura's OR release and remand into custody on November 1, Judge Laettner testified: "I was in open court when all parties were present, and I stated very plainly he's remanded. That was on the record." Judge Laettner's decision to remand Ventura is not reflected in the reporter's transcript of the proceeding. It is also not reflected in the contempo-

[4] A peremptory challenge of a judge pursuant to Code of Civil Procedure section 170.6 is initiated by the filing of a declaration under penalty of perjury, or an oral statement under oath, that the judge is prejudiced against a party or attorney or that the party cannot have a fair and impartial trial before the judge. No other act or proof is required to disqualify the judge. A peremptory challenge can be stricken, without a hearing, if it is untimely.

raneous notes Judge Laettner took during the in-chambers discussion, and it is not in the contemporaneous notes he made while he was on the bench during the November 1 proceeding. The contemporaneous notes he made for the October 31 and November 8 proceedings, however, do make note of Ventura's release status.

The remand order is reflected on the clerk's minute order. Judge Laettner testified that he turned to his right and told his clerk that Ventura was remanded. When asked whether he looked at DPD Thomas and told her that he was revoking Ventura's OR and remanding him, Judge Laettner testified: "No. I said that to my clerk in court loudly enough that I believed everyone would hear. And I also believe that she [DPD Thomas] knew it was going to happen because [of] what had just happened in chambers. It was no surprise."

DPD Thomas testified that, on November 1, Judge Laettner did not say during the in-chambers conference that he was going to revoke Ventura's OR, and he did not say in open court that he was revoking Ventura's OR and remanding him, or ask if she wished to be heard.

DDA DeFerrari appeared for the prosecution in the *Ventura* matter on November 1, 2013. Consistent with DPD Thomas, her notes for that day reflect that Ventura was on OR status. She does not recall Ventura's OR status being revoked on November 1 or even being discussed that day.

The *Ventura* case came before Judge Laettner again on November 8, 2013. During the morning session of the hearing, DPD Thomas raised the issue of Ventura's remand, stating her belief that the minute order for November 1 "inadvertently" reflected her client's remand without bail. She asked Judge Laettner to correct the minute order "for housekeeping purposes" since the remand order was "in error." She told him: "So it appears as though there was a mistake as to the November 1st hearing because I don't believe we addressed his custodial status at that time. I think we all believed that he would have been released on his own recognizance." According to the transcript, neither Judge

Laettner nor DDA DeFerrari said anything to contradict DPD Thomas's statement that Ventura's custodial status had not been addressed on November 1.

Regarding Judge Laettner's testimony that he denied DPD Thomas's 170.6 challenge as untimely in open court and in her presence on November 1, the transcript does not reflect Judge Laettner saying the challenge was untimely or the basis for the ruling. The minute order also does not reflect that the judge found the 170.6 challenge untimely. Judge Laettner admits that it would be appropriate for the clerk's minute order to reflect his finding that the challenge was rejected as untimely. Judge Laettner's contemporaneous notes do not reflect the filing of the challenge or that he found it untimely; he does not know why this is so. Judge Laettner also testified that he did not look at DPD Thomas and tell her he was rejecting her challenge as untimely or ask her if she wished to be heard.

The masters found Judge Laettner's testimony "not credible" that he "very plainly," in open court, revoked Ventura's OR release and remanded him. They stated:

> While at some point in time he instructed his clerk that the defendant was to be remanded, it was not announced during his chambers discussion or in open court. The transcript does not reflect his decision, his contemporaneous notes do not show it, the deputy public defender testified it didn't happen, and the deputy district attorney cannot recall it happening. And when asked directly, Judge Laettner admitted that he did not turn to DPD Thomas and say: "Ms. Thomas, I'm revoking his OR. I'm remanding your client. Do you wish to be heard?"

The masters also found "not credible" Judge Laettner's testimony that he rejected DPD Thomas's 170.6 challenge in open court and on the record because the transcript does not reflect it, the court minutes do not show it, and his contemporaneous notes do not show it. The masters said: "The fact that the record is devoid of reference to Judge Laettner's rejection of the 170.6 challenge raises the inference that it was never done."

Judge Laettner objects to the finding that he was not credible about revoking Ventura's OR release and remanding him in open court. In addition to insisting that he did so by turning to the right and telling his clerk about the revocation and remand, he asserts that DPD Thomas knew from the chambers discussions on October 31 and November 1 that Ventura was going to be remanded due to his termination from a treatment program, which was a violation of a term of probation. Ventura was released on OR on October 31, so his remand would not likely have been discussed that day. And even if it were discussed in chambers on November 1, his counsel, DPD Thomas, had the right to be heard before the remand occurred. She denies that Judge Laettner told her on November 1, in chambers or on the record, that he was going to revoke Ventura's OR release from the previous day. Other than the judge's testimony, which the masters found not credible, there is no evidence to contradict the testimony of DPD Thomas.

The judge also contends that DPD Thomas did not address the remand between November 1 and November 8, which corroborates that she knew about it on November 1. She did not do anything because she did not learn about it until November 7, when she saw that the remand box on the minute order for the criminal case was checked. Until then, she believed Ventura was in custody on an immigration hold. She learned about the remand when she and Ventura's immigration attorney were trying to get the immigration hold released by posting bond, which they would not have done had they known that Ventura had been remanded without bail by Judge Laettner. The evidence supports a finding that DPD Thomas did not know about the remand without bail on November 1, and that Judge Laettner did not order the remand in open court in her presence.

Judge Laettner also objects to the masters' finding that he was "not credible" about rejecting the 170.6 challenge in open court. He submits that the masters omit that DPD Thomas had previously moved for Judge Laettner to decide contested factual issues, thereby rendering the 170.6 peremptory

challenge untimely. Whether or not the peremptory challenge was untimely or meritorious is not relevant; the issue is whether Judge Laettner's statement under oath that he denied the 170.6 in open court is true. The masters found that it was not, and we agree, based on the evidence. We agree with the judge, however, that if the peremptory challenge was untimely, the judge was not required to hold a hearing regarding the timeliness of the challenge, and could have simply stricken it. He was, nevertheless, required to advise DPD Thomas of his ruling. The evidence does not support his claim that he did so in open court. It shows, to the contrary, that he did not.

We agree with, and adopt, the masters' findings, including regarding credibility.

2. Conclusions of Law

The masters determined that Judge Laettner's conduct in the *Ventura* matter was willful misconduct. They concluded that he abused his authority by failing to give Ventura's attorney, DPD Thomas, notice and the opportunity to be heard as to (1) his decision to revoke Ventura's OR release and remand him on November 1, 2013, and (2) his rejection of her 170.6 challenge as being untimely.

To support their finding that his conduct was in bad faith, they referred to the morning session on November 8, when DPD Thomas raised the issue of Ventura's remand, describing it as an error. At the beginning of the afternoon session, Judge Laettner stated that Ventura would have to enroll in a program as a condition of his OR release. DPD Thomas again raised the issue of the revocation of Ventura's OR, arguing that there had been no changed circumstances to justify his remand. The masters cited the following colloquy from the transcript:

> MS. THOMAS: So the court had previously OR'd him with—subject to no conditions on the 31st of October. I don't believe that there has been any change in circumstance from that date to today.

> THE COURT: He's been remanded. *That's one change.* If you want him released on his OR, those are the conditions. If you don't then we can continue with this hearing on December the 20th with him in custody. (Italics in masters' report.)

The masters found that Judge Laettner took advantage of Ventura's custodial status by conditioning his release on his enrollment in a program, and that the knowing or reckless failure to provide Ventura the process he was due was willful misconduct. And on November 8, Judge Laettner did not correct DPD Thomas by indicating that he had issued the revoke-and-remand order in open court on November 1; instead, he repeatedly reiterated that Ventura's OR would be conditioned upon his entry into a program.

In support of this conclusion, we note from the record that when DPD Thomas's colleague, DPD Jonathan Laba, accompanied her to court on November 8, the following exchange occurred:

> MR. LABA: . . . Our particular concern, procedurally, is what happened on Friday [November 1] because Ms. Thomas and Mr. Vaca [Ventura's immigration attorney], both of whom were here, have conveyed that the court didn't make any statements on the record about changing the previous day's OR to no-bail remand that showed upon the court's minute order, which is why now we're addressing the issue of his being released with conditions. Either the court did that and did it on the record, or the court did not, but that was not done. I don't know why the minute order reflects that, and I don't know why we are now addressing adding conditions to the OR release.
>
> THE COURT: Well, he was remanded on the 1st, and we have had many, many cases. I don't have a clear recollection of what happened on the 1st, but I have reviewed the minute order. He was remanded. It would have been with me saying he's remanded. That's where you find him. He is remanded.

Judge Laettner argues that there is no corrupt purpose for his remand of Ventura because Ventura was in violation of his probation by failing his treatment program. But Ventura had already been released on OR without conditions, and when DPD Thomas asked for him to be released on OR again, the judge required a condition, which appears to be retaliatory.

We further note that on November 1, right after Judge Laettner heard the *Ventura* matter, he heard *People v. Williams*, during which he snapped at DPD Wills-Pierce. He then called her up to the bench and told her that he was sorry he was mad earlier, but that it was her friend, DPD Thomas, who had made him so mad. DPD Thomas testified that when she confronted Judge Laettner about this later the same day, he confirmed that she had made him upset. Judge Laettner testified that he was angry or upset at DPD Thomas because he believed she had been dishonest about her client.

We agree with the masters that there is clear and convincing evidence that Judge Laettner revoked Ventura's OR and remanded him without bail without notifying DPD Thomas or letting her be heard—which the masters found to be a reckless denial of Ventura's due process, the basis for willful misconduct.

We do not find that Judge Laettner was required to give DPD Thomas the opportunity to be heard regarding his denial of her 170.6 challenge as untimely. But we do find that he was required to notify her of his ruling, and we agree with the masters that Judge Laettner lacked credibility when he testified that he did so in open court. There is no evidence to support his claim that he did.

The masters determined that Judge Laettner's conduct violated canons 1, 2, 2A, 3 (a judge shall perform the duties of judicial office impartially, competently, and diligently), and 3B(2). We agree with those legal conclusions and that his misconduct was willful.

## F. Count Eight—Failure to Recuse or Disclose Son's Employment in District Attorney's Office[5]

Judge Laettner is charged with failing to recuse or timely disclose on the record his son's employment with the district attorney's office in some cases where that office appeared.

The masters found that Judge Laettner had a system for appropriately making disclosures on the record, but that he failed to routinely do so in juvenile cases. They found, nevertheless, that he did not commit misconduct. We respectfully disagree and conclude that the judge's failure to always disclose the conflict on the record in juvenile cases constitutes improper action (which we do not consider for purposes of removal).

### 1. Findings of Fact

Judge Laettner's son, Max Laettner, was a law clerk at the Contra Costa County DA's Office starting August 18, 2014, and a deputy district attorney starting June 29, 2015. Judge Laettner understood that he was required to disclose his son's employment as an attorney in the DA's office. He established a two-step procedure to address the disclosure requirement, which was to give an oral admonition at the beginning of the calendar, before cases were called, and to have the clerks stamp on the minute orders in every case a notice that his son was a deputy district attorney in the DA's office. The bailiff would double-check that orders were stamped with the disclosure before distributing them. Judge Laettner testified that he made the oral disclosure every day at the commencement of the calendar, before any cases were called, and that he was supposed to give the oral disclosure in the afternoon, but he is not sure he did it every time. In juvenile cases, however, Judge Laettner only made the disclosure to the attorneys, and only at the beginning of the calendar. It is not clear that all of the attorneys would be present at that point. None of the juveniles or their

[5] We address Counts Six and Seven, where no misconduct was found, after Counts Eight and Nine.

families would be present when the judge made the disclosure, as the cases came in "one at a time" after the judge purportedly made the oral disclosure.

Three juvenile cases were identified in which the judge did not make the disclosure on the record:

(a) In *In re Vanessa W.*, Judge Laettner presided over the first hearing on April 1, 2014. His son started as a clerk in the DA's office in August 2014. The first hearing in the case after Judge Laettner's son started in the DA's office, on October 7, 2014, was not reported, and the minutes do not indicate that the judge made a disclosure about his son. There was evidence that Judge Barry Baskin, as the "ethics advisor," had advised Judge Laettner that he was not required to make a disclosure about his son's clerkship. The transcript of the first reported hearing in the case, on April 8, 2016, does not reflect an oral disclosure on the record that day, but the minute order contains the stamped disclosure. Another minute order, dated April 29, 2016, also contains the stamped disclosure.

(b) In *In re Lauryn G.*, Judge Laettner made no disclosure on the record at four hearings. He admitted that, on one occasion, he presided over this case after his son had appeared on an uncontested motion to continue, and that he would have recused from the case had he noticed that. The masters had no doubt that he would have done so.

(c) In *In re Victor E.*, Judge Laettner made no disclosure on the record at a number of hearings. Only some of the minute orders were stamped.

Neither party objects to these factual findings.

2. Conclusions of Law

Canon 3E(2)(a) provides that in "all trial court proceedings, a judge shall disclose on the record . . . information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification." Section 170.1, subdivision (a)(6)(A), provides that a judge shall be disqualified if, for any reason, a "person

aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

The masters found that Judge Laettner was diligent in his efforts to disclose that his son was employed as a DDA by routinely making an oral disclosure, backed up by a written disclosure on the minute order, which was checked by the bailiff. There was no evidence that Judge Laettner was careless or indifferent about his duty to disclose.

The masters acknowledged that Judge Laettner handled some of the busiest court calendars with a significant number of cases, and they agreed that, in juvenile matters, "group 'disclosures' are impractical due to the sequential nature of the minors' appearances in a courtroom that is not open to the public." They found, nevertheless, that Judge Laettner omitted necessary on-the-record disclosures in several instances, and stated:

> Minute orders issued after a hearing, which bear the disclosure stamp, do not remedy the lack of an oral disclosure before a proceeding commences. It is at the outset of a hearing that the parties and attorneys must have the relevant disclosure, in order to decide whether to seek a disqualification before the matter is heard by the judge.

The masters concluded that Judge Laettner failed to recuse himself in *In re Lauryn G.* and failed to timely disclose his son's employment with the DA's office in several instances in the *In re Vanessa W.* and *In re Victor E.* matters.

Despite the foregoing, the masters found that, under all of the circumstances, and weighing the court's significant caseload, coupled with the judge's diligent and consistent efforts to comply with the disclosure requirements, there was not clear and convincing evidence that these failures "even approached improper action . . . let alone constituted prejudicial misconduct or willful misconduct," as urged by the examiner.

We respectfully disagree with the masters' legal conclusion regarding Judge Laettner's failure to disclose on the record in every case his son's employment with the DA's office. The rules of ethics are clear that a judge must disclose that his or her adult child works in the district attorney's office in every case in which the district attorney's office appears. (See Cal. Judges Assn. (CJA), Jud. Ethics Update (2017), p. 2; CJA Jud. Ethics Update (2007) p. 1; CJA Jud. Ethics Com. Opinion 51 (2001) p. 2; Cal. Supreme Ct. Com. on Jud. Ethics Opns., Formal Opn. No. 2013-002 (2013) p. 8.)

The evidence establishes that Judge Laettner did not always properly disclose his son's employment with the DA's office in juvenile cases, and that he knew he was supposed to do so. The requisite disclosure is for the benefit of the parties, so that they might evaluate whether to seek to disqualify the judge. We find that the judge's failure to disclose his son's employment on the record in all juvenile cases violated canon 3E(2)(a). We further find that this was improper action, and not willful misconduct as argued by the examiner, because, in light of Judge Laettner's efforts to comply with the disclosure requirement, as described above, we do not believe that an objective observer would find his failure to do so in every case prejudicial to public esteem for the integrity and impartiality of the judiciary. We also find no corrupt purpose. Because we conclude that it is improper action, we do not consider this charge for purposes of removal.

### G. Count Nine—Ex Parte Comments to Deputy Public Defenders

Judge Laettner is charged with making ex parte comments in response to peremptory challenges exercised by deputy public defenders that would reasonably be perceived as sexual harassment or sexual discrimination and, at a minimum, gave the appearance that he was attempting to influence the attorneys not to exercise the challenges.

The masters found that Judge Laettner committed willful misconduct by engaging in two ex parte communications with deputy public defenders who were filing peremptory challenges against him. They did not find sexual harassment or sexual discrimination.

The masters further found that Judge Laettner's testimony was "not credible" regarding the statements he made to the deputy public defenders.

We adopt the masters' findings of fact. Due to the statute of limitations, we consider this subcount only for purposes of evaluating the judge's honesty during this proceeding (see footnote 3), and we need not address whether we adopt the masters' legal conclusion as to the level of misconduct.

1. Findings of Fact

a. Conversation with DPD Eiland

In 2008, Judge Laettner presided over the trial in *People v. Hector Ignacio*, a sexual battery case in which defendant Ignacio was charged with grabbing a woman's breast twice. DPD Nicole Eiland represented Ignacio. The jury acquitted Ignacio of sexual battery, but convicted him of simple battery. Judge Laettner sentenced Ignacio to 60 days in jail and probation for three years. The maximum penalty for simple battery is six months in county jail (Pen. Code, §§ 242, 243, subd. (a)).

DPD Eiland considered the sentence to be unduly harsh and began exercising peremptory challenges against Judge Laettner, pursuant to Code of Civil Procedure section 170.6. She testified that, three or four weeks after she began filing the challenges, Judge Laettner called her up to the bench and indicated that he had noticed that there had been challenges filed against him and "couldn't help but think it had something to do with the last case that [they] had together," which was the *Ignacio* case. She testified that he told her that he wanted her to think about "what if this had been [her] or what if this had been Ms. MonPere" whose breast had been grabbed. DPD Eiland testified that Judge Laettner never explicitly said not to file challenges against him, but she felt that

she was "being called into the principal's office and told not to do this [file 170.6 challenges] anymore."

Judge Laettner denied discussing the 170.6 challenges with DPD Eiland. He admitted having a conversation with her about whether his sentence in *Ignacio* was too harsh and said he did so because he could see that she was still very upset with him. He testified that he did not say anything about the sentence, but that he said she needed to consider the victims. He denied making reference to DPD MonPere or grabbing her breast, but testified that he might have said, "[W]hat if it had been a family member or a friend that had been a victim in a case?" He said he did this because he wanted DPD Eiland to have empathy for the victims of crime and "basically to defend [him]self." He also said she needed to consider victims because she had a hostile demeanor toward him and, "in fairness to [him], since [he] was considering the victim who had been essentially molested," she should consider victims.

The masters found DPD Eiland's testimony credible. It was partially corroborated by Judge Laettner's testimony that he asked her what if the assault in *Ignacio* had involved a family member or friend, and was further corroborated by DPDs Osborne and Cuthbertson, who testified that Judge Laettner made similar comments to them. The masters also found that, even though Judge Laettner did not explicitly say not to file 170.6 challenges against him, he indirectly referenced DPD Eiland's 170.6 challenges against him during his conversation with her.

b. Conversation with DPDs Osborne and Cuthbertson

DPDs Osborne and Cuthbertson also began exercising peremptory challenges against Judge Laettner in 2008 after his sentence in *Ignacio*. Because their challenges of him "jammed up" the three-judge courthouse, Supervising Judge William Kolin had a conversation with DPD Osborne, during which it was agreed that he and DPD Cuthbertson would pretry cases with Judge Laettner, which Judge Kolin would review.

About a month or so after Judge Laettner sentenced Ignacio, DPDs Osborne and Cuthbertson and a prosecutor were pretrying cases in front of Judge Laettner. The judge asked the prosecutor to leave. DPD Osborne testified:

> So Judge Laettner said that, you know, *he wasn't trying to tell us to—to not challenge him on cases*, but he could tell that we were upset with him. And so he—I started telling him about why I was—why I was challenging him on those cases. [¶] And I told him that the sentence for Ms. Eiland's client was grossly unfair and disproportionate to the crime that he was convicted of. And—you know, and after that, Judge Laettner said, well, you know, *what if it had been Ms. MonPere's breast that this man had—had grabbed?*
> (Italics in masters' report.)

DPD Osborne got the sense that Judge Laettner was trying to smooth things over with the public defenders.

DPD Cuthbertson also testified that Judge Laettner asked the district attorney to leave. He said the judge then brought up the challenges, saying: "I would never tell you not to represent your clients to the best of your ability. But I would be lying if I told you that being challenged didn't hurt my feelings or didn't hurt." DPD Cuthbertson also testified that, in talking about the *Ignacio* case, Judge Laettner asked, "[W]hat if that was Ms. MonPere's breast that he grabbed?" DPD Cuthbertson remembers this because it was inappropriate, DPD MonPere was his friend, and the "power dynamics in the room" were such that he "felt what was happening wasn't right."

Judge Laettner admitted having an in-chambers discussion with DPDs Osborne and Cuthbertson about *Ignacio,* but he denied asking the district attorney who had been in chambers to leave. Judge Laettner denied knowing, at the beginning of his conversation with the DPDs, that they had been filing 170.6 challenges against him. He testified that DPDs Osborne and Cuthbertson were "kind of my guys" and that he began the conversation by asking them, "[S]o

what's going on you guys?" He said DPD Osborne told him they had been challenging him because of his sentence in *Ignacio,* at which point Judge Laettner said he could not discuss challenges with them, and that they should challenge a judge if they thought it was in their client's best interest. He also testified that when DPD Osborne said the reason they were challenging him was because they thought the sentence in *Ignacio* was unfair, he said something like, "[W]hat if it had been a family member or friend or Ms. Eiland or Ms. MonPere that had been the victim?"

The masters found that Judge Laettner was "not credible" when he testified that, until their conversation in chambers, he was unaware that DPDs Osborne and Cuthbertson were filing 170.6 challenges against him, because he was in a three-judge courthouse, where two judges were having to do the work of three, and the supervising judge took it upon himself to intercede with the DPDs.

The masters found the testimony of DPDs Osborne and Cuthbertson credible that Judge Laettner engaged them in a discussion about their 170.6 filings. Judge David Flinn, formerly on the Contra Costa County bench, testified that when Judge Laettner had been receiving 170.6 challenges for a week or two, Judge Laettner sought his advice about his experience with 170.6 challenges. Judge Flinn related that Judge Laettner was frustrated that he could not stop the deputy public defenders in the hallway and ask why they were doing it, or explain the reason he ruled as he did, but he understood that he could not do this. Judge Flinn told Judge Laettner that, by "reaching out and being friendly to the public defenders," the challenges would stop. DPD Cuthbertson's testimony that Judge Laettner said he would be lying if he said being challenged did not hurt his feelings was consistent with the frustration Judge Laettner expressed to Judge Flinn regarding his inability to explain himself to the DPDs. Further, DPD Cuthbertson's testimony that Judge Laettner brought up the challenges is consistent with Judge Flinn's advice (which the masters found "questionable") to reach out and be friendly to the public defenders.

The masters also found "not credible" Judge Laettner's denial that he referred to touching DPD MonPere's breast. He admitted saying to DPDs Osborne and Cuthbertson, "[W]hat if it had been a family member or friend or Ms. Eiland or Ms. MonPere that had been the victim?" The masters reasoned that, if he was trying to impress upon them the seriousness of the situation, which he said he was, then he would refer to the defendant's conduct, "grabbing breasts," when asking them to imagine if it had been their colleague. And the masters found credible and compelling DPD Cuthbertson's explanation as to why he remembers that Judge Laettner referred to DPD MonPere's breast.

The masters found that Judge Laettner did speak to DPDs Eiland, Osborne, and Cuthbertson about the 170.6 challenges, and that, by telling them to consider victims, he was defending his sentence in *Ignacio.* According to the masters, the misconduct in this case is Judge Laettner's defense of his sentence in response to the public defenders' 170.6 challenges. His suggestion to DPD Cuthbertson that his feelings were hurt by the challenges from his "guys" reasonably calls into question his ability to make a difficult or unpopular decision in the future. As the masters stated, "The integrity of the judiciary depends upon the unflinching posture by judges that necessary but unpopular decisions will always be made."

Judge Laettner objects to the masters' findings that he was not credible. He contends that he never mentioned the 170.6 challenges to DPD Eiland, and that she testified that he did not reference peremptory challenges pursuant to Code of Civil Procedure section 170.6. But DPD Eiland, whom the masters found credible, testified that, while Judge Laettner never said not to file challenges against him, he told her he could not help but notice that she had been exercising challenges against him, and that he thought it had something to do with their last case.

The judge objects that the masters omitted that DPD Osborne admitted misremembering the events and/or adopting the recollections of other parties regarding the conversation about the *Ignacio* sentence. First, DPD MonPere told

DPD Osborne that she did not think he was there when the judge's comment about her was made, but DPD Osborne said he did not think that was the case, and he testified that he had "strong memories" of the conversation with Judge Laettner. Second, DPD Osborne admitted that DPD Cuthbertson reminded him that they had met with the judge when the comment was made, which confirmed his memory. That DPD Osborne was at first uncertain about his memory, and that DPD MonPere thought DPD Osborne was not present, is not determinative of whether the comments were made. We find that there is sufficient evidence to support the masters' finding that they were in fact made.

Judge Laettner argues that there was no "blanket challenge"[6] by the public defenders against him, but that there was one against Judge William Kolin, and that therefore he was credible when he said he did not know that DPDs Osborne and Cuthbertson were filing challenges against him. The masters referred in their report to the filing of 170.6 challenges against Judge Laettner by DPDs Osborne and Cuthbertson in early 2008 as a "blanket challenge." They are not referring to a "blanket challenge" by the entire public defender's office. The evidence that DPDs Osborne and Cuthbertson routinely challenged Judge Laettner for a period of time in 2008 is uncontroverted.

Judge Laettner says that differences in testimony as to whether he referred to DPD MonPere's breast is due to a faulty memory, not dishonesty. But he also asserts that he admitted the conduct before formal proceedings were initiated. In his response to a supplemental preliminary investigation letter and in his verified Answer, however, he denied referring to DPD MonPere's breast during his conversation with DPDs Cuthbertson and Osborne. We agree with the masters' finding that Judge Laettner's denial that he made the comment about DPD MonPere's breast lacks credibility.

[6] "Blanket challenge" refers to the practice of a party or attorney repeatedly filing 170.6 challenges against a particular judge.

2. Conclusions of Law

The masters determined that Judge Laettner committed willful misconduct because, according to Judge Flinn, he understood that he could not explain himself, but, by asking the public defenders to consider the victim, he was speaking directly to the reason the peremptory challenges were being made. Willful misconduct occurs when a judge acts on the desire to stop 170.6 challenges from being filed against him by "initiating any communication with the lawyer or the law firm involved." (Rothman, *supra*, § 5:4, p. 267.) The masters found that, although he did not explicitly tell the DPDs not to file the challenges, because of the "power dynamics in the room," as felt by DPD Cuthbertson, and DPD Eiland's feeling that she was "being called into the principal's office and told not to do this anymore," the act of explaining his sentencing decision, in the context of a blanket challenge, was for a purpose other than the faithful discharge of his judicial duties.

They also found that the judge's comment about considering if it had been DPD MonPere's breast that had been grabbed was undignified and discourteous, contrary to canon 3B(4). They did not find that it constituted gender bias or sexual harassment. As to both subcounts, they found the judge violated canons 1, 2, 2A, 3B(2), 3B(4), and 3B(7).

Due to the statute of limitations, we consider this count only for purposes of evaluating the judge's honesty during this proceeding (see footnote 3), and we need not address whether we adopt the masters' legal conclusion as to the level of misconduct.

**H. Count Six—Comments in dependency case**

Judge Laettner is charged with making statements in a case involving a juvenile that gave the appearance of prejudgment and that would reasonably be perceived as bias or prejudice.

We adopt the masters' findings and their conclusion that there is not clear and convincing evidence of the alleged misconduct.

### I. Count Seven—Instituting program to address backlog

Judge Laettner is charged with instituting a new program to address a backlog in criminal court, which was allegedly an abuse of authority, had a chilling effect on defendants' constitutional right to trial by jury, and gave the appearance that he intended to give harsher treatment to defendants who asserted their right to trial and were convicted.

We adopt the masters' findings and their conclusion that there is not clear and convincing evidence of the alleged misconduct.

## IV. APPROPRIATE DISCIPLINE

In determining the appropriate level of discipline, we consider our mandate to protect the public, to enforce rigorous standards of judicial conduct, and to maintain public confidence in the integrity and impartiality of the judiciary. (See *Broadman, supra,* 18 Cal.4th at pp. 1111-1112.)

The commission has identified several factors to consider in determining the appropriate sanction, including the judge's honesty and integrity, the number of acts and seriousness of the misconduct, whether the judge appreciates the impropriety of the conduct, the likelihood of future misconduct, the impact of the misconduct on the judicial system, and the existence of prior discipline. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 95-96.) The commission may also consider the effect of the misconduct on others and whether the judge has cooperated fully and honestly in the commission proceeding. (Policy Declarations of the Com. on Jud. Performance, policy 7.1(1)(f), 7.1(2)(b).)

Foremost in the commission's consideration of the foregoing factors is honesty and integrity. (*Saucedo, supra*, 62 Cal.4th CJP Supp. at p. 96.) Honesty is a minimum qualification expected of a judge. *(Kloepfer, supra*, 49 Cal.3d at p. 865.) A judge who does not honor the oath to tell the truth cannot be entrusted with judging the credibility of others. (*Inquiry Concerning MacEachern* (2008) 49 Cal.4th CJP Supp. 289, 309.) The commission takes "particularly seriously a judge's willingness to lie under oath to the three special masters appointed by the Supreme Court to make factual findings critical to [its] decision." (*Saucedo, supra*, 62 Cal.4th CJP Supp. at p. 97.) The California Supreme Court has said, "There are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission in the course of its investigation into charges of wil[l]ful misconduct on the part of the judge." (*Adams II, supra,* 10 Cal.4th at p. 914).

Judge Laettner repeatedly asserted, in his post-hearing briefs and at his appearance before the commission, that the special masters concluded that he is "honest to a fault." The masters, however, specifically stated in their report that, to the contrary, Judge Laettner was "not credible" in six instances and that his testimony was "impeached" in another. They also rejected much of his testimony in favor of that of other witnesses. While the masters found Judge Laettner's acknowledgment of wrongdoing as to some of the acts charged to be mitigating, they determined that he was "not credible or not truthful as it relates to his testimony concerning several of the events" in this matter, and that his "lack of candor regarding several of the allegations is troubling."

The instances where the masters found, either explicitly or implicitly, that Judge Laettner was not credible include his testimony that:

- He called DPD Della-Piana into the well to ensure she received the minute orders, while the prosecutor was at counsel table, and told her he was resetting Imlay's bail at $25,000 per case.
- His order exonerating and resetting Imlay's bail is not on the record because his court reporter was not present, or was present but did not take his order down.
- He was confused about who represented Lauryn G.
- He did not talk to DPD Della-Piana about *Eric B.* in the hallway.
- He did not talk to DPD Della-Piana about *Imlay* in chambers.
- He revoked Ventura's bail and remanded him in open court.
- He rejected DPD Thomas's 170.6 peremptory challenge as untimely in open court.
- He did not know he was being routinely peremptorily challenged by DPDs Osborne and Cuthbertson in a three-judge courthouse.
- He did not refer to DPD MonPere's breast when he said the DPDs should consider the victim in *Ignacio*.

Judge Laettner argues that differences in testimony may be the result of faulty memory, rather than conscious dishonesty. But the masters found, in several instances, that the judge's explanations lacked credibility because they did not make sense. For example, he testified that DPD Della-Piana was in the well when he revoked Imlay's bail, but the masters stated that there would be no reason for this to occur, and it would have been improper. His explanations about why something was not on the record in *Imlay* were inconsistent: he said his court reporter was not present, and he also said she was present but not taking things down. According to the masters, his claim that he was confused as to which DPD represented Lauryn G. was not believable given DPD Moghtader's prior involvement in the case and DPD Della-Piana's references to her during the hearing. And his assertion that he did not know he was being peremptorily

challenged is at odds with Judge Flinn's testimony that he sought Judge Flinn's advice on how to handle the challenges.

Judge Laettner also claims that the special masters found that he has taken full responsibility for his mistakes "without excuse." There is no such finding in the masters' report. Judge Laettner denies committing misconduct in three of the six counts the masters found were proven with clear and convincing evidence (Counts One, Three, and Nine), and in a fourth count the masters concluded did not constitute misconduct but we did (Count Eight). Further, he does not take responsibility for the following conduct:

- Ex parte communication with DDA Fernandez—The judge says DPD Della-Piana's absence from the courtroom "made her inclusion [in the ex parte] impossible." (There was no need for the ex parte communication in the first place.)
- "Teenage daughter" comment to DPD Della-Piana—He denies that this was demeaning and said he intended it as a "compliment." (The masters found it "inconceivable" that she might take it as a compliment.)
- Ex parte communication with DPD Della-Piana regarding *Eric B*.—He denies discussing the *Eric B.* case with her. (She testified that he did, and the masters found that he did. And he says in his post-hearing brief that he did not explicitly deny referencing *Eric B.* during the ex parte discussion with DPD Della-Piana, but when he was asked whether he discussed that case with DPD Della-Piana on that occasion, he responded, "No.")
- Ex parte communication with DPD Della-Piana regarding *Imlay*—He denies discussing the *Imlay* cases with her. (She testified that he did, he admitted in his Answer that he did, and the masters found that he did.)
- Remand of Ventura—He denies that he did this off the record. (The evidence indicates that he did not do it on the record.)

- Denial of DPD Thomas's 170.6 request—He denies that he did this off the record. (The evidence indicates otherwise.)
- Discussion of peremptory challenges with DPD Eiland—He denied that he discussed them with her. (She testified that he did, and the masters found her credible.)
- Referring to DPD MonPere's breast when asking the DPDs to consider the victims—He denied doing so. (DPDs Osborne and Cuthbertson testified that he did, and the masters found them credible.)

Judge Laettner emphasizes that he admitted the misconduct in Counts Two, Four, and Five, which the masters found reflected a pattern of gender bias against women. But he only admitted some of the misconduct, and, as the masters stated, he attempted to minimize and justify some of his remarks. For example, he said he commented on DDA Bell's looks because he wanted to convey her competence to grand jurors, he claimed that comparing DPD Della-Piana to a teenage girl was a compliment, and he said he told DPD MonPere that she was "his favorite," in front of other attorneys, to build her confidence.

Judge Laettner also contends that he promptly recognizes his mistakes, and cites as an example his response to DPD Wills-Pierce's complaint that he said, "I can take judicial notice that women can drive you crazy." But he did not apologize for the comment until several days later, when DPD Wills-Pierce confronted him about it. Moreover, he testified that he and then-Supervising Judge Barry Goode "had a chuckle" about it, which does not reflect recognition of the effect such a comment could have on a professional female attorney or her clients, particularly in a domestic violence case.

Further, Judge Laettner still blames the Contra Costa County Public Defender's Office, stating in his post-hearing briefing that "[i]t cannot be overlooked that all but one complainant" is from there, and that he is facing disciplinary action "only as the result of" circumstances involving a campaign against him by the Contra Costa County Public Defender. The masters found,

and we agree, that the source of the complaints is irrelevant; it is the judge's conduct that matters.

Judge Laettner's inability to fully accept responsibility for his behavior was evident at his appearance before the commission on October 2, 2019. While he acknowledged generally the impropriety of his comments in Counts Two, Four and Five, he continued to deny responsibility for the significant acts of misconduct in Counts One and Three, and to blame others. Judge Laettner argued that the special masters were incorrect in each of the multiple instances they found his explanations or statements to be not credible, and he denied that he might have been mistaken as to any instance, even after hearing testimony from other individuals that was inconsistent with what he said was his recollection. When asked why he thought the special masters found some of his testimony to be not credible, he responded that they "weren't given the whole story." He claimed that he had "100 other witnesses lined up and ready to go," with "testimony that corroborated [him]," but that the masters did not allow their testimony. This assertion seems disingenuous in light of what actually occurred during this proceeding.

Judge Laettner called close to 40 witnesses on his behalf during the evidentiary hearing (and cross-examined the examiner's many witnesses). After the special masters heard 34 witnesses testify about Judge Laettner's character and honesty, Judge Laettner said he had seven additional witnesses he wished to call (Kim Carmichael, Thomas Wolfrum, Sergeant Mike Parrish, Deputy Sheriff Lisa Berry, DDA Melissa Smith, Peter Silten, and Laura Delehunt). The masters indicated that they had "heard a great deal of testimony with regard to Judge Laettner's character and traits for honesty, respect, and dignity," including "from some of the most well-respected judges in California," and they excluded the testimony of the last four witnesses on the ground that it was cumulative. Evidence Code section 352 allows the court to exclude evidence if, in its discretion, the probative value of the evidence is substantially outweighed by the

probability that its admission will necessitate undue consumption of time. (See *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163 [masters may exclude cumulative evidence].) Carmichael was not available to testify, but Wolfrum and Sergeant Parrish testified. Judge Laettner's counsel then informed the special masters that the judge had no other witnesses to call.

We note that testimony about the judge's reputation for honesty is different from that of percipient witnesses who would testify about the facts upon which the misconduct findings are based.

After the evidentiary hearing before the special masters was concluded, Judge Laettner submitted with his opening brief to the commission a request to reopen the evidence, pursuant to commission rule 133(a), on the ground that his due process rights under commission rule 126[7] had been denied because the special masters did not let him call additional witnesses to testify as to his "character for honesty."

Judge Laettner's request also sought to introduce declarations and testimony of witnesses with evidence that he claimed was new and that corroborated his testimony in the six instances where the masters expressly found his testimony to be not credible, summarized as follows:

(a) Declaration of former Judge William Kolin: In his proposed declaration, Judge Kolin does "not recall Judge Laettner being 'blanket' challenged under [Code of Civil Procedure section] 170.6 on all public defender cases." Judge Laettner was not alleged to be the subject of a blanket challenge on all public defender cases. The proposed declaration does not refute the masters' finding that Judge Laettner was not credible when he testified that he did not know of a blanket challenge by DPDs Osborne and Cuthbertson.

[7] Rule 126 states in relevant part that: "When formal proceedings have been instituted, a judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses."

(b) Declaration of Deputy Sheriff Lisa Berry: Deputy Berry's proposed declaration states that she does not recall public defenders filing peremptory challenges against Judge Laettner on every matter. Like Judge Kolin's declaration, this is not relevant because there is no allegation that public defenders filed peremptory challenges against Judge Laettner on every matter.

(c) Declaration of DDA Jun Fernandez: DDA Fernandez was a witness during the hearing. His proposed declaration seeks to revise his prior testimony. Judge Laettner had ample opportunity during the hearing to elicit from DDA Fernandez all information relevant to the charges. Judge Laettner offered no reason why he did not do so during the hearing.

(d) Declaration of Deputy Scott Reed: Deputy Reed was also a witness during the hearing. The masters did not believe all of his testimony. His proposed declaration states that Judge Laettner said he was exonerating bail and resetting it in *Imlay* in open court with all parties present. Deputy Reed's declaration also states that he cannot recall if the court reporter was present when the judge issued the bail order, that public defenders commonly interchange cases, and that DPD Della-Piana was often flirtatious in the courtroom, whereas the judge was not.

Deputy Reed testified at the hearing, and Judge Laettner had a full opportunity to question him about all of the issues he seeks to address in the declaration, including that of bail in the *Imlay* case, which was a significant charge in the case. The judge offers no reason why he did not elicit the information in Deputy Reed's declaration during the hearing. And whether public defenders exchange cases has no bearing on whether Judge Laettner knew who was representing the defendant in *Lauryn G.* The issue of DPD Della-Piana's alleged flirtatiousness, and that of the judge, was also the subject of testimony and could, and should, have been fully addressed during the hearing.

(e) Testimony of Lisa Humiston: Judge Laettner also sought to reopen the evidence to have Humiston, his courtroom clerk, testify that he said in open court, with all parties present, that Ventura was remanded. Judge Laettner was notified of this allegation on August 4, 2017, and it was thoroughly addressed at the hearing. The judge included Humiston on his witness list, but he chose not to call her at the hearing. He offered no reason for not calling her.

The commission denied Judge Laettner's request to reopen the evidence on the grounds that he failed to establish that his due process rights were being violated or that there was good cause to reopen the hearing to take additional evidence, as required. (See *Inquiry Concerning Hyde* (2003) 48 Cal.4th CJP Supp. 329 [good cause requirement for reopening the record in formal proceedings].)

Accordingly, Judge Laettner's argument at his appearance that the masters did not get the "whole story" because he was precluded from calling "100 other witnesses" who would have refuted the masters' credibility findings is dubious at best.

Regarding the nature and seriousness of the misconduct, we find, for purposes of determining the appropriate level of discipline, that Judge Laettner committed five acts of willful misconduct and eleven acts of prejudicial misconduct. This is a significant amount of misconduct. Judge Laettner's willful misconduct includes two improper ex parte communications with DPD Della-Piana about pending cases for the impermissible purpose of addressing his frustration about her feelings toward him; his ex parte communication with DDA Fernandez because he was "mad" at DPD Della-Piana; and his retaliatory conduct in remanding DPD Thomas's client, without bail, without affording her the opportunity to be heard. His prejudicial misconduct includes the separate incident of remanding defendant Imlay and resetting bail without affording her attorney, DPD Della-Piana, the opportunity to be heard; inappropriate remarks to DPD Della-Piana; inappropriate comments to and about a number of women,

many of which reflect gender bias; comments that create the appearance of bias based on physical appearance; and poor demeanor toward DPD Wills-Pierce because he was upset with DPD Thomas.

Judge Laettner claims that he did not know that comments about the physical appearance of women were improper, that he learned this from the commission's investigation letter and discussions with his presiding judge, and that he was not trained on this issue until September 2018. The masters noted that, presumably during Judge Laettner's 10 plus years on the bench, he "received ethics and conduct training, in the form of CJER's New Judge Orientation, and qualifying ethics courses, elective and mandatory, every three years." They also found that, after 10 years on the bench, "it can be expected that a judge's words and conduct will have conformed to the demands of the canons," but that Judge Laettner's did not do so.

We also note that the California Judicial Conduct Handbook in effect when Judge Laettner took the bench in 2006 addresses gender bias and states that unprofessional remarks made in the courtroom concerning an attorney's personal appearance can have an impact on the credibility of women in court and, when addressed to a woman lawyer, makes it difficult for her to effectively represent her clients. The 1999 Handbook also notes that exhibitions of gender bias have been regarded as conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (Rothman, Cal. Judicial Conduct Handbook (2d ed. 1999) § 2.11, pp. 37-38.) Thus, Judge Laettner should have been on notice that comments in the courtroom about a woman's personal appearance are inappropriate.

Judge Laettner also argued at his appearance that he has received a lot of counseling and now understands that he should not comment on women's physical appearance. But he introduced no evidence of that counseling at the evidentiary hearing. And his misconduct goes beyond improper comments to women. He did not indicate at his appearance that he understood why the

additional misconduct (e.g., denial of due process and improper ex parte communications) was wrong; instead, he claimed that the masters were wrong.

Given the judge's failure to acknowledge the impropriety of much of his misconduct, and his lack of credibility before the masters, we do not believe that he has shown sufficient appreciation of his misconduct to assure us that he will not reoffend. "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248; *Ross*, *supra*, 49 Cal.4th CJP Supp. at p. 139.)

Judge Laettner contends that the masters found "undisputed" evidence that there will be no further misconduct. The masters made no such finding. They described him as an "asset" to the local bench, and, from this, he extrapolates a finding as to his future misconduct that the masters never made.

Judge Laettner's claim that he has committed no misconduct since 2017 is not given much weight because neither he nor the commission members would necessarily know if complaints have been made about him because the commission members are typically not told about a new complaint if it is received while formal proceedings are pending.

Regarding the impact of the judge's misconduct on the judicial system, the masters found that Judge Laettner's actions eroded public confidence in the dignity, integrity, and impartiality of the judiciary. They specifically noted that commenting on the physical appearance of women attorneys and joking about how "women can drive you crazy" diminishes the dignity of the process of the court. They said that partiality, showing favoritism, and referring to an attorney's physical beauty "strikes at the very foundation of the administration of justice and erodes public trust and confidence." We agree with the masters' findings that Judge Laettner's conduct had an adverse impact on the judicial system in general.

We also take into account the effect of the judge's conduct on other individuals. The masters found that two individuals' "employment circumstances changed as a byproduct of Judge Laettner's conduct." His former court reporter, Michel, said she left his department in June 2017 because she "could no longer take" his favoritism toward tall, skinny blondes and petite Asian women. DPD Della-Piana was transferred after bringing the judge's comments about being a "hard one" and "not spanked enough" to her supervisor's attention.

Laettner has no prior discipline. This is a mitigating factor in light of his 13 years on the bench. But because the aim of commission proceedings is protection of the public and not punishment, in the more serious cases involving willful and prejudicial misconduct, mitigating circumstances have only limited appeal. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 12:92, p. 856.) The commission has removed other judges from the bench who had no prior misconduct, particularly where dishonesty was involved (e.g., *MacEachern, supra,* 49 Cal.4th CJP Supp. at p. 311; *Saucedo*, *supra,* 62 Cal.4th CJP Supp. at p. 102.)

We also take into account the testimony of numerous witnesses in favor of Judge Laettner, and we acknowledge his years of judicial service and contributions to the bench. But the California Supreme Court has held that even a good reputation for legal knowledge and administrative skills does not mitigate willful misconduct or prejudicial misconduct. (*Kloepfer, supra,* 49 Cal.3d at p. 865.) And as the commission stated in *Ross, supra,* 49 Cal.4th CJP Supp. at page 90, "If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental."

In light of all of the foregoing factors—but particularly the requirement that judges must, at a minimum, be honest and have integrity—we conclude that removal from the bench is warranted.

## ORDER

Pursuant to the provisions of article VI, section 18 of the California Constitution, and rules 120(a) and 136 of the Rules of the Commission of Judicial Performance, we hereby remove Judge John T. Laettner from office and disqualify him from acting as a judge.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Anthony P. Capozzi, Esq.; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Ms. Kay Cooperman Jue; Dr. Michael A. Moodian; and Mr. Adam N. Torres voted in favor of all the findings and conclusions expressed herein and in this order of removal. Commission members Hon. William S. Dato, Hon. Lisa B. Lench, and Mr. Richard Simpson concur as to the factual findings and most of the legal conclusions expressed herein, but dissent as to the order of removal and would have imposed a public censure.

Dated: November 6, 2019



Nanci E. Nishimura
Chairperson of the commission

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| INQUIRY CONCERNING JUSTICE JEFFREY W. JOHNSON,<br><br>No. 204 | DECISION AND ORDER REMOVING JUSTICE JEFFREY W. JOHNSON FROM OFFICE |

## I. INTRODUCTION

This disciplinary matter concerns Justice Jeffrey W. Johnson of the California Court of Appeal, Second Appellate District, Division One. Justice Johnson was notified of the commission's investigation in July 2018. A notice of formal proceedings was filed on January 4, 2019. The notice was amended three times to add charges. A third amended notice was filed on June 18, 2019.

Justice Johnson was charged with 10 counts, which with subparts contain 62 allegations of misconduct. The charges involve sexual misconduct toward 17 women he encountered at the courts where he worked and at professional functions (Counts One, Two, Three, Four, Five, Seven, and Nine), including the unwanted touching of several women; disparaging women with whom he works (Count Ten); poor demeanor toward those with whom he works (Count Six); and multiple instances of undignified conduct while under the influence of alcohol, which demeaned the judicial office (Count Eight).

The California Supreme Court appointed Hon. Judith L. Haller, Associate Justice of the Court of Appeal, Fourth Appellate District, Division One; Hon. Louis R. Hanoian, Judge of the San Diego County Superior Court; and Hon. William D. Lehman, Judge of the Imperial County Superior Court, as special masters to conduct an evidentiary hearing and prepare a report to the commission of their findings of fact and conclusions of law.

The special masters presided over 17 days of testimony, with over 100 witnesses and 120 admitted exhibits, and multiple discovery motions. The hearing took place between August 5 and 27, 2019, with an additional day of testimony on September 11, 2019, and closing arguments on October 8, 2019. The masters filed their report to the commission on January 3, 2020. The commission heard oral argument, presided over by then-chairperson Nanci E. Nishimura, Esq., on May 7, 2020.

The masters found that the allegations in Count One (in part), Two (in part), Three, Four (in part), Five, Six, Seven (in part), Eight (in part), Nine, and Ten were proven by clear and convincing evidence. They concluded that Justice Johnson engaged in 15 instances of prejudicial misconduct (comprised of 42 proven allegations), as well as 5 instances of improper action (comprised of 5 proven allegations).

Based on our independent review of the record, we conclude that the findings of fact in the masters' report are supported by clear and convincing evidence, and we adopt them in their entirety. In this decision, we summarize the factual findings. The findings include that Justice Johnson was, at times, intentionally dishonest in his testimony.

We adopt the masters' legal conclusions as to most of the allegations, but respectfully reach our own independent legal conclusions as to certain allegations. We find that Justice Johnson engaged in 18 instances of prejudicial misconduct.

In their report, the masters stated:

> The proven allegations establish Justice Johnson lacked personal boundaries; engaged in unwanted touching of several women; attempted to use the prestige of the judicial office to create personal relationships with women; and engaged in ongoing improper touching and sexually related comments toward his colleague, Court of Appeal Justice Victoria Chaney.

> Justice Johnson's pattern of conduct toward these women reflects ethical lapses that undermine the public's trust in the judicial process and erodes the confidence we ask the public to place in our individual judges. These lapses are compounded by Justice Johnson's failure to take responsibility for many of his actions and to manifest insight into his behavior. We find particularly concerning Justice Johnson's actions towards women who had recently graduated from law school; were in the early stages of their legal careers; and welcomed the opportunity to establish professional contacts with a Court of Appeal justice. Additionally, the evidence established the most serious misconduct occurred when Justice Johnson was intoxicated, impairing both his judgment and his recollection of events.
>
> In making these findings, we have carefully considered, but largely rejected, Justice Johnson's defenses, including that (1) witness memories of the relevant events were exaggerated or misconstrued because widespread negative publicity and unsubstantiated gossip caused many of the women to rethink and overstate their encounters; and (2) many of the witnesses (including Justice Chaney) should not be believed because they did not tell him his conduct was unwelcome or report his actions until many years later.

We find that, by engaging in sexual misconduct, Justice Johnson severely undermined public esteem for the integrity of the judiciary. Treating women disrespectfully, including unwanted touching and making inappropriate sexual comments, reflects a sense of entitlement completely at odds with the canons of judicial ethics and the role of any judge. Sexual misconduct has no place in the judiciary and is an affront to the dignity of the judicial office.

Justice Johnson refused to admit his most serious sexual misconduct. Rather than take responsibility for his offensive behavior, he maligned the victims, including his colleague Justice Chaney, and accused them of testifying

falsely. But it is Justice Johnson whom the masters found, and we find, testified untruthfully in many instances.

As to the sexual misconduct Justice Johnson does admit, he claimed that he did not know it was wrong. At his appearance before the commission, he attributed the misconduct he has admitted to his being "friendly." But friendliness does not extend to sexualized behavior. Judges have been on notice for many years that men and women alike are entitled to a professional workplace free from inappropriate and unwelcome conduct, particularly from judges, who are held to a higher standard of behavior. Judges, including Justice Johnson, receive ethics training that reinforces this concept. In addition, Justice Johnson was personally cautioned about some of his inappropriate conduct. He failed to heed these warnings and to comport himself in a professional manner befitting his position.

At his appearance before the commission, Justice Johnson told commission members that he was raised to treat everyone "with respect and dignity." Yet he failed to treat everyone at the appellate court with dignity and respect, not only by engaging in sexual misconduct, but also by displaying poor demeanor to coworkers and making disparaging remarks about colleagues, and by becoming intoxicated and using the courthouse to socialize late at night, sometimes in the presence of courthouse custodians and court personnel who were working there.

Justice Johnson's misconduct has severely tarnished the esteem of the judiciary in the eyes of the public. Given his persistent denials of serious misconduct, we do not have confidence that he can reform, as he has not conveyed that he recognizes the extent of his wrongdoing. Further, given his lack of candor during this proceeding, we do not have confidence that he has the fundamental qualities of honesty and integrity required of a judge. Consequently, in order to fulfill our mandate of protecting the public, enforcing high judicial standards, and preserving public respect for the judiciary, we remove Justice Johnson from office.

Justice Johnson is represented by Paul S. Meyer, Esq., Reginald A. Vitek, Esq., Willie L. Brown, Jr., Esq., and Thomas J. Warwick, Jr., Esq. The examiners for the commission are acting commission trial counsel Emma Bradford, Esq., trial counsel Mark A. Lizarraga, Esq., and commission assistant trial counsel Bradford Battson, Esq.

## II. LEGAL STANDARDS

### A. Three Levels of Judicial Misconduct

Willful misconduct consists of unjudicial conduct, committed in bad faith, by a judge acting in a judicial capacity. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091.)

Prejudicial misconduct is "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) The California Supreme Court has defined prejudicial misconduct as either "willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity" or "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (*Broadman, supra,* 18 Cal.4th at pp. 1092-1093.) The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred. (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 (*Adams II*).)

Improper action occurs when the judge's conduct violates the canons of the California Code of Judicial Ethics, but an objective observer aware of the circumstances would not deem the conduct to have an adverse effect on the reputation of the judiciary. (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89.) A judge may be removed from office or censured based on willful misconduct or prejudicial misconduct, but not improper action. (Cal. Const., art. VI, § 18, subd. (d).)

Only prejudicial misconduct and improper action are relevant in this matter because the examiner did not argue, and the special masters did not find, that any of Justice Johnson's misconduct constitutes willful misconduct, based on the assertion that it did not involve him acting in his judicial capacity. The masters accepted the parties' agreement that Justice Johnson was not acting in a judicial capacity in connection with the allegations. The commission accepts this agreement for purposes of this decision only, but notes that certain instances of misconduct occurred in the courthouse, while Justice Johnson was working with others on judicial matters, and other instances of misconduct occurred while he was at professional events in his capacity as an appellate justice.

**B. Burden of Proof**

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman, supra,* 18 Cal.4th at p. 1090.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*) Clear and convincing evidence is so clear as to leave no substantial doubt. It is sufficiently strong to command the unhesitating assent of every reasonable mind, but need not establish the facts beyond a reasonable doubt. (*Ibid*.)

**C. Standards Regarding Masters' Findings and Conclusions**

The factual findings of the masters are given special weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Broadman, supra,* 18 Cal.4th at p. 1090.) The legal conclusions of the commission are given great weight because of the commission's expertise in evaluating judicial misconduct. (*Ibid.*) The commission may determine, however, that it is appropriate to disregard the factual findings and the legal conclusions of the special masters and make its own determinations based on its own independent review of the record. (See *Inquiry Concerning Clarke* (2016) 1 Cal.5th CJP Supp. 1, 7.)

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### BACKGROUND

Justice Johnson has been a judge for 19 years. He attended Duke University, studied at Oxford University as a Duke Scholar, and graduated from Yale Law School in 1985. He worked as an attorney in private practice from 1985 to 1989 and was an Assistant United States Attorney from 1989 to 1999. In 1999, he was selected as a United States Magistrate Judge for the Central District, where he served until his appointment in 2009 to the Court of Appeal, Second District, Division One.

### COUNT ONE—Sexual harassment of Justice Chaney

Justice Johnson was charged with a pattern of conduct toward his colleague on the bench, Justice Victoria Chaney, that was unwelcome, undignified, discourteous, and offensive, and would reasonably be perceived as sexual harassment or gender bias (counts 1A-1J). The alleged misconduct involved multiple instances of unwanted touching and other sexual misconduct.

A. Proven charges found to constitute misconduct

The masters found, based on clear and convincing evidence, that Justice Johnson, while at court, asked Justice Chaney to have an affair with him after she had already declined his request (count 1C), said he wanted to "squeeze" her "titties" to make her "feel better" and then squeezed one of her breasts in the courthouse hallway (count 1D), repeatedly touched her breasts while hugging her (count 1E), occasionally patted her buttocks in the courthouse hallway (count 1F), commented on her nipples (count 1G), and warned her not to report him for sexual harassment (count 1J). They also found that, when they were on a work trip, he entered her hotel room uninvited (count 1B), and, at a restaurant, implied that she should not report him for sexual harassment (count 1H).

1. Findings of Fact

Count 1B: Entering hotel room uninvited

Justices Johnson and Chaney attended the National Judicial College in Reno in 2010. They had dinner together each evening. During these dinners, Justice Johnson drank alcohol and appeared to be intoxicated. Justice Chaney testified that, during dinner the first night, Justice Johnson asked her if she ever had an affair. She perceived this as a "come on." When they returned to the hotel, he escorted her back to her room and then followed her into her room uninvited, which made her uncomfortable. Justice Chaney testified that Justice Johnson did not say anything inappropriate, but he touched her shoulder, arm, and back, which made her feel uncomfortable. Although she felt uncomfortable the first night, she continued to spend time with Justice Johnson because they were colleagues on a court together, and were going to be working together for the foreseeable future. Justice Chaney also testified that, after subsequent dinners together, Justice Johnson again entered her room by walking close behind her when she opened her hotel room door. He left when she asked him to, but she felt upset and uncomfortable because she "felt that he wanted sex."

Justice Chaney's testimony about what occurred the first night was corroborated by the testimony of her best friend, Emily Bernardis, whom the masters viewed as an "open and honest witness." Bernardis testified that Justice Chaney called her from her hotel room and told her that Justice Johnson had been drinking and "pushed his way into the room," which made Justice Chaney "freaked out" and "very upset." Justice Chaney's testimony was also corroborated by Daniel Alexander (her friend and later her research attorney), and Raphael Gunner (her private yoga instructor of 17 years), each of whom testified that she told them about the incident. Gunner testified that Justice Chaney told him that, one evening, Justice Johnson pressured her to let him into her room, that it was obvious to her that he wanted to have a sexual encounter with her, and that she had to firmly keep him from entering the room. Alexander

testified that, one year after the trip, Justice Chaney told him that she had dinner with Justice Johnson in Reno and that he had pushed into her hotel room, and she could not get him out. The masters found that, even though the testimony of Bernardis and Gunner did not precisely match Justice Chaney's testimony, it supported the fact that Justice Johnson came into Justice Chaney's hotel room uninvited for at least a few minutes on one night, and the witnesses confirmed the essence of what occurred. The masters also concluded that Justice Chaney's clear explanation of the incident was believable and consistent with other evidence showing Justice Johnson's overly friendly and overly familiar conduct with women, particularly when he is drinking alcohol.

The masters determined, however, that other details in Justice Chaney's testimony—that Justice Johnson touched her when he came into her hotel room the first night, and that he came into her room uninvited on additional nights after the first night—were not alleged in the notice, and were not disclosed to Bernardis, Gunner, Alexander, commission staff, or Administrative Presiding Justice Elwood G. Lui, to whom she reported Justice Johnson's conduct in connection with a workplace investigation conducted in July 2018 by outside counsel at the court's request. As a result, the masters declined to credit Justice Chaney's testimony on these points, and found that the truth of what actually happened in Reno was somewhere in between each party's version of the events.

Justice Johnson denied propositioning Justice Chaney or going to her room at any time during the trip, and said that he did not know where her room was located. He testified that her testimony that he came to her room was an "unequivocal lie." Justice Johnson also denied being intoxicated the first evening, claiming that he had one or two beers and that this matter is "full of stereotypes." The masters found Justice Johnson's denials about what occurred the first evening in Reno to be "untrue" and that his testimony reflected "intentional misrepresentations."

Justice Johnson asserted that Justice Chaney should not be believed because she testified incorrectly regarding certain details about the trip, such as the name of the hotel, the precise date of the event, and whether she had rented a car. Justice Chaney testified that she rented a car when they arrived in Reno, that she gave Justice Johnson a ride to their hotel, and that they stopped at a convenience store where she purchased Diet Cokes and he purchased a bottle of liquor of some sort. Justice Johnson called her testimony that she drove him in the rental car, and that he stopped to buy liquor, a "total fabrication." He produced copies of expense reimbursement requests he submitted in 2010 that show that he paid $45 for a taxi he and Justice Chaney shared between the hotel and the judicial college each day, and he testified that Justice Chaney paid for a taxi in the other direction each day. He asserted that this proved they used taxis to travel to the judicial college, not Justice Chaney's rental car. He also provided evidence that the program ended at 4:00 p.m. the last day and that his flight was at 5:30 p.m., so they would not have had time to return the rental car before his flight.

The masters agreed that some of Justice Chaney's testimony was not fully substantiated and/or conflicted with written records of the trip, but they concluded that this was the result of her "misremembering, rather than any intentional misrepresentation." They stated: "It makes sense that Justice Chaney would not remember the details of a trip that occurred more than nine years before she testified, but that she would recall an unsettling event—the fact that Justice Johnson came into her hotel room with some suggestion that he would like to carry things further."

The masters stated that this conclusion is consistent with the opinions of Dr. Mark Kalish, a forensic psychiatrist who testified on Justice Johnson's behalf regarding memory and how it is impacted by internal factors (e.g., an individual's personality, former experiences, and perspective), and external factors (e.g., the passage of time, "social contagion," which is the desire to be part of a group

dynamic, and confirmation bias). They noted that Dr. Kalish has not conducted research in the area of sexual harassment. With regard to Justice Johnson's assertion that factors identified by Dr. Kalish as impacting witness memories are present in this matter, the masters stated: "In evaluating testimony, we have carefully considered these views and found some relevant and others inapplicable. For example, we agree that in the case of an emotionally traumatic event, witnesses accurately recall the 'gist' of the encounter, even if they are mistaken regarding details. Likewise, because the passage of time is always an important factor in evaluating witness testimony, we have found contemporaneous corroborating evidence quite helpful."

Justice Chaney and Justice Johnson also each testified that the other had made a sexual proposition while they were at the conference. The masters declined to fully credit either Justice Chaney's or Justice Johnson's versions regarding the propositions, noting that this allegation was not charged in the notice. They concluded that Justice Chaney and Justice Johnson had conversations about various personal topics, some of which may have included comments of a sexual nature, but did not encompass any form of sexual propositioning. Because this allegation was not charged, and neither party's version was found to be true, we decline to go into detail about the alleged sexual propositioning.

Count 1C: Asking her to have an affair

Between about February to April 2010, while they were in Justice Johnson's chambers, Justice Johnson told Justice Chaney that he wanted to have an affair with her and that they were "perfect together," or words to that effect. His affair proposal made her feel "more than uncomfortable," frustrated, angry, and nervous, and she became concerned about how she was going to get out of it. She responded that she was happily married, and said, "It's not good to dip your pen in the company inkwell," referring to the fact that a romantic

relationship at work can be "complicated." Although she rebuffed his advances, within the next two months he again asked her to have an affair with him.

The masters found this improper because the conversations occurred at court during working hours while they were finishing a discussion about a case, and Justice Johnson continued to ask Justice Chaney to have an affair after she declined his offer. They found her detailed recall of this proposal to be "highly credible" and consistent with their findings regarding the events in Reno. Justice Chaney's testimony was corroborated by Justice Thomas L. Willhite, Jr. and Justice Lui, each of whom said that Justice Chaney told them about the incident. They also found it consistent with testimony given by independent rebuttal witness Nina Park, who testified that, during the same time period, Justice Johnson told her that he "wished his wife would have an affair or something to that effect because that would then kind of give him an open license to have affairs."

Justice Johnson denied the allegations. He testified that, in 2017, Justice Chaney said: "Wouldn't it be funny if we had an affair and no one knew. It would be our laugh alone, and no one else would know about it." He said he ignored the statement. He also said that she asked him if he wanted to see her MRI or X-ray, which he thought was strange because it would have been essentially a "naked" picture of her. The masters found that Justice Johnson's testimony on this subject, including that he "categorially denied ever asking Justice Chaney to have an affair," reflected "his failure to tell the truth."

Count 1D: Wanting to "kiss and squeeze [her] titties" and touching her breast

In approximately the summer of 2010, when Justice Johnson saw Justice Chaney in the courthouse hallway after a difficult hearing she had just finished, he said to her, "Well, I should kiss and squeeze your titties to make you feel better," or words to that effect, and then squeezed one of her breasts. Justice Chaney testified that she was shocked and upset, but did not say anything to

Justice Johnson. She went immediately to her chambers and told her research attorney Adam Phipps what had happened. Justice Chaney testified that she was either crying or on the verge of crying, and that she was upset and shaking. The masters found Justice Chaney's testimony on this matter to be "highly credible." They further found that Justice Chaney's testimony about the motion Justice Johnson made with his hands, as though he would place them on her breasts, to be highly similar to his conduct with federal court employee Isabel Martinez, to whom he made a similar gesture after her breast augmentation surgery.

Justice Chaney's testimony was compellingly corroborated by attorney Eric George, to whom she disclosed the incident at a professional event later that day, only after he observed that she appeared to be upset and repeatedly asked her what was wrong. George confirmed Justice Chaney's account of what occurred. He testified that Justice Chaney told him that Justice Johnson had said he would "rub her breasts to make her feel better." Justice Chaney testified that she told George that she was having problems with Justice Johnson and was afraid of him, but she did not want to take any action because she was concerned that it would upset the "delicate balance" in her division at court.

Justice Chaney also discussed Justice Johnson's conduct with her friend Bernardis, her research attorney Alexander, and California Highway Patrol (CHP) Officers Tatiana Sauquillo and Matthew Barnachia. In October 2016, Justice Chaney had lunch with Officers Sauquillo and Barnachia and disclosed to them some of Justice Johnson's inappropriate conduct toward her. Officer Barnachia testified that, during the lunch, Justice Chaney "mentioned something to the effect that when she was hugging Justice Johnson, he grabbed maybe her breast or breasts," and that Justice Johnson had "offered to kiss her boobs to make her feel better." Texts between Officers Sauquillo and Barnachia after the lunch further corroborated Justice Chaney's testimony. Among other things, Officer Barnachia texted: "I can't believe he told her that kissing her boobs will make her

feel better!!! And I saw her afterwards, the harassment still goes on according to her. It's not just a few random incidents. He wants that ass!! [emojis]" Officer Barnachia also texted: "He is a creep!"

Justice Johnson "strenuously denied" that this incident ever occurred and testified that he does not use the word "titties." He asserted that Justice Chaney was using every stereotype people want to buy into to blame him. The masters specifically rejected his denials about the incident.

Count 1E: Hugging and breast touching

On multiple occasions between January 2010 and June 2018, Justice Johnson hugged Justice Chaney and pressed against her entire body, intentionally touched her breast, and made comments such as, "Mmm-mmm" and "You feel good." Justice Chaney described the touching of her breast as "significant," and not light or fleeting. She testified that this occurred only when they were alone. She would pull away as fast as she could.

Justice Chaney's testimony was corroborated by the testimony of Gunner and Bernardis, whom she told about the breast-touching incidents close to when they were occurring. Justice Chaney's testimony was also corroborated by Alexander, who said that, in August or September 2017, Justice Chaney came into his office, upset and shaking, and told him that Justice Johnson had grabbed her breast again. And Justice Chaney's testimony was consistent with the independent testimony of former Assistant United States Attorney (AUSA) Barbara Curry, who described receiving similar hugs and hearing similar sounds from Justice Johnson, but without the breast-touching, many years earlier. Curry also said that Justice Johnson sometimes asked her questions about her sex life with her husband.

Justice Johnson denied ever touching Justice Chaney's breasts and said the hugs were mutual. As to the allegation that he would say "Mmm-mmm" while hugging her, he testified that she was "telling lies" and that the "stereotypical

allegations" of him "being inarticulate and animal-like and making animal noises is a total insult."

The masters found that Justice Chaney had no motive to lie about the nature of the hugs or breast touching. The masters did not find, however, that the hugs occurred with the regularity to which Justice Chaney testified because there was no specific evidence of hugs occurring after 2014 until about September 2017, when Justice Chaney told Alexander that Justice Johnson had hugged her "again," suggesting that the offensive hugs had resumed following an extended period without hugs.

In addition, in February 2014, Justice Johnson told Justice Chaney that he was going to apply for a position on the California Supreme Court and asked her to write a recommendation letter in support of the appointment. Justice Chaney wrote a letter to the Governor's appointments secretary, along with Justice Robert M. Mallano, recommending Justice Johnson for the appointment. In the letter, Justice Chaney praised Justice Johnson as a "family man" who was "eminently qualified to sit on the California Supreme Court," who would "make a great contribution to our state," and who "has common sense and is collegial in dealing with the justices on his panel." When asked why she signed the letter given the ongoing harassment issues, Justice Chaney testified that she was not sure how much Justice Johnson understood about his inappropriate behavior and, given that she thought she was the only person at the court who was being sexually harassed, it was okay with her if he was appointed to the California Supreme Court. The masters found it doubtful that Justice Chaney would have written such a glowing letter if Justice Johnson had been grabbing her breasts with "significant pressure" once or twice a month during the years before she signed the letter.

Count 1F: Buttocks-patting

Between January 2010 and June 2018, Justice Johnson occasionally patted Justice Chaney on her buttocks while the justices were walking into oral

argument. The masters found this conduct was consistent with Justice Johnson's overly personal and overly familiar conduct toward women in the workplace. Bernardis and Gunner corroborated Justice Chaney's testimony by testifying that she had told them about Justice Johnson patting her bottom.

Justice Johnson testified that this "never happened." He argued that witnesses, including four justices who walked with Justice Johnson and Justice Chaney to oral argument many times, testified that they never noticed any discomfort on the part of Justice Chaney when she was around Justice Johnson.

Count 1G: Comments about nipples

Between January 2010 and June 2018, Justice Johnson would make comments such as "You're happy to see me" or "Looking good today," and make sounds, such as "Mmm, mmm, mmm," while he was looking at Justice Chaney's chest area and the outline of her nipple was visible when she was wearing a sweater. Justice Chaney testified that she would change the subject, back away, or turn around, and that she tried using devices to cover her nipples, but they were uncomfortable and did not remedy the problem.

Gunner corroborated that Justice Chaney told him about the nipples issue. The masters found that this was a highly embarrassing topic for Justice Chaney to testify about, and she had no motive to testify about the comments if they did not occur. They also found that this conduct is consistent with Justice Johnson's overly personal behavior, his comments about breast implants to staff members when he worked at the federal court, and his repeated touching of Justice Chaney's breasts.

Justice Johnson testified that he did not remember Justice Chaney wearing a sweater, but if she did, he was not paying attention. He did not specifically deny this conduct, but he denied making the "noises" Justice Chaney was trying to attribute to him.

Count 1H: Squeezing and sexual harassment remark

In December 2013, Division One of the Second Appellate District held a holiday party at the Taix French Restaurant, attended by 35 to 40 staff members. Justice Chaney and research attorney Peter Israel approached the open bar, where there was an opening next to where Justice Johnson was standing. Justice Chaney testified that she and Israel squeezed in so that she was standing between Justice Johnson and Israel at the bar. Justice Chaney testified that Justice Johnson, who was drinking an alcoholic beverage, put his arm around her, touched her left breast, stroked her buttocks area, and made a "raunchy" comment about her breast or body part. She could not remember the exact comment. She said she was startled and embarrassed, and pulled away. She testified that Israel saw it and appeared startled, and that Justice Johnson said to her and Israel, "You can't sexually harass someone who's on your own level," or words to that effect. She further testified that Israel responded, "Justice Johnson didn't know the law of sexual harassment if he believed that."

Israel testified that he did not recall the incident or making the comment. Justice Chaney's research attorney Alexander testified that she later told him about this incident. Justice Chaney also told Justice Willhite about it.

Justice Johnson testified that Justice Chaney walked up to him and pressed against him, and that he did not rub his hand up and down her side, or put his hands on her bottom, or make the comment she attributes to him.

The masters found that Justice Johnson squeezed Justice Chaney against him as she stood next to him because this was consistent with their outwardly close and friendly relationship, they were at a holiday party where Justice Johnson was acting in an informal manner and was drinking alcohol, and his conduct in physically touching her had apparently become, in his view, a normal part of their relationship.

The masters did not find, however, that he squeezed her breast or buttocks or rubbed her body or made a vulgar comment about her body, as Justice Chaney testified, because Israel testified that he was present at the restaurant but did not observe such conduct. They also noted that many people were at the Taix event, and they did not believe that Justice Johnson would engage in the breast and buttocks touching, or make a "raunchy" comment, in view of others. The masters also did not believe that Justice Chaney would have written a positive letter about Justice Johnson to the Governor's appointments secretary in connection with his being considered for the California Supreme Court if all of the conduct she described had occurred.

Count 1J: Comment about reporting sexual harassment

In December 2017, during a discussion about sexual harassment, Justice Johnson said to Justice Chaney, "You would never report me [for sexual harassment], would you?" or words to that effect, and he was not joking when he said this. Justice Chaney testified that he was glaring at her and looked a little frightened, and she felt threatened. She responded by staring at him for a moment and then said, "No." Alexander testified that Justice Chaney told him about the incident.

The masters found little doubt that, by that time, because Justice Johnson knew of ongoing sexual harassment investigations of other judges, the widespread public conversation about the "Me Too" movement, and his own prior conduct, he would have serious concerns about whether information about his past conduct toward Justice Chaney and other women would come to the attention of the authorities.

Justice Johnson testified that he did not recall saying anything like that, but if he did, it would have been a joke.

The examiner did not object to the masters' factual findings regarding the foregoing charges (counts 1B through 1J). Justice Johnson's objections to these factual findings are addressed below.

2. Justice Johnson's objections to allegations involving Justice Chaney

In his post-masters' report briefing, Justice Johnson objected to the foregoing factual findings and argued that Justice Chaney should not be believed about any of the proven charges for the following reasons.

First, Justice Johnson argued that, if Justice Chaney actually believed she was a victim of sexual harassment, she would have reported him, but she never reported him to any authority, despite her duty under canon 3 to report judicial misconduct ("Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, that judge shall take appropriate corrective action, which may include reporting the violation to the appropriate authority.").

Second, she treated him in a friendly manner, spent time alone with him, and referred to him as her "conjoined twin" and to herself as "the other twin." She would frequently engage in friendly communications with Justice Johnson in person and by telephone, email, and texting. They occasionally had lunch together, and, about six months after the alleged incident at the Taix restaurant, they had dinner alone together at a restaurant during an appellate justices' conference, rather than attending the official group dinner. In January 2017, Justice Chaney sent Justice Johnson a crude political cartoon with sexual overtones. It showed President Trump putting his hand underneath a woman's dress and grabbing her bottom, and, in the next panel, showed Russian President Putin grabbing Trump's bottom. Justice Chaney testified that she sent the cartoon to Justice Johnson because they had been having a conversation with Justice Frances Rothschild about President Trump, and the cartoon fit into what they were discussing.

Third, many witnesses (including four justices) testified that they did not see Justice Chaney displaying discomfort with Justice Johnson; rather, the two acted as if they were good friends and colleagues.

Fourth, Justice Chaney wrote the letter of recommendation to the Governor about Justice Johnson in February of 2014, listing his many positive attributes.

Justice Chaney testified about the following reasons she did not report Justice Johnson or tell him to stop sexually harassing her. She was concerned about the negative effect that such a report would have on the court's work, particularly in light of her awareness of conflicts and divisiveness among the justices of her division. She did not think there was a person at the court to whom she could report him who would take action on her complaint. She believed that, until the "Me Too" movement, women who complained were not believed and instead were ridiculed, fired, or marginalized. She was afraid of how Justice Johnson would respond based on his temper, which she had previously observed him display at court. She had conflicting feelings about him. She thought she was the only one being subjected to his sexual harassment and believed she could handle it because she is a "tough lady." Although she had heard rumors that Justice Johnson sexually harassed women outside the court, she did not know anything specific about his treatment of women at the court. Once she learned that others at the court claimed he had sexually harassed them and that she would be interviewed as part of a workplace investigation, she decided to report his conduct. Justice Chaney's concerns about the consequences of reporting Justice Johnson were corroborated by her friend Bernardis, her yoga teacher Gunner, research attorney Alexander, Justice Willhite, and Justice Lui.

In late 2013 or early 2014, Justice Chaney told Justice Willhite about various incidents involving Justice Johnson, including comments he made to her about her body, an affair, and Black men, and that he had touched her breast. Justice Willhite testified that he urged Justice Chaney to report Justice Johnson, but she did not think Justice Mallano, then the administrative presiding justice, would do anything about it because he and Justice Johnson were Yale grads and

"seemed to be palling around together." Justice Willhite further testified that Justice Chaney said she was afraid of Justice Johnson's temper (see count 6A), that she was afraid it would be a "he-said, she-said, and he might insert racial overtones into it," and she did "not want to go through all that." She also said she had to work with Justice Johnson. She asked Justice Willhite to keep their conversation confidential, and he did.

In 2018, when Justice Chaney learned that she would be interviewed as part of a workplace investigation, she met with Justice Lui, who testified that she told him that Justice Johnson had asked her to have an affair, would grab her breast when he hugged her, said he should hug her "titties" and kiss them, and grabbed her breast at the Taix holiday party. Justice Lui testified that Justice Chaney told him she had not reported Justice Johnson earlier because she was "fearful" and "women of her generation didn't do that," she wanted to get along with the people in her division, and she could not just transfer somewhere else.

Dr. Louise Fitzgerald, an expert witness in sexual harassment called by the examiner, testified that women generally do not report sexual harassment because there is a "very high personal and professional cost to reporting, and reporting does not necessarily preclude further harassment." She also testified that if a victim has previously stayed silent about sexual harassment, she is more likely to come forward to prevent the same conduct from happening to other women. Dr. Fitzgerald said that learning that other women have been harassed or are at risk of being harassed can change the calculus and can outweigh the personal costs of reporting.

Based on Justice Chaney's testimony, and that of the expert witness, the masters accepted Justice Chaney's explanation that she believed disclosing Justice Johnson's conduct would seriously disrupt the work of their division, so she committed to maintaining a collegial relationship with him. Although they found her decision to write the letter to the Governor's appointments secretary "perplexing," and stated that her representations in the letter about his fitness,

character, and collegial nature stand in "stark contrast" to her testimony, they concluded that Justice Chaney's statements in the letter "do not negate the reliability of her overall testimony." Further, while they agreed with Justice Johnson that Justice Chaney's failure to report his conduct raises "legitimate questions," they found that, despite her awareness of her duty, she made the deliberate decision to address the situation by working cooperatively with him, "an appeasement strategy commonly used by sexual harassment victims." The masters stated:

> Although in retrospect Justice Chaney's decision not to report or at least tell Justice Johnson his behavior made her uncomfortable may have been ill-advised, there was nothing in her actions that excused Justice Johnson's conduct.
>
> Any reasonable judicial officer should and would have known that you do not touch a colleague's breasts; you do not pat a colleague's buttocks; you do not comment on her nipples; and you do not state that you want to squeeze her "titties." The conduct would be wrongful under any circumstance, but was particularly objectionable because it occurred at the courthouse and reflected "an utter disrespect for the dignity and decorum of the court and is seriously at odds with a judge's duty to avoid conduct that tarnishes the esteem of the judicial office." [Citation.]

Justice Johnson also argued that Justice Chaney should not be found credible due to inconsistencies between some of her testimony and that of other witnesses. For example, Justice Chaney testified that she was unaware that other women at court were being harassed, but she admitted being aware in 2010 of numerous rumors that Justice Johnson harassed women outside of court, knowing that Officer Sauquillo was uncomfortable with Justice Johnson while Officer Sauquillo worked at the court, and knowing by February 2018 that Officer Sauquillo alleged that Justice Johnson propositioned her with sexually explicit language. Further, Justice Chaney did not identify Officer Sauquillo or

Officer Barnachia as persons with knowledge of the relevant events during the workplace investigation at the court, even though she disclosed serious misconduct claims to them two years earlier.

The masters determined that the conflicts in the evidence concern "primarily collateral matters and/or reflect faded memories based on the passage of time, and do not suggest that Justice Chaney cannot be believed on the larger issues of whether [Justice Johnson] engaged in unwanted touching and inappropriate statements." They concluded that her omitting to identify Officers Sauquillo and Barnachia as individuals knowledgeable about Justice Johnson's conduct is consistent with her lack of recall about a conversation she had with Officer Barnachia two years earlier, as well as her desire to protect Officer Sauquillo's confidentiality.

Justice Johnson also posited that Justice Chaney should not be believed because some of her testimony about a telephone conversation she had with Justice Lui in July 2018 was impeached by Justice Lui. Justice Chaney testified that she thought Justice Lui asked her about a female officer in the judicial protection unit during their conversation, and he testified that he did not ask her anything about Officer Sauquillo and does not recall whether Justice Chaney mentioned Officer Sauquillo's name. This conflict or confusion seems to be based on whether Justice Lui identified Sauquillo by name during that conversation. Justice Lui's testimony on the subject is unclear and does not unequivocally impeach Justice Chaney's testimony. And it does not establish that Justice Chaney lacked credibility as to all her allegations.

Justice Johnson further argued that the masters used a "double standard" to credit Justice Chaney's testimony and discredit his testimony. The masters, however, did not unquestioningly accept Justice Chaney's testimony wholesale. To the contrary, they specifically declined to credit some of her testimony, including that Justice Johnson came to her hotel room uninvited all three nights of the conference in Reno, that he grabbed her breasts with "significant pressure"

once or twice a month in the years before she wrote the letter of recommendation to the Governor, that he hugged her and touched her breast as frequently as she claimed, and that he touched her inappropriately and made a "raunchy" comment about her body at the Taix restaurant. They also credited Justice Johnson's testimony about Officer Sauquillo's most serious allegations by finding that the touching and sexual propositioning she alleged did not occur.

Based on our independent review of the evidence, we have determined that the masters properly evaluated the evidence and reached a balanced and correct assessment of what was proven—and what was not proven—by clear and convincing evidence as to the allegations in Count One. We agree that some of Justice Chaney's conduct while she was experiencing sexual harassment by Justice Johnson—particularly the letter to the Governor praising Justice Johnson, her ongoing friendly behavior, and referring to herself as his "conjoined twin"—seems odd and hard to explain. Nevertheless, we also agree with the masters that Justice Chaney's behavior toward Justice Johnson was part of her appeasement strategy, born of her desire to get along with her colleagues and maintain conviviality at the court. And we understand that this desire was one of the several reasons that she did not report him. Justice Chaney's attitude is supported by the testimony of Justice Mallano, who testified that he could understand why she might not want to report sexual harassment if it happened, and remarked: "How could you have four people working as partners, if one suggested that the other committed a sexual battery on them?" Finally, we accept that Justice Chaney had conflicting feelings about Justice Johnson, including being afraid of him, having witnessed his angry demeanor toward her and others.

We do not find Justice Johnson's objections to the masters' findings of fact regarding Justice Chaney persuasive or consistent with the evidence, and we adopt the masters' factual findings.

3. Conclusions of Law

The masters determined that Justice Johnson's conduct toward Justice Chaney, as described above, was unwelcome, undignified, discourteous, offensive, and would reasonably be perceived as sexual harassment of Justice Chaney. They also concluded that it constituted conduct prejudicial to public esteem for the judicial office and violated canons 1 (a judge shall observe high standards of conduct so that the integrity of the judiciary is preserved); 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); 3B(4) (a judge shall be patient, dignified, and courteous to persons with whom the judge deals in an official capacity); 3B(5) (a judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as sexual harassment); 3C(1) (a judge shall not, in the performance of administrative duties, engage in speech, gestures, or other conduct that would reasonably be perceived as sexual harassment); and 4A(2) (a judge shall conduct all of the judge's extrajudicial activities so that they do not demean the judicial office).

The examiner did not object to these legal conclusions. Justice Johnson's objections to these legal conclusions are the same as his objections to the masters' factual findings, which we find are neither persuasive nor consistent with the evidence. We adopt the masters' legal conclusions.

B. Charges not proven to be misconduct

The masters also found that the facts in two charges involving Justice Chaney (counts 1A and 1I) were proven by clear and convincing evidence, as summarized below, but that they did not constitute misconduct.

Count 1A: Telephone call in 2009

1. Findings of Fact

In June 2009, Justice Johnson and Justice Chaney were nominated to the Court of Appeal, Second Appellate District, Division One, on the same day. Justice Mallano wanted to encourage collegiality at the court. He asked Justice Chaney to call Justice Johnson to welcome him to the court. Justice Chaney called Justice Johnson and told him that she was looking forward to working with him. He responded, "I didn't know you were so beautiful," and said he had seen her photograph in the newspaper that morning. The comment confused her, but did not make her uncomfortable.

Justice Chaney's testimony was corroborated by Alexander and Gunner, each of whom testified that she told them about the comment. Gunner testified that Justice Chaney told him about it shortly after the telephone conversation. The comment was also consistent with Justice Johnson's own testimony that he regularly complimented people, including on their physical attributes, as his way of creating a positive relationship.

Justice Johnson denied that the telephone call occurred. He testified that he had received calls from the two other justices on the panel and thought it was "unusual" that he had not received a telephone call from "the third person on the panel" to congratulate him.

The masters found Justice Johnson's credibility on this point to be questionable because he and Justice Chaney were nominated the same day, and Justice Chaney was not on the panel at that time. They stated that Justice Johnson's denial that the telephone call occurred illustrates his "lack of candor."

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the comment was not judicial misconduct because a single comment to a colleague who was not necessarily offended by it does not rise to the level of a violation of the canons of judicial ethics.[1]

Neither side objected to the masters' legal conclusions, and we adopt them. We dismiss count 1A.

Count 1I: Remark re genitals

1. Findings of Fact

Around the time Justice Chaney signed the Supreme Court recommendation letter to the Governor, she had several conversations with Justice Johnson about why the Governor might not select him for the position. Justice Chaney testified that Justice Johnson discussed his belief that his being a Black male would be a negative factor. She testified that he said that a Black man is very powerful and people are "afraid of the size of a Black man's penis or 'cock' or 'dick'," and that "Black men can pleasure women or something on that order."

The masters found that Justice Johnson made the comments about the size of African-American male genitals, but not in a sexually suggestive or stereotyping manner.

Neither side objected to the masters' factual findings, and we adopt them.

[1] The masters also concluded (incorrectly) that because Justice Johnson made the comment before he was confirmed, it falls outside the commission's jurisdiction as pre-bench conduct. The commission has jurisdiction over conduct occurring within six years before the commencement of the judge's current term. (Cal. Const., art. VI, § 18, subd. (d).) Justice Johnson's current term began in January of 2015. The commission has frequently disciplined judges for pre-bench conduct (e.g., *Inquiry Concerning Couwenberg* (2001) 48 Cal.4th CJP Supp. 205, *Public Censure of Judge Paul D. Seeman* (2013), *Public Censure of Judge Charles R. Brehmer* (2012), *In re Charles S. Stevens* (1982) 31 Cal.3d 403).

2. Conclusions of Law

The masters concluded that no misconduct occurred because the comments did not contravene the canons.

Neither party objected to the masters' legal conclusions, and we adopt them. We dismiss count 1I.

**COUNT TWO—Conduct toward CHP Officers Sauquillo and Davison**

It was alleged that Justice Johnson made vulgar sexual comments to CHP Officer Tatiana Sauquillo (count 2A), made comments about her appearance (count 2B), put his hand on her thigh while she was driving him (count 2C), and propositioned her for sex (count 2D). It was also alleged that he spoke to CHP Officer Shawna Davison in a sexually suggestive tone (count 2E).

A. Proven charges found to constitute misconduct

The masters found that Justice Johnson made comments to Officer Sauquillo about her appearance and his wife that made her uncomfortable and were improper (count 2B).

Count 2B: Comments to Officer Sauquillo about her appearance

1. Findings of Fact

Officer Sauquillo worked in the Judicial Protection Section (JPS) between 2013 and 2016. Her assignments included transporting Court of Appeal justices to work-related functions. Between October 2013 and May 2016, Justice Johnson occasionally made comments to Officer Sauquillo about her appearance when they were in his chambers, in the court hallways, and when she was driving him while she was assigned to the JPS unit. These comments included that she looked good in her uniform, that he would like to see her out of her uniform, that she looked cute and pretty, that he liked what she was wearing, and unflattering comments about his wife in comparison to Officer Sauquillo. His comments made her uncomfortable.

Justice Johnson admitted that he may have told Officer Sauquillo, "You look nice," but he denied making the other comments.

The masters found that Justice Johnson made the comments because he admitted complimenting Officer Sauquillo's appearance, Officer Barnachia believed that Justice Johnson had a "crush" on Officer Sauquillo, and Justice Johnson's comments were consistent with evidence that he often made these types of comments to women with whom he worked.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that Justice Johnson's comments to Officer Sauquillo about her appearance and his wife would reasonably be perceived as sexual harassment, constituted prejudicial misconduct, and violated canons 1, 2, 2A, 3B(4), and 3C(1).[2]

Neither party objected to the masters' legal conclusions, and we adopt them.

B. Charges not proven to be misconduct

The masters found that three counts of alleged inappropriate conduct involving crude sexual propositioning and touching of Officer Sauquillo (counts 2A, 2C, and 2D), and one count of alleged suggestive conduct toward Officer Davison (count 2E), were not proven by clear and convincing evidence.

Count 2A, 2C and 2D: Touching Officer Sauquillo's thigh and propositioning her in vulgar language

1. Findings of Fact

Officer Sauquillo testified that, on April 11, 2014, when she was driving Justice Johnson back to court from a professional event in Baldwin Hills, he put

[2] The masters specified that their conclusion that the conduct would reasonably be perceived as sexual harassment does not include a finding that the conduct was in fact sexual harassment under California law because sexual harassment requires severe and pervasive conduct. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 283.)

his hand on her thigh and propositioned her for sex. She said that he asked if she wanted to go have drinks with him afterwards, and if she would go back to his chambers "to essentially have sex." She also testified that she was "pretty sure" it was at that event when he asked her to "pull over" to "have sex." She declined his overtures. During her direct testimony, she did not say that he said he wanted to "bend her over" or "fuck her from behind," as alleged. When asked on cross-examination if the drive from Baldwin Hills was when Justice Johnson made the "gross statements" to her (i.e., "bend her over," etc.), she said, "Yes," without elaboration.

She did not recall telling anyone about the alleged touching, crude statements, and propositioning while she still worked at the court. When she requested a transfer from the JPS, she did not tell anyone that it was because of Justice Johnson's conduct. She testified that she did not file a complaint about him because she wanted to avoid retaliation, which she had experienced when she previously reported her former CHP supervisor for sexual harassment. She testified that, after she left the court, she told Justice Chaney and Officer Barnachia about Justice Johnson's conduct, but was unsure whether she told either of them about the sexual propositioning with vulgar language. Officer Barnachia testified that he did not recall Officer Sauquillo saying anything to him about Justice Johnson making vulgar comments, propositioning her, or putting his hand on her thigh. Justice Chaney testified that she did not learn of Officer Sauquillo's specific claims until February 2018.

Justice Johnson strenuously denied these allegations and presented evidence that, in April 2014, he and his family were under tremendous stress arising from an incident in which his daughter was being stalked. He also provided evidence that Officer Sauquillo requested a transfer from the JPS unit due to conflicts with her supervisor, and she did not tell anyone it was because of him.

The masters found that the allegations that Justice Johnson once put his hand on Officer Sauquillo's thigh while she was driving him and sexually propositioned her in crude, graphic terms were not proven for several reasons.

First, Officer Sauquillo testified about only one occasion when he sexually propositioned her and touched her, which was while she was driving him from the Baldwin Hills event, and her testimony about this was "equivocal and evasive." For example, when asked to identify all of Justice Johnson's comments that made her feel uncomfortable, Officer Sauquillo briefly stated that, during the drive back, he asked her to have drinks and go to his chambers "to essentially have sex" and she was "pretty sure it was that event, too, when he asked [her] if [she] would pull over [to have sex]."

Second, she admitted that, several years earlier, a CHP supervisor had made vulgar comments to her that were identical to those she alleged Justice Johnson had made (i.e., wanting to "bend her over" and "fuck her from behind"). The masters found that, absent some connection, the possibility of Justice Johnson saying the exact same comments to Officer Sauquillo is "remote."

Third, the masters found it "troubling" that she did not recall telling anyone about the propositioning and vulgar comments until she met with Justice Lui in June 2018 in connection with the workplace investigation. While the masters acknowledge that delayed and selective reporting of sexual harassment is common, and that Officer Sauquillo had suffered retaliation when she reported her previous CHP supervisor for sexual harassment, they viewed these factors "under the unique circumstances" of her close relationships, and highly candid conversations, with Justice Chaney and Officer Barnachia and believed that she would have revealed his behavior to her trusted friends before finally doing so four years later, in February 2018.

Fourth, Officer Sauquillo continued to drive Justice Johnson for about two years and did not ask to not be assigned to drive him or testify about any similar conduct during that time.

Fifth, she testified that she left the JPS unit because she was worried about Justice Johnson's conduct, but her personnel records do not mention that reason, and two witnesses who were close with her testified that she complained about her then-supervisor, not Justice Johnson.

Sixth, no evidence was presented that Justice Johnson was intoxicated the evening of the Baldwin Hills event, which is distinguishable from other incidents in which Justice Johnson engaged in unwanted touching of women while he was intoxicated.

Seventh, Justice Johnson's testimony about the stress he was experiencing due to the events involving his daughter undermines the allegation that he engaged in the conduct at the time. The masters stated that all of these factors together "create serious misgivings about the accuracy of the charged allegations."

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the allegations were not proven with clear and convincing evidence.

Neither party objected to these legal conclusions, and we adopt them. We dismiss counts 2A, 2C, and 2D.

Count 2E: Invitation to Officer Davison

1. Findings of Fact

In November 2015, CHP Officer Shawna Davison was assigned to drive Justice Johnson home from the airport. This was the only time she performed a protective service detail for him. She testified that, when they arrived at his house, he invited her inside more than once to use the restroom and told her that no one was home. She perceived it as "sexual in nature" and "sexually suggestive," but she did not testify why she perceived it that way. She declined his offer.

The masters found that Justice Johnson invited Officer Davison into his house after she drove him home, but not that it was in a "sexually suggestive" tone or other improper manner.

Justice Johnson testified that he might have said she should feel free to use his bathroom because he knew she had another 50 miles to drive. He also said that he was upset and distracted that day because his best friend from college had died unexpectedly a few days earlier, he was involved with funeral arrangements and eulogies, and his wife was home to assist him. His wife corroborated that she was home that day to assist him.

Neither side objected to these factual findings, and we adopt them.

2. Conclusions of Law

While the masters found Officer Davison credible in thinking that his invitation was "suggestive," they found no misconduct based on the lack of any objective factors supporting her conclusion, as well as on Justice Johnson's credible testimony that he was distracted and upset that afternoon, and that he may have been concerned that Officer Davison would need to use the facilities before making a long drive.

Neither side objected to these legal conclusions, and we adopt them. We dismiss charge 2E.

**COUNT THREE—Conduct toward attorney Butterick**

Justice Johnson was charged with engaging in unwelcome, undignified, discourteous behavior toward research attorney Jessica Butterick, that would reasonably be perceived as sexual harassment, on three occasions in 2015 and 2018 (counts 3A, 3B, and 3C). The masters found that these counts were proven.

1. Findings of Fact

Butterick began working for Justice Luis A. Lavin at the Court of Appeal in August 2015. Justice Lavin's chambers were in the North Tower; Justice

Johnson's are in the South Tower. In September 2015, while Butterick was temporarily working in the South Tower, she encountered Justice Johnson. He asked her what she was doing there, and, while stroking her arm between her elbow and shoulder, said, "Well, we got to get you back over here more often." This made her feel uncomfortable.

Butterick's testimony was corroborated by research attorney Alex Ray, who testified that Butterick told him that she had just met Justice Johnson in the hallway, and that he had said something like, "I've never seen you around here before," and touched her arm or shoulder. Butterick also later told research attorney Merete Rietveld about it, which further corroborated her testimony.

At the evidentiary hearing in this matter, Butterick described the way in which Justice Johnson stroked her arm, which included touching her arm in an intimate manner such that his thumb was squeezing her upper arm or near her underarm.

Two months later, she told other attorneys she would not take an office near Justice Johnson's chambers because she felt uncomfortable being so close to his chambers. Ray corroborated this.

In February or March 2018, Butterick encountered Justice Johnson near his chambers in a hallway with photographs of Court of Appeal justices. When he saw her, he said, "You're new," and she responded that she had been Justice Lavin's research attorney for several years. He reached out to shake her hand for what she thought was an "unusual amount of time. Justice Johnson said, "Well, I'm Jeff Johnson. Why haven't we met before?" She replied, "Judge, we met a couple of times." He looked at the row of photographs of appellate justices, which Butterick described as a "row of very [W]hite men," and said to her, "Well, not a lot of people around here look like me." She responded, "Well, everyone here looks like me," because she believed most of the research attorneys were White women. He said words to the effect of, "No. Not a lot of people look like you." Butterick found this overly familiar, and it made her feel a

little bit uncomfortable. Butterick's testimony about this encounter was corroborated by Ray, who testified that she discussed the incident with him at the time. The masters found that, in context, Justice Johnson's statements were intended to be a comment on Butterick's attractiveness and were overly familiar, and that the extended handshake was inappropriate in the workplace.

Later that week, Butterick again saw Justice Johnson in the hallway. He said to Butterick, "Twice in one week," and briefly stroked her arm, which was unwelcome.

Butterick testified that she did not report the conduct in 2015 because reporting inappropriate behavior is "never good for anyone's career," and she believed it would be "career suicide" and would not make a difference. In 2018, she learned that another research attorney, Katie Wohn, had reported Justice Johnson's inappropriate conduct to Justice Lui, so she gave Rietveld, who was communicating with Justice Lui about the workplace investigation, permission to give her name to Justice Lui because she wanted to support Wohn and protect other women.

Justice Johnson admitted the three encounters with Butterick and that they may have included "some form of physical touching," but he denied stroking her arm, particularly in the manner she demonstrated.

The masters found that the three encounters occurred, and that Justice Johnson put his hand on Butterick's arm and stroked it between her elbow and shoulder as he was shaking her hand and greeting her in 2015 and 2018, but that he did not do it in the manner she demonstrated at the hearing because that was not included in her earlier description of the touching to her friends or to commission staff.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the conduct described above constituted a pattern that would reasonably be perceived as sexual harassment,[3] was prejudicial misconduct, and violated canons 1, 2, 2A, 3B(4), and 3C(1).

Neither party objected to these legal conclusions, and we adopt them.

**COUNT FOUR—Conduct toward attorney Blatchford**

Justice Johnson was charged with engaging in unwelcome, undignified, discourteous behavior toward his research attorney, Andrea Blatchford, that would reasonably be perceived as sexual harassment on six occasions in 2018 (counts 4A-4F). The masters found that all but one of these charges were proven.

A. Proven charges found to constitute misconduct

1. Findings of Fact

Count 4A: Hug and comment

Blatchford worked as a research attorney on Justice Johnson's staff, starting in February 2018. She transferred after five months. About a month after Blatchford began working in his chambers, Justice Johnson raised his voice and reprimanded her during a phone conversation. Afterward, they had a nice conversation about it, and he asked her for a hug. He hugged her and commented that he was very fond of her. Neither the hug nor the comment made her uncomfortable.

Justice Johnson acknowledged that Blatchford "basically told the truth" about the various incidents and that some of his conduct might have been inappropriate.

[3] See footnote 2.

Count 4B: Questions about tattoos

In about May 2018, Justice Johnson and Blatchford were in his chambers, and he pointed to her forearm and asked, "Is that a tat?" [referring to tattoos]. She responded, "Yes." He asked her if she had any more. She said she had five and identified some of them. After the conversation ended, she returned to her office and was working when Justice Johnson came to her office and asked, "Where are the other two?" His question made her a little uncomfortable because he reinitiated the conversation "sort of randomly."

Justice Johnson admitted asking about the tattoos but said he believed the discussion was appropriate because he thought of tattoos as "art" and did not intend anything sexual by his question. He now understands that his behavior was not appropriate. The masters found his "attempts to justify or explain his comments to be unsupported."

Count 4C: Questions about boyfriend

In April or May 2018, Justice Johnson asked Blatchford several questions about her boyfriend. He asked if her boyfriend was an intellectual and said, "You strike me as an intellectual . . . I think it's very important for two people to share that in common." Blatchford felt this discussion was "too personal."

Shortly thereafter, while discussing how to value stolen property in connection with a restitution issue, Blatchford, seeking to show the difficulty in valuing items, noted that a necklace from Tiffany that she was wearing had cost only $200. Justice Johnson asked, "Is that necklace a gift from your boyfriend?" The question made her a little bit uncomfortable because she was wondering why he was asking about her boyfriend again.

In June 2018, Justice Johnson brought up Blatchford's boyfriend again. When she mentioned that she lived in Baldwin Hills, a historically Black neighborhood, he asked, "Oh, is your boyfriend Black?" She said, "No." He then asked her, "Have you ever dated Black guys?" She replied, "Yes." He said, "Well, I guess you went back then." Blatchford understood that Justice Johnson

was referring to a well-known joke that, “Once you go Black, you never go back.” Blatchford said she felt shocked by the comment because the only other time someone said that to her was when a Black man was hitting on her or flirting with her, and because it is a “very explicit reference to the stereotype that Black men are well-endowed,” compared to White men. Blatchford felt really uncomfortable, and she just wanted to “make it stop and get out.”

Justice Johnson admitted asking the questions and making the “Well, I guess you went back then” comment, but said it was a “really dumb joke” that was intended to make fun of a stereotype. He testified that he thought she would see how he was making fun of a stereotype because Blatchford “seemed to be a really enlightened person.” He also testified that he now understands that she felt uncomfortable, and acknowledged that the joke was in poor taste. He apologized for the joke and accepted full responsibility for it.

Count 4D: Comment about President Trump and Stormy Daniels

Justice Johnson, Blatchford, and others were at a staff lunch at the Blue Cube restaurant in May 2018. A research attorney raised the subject of a recent television interview of Stormy Daniels and said she did not believe the sexual contact between Daniels and President Trump was consensual. Justice Johnson commented, “To me, it just sounded like it was pedestrian sex.” Blatchford understood this to mean that the sex itself was “standard, boring, and not kinky,” and it made her uncomfortable because the discussion had been about consent versus coercion, not sex.

Justice Johnson admitted making the statement, but testified that it was merely a shorthand or sanitized version of Daniels’s comments about the quality of President Trump’s sexual performance. The masters found “his attempts to justify or explain his comments to be unsupported.” Justice Johnson testified that he now realizes that there were different sensibilities among those present, and he did not appreciate or respect them the way he should have at the time.

Count 4F: Comment about prostate exam

During a chambers conversation with Blatchford and Justice Helen Bendix, after Justice Bendix mentioned her gynecologist appointment and said, "You men don't have to go through the kinds of things women do," Justice Johnson responded, "Well, there is a prostate exam," and then said, "But it's not like we get aroused during those exams," and laughed. This made Blatchford uncomfortable because "it was yet another instance when he was sort of injecting sex into a conversation that really had nothing to do with sex." Justice Bendix testified that she recalled saying something about the appointment and that women need to go to these appointments regularly, but she did not remember Justice Johnson responding to her statements.

Justice Johnson denied making the comment about "arousal," but the masters credited Blatchford's testimony on this issue because she recalled that the comment was unnecessary to the conversation, and it was consistent with her observations that Justice Johnson frequently injects sex-related topics into routine conversations.

Neither party objected to the factual findings regarding the foregoing counts, and we adopt them.

2. Conclusions of Law

The masters stated: "Justice Johnson engaged in a pattern of conduct toward his research attorney Blatchford that made her feel uncomfortable. The conduct included asking her overly personal questions about topics related to her tattoos and her boyfriend; making a joke based on sexual and racial stereotypes; making a sexual reference during a staff lunch that was out of context for the specific topic being discussed; and making a joke about sexual arousal while in his chambers. Considered together, the comments were unwanted and had no place in the courthouse or at the staff lunch during the work day." They concluded that allegations proven in counts 4A, 4B, 4C, 4D, and 4F were part of

a pattern that would reasonably be perceived as sexual harassment,[4] constituted prejudicial misconduct, and violated canons 1, 2, 2A, 3B(4), and 3C(1).

Neither party objected to these legal conclusions, and we adopt them.

B. Charges not proven to be misconduct

Count 4E: Comment about being his "favorite"

Justice Johnson told Blatchford that she was his "favorite" and put his finger to his lips. Blatchford felt uncomfortable because she did not think it was healthy to compare employees that way, and she did not want to keep secrets from her coworkers. She told him that she did not like him saying that, but he continued to make the comment to her several times. She acknowledged that the comments were made in the context of Justice Johnson's appreciation for her work.

Justice Johnson admitted making the comment that Blatchford was his favorite and putting his finger to his lips. He said he did so because he did not want to make his other attorneys feel bad.

The masters found that, although these facts were proven, the "favorite" comments did not constitute misconduct because Blatchford and Justice Johnson understood that they were made in reference to Blatchford's work.

Neither party objected to these factual findings or legal conclusions, and we adopt them. We dismiss count 4E.

## COUNT FIVE—Conduct toward other women at the appellate court

Justice Johnson was alleged to have engaged in inappropriate conduct toward several Court of Appeal employees: judicial assistants Trisha Velez (count 5A) and Carolyn Currie (count 5C), research attorney Katie Wohn (count 5B), and Court of Appeal Justice Elizabeth Grimes (count 5D). All of these charges were found proven.

[4] See footnote 2.

Count 5A: Judicial assistant Velez

1. Findings of Fact

In 2013, Justice Johnson repeatedly asked Justice Chaney's judicial assistant Trisha Velez to join him for coffee, which she declined about five times. He later saw her walking into the courthouse when Justice Chaney was scheduled to be absent, and told her she had no excuse not to join him for coffee. She reluctantly agreed. During their conversation at the Syrup café, he told her that, if he were appointed to the California Supreme Court, he would like to bring her as one of his judicial assistants. She agreed to have coffee with him a second time, during which he told her he was "unhappily married" and asked about her private life. When she said her first husband was a "philanderer," he replied that if he were married to her, he "would never leave her bed," and that he liked her. This incident had a big impact on her and made her very uncomfortable and upset. Two weeks later, Justice Johnson approached her at her desk, and she told him that she was never going to coffee or anywhere with him again. Five minutes later, he telephoned her and asked her to come to his chambers and said he wanted to talk to her. This made her feel "panicked," and she contacted research attorney Kristi Cook, who suggested that they immediately leave the court together, which they did. During the five years following the coffee outings, Justice Johnson made comments like, "You're my favorite," "I love you" and wink at her, "I got your back," and "We're good," and would blow kisses at her. Justice Johnson also told Justice Chaney and Justice Rothschild about Velez's private life, which he learned about from Arash Goleh, a friend of his who had attended high school with Velez. Velez was embarrassed and horrified that the justices were discussing her personal life.

Justice Johnson admitted having coffee with Velez twice, asking her to come to his chambers, and making personal statements about her private life to others. He said he regretted revealing Velez's personal information. Justice Johnson denied making the comment that, if he were married to her, he would

never leave her bed. He testified that he was "100 percent confident" that he said, "A good man wouldn't leave his wife at home in bed wondering where he was." He also denied telling her he was unhappy in his marriage.

The masters found that his testimony denying the "I would never leave your bed" remark was "not credible" and reflects his "intentional fabrication of the relevant facts." They noted that, in his written response to the preliminary investigation letter, Justice Johnson denied conveying to Velez "anything about a bed." They said: "This evolution in his description of the conversation suggests that Justice Johnson is being untruthful and is attempting—upon further reflection—to posit an innocent (but false) context for his remarks." They further noted that, although in his response to the commission's preliminary investigation letter he denied calling her his favorite and blowing her kisses, he did not attempt to rebut these allegations at the evidentiary hearing.

The masters found Velez to be a credible witness who described the events in a detailed and straightforward manner, without embellishment, and who had no motive to misrepresent the facts. Her testimony about her conversations at the Syrup café were corroborated by Cook, with whom Velez discussed Justice Johnson's actions, including the remark about never leaving her bed. Velez's testimony was further corroborated by Justice Johnson's judicial assistant Carolyn Currie, who testified that Velez told her about going to coffee with Justice Johnson, his comment about never leaving her bed, and Velez's statement to her that Justice Johnson was the "biggest sexual harasser." The masters also found Justice Johnson's statements to be consistent with those he made to other women about being in love with them if they had met when they were younger and being unhappily married.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that seeking to create a personal or romantic relationship with Velez during working hours, making sexually suggestive

remarks at a café, making inappropriate and overly personal statements to her for the next five years, and discussing her personal life with others without her permission was part of a pattern that would reasonably be perceived as sexual harassment,[5] constituted prejudicial misconduct, and violated canons 1, 2, 2A, 3B(4), and 3C(1). As the masters stated, "Respect for the judicial office is diminished when a judicial officer uses sexually suggestive language and seeks to establish a personal or romantic relationship with a judicial assistant during working hours over her clear discomfort."

Neither party objected to these legal conclusions, and we adopt them.

Count 5B: Attorney Wohn

1. Findings of Fact

Katie Wohn was Justice Johnson's research attorney between 2009 and 2015. Between August 2009 through November or December 2012, Justice Johnson made multiple comments about Wohn's appearance and scent, including telling her that certain clothing "looked great" on her, that she "smelled nice," and that she had "beautiful eyes," which made her feel uncomfortable. He also invited her to lunch for her birthday in 2012. She tried to invite other people to join, but no one was available. It was the first time she went to lunch with Justice Johnson. During the lunch, Justice Johnson told Wohn that if he had been in high school with her, he would have been in love with her. This made her feel very uncomfortable because he was looking straight at her and "it seemed flirtatious." She felt it was a "lead-in to looking for more of a relationship" than a work relationship. She responded with something like, "No, you wouldn't," and they left soon after. Wohn testified that Justice Johnson stopped making compliments and personal comments to her after they had a disagreement about her work schedule.

[5] See footnote 2.

Wohn also testified that Justice Johnson would often sit in a guest chair in his office that allowed him to stare directly into her office, which made her so uncomfortable that she would bring in large flower arrangements to block his view. She also testified that she saw him intoxicated and with a woman late at night in his chambers, and that she saw beer bottles in his office trash can when she arrived in the morning. She did not report his conduct because she did not believe the court would follow up.

Justice Johnson did not specifically deny saying that he would have been in love with Wohn if he had been in high school with her. He admitted making the statements to Wohn about her appearance and smell, but denied that he did so for an improper purpose or to make Wohn uncomfortable. He argued that they were only "social compliments" that are "part and parcel of casual conversation amongst adults." The masters rejected this contention and stated that his comments about his supervised employee's appearance were not appropriate conversation at work. Justice Johnson also claimed that Wohn's testimony reflected an embellished memory after she spoke with other Court of Appeal attorneys. The masters also rejected this, stating that, based on Wohn's testimony, they were convinced that, from day one, Wohn was uncomfortable with Justice Johnson's informal and overly personal communications with his staff and became increasingly offended when he began making compliments about her appearance and staring at her.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of law

The masters concluded that Justice Johnson's remarks would reasonably be perceived as sexual harassment[6] and violated canons 1, 2, 2A, 3B(4), and 3C(1), but because they were isolated and the content did not bring disrepute to

[6] See footnote 2.

the judicial office, they constituted improper action, rather than prejudicial misconduct.

Justice Johnson did not object to these legal conclusions. The examiner objected and requested that this charge be combined with four others (counts 5A, 5C, 5D, and 10) and be found to constitute prejudicial misconduct. We agree with the examiner that Justice Johnson's remarks to Wohn should be deemed prejudicial misconduct, rather than improper action. We agree with the masters that the conduct would reasonably be perceived as sexual harassment and conclude, therefore, that because the perception of sexual harassment is involved, a reasonable observer would find it prejudicial to public esteem for the judicial office. In addition, the fact that Justice Johnson was Wohn's supervisor while he was engaging in the misconduct is relevant to our determination. Accordingly, we find that the allegations involving Wohn constituted prejudicial misconduct. We do not find it necessary to consolidate these charges with others, as the examiner suggests, in order to conclude that Justice Johnson's conduct toward Wohn constitutes prejudicial misconduct.

Count 5C: Judicial assistant Currie

1. Findings of Fact

Between 2009 and 2011, Justice Johnson made comments to his judicial assistant Carolyn Currie about her appearance and scent, such as "You look hot," and "You smell good," that made her uncomfortable. Currie said she did not report Justice Johnson's conduct because she did not know what the process was, she did not know of anyone to go to, and Justice Johnson was her boss and had the power to fire her.

The masters found that Currie's testimony was "highly credible," and that her testimony was supported by evidence showing that Justice Johnson frequently did not conduct himself in accord with professional standards at work, and that he often acted in an overly personal and inappropriate manner with his staff and other employees.

Justice Johnson admitted making the complimentary comments. He said he did not realize that using the word "hot" to compliment someone's outfit was socially inappropriate, and that his intent was solely to express that something looks "really good" on the person.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of law

The masters concluded that Justice Johnson's remarks would reasonably be perceived as sexual harassment[7] and violated canons 1, 2, 2A, 3B(4), and 3C(1), but because they were isolated and the content did not bring disrepute to the judicial bench, they constituted improper action, rather than prejudicial misconduct.

The examiner objected on the ground that the conduct should constitute prejudicial misconduct. We agree with the examiner that if the conduct would reasonably be perceived as sexual harassment, a reasonable observer would find it prejudicial to public esteem for the judicial office. We also find it relevant that Justice Johnson was Currie's supervisor while he was engaging in the misconduct. Accordingly, we find that the allegations involving Currie constitute prejudicial misconduct. We decline the examiner's request to consolidate this charge with others because we find that it constitutes prejudicial misconduct on its own.

Count 5D: Justice Grimes

1. Findings of Fact

In about 2010, Justice Johnson told Justice Elizabeth Grimes, who was wearing workout shorts and a top at lunchtime, something like, "You have the cutest little ass in the Second Appellate District." He repeated his remark to Justice Chaney, who was present and asked him what he had said. Justice Chaney's testimony on this subject was supported by evidence showing that

[7] See footnote 2.

Justice Johnson would regularly notice and remark on the physical attributes of women, including those with whom he worked (see, e.g., testimony of Officer Barnachia, Officer Sauquillo, Wohn, Currie, and Butterick).

Justice Grimes testified that she did not recall the remark. She acknowledged, however, that she would regularly work out with a personal trainer during the relevant time period. Justice Lui testified that, after Justice Chaney told him about the "best ass" remark, he asked Justice Trisha Bigelow whether she was aware of any inappropriate actions or statements by Justice Johnson, and she volunteered that Justice Grimes had told her about the "best ass" statement.

Justice Johnson denied making the remark and said it was "another lie" by Justice Chaney.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of law

The masters found that Justice Johnson made the "cutest ass" (or similar) statement in a public space that could have been overheard by others (and was overheard by Justice Chaney) during work hours in front of the courthouse building, which, even if in jest, was inappropriate and undignified, in violation of canons 1, 2, 2A, and 3B(4). They concluded that because it was a single remark and not in a courtroom setting, an objective observer would not conclude that it diminished public esteem for the judicial office; therefore, it was improper action and not prejudicial misconduct. They also did not find that it created the appearance of sexual harassment.

The examiner requested that this charge be grouped with others as prejudicial misconduct. We decline to do so because we do not believe a reasonable observer would necessarily find that the comment, made by one judge to a peer, would tarnish public esteem for the judiciary. We adopt the masters' legal conclusions.

## COUNT SIX—Demeanor toward people at the appellate court

Justice Johnson was charged with displaying poor demeanor toward four court employees: Justice Chaney (count 6A), judicial assistant Carolyn Currie (count 6B), his research attorney Ellen Lin (count 6C), and Justice Chaney's research attorney Daniel Alexander (count 6D). All of these charges were found proven.

### Count 6A: Justice Chaney

#### 1. Findings of Fact

Shortly after an oral argument session in October or November 2009, Justice Johnson approached Justice Chaney in the courthouse hallway, got very close to her, pointed and shook his finger in her face, and said, "Don't you ever interrupt me again." The encounter left her shocked and frightened. Justice Chaney's yoga teacher Gunner testified that she told him about this incident, which left her shaken.

Justice Johnson denied that the incident occurred and suggested that Justice Chaney is overly sensitive.

The examiner did not object to the masters' factual findings. Justice Johnson objected on the general grounds that Justice Chaney was not credible, as discussed in Count One above. We do not find Justice Johnson's objections persuasive or consistent with the evidence, and we adopt the masters' factual findings.

#### 2. Conclusions of Law

The masters concluded that Justice Johnson displayed anger toward Justice Chaney without justification and that this was prejudicial misconduct and violated canons 1, 2, 2A, and 3B(4).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected on the general grounds regarding Justice Chaney, as discussed in Count One above. We do not find Justice Johnson's objections

persuasive or consistent with the evidence, and we adopt the masters' legal conclusions.

Count 6B: Judicial assistant Currie

1. Findings of Fact

On multiple occasions between 2009 and 2018, when Justice Johnson's judicial assistant Currie questioned his instructions, he raised his voice (but did not yell), called her "defiant," and told her he was the boss and she needed to do what he said. Currie testified that she would generally respond by going to the bathroom and crying. The masters found that his conduct was not justified because, although a supervisor can become frustrated and angry when a supervised employee challenges his or her decisions, a judge is required to be patient, dignified, and courteous with all persons with whom the judge deals, including court personnel.

Justice Johnson admitted becoming upset with Currie six or seven times and talking to her in a stern tone, but he denied yelling at her.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the conduct toward Currie was improper action because Justice Johnson's discourteous treatment of her happened only a "handful" of times in eight years, the conduct reflected frustrations that are not uncommon when supervisors and staff disagree, and the remarks were not flagrant. They concluded that the conduct violated canons 1, 2, 2A, and 3B(4).

Neither party objected to these legal conclusions, and we adopt them.

Count 6C: Attorney Lin

1. Findings of Fact

Between October 1, 2015 and September 9, 2016, Justice Johnson told his research attorney Ellen Lin that her work on draft opinions was "horrible" and "ignorant," yelled at her on numerous occasions, and stomped his feet while yelling at her on at least one occasion. The masters found Lin to be highly

believable, and her testimony was corroborated by Currie, who testified that she twice heard Justice Johnson "aggressively yelling" at Lin when he was in Lin's office with the door closed, and by judicial assistant Tracey Bumgarner, who testified that she once heard Justice Johnson yelling at Lin. The masters stated that the fact that Justice Johnson was not satisfied with Lin's work did not provide justification to yell and stomp his feet at a supervised employee.

Justice Johnson did not specifically deny yelling at Lin. He acknowledged that he was highly frustrated with the quality of Lin's work.

The examiner did not object to the masters' factual findings. Justice Johnson objected that the findings regarding yelling are unsubstantiated. Because the masters found that Currie and Bumgarner corroborated the yelling allegation, we adopt the masters' factual findings, including as to yelling.

2. Conclusions of Law

The masters concluded that Justice Johnson used derogatory and humiliating words to criticize Lin's work, which was prejudicial misconduct and violated canons 1, 2, 2A, and 3B(4).

Neither party objected to the masters' legal conclusions, and we adopt them.

Count 6D: Attorney Alexander

1. Findings of Fact

In approximately December 2017 or January 2018, when Justice Johnson was discussing a case with Justice Chaney and Justice Rothschild, and research attorney Alexander, he disagreed with Alexander about how the case should be decided and became angry and yelled at Alexander over their difference of opinion. Alexander testified that it was like an "explosion," and that Justice Johnson called him and Justice Chaney "stupid," which felt humiliating. The masters found his testimony credible.

Justice Chaney corroborated Alexander's testimony, stating that Justice Johnson disagreed with Alexander "strongly, rudely, aggressively" and called

them “stupid.” She said it was frightening and upsetting. Justice Rothschild also corroborated Alexander’s testimony, testifying that Justice Johnson became angry and aggressive with Alexander, and she believed his anger to be inappropriate to the situation.

The masters found that Justice Johnson attacked Alexander personally by yelling at him in a demeaning fashion, which was offensive and discourteous.

Justice Johnson denied acting inappropriately or calling Alexander “stupid.” He described Alexander’s claim that he called Alexander “stupid” an “abject lie.” Johnson’s defense was supported by the testimony of Roger Smith, his former research attorney, who described Johnson’s communication style as forceful and direct, but without animosity or ill will. He said he never saw Justice Johnson show anger. Smith said that when Justice Johnson engaged in a vigorous discussion about the law, his voice would go up in volume and acquire an edge, which he did not regard as yelling, although others might. Rebekah Young, another former research attorney, also testified that she never saw Justice Johnson act inappropriately in terms of tone or demeanor, and she always observed him to be respectful of staff attorneys from other chambers.

The examiner did not object to the masters’ factual findings. Justice Johnson objected that the findings regarding yelling are unsubstantiated, as corroborated by Justice Rothschild. But Justice Rothschild corroborated that Justice Johnson displayed inappropriate anger toward Alexander. Because the masters found that Justice Rothschild and Justice Chaney corroborated the yelling allegation, we adopt the masters’ factual findings, including as to yelling.

2. Conclusions of Law

The masters concluded that Justice Johnson’s disrespectful conduct toward Alexander was not patient, dignified, or courteous, which was prejudicial misconduct, and violated canons 1, 2, 2A, and 3B(4).

Neither party objected to these legal conclusions, and we adopt them.

## COUNT SEVEN—Conduct toward other women attorneys

Justice Johnson was charged with engaging in a pattern of conduct toward other women attorneys that demeaned the judicial office and lent the prestige of judicial office to advance his personal interests. The alleged conduct involved the following female attorneys, who did not work at the Court of Appeal: Melanie Palmer (count 7A), Allison Schulman (count 7B), Wendy Segall (count 7C), Price Kent (count 7D), Roberta Burnette (count 7E), and Taylor Wagniere (count 7F). The masters found that the allegations were proven as to all of these women except Segall.

A. Proven charges found to constitute misconduct

With respect to Palmer, Justice Johnson was attempting to engage in a personal relationship by seeking to impress her with his status and power, and the trappings of his judicial office, by inviting her to the courthouse and making inappropriate comments to her (count 7A). With respect to Schulman, Justice Johnson became intoxicated, repeatedly touched her body in inappropriate ways, grabbed her waist and wrist, kissed her, and made inappropriate statements to her at one professional event, and became intoxicated and made inappropriate statements to her at another event (count 7B). With respect to Kent, Justice Johnson became highly intoxicated at a dinner, discussed inappropriate personal subjects, suggested he could assist her career, and ran his hand up her thigh under the table (count 7D).

Count 7A: Attorney Palmer

1. Findings of Fact

Attorney Melanie Palmer met Justice Johnson at a mentorship event for new attorneys in 2013. He encouraged the new attorneys there to reach out to him for mentorship. Palmer did so. They agreed to meet for dinner. During the dinner, Palmer told Justice Johnson that she was interested in working at the district attorney's office. They had dinner and drinks, during which he told her that she looked "pretty and young," and that she would have to "prove herself."

After dinner and drinks, Justice Johnson took her back to his chambers at the courthouse, where he commented on her legs and told her she was fit and beautiful, and suggested that his wife used to be attractive, but no longer cared about fitness. This made Palmer uncomfortable. He also told her that he knew Los Angeles County District Attorney (DA) Jackie Lacey and walked his dogs with her, implying that he could help Palmer get a job at the DA's office. He also sent sexually suggestive texts to Palmer over the course of the next few months. This made her feel uncomfortable and "gross." In 2016, she told her friend, attorney Allison Schulman, about Justice Johnson inviting her to his chambers and that it made her feel uncomfortable. Palmer also told Helen Zukin, then a partner at her law firm and now a judge, that she had had a bad experience with Justice Johnson when she was a new lawyer, and that he had taken her back to his chambers after dinner, where he complimented her body and made negative comments about his wife's body, and then sent her texts that were very suggestive and inappropriate.

The masters said, "Viewing the totality of the circumstances, Justice Johnson was attempting to create a personal or romantic relationship with Palmer by bringing her to his chambers, impressing her with his power and status, suggesting that he could assist her with employment opportunities, and then sending her sexually suggestive texts for about four months."

Justice Johnson admitted bringing Palmer back to the courthouse at night and talking to her, but he denied mentioning anything about his wife or sending her suggestive texts. Justice Johnson said he took Palmer to the courthouse because she was asking questions about it, he believes it is one of the most beautiful courtrooms in the state, and he wanted to show her photographs of himself with his family and famous people. He denied that taking a young woman back to his chambers alone after dinner and drinks created any appearance of impropriety. He specifically denied that he told her that he knows DA Lacey and walks his dogs with her, and that he said or implied he could help

her get a job with the DA's office. He testified that he told Palmer that he knows DA Lacey and walks his dogs past her house a lot of mornings. He acknowledged that he was willing to help advance Palmer's career, but said he was not trying to create the impression that he could help her get into the DA's office.

The masters found Justice Johnson's denials "not credible." They found Palmer credible because the conduct about which she testified was consistent with that of other witnesses who had no connection to her, there was no evidence she had any motive to fabricate or exaggerate her testimony, she told a friend about her visit to Justice Johnson's chambers and that it made her uncomfortable well before the court's workplace investigation began, she fit the pattern of the type of women with whom Justice Johnson tried to cultivate a personal or romantic relationship, a superior court judge vouched for her credibility, and she was worried about what the reporting would do to her career. Further, the number and timing of the texts from Justice Johnson do not support his testimony that they were work-related and instead support Palmer's testimony that they were inappropriate. The masters also found that one allegation about a text stating that he felt "insecure" and that she needed to "give [him] something" was not proven because no evidence was produced to support this allegation.

Neither party objected to the factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Palmer violated his obligations to uphold the integrity of the judiciary, demeaned the judicial office, impaired the dignity and prestige of the institution of the Court of Appeal, and lent the prestige of the judicial office to advance his personal goals. They stated that a "judicial officer must act in an honorable fashion and must participate in maintaining standards of conduct so that the integrity of the judiciary is preserved." They further concluded that Justice Johnson's actions toward Palmer constituted prejudicial misconduct and violated canons 1, 2, 2A,

2B(2) (judge shall not lend the prestige of judicial office to advance the judge's personal interests), and 4A(2).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected by stating his belief that a conclusion of improper action should be applied to all of the findings in Count Seven, rather than prejudicial misconduct, because an objective observer would not conclude that his conduct would undermine public esteem for the judiciary or bring the judicial office into disrepute. Justice Johnson asserted that the findings in Count Seven "relate to social conversations unrelated to judicial conduct, and when examined separately reflect settings in which judicial officers routinely engage in casual private discussions."

We agree with the masters that Justice Johnson's attempts to cultivate a personal relationship with Palmer, and taking advantage of his position as a respected justice to do so, including by taking her to the courthouse alone at night, making inappropriate comments about her body and his wife, and sending her suggestive texts, bring the judicial office into disrepute and constitute prejudicial misconduct. We adopt the masters' legal conclusions.

Count 7B: Attorney Schulman

1. Findings of Fact

In June 2015, at a reception hosted by the Consumer Attorneys Association of Los Angeles (CAALA) for graduates of its trial academy for newer attorneys, Justice Johnson was introduced to young attorney Allison Schulman, who was excited to meet an appellate justice. He suggested that attorneys take photographs with him and then text him the photographs so he would remember their names. Schulman agreed, took a photograph with Justice Johnson, and texted it to him. Later at the reception, he began acting in a "touchy-feely" manner toward Schulman. He put his hand on her arm, and grabbed her stomach and waist area to turn her body around so that he could talk to her. She testified that he did this more than five times, which made her uncomfortable.

Schulman testified that she was uncomfortable with Justice Johnson's conduct and said, "I don't think it's really appropriate for a man I don't know that I just met to be touching my stomach, and he's in a power [position] and should be more professional than that." As Schulman was leaving the reception with Jake Finkel, a young male attorney who also had attended the trial course, Justice Johnson grabbed her wrist and pulled her toward him, and made comments about her leaving the party with Finkel, including telling her that Finkel was going to "rape" her. He also told her that his friends who were sheriffs or police chiefs would come looking for her if she did not text him the next morning to let him know she was okay. She told Justice Johnson that they were just going to their cars. She felt shocked by his behavior. As she started to exit, Justice Johnson pulled her forward and kissed her cheeks three times. She described the kisses as "really wet" and "gross." Schulman believed Justice Johnson was intoxicated based on the way he was speaking and his unprofessional behavior. She testified that she had only one drink that night. She did not ask him to stop his behavior because she "didn't want to have any problems with him, because he was a judge," and she "just wanted to get out of this situation."

The masters found that Schulman's testimony was "highly believable" regarding this event. They said she testified in a careful manner, provided specific details, and made no attempt to overstate the events. They also found that Justice Johnson was intoxicated at this event.

Schulman's testimony was corroborated by Finkel, who said that, as they were leaving, Schulman looked "surprised and shocked" and was "upset" and told him that Justice Johnson had grabbed her arm, kissed her on the cheek, and told her not to leave with Finkel because Finkel was going to rape her.

Schulman's testimony was also corroborated by the testimony of attorney Ariadne Giannis, who attended the reception and witnessed Justice Johnson touching Schulman inappropriately, putting his arm around Schulman's waist or shoulder, and "being generally touchy and feely." Giannis could tell from

Schulman's face that she was "incredibly offput and uncomfortable" by Justice Johnson's actions. When Schulman later told Giannis that she was very upset, Giannis indicated that she had seen what had happened and understood why Schulman would be upset.

Schulman's testimony was further corroborated by Facebook Messenger communications that she exchanged with attorney Michelle Iarusso that evening, in which she said that Justice Johnson was "groping all of the women" and told her that the guy she was talking to was going to rape her. When Schulman sent Iarusso a photograph of Justice Johnson, which she said was taken when he was "soberish," Iarusso responded, "Jeff," and "He likes a good drink." Iarusso was, coincidentally, friends with Justice Johnson.

Three months later, in September 2015, Schulman and Justice Johnson both attended a CAALA event in Las Vegas. Justice Johnson was a speaker and attended the event in his capacity as an appellate justice. He spent some of his free time with his close friend, Goleh. Goleh invited Schulman to an invitation-only dinner, and said they should meet at a cocktail party beforehand. When Schulman arrived at the cocktail party with Iarusso, Goleh was there and was soon joined by Justice Johnson and his friend Ray Patel. Goleh told Schulman that she would be going to the dinner alone with Justice Johnson because there were only two tickets. This made her feel very uncomfortable. She suggested that they all go to a party that they could all attend instead, which they did. At one point, Schulman was sitting on a couch with Justice Johnson, Patel, and Iarusso. When Iarusso left to get a drink, Justice Johnson asked Schulman to sit right next to him on the couch. When she declined, he asked her about her law firm. She told him she handled employment law cases. He responded that he had the perfect employment case, with "100 percent perfect liability" and "high damages," to refer to her, and said, "But I can only give it to you if you come sit right next to me." Schulman did not want to do this and got up. When she

started to walk away, he yelled at her. Schulman testified that she was "fairly sober" when this occurred.

The masters found that Schulman's testimony was "highly believable" as to the CAALA event and "highly credible" as to the Las Vegas event. They also found that there was "strong, highly credible" evidence that Justice Johnson was intoxicated at the CAALA event.

Schulman's testimony about the Las Vegas event was corroborated by texts between Schulman and Iarusso that were sent before there were any reports of Justice Johnson's alleged sexual harassment of others.

Justice Johnson claimed that Schulman was not credible because she was drinking alcohol at both events and was prone to overdramatizing incidents. He denied grabbing Schulman's stomach and wrists and said he put his arm around her waist only once when the photograph was taken, and he may have shaken her hand with two hands and kissed her "European style." Justice Johnson said he spent the entire evening in Las Vegas with Goleh and Patel, and his only exchange with Schulman and Iarusso was to briefly say hello. He denied sitting on a couch with Schulman and said it made no sense to refer a case to her because she was a brand-new lawyer.

Justice Johnson called his friend Goleh as a witness in his defense. Goleh testified that he was with Justice Johnson most of the evening of the CAALA reception and did not see Justice Johnson acting inappropriately, and that Justice Johnson routinely hugs and kisses people. Goleh said he saw Justice Johnson greet Schulman by shaking her hand and kissing her in a "European" or "Persian" style. He testified that Schulman is often "emotional" when she drinks, and he once saw her standing alone and crying at an unrelated event. Goleh further testified that he was with Justice Johnson the entire evening of the party in Las Vegas, except when he had to use the restroom, and he did not recall seeing Schulman.

The masters rejected Goleh's assertions that Justice Johnson always acted appropriately toward Schulman at the CAALA event because of Goleh's close relationship with Justice Johnson and the inconsistency of his testimony with established facts, including the testimony of Justice Johnson and Iarusso. They did not find it believable that Goleh would have been standing next to Justice Johnson most of the night of the CAALA reception and, therefore, did not accept his assertions that Justice Johnson always acted appropriately toward Schulman. And both Justice Johnson and Iarusso recalled seeing or being with Goleh and Schulman in Las Vegas, which undermines Goleh's testimony that he did not recall seeing Schulman there.

Justice Johnson also called Iarusso as a witness in his defense. The masters found that Iarusso's testimony was "unreliable and biased." Iarusso testified that she and Schulman "drank with abandon" in Las Vegas and that Schulman was "very intoxicated" when they met up with Justice Johnson and Goleh that evening. Iarusso testified that Schulman never complained about Justice Johnson's conduct at either event, but the masters found that Iarusso's testimony was "severely impeached" on cross-examination when she acknowledged her communications with Schulman the evening of the CAALA event. She admitted Schulman had texted her that Justice Johnson got "wasted," "was groping all of the women," and suggested Finkel was going to rape her, to which Iarusso responded that "Jeff" "likes a good drink." Iarusso had a text message exchange with Schulman about nine months after the Las Vegas event, in which Schulman complained about Justice Johnson's conduct and referenced Justice Johnson's "groping all of us" and "telling me that my friend was going to rape me" and that he was going to call his sheriff friends if she did not text him the next morning to tell him she was okay. Schulman also texted that, in Las Vegas, Justice Johnson "was telling me he had a great employment law case for me which he was completely making up, but that I could only have it if I came and sat right next to him."

The masters found Justice Johnson's defenses concerning the first event to be unsupported, and that his denials were overcome by strong, highly credible evidence. Concerning the Las Vegas event, they found that he was attempting to create a personal relationship with Schulman that evening, and that he was seeking to pressure Schulman to sit next to him on the couch by stating that he could refer a case to her. His anger when she refused is consistent with other evidence of his demeanor.

Schulman testified that she did not report the events involving Justice Johnson because she was concerned about retaliation and the consequences of reporting a judicial officer. She first reported the incidents to the commission in July 2018, after her acquaintance Melanie Palmer told her about the Daily Journal article discussing sexual harassment allegations against Justice Johnson.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Schulman violated his obligations to uphold the integrity of the judiciary, demeaned the judicial office, impaired the dignity and prestige of the institution of the Court of Appeal, and lent the prestige of the judicial office to advance his personal goals. They further concluded that it constituted prejudicial misconduct and violated canons 1, 2, 2A, 2B(2), and 4A(2).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected by stating his belief that a conclusion of improper action should be applied to all of the findings in Count Seven, which he asserted "related to social conversations unrelated to judicial conduct," and, when examined separately, "reflect settings in which judicial officers routinely engage in casual private discussions."

We agree with the masters that Justice Johnson's conduct toward Schulman, including grabbing her waist and wrist, kissing her, saying the person

she was with was going to rape her, and trying to get her to sit next to him by taking advantage of his position and saying he would refer a case to her, bring the judicial office into disrepute. We adopt the masters' legal conclusions.

Count 7D: Attorney Kent

1. Findings of Fact

Attorney Price Kent worked as a young associate at the law firm of Marcin Lambirth from 2007 to 2012. At that time, the firm was managed by partners John Marcin and Timothy Lambirth. The firm is now closed. In about June 2009, the Marcin Lambirth partners invited Kent to attend Justice Johnson's Court of Appeal nomination party. Marcin was close friends with Justice Johnson. When Kent met Justice Johnson, he told her that he would like to invite her to his chambers to talk, so he could learn more about her and perhaps help her with her career. Two months later, the firm partners invited Kent to Justice Johnson's swearing-in ceremony and told her that Justice Johnson had been impressed with her and asked them to bring her to the ceremony.

In late 2009 or early 2010, the firm hosted a bowling event for its attorneys, followed by a dinner at Maggiano's restaurant. Justice Johnson attended both the bowling event and the dinner. At the bowling alley, Justice Johnson discussed inappropriate personal subjects with young attorneys. He drank a lot of alcohol and discussed with Kent his views that "humans were not meant to be a monogamous race" and identified various "powerful people" who agreed with him. Kent tried to change the subject and did not think it was professional or appropriate to be discussing "people's sexual exploits or whether it was okay to cheat." Kent felt Justice Johnson was acting "flirtatious," "overly friendly," and "entitled" toward her. At the dinner, Justice Johnson asked to sit next to Kent. He sat to her left, and the partners sat to her right. During the dinner, Justice Johnson again invited her to his chambers and said he could help her with her career and networking, and introduce her to people he knew "in the business." He then reached under the table, put his hand just over her knee, and slid his

hand up to the middle of her thigh. Kent was shocked and tried to remove his hand, and said something to the effect of, “Are you kidding me?” Justice Johnson did not immediately remove his hand and said something like, “What?” Kent immediately left the table because she was upset and in shock. She told her paralegal what had happened. When she returned to the table to get her things, Justice Johnson kept insisting that he walk her to her car. She repeatedly said, “No.”

The next morning, Kent emailed the law firm partners telling them what had happened and that she was very upset about the incident. (The email was not produced, presumably because the firm dissolved years ago, and such records were not kept.) Kent expressed concern that Justice Johnson had an alcohol problem. The partners told her they would handle it and speak to Justice Johnson. They later told her they had done that and that Justice Johnson apologized and said he had had too much to drink.

Kent’s testimony was corroborated by Regina Ashkinadze Spurley, a former Marcin Lambirth attorney who attended the bowling event and the dinner. Spurley recalled Justice Johnson leaning in toward Kent and paying attention only to Kent at the dinner, and that Kent was very upset later that night and Justice Johnson had said or done something during the dinner that made Kent highly upset and leave the event. Spurley remembered thinking that Justice Johnson was under the influence of alcohol that evening.

Justice Johnson recalled seeing Kent at a bowling alley event, but in 2012. He denied being intoxicated at the event that took place in 2009 or 2010. He did not recall sitting next to Kent at Maggiano’s or speaking to her while he was there. He said the allegations about putting his hand on Kent’s thigh was “pure fabrication.” The masters found Kent’s recall of the events to be “highly credible” and that there was no evidence she had any motive to misrepresent the truth. To the contrary, she was a reluctant witness. The masters declined to credit Justice Johnson’s assertions that he did not engage in the wrongful conduct.

Justice Johnson called as a defense witness Timothy Lambirth, a partner at the firm where Kent was employed. Lambirth testified that he did not believe Justice Johnson was intoxicated at the bowling event. He did not testify about Justice Johnson's level of intoxication at the subsequent dinner. Lambirth also testified that the next day Kent, who was "a little bit agitated," told him that Justice Johnson had "hit on her" and walked her to her car, where he wanted, or tried, to kiss her. Lambirth did not recall Kent saying anything about Justice Johnson touching her thigh, but he acknowledged that he had suffered from a neurological condition that could cause some cognitive issues. The masters found Lambirth's testimony that Kent complained to him the next day about Justice Johnson's behavior to be corroborating.

Justice Johnson objected to the masters' factual findings on the grounds that there is no clear and convincing evidence of this charge based on Lambirth's testimony, Kent's conversation with "scorned" attorney Lisa Miller, and the influence of (unspecified) outside events. Justice Johnson asserted that Miller had propositioned him, and when he told the partners at the Lambirth firm, where she was employed, she lost her job.

Justice Johnson argued that Lambirth's memory was distinct as to certain details (Justice Johnson's level of intoxication and what Kent reported to Lambirth the next day), and that those details are in conflict with Kent's testimony. He also asserted that Lambirth's memory difficulties only kept him from managing full cases by himself.

Justice Johnson claimed that Lambirth, who attended the dinner, testified "unequivocally" that Justice Johnson was "sober for the entirety of the event." Lambirth did not testify that Justice Johnson was "sober" at the dinner; he testified that Justice Johnson "did not appear intoxicated" and, in his opinion, "had not been drinking much," at the bowling alley. This preceded the subsequent dinner at a restaurant, where the thigh touching of Kent occurred.

Moreover, Kent and Spurley each testified that Justice Johnson appeared to be intoxicated at the dinner.

Justice Johnson pointed to Lambirth's testimony that Kent told him Justice Johnson had tried to kiss her on her way to her car, but did not say that he touched her thigh. The masters apparently concluded, however, that Lambirth's memory was less reliable than Kent's about the actual conduct because Lambirth had neurological problems during the relevant time. And the touching was likely to make more of a memorable impact on Kent than on Lambirth, and she had no motive to misrepresent the truth.

Justice Johnson also argued that Kent's 2018 contact with Miller cast doubt on her credibility and motivation. The masters found no showing of any relationship between them, other than a professional relationship because they had both worked at the Lambirth firm. They also found no evidence that Kent had any reason to lie on the witness stand merely to gain favor with Miller.

We concur with the masters' factual findings and adopt them.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Kent demeaned the judicial office and lent the prestige of the judicial office to advance his personal interests. They further concluded that it constituted prejudicial misconduct and violated canons 1, 2, 2A, 2B(2), and 4A(2).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected by stating his belief that a conclusion of improper action should be applied to all of the findings in Count Seven, which he asserted "related to social conversations unrelated to judicial conduct," and, when examined separately, "reflect settings in which judicial officers routinely engage in casual private discussions."

We agree with the masters that Justice Johnson's actions toward Kent, including making inappropriate comments and running his hand up her thigh, bring the judicial office into disrepute. We adopt the masters' legal conclusions.

Count 7E: Attorney Burnette

1. Findings of Fact

In October 2015, attorney Roberta Burnette attended an Association of Business Trial Lawyers (ABTL) dinner at the Jonathan Club in Los Angeles as a networking event because she hoped to be appointed to the ABTL board by her firm. She attended with her then-boyfriend, now-husband Greg Elliot. Justice Johnson also attended the event. When she was alone at a table with Justice Johnson, he said to her, "You know, you're very voluptuous." Trying to brush it off, she said, "Thank you," and then "Hey, have you heard of the Los Angeles Lawyers Philharmonic Orchestra?" He nodded yes, and she said, "I'm in the orchestra. I play the viola. I'm the principal violist." He kept nodding, and she said, "My stand partner is Judge Bendix [then a superior court judge, now a justice on Justice Johnson's court]. Do you know Judge Bendix?" Justice Johnson continued to nod and said, "Yes." He then said, "So you play the viola?" When Burnette said, "Yes," he said, "You need to put your viola mouth on my big black dick." She was shocked and tried to treat it like he had been joking and said, "Oh, no. You don't play the viola with your mouth. It's a string instrument. It's like a big violin." She pantomimed how to play a viola. He responded, "Oh, so you stroke it?" She started saying, "Oh, no, no," and he blurted out, "You need to stroke my big black dick with your viola hand." She stood up, approached Elliot, and said to him, "Get me out of here right now." They left immediately. As they were leaving, she told Elliot what Justice Johnson had said to her.

Elliot corroborated substantially all of Burnette's testimony. He testified that after Burnette told him that she wanted him to get her out of there, as they were taking the elevator, she told him that Justice Johnson had made "very crude and disgusting" remarks to her. He could not recall the precise words used.

After Burnette reported Justice Johnson's actions to her law firm, they did not appoint her to the ABTL board. Burnette did not report Justice Johnson's

conduct to any authority because it was embarrassing, she thought it was a "one-off situation" involving a man who had "just made a really vulgar pass," and she was concerned about retaliation against her or her law firm.

Justice Johnson strenuously denied ever meeting Burnette and said her claims were false and "malicious," and based on a stereotype of a Black man. He testified: "She says that I told her she was voluptuous. So that stereotype, Black male sexualization. She says that I didn't know what the viola was. I'm a Duke, Yale, Oxford educated man whose wife plays cello, who grew up in a household full of music. And she assumed I didn't know what the viola was. So stereotype, ignorant Black man. Then she goes to my next thought being put your viola mouth on my genitals. I described my genitals. No educated Black man who wants to fit into the world and who has been as lucky, successful, and fortunate as I have been wants to be known by his genitals. I'm not going to say to somebody, the first time I meet them, something about my genitals or the color of my genitals or the size. This is not something I've ever said."

Justice Johnson provided a declaration from attorney Eric Swanholdt, which stated that Swanholdt was with Justice Johnson the entire evening, and he did not observe Justice Johnson acting in an improper manner.[8] Swanholdt also stated that he has never seen Justice Johnson show "aggressive sexual or improper intent" or use the type of vulgar language identified by Burnette.

In his post-masters' report briefing, Justice Johnson objected to the masters' factual findings and argued that the clear and convincing standard was not met, based on the following arguments.

First, he claimed that the masters' "reliance on what appear to be political considerations arising from the 'Me Too' movement prompted clear distortions and a reliance on a double standard."

[8] The parties stipulated to the admissibility of the declaration due to Swanholdt's unavailability to testify in person.

Justice Johnson offered no evidence to support the notion that the masters credited Burnette's testimony due to political considerations, and there is none.

Second, Justice Johnson claimed that there is not a "single witness to corroborate [Burnette's] version of the events." He argued that the masters' conclusion that Burnette's testimony was corroborated by Elliot and two other witnesses is "demonstrably false." He asserts that Elliot's inability to recall the exact words allegedly used means that Elliot "did not corroborate anything."

To the contrary, Elliot testified that Burnette told him that Justice Johnson had made "very crude and disgusting" remarks to her that made her "creeped out" and "quite upset" and caused her to want to leave the event immediately. Elliot did not testify that he could not recall any of the words she spoke, as Justice Johnson asserts. He testified that Burnette told him the language used, but that he did not recall the "exact words." The masters found it surprising that Elliot did not remember the precise words used, but that this did not negate his credibility because it "is reasonable to conclude that an individual would not necessarily commit to memory the vulgar language used against his girlfriend." They also found Elliot credible because he could easily have pretended to remember the exact words since he and Burnette continued to discuss the event after she reported the facts to the commission.

The masters also found that Swanholdt's declaration corroborated Burnette's testimony, contrary to Justice Johnson's assertion that it supports his claim that he never met Burnette. Swanholdt's declaration states that he "believes" he and Justice Johnson were together the entire evening, he does not recall them being apart, and he did not see Justice Johnson sitting next to anyone alone at a table at any time. The masters gave little weight to this because "it is not realistic to assume that two friends would be physically together for an entire night at a professional event at which socializing and networking is expected." Further, Swanholdt declared that he and Justice Johnson joined a table with two other people near a bar, which is consistent with

Burnette's testimony that she walked up to a group of four or five people seated at a table near a bar.

Justice Johnson also contended that the testimony of Los Angeles County Superior Court Judge Kevin Brazile only corroborates that he had been drinking, and not that he "was 'highly intoxicated' to the point where he would black out," a conclusion he asserts is unsupported by any evidence.

The masters never stated that Justice Johnson was intoxicated "to the point of blacking out." What they said is: "Heavy intoxication can affect the ability to recall events. It is undisputed that Justice Johnson was drinking heavily that evening." Judge Brazile, who is Justice Johnson's friend, testified that Justice Johnson "had been drinking a bit much" and was headed to the bar to continue drinking, and that he expressed concern about how Justice Johnson was going to get home because he felt the justice was not in a condition to drive. Justice Johnson testified that he did not think he was able to drive.

Justice Johnson also argued that Burnette testified that she told her adult children and friends what occurred, but that there is no corroboration because these witnesses were not called.

Burnette and her husband Elliot testified convincingly about what occurred. The masters found Burnette and Elliot to be credible and deemed their testimony sufficient to prove the allegations. We concur that their testimony is sufficient.

Third, Justice Johnson claimed that Burnette's story is "unbelievable on its face." The masters found Burnette to be a "highly believable witness" and with "nothing to gain from the reporting" of Justice Johnson's conduct. They stated that there was "no evidence whatsoever supporting that she would concoct an elaborate story of Justice Johnson making vile comments to her in response to her mentioning that she plays in an orchestra." They also found no motive why she would fabricate a story to accuse an appellate justice she did not know of such offensive conduct.

Fourth, Justice Johnson argued that Burnette's "actions did not match her words" because she did not walk away after he allegedly called her "voluptuous." The masters found believable her explanation that she tried to divert his attention and allow him to save face. And she did walk away after his remarks became more offensive.

Fifth, Justice Johnson claims that the comments play into the worst racial stereotypes, that no self-respecting African-American man would ever use them, and that no witness has suggested that he has. He asserts that the vulgar language Burnette attributed to him "is the type of language that a Caucasian person might believe a [B]lack man would use based on stereotypes about how [B]lack men talk."

The masters found no evidence to support Justice Johnson's claim that Burnette's testimony is the result of stereotyping of Black males. The evidence also shows that Justice Johnson has invoked racial stereotypes himself (e.g., his comment to Blatchford about "going back," and his remarks to Justice Chaney about the size of an African-American man's genitals, both of which are based on a stereotype).

Justice Johnson also argued that "no witness came forward to suggest that these highly offensive, racially tinged remarks are any part of Justice Johnson's vocabulary or character," and that the masters improperly considered his alleged propensity to use sexually inappropriate language when drinking. The masters found Justice Johnson's claim that he never uses sexually inappropriate language to be "not credible." The evidence shows that Justice Johnson can be crude. He admitted giving his externs T-shirts stating "BAMF," which he testified stands for "badass motherfucker." They also found that he asked attorney Nina Park, "I've always been wondering, but do you shave your pussy?" (Park was a rebuttal witness whose testimony the masters considered solely for its relevance to certain issues, such as this one.) And Martinez testified that, at a dinner attended by law clerks, Justice Johnson said, "If you want a daughter, you need

to do it doggy style." He admitted making this comment. They further found that he told Justice Chaney that "people are afraid of the size of a Black man's . . . cock or dick."[9]

Sixth, he contended that Burnette could be helping her friend Lisa Miller by "embellishing" the story. Burnette described Miller as a "professional acquaintance" with whom she speaks only once every one or two years. Embellishment implies that Justice Johnson did meet Burnette that evening, but that Burnette exaggerated what occurred, whereas he denies ever meeting Burnette at all. The masters found "no evidence that Burnette had any reason to lie on the witness stand merely to gain favor with Miller or because Miller was angry with Justice Johnson."

Seventh, Justice Johnson argued that Burnette has her own ax to grind with him because she suggested that her then-law firm retaliated against her for complaining about him by denying her the position she wanted on the ABTL board. This makes no sense if, as Justice Johnson claims, he never met Burnette; there would be no reason for her to invent a complaint about an appellate justice *before* the firm decided not to put her on the board.

In our view, not only would Burnette have no reason to make up this story, but when her testimony is viewed in light of the corroborating testimony and the many claims of Justice Johnson's sexual impropriety toward women, including putting his hand on Kent's thigh at a different dinner, also while he was intoxicated, the evidence is clear and convincing that the alleged misconduct involving Burnette occurred. We do not find any of the justice's arguments or objections persuasive, and we adopt the masters' factual findings.

[9] The masters concluded that this last statement was not misconduct under the circumstances in which it was said.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Burnette demeaned the judicial office and the integrity of the judiciary. They further concluded that it constituted prejudicial misconduct and violated canons 1, 2, 2A, and 4A(2).

The examiner did not object to the masters' legal conclusions. Justice Johnson objected by stating his belief that a conclusion of improper action should be applied to all of the findings in Count Seven, which he asserted "related to social conversations unrelated to judicial conduct," and, when examined separately, "reflect settings in which judicial officers routinely engage in casual private discussions."

We agree with the masters that Justice Johnson's crude, graphic remarks to Burnette during a professional dinner bring the judicial office into disrepute. We adopt the masters' legal conclusions.

Count 7F: Attorney Wagniere

1. Findings of Fact

Taylor Wagniere met Justice Johnson when she was a law-student extern for a different justice at the Second District Court of Appeal in 2011. Between 2013 and 2015, after her externship had concluded, Justice Johnson and Wagniere had a friendly relationship and occasionally met for lunch or dinner. During that time, Justice Johnson sometimes made her feel uncomfortable by divulging more personal information than she felt was appropriate, commenting on her physical appearance, wanting to know who she was dating, and implying that their lunches or dinners were dates. Justice Johnson also told Wagniere that he was unhappily married, and that he and his wife were living separately, but in the same house. He once kissed her on the mouth, without her consent, which shocked her and made her feel uncomfortable. She continued to exchange texts with Justice Johnson and occasionally see him for meals until 2018.

Justice Johnson admitted kissing Wagniere once, but asserted that he did so to show her his support. He denied making the comments about his marriage.

Neither party objected to the masters' factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Wagniere constituted improper action and violated canons 1, 2, 2A, 2(B)2, and 4A(2).

Neither party objected to the masters' legal conclusions, and we adopt them.

B. Charges not proven to be misconduct

The masters found that the allegations in one charge (count 7C) were proven, but that they were not misconduct.

Count 7C: Deputy District Attorney Segall

1. Findings of Fact

When Justice Johnson was walking to lunch with then-Deputy District Attorney Wendy Segall (now a judge), he made comments about her appearance and put his hand on the small of her back to guide her across the street, both of which made her uncomfortable. At the lunch, when talking about Justice Johnson's children, Segall said something like, "You finally got a boy," to which Justice Johnson responded, "Well, it was fun trying," or words to that effect.

Justice Johnson admitted the allegations, but denied that they were canon violations.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that Justice Johnson's conduct toward Segall (count 7C) did not constitute a violation of the canons. They stated that, although Justice Johnson's comments during lunch could possibly be perceived as personal or overly friendly, and he may have had a hope or desire to develop a closer relationship in the future, the "judicial canons are not so broad that they

prohibit such thoughts or giving compliments to a lunch companion with whom he or she does not work."

Neither party objected to this legal conclusion, and we adopt it. We dismiss count 7C.

## COUNT EIGHT—Alcohol-related behavior

Justice Johnson was charged with nine instances of demeaning the judicial office by appearing to be under the influence of alcohol, seven instances of which occurred at the courthouse late at night. The masters found that seven of the allegations were proven.

A. Proven charges found to constitute misconduct

The masters found that seven of the instances were proven and grouped them into three findings of prejudicial misconduct (one for a wedding he attended (count 8B), one for the CAALA event in Los Angeles (count 8C), and five incidents at the courthouse (counts 8D, 8E, 8G, 8H, and 8I).

1. Findings of Fact

Count 8B: Wedding

In September 2011, Justice Johnson attended the wedding of AUSA Julian Andre in Modesto. Andre was Justice Johnson's extern in 2005 or 2006, and the two have remained good friends. Justice Johnson performed the wedding ceremony, after which there was a cocktail hour, a dinner, and a reception. During the cocktail hour and dinner, Justice Johnson drank to excess. Around midnight, close to when the reception was ending, a staff member asked Justice Johnson to leave the establishment. He was the only guest asked to leave before the end of the reception. Andre testified that he heard Justice Johnson asking, in "an elevated voice," why he had to leave. Andre's brother saw Justice Johnson and a staff person "appear agitated," and it seemed that their voices were raised. Andre's brother and a friend told Justice Johnson it was time to go, and he agreed. The next day, some of Andre's friends thought Justice Johnson

may have had a little too much to drink and maybe was “a little flirty,” and they felt “somewhat uncomfortable.” Andre’s brother did not think Justice Johnson appeared intoxicated at that point, but may have been “buzzed.” The masters declined to give much weight to the testimony of Andre and his brother regarding Justice Johnson’s level of intoxication due to their relationship with him and their status of groom and best man at the wedding.

The masters gave more credit to the notes of an interview given to commission staff by Daniel Nobel, a friend of Andre’s who attended the wedding and is now a pediatric dentist.[10] According to the notes, Nobel said that, at the rehearsal dinner, Justice Johnson gave unwelcome attention to various young women and commented on their beauty. The notes reflect that Nobel said Justice Johnson was asked to leave by a restaurant employee and had said or done something disrespectful to a female employee. According to the notes, Justice Johnson was “drunk” and “loud, yelling, belligerent,” and had “no level of decorum.”

Justice Johnson testified that he had a glass or two of wine at the dinner, or maybe a couple of glasses during the remainder of the night, and when he asked for a beer at the end of the evening, the waiter said, “No, we’re closing,” and told him he had to leave. According to Justice Johnson, he asked why the waiter was yelling so loud, the waiter said it was because it was time for him to go, he responded, “Okay. That’s not very nice of you, but I’ll go,” and Andre’s brother and a “really big guy” showed up and said it was time to go. He denied that there was an incident involving a female staff member.

The masters stated: “The evidence was undisputed that Justice Johnson was the only guest who was asked to leave the reception before the end of the party. Instead of complying, he demanded another alcoholic beverage and, when this was refused, he became loud, yelled, and acted in a ‘belligerent’

[10] The notes were admitted by stipulation because Nobel was unavailable to testify.

manner. This confrontation was noticeable to the guests and was so unsettling that the groom's brother and at least two others were required to intervene and make clear to Justice Johnson that he needed to leave the premises." The masters noted that Justice Johnson had served as the officiant at the wedding and those in attendance were aware of his status as a Court of Appeal justice, and his intoxicated state was a topic of discussion among the wedding guests the next day.

Count 8C: CAALA reception

The masters referred to the facts in count 7(B) regarding the CAALA reception in Los Angeles, at which Justice Johnson became highly intoxicated and engaged in inappropriate behavior with a young female attorney (Schulman) (i.e., grabbing her waist repeatedly, grabbing her wrist and pulling her toward him, kissing her on the cheeks, and telling her that the man she was going to leave with was going to rape her).

Justice Johnson denied being intoxicated at this event.

Count 8D: Incident in August or September 2016

In August or September 2016, custodian Rodney Pettie and Justice Rothschild's judicial assistant Tracey Bumgarner saw Justice Johnson intoxicated at the courthouse late at night. Bumgarner testified that she was working late, and Justice Johnson came into Justice Rothschild's chambers and said, "I got your back Trace, I got your back." She said Justice Johnson appeared to be "very, very, very intoxicated" and was "slurring his words a lot" and "speaking very slowly." Shortly after, she and custodian Pettie were leaving when they encountered Justice Johnson, who was also leaving, and they spoke with him for five to ten minutes. When Bumgarner took the elevator to the judicial parking area where her car was parked, she saw Justice Johnson get into his car and start driving away. As he was driving away, she heard his vehicle hit something or "he slammed his brakes on so hard it sounded like he hit something." Pettie testified that Justice Johnson appeared to have "had a few

drinks that night" and that he believed Justice Johnson was intoxicated based on the "slurring of words, the dialogue that he was having" with them, and the smell of alcohol.

Justice Johnson denied being intoxicated at the courthouse at any time.

Count 8E: Incident in summer of 2017

During the summer of 2017, custodian Darnice Benton saw Justice Johnson outside the courthouse at around 1:00 a.m., as she was driving away at the end of her shift. He was walking on the street and, in her opinion, looked "severely inebriated." She testified that he was walking "topsy-turvy" and in a manner consistent with others she has seen who were intoxicated. She demonstrated this by walking in an extremely unsteady manner, taking very high steps and waving her arms up and down. Benton pulled over to the side of the street and called her supervisor because she was worried about Justice Johnson's safety. Benton's supervisor told her Justice Johnson was a grown man and could handle himself. Benton saw Justice Johnson walk into the Court of Appeal building.

Justice Johnson denied being intoxicated at the courthouse at any time.

Count 8G: Incident involving statues

Custodians Pettie and Cruz Hermosillo testified that they saw Justice Johnson at the courthouse at approximately 1:00 a.m. one night in 2015 with two young women who were dressed as if they were going to a club, with short skirts and high heels. The women appeared to be drunk. The women climbed on large lion statues in the lobby of the courthouse and took "selfies." One of the women fell off a statue and was laughing hysterically. Justice Johnson was standing about ten feet away from them, acting nonchalant, and holding a brown paper bag. He looked at the custodians and shrugged his shoulders, saying, "What are you going to do?" He also asked custodian Hermosillo if he wanted to come to his chambers to "party" with him and the women. These findings are consistent with evidence that the masters found "convincingly shows" that Justice

Johnson would often leave court at about 5:00 p.m. or 5:30 p.m., go to bars or restaurants and drink alcohol, and then come back to the Court of Appeal many hours later.

Justice Johnson did not deny that this incident occurred, but he denied that he was intoxicated. He said he was with "two White women" whom he knew, and whom he said were close friends and "free spirits." He said he told them to get off the statue and they would not. He did not specifically deny asking Hermosillo whether Hermosillo wanted to "party" with him.

Count 8H: Incident in 2016

In 2016, custodian Hermosillo saw Justice Johnson, whom Hermosillo described as "over-the-top drunk," in the courthouse at approximately 11:00 p.m. Justice Johnson told Hermosillo that some people were going to come into the courthouse and asked if Hermosillo would bring them to his chambers. A man and a woman subsequently entered the building from the parking garage. The woman appeared to be intoxicated. Hermosillo took them to Justice Johnson's chambers, and they remained in the building past midnight.

Justice Johnson did not deny that this incident occurred, but he denied that he was intoxicated.

Count 8I: Incident in December 2017

In approximately December 2017, custodian Gabriel Gutierrez saw Justice Johnson in the courthouse hallway around 10:00 p.m. and thought the justice was "drunk." Justice Johnson was leaning against the wall, walking slowly, and stumbling a little bit. Gutierrez asked if Justice Johnson needed assistance. Justice Johnson responded that he was "okay," smiled and burped, while putting two fingers against his lips. He also said, "Take care. Happy holidays. Have a good night."

Justice Johnson denied being intoxicated at the courthouse at any time.

Additional Evidence

The masters considered as additional evidence the testimony of custodian Pettie, who has been cleaning Justice Johnson's chambers for nine years. He has a friendly relationship with Justice Johnson. Although a somewhat reluctant witness, he testified that, between 2016 and 2018, he saw Justice Johnson intoxicated in the late evening about five times. He occasionally saw beer bottles in Justice Johnson's office trash can, "maybe like twice in three or four months." The masters also considered the testimony of custodian Hermosillo, who testified that, between 2015 and 2018, he saw Justice Johnson at the courthouse "on a regular basis" and on "multiple occasions" with "different women" late at night, usually between 10:30 p.m. and 11:00 p.m. He could not tell for certain whether Justice Johnson was actually drunk. He said Justice Johnson would often be carrying a brown paper bag that appeared to contain a "six-pack." He told his supervisor about this behavior because he did not think it was "normal," but he was told to mind his own business. Hermosillo also testified that Pettie would tell him stories about "unusual things going on pertaining to Justice Johnson's chambers."

Justice Johnson's former research attorney Wohn testified that, between 2009 and 2015, she would sometimes see beer cans or bottles in Justice Johnson's trash can when she arrived in the morning. One evening when she was working late, she saw Justice Johnson come into chambers walking very carefully and hanging onto whatever was next to him. He appeared to be trying very carefully to look like he was not intoxicated. She also testified about an incident in about 2011 or 2012 when she heard Justice Johnson enter his chambers with a woman who was apparently not his wife, and they were laughing. Wohn left very soon thereafter.

2. Justice Johnson's defenses and objections to intoxication allegations

Justice Johnson testified that he has never been under the influence of alcohol at the courthouse and that all of the witnesses who testified that he was under the influence were "testifying falsely" as the result of a stereotype of a "shiftless, drunk, lazy Black man." The masters found no evidence that the witnesses who observed Justice Johnson intoxicated at the courthouse testified falsely or were motivated by racial stereotypes. We agree that there is none.

Justice Johnson also argued that he suffers from diabetes, and that this should be a mitigating factor for him. He asserted that both high blood sugar and low blood sugar can cause problems for him, and that high blood sugar causes him to stammer and stutter and experience headaches and fatigue. His wife and two close friends (Goleh and Ralph Galloway) testified that they have seen him unbalanced and unsteady, and slurring words, due to diabetes.

Justice Johnson provided a letter from his treating physician, Dr. Bennett Sloan, stating that he has Type 2 diabetes and that hypoglycemia can occur. The masters noted that Dr. Sloan does not state that Justice Johnson suffers from hypoglycemia or its symptoms.

Justice Johnson also provided a Mayo Clinic article entitled "Hypoglycemia," which states that shakiness, fatigue, pale skin, and tingling around the mouth can be caused by blood sugar levels that are too low. The masters noted that the article states that these same symptoms can also be caused by "excessive alcohol consumption." They concluded that hypoglycemia and its symptoms can also manifest if a person with diabetes consumes alcohol. They specifically rejected Justice Johnson's arguments that his symptoms were the result of low blood sugar, stating that he never presented any evidence that he was suffering from diabetes symptoms or low blood sugar when he was observed exhibiting symptoms of intoxication at the courthouse at night.

The masters also pointed out that Justice Johnson had a habit of going to bars after work and returning to court after drinking alcoholic beverages, and that two witnesses testified about beer bottles found in his chambers trash can. Twelve witnesses testified that they observed him under the influence of alcohol to a degree that he appeared intoxicated (Benton, Pettie, Gutierrez, Hermosillo, Kent, Justice Chaney, Judge Brazile, Burnette, Schulman, Bumgarner, Wohn, and Spurley). Further, he did not explain what he was doing at court late at night when he encountered Bumgarner and Pettie. His close friend Goleh could not recall a single instance, among the hundreds of times they had been together, when he had seen Justice Johnson with diabetic symptoms in the evening. The masters concluded that, by blaming his intoxication symptoms on his diabetes, Justice Johnson "ignores the facts, manifests a lack of awareness that he has a problem with alcohol, and reflects a lack of candor on his part."

We agree with the masters and reject Justice Johnson's arguments about diabetes. We adopt the masters' factual findings.

3. Conclusions of Law

The masters concluded that Justice Johnson's conduct at the wedding (count 8B), his conduct at the CAALA reception (count 8C), and his conduct at the courthouse taken as a group (counts 8D, 8E, 8G, 8H, and 8I) demeaned the judicial office, constituted prejudicial misconduct, and violated canons 1, 2, 2A, and 4A(2). His undignified conduct, as described in counts 8B, 8D, 8E, 8H, and 8I, also violated canon 3B(4).

Regarding the wedding, the masters stated that although it was a private event, "a judge must expect to be the subject of constant public scrutiny, and is prohibited from behaving with impropriety or the appearance of impropriety in both professional and personal conduct."

Regarding the intoxication at the courthouse, the masters found that Justice Johnson "was improperly using court facilities for his personal benefit as a venue to socialize with others in a fashion that was discourteous and disres-

pectful to others at the court facility." They stated: "Engaging in irresponsible and improper behavior in the courthouse 'reflects an utter disrespect for the dignity and decorum of the court and is seriously at odds with a judge's duty to avoid conduct that tarnishes the esteem of the judicial office in the public's eye,'" citing *Censure of Judge Steiner* (2014) at page 7.

The examiner did not object to the masters' legal conclusions. Justice Johnson's objections to their legal conclusions are predicated upon his objections, discussed above. We find those objections unavailing and adopt the masters' legal conclusions.

B. Charges not proven to be misconduct

Count 8A: Intoxication at bar on Spring Street

Justice Johnson was alleged to have been intoxicated at a bar on Spring Street near the Court of Appeal building (count 8A). The masters found that not all of the allegations in this count were proven and that no canons were violated by his actions.

Neither party objected to the masters' factual findings and legal conclusions, and we adopt both. We dismiss count 8A.

Count 8F: Smelling of alcohol at courthouse at night

Justice Johnson allegedly was frequently seen returning to the courthouse at approximately 10:30 p.m. or 11:00 p.m. with a strong smell of alcohol on his breath. The masters found that this charge was not proven.

Neither side objected to the masters' factual findings or legal conclusions, and we adopt both the findings and the conclusions. We dismiss count 8F.

## COUNT NINE – Conduct while magistrate judge

It was alleged that Justice Johnson made inappropriate comments to federal court employees Isabel Martinez (count 9A) and Nicole Denow (counts 9B-9E) between 2004 and 2008, while he was a federal magistrate judge. The

masters found that the allegations in Count Nine are barred by the statute of limitations,[11] but they made the factual findings, summarized below, because they are relevant to support other allegations.

1. Findings of Fact

Count 9A: Clerk Martinez

The masters found that then-Magistrate Judge Johnson asked Isabel Martinez, another judge's courtroom clerk who had had a breast augmentation, "out of the blue" if she had had her "boobs done," and held up his hands with his fingers spread apart and asked if he could touch them. She said, "No." The comments made her feel uncomfortable and embarrassed. Martinez testified that, even before he made the comments about her breasts, she did not feel comfortable with him because he would often make inappropriate comments to her, such as asking why she did not "date Black guys."

Martinez's testimony was corroborated by Currie, who worked at the federal court at that time. Currie testified that Martinez told her about the breast incident and that Martinez thought it was "very creepy." Martinez also told Chief Magistrate Judge Patrick Walsh about the incident in 2018. Judge Walsh, who supervised Martinez for 18 years, testified that it was difficult for Martinez to talk about the incident and that he has never questioned her honesty.

Justice Johnson denied asking to touch Martinez's breasts, but admitted asking if she had a breast augmentation. He said he commented on her breasts because he was under the mistaken impression that she had asked his opinion about them. The masters did not find this explanation to be credible.

Neither party objected to these factual findings, other than on statute of limitations grounds, and we adopt them.

[11] The commission can censure or remove a judge for conduct occurring within six years of the start of the judge's current term. (Cal. Const., art. IV, § 18, subd. (d).) Justice Johnson's current term began in January 2015. Conduct that occurred before January 2009 is, therefore, barred by the statute of limitations.

Count 9B-9E: Denow

The masters found that, from August 2006 to May 2008, then-Magistrate Judge Johnson made various comments to his law clerk, Nicole Denow, that she found offensive and that made her uncomfortable. These comments included remarks about her physical appearance, questions about an extern's boyfriend, negative comments about his wife, and remarks about other women's "boob jobs." The remarks were offensive to her at the time. He once asked her whether it was her "time of the month," which she found uncomfortable, demeaning, and sexist. Once, after Denow went to a farmer's market with another law clerk, then-Magistrate Judge Johnson made a "face of disgust" and said, "I just pictured you having sex with [the law clerk]."

The masters found that Denow was a very honest person and the remarks were consistent with some of Justice Johnson's conduct toward other women. The masters also found that Justice Johnson's denials about making negative comments about his wife, the "sex with [the law clerk] remark," and the "time of the month" remark reflected his "attempts to misrepresent the true facts and the context of the remarks."

Justice Johnson admitted some, but not all, of the remarks.

Neither party objected to these factual findings, other than on statute of limitations grounds, and we adopt them.

2. Conclusions of Law

We agree with the masters that the allegations are barred by the statute of limitations, and, therefore, reach no conclusion as to the level of misconduct and do not consider these allegations when determining discipline. We do, however, consider the conduct to the extent that it supports factual findings in other charges and as evidence of Justice Johnson's honesty, or lack thereof, during these proceedings.

**COUNT TEN—Comments about Justices Chaney and Rothschild**

Justice Johnson allegedly referred to Justices Chaney and Rothschild as "nasty ass bitches" when speaking to certain CHP officers.

1. Findings of Fact

The masters found that, between September 2015 and October 2016, during a conversation with CHP Officer Barnachia, who was driving him in an official capacity, Justice Johnson referred to Justices Chaney and Rothschild as "nasty ass bitches." They found it corroborating that Officer Barnachia sent Officer Sauquillo a text in October 2016 stating that Justice Johnson would "talk shit" about Justices Chaney and Rothschild, and called them "nasty ass bitches." Officer Sauquillo replied to Officer Barnachia with a text that Justice Johnson called them that to her as well. The masters also found Officer Sauquillo's testimony that Justice Johnson referred to Justices Chaney and Rothschild in the same way to be credible. They further found that such a remark is consistent with Justice Johnson's admission that he used profanity in the workplace in another context, such as giving his externs T-shirts with the initials "BAMF" on them, which he said stands for "bad ass motherfucker."

Justice Johnson testified that he did not recall using the phrase "nasty ass bitches" and that it is not a phrase he uses, but he was "not going to call [Officer] Barnachia a liar." He also testified that the phrase is a "sideways" compliment for a tough or strong-willed woman who is hard to get along with. He said that, if he used it, he is sorry, but he does not believe it violates the canons because it was a private comment that had no improper purpose, and he did not expect the comment would be made public.

Neither party objected to these factual findings, and we adopt them.

2. Conclusions of Law

The masters concluded that the conduct violated canons 1, 2, 2A, and 3B(4), and stated that, "Making personal remarks using profanity about a fellow judicial officer to a subordinate state employee places the judiciary in a negative

light and undermines respect for the judiciary." Nevertheless, they found that the conduct was improper action because they did not think an objective observer would conclude that a few comments made in private to security officers about judicial colleagues would erode public esteem for the judiciary or bring the judicial office into disrepute.

Justice Johnson objected to the legal conclusion that the remark was improper action on the ground that a private comment to another person "in a casual setting where profanity is often used" is not a violation of the canons. He argued that there is no claim that he was actually demeaning another person when he used profanity to underscore a comment about a "strong willed woman." We disagree and find, based in part on the corroborating texts between Officer Barnachia and Officer Sauquillo, that the comment was pejorative and disparaging about his fellow justices, and that it violated the canons.

The examiner objected to the masters' legal conclusion that the remark was improper action, and not prejudicial misconduct, on the ground that the test for prejudicial misconduct is not whether the remarks were made in private, but whether they would, if known to an objective observer, appear to be prejudicial to public esteem for the judicial office, citing *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275. The examiner also cites *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 377 for the proposition that, regardless of the speaker's intent, derogatory remarks may become public knowledge and thereby diminish the hearer's esteem for the judiciary, and the "reputation in the community of an individual judge necessarily reflects on that community's regard for the judicial system." The examiner argued that the justice's use of the phrase should be grouped in with comments to Wohn, Currie, and Justice Grimes for a finding of prejudicial misconduct.

We agree with the examiner that disparaging one's colleagues on the bench to individuals who also work for those colleagues (providing judicial security), and using profanity to do so, would, to an objective observer, be

prejudicial to public respect for the judiciary. The masters agree that the remarks undermine respect for the judiciary. And the remarks have, in fact, become public. We conclude that this conduct constitutes prejudicial misconduct.

**Rebuttal and Sur-rebuttal Testimony**

The examiner called 11 rebuttal witnesses. Justice Johnson called one witness, and testified himself, in sur-rebuttal. Justice Johnson objected to all but three of the rebuttal witnesses. The masters overruled his objections. In their report, the masters stated that their conclusions would have been the same had the rebuttal witnesses not testified, and they only reference the witnesses' testimony to emphasize prior conduct similar to conduct charged in the notice. The masters declined to provide detailed accounts of these witnesses' testimony.

In his post-masters' report briefing, Justice Johnson argued that the testimony of the rebuttal witnesses was improperly admitted and was a "shocking breach of due process and equal protection under the law." We disagree and find that the masters' exercise of their discretion in allowing the testimony was not improper. We refer to this testimony only to the extent that it supports the masters' findings regarding conduct charged in the notice.

## IV. DISCIPLINE

In determining the appropriate level of discipline, we consider that our mandate is not to punish, but rather is to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and impartiality of the judiciary. (See *Broadman, supra,* 18 Cal.4th at pp. 1111-1112.)

The commission has identified several factors it considers in determining the appropriate sanction, including the number of acts and the seriousness of the misconduct, the judge's honesty and integrity, whether the judge appreciates the impropriety of the conduct, the likelihood of future misconduct, the impact of the misconduct on the judicial system, and the existence of prior discipline. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 50.)

The commission may also consider the effect of the misconduct on others and whether the judge has cooperated fully and honestly in the commission proceeding. (Policy Declarations of Com. on Jud. Performance, policies 7.1(1)(f) and 7.1(2)(b).)

The commission also considers any mitigating factors that a judge may advance. (*Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 295.)

**A. Number of Acts and Seriousness of Misconduct**

The number of acts of misconduct is relevant to determining appropriate discipline to the extent that it shows whether the conduct consisted of isolated incidents or a pattern that demonstrates a lack of judicial temperament. (See *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918.)

Justice Johnson committed 18 acts of prejudicial misconduct (based on 42 separate instances of proven misconduct). This is a substantial amount of misconduct, and some of it is quite egregious. The masters found the "particularly flagrant" nature of some of the misconduct and the "large number of victims" to be factors in aggravation. Eleven women were victims of Justice Johnson's sexual misconduct (Justice Chaney, Officer Sauquillo, court staff attorneys Butterick, Blatchford, and Wohn; judicial assistants Velez and Currie; and private attorneys Palmer, Schulman, Kent, and Burnette). Seven women were victims of conduct that would reasonably be perceived as sexual harassment in their workplace (Justice Chaney, Officer Sauquillo, Butterick, Blatchford, Velez, Currie and Wohn). Justice Johnson also touched four women's bodies without their consent. He touched Justice Chaney's breasts and patted her buttocks on a number of occasions; he stroked Butterick's arm twice; he grabbed Schulman repeatedly around the waist and at her wrist, and kissed her; and he ran his hand up Kent's thigh. The incidents involving Justice Chaney and Butterick occurred at the courthouse, during business hours. The incidents

involving Schulman and Kent occurred at law-related functions. Unwanted touching is especially serious misconduct.

Justice Johnson also engaged in patterns of making comments to women that were unseemly and particularly inappropriate coming from an appellate justice. Seven women testified that his behavior toward them at court made them uncomfortable (Justice Chaney, Officer Sauquillo, Butterick, Blatchford, Velez, Wohn, and Currie).

Four additional women, who encountered Justice Johnson at professional functions and were aware of his judicial position, testified that his inappropriate behavior toward them shocked them or made them uncomfortable (Palmer, Schulman, Kent, and Burnette).

Justice Johnson also displayed inappropriate demeanor toward three attorneys with whom he worked and his peer on the bench, Justice Chaney.

Justice Johnson further displayed undignified behavior by becoming intoxicated on multiple occasions, and, as the masters stated, he had a pattern of acting "highly inappropriately with female attorneys when he is intoxicated."

Justice Johnson's patterns of improper conduct demonstrate that he lacks the temperament and judgment required for his position.

Justice Johnson argued that he should not be removed for prejudicial misconduct alone because judges have only been removed in matters that include willful misconduct. Justice Johnson appears to believe that prejudicial misconduct is, by definition, less serious than willful misconduct. As noted above, the Supreme Court has defined prejudicial misconduct as "willful misconduct out of office," with the same characteristics as willful misconduct (i.e., unjudicial conduct committed in bad faith), but which takes place when the judge is not acting in a judicial capacity. (*Broadman, supra,* 18 Cal.4th at pp. 1092-1093.) The California Constitution (art. VI, § 18, subd. (d)(2)) states that the commission may remove a judge for prejudicial misconduct. (See, e.g., *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191

[prejudicial conduct may "by itself, justify removal"]; *Saucedo, supra,* 62 Cal.4th CJP Supp. at p. 46 ["judge may be removed for prejudicial misconduct"]; *Van Voorhis, supra,* 48 Cal.4th CJP Supp. at p. 314 [judge can be removed for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute"].) A judge can even be removed for only one act of prejudicial misconduct. (*Inquiry Concerning Willoughby* (2000) 48 Cal.4th CJP Supp. 145, 165 ["The commission's reluctance to remove Judge Willoughby from office should not be construed to suggest that the commission will not in the future remove a judge from office, even for a single act of prejudicial conduct, where warranted"].) And, last year, the commission imposed a censure and bar—the maximum penalty available for former judges—based solely on prejudicial misconduct. (*Inquiry Concerning Bailey* (2019) 6 Cal.5th CJP Supp. 24.)

The number and nature of the 18 acts of prejudicial misconduct, and the several acts of unwanted physical touching in particular, support our determination that removal is the appropriate sanction.

**B. <u>Honesty and Integrity</u>**

The commission has stated that foremost in its consideration of factors relevant to discipline is honesty and integrity. (*Saucedo, supra*, 62 Cal.4th CJP Supp. at p. 50.) Honesty is a minimum qualification expected of every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865.) A judge's dishonesty has often been a factor when removing judges from the bench. (See, e.g., *Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146; *Inquiry Concerning MacEachern* (2008) 49 Cal.4th CJP Supp. 289, 309; *Ross, supra,* 49 Cal.4th CJP Supp. at pp. 87, 141-143; *Inquiry Concerning Spitzer* (2007) 49 Cal.4th CJP Supp. 254, 286; *Saucedo*, *supra,* 62 Cal.4th CJP Supp. at p. 52.) "If the essential quality of veracity is lacking, other positive qualities of the person cannot redeem or compensate for the missing fundamental." (*Ross, supra,* 49 Cal.4th CJP Supp. at p. 90.) "The public will not, and should not, respect a judicial officer who has been shown to have repeatedly lied for his own

benefit." (*Inquiry Concerning Murphy* (2001) 48 Cal.4th CJP Supp. 179, 202.) "A judge who does not honor the oath to tell the truth cannot be entrusted with judging the credibility of others." (*MacEachern, supra,* 49 Cal.4th CJP Supp. at p. 309.)

The masters found, as the first aggravating factor, that "Justice Johnson was not truthful in several aspects of his testimony and made affirmative misrepresentations about his behavior and the conduct of others." They specifically pointed out his lack of honesty in connection with five of the ten counts (Counts One, Five, Seven, Eight, Nine),[12] including the following:

- He was "not always truthful" in his testimony about Justice Chaney.
- His "lack of candor" was illustrated by his denial of his telephone call with Justice Chaney.
- His denials that he entered Justice Chaney's hotel room the first night of the Reno trip were "untrue," reflects his "intentional misrepresentations," and were "untruthful."
- His denials that he asked Justice Chaney to have an affair reflect "his failure to tell the truth" and were not credible.
- His testimony about his conversation with judicial assistant Velez, in which he denied making a comment about never leaving her bed, was "not credible" and reflects his "intentional fabrication of the relevant facts."
- His denials that he told attorney Palmer that he knows Los Angeles County DA Jackie Lacey and walks his dogs with her, and that he said

[12] The judge's testimony regarding the allegations in Count Nine, which are barred by the statute of limitation for purposes of evaluating the level of discipline, can be considered for purposes of evaluating his truthfulness during the proceeding. (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)((b).)

or implied he could help Palmer get a job with the DA's office, were "not credible."

- His denials of certain comments he made to former federal law clerk Denow about his wife, visualizing Denow having sex with another law clerk, and Denow's time of the month reflect "attempts to misrepresent the true facts and the context of the remarks."
- His claim that he does not use sexually inappropriate language was found "not credible" by the masters.
- His argument that his intoxication symptoms should be blamed on his diabetes "reflects a lack of candor on his part."

The Supreme Court has said there are few actions that "provide greater justification for removal from office than . . . deliberately providing false information to the Commission in the course of its investigation." (*Saucedo, supra,* 62 Cal.4th CJP Supp. at p. 50). The commission takes "particularly seriously a judge's willingness to lie under oath to the three special masters appointed by the Supreme Court to make factual findings critical to [its] decision." (*Saucedo, supra*, 62 Cal.4th CJP Supp. at p. 51.) "Lack of candor toward the commission is uniquely and exceptionally egregious." (*Ross, supra*, Cal.4th CJP Supp. at p. 90.)

We find that Justice Johnson's intentional fabrication and misrepresentation of facts during the evidentiary hearing, while he was under oath, is exceptionally egregious and demonstrates that he lacks the essential qualities of honesty and integrity that are required of a judge.

### C. Appreciation of the Misconduct and Likelihood of Future Misconduct

"A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248.) "Implicit in the lack of reform is the risk of yet further violations in the future." (*Ross*, *supra*, 49 Cal.4th CJP Supp. at p. 143.)

"It is very difficult for a judge to avoid repeating an ethical violation unless he or she recognizes the act as misconduct." (*Van Voorhis, supra,* 48 Cal.4th CJP Supp. at p. 308.)

- Justice Johnson denied the following allegations, which the masters found were proven by clear and convincing evidence:
- Justice Chaney's testimony that he became intoxicated in Reno and entered her hotel room uninvited, solicited an affair with her, offered to "squeeze [her] titties" to make her "feel better," touched her breasts and made "mmm-mmm" sounds when he hugged her, patted her on the buttocks, made comments while staring at her chest, and squeezed her and said, "It can't be sexual harassment because we are both on the same level." He said the "titties" comment was an "absolute fabrication" and Justice Chaney was "using stereotypes to blame" him, and that the allegations about touching her breasts and making sounds were "lies" and "racial stereotyping."
- Butterick's testimony that he stroked her arm between her elbow and shoulder.
- Velez's testimony that he said if he were married to her, he would "never leave her bed," and that he would blow her kisses and call her his "favorite."
- Palmer's testimony that he made negative remarks about his wife, sent Palmer sexually suggestive texts, and told her that he was friends with DA Lacey.
- Schulman's testimony that he grabbed her stomach and wrist, kissed her, said the attorney with whom she was leaving an event was going to rape her, and tried to get her to sit next to him on a couch at a law function by telling her he could refer a case to her.

- Kent's testimony that he put his hand on her thigh under the table during a dinner, which he called "pure fabrication."
- Burnette's testimony about his repugnant comments about the viola, which he said was false and "malicious," and based on stereotypes of a Black man.
- All seven instances of being intoxicated, claiming that every witness who testified about seeing him intoxicated at the courthouse was testifying "falsely" as a result of a racial stereotype.

The masters found it to be an additional aggravating factor that "Justice Johnson showed only limited insight into his misconduct as evidenced by his focus on blaming others for the more serious incidents." They specifically rejected his assertion that he has accepted responsibility for his conduct and stated that, with respect to his most serious misconduct, "there is no evidence he has accepted responsibility for this behavior." To the contrary, he has "attempted to shift the blame to the victims, suggesting they were lying, improperly influenced by third parties, or advancing racial stereotypes."

Justice Johnson has, in fact, gone beyond "suggesting" certain victims were lying and has outright accused them of doing so. He accused Justice Chaney of "telling lies" for "the entire nine-year period" that they were colleagues on the bench, Velez of telling a "false lie" about what he said to her, Kent of "lying" about him touching her thigh, and Burnette of making claims that were "false" and "malicious." He accused Justice Chaney, Officer Sauquillo, and Burnette of racism, asserting that they were "invoking images" of him that were "racist and stereotypical because they thought it would make their story more believable." He also claimed the witnesses who observed him to be intoxicated at the courthouse were resorting to racist stereotypes of him "being a shiftless, drunk, lazy [B]lack man."

The masters found that the claims of stereotyping and racism were not supported by the evidence. We agree that there is no evidence to support

Justice Johnson's claims of stereotyping or racism. In *Spitzer, supra,* 49 Cal.4th CJP Supp. at page 287, the commission stated that it was "troubled" by the judge's willingness to impugn the credibility of witnesses, and noted that the judge's lack of candor was "fundamentally at odds with the role of a judge who is sworn to uphold the law."

We, too, are troubled by Justice Johnson's assertions that certain witnesses, whom the masters found credible, were lying or invoking racist stereotypes. These unfounded accusations compound the injury these witnesses have suffered as a result of Justice Johnson's actions.

As to the limited conduct Justice Johnson does admit (primarily the comments to Officer Sauquillo about her appearance, and various comments to Blatchford, Velez, Currie, and Wohn), the masters state that, while they believe he has gained insight and now understands that he overstepped boundaries, he continues to attempt to justify his behavior by arguing that he did not intend to offend, that he was "curious," that he was attempting to create a positive relationship with others, and that he thought the woman was "more sophisticated and would understand." To the extent that Justice Johnson admitted some of the less serious misconduct, he has, for the most part, either minimized it or argued that it does not violate the canons, as exemplified by the following:

- He characterized the masters' finding that he stroked Butterick's arm twice as a "contested view of [a] handshake or touching forearm in greeting."
- He said his overly personal questions to Blatchford, jokes, and references to sex ("pedestrian sex," "arousal," "Well, I guess you went back then") are "not significant misconduct at all."
- He asserted that blowing kisses, and saying, "You're my favorite" and "I love you," to Velez are comments "praising work performance."
- He argued that the phrase "nasty ass bitches" is "complimentary" and did not violate the canons.

Justice Johnson contended that it is mitigating that much of his proven past conduct was "within the bounds of tolerated or acceptable conduct in the not-so-distant past." The masters found that this contention is unsupported as it concerns judicial officers. They stated:

> It has long been the rule that in all aspects of a judge's life, "a judge must be acutely and constantly aware that everything he or she does or says must be managed through the filter of identity with this high office," and with the awareness a judge is a "public figure who is seen as a symbol of justice." (Rothman [et al., Cal. Judicial Conduct Handbook (4th ed. 2017)] § 1:31 at 21-22.)
>
> Many of the misconduct incidents at issue in these proceedings were clearly wrong today and were clearly wrong from the time he was appointed in 2009. This is true even with respect to his inappropriate compliments and personal questions to female court staff. For well over 10 years, judicial officers have been required to attend mandatory ethics courses where they have been cautioned to avoid engaging in overly familiar conduct with staff and commenting on their appearance. (See Rothman, *supra*, § 2:11 at 74-75.)

At Justice Johnson's appearance before the commission, he stated that classes on gender in the workplace that he has taken since the investigation began have made him "more aware of the changing mores in our society and the rights of women in the workplace." While it is true that social mores have evolved, it has never been acceptable for a judge to engage in unwelcome physical contact with women, or to engage in conduct that would reasonably be perceived as sexual harassment, especially at court. Since 2009, when Justice Johnson was appointed to the Court of Appeal, the Code of Judicial Ethics has required judges to be patient, dignified, and courteous to those with whom they deal in an official capacity; to avoid impropriety and the appearance of impropriety; to refrain from conduct that would reasonably be perceived to be sexual

harassment; and to not demean the judicial office. Since 1999, when the second edition of the California Judicial Conduct Handbook was published, judges have been warned to avoid sexual harassment: "Judges, as administrators of the judicial system, have an obligation to know what constitutes sexual harassment in the work place, and to not only avoid it themselves, but to deal with it in their supervisorial capacity over staff." (Rothman, Cal. Judicial Conduct Handbook (2d ed. 1999) § 6.29, pp. 174-175). Moreover, judges, including Justice Johnson, have been receiving training in avoiding sexual harassment for years.

It is implausible that Justice Johnson did not know the appropriate standards of behavior for a person in his position. Indeed, this is evidenced by his proven comments to Justice Chaney: "It can't be sexual harassment because we're both on the same level" and, "You would never report me [for sexual harassment], would you?" Justice Johnson disregarded those standards for years, creating discomfort for multiple women. And being intoxicated at the courthouse late at night in the presence of those working there has never been proper. We are not persuaded by the argument that much of his proven conduct was within the bounds of acceptable conduct in the "not-so-distant" past.

Justice Johnson also argued that he had no notice that his conduct was improper, and stated, in his post-masters' report briefing that, "While a judicial officer, [he] was never afforded the opportunity to demonstrate his ability to reform in the face of discipline or allegations." The masters rejected this claim, and so do we.

First, the masters stated that he "was, or should have been, aware his misconduct violated the judicial canons" because "some of his conduct was so flagrant that a warning was unnecessary," and "[h]is conduct in becoming highly intoxicated and then engaging in grossly inappropriate behavior with female attorneys did not require advance notice [that] the conduct violated judicial canons of ethics."

Second, he "was on notice that he needed to change his behavior," at least with respect to his alcohol intoxication at the courthouse and his conduct toward women. In late 1994, then-AUSA Richard Drooyan warned then-AUSA Johnson about comments Johnson had made to a young female AUSA about her looks and her dress on several occasions, and told Johnson that he could not do that in a professional setting in an office. Further, Eric George, an attorney whom the masters found "highly reliable on this topic," testified that in approximately late 2009, he learned that the Daily Journal was planning to publish a story about Justice Johnson being ejected from a bar after grabbing the posterior of a waitress while intoxicated. George told Justice Johnson that he had to be careful about being in a situation where he "could be compromised by having these sorts of things said about him." And Justice Johnson admitted that former Justice Joan Dempsey Klein told him in 2014 that there were rumors about him bringing women back to the courthouse, which, if true, would put him in "deep trouble." The masters found that the evidence establishes that some of the rumors were true (i.e., that he was highly intoxicated at the courthouse and brought women guests who were intoxicated into the building).

The evidence establishes that Justice Johnson was on notice about the impropriety of his behavior, yet continued to engage in such behavior for years. Even without the warnings, he should have known his behavior was improper.

Justice Johnson also seems to fault some of the women for not reporting him sooner, arguing that he was denied the opportunity to effect change and modify his behavior. This reflects a lack of awareness that most of the women involved, especially at court, were in a subordinate position to him and did not want to risk potential retaliation if they reported his misconduct. Even some of the women outside of court were reluctant to report his behavior due to possible adverse consequences to their careers. Burnette experienced such a consequence when, after she reported his conduct to her law firm, she was not asked to represent her firm on the ABTL board. Palmer testified that she did not

initially report Justice Johnson because she was concerned that he would badmouth her, and she did not want to put herself in a position where a justice did not like her. Schulman testified that she did not initially report Justice Johnson because she was concerned about retaliation and the consequences of reporting a judicial officer. These concerns are understandable, and the failure to immediately report the misconduct does not mean that it did not happen.

At his appearance before the commission, Justice Johnson asserted that he has undergone therapy and taken various classes, that he has stopped drinking alcohol, and that he has learned to be more cognizant of how his behavior affects others. But he only undertook education and abstinence since the inception of this proceeding. What he did not say at his appearance is that he admits the most serious sexual misconduct. This fact strongly supports our determination that he lacks the capacity to reform.

Justice Johnson further argued that his "excellent" and "exemplary" conduct over the last two years is "the only evidence/predictor" of his "future self-discipline and sensitivity" that the masters had before them. This argument lacks merit because Justice Johnson has been away from the court and its female employees, other than for oral argument, since July 2018, and there is no evidence in the record of his conduct toward women during the past two years.

We find that the extent of Justice Johnson's lack of recognition of his misconduct creates a significant risk that he will reoffend.

**D. <u>Impact on Judicial System and Others</u>**

"In determining the appropriate level of discipline, the impact of the misconduct on the integrity of and respect for the judiciary must be considered." (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 12:91 at p. 849, citing *Inquiry Concerning Hyde* (2003) 48 Cal.4th CJP Supp. 329, 370.) The nature and extent to which the misconduct has been injurious to others is also relevant in this matter. (Policy Declarations of Com. on Jud. Performance, policy 7.1(1)(f).)

In his post-masters' report briefing, Justice Johnson asserted that, "No person was harmed in their position or treated unfairly by Justice Johnson." This statement reflects a remarkable lack of recognition of the impact of his behavior on others. Although none of Justice Johnson's prejudicial misconduct occurred while he was on the bench, certain instances occurred in the courthouse during court hours, and other instances occurred while he was holding himself out as an appellate justice at professional functions. Further, much of Justice Johnson's misconduct affected the working lives of women at the court, as exemplified by the following:

- Justice Chaney testified that his conduct toward her made her uncomfortable, and she was, and is, afraid of him. Some of his sexual harassment of her made her feel "shocked" and "upset," and she discussed his behavior toward her with others working at the court.
- Butterick, a court research attorney, testified that her interactions with Justice Johnson made her uncomfortable, she told her colleagues she would not take a particular office that was close to Justice Johnson's chambers, and she avoided the South Tower because she did not want to encounter Justice Johnson there.
- Blatchford, a court research attorney, said Justice Johnson's questions about her tattoos and her boyfriend made her "a little uncomfortable," his comments about "pedestrian sex" and "arousal" made her "uncomfortable," and his comment about "not going back" made her "really uncomfortable." She said his references to personal topics caused her to be "on guard."
- Velez, Justice Chaney's judicial assistant, testified that Justice Johnson's remark about never leaving her bed had a "big impact" on her and made her "very uncomfortable." She also said she felt "panicked" when he called her and asked her to come to his chambers, which caused her to leave work early. She felt "embarrassed and

horrified" by his discussing her personal life with other justices. She would attempt to avoid interactions with him, pretending to be on a call, ducking behind her monitor, or leaving the courthouse.

- Wohn, his former research attorney, said that Justice Johnson's comments about her appearance and smell, and that he would have been in love with her in high school, made her feel uncomfortable. She was so uncomfortable about him looking at her that she brought in large flower arrangements to obscure his view of her at her desk.
- Currie, his judicial assistant, testified that Justice Johnson's comments about her appearance and smell made her uncomfortable and embarrassed her.
- Officer Sauquillo said Justice Johnson's comments about her appearance when she was at court made her uncomfortable.

Justice Johnson's conduct also had an adverse impact on female attorneys who did not work at the court, but who encountered him at various law-related functions that he attended by virtue of his position as an appellate justice. For example:

- Palmer said Justice Johnson's comments during her visit to the courthouse made her uncomfortable, and his subsequent sexually suggestive texts made her "feel gross."
- Schulman was "shocked" and "very upset" by his grabbing of her stomach and wrist, kissing her, and commenting that she was going to be raped.
- Kent felt uncomfortable when he paid too much attention to her and was "shocked" and "very upset" when he ran his hand up her thigh under the table.

- Burnette was “quite upset” and “creeped out” by Justice Johnson’s vulgar comments related to her playing the viola, and left the event immediately after he made them.

Justice Johnson’s displays of anger toward those with whom he worked also had an adverse impact on them. For example:

- Justice Chaney felt “shocked” and “frightened” by his angry outburst toward her.
- Currie would go to the restroom and cry after Justice Johnson became angry with her.
- Alexander testified that Justice Johnson’s yelling and calling him “stupid” felt humiliating.

Justice Johnson’s appearances at the courthouse late at night when he was intoxicated, and often in the company of others, affected the custodians who were working there. For example:

- Custodian Hermosillo testified that he told his supervisor about Justice Johnson’s behavior involving women at the courthouse late at night because he did not think such behavior was “normal,” and his supervisor told him to mind his own business.
- Custodian Benton testified that, when she observed him intoxicated out on the street at around 1:00 a.m. one night, she was so concerned about his safety that she called her supervisor, who told her Justice Johnson could handle himself.
- Custodian Gutierrez once encountered Justice Johnson walking slowly and stumbling in the courthouse hallway around 10:00 p.m. and believed he was drunk, so he asked Justice Johnson if he needed assistance.

We consider the adverse effects of Justice Johnson’s misconduct on the individuals who were subjected to his actions, and the negative impact of his

misconduct on public perception of the judiciary, to be a substantial aggravating factor.

**E. Prior Discipline**

Justice Johnson has no prior discipline. The masters found that, while mitigating, this is of "limited weight" given their serious reservations about his ability to reform. Mitigating circumstances have only limited appeal because the aim of commission proceedings in the more serious cases is protection of the public and not punishment. (Rothman, *supra*, § 12:92, p. 856-857.) The commission has removed other judges from the bench who had no prior misconduct, particularly where dishonesty was involved (e.g., *MacEachern, supra,* 49 Cal.4th CJP Supp. at p. 311; *Saucedo*, *supra,* 62 Cal.4th CJP Supp. at p. 53.)

With 18 findings of prejudicial misconduct, some of which would reasonably be perceived as sexual harassment and involves unwelcome touching, and others of which involve misuse of the prestige of office in an effort to cultivate personal relationships with young women, and still others involve intoxication at the courthouse, this matter falls within the "more serious cases" category, and Justice Johnson's lack of prior discipline is of little weight in mitigation.

**F. Contributions to Others**

There is substantial evidence about Justice Johnson's contributions to the judiciary and to his community. The masters found Justice Johnson's community service to be mitigating, as follows. He has had a positive impact on many lives and devoted time and effort to giving back to the community. His community service includes teaching, tutoring, assisting students in an underserved elementary school, and helping establish a toy drive for underprivileged children. He has taught at local law schools and served as an important mentor to young men and women, many of whom attribute their success in the legal field and their personal lives to Justice Johnson's encouragement and guidance. He assisted others in difficult times. Justice Johnson has also performed important work for,

and made exemplary contributions to, the judicial branch as a member of the Court Facilities Advisory Committee and as chair of the Courthouse Cost Reduction subcommittee, for which he received a Judicial Council award in 2017.

In his post-masters' report briefing, Justice Johnson claimed that his work is "exceptional" and that he was lauded by Justice Rothschild and "all staff attorneys" for his intellect and ability to keenly examine legal issues, without anyone noting any issue that affected his work performance. This claim is undercut by the testimony of Justice Rothschild and Justice Lui.

Justice Rothschild, Justice Johnson's presiding justice since 2014, testified that, while she respected his intellect, she did not respect his work ethic or his work product. She also testified that she counseled Justice Johnson about his demeanor, and that she observed him being angry toward individuals and too aggressive toward attorneys. Justice Rothschild also testified that Justice Lui spoke with Justice Johnson about his demeanor. Justice Rothschild further testified that Justice Johnson's frequent absences from the courthouse and unavailability during work hours made it more difficult to get the division's work done.

Justice Lui, the administrative presiding justice, testified that Justice Johnson had an inappropriate demeanor in court and raised his voice in an angry manner at Justice Rothschild during a case conference.

Justice Johnson also claimed that colleagues testified enthusiastically about his work ethic and intensive preparation for difficult hearings. But that testimony pertains solely to his work on the Court Facilities Advisory Committee, not his work on the bench.

It is undisputed that Justice Johnson has made significant contributions to the judiciary as well as to his community. But even a good reputation for legal knowledge and administrative skills does not mitigate prejudicial misconduct. (*Kloepfer, supra,* 49 Cal.3d at p. 865.)

### G. "Social Contagion"

Justice Johnson argued, as another mitigating factor, that he is the victim of "social contagion," whereby witnesses' testimony was tainted because they talked to each other about him. According to Justice Johnson, the following occurred: "Rumors and unsubstantiated gossip" about him began to circulate at the Court of Appeal at least as early as 2016, which included the "exchange and propagation of recalled experiences among persons who would later become complaining witnesses." In the fall of 2017, a staff attorney at the appellate court, Merete Rietveld, began collecting stories about his rumored conduct and, in 2018, initiated circulation of a petition urging sexual harassment training at the court. It went to over 100 people in the judiciary. Rietveld also urged Administrative Presiding Justice Lui to conduct an investigation of allegations about Justice Johnson. Justice Lui initiated a workplace investigation that was conducted by outside counsel.

Around the same time, on July 2, 2018, Justice Lui asked Officer Barnachia whether he was aware of any inappropriate behavior by Justice Johnson toward a female CHP officer. Officer Barnachia mentioned Officer Sauquillo. Justice Lui interviewed Officer Sauquillo, who reported that Justice Johnson had propositioned her, using crude, graphic sexual language. Justice Lui prepared an email about her allegations that he sent to "hundreds and likely thousands" of court personnel throughout the state.[13] Justice Lui sent a subsequent email asking recipients to disregard and not redistribute his earlier

[13] Justice Lui testified that he intended to send a cc of the email to Kathleen Ewins, counsel for the court, but, by mistake, the recipient line autofilled "EXEC-appellate and Supreme Court Staff," which is the group for all appellate court justices and staff, and he did not notice the error. (He apparently typed "Ex" rather than "Ew.") Officer Sauquillo was later discovered to have made similar allegations against a former CHP supervisor, using the same crude language she attributed to Justice Johnson. As discussed above, the masters ultimately found her claim against Justice Johnson to be not credible.

email. The Daily Journal printed an account of Officer Sauquillo's allegations the next day. Justice Johnson asserts that the story "spread like wildfire" and influenced witnesses' thoughts about him.

After the Daily Journal article appeared, attorney Lisa Miller contacted various witnesses whom she knew had had encounters with Justice Johnson and sent an anonymous letter to the commission describing people who had information about Justice Johnson. Justice Johnson asserts that Miller has animosity toward him because he reported her to her boss after she sexually propositioned him, and she was let go by her law firm as a result. He says that a number of witnesses talked among themselves before they were interviewed by commission staff. Justice Johnson argued that there was the "contagion effect" of publicity and gossip that adversely affected witnesses' attitudes and recollections over time.

But Justice Johnson offers no proof that any witness fabricated a story about him based on conversations with other people. The masters concluded that, while there was evidence that Miller had been terminated after Justice Johnson's complaint to the partners in her law firm that she had contacted him about personal matters, the women identified by Miller told the truth and were not improperly influenced by her.

Justice Johnson also points to "admissions about Justice Chaney's private discussions with her staff before they went in for interviews." But this reference pertains to Velez's testimony that Justice Chaney briefly told her "a few things" about Justice Chaney's experience with Justice Johnson before Velez's interview with commission staff, but *after* Velez's interview with the attorney retained to conduct the court's investigation. Velez had, therefore, already been interviewed about her own experiences with Justice Johnson. Justice Johnson also points out that the masters found that Butterick embellished her description of his stroking of her arm while she was testifying, which he attributes to her having talked to other people. But there is no evidence this occurred as a result of her

talking to people, and the masters rejected her embellished description because it was inconsistent with her prior descriptions to friends and commission staff.

Justice Johnson argued that the "toxic nature of the allegations and virulent social metastatic oozing of the leaked email, gossip, Me Too's impact on social and political burdens of proof and objectivity, media propagation of salacious claims, coupled with confirmation bias—rendered fair and objective decision-making more difficult and more politically risky." The masters found that the evidence did not support Justice Johnson's "social contagion" argument.

We agree. Not only is there no evidence to support this highly speculative theory, but there is clear and convincing evidence to support the masters' factual findings, many of which are undergirded by contemporaneous corroborating evidence that preceded any discussions witnesses may have had with one another.

Furthermore, the masters were apparently not swayed against Justice Johnson by any outside factors when they determined to discredit Officer Sauquillo's allegations about Justice Johnson propositioning her for sex in graphic, vulgar language. This was a significant charge in this matter, and their decision to reject it, and some of Justice Chaney's allegations, demonstrates their neutrality. We acknowledge that Officer Sauquillo's allegations were widely disseminated via Justice Lui's email and were publicized in the media, but this does not support Justice Johnson's claim that the victims of his more serious sexual misconduct, or the custodians who observed him intoxicated at the courthouse late at night, fabricated their testimony.

Justice Johnson also argued that the witnesses benefitted from making claims against him, asserting: "Once the word is out that the administration, back channel conversations, colleagues and coworkers are promoting a negative view of a judicial officer, the benefits to career and social approval become irresistible. . . . Simply stated: *when your boss asks you to join the team, you join the team*." (Italics in original.) There is no support for this assertion.

First, there is no evidence that anyone's "boss" asked anyone to do anything, especially with respect to an investigation of Justice Johnson.

Second, a number of witnesses do not work for the court and stand to gain nothing from their testimony (e.g., Burnette, Kent, Schulman, and Palmer). Indeed, it is difficult to understand how testifying publicly about being the victim of sexual misconduct could result in any career benefit.

Third, some witnesses were reluctant and required subpoenas before they would testify (e.g., Butterick, Lin, Kent, Pettie, Denow, and Melissa Miller [rebuttal witness whose testimony was not used for findings]).

We reject Justice Johnson's argument that "social contagion" is a mitigating factor.

**H. <u>Comparable Discipline</u>**

Justice Johnson claimed that he does not fall within the realm of other removal decisions by the commission because his conduct does not include the certain "disqualifying characteristics" or "critical elements generally common to those decisions."

First, he argued that there is no willful misconduct. As previously discussed, willful conduct is not required for removal.

Second, he has no "prior discipline which was not heeded." Of the 12 judges removed by the commission, five (or nearly half) had no prior discipline (Judges Couwenberg, Spitzer, MacEachern, Saucedo, and Laettner). The existence of prior discipline is not a prerequisite for removal.

Third, he said that "a failure to take steps to modify behavior" "after notice of the investigation" is another "critical element." This is also not required. Several judges were removed for conduct they could have not subsequently modified (e.g., Saucedo, MacEachern, and Stanford).

Fourth, Justice Johnson listed the "occurrence of improper efforts to influence witnesses and/or non-cooperation with the commission" as another

required element for removal. That is also not required, and Justice Johnson does not cite any authority identifying that as a requirement.

Justice Johnson also argued that he should receive lesser discipline than removal based on Supreme Court and commission precedent in the following cases.

Judge Gary Kreep, who was censured in 2017, engaged in 29 individual acts of misconduct (grouped into one instance of willful misconduct and 17 instances of prejudicial misconduct) over a three-year period, with the majority occurring within his first year on the bench. (*Inquiry Concerning Kreep* (2017) 3 Cal.5th CJP Supp. 1.) Justice Johnson drew various similarities and differences between his matter and that of Judge Kreep, arguing that he, too, should receive a censure. He said that Judge Kreep's misconduct included sexual comments, among other things, and the commission found that, in addition to constituting a pattern, his behavior evidenced his "failure to recognize that his comments could offend people or make them feel uncomfortable."

There are significant differences between this matter and that of Judge Kreep. Judge Kreep's conduct toward women was much less serious; it did not involve the unwanted touching of multiple women. It also did not involve undignified conduct while intoxicated on multiple occasions. Judge Kreep's conduct occurred mostly during his first year on the bench, but Justice Johnson's misconduct upon which our decision is based spanned nine years on the bench. Judge Kreep modified his behavior while at court, after being counseled. Justice Johnson received several warnings, but did not modify his behavior.

Judge John Fitch was censured in 1995 for inappropriate comments to court staff attorneys, and others, as well as for nonconsensual touching of women working under his supervision. (*Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552.) Judge Fitch made the remarks "on several occasions," and "on a few isolated occasions" touched, or attempted to touch, women working under his supervision (e.g., slapping or patting their buttocks).

(*Id.* at p. 557.) The commission found that the touching was episodic, relatively infrequent, and did not constitute a pattern of misconduct. (*Id.* at p. 554.) In contrast, Justice Johnson's improper touching of Justice Chaney was found to constitute a pattern, and his touching of Kent and Schulman was more extreme than Judge Fitch's conduct. Also, Judge Fitch had ceased his conduct for the three years before the commission issued its decision, whereas Justice Johnson has been away from the court since the investigation began, and has not been able to demonstrate that he has ceased the conduct toward court employees. Significantly, 25 years have elapsed since the decision involving Judge Fitch, and behavioral standards for judges, particularly with respect to sexual harassment, have changed.

Judge John Gibson received a public admonishment in 2010 for inappropriate gestures and comments to court staff, many of which were sexually suggestive. (*Inquiry Concerning Gibson* (2000) 48 Cal.4th CJP Supp. 112.) Judge Gibson's case is distinguishable because he had a "unique" joking relationship with the woman involved in seven of the eight incidents of prejudicial misconduct, and several circumstances mitigated the risk of future violations, including that the events had occurred six years earlier, when he was new to the bench, and no subsequent incidents had been reported.

Judge John Harris received a public admonishment in 2005 for, among other things, making comments to women at court, and, in one instance, putting his hands on an attorney's face and saying, "You're so cute." (*Inquiry Concerning Harris* (2005) 49 Cal.4th CJP Supp. 61.) Judge Harris was a former judge when the discipline was issued and did not intend to return to the bench; therefore, the capacity to reform was not a relevant consideration. (*Ibid.*) Here, the conduct is far worse, and a critical issue is Justice Johnson's capacity to reform.

Judge Scott Steiner stipulated to a censure in 2014 for, among other things, engaging in sexual activity in chambers with two women with whom he had personal relationships. (*Censure of Judge Steiner* (2014).) Justice Johnson

argued his conduct "does not begin to approach the level or nature of misconduct found in Judge Steiner's matter." The difference is that, as Justice Johnson notes, the commission agreed to a censure, rather than removal, because Judge Steiner fully acknowledged his wrongdoing, which involved consensual conduct, and expressed remorse and contrition. Justice Johnson does not admit most of the misconduct proven in this matter, particularly the most serious misconduct, and it was not consensual.

Similarly, Judge Cory Woodward received a censure in 2014 for engaging in sexual activity in the courthouse with his clerk and misleading court administration about their relationship. (*Censure of Judge Woodward* (2014).) Like Judge Steiner, he admitted all of his misconduct, which involved consensual behavior, and expressed remorse and contrition.

## V. CONCLUSION

"Certain misconduct is so completely at odds with the core qualities and role of a judge that no amount of mitigation can redeem the seriousness of the wrongdoing or obviate the need for removal in order to fulfill our mandate to protect the public, enforce high standards of judicial conduct, and maintain public confidence in the integrity of the judiciary." (*Saucedo*, *supra,* 62 Cal.4th CJP Supp. at p. 53.) The "ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibility of judicial office." (*Geiler, supra,* 10 Cal.3d at p. 281.)

Judges are expected to be honest, have integrity, uphold high personal standards, and treat everyone with dignity and respect, on or off the bench. Justice Johnson's conduct before, and during, this proceeding demonstrates that he does not meet these fundamental expectations. He committed 18 acts of prejudicial misconduct and was found to have engaged in the unwanted touching of four women, to have engaged in conduct that would reasonably be perceived as sexual harassment of seven women at his court, to have misused the prestige

of his position and demeaned his judicial office by attempting to develop personal relationships with three other young women, and to have further demeaned his office by his offensive conduct toward a fourth woman, as well as by multiple incidents of undignified conduct while intoxicated.

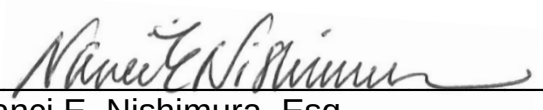
Justice Johnson's refusal to admit to serious misconduct, and his intoxication, coupled with his failure to be truthful during the proceedings, compels us to conclude that he cannot meet the fundamental expectations of his position as a judge. Fulfilling the commission's mandate—particularly with respect to maintaining public confidence in the integrity of the judiciary—can only be achieved by removing him from the bench.

**ORDER**

Pursuant to the provisions of article VI, section 18 of the California Constitution, and rules 120(a) and 136 of the Rules of the Commission on Judicial Performance, we hereby remove Justice Jeffrey W. Johnson from office and disqualify him from acting as a judge.

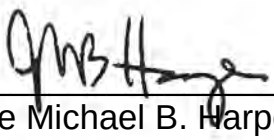
Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Kay Cooperman Jue; Nanci E. Nishimura, Esq.; Victor E. Salazar, Esq., Mr. Richard Simpson; and Mr. Adam N. Torres voted in favor of all the findings and conclusions expressed herein and in this order of removal. Commission members Ms. Sarah Kruer Jager and Hon. Lisa B. Lench were recused from this matter.

Dated: June 2, 2020



Nanci E. Nishimura, Esq.
Former chairperson of the commission

Dated: June 2, 2020



Honorable Michael B. Harper
Current chairperson of the commission

COMMISSION ON JUDICIAL PERFORMANCE
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FOR RELEASE
June 2, 2020

# COMMISSION ON JUDICIAL PERFORMANCE ISSUES DECISION AND ORDER REMOVING JUSTICE JEFFREY W. JOHNSON FROM OFFICE

The Commission on Judicial Performance has issued a decision and order removing Justice Jeffrey W. Johnson of the California Court of Appeal, Second Appellate District, Division One, from office. The commission's determination becomes final in 30 days, subject to discretionary review by the California Supreme Court.

The commission ordered Justice Johnson removed from office for 18 acts of prejudicial misconduct, comprised of more than 40 proven allegations. The commission found that Justice Johnson engaged in the unwanted touching of four women; engaged in conduct that would reasonably be perceived as sexual harassment of seven women at his court; misused the prestige of his position and demeaned his judicial office by attempting to develop personal relationships with three other women, and further demeaned his office by his offensive conduct toward a fourth woman, as well as by multiple incidents of undignified conduct (including conduct at the courthouse for the Court of Appeal) while intoxicated; and displayed poor demeanor to coworkers and made a disparaging remark about judicial colleagues.

Justice Johnson's misconduct was aggravated by his lack of candor throughout the commission proceedings. The commission found that Justice Johnson "testified untruthfully in many instances." As a result of his misconduct and his lack of candor during the course of the proceedings, the commission concluded that Justice Johnson "cannot meet the fundamental expectations of his position as a judge."

The commission's Decision and Order is available on the commission's website at https://cjp.ca.gov (under "Pending Cases - Press Releases & Documents" and "Public Discipline & Decisions"). Justice Johnson is represented by Paul S. Meyer of Costa Mesa and Reginald A. Vitek of San Diego.

* * *

The commission is composed of six public members, three judges, and two lawyers. The chairperson is Hon. Michael B. Harper. Commission members Sarah Kruer Jager and Hon. Lisa B. Lench are recused in this matter.

For further information about the Commission on Judicial Performance, see the commission's website at https://cjp.ca.gov.

[L.A. No. 30058. In Bank. Oct. 25, 1973.]

LELAND W. GEILER, a Judge of the Municipal Court, Petitioner, v. COMMISSION ON JUDICIAL QUALIFICATIONS, Respondent.

SUMMARY

On the basis of evidence heard by special masters appointed by the Supreme Court, the Commission on Judicial Qualifications recommended that petitioner, a municipal court judge, be removed from office. After granting a writ of review to examine the commission's findings, conclusions and recommendation, the Supreme Court adopted the commission's recommendation. As a preface to its decision, the court summarized the relative positions and functions of the masters, the commission and the court, and explained that in reviewing the commission's recommendation, the court will make an independent evaluation of the record evidence, and will then decide, as a question of law, whether conduct which the court may have found, as a fact, to have occurred comes within Cal. Const., art. VI, § 18, as "wilful misconduct in office," or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The court found such conduct in evidence that, among other things, petitioner had brandished a dildo in chambers and had used the incident to curtail a public defender's cross-examination, had profanely and abusively reprimanded court employees, and had, in bad faith, interfered with the attorney-client relationship, by indulging his petty animosity toward public defenders. The court did conclude, however, that petitioner's conduct did not evidence moral turpitude, dishonesty or corruption and, accordingly, ordered that despite his removal from office, he is to be permitted to practice law if otherwise qualified. (Opinion by The Court.)

## HEADNOTES

Classified to McKinney's Digest

(1) **Judges § 19—Removal—Censure—Review of Commission's Recommendations.**—Although a recommendation of censure or removal of a judge by the Commission on Judicial Qualifications is not self-effectuating, the commission does possess fact-finding and recommendatory powers which represent an allocation of judicial functions by the Constitution. Thus, the Supreme Court may treat a petition challenging the commission's recommendation as a petition for a writ of review.

[See Cal.Jur.2d, Judges, § 24.]

(2) **Judges § 19—Removal—Censure—Burden of Proof.**—The burden of proof imposed on the Commission on Judicial Qualifications' examiners in an inquiry concerning a judge should be analogous to that employed in State Bar disciplinary proceedings.

(3) **Judges § 19—Removal—Censure—Standard of Proof.**—The standard of proof in an inquiry concerning a judge before the Commission on Judicial Qualifications is proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty.

(4) **Judges § 19 — Removal — Censure — Commission's Powers.** — The Commission on Judicial Qualifications, not special masters who may be appointed by the Supreme Court, is vested by the Constitution with the ultimate power to recommend, to that court, the censure, removal, or retirement of a judge. Thus, the commission is free to disregard the masters' report and may prepare its own findings of fact and consequent conclusions of law, but must apply the "clear and convincing evidence" standard of proof in its independent evaluation of the evidence before the masters. It may, of course, give great weight to the masters' action on the ground that they had heard the presentation of evidence and were, therefore, in a better position than the commission to pass on the truthfulness of the testimony.

(5) **Judges § 19—Removal—Censure—Supreme Court's Power.**—The Supreme Court's power to retire a judge for disability or to censure or remove a judge for misconduct is contingent on the Commission on

Judicial Qualifications having so recommended and is, therefore, more limited than the court's power to commence proceedings on its own motion to disbar or suspend an attorney.

(6) **Judges § 19—Removal—Censure—Review of Commission's Recommendations.**—In reviewing the Commission on Judicial Qualifications' recommendation as to censure or removal of a judge for misconduct, the Supreme Court will make an independent evaluation of the record evidence adduced below. After conducting such a review, the court will decide, as a question of law, whether certain conduct, which the court may have found as a fact to have occurred, was "wilful misconduct in office," or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," coming within Cal. Const., art. VI, § 18. The court's determination as to whether to dismiss the proceedings or order the judge censured or removed from office must rest on the court's findings of fact and conclusions of law.

(7) **Judges § 19 — Removal — Censure — Constitutional Provision.**—In authorizing the censure or removal of a judge for "wilful misconduct in office," Cal. Const., art. VI, § 18, subd. (c), connotes something graver than it does in authorizing such discipline for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The more serious charge should be reserved for unjudicial conduct which a judge, acting in his judicial capacity, commits in bad faith, whereas the lesser charge should be applied to conduct undertaken in good faith but which would appear to an objective observer to be, not only unjudicial conduct, but conduct prejudicial to public esteem for the judicial office. However, in appropriate circumstances, the lesser charge may sustain the sanction of removal from office.

(8) **Judges § 19—The Office—Removal—Causes for Removal.**—Removal of a trial judge from office was called for by evidence that, in brandishing a dildo in chambers, in referring to the incident in open court, with intent to curtail cross-examination, and in profanely and abusively reprimanding court employees, the judge engaged in "wilful misconduct in office," within Cal. Const., art. VI, § 18, subd. (c), and by other evidence demonstrating "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," within that constitutional provision, including interference by the judge with the attorney-client relationship, in violation of Code Civ. Proc., § 284.

## COUNSEL

Hutchinson & Irwin, Paul R. Hutchinson and James A. Irwin for Petitioner.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant Attorney General, James H. Kline and Douglas B. Noble, Deputy Attorneys General, for Respondent.

## OPINION

THE COURT.—Petitioner was appointed a judge of the Municipal Court for the Los Angeles Judicial District of Los Angeles County on December 30, 1966. On March 26, 1971, the Commission on Judicial Qualifications[1] (hereafter the Commission) resolved on its own motion pursuant to rule 904 of the California Rules of Court[2] to conduct a preliminary in-

[1]The California Constitution, article VI, section 8, provides in pertinent part: "The Commission on Judicial Qualifications consists of 2 judges of courts of appeal, 2 judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; 2 members of the State Bar who have practiced law in the State for 10 years, appointed by its governing body; and 2 citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor and approved by the Senate, a majority of the membership concurring. All terms are 4 years."

Article VI, section 18, subdivision (c), of the California Constitution provides: "On recommendation of the Commission on Judicial Qualifications the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of his current term that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

Subdivision (e) of the same section provides: "The Judicial Council [see Cal. Const., art. VI, § 6] shall make rules implementing this section and providing for confidentiality of proceedings." These are rules 901-921 of the California Rules of Court.

[2]All references herein to specific rules are to the California Rules of Court.

"Rule 904. Preliminary Investigation.

"(a) The Commission, upon receiving a verified statement, not obviously unfounded or frivolous, alleging facts indicating that a judge is guilty of wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or that he has a disability that seriously interferes with the performance of his duties and is or is likely to become permanent, shall make a *preliminary*

vestigation of the judicial conduct of petitioner. Pursuant to rule 905 the Commission filed a notice of formal proceedings herein on January 21, 1972. The Commission requested this court by resolution of February 11, 1972, to appoint three special masters for the taking of evidence, as authorized by rule 907. By order filed March 7, 1972, this court appointed three special masters to hear and take evidence in this matter and to report thereon to the Commission.[3]

After a hearing which consumed 21 court days the masters rendered their report on July 5, 1972. The Commission had set forth in the six counts of its notice of formal proceedings 23 specifications of wilful misconduct in office and conduct prejudicial to the administration of justice. The masters found that petitioner had, as charged in five of these specifications, been guilty of conduct prejudicial to the administration of justice which brought the judicial office into disrepute. As to the remaining specifications the masters concluded that petitioner was not guilty of wilful misconduct in office or conduct prejudicial to the administration of justice. The masters unanimously recommended that petitioner "be censured for the following reasons: [¶] 1. Indiscreet use of vulgar, unjudicial and inappropriate language directed toward court attaches and lawyers. [¶] 2. His crude and offensive conduct in public places."

Both petitioner and the examiners filed objections to the report of the masters pursuant to rule 913.[4] After the Commission had itself heard oral argument in accordance with rule 914, and following each member's consideration of the evidence adduced before the masters and the objections filed to the masters' findings thereon, the Commission issued its own unanimous findings of fact and conclusions of law. In addition to the five specifications upon which the masters had found petitioner guilty of misconduct, the Commission also found petitioner guilty of conduct prejudicial to the administration of justice as charged in four other specifications. In relation to the remaining 14 specifications the Commission concluded

investigation to determine whether formal proceedings should be instituted and a hearing held. The Commission without receiving a verified statement may make such a preliminary investigation on its own motion."

[3]We appointed Arthur L. Alarcon, judge of the Superior Court of the County of Los Angeles (presiding master); D. Sterry Fagan, judge of the Superior Court of the County of Los Angeles; and Peter S. Smith, judge of the Municipal Court for the Alhambra Judicial District of Los Angeles County who, before hearings began, was elevated to the Superior Court of the County of Los Angeles.

[4]The Commission designated two deputy attorneys general as examiners "to gather and present evidence before the masters or Commission with respect to the charges against a judge." (Rule 921 (f).) The same deputy attorneys general argued the cause for the Commission before this court.

that the charges were either unproved or did not warrant discipline. The Commission thereupon recommended to this court, pursuant to rule 917 and article VI, section 18 of the California Constitution (see fn. 1, *supra*), that petitioner be removed from office. The recommendation of removal was approved by seven members of the Commission. The two remaining members of the Commission voted to recommend censure rather than removal of petitioner.

(1)(See fn. 5.) We granted a writ of review to examine the Commission's findings of fact, conclusions of law, and recommendation of removal.[5] (See rule 920.) After reviewing the entire record, we adopt the recommendation of the Commission.

(2) In reviewing the Commission's recommendation, we must address ourselves to the issue of the quantum of proof applicable to an inquiry concerning a judge. We believe the burden of proof imposed upon the examiners in such an inquiry should be analogous to that employed in State Bar disciplinary proceedings, wherein we require that charges of misconduct "be sustained by convincing proof and to a reasonable certainty and any reasonable doubts should be resolved in favor of the accused." (*Moore* v. *State Bar* (1964) 62 Cal.2d 74, 79 [41 Cal.Rptr. 161, 396 P.2d 577].)
(3) We accordingly declare the standard of proof in such an inquiry before the Commission to be proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty. (Cf. *Medoff* v. *State Bar* (1969) 71 Cal.2d 535, 550 [78 Cal.Rptr. 696, 455 P.2d 800].)

(4) The Commission, not the masters, is vested by the Constitution with the ultimate power to recommend to this court the censure, removal or retirement of a judge. Thus the Commission is free to disregard the report of the masters and may prepare its own findings of fact and consequent conclusions of law. The Commission must, however, apply the "clear and convincing evidence" standard of proof in its independent evaluation of the evidence adduced before the masters. Moreover, "[s]ince it is difficult to pass upon the weight to be given the testimony of a witness when only

[5]Although a recommendation of censure or removal by the Commission on Judicial Qualifications is not self-effectuating, the Commission does possess fact-finding and recommendatory powers which represent an allocation of judicial functions to the Commission by the Constitution. Thus when we receive a petition challenging the recommendation of the Commission, we deem it proper to treat it as a petition for a writ of review. (Code Civ. Proc., § 1067.) Code of Civil Procedure section 1068 provides: "A writ of review may be granted . . . when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."

the written record is before a reviewing body," the Commission may properly "give great weight to the action of the [special masters]," who, having heard the presentation of evidence were "in a better position than the [Commission] to pass upon the truthfulness of the testimony." (*McKinney* v. *State Bar* (1964) 62 Cal.2d 194, 196 [41 Cal.Rptr. 665, 397 P.2d 425].)

We must also decide the appropriate standard for this court to employ in reviewing a recommendation by the Commission. Were this recommendation of independent force and effect absent further action by this court, our review of the evidentiary basis for that recommendation might properly be limited to a determination whether the Commission's findings of fact were supported by substantial evidence. Under such a standard of review, we would not be free to disregard the Commission's findings merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact. (Cf. *People* v. *Mosher* (1969) 1 Cal.3d 379, 395 [82 Cal.Rptr. 379, 461 P.2d 659].) Procedures in State Bar matters offer an alternative standard—an independent review of the record by this court. (5) However, the power to retire a judge for disability or to censure or remove a judge for misconduct is, of course, contingent on the Commission having so recommended (Cal. Const., art. VI, § 18), and is therefore more limited than our power to commence proceedings on our own motion to disbar or suspend an attorney. (See Bus. & Prof. Code, § 6107; *In re Hallinan* (1954) 43 Cal.2d 243, 253-254 [272 P.2d 768].) (6) Nevertheless, since the ultimate, dispositive decision to censure or remove a judge has been entrusted to this court, we conclude that in exercising that authority and in meeting our responsibility we must make our own, independent evaluation of the record evidence adduced below. After conducting such a review we may then decide as a question of law whether certain conduct, which we may have found as a fact to have occurred, was "wilful misconduct in office" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18.) Finally, it is to be our findings of fact and conclusions of law, upon which we are to make our determination of the ultimate action to be taken, to wit, whether we should dismiss the proceedings or order the judge concerned censured or removed from office.

Having clarified what we consider to be the proper institutional role of this court vis-à-vis the Commission and the special masters in an inquiry, we turn to the instant proceeding. It should be noted initially that the masters did apply the proper standard of proof in preparing their findings of fact. The masters' formal findings contain four separate references to

a "clear and convincing evidence" standard of proof in holding certain allegations not to have been proven.

Although its conclusions of law differed, the Commission's findings of fact paralleled the masters' findings. The Commission adopted as its own all but a few words of the masters' findings relative to the first five counts of the notice of formal proceedings, containing 22 of the 23 specifications of misconduct by petitioner. Where the Commission's findings in regard to these specifications did differ from the masters', they reflected the Commission's quite proper determination to focus on an *objective* appraisal of petitioner's conduct in terms of the effect of such conduct on the administration of justice. The masters were more concerned with the *subjective* motivations of petitioner in engaging in specified conduct, and with the *subjective* appraisal of his motivations by the persons directly affected by the specified conduct. It should be emphasized that there were no significant differences in the Commission's and the masters' determinations of whether or not the conduct alleged to have occurred in the 23 specifications did in fact occur. In no instance did the Commission find to have occurred conduct alleged in a particular specification, which allegation the masters had previously found not proven.

The specifications found by the Commission to have been proven other than that of count six generally concerned crude behavior and vulgar language which petitioner used in dealing with various professional associates, employees and officers of the court. Petitioner was found to have prodded a deputy public defender with a "dildo" during a conference in chambers one morning, and later that day to have referred to this incident twice in open court so as to curtail the victim's cross-examination of two witnesses. Petitioner was found to have approached a court commissioner from behind in a public corridor of the hall of justice and to have grabbed this victim's testicles. Petitioner was found on two occasions to have made lustful references to his female clerk, once while in chambers in the presence of a group of professional associates. Petitioner was found to have habitually used vulgar and profane language in his conversations with this clerk, and on two occasions to have used profane terms of personal abuse in reprimanding her and another woman employed by the court. Petitioner was also found to have invited two female attorneys into his chambers wherein he discoursed on the salacious nature of the evidence adduced in criminal cases concerning homosexual acts and rape, punctuating his commentary with profane terms for bodily functions.[6]

[6]The Commission's findings as to all specifications determined by the Commission to have been proven other than the specification of count six (see fn. 7, *infra*) are as follows:

The only substantive difference between the masters' and the Commission's findings arose in relation to count six, which set forth the 23d and

"FINDINGS

"1. Respondent is and since December 30, 1966, has been a judge of Municipal Court of the Los Angeles Judicial District.

"FINDINGS (COUNT ONE A)

"2. On the morning of January 29, 1971, Deputy District Attorney G. and Deputy Public Defender David E. were invited into Judge Geiler's chambers by the clerk, Burt Martinez. After Mr. G. and Mr. E. had entered chambers Judge Geiler appeared from the vicinity of the filing cabinet holding a battery-operated object resembling a penis and sometimes referred to as a 'dildo.'

"The object was thrust by Judge Geiler into the area of Mr. E.'s buttocks touching his body. Mr. E. joined the others in Judge Geiler's chambers in general laughter concerning this incident.

"In the morning session on that same date following the above incident and during the course of the preliminary hearing in *People* v. *Hall*, A-172, 876 (Exh. 3), Judge Geiler interrupted cross-examination by Mr. E. as follows:

'MR. E: One or two questions, your Honor, then I won't take any more of your time on this case.

'THE COURT: Get the machine out.

'THE CLERK: The battery?

'THE COURT: The battery.

'MR. E: I have no further questions, your Honor.'

"In the afternoon session during the preliminary hearing in *People* v. *Parks*, A-268-529 (Exh. 4), after an objection by Deputy District Attorney G. to a question by Deputy Public Defender David E., the following occurred:

'THE COURT: It's immaterial whether it was or it wasn't. He's not charged with anything earlier in the morning at 7:00 o'clock.

'Goes to good faith. Suppose it wasn't.

'It had been but it turned out that he had the thief. Ha, ha, ha. Shove it. That's what you're thinking about. You're convincing me more every moment.

'Did you get those batteries?

'THE CLERK: I'm charging it up. I've got a bigger one. Fifteen volts.

'THE COURT: David, we've got a fifteen-volter in there now.

'THE CLERK: With a longer handle.

'THE COURT: Hurry, David. We got a fifteen-volt battery for you.

'MR. E: Okay. We're referring to that incident this morning, your Honor?

'THE COURT: No, the one that you're going to take home tonight.

'Go ahead.

'MR. E: I have no further questions of this officer, your Honor.'

"The above quoted remarks of Judge Geiler were intended to and did have the effect of curtailing defense cross-examination during the Hall and Parks matters by means of implied threats of embarrassment and ridicule to Deputy Public Defender E.

". . . . . .

"FINDINGS (COUNT ONE B)

"3. In the fall of 1970, Mr. M., a traffic court commissioner, was engaged in a conversation in a hallway on the seventh floor of the Hall of Justice. Judge Geiler

final specification of misconduct in the original notice. Count six charged: "In nine preliminary hearings, you have arbitrarily and capriciously relieved the public defender and appointed private counsel. . . . In none

approached Commissioner M. from behind, reached under his crotch, and grabbed him by the testicles, causing Commissioner M. so much pain that he almost passed out. Nevertheless, Commissioner M. considered the conduct to be friendly horseplay.

". . . . . .

"FINDINGS (COUNT THREE A)

"4. In the summer of 1969, at a time when five to six men were in Judge Geiler's chambers, Mrs. P., his court clerk, entered the Judge's chambers at his request. Shortly thereafter she left. As she was leaving, Judge Geiler stated, 'How would you like to eat that?' His question referred to Mrs. P. This comment was a crude effort at humor and part of an established course of conduct.

". . . . . .

"FINDINGS (COUNT THREE B)

"5. On occasions during the early part of 1970, Judge Geiler telephoned his clerk, Mrs. P., and gave her the following instruction with reference to the cases and persons in his courtroom: 'Get the mother fuckers ready. I will be there shortly.' This type of language was typical of the vocabulary utilized in their conversations.

". . . . . .

"FINDINGS (COUNT THREE C)

"6. In the early part of 1970, Judge Geiler occasionally asked Mrs. P., 'Did you get any last night?' This comment was a crude effort at humor and part of an established course of conduct.

". . . . . .

"FINDINGS (COUNT THREE D)

"7. In March of 1970 on an occasion when Mrs. P. returned to court late from her lunch, Judge Geiler told her that she was 'nothing but a fucking clerk' and that she was to do exactly as she was told.

". . . . . .

"FINDINGS (COUNT THREE G)

"8. On November 10, 1970, Judge Geiler, while in the office of Mrs. E., the calendar court coordinator for the municipal court, used the following language in reprimanding Mrs. E: 'son-of-a-bitch,' 'bitch,' and 'fucking clerk.' Judge Geiler also stated, 'No fucking clerk is going to keep time on me' or 'keep track of me,' and 'Don't you ever forget that you are just a fucking clerk.'

". . . . . .

"FINDINGS (COUNT THREE H)

"9. Judge Geiler was introduced to a female attorney, Mrs. C. at a Christmas party at the office of Mr. F., also an attorney. On that occasion, outside Mrs. C's presence, Mr. F. asked Judge Geiler to help Mrs. C. in criminal matters because of her inexperience.

"On March 17, 1971, Mrs. C. appeared in Judge Geiler's court to conduct a preliminary hearing. Mrs. W., another female attorney, sat at the counsel table with her throughout the preliminary hearing. Upon the completion of that matter Judge Geiler invited Mrs. W. and Mrs. C. into chambers to discuss the handling of preliminary hearings.

"Judge Geiler spoke of the importance of the religion of judges in predicting how

of these nine cases was there an assertion of a conflict of interest." The findings of the Commission as to count six are set out in the margin.[7]

The Commission's findings as to count six are substantially identical to those of the masters save for the final two paragraphs. The masters had found mutual hostility between petitioner and the public defender's office;

they will rule on a matter. However, the major part of the Judge's conversation, a monologue which lasted approximately ten to twenty minutes, was rambling and disjointed. The only thread tying the conversation together was the theme of sex. For example, Judge Geiler told of a gang-rape by 'hot-blooded' Mexicans and of a judge who had vomited upon surreptitiously witnessing a homosexual act in the lavatory at the May Company. Judge Geiler also discussed other homosexual acts and degrees of penetration in rape cases, all with apparent relish at the salacious nature of the subject matter. He used 'street language' such as, 'shit' and 'fuck,' in discussing cases. . . ."

[7]"In the nine preliminary hearings specified in COUNT SIX of the Notice of Formal Proceedings the Public Defender was relieved as counsel. The respective defendants were eligible for representation by the Public Defender and the Public Defender's office was willing to represent and was appearing for each defendant. In the eight escape cases, Judge Geiler made a preliminary statement from the bench regarding his sentencing policy on escape cases where there was no evidence of violence or damage to property.

"In each case the defendant advised the court of his desire to plead guilty to a misdemeanor, but the Public Defender refused to plead the defendant guilty for the following reasons:

"(1) *Hakes*—The Public Defender wanted to consolidate this matter with other pending superior court cases so that defendant might spend less time in jail.

"(2) *Cole*—No statement was made to show any reason for the Public Defender's reluctance.

"(3) *Dominguez*—Uncertainty as to the effect of a guilty plea on defendant's parole status.

"(4) *Marquardt*—Refusal of Judge Geiler to make a record of the plea bargain.

"(5) *Oderda*—Uncertainty as to the effect of a guilty plea on defendant's parole status.

"(6) *Saldate*—The records of the proceedings before Judge Geiler do not reflect whether the Public Defender made any statement as to whether or not Saldate would plead guilty or the reasons why he should not do so, nor whether an opportunity was afforded to express the Public Defender's position.

"(7) *Ramirez*—The Public Defender and the District Attorney agreed to a lesser sentence because of mitigating circumstances. Judge Geiler refused but subsequently acceded to the same sentence after the substitution of private counsel.

"(8) *Deever*—Refusal of Judge Geiler to make a record of the plea bargain.

"(9) *Ricketts*—Judge Geiler refused to give the Public Defender additional time to research a possible defense suggested by the defendant.

"There was no evidence to show that there was a conflict of interest between the public defender and the defendants.

"In each case, private counsel was appointed at the request of the defendant for the purpose of the plea only and without compensation. Thereafter, each defendant entered a guilty plea in compliance with *'IN RE TAHL.'*

the Commission found petitioner responsible for this hostile relationship. The Commission additionally found that petitioner's substitutions of counsel were the direct result of petitioner's hostile attitude toward deputy public defenders.

We have made a detailed review of the full record and independently find upon clear and convincing evidence in accord with the findings of the Commission, including the findings as to the specification of count six. We adopt the Commission's findings as our own.

The Commission concluded on its findings that each of the proven specifications involved conduct constituting "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." With the qualifications subsequently noted, we reach similar conclusions.

The ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office. It is immaterial that the conduct concerned was probably lawful, albeit unjudicial, or that petitioner may have perceived his offensive and harassing conduct as low-humored horseplay.

The first two canons of the Code of Judicial Conduct proposed in 1972 by the American Bar Association's Special Committee on Standards of Judicial Conduct emphasize the importance of appraising alleged judicial misconduct objectively rather than subjectively. Canon One declares: "a

"After the pleas, the defendants in the escape cases received sentences ranging from 10 to 45 days in county jail, consecutive. Defendant Dominguez pleaded guilty to misdemeanor possession of marijuana and was placed on probation and fined $100. No evidence was offered to show that any of the defendants were innocent of the charges.

"Judge Geiler had a hostile attitude and bias toward members of the Public Defender's office. As a result, some members of the Public Defender's office were hostile towards Judge Geiler. Since 1970 the Public Defender's office has attempted to limit the tour of duty of the Deputy Public Defenders assigned to Judge Geiler's court to a period of one week. Four of the five Deputy Public Defenders who testified regarding their being relieved as counsel by Judge Geiler had been admitted to practice law for periods of time ranging from two to four months at that time.

"Deputy Public Defenders were required by office policy to obtain approval from a supervisor before pleading a defendant guilty to a misdemeanor at the time of a preliminary hearing in any municipal court. In eight of the foregoing cases, the Deputy Public Defender had a valid reason for refusing to accede to Judge Geiler's desire for an immediate guilty plea. However, because of Judge Geiler's preconceived bias against Deputy Public Defenders and his professed desire to expedite the administration of justice even at the expense of defendants' constitutional rights, Judge Geiler initiated and carried out the foregoing substitutions of counsel."

judge should uphold the integrity and independence of the judiciary." The accompanying text adds: "A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." Canon Two speaks for itself: "A judge should avoid impropriety and *the appearance of impropriety* in *all* his activities." (Italics added.)

The preface to the proposed Code of Judicial Conduct concludes: "The canons and text establish mandatory standards unless otherwise indicated. It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement." California is fortunate in that it need not formally adopt the proposed code in order to hold its judiciary to the high standard of conduct the public and the bar are entitled to expect of the judicial branch of government.

The Commission on Judicial Qualifications was created by constitutional amendment in 1960, when new section 10b was added to article VI. The proposition establishing the Commission found its way to the ballot in response to a demonstrated need to insure that those who sit in judgment in this state are both fit and able to discharge their responsibilities. One of the most dedicated and persuasive proponents of the Commission was Chief Justice Phil S. Gibson of this court.[§]

We had earlier held that the State Bar lacked jurisdiction over judges. (*State Bar of California* v. *Superior Court* (1929) 207 Cal. 323 [278 P. 432].) Due to the unwieldiness of legislative impeachment as a means of imposing judicial discipline, the bar of this state had been held to a higher standard of conduct than the bench—in reverse of the dictates of common sense and sound legal policy. The Commission provided an innovative and effective alternative to the impeachment process.

Although formal proceedings of the Commission have been few, the potentiality of such proceedings has proven to be the vital element of the Commission's efficacy. Each year since the establishment of the Commission the possibility of an inquiry and ultimately removal from office has led several unfit or disabled judges to remove themselves from the active ranks of the judiciary. In contrast to the low profile of most of its work, the California Commission on Judicial Qualifications, the first such commission created in the United States, has itself been much publicized as a model

[§]See Gibson, *For Modern Courts* (1957) 32 State Bar J. 727, 733-735. See generally Frankel, *Judicial Conduct and Removal of Judges for Cause in California* (1962) 36 So.Cal.L.Rev. 72; Frankel, *Removal of Judges: California Tackles an Old Problem* (1963) 49 A.B.A.J. 166.

for other states anxious to share California's reputation for an outstanding judicial system.[9]

This court has considered disciplinary recommendations from the Commission on only five prior occasions. In the first instance, the Commission recommended removal. Without commenting on the validity of the Commission's findings of fact, we rejected the recommendation of removal of the judge concerned. (*Stevens* v. *Commission on Judicial Qualifications* (1964) 61 Cal.2d 886 [39 Cal.Rptr. 397, 393 P.2d 709].) At that time, however, our Constitution (art. VI, § 10b) authorized removal as the sole disciplinary measure, and limited the grounds for imposing discipline on a judge to "willful misconduct in office or willful and persistent failure to perform his duties or habitual intemperance."[10]

In 1966 a second constitutional amendment concerning the Commission on Judicial Qualifications repealed section 10b and added new section 18 to article VI (see fn. 1, *supra*), thereby broadening the grounds for removal of a judge and adding the intermediate disciplinary option of public censure. Since 1966 this court has on four occasions adopted the recommendation of the Commission that a judge be publicly censured for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (*In re Chavez* (1973) 9 Cal.3d 846 [109 Cal.Rptr. 79, 512 P.2d 303]; *In re Sanchez* (1973) 9 Cal.3d 844 [109 Cal.Rptr. 78, 512 P.2d 302]; *In re Glickfeld* (1971) 3 Cal.3d 891 [92 Cal.Rptr. 278, 479 P.2d 638]; *In re Chargin* (1970) 2 Cal.3d 617 [87 Cal.Rptr. 709, 471 P.2d 29].)

As indicated above, the Commission in the instant matter concluded that the conduct proven in the previously discussed specifications constituted "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." As we have noted above, the second ground for imposing discipline was added to the Constitution in 1966. (7) We believe this mandates our construing "wilful misconduct in office" as connoting something graver than the "lesser included offense" of "conduct prejudicial to the administration of justice

[9]Chief Justice Roger J. Traynor stated in an address to the Virginia State Bar Association: "When a bench can quit itself of a burdensome member through such a commission, it gains as much as the Bar and the public. It reaps added benefits from each judge's quickened awareness that he must meet reasonable standards of competence and behavior in relation to his office." Traynor, *Who Can Best Judge the Judges?* (1967) 42 State Bar J. 225, 239. See also A.B.A., The Improvement of the Administration of Justice (5th ed., 1971) at pp. 57-58; Frankel, *Judicial Ethics and Discipline for the 1970s* (1970) 54 Judicature 18.

[10]See Frankel, *Judicial Discipline and Removal* (1966) 44 Tex.L.Rev. 1117, 1129-1130.

that brings the judicial office into disrepute." The more serious charge should be reserved for unjudicial conduct which a judge acting in his judicial capacity commits in bad faith, while the lesser charge should be applied to conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.[11]

(8) Viewed in this light, we conclude that the following specifications of petitioner's vulgar and profane conduct constituted "wilful misconduct in office:" petitioner's brandishing of the "dildo" and petitioner's subsequent remarks, found by the Commission to have been made with the intent of curtailing cross-examination by the victim, and petitioner's profane and abusive reprimanding of two court employees. We consider the remaining proven instances of petitioner's vulgar conduct to have been "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

Turning to the final specification of misconduct embodied in count six, we regard the Commission's conclusions[12] to be worthy of incorporation in this opinion:

"We conclude that Judge Geiler violated Code of Civil Procedure section 284 when he relieved the Deputy Public Defenders in the eight cases (excluding *Cole*). While legal precedent in this area is scant, any excuse for Judge Geiler's noncompliance with Code of Civil Procedure section 284 was precluded by the fact that he did not act in good faith. Judge Geiler interfered with the attorney-client relationship between the public defenders and their clients. All of the cases were the type which probably would have become misdemeanors by sentence had the defendants been held to answer and pleaded guilty or been convicted in the superior court. In these cases, no actual prejudice was suffered by any of the defendants. Nevertheless, Judge

[11]The lesser charge of "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" would also apply to wilful misconduct out of office, i.e. unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. It should be emphasized that our characterization of one ground for imposing discipline as more or less serious than the other does not imply that in a given case we would regard the ultimate sanction of removal as unjustified solely for "conduct prejudicial to the administration of justice which brings the judicial office into disrepute."

[12]It is significant that all nine members of the Commission concurred in these conclusions. All the findings of fact of the Commission, and all the conclusions of law relative to each proven specification of misconduct were adopted by unanimous resolution. The only nonunanimous act of the Commission was its recommendation of removal, for which seven members of the Commission voted. Two members of the Commission voted to recommend censure.

Geiler's bad faith interference with the attorney-client relationship in violation of Code of Civil Procedure section 284 constituted conduct prejudicial to the administration of justice and wilful misconduct in office.

"During the last few years there has been great public concern over the problem of trial court delay and congestion. It may be argued that Judge Geiler was attempting to respond to this crisis in the court system by encouraging pleas of guilty in minor cases which would undoubtedly result in a misdemeanor disposition in the superior court. However, a judge must decide each case on its own individual merits. In his misguided attempt to expedite justice, Judge Geiler did not do so. By his own testimony, he had biased preconceptions as to public defender cases. This precluded good faith consideration of each of these eight cases on its own merits.

"Judge Geiler's refusal to permit plea bargains in the *Marquardt* and *Deever* cases to be placed 'on the record' was petty, unreasonable and contrary to the rule set forth in *People* v. *West*. Judge Geiler's refusal to allow the Public Defender in the *Ricketts* case additional time to investigate a possible defense was arbitrary and made in callous disregard of the defendant's interests. Judge Geiler's replacement of the Public Defenders in the *Dominguez* and *Oderda* cases in effect precluded the investigation of possible parole consequences of guilty pleas; as such these actions also were made in callous disregard of the defendants' interests. Judge Geiler's summary dismissal of the Public Defender in the *Saldate* case for no apparent reason and without any discussion whatsoever was arbitrary, unjust, and capricious. In the *Ramirez* case, Judge Geiler's removal of the Public Defender who insisted on a lesser sentence, coupled with the Judge's subsequent imposition of the same sentence, was arbitrary and capricious. Finally in the *Hakes* case, Judge Geiler's removal of the Public Defender prevented the reasonable consolidation of this matter with other pending superior court cases.

"Thus we conclude that the actions of Judge Geiler in these eight cases violated Code of Civil Procedure section 284, interfered with the attorney-client relationship and were made in bad faith.

"The foregoing conduct of Respondent constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

We agree with the Commission that the conduct charged in count six was not only unjudicial but unlawful as well. (Cf. *Smith* v. *Superior Court* (1968) 68 Cal.2d 547 [68 Cal.Rptr. 1, 440 P.2d 65].) We also are in accord

with the Commission in concluding, contrary to the special masters, that petitioner acted in "bad faith." However, we feel this last conclusion requires elucidation.

By "bad faith," we do not mean to imply that petitioner sought to harm the interests of the defendants involved. Rather, we mean that in indulging his petty animosity toward deputy public defenders, and in culmination of a pervasive course of conduct of overreaching his authority over subordinates, petitioner intentionally committed acts which he knew or should have known were beyond his lawful power. The resulting misconduct entailed the most insidious kind of official lawlessness—disregard for the statutory and constitutional rules by which a society of millions and a heritage of centuries have sought to preserve fundamental fairness within a legal system which cannot escape the inherent imperfections of mankind.

No more fragile rights exist under our law than the rights of the indigent accused; consequently these rights are deserving of the greatest judicial solicitude. The ideal of our legal system is that the judicial should be equated with the just. Such an ideal cannot be achieved if one man clothed with judicial power may ignore with impunity such a basic institutional mandate as the sanctity of the attorney-client relationship merely because the attorneys are young deputy public defenders and their clients are indigent.

It is immaterial whether petitioner's abuse of power resulted in just or unjust treatment for any given defendant. It is undisputed that petitioner bore no ill will towards the individual defendants enumerated in count six. Petitioner's bad faith was directed towards our legal system itself; his arbitrary substitutions of counsel because of his personal beliefs as to the defendants' guilt and his personal hostility to their counsel smacks of an inquisitorial intent to serve imagined truth at the expense of justice. Our adversary system of justice and our elaborate procedure for the prosecution of alleged criminals represents an institutional recognition of the fallibility of the individual. Much as our political system apportions power among jealous branches of government, so within the judicial branch we have striven to disperse the functions of the judicial process among many adverse participants in the hope that the institutions of our legal system will bear a collective capacity for justice and righteousness which no single mortal can achieve. It is this commitment to institutional justice which petitioner's individual conduct threatens to corrupt. Risk of recurrence of such conduct cannot be tolerated.

After reviewing the entire record and considering all the facts and circumstances, we have concluded that the recommendation of the Commission should be adopted. We therefore order Judge Leland W. Geiler of the Municipal Court of the Los Angeles Judicial District of Los Angeles County removed from office. This order is final forthwith.[13]

As indicated above, before the advent of the Commission on Judicial Qualifications the bar of this state was held to a higher standard of conduct than the bench. This anomaly has since been rectified and the reverse is now true. We recognize that petitioner's removal from office is required more by the high standards of judicial office than by his personal failings. Much evidence was adduced before the Commission of petitioner's diligence in the work of the law, and his unjudicial conduct cannot be said to amount to moral turpitude, dishonesty or corruption. (Cf. Bus. & Prof. Code, § 6106.) We therefore further order that despite his removal from judicial office Leland W. Geiler shall if otherwise qualified be permitted to practice law in the State of California. (See Cal. Const., art. VI, § 18, subd. (d).)

Petitioner's application for a rehearing was denied November 15, 1973.

[13]This is the first instance in which we have removed a judge from office and we do so only after careful consideration of all matters, including the standards of conduct to which members of the judiciary must conform, the nature of our review of proceedings before the masters and the Commission, and the full record of those proceedings as reported to this court. The record discloses that the masters rendered their report 120 days after their appointment. During the hearings, which consumed 21 court days, they heard a total of 73 witnesses whose testimony is reported in 3,193 pages of transcript. Thereafter the Commission, after careful deliberations over a 56-day period, made and reported its findings of facts, conclusions of law and recommendations. Both the Commission and this court were required to review the full transcript in performance of their responsibilities to make independent findings on a conflicting factual record.

13 Cal.3d 778
532 P.2d 1209, 119 Cal.Rptr. 841
**(Cite as: 13 Cal.3d 778)**
<YELLOW FLAG>

WILLIAM D. SPRUANCE, a Judge of the Municipal Court, Petitioner,
v.
COMMISSION ON JUDICIAL QUALIFICATIONS, Respondent

S.F. No. 23153.

Supreme Court of California.

March 25, 1975.

SUMMARY

On the petition of a municipal court judge to modify or reject the recommendation of the Commission on Judicial Qualifications that he be removed from office, the Supreme Court held that the judge had engaged in inexcusable and reprehensible conduct constituting in some instances "wilful misconduct in office" and in other instances "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" within the meaning of Cal. Const., art. VI, § 18, providing for censure or removal in such cases, and accordingly it adopted and effectuated the commission's recommendation of removal. In reaching its decision, the court discussed proven instances of the judge's having treated attorneys and litigants in a cavalier, rude, and improper manner, of his judicial conduct being subject to the improper influence of his business relationships and social friendships, of his having solicited another judge to dismiss a traffic citation which he had received and his subsequent alteration of the reported disposition so as to conceal the fact that he had received preferential treatment, and of his having consistently appointed two attorneys, who were long-time friends and political supporters, in criminal cases in which the defendant was either not entitled to counsel at public expense or the public defender had not been requested to represent them. In view of its findings that the judge had acted in bad faith on numerous occasions, the court further held that no credit could be given to his asseverations of mitigating circumstances, and that mere censure would woefully fail to convey the court's utter reproval of any judge who allows malice or other improper personal motivations to infect the administration of justice. In view of the judge's previous long unblemished career as a lawyer, however, and the fact that, as a practicing attorney, he would not have available that authority which he abused as a judge, the court ordered that despite his removal from judicial office, he be permitted, if otherwise qualified, to practice law in the State of California.

In Bank. (Opinion by The Court.) ***779**

HEADNOTES

Classified to California Digest of Official Reports

(1) Judges § 6--Removal.
The language of Cal. Const., art. VI, § 18, that "on recommendation of the Commission on Judicial Qualifications the Supreme Court may" censure or remove a judge for wilful misconduct or prejudicial conduct, as well as sound procedure, requires that the Supreme Court predicate its adoption, modification, or rejection of the commission's recommendation solely on those specifications in the notice of formal proceedings which the commission has found both to have been proven as a matter of fact and to have constituted constitutionally sufficient grounds for the imposition of discipline.

(2) Judges § 6--Removal--"Wilful Misconduct."
Under Cal.Const., art. VI, § 18, relating to discipline of judges, for "wilful misconduct in office, ... or conduct prejudicial to the administration of justice," the more serious charge, "wilful misconduct," is reserved for unjudicial conduct committed in bad faith by a judge acting in his judicial capacity, and the term "bad faith" implies that the judge intentionally committed acts which he knew or should have known were beyond his lawful power. As so used, the term entails actual malice as the motivation for a judge's acting ultra vires, and it also encompasses acts within the lawful power of a judge which nevertheless are committed for a corrupt purpose. In sum "bad faith" is quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly.

[See Cal.Jur.2d, Judges, § 24; Am.Jur.2d, Judges, §§ 18, 19.]

(3) Judges § 6--"Prejudicial Conduct."
Under Cal.Const., art. VI, § 18, relating to discipline of judges for "wilful misconduct in office, ... or conduct prejudicial to the administration of justice," "prejudicial conduct" includes conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct, but conduct prejudicial to public esteem for the judicial office, as well as wilful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. ***780**

(4) Judges § 6--Removal--"Wilful Misconduct."
Proven charges against a municipal judge of treating attorneys and litigants in his court in a cavalier, rude, and improper manner, established that he acted in bad faith in exceeding the bounds of his lawful power, and such incidents therefore constituted "wilful misconduct in office" within the meaning of

Cal.Const., art. VI, § 18, setting forth grounds for discipline of judges, where the record showed that he had acted out of revenge and hostility toward an attorney who had filed an affidavit of prejudice by failing to immediately disqualify himself, that his questioning of a deputy district attorney at length concerning a case not then before him, was also an abuse of judicial authority and clearly motivated by feelings of animosity, and that his utterance of a contemptuous "raspberry" while a defendant in a criminal prosecution was testifying in his own behalf was a deliberate and malicious attempt to prejudice the defendant's case, motivated by the judge's anger toward the deputy public defender.

(5) Judges § 6--Removal--"Prejudicial Conduct."
While a municipal judge's use of a vulgar "finger" gesture to indicate that the tardiness of a defendant in a traffic matter demonstrated the defendant's lack of respect for the court resulted in a loss of courtroom dignity, it was not done in bad faith, and therefore did not constitute "wilful misconduct" within the meaning of Cal.Const., art. VI, § 18. Because it was an isolated act directed toward edifying the defendant rather than prejudicing his case, it fell within that section's less serious category of "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

(6) Judges § 6--Removal--"Wilful Misconduct."
Proven charges against a municipal judge that his judicial conduct was subject to the improper influence of his business relations and social friendships, constituted, with the exception of one specification concerning use of an obscenity, "wilful misconduct in office" within the meaning of Cal.Const., art. VI, § 18, setting forth grounds for discipline of judges, where, in each specified incident, he intentionally used the prestige or authority of his judicial office to effect or influence the disposition of a criminal case out of his desire to help friends and political supporters, and where his conduct in one of the incidents was motivated not only by political favoritism but also by a desire to punish a deputy district attorney for his refusal to accept his suggestion of a negotiated plea. ***781**

(7) Judges § 6--Removal--"Wilful Misconduct."
A municipal judge's conduct with respect to a traffic citation he had personally received constituted "wilful misconduct in office" within the meaning of Cal.Const., art. VI, § 18, setting forth grounds for discipline of judges, where he not only circumvented proper legal procedure in causing another judge to dismiss the charge, but also altered that judge's notation on the citation so as to indicate that he had attended traffic school, thereby concealing the fact that he had received preferential treatment.

(8) Judges § 6--Removal--"Wilful Misconduct."
A municipal judge's appointment of 2 attorneys in 27 criminal

cases in which the defendant was either not entitled to counsel at public expense or the public defender had not been requested to provide representation constituted "wilful misconduct in office" within the meaning of Cal.Const., art. VI, § 18, setting forth grounds for discipline of judges, where both attorneys were long- time friends and political supporters, and the appointments clearly conflicted with the standards established by the California Code of Judicial Conduct.

(9) Judges § 6--Removal.
The Supreme Court makes the decision whether a judge, whose conduct has been found to be either wilful misconduct or prejudicial misconduct should be censured or removed from the bench on the basis of its own findings of fact and conclusions of law. Although the court gives great weight to the findings of fact of special masters appointed to hold evidentiary hearings, the conclusions of law and the ultimate sanction are solely within the province and domain of the court, and it does not defer to either the masters or the Commission on Judicial Qualifications in deciding such matters. (Stating that language to the contrary in McCartney v. Commission on Judicial Qualifications, 12 Cal.3d 512 [116 Cal.Rptr. 260, 526 P.2d 268] is no longer to be regarded as controlling.)

(10) Judges § 6--Removal.
Removal from office, rather than censure, was the appropriate discipline for a municipal judge whose actions in several specified incidents had been found to constitute "wilful misconduct in office," and in other instances "conduct prejudicial to the administration of justice" within the meaning of Cal.Const., art. VI, § 18, setting forth grounds for removal or censure of judges. Since the judge was found to have acted in bad faith on numerous occasions, no credit could be given to his asseverations of mitigating ***782** circumstances, and, in view of the clear evidence of his petty tyranny and favoritism, mere censure would woefully fail to convey the court's utter reproval of any judge who allows malice or other improper personal motivations to infect the administration of justice. It is the duty of the court to preserve the integrity and independence of the judiciary, and the risk of the recurrence of the judge's conduct could not be tolerated.

COUNSEL

Mintz, Giller, Himmelman & Mintz, Herman W. Mintz and Leland J. Bruzzone for Petitioner.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Edward P. O'Brien, Assistant Attorney General, William D. Stein and Linda Ludlow, Deputy Attorneys General, for Respondent.

THE COURT.

The Commission on Judicial Qualifications (hereinafter the Commission) has recommended the removal from office of Judge William D. Spruance of the Municipal Court for the San Leandro-Hayward Judicial District of Alameda County. [FN1] Pursuant to rule 920 of the California Rules of Court, [FN2] Judge Spruance has petitioned this court ***783** to modify or reject the Commission's recommendation. In discharging our solemn constitutional duties in this matter we have independently reviewed the entire record and have adopted with some modifications the findings of the Commission, as set forth seriatim hereinafter. We conclude that petitioner has engaged in inexcusable and reprehensible conduct constituting in some instances "wilful misconduct in office" (hereinafter wilful misconduct) and in other instances "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (hereinafter prejudicial conduct). We accordingly adopt and hereby effectuate the Commission's recommendation of removal.

FN1 The California Constitution, article VI, section 8, provides in pertinent part: "The Commission on Judicial Qualifications consists of 2 judges of courts of appeal, 2 judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; 2 members of the State Bar who have practiced law in this State for 10 years, appointed by its governing body; and 2 citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor and approved by the Senate, a majority of the membership concurring. All terms are 4 years."
Article VI, section 18, subdivision (c), of the California Constitution provides: "On recommendation of the Commission on Judicial Qualifications the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of his current term that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

FN2 All references herein to specific rules are to the California Rules of Court. (See Cal. Const., art. VI, § 18, subd. (e).)

After practicing law for almost 20 years, petitioner campaigned for and was elected to the municipal court, taking office on January 4, 1971. On January 11, 1973, he was notified that the Commission had, on its own motion pursuant to rule 904, ordered a preliminary investigation of his judicial conduct. On July 13,

1973, petitioner was served with a five-count Notice of Formal Proceedings (rule 905) encompassing nineteen specifications of wilful misconduct and prejudicial conduct. Following petitioner's filing of a verified answer, this court on January 4, 1974, at the Commission's behest, appointed three special masters to hold evidentiary hearings. (Rule 907.) [FN3]

FN3 The special masters so appointed were Alvin E. Weinberger, retired Judge of the Superior Court of the City and County of San Francisco (presiding master); Albert A. Axelrod, retired Judge of the Municipal Court of the City and County of San Francisco; and Sidney Feinberg, Judge of the Municipal Court for the Palo Alto-Mountain View Judicial District of Santa Clara County.

The 19 days of hearings before the masters commenced on February 19, 1974, and concluded on March 19, 1974. During the course of the proceedings, the examiners designated by the Commission to prosecute the charges against petitioner (rule 921(f)) received permission to strike three of the specifications in count I of the Notice of Formal Proceedings (counts I-C, I-D, and I-H). The masters filed their report on April 25, 1974, finding five specifications not proven (counts I-G, I-I, II-D, II-G, and IV). Of the remaining eleven specifications, six were found to constitute both wilful misconduct and prejudicial conduct (counts II-A, II-B, II-C, II-F, III, and V), three were found to constitute wilful misconduct (counts I-E, I-F, and II-E), and the final two specifications were found to constitute prejudicial conduct (counts I-A and I-B). The masters, who also made findings concerning factors in mitigation, unanimously recommended that petitioner be censured.

After considering the masters' report (rule 912), written objections ***784** thereto (rule 913), which were filed only by the examiners, and oral arguments (rule 914), the Commission, on July 16, 1974, issued its own findings of fact, conclusions of law and recommendation. (Rules 918 and 919.) By unanimous vote (save for a seven-to-two vote as to count I-A) the Commission adopted the masters' findings of fact concerning the eleven specifications found proven by the masters. The Commission unanimously concluded that these proven specifications constituted wilful misconduct. The Commission dismissed the five charges the masters found not proven, [FN4] as well as the three charges which had been stricken. The Commission made no findings concerning mitigation. By a five-to-four vote the Commission recommended to this court that petitioner be removed from office. (Rule 917.) Petitioner was thereby disqualified from acting as a judge for as long as the Commission's recommendation of removal remained pending before this court. (Cal. Const., art. VI, § 18, subd. (a).)

FN4 The first part of count II-D, which overlaps part of count I-F, was considered and determined by the masters as a part of count I-F. The remaining allegations of count II-D

were found to be not proven. The Commission, combining both counts, made findings pertaining solely to the charges involving count I-F. In the absence of any additional findings, we deem the remaining aspects of count II-D to have been impliedly dismissed by the Commission.

Following the procedure set forth in Geiler v. Commission on Judicial Qualifications (1973) 10 Cal.3d 270 [110 Cal.Rptr. 201, 515 P.2d 1], we granted a writ of review to examine the Commission's findings of fact, conclusions of law, and recommendation of removal. Since the ultimate, dispositive decision to censure or remove a judge has been entrusted to this court, we felt it our responsibility "in exercising that authority ... [to] make our own, independent evaluation of the record evidence adduced below." ( Id., at p. 276.) (1)(See fn. 5.) In fulfilling that responsibility, we have examined in full detail the record of proceedings below and find in accordance with the Commission that the 11 specifications of misconduct not stricken or dismissed below [FN5] have been proven by "clear and convincing evidence" sufficient to sustain them "to ***785** a reasonable certainty." (See Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 275.)

FN5 Among the arguments addressed to the court in this case is one of first impression which we feel should be answered directly. The examiners have argued that the dismissal by the Commission of certain of the specifications of misconduct by petitioner should not necessarily be accorded conclusive effect. The examiners contend that two of the dismissed specifications (counts I-G and I-I) were proven by clear and convincing evidence and constitute conduct for which the Constitution authorizes the imposition of discipline (see Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at pp. 283-284) notwithstanding the fact that the Commission, in stating that the specifications were "not sustained," chose not to issue any findings of fact and conclusions of law. The examiners maintain that because we have undertaken to review the record ourselves and to adopt our own findings of fact and conclusions of law, it is within our power to find proven any of the charges lodged against petitioner upon which evidence was received regardless of the Commission's disposition of such charges. We emphatically disagree.
The Constitution clearly makes our power to discipline a judge for misconduct "contingent on the Commission having so recommended." ( Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 276; Cal.Const., art. VI, § 18, subd. (c) [see fn. 1, supra].) It would be entirely inconsistent with this constitutional division of functions for us to consider in passing on the Commission's recommendation any allegations of prejudicial conduct or wilful misconduct other than those which formed the basis of that recommendation. Unlike our statutory and inherent

constitutional powers to control the professional conduct of members of the bar (see Bus. & Prof. Code, § 6107; In re Hallinan (1954) 43 Cal.2d 243, 253-254 [272 P.2d 768]), our shared constitutional power to censure or remove a judge for misconduct does not permit us to impose such discipline on our own motion. (Cf. Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 276.)

Moreover, the examiners' argument overlooks the dual function which the Commission performs. When considering the masters' report and deciding upon its own findings of fact and conclusions of law, the Commission acts in an adjudicatory role with the prosecutorial function left to the examiners. (See rule 921(f).) But before us the Commission's role is exclusively that of an adversary, as the Commission is the respondent to the petition for a writ of review. (Rule 920(a).) The examiners appear before us merely as counsel to respondent. As such, the examiners are no more free than the Commission itself to argue against the validity of respondent's own adjudication of the facts and consequent conclusions of law. Its dismissal of certain of the specifications against petitioner having been based on its own evaluation of the evidentiary record in the light of the constitutionally ordained grounds for imposing discipline, the Commission is estopped from urging us, through counsel, to assess the record otherwise.

For the foregoing reasons we conclude that the Constitution as well as sound procedure compel us to predicate our adoption, modification, or rejection of the Commission's recommendation solely upon those specifications in the Notice of Formal Proceedings which the Commission found both to have been proven as a matter of fact and to have constituted constitutionally sufficient grounds for the imposition of discipline. It would make a mockery of the constitutional requirement that our imposition of discipline on a judge be contingent "[o]n recommendation of the Commission" (Cal. Const., art. VI, § 18, subd. (c)), for us to contemplate basing our adoption or modification of such a recommendation on conduct which the Commission has not considered in formulating its recommendation.

We wish to emphasize, however, that with respect to those specifications which have been found proven by the Commission and have been deemed by the Commission to be grounds for imposing discipline, and hence are properly before us in reviewing the Commission's recommendation that discipline in fact be imposed, we do not mean to intimate that this court gives dispositive effect to these determinations of questions of fact and law by the Commission. Such determinations are the condition precedent to our consideration of whether a judge is to be disciplined. This condition having been met, we regard it as established by Geiler that it is solely for this court to decide not only the question of fact whether the conduct in issue occurred but also, unfettered by the characterizations

of the Commission, the question of law whether the proven conduct falls within the class of conduct for which the Constitution authorizes the imposition of discipline. (See Geiler, supra, 10 Cal.3d at pp. 276, 283-284.) We reserve decision whether we are similarly unfettered by the nature of the discipline recommended by the Commission, to wit, whether our power to "modify" a recommendation of the Commission (rule 920(a)) would allow us to impose greater rather than lesser discipline than that recommended, and thus to remove from office a judge whom the Commission has recommended merely be censured.

***786** We turn now to a precis of the proven specifications of misconduct. As to each such specification, our findings of fact are set forth in the margin. Our findings are adapted, and in some instances adopted in haec verba, from those of the Commission.

Count I generally charged petitioner with having conducted his court in a bizarre and unjudicial manner. In particular, he was alleged to have treated attorneys in a cavalier, rude and improper manner. Count I-E charged that petitioner had subjected an attorney to improper cross-examination when the attorney took the stand in support of his motion to disqualify petitioner (Code Civ. Proc., § 170.6), and had improperly levied "witness fees" against the attorney as a condition to petitioner's disqualification of himself. [FN6] In count I-F petitioner was charged with ***787** having demeaned a deputy district attorney in open court and having placed him under restraint, because the deputy had appealed petitioner's disposition of another case. [FN7] Count I also set forth proven specifications ***788** of petitioner's treatment of litigants in a cavalier, rude and improper manner. Thus, in count I-A, petitioner was alleged to have expressed his disbelief in the testimony of a defendant by having created a sound ***789** commonly referred to as a "raspberry" [FN8] and in count I-B, petitioner was charged with having made a vulgar gesture (giving the "finger" or digitus impudicus) in reprimanding a defendant for coming in late in a traffic matter. [FN9]

FN6 Our findings for count I-E are as follows:
1. On or about August 11, 1972, the case of People v. Dutro was set for hearing on a preliminary examination in department 1 of the San Leandro- Hayward Municipal Court.
2. The petitioner who normally presided over department 5 of said court was on the day in question also presiding over department 1, and had been so presiding for approximately two weeks, substituting for Judge Robert Fairwell.
3. On at least two different occasions immediately prior to August 11, 1972, petitioner had indicated to different deputy district attorneys of Alameda County that he remembered Attorney Victor J. Gianunzio with some degree of displeasure and hostility because of an incident which

occurred several years prior when petitioner was a private counsel representing a party in civil litigation and Mr. Gianunzio represented the opposing party.
4. Mr. Gianunzio represented the defendant Dutro at the preliminary examination, and when the case was called he made an oral motion supported by an oral statement under oath (Code Civ. Proc., § 170.6, subd. (2)) seeking to disqualify petitioner from hearing the matter.
5. The oral statement of Mr. Gianunzio alleged: (a) he did not know until the day of the hearing that petitioner was sitting in department 1; (b) some years previous to petitioner's taking the bench the two men had been on opposite sides of some civil litigation and, as a result of an incident during the course of that litigation involving him and the petitioner, the latter had been held in contempt; (c) subsequent to that incident and prior to petitioner's assumption of the bench, he had made overtures to petitioner through third parties to correct the misunderstanding that had arisen and such overtures had been rebuffed; and (d) he was informed and believed that petitioner had expressed an opinion that he (Gianunzio) had "better not appear in his Court."
6. Petitioner questioned Mr. Gianunzio extensively in open court, demanding to know the source of his purported knowledge that petitioner was prejudiced against him.
7. Petitioner denied the disqualification motion on the ground that it was not timely, since (a) he had been sitting in department 1 for more than two weeks preceding the date of the hearing; (b) it was commonly known that during the months of July, August and September many judges take vacations, and (c) department 1 and department 5 had been combined for the period of July 31 - August 25, 1972, inclusive, with petitioner presiding.
8. Petitioner had himself sworn during the course of the proceedings and testified that he had no present recollection of the prior incident between himself and Mr. Gianunzio.
9. Ultimately petitioner disqualified himself and continued the matter conditioned, on the motion of the district attorney, upon Mr. Gianunzio's paying witness fees for all witnesses (approximately 10), including police witnesses, summoned by the district attorney for the preliminary examination.
10. Subsequently, on August 14, 1972, petitioner and Mr. Gianunzio reconciled their differences and petitioner reduced the amount to be paid as witness fees reciting that the fees would be paid by Mr. Gianunzio out of his own pocket and without any appeal from the order directing such witness fee payment.
11. Petitioner knew or should have known the proper method for handling a motion for disqualification. (Code Civ. Proc., § 170.6.) He acted out of revenge and in bad faith in testifying from the bench that he had no present

recollection of the prior incident between himself and Mr. Gianunzio, and in questioning Mr. Gianunzio in open court as to the source of Mr. Gianunzio's statement that petitioner was hostile toward him.

FN7 Our findings for count I-F are as follows:
1. On October 31, 1972, about 5:15 p.m., Deputy District Attorney Melville Behrendt appeared in petitioner's court for the purpose of asking petitioner to issue a search warrant. Deputy District Attorney Gerry Hubert, who was appearing for the People in a criminal matter, asked leave of court to bring up the search warrant. At this point Mr. Behrendt approached the bench with the search warrant and gave it to petitioner.
2. Prior to October 31, 1972, a notice of appeal had been filed by the district attorney from the decision of petitioner in the case of People v. Peluso. In support of the notice of appeal Mr. Behrendt had sworn to and filed his affidavit.
3. Upon Mr. Behrendt's approaching the bench, petitioner brought up the Peluso case, a matter not then pending before him and in no manner connected with the request to issue the search warrant. Petitioner proceeded to question Mr. Behrendt at length regarding the Peluso case affidavit.
4. Some 15 to 20 minutes later, after petitioner ordered production of Mr. Behrendt's affidavit and required him to read it, petitioner resumed his questioning. Mr. Behrendt was reluctant to answer any questions regarding the matter and the following colloquy ensued:
"Mr. Behrendt: Your Honor, I recognize this affidavit as the affidavit that I signed on the 7th day of September, 1972 and I think that's all I should say at this time and I believe if the court has any jurisdiction at this time to ask me questions, that matter is not regularly scheduled at this time for a hearing in this department without notice to myself and I believe now the Appellant [sic] Department of the Superior Court will -
"The Court: Well, I don't believe it has gone up, Mr. Behrendt. That's why I am trying to find out what is going to be the status of this case. My understanding was that while it was filed there has to be some sort of a writ taken in order to get it up to the Appellate Court and all I am asking you, if the statement made by you, page two, lines 12 through 13 -
"Mr. Behrendt: I stated upon my affidavit that and that's all I should state at this time.
"The Court: Did you check the record? Did you check with the Department of Motor Vehicles? Did you ever check the record of the courts to see if the court in fact ordered what you said, contrary to what it had stated in open court?
"Mr. Behrendt: May I ask what purpose these questions are being asked me at this time?
"The Court: I don't believe, Mr. Behrendt, that it is your

position as an officer to ask the court any questions. The court is asking you and the court, I believe, is entitled to a little courtesy.
"Mr. Behrendt: I have always been courteous to this court, Your Honor, and - "The Court: Now, the -
"Mr. Behrendt: - and I have a right to reserve any answer to -
"The Court: Well, now, Mr. Behrendt, I'll tell you what. You have a seat in the jury box.
"Mr. Behrendt: Am I being held, Your Honor, in custody at this time?
"The Court: If you wish it this way.
"Mr. Behrendt: I ask the court to put me under arrest. I may ask for a writ in this so - I'm here in another matter before this court to ask this court to issue a search warrant and -
"The Court: Behrendt, you may be quiet, Mr. Behrendt. I'm not in a position to read that affidavit and in view of the fact that you are the person who prepared it, I want some time to read it carefully before I sign it. Now, you may have a seat. You may have a seat, Mr. Behrendt.
"Mr. Behrendt: Is the court holding me in contempt or holding me in custody at this time?
"The Court: The court is telling you to sit down.
"Mr. Behrendt: Your Honor, at this time I intend to leave the courtroom unless I am being placed under arrest for contempt.
"The Court: Mr. Behrendt, don't leave the courtroom. I'm telling you to sit down. Now, that is a court order, if you wish. "Mr. Behrendt: Is the court placing me in custody at this time, Your Honor?
"The Court: It depends on what you do, Mr. Behrendt. The court is telling you to sit down, Mr. Behrendt, I don't want to do anything rash. Now, you sit down.
"Mr. Behrendt: May I ask the court what authority it is holding me in this court?
"The Court: Mr. Behrendt, that is a court order, to sit down until such time -
"Mr. Behrendt: May the court define my status at this time, why I am being held inside this courtroom?
"The Court: Until such time as I have had a chance to read the affidavit for your search warrant and go over it with you -
"Mr. Behrendt: May I withdraw that search warrant from this court?
"The Court: No, Mr. Behrendt, you may not.
"Mr. Behrendt: May I ask the court's reason for that?
"The Court: Because the court was originally asked to sign it and the court will read it carefully.
"Mr. Behrendt: Well, Your Honor, if I might state to the court at this time, may I make a statement to the court at this time?
"The Court: Mr. Behrendt, I have had enough of you, now, you

sit down. "Mr. Behrendt: Your Honor, at this time -
"Mr. Court: Mr. Behrendt, this is the last time. Now, sit down.
"Mr. Behrendt: Excuse me, Your Honor, I intend to leave the court. If I am no longer required -
"The Court: You are required here.
"Mr. Behrendt: May I ask the reason the court is requiring me to stay in this courtroom?
"The Court: Do you want to escort him to a seat, please?
"Mr. Behrendt: Am I being placed in custody at this time?
"The Court: Would you escort him to a seat, please? You may have a seat in the jury box."
5. Whereupon the bailiff took Mr. Behrendt by the arm and escorted him to the jury box.
6. The affidavit in support of the search warrant, though drafted by Mr. Behrendt, was signed by a police officer.
7. Ultimately, petitioner signed the search warrant after Mr. Behrendt had been kept in the jury box for approximately one-half hour, remarking that the search warrant was "slightly defective" in that night service had not been requested and petitioner was now so amending it. The subject matter of the search warrant was a vehicle then impounded and under police guard. Upon the signing of the warrant, petitioner suggested that in the future Mr. Behrendt should not return to petitioner's court.
8. It was petitioner's practice to order that persons placed in custody or under restraint, in open court, be seated in the jury box pending further action and only such persons in custody or under restraint, as a general rule, were so seated.
9. The affidavit filed pursuant to the appeal was in error and the deputy district attorney had, in fact, not checked the applicable records of the Department of Motor Vehicles.
10. Petitioner knew or should have known that it was beyond his judicial authority to bring up the Peluso case, to interrogate Mr. Behrendt regarding the Peluso matter, or to place Mr. Behrendt under restraint. Petitioner's attempt to put a gloss of good faith over the entire incident by stating that his careful scrutiny of the warrant had disclosed it to be "slightly defective" failed to conceal the fact that his conduct was clearly motivated by feelings of animosity toward Mr. Behrendt.

FN8 Our findings for count I-A are as follows:
1. Sometime in the summer of 1972 petitioner presided at the trial in the case of People v. Fusilero in the Fremont Judicial District. 2. While the defendant Fusilero was on the witness stand, testifying in his own behalf, petitioner emitted a contemptuous sound commonly called a "raspberry" to indicate his disbelief of the witness. Such derisive sounds had been made by petitioner in open court on other occasions.
3. Petitioner's contemptuous "raspberry" was at least

partially motivated by his anger towards the deputy public defender for having refused petitioner's settlement proposal, and was an attempt to prejudice the defendant's case.

FN9 Our findings for count I-B are as follows:
1. In 1972 in open court petitioner did use a vulgar gesture (giving "the finger") in reprimanding a defendant for coming in late in a traffic matter.
2. The petitioner used the gesture to indicate that the tardiness of the defendant demonstrated the latter's lack of respect for the court and not to demean the defendant nor to suggest the attitude of the court toward the defendant.
3. The evidence is not clear and convincing that petitioner used the gesture on any other occasion.

Count II generally alleged that petitioner's judicial conduct was subject to the improper influence of his business relations and social friendships. In counts II-A and II-B, petitioner was charged with having approached a deputy district attorney, as well as that deputy's superior, in an attempt to influence the disposition of a case pending against a friend. [FN10] In count II-C, it was charged that petitioner had attempted to ***790** coerce a deputy district attorney into accepting a negotiated plea and, upon his refusal to accept, petitioner had suppressed the evidence and had acquitted the defendant, who was the son of a friend and political supporter. [FN11] In count II-E, petitioner was charged with having caused a defendant cited for engaging in a speed contest (Veh. Code, § 23109, subd. (a)) to appear before him rather than in the department in which the defendant had been directed to appear. When the defendant, who was the nephew of a friend and political supporter, appeared before petitioner, the charge against the defendant was reduced to illegal parking (Veh. Code, § 22502) without notice to or an appearance by the ***791** district attorney. [FN12] And finally, in count II-F it was alleged that petitioner had improperly transferred to his own court the file in a felony-assault ***792** case involving the same defendant as in count II-E, whereupon petitioner had ordered the defendant released on his own recognizance ***793** so as to prevent the defendant from being booked and interrogated by the police pursuant to the execution of an outstanding warrant for his arrest. [FN13] ***794**

FN10 Our findings for counts II-A and II-B are as follows:
1. On or about April 1972, there was a jury trial in the San Leandro- Hayward Judicial District before Judge Edgar, against one Alchian for an alleged violation of Vehicle Code section 23102. William Cosden, deputy district attorney, prosecuted, and Attorney Larry J. Frumes defended. The jury disagreed eleven to one for conviction. A mistrial was declared. Thereafter, the case was pending for resetting.
2. At all times material herein Mr. Alchian was a friend of petitioner. Mr. Frumes, a young attorney admitted to the bar

in 1972, was dating petitioner's daughter and was associated with, or a law partner of, Robert Winkler, a close personal friend of petitioner for many years. (See finding No. 5, count V, fn. 15, infra.)
3. At no time material hereto was the case of People v. Alchian pending before petitioner, nor in the normal course of business would petitioner have presided over any jury retrial since he was not then assigned to criminal jury trials.
4. Subsequent to the mistrial in the Alchian case and while it was pending for resetting, petitioner, on a number of occasions, urged and sought to persuade Deputy District Attorney Cosden to reduce the charge against Mr. Alchian from Vehicle Code section 23102 (driving while under the influence of intoxicating beverage) to Vehicle Code section 23103 (reckless driving). On at least one occasion petitioner attempted similarly to persuade George Nicholson, then Mr. Cosden's superior in the district attorney's office.
5. Petitioner knew or should have known that he was using the prestige and authority of his judicial office to effect a disposition of a criminal case not before him in any judicial capacity and for reasons unconnected with the merits of the case.

FN11 Our findings for count II-C are as follows:
1. On May 26, 1972, the case of People v. Christopher Stephen Goulardt charging the defendant with violations of Penal Code section 647, subdivision (f) (under influence of drugs in a public place) and Health and Safety Code section 11530 (possession of marijuana), was tried before petitioner sitting without a jury.
2. The defendant Goulardt's father, Kenneth J. Goulardt, was then administrative aide to the Mayor of Hayward, had known petitioner for about 10 years, and had been active in his campaign.
3. The defense counsel was Attorney Julio Juarez, a campaign supporter and long-time personal friend of petitioner. (See finding No. 3, count V, fn. 15, infra.)
4. During the course of the trial petitioner made a suggestion, which he had been informed prior to trial would be unacceptable, namely, that the district attorney's office permit the defendant to plead to the Penal Code section 647, subdivision (f) charge and dismiss the Health and Safety Code section 11530 charge.
5. Deputy District Attorney Robert B. Hutchins refused to accede, whereupon petitioner engaged in further questioning of police officers and then stated that the district attorney's refusal to accept the plea had placed him "in a box" and he would have to do something he did not wish to do.
6. Although the record is confused as to whether certain witnesses were sworn, whether a formal motion to suppress

evidence was made, whether any order other than that suppressing evidence under Penal Code section 1538.5 was made in open court, the minutes reveal that the defendant was found not guilty on both counts.
7. The Appellate Department of the Alameda County Superior Court reversed the trial court, and was itself reversed by the Court of Appeal, First District on the ground that the defendant having been once in jeopardy could not be retried despite what may have been "flagrant error" resulting in a "gross miscarriage of justice."
8. At the conclusion of the case petitioner stated that although the defendant was in fact guilty he had been saved by a technicality.
9. Petitioner purported to suppress all of the evidence against the defendant, not because he believed the defendant's arrest to have been invalid under the law as applied to the facts of the case, but rather because by resorting to the rubric of search and seizure law he could with colorable justification direct the acquittal of the defendant, notwithstanding what he knew or should have known, as an experienced criminal attorney, was ample evidence in the absence of any defense to find the defendant guilty of at least the Penal Code section 647, subdivision (f) charge. Petitioner's attempt to put a gloss of good faith on the whole incident, by declaring that the defendant "had been saved by a technicality," was intended to conceal the fact that petitioner's conduct was motivated by his relationship with the defendant's father and with the defendant's counsel, as well as petitioner's desire to punish the deputy district attorney for his refusal to accept petitioner's suggestion of a negotiated plea.

FN12 Our findings for count II-E are as follows:
1. On or about July 6, 1972, Ralph N. Leines was arrested and taken into custody by an officer of the San Leandro Police Department for a violation of Vehicle Code section 23109, subdivision (a), (speed contest). Later, on the same day, Mr. Leines was released on a citation directing him to appear before Department 2 of the San Leandro-Hayward Municipal Court, sitting in San Leandro.
2. Sometime between July 6, 1972, and July 19, 1972, Mr. Leines gave his citation to Mr. James M. Temple, a bail bondsman, who said that he would see what he could do for Mr. Leines.
3. On or about July 19, 1972, Mr. Temple met petitioner in his chambers. No one other than petitioner and Mr. Temple were present. Mr. Temple showed Mr. Leines' citation to petitioner, who wrote on the face of the citation as follows:
"7-19-72 40 hours at SLBC by 9/30/72 all sessions ts Reduce on Completion to 22502 V.C. wt wds To 7/28/72 Ex SENT"
4. This meant that Mr. Leines was to (a) donate 40 hours of work to the San Leandro Boys Club by September 30, 1972; (b)

attend traffic school; and (c) upon completion of traffic school, the charge of Vehicle Code section 23109 would be reduced to Vehicle Code section 22502 (illegal parking) so that no abstract of conviction would be forwarded to the Department of Motor Vehicles.

5. Mr. Temple was advised by petitioner to notify Mr. Leines to appear on July 20, 1972, in department 5 before petitioner. Mr. Temple did so advise Mr. Leines, who appeared as requested but his case was not calendared nor called, so he left department 5 after the clerk gave him a date about one week later.

6. Unknown to petitioner, a criminal complaint had been filed against Mr. Leines by the district attorney on July 11, 1972, on account of said violation of Vehicle Code section 23109. The criminal complaint was calendared before Judge Byers in department 2 in San Leandro, the department where Mr. Leines had been cited to appear. When Mr. Leines did not appear in department 2 on July 20, 1972, a bench warrant was issued for his arrest.

7. The following appears upon a form used by the San Leandro-Hayward Municipal Court to keep a record of the action taken in a case:

"CRT. DATE ATTY PROCEEDINGS

JUL 20 1972 NA-BW-$750 bail RKB

JUL 20 pro-per QUASH B/W-40 HRS S.L.B.C. 6 sessions By 9/30/72 to
Traffic School on completion 22502 7/28/72 For
Ex.Sent WDS

7-28-72 T.S. assigned Oct 28 1972

AUG 8 '72 ENTERED ON MINUTES OF 8/3/72"

There is an obvious irregularity in the date "JUL 20" on the second line under "CRT. DATE" which consists of the letters "JUL" imprinted by a rubber stamp, but with the numerals "20" handwritten by a felt tip pen, possibly obliterating other numerals underneath.

8. The official criminal docket for the case shows the following:

"DATE JUDGE PROCEEDINGS

| | | |
|---|---|---|
| 7-11-72 | | Complaint filed, sworn to by Larry Rinne, SLPD charging the defendant with having committed on or about July 6, 1972, the crimes of misdemeanors to wit: a violation of Section 23109a of the Vehicle Code, two counts thereof. Defendant was cited to appear on July 20, 1972 at 9:00 a.m. in Department 2. |
| 7-20-72 | Byers | DDA: W. Cosden. Defendant not appearing, bench warrant ordered with bail set at $750.00 |
| 8-3-72 | Spruance | Action on calendar for arraignment. (Minutes do not reflect whether defendant was present.) Action transferred from Department 2. Bench warrant is ordered quashed. Time is waived, jury waived, guilty plea entered. Defendant sentenced to 40 hours work for San Leandro Boys Club to be completed by 9-30-72. Defendant is ordered to attend 6 sessions of Traffic School, charge to be reduced to 22502 of the Vehicle Code upon completion." |

9. On or about July 28, 1972, Mr. Leines appeared before petitioner in department 5, entered his plea and was sentenced. At that time petitioner knew that the case was pending in department 2 and that Judge Byers had issued a bench warrant on account of Mr. Leines' failure to appear in department 2 on July 20, 1972. At said appearance of Mr. Leines, petitioner quashed the said bench warrant.

10. The Presiding Judge of the San Leandro-Hayward Municipal Court made no order, formal or informal, transferring the Leines case from department 2 to petitioner in department 5, nor was Judge Byers, presiding in department 2, consulted by petitioner regarding the case.

11. The district attorney's office had no knowledge or notice of petitioner's action in the case until on or about August 3, 1

972.
12. On August 29, 1972, a notice of appeal was filed by the district attorney and ultimately the appellate department of the superior court set aside petitioner's judgment on the ground that it was void and remanded the case to the San Leandro-Hayward Municipal Court with directions that it be started over again with an arraignment of Mr. Leines.
13. Petitioner was friendly with James Temple's father and particularly with defendant Leines' uncle, Joseph Egan, who supported petitioner's election campaign. (See finding No. 3, count II-F, fn. 13, infra.)
14. Petitioner knew or should have known that he improperly assumed jurisdiction of the Leines case, in violation of rule 533(a), as then applicable, and that he acted in derogation of the rights of the People in proceeding without giving notice to the district attorney. It can only be concluded that petitioner's actions were motivated by nothing having to do with the merits of the case, but rather by his friendship with either Mr. Temple's father or Mr. Egan or both.

FN13 Our findings for count II-F are as follows:
1. On August 7, 1972, a felony assault complaint was filed in San Leandro by the district attorney against Ralph N. Leines, the same individual who appears in count II-E. A warrant for Mr. Leines' arrest was prepared but the issuance of the warrant was deferred to the following day.
2. On August 7, 1972, Mr. Leines called the police in San Leandro and was advised that there was a felony complaint on file against him and that the police wished to interview him at the police station. Mr. Leines called his parents for advice.
3. Mr. Leines' father met that day with his brother-in-law, Joseph Egan, business agent for the plasterers' union, who had known petitioner for some 12 years and had been active in his campaign for election in 1970 to his present judicial position. Mr. Egan and Mr. Leines, senior, went to the court in Hayward to see petitioner about 5 p.m., August 7, 1972, and met petitioner in the parking lot outside the court building, just as petitioner was about to leave. A few minutes thereafter the clerk of the court entered the parking lot and was approached by petitioner and directed to bring the court file on the Leines assault matter from San

Leandro to Hayward and to have the case placed on petitioner's calendar for the morning of August 8, 1972. Mr. Egan was directed by petitioner to have the defendant Leines in his court the following morning.

4. On the morning of August 8, 1972, the case of People v. Leines charging a violation of Penal Code section 245, was called and petitioner ordered the defendant released on his own recognizance. Although he had been informed the previous night that the San Leandro Police Department wished to interview and book the defendant, petitioner did not require at that time that the defendant be booked.

5. At the time petitioner released defendant on his own recognizance he stated that while he did not know the defendant (he had sentenced him on July 28, 1972, see count II-E, fn. 12, supra) he did know defendant's uncle, Mr. Egan, and that this was the first time that defendant had been involved in anything.

6. The case properly should have been in a department of the court in San Leandro and in the regular course of business would not have been in petitioner's department for any purpose.

7. Petitioner, in proceeding as he did, intended (a) to prevent the police from seeking to interrogate the defendant prior to the defendant's securing counsel, and (b) to avoid the booking of the defendant, as a favor to Joseph Egan, a friend and political supporter of petitioner.

8. On or about August 9, 1972, Deputy District Attorney George Nicholson telephoned petitioner with reference to releasing Mr. Leines without ordering him to be booked. Petitioner informed Mr. Nicholson that as an attorney he had avoided booking whenever possible and, as a judge, he was going to continue to do so; that he had done favors for people in the past and he intended to continue to do so. When Deputy Nicholson suggested that his conduct was improper petitioner replied with an obscenity.

Count III consisted of a single specification alleging that

petitioner had solicited another judge to dismiss a traffic citation which he had received and that petitioner had subsequently altered the reported disposition so as to convey the false impression that the citation had been dismissed upon petitioner's having completed traffic school. [FN14]

FN14 Our findings for count III are as follows:
1. On or about November 2, 1971, petitioner personally received a traffic citation for allegedly running a red light. (Veh. Code, § 21453, subd. (a).) The citation directed petitioner to appear within 15 days.
2. On the same day that he received the citation petitioner went to the chambers of Judge Robert Fairwell, then presiding in department 1, and in the presence of at least one other person, Richard Jones, then a deputy district attorney, handed the citation to Judge Fairwell, who attempted to disqualify himself in the proceeding by writing "disqualified" on the back of the copy of the citation. Petitioner indicated displeasure with Judge Fairwell either verbally or by facial expression, whereupon Judge Fairwell crossed out the word "disqualified" and wrote on the back of the citation the following:
"11/2/71 Dismissed R.F."
3. Immediately thereafter petitioner, without the knowledge of Judge Fairwell, altered the above notation as follows:
"11/2/71 all Sessions TS Dismissed on completion R.F."
In fact, petitioner did not attend traffic school pursuant to his own notation on the citation.
4. The San Leandro-Hayward Municipal Court judges have authorized the clerks of the court to send defendants with first offenses to traffic school without any appearance before a judge.
5. We can only conclude that petitioner knowingly circumvented proper legal procedure and placed Judge Fairwell in an embarrassing predicament for the purpose of having his citation dismissed. The only reasonable inference from petitioner's alteration of Judge Fairwell's outright dismissal of the citation was that petitioner intended to convey the erroneous impression that the citation had been dismissed after petitioner had attended traffic school in accordance with the usual practice in the San Leandro-Hayward Municipal Court, thus concealing the fact that he had received preferential treatment.

Finally petitioner was charged in the single specification of count V with having consistently appointed two attorneys in criminal cases in which the defendant was either not entitled to counsel at public expense or the public defender had not been requested to represent them. [FN15] ***795**

FN15 Our findings for count V are as follows:
1. In the period July 1971 to July 1972 petitioner appointed two attorneys, Julio Juarez and Robert Winkler, to represent

criminal defendants in cases pending in the San Leandro-Hayward Municipal Court. Mr. Juarez was appointed in 18 cases; Mr. Winkler in 9 cases. These 27 appointments constituted somewhat more than 44 percent of all appointments made by petitioner in that same period. The balance of petitioner's 61 appointments, constituting approximately 56 percent of his total appointments, were received by 22 other attorneys, no one of whom received more than 3 appointments, or approximately 5 percent of the total appointments. Petitioner maintained no list of attorneys available for appointment in appropriate criminal cases.

2. At all times material hereto, there was an Alameda County Public Defender's office duly constituted and able to afford legal representation to indigent defendants. In the 27 appointments that were made to Mr. Juarez and Mr. Winkler, no valid reason, such as conflict of interest, existed to justify such appointments, nor does it appear that in each of the 27 cases a determination of the indigency of these defendants had been duly made as required by Government Code section 27707. Mr. Juarez and Mr. Winkler were compensated by Alameda County public funds in amounts not less than $150 for each court appearance without regard to the nature of the service performed or the time expended pursuant to orders for payment of attorney's fees.

3. Mr. Juarez has been a friend of petitioner since 1951. At one time prior to petitioner's election to the municipal court, Mr. Juarez rented office space from the law firm of which petitioner was then a partner. Mr. Juarez presently rents office space from Mr. Winkler, whom he has known for some 10 years. Because of his long friendship with petitioner Mr. Juarez was very active in petitioner's campaign for election in 1970.

4. Mr. Juarez has been an attorney since 1966, practicing in the San Leandro-Hayward area. Between 1966 and the time petitioner took office in January 1971, Mr. Juarez had received approximately 8 to 10 appointments from all courts to represent criminal defendants.

5. Mr. Winkler has known petitioner for the past 25 years. They have been close personal friends since they were in law school together. Mr. Winkler was active in petitioner's campaign for election in 1970.

6. Petitioner knew or should have known the proper procedures required in appointing private counsel for indigent defendants. We can only conclude that petitioner's appointments of Messrs. Juarez and Winkler were motivated by his desire to reward his friends and election campaign supporters.

Taken as a whole the record indicates that petitioner engaged in a pervasive course of conduct of overreaching his judicial authority by deciding cases for reasons other than the merits, by improperly influencing another judge, and by using the judicial

process to gain special favors for friends and political supporters. The record also shows that petitioner has under color of judicial office repeatedly committed petty, vindictive, vulgar and otherwise unjudicial acts.

We turn now to the question whether the conduct which we have found as a fact to have occurred is conduct for which discipline may constitutionally be imposed. Other than for habitual intemperance or wilful and persistent failure to perform his duties, the Constitution provides that a judge may be censured or removed from the bench only for wilful misconduct or prejudicial conduct. (See fn. 1, supra.) We first sought to give meaning to these standards of conduct in Geiler. (2) We explained that the more serious charge, "wilful misconduct," is reserved for unjudicial conduct committed in bad faith by a judge acting in his judicial capacity. (10 Cal.3d at pp. 283-284.) The term "bad faith" implies that the judge "intentionally committed acts which he knew or should have known were beyond his lawful power." (10 ***796** Cal.3d at p. 286.) As so used, "bad faith" entails actual malice as the motivation for a judge's acting ultra vires. The requisite intent must exceed mere volition; negligence alone, if not so gross as to call its genuineness into question, falls short of "bad faith." "Bad faith" also encompasses acts within the lawful power of a judge which nevertheless are committed for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties. In sum, "bad faith" is quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly.

(3) The "lesser included offense" of "prejudicial conduct" lacks the element of either "bad faith" or action in a judicial capacity. [FN16] "Prejudicial conduct" includes "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" (

FN16 The masters found six specifications of misconduct to constitute both wilful misconduct and prejudicial conduct. Because "prejudicial conduct" is a "lesser included offense" of "wilful misconduct" the masters' additional findings that each of the six charges constituted prejudicial conduct were superfluous. Geiler, supra, 10 Cal.3d at p. 284), as well as "wilful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity." (10 Cal.3d at p. 284, fn. 11.) We stressed in Geiler the importance of an objective rather than a subjective appraisal of judicial conduct in light of the constitutional standards for judicial discipline, and pursuant thereto we noted that the canons of the American Bar Association's Code of Judicial Conduct might usefully be consulted to give meaning to the constitutional standards.

[FN17]

FN17 In Geiler we said: "The first two canons of the Code of Judicial Conduct proposed in 1972 by the American Bar Association's Special Committee on Standards of Judicial Conduct emphasize the importance of appraising alleged judicial misconduct objectively rather than subjectively. Canon One declares: 'a judge should uphold the integrity and independence of the judiciary.' The accompanying text adds: 'A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.' Canon Two speaks for itself: 'A judge should avoid impropriety and the appearance of impropriety in all his activities.' (Italics added.)" (10 Cal.3d at pp. 281-282.)
The American Bar Association's Code of Judicial Conduct was adopted by the House of Delegates on August 16, 1972. Subsequently, the Conference of California Judges adopted, with some modifications not relevant here, the American Bar Association Code of Judicial Conduct of 1972, effective January 1, 1975. (See Cal. Rules of Court, Appendix, div. II, Cal. Code of Jud. Conduct.)

(4) We examine first the proven specifications of count I. At the outset we refer to the third canon of the California Code of Judicial Conduct (see fn. 17, supra), which provides in pertinent part that "[a] ***797** judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control." (Canon 3A(3).)

Except for petitioner's vulgar "finger" gesture (count I-B; see fn. 9, supra) the proven specifications of count I show that petitioner engaged in a pervasive course of conduct of acting vindictively toward recalcitrant attorneys. With regard to petitioner's conduct toward Mr. Gianunzio (count I-E; see fn. 6, supra), it goes without saying that as a judge, petitioner should have known the proper method for handling a motion for disqualification. (Code Civ. Proc., § 170.6.) We have previously noted in connection with similar misconduct that "the rule has developed that, once an affidavit of prejudice has been filed under section 170.6, the court has no jurisdiction to hold further proceedings in the matter except to inquire into the timeliness of the affidavit or its technical sufficiency under the statute. ... When the affidavit is timely and properly made, immediate disqualification is mandatory. ... As this court has noted in respect to the exercise of contempt powers, '[a] judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws. ..."' (McCartney v. Commission on Judicial Qualifications, (1974) 12 Cal.3d 512, 531-532 [116

Cal.Rptr. 260, 526 P.2d 268].) Clearly, petitioner abused his judicial authority and acted out of revenge and hostility. Petitioner's treatment of Mr. Behrendt regarding the Peluso case (count I-F; see fn. 7, supra) was also an abuse of judicial authority and clearly motivated by feelings of animosity. Similarly, petitioner's contemptuous "raspberry" (count I-A; see fn. 8, supra) was a deliberate and malicious attempt to prejudice the defendant's case, motivated by petitioner's anger toward the deputy public defender. Because petitioner acted in bad faith in exceeding the bounds of his lawful power, we find each of these incidents to have been wilful misconduct.

(5) We find petitioner's vulgar "finger" gesture (count I-B; see fn. 9, supra), which resulted in a loss of courtroom dignity, to have been prejudicial conduct. Because it was an isolated act directed towards edifying the defendant rather than prejudicing his case, it was not done in bad faith and hence cannot be deemed to have been wilful misconduct.

(6) We examine next the proven specifications of count II, referring again to one of the canons of the California Code of Judicial Conduct: ***798** "A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. ..." (Cal. Code of Jud. Conduct, supra, Canon 2B.) The proven specifications of count II show a flagrant disregard for this canon. In each of the incidents, petitioner intentionally used the prestige or authority of his judicial office to effect or influence the disposition of a criminal case for a personal reason unconnected with the merits of the case, to wit, petitioner's desire to help friends and political supporters. Petitioner was thus acting in bad faith in attempting to influence the disposition of the Alchian case (counts II-A and II-B; see fn. 10, supra) which was not before him in any judicial capacity; in dismissing the Goulardt case (count II-C; see fn. 11, supra); in improperly assuming jurisdiction and acting without notice to the district attorney in the Leines traffic case (count II-E; see fn. 12, supra); as well as in improperly assuming jurisdiction and releasing Leines on his own recognizance in the assault case (count II-F; see fn. 13, supra). As to the Goulardt case, there are additional grounds for the conclusion that petitioner acted in bad faith. In another instance of the course of conduct involved in count I, petitioner's handling of the Goulardt case was motivated not only by political favoritism but also by a desire to punish the deputy district attorney for his refusal to accept petitioner's suggestion of a negotiated plea. We have no recourse but to conclude that each of the proven specifications of count II constituted wilful misconduct, save only with respect to our finding concerning petitioner's use of an obscenity when talking on the telephone with a deputy district attorney (finding No. 8,

count II-F; see fn. 13, supra). For the reasons expressed above regarding the "finger" gesture (count I-B; see fn. 9, supra), we conclude that petitioner's injudicious comment constituted prejudicial conduct. In McCartney we established that the muttering of profanity need not necessarily be deemed serious enough to warrant removal or censure. It should be noted, however, that the conduct there in issue, although unbecoming and injudicious, was not intended to be heard and was "not directed as a reprimand to court personnel, attorneys or any other specific individuals." ( McCartney v. Commission on Judicial Qualifications, supra, 12 Cal.3d at p. 535.)

(7) We also find petitioner's conduct regarding his own traffic citation (count III; see fn. 14, supra) to have been wilful misconduct. Inasmuch as the judicial district's practices allowed petitioner to be assigned automatically and ministerially to traffic school, we can only ***799** conclude that petitioner acted in bad faith in circumventing proper legal procedure to have his citation dismissed as well as in thereafter concealing the fact that he had received preferential treatment.

(8) Finally, we consider petitioner's illegal and unjustified appointments of two attorneys in criminal cases (count V; see fn. 15, supra). Once more we refer to the standards of conduct established by the California Code of Judicial Conduct: "A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered." (Cal. Code of Jud. Conduct, supra, (Canon 3B(4)).) California law provides that the court makes the final determination as to whether the defendant is financially qualified for representation at county expense. (Gov. Code, § 27707.) In counties where there is a public defender's office the court normally appoints the public defender to represent the indigent defendant. "Where there is no public defender, or the court finds that because of a conflict of interest or other reasons the public defender has properly refused to represent the indigent, the court shall appoint private counsel, in which case the court shall fix a reasonable fee and order that the fee, together with necessary expenses, be paid by the county." (Misdemeanor Procedure Bench Book, California College of Trial Judges (1971) § 1.39 (including a sample form for defendant's "declaration of financial inability to employ counsel"); see also California Municipal Justice Courts Manual, California Center for Judicial Education Research (1974) § 11.43 (also including the same sample form).) We find that petitioner acted in bad faith in exceeding the bounds of his lawful powers for the purpose of benefiting his friends and political supporters. His appointments clearly conflicted with the standards established by the California Code of Judicial Conduct. Therefore, we find petitioner's conduct to have been wilful misconduct.

(9) We come now to our most important responsibility, [FN18] the decision of the ultimate question whether a judge, whose conduct has ***800** been found to be either wilful misconduct or prejudicial conduct, [FN19] should be censured or removed from the bench. (See fn. 1, supra.)

FN18 Under the controlling principles of Geiler, it is our findings of fact and conclusions of law upon which we make our determination of the ultimate action to be taken. ( Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 276.) Although we give great weight to the masters' findings of fact ( id., at pp. 275-276), the conclusions of law and the ultimate sanction are solely within our province and domain; we do not defer to either the masters or the Commission in deciding these matters. Language to the contrary in McCartney v. Commission on Judicial Qualifications, supra, 12 Cal.3d at page 540 is no longer to be regarded as controlling.

FN19 As we noted in Geiler, "[i]t should be emphasized that our characterization of one ground for imposing discipline as more or less serious than the other does not imply that in a given case we would regard the ultimate sanction of removal as unjustified solely for 'conduct prejudicial to the administration of justice which brings the judicial office into disrepute."' (Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 284, fn. 11.)

(10) Petitioner has presented a good deal of evidence that he worked hard in an overworked court, that he was conscientious in admonishing defendants of their rights, that he gave special attention to Spanish-speaking defendants, that he assumed judicial office in a court where "loose practices" prevailed and no rules existed, and that the lack of communication between the various judges of his court compounded the problems created by the considerable geographical distance between them. Petitioner offers this evidence to mitigate the adverse inferences from the procedural irregularities underlying his conduct. Petitioner concedes some of these irregularities but what he emphatically does not concede is the bad faith which we have found to pervade the proven specifications. Petitioner does not contend nor can we conceive that there are circumstances in which bad faith itself can be excused by extraneous circumstances. There can be no mitigation for maliciously motivated unjudicial conduct. Since we have found petitioner to have acted in bad faith on numerous occasions, we obviously have given no credit to petitioner's asseverations of mitigating circumstances.

Petitioner first argues that he was the victim of the judicial district's "loose practices." We grant that loose practices prevailed, but petitioner was accused of more than merely following irregular procedures. His appointments of attorneys without first ascertaining the indigency of the defendant or

whether the public defender's office refused representation because of a conflict of interest cannot justify his favoritism toward Messrs. Juarez and Winkler. Similarly, even though "loose practices" permitted reductions of certain Vehicle Code violations to parking violations, the transferring of cases from one court to another, and the granting of a release to a defendant not otherwise before the judge, special favors for friends and political supporters were not sanctioned by any such "loose practices."

Petitioner also argues that he was inexperienced and that he had no idea that he was acting improperly because "no one complained." Although petitioner was "green" as a judge, he had 20 years of ***801** experience as a criminal attorney, practicing in many courts. Furthermore, he had many reference works at his disposal to answer most questions as to proper courtroom procedure. (E.g., Misdemeanor Procedure Bench Book, supra. See also the recently prepared Cal. Municipal Justice Courts Manual, supra.) Finally, the evidence is clear and convincing that when attorneys did object, petitioner retaliated. Thus, his vengefulness went beyond mere ignorance of proper procedures. In the Fusilero case, the deputy public defender's objection resulted in his client getting petitioner's "raspberry." Petitioner was "provoked" by Deputy District Attorney Behrendt's erroneous affidavit filed for an appeal taken in another matter and put him in the jury box, notwithstanding the deputy objected and wanted his status clarified. We can accept the earlier error as justification for petitioner's "close scrutiny" of the search warrant application, even though the deputy district attorney merely participated in the preparation of the warrant and was not the affiant, but not as justification for restraining the deputy unlawfully. In the Goulardt matter, when Deputy District Attorney Hutchins objected, petitioner claimed he was being placed "in a box" and would have to do something he did not wish to do. And, in the Leines felony-assault matter, to Deputy District Attorney Nicholson's objection, petitioner responded with an obscenity.

Petitioner finally argues that his heavy workload justified much of his conduct. We agree with the Commission that "petitioner's intent and motivation for committing these acts goes beyond the fact that he knew or should have known that he was acting beyond his lawful power. Here, the evidence clearly shows the reasons, and these reasons belie any excuse that petitioner proceeded improperly merely because he was overworked or inexperienced in proper procedures." Thus petitioner's claims that calendar pressures and language problems necessitated the appointment of private counsel do not conceal the fact that he was motivated by the desire to reward his friends and political supporters.

To be sure, if petitioner's giving the "finger" to a defendant and his use of an obscenity during a telephone conversation with a deputy district attorney were the only charges brought against him, censure would be the appropriate discipline, since we find

little risk of the recurrence of such conduct. We are persuaded to accept petitioner's explanation that in both incidents he was provoked, but that in any event, he realized how inappropriate his actions were and would not permit their recurrence. ***802**

In light of the remaining specifications of misconduct, however, we conclude that the Commission's recommendation of removal should be adopted. We find that petitioner's motives were far worse than those in issue in McCartney, [FN20] where we were persuaded that mitigating factors successfully rebutted any inference of bad faith. We would be remiss in our duty if we allowed petitioner's claims of justification to mitigate against removal, in view of the clear evidence of petitioner's petty tyranny and favoritism, which has led to our determination that petitioner has acted in bad faith. Mere censure of petitioner would woefully fail to convey our utter reproval of any judge who allows malice or other improper personal motivations to infect the administration of justice.

> FN20 In McCartney we were concerned merely with "modes of proper judicial behavior necessarily learned only by judicial experience." ( McCartney v. Commission on Judicial Qualifications, supra, 12 Cal.3d at p. 539.) Here, we are concerned with the basic respect for our institutions of justice which should be a fundamental concern of every judge and attorney.

We are ever mindful of the important role the municipal court judge fulfills in our system of justice. He handles more cases than any other judge in any other court and the municipal court is the only court that the average citizen is likely to observe or participate in. Furthermore, the municipal court judge has broad powers in the performance of his duties: he reviews the sufficiency of warrants and the validity of their execution; he presides over hearings which determine whether certain offenders will be bound over for trial in the superior court; he sets bail, appoints counsel and can even release defendants on their own recognizance; and finally, absent a clear showing of abuse, many of his rulings, decisions and findings are final. In fact, in misdemeanor cases, his authority is almost supreme, since he often acts as both judge and jury and rarely are his decisions appealed. Consequently, we must be careful that the municipal court judges of this state are fully capable of assuming the responsibilities inherent in such an important job.

Because it is our duty to preserve the integrity and independence of the judiciary (Cal. Code Jud. Conduct, supra, Canon 1) and because we cannot tolerate the risk of recurrence of petitioner's conduct, we order Judge William D. Spruance of the Municipal Court of the San Leandro-Hayward Judicial District removed from office. This order is final forthwith.

However, we feel that justice will best be served by allowing

petitioner ***803** to resume the practice of law. [FN21] We note that his long career as a lawyer was unblemished and that, as a practicing attorney, he will not have available that authority which he abused as a judge. We therefore further order that despite his removal from judicial office, William D. Spruance shall, if otherwise qualified, be permitted to practice law in the State of California. (See Cal. Const., art. VI, § 18, subd. (d).) ***804**

FN21 Judge Geiler was also permitted to practice law despite his removal from the bench. We noted that his unjudicial conduct did not amount to moral turpitude, dishonesty or corruption (cf. Bus. & Prof. Code, § 6106), but that his removal was required "more by the high standards of judicial office than by his personal failings." ( Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 287.) We wish to point out that the misconduct here involved is more serious with regard to petitioner's qualifications to practice law. By allowing petitioner to resume the practice of law we do not mean to intimate that petitioner's pattern of conduct of bringing improper influences to bear upon the judicial office is more proper for an attorney than a judge. Were the conduct here involved committed by an attorney, although we do not perceive that the attorney would be subject to so severe a sanction as disbarment, he would certainly be subject to public reproval or other appropriate discipline.

Cal.,1975.

Spruance v. Commission on Judicial Qualifications

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[L.A. No. 30430. In Bank. July 10, 1975.]

NOEL CANNON, a Judge of the Municipal Court, Petitioner, v. COMMISSION ON JUDICIAL QUALIFICATIONS, Respondent.

SUMMARY

Following the filing of a notice of formal proceedings, the Supreme Court appointed special masters to hear evidence on charges of alleged judicial misconduct on the part of a judge. On the basis of this evidence, the masters recommended censure. However, the Commission on Judicial Qualifications recommended removal.

After making an independent review of the entire record and drawing its own findings and conclusions, the Supreme Court ordered that the judge be removed from office. The court rested its order on evidence of 21 acts of wilful misconduct in office and 8 other acts constituting conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Among these acts, the court characterized as "particularly egregious" the bad faith and maliciousness with which the judge, purportedly pursuant to her direct contempt powers, ordered the incarceration of public defenders, and thereby denied the effective right of counsel to clients who were required to defend with substituted counsel who were not afforded a reasonable opportunity to prepare. The court adverted to other conduct by the judge supportive of its conclusion that she had maligned the judicial office and shown her lack of temperament and ability to perform judicial functions in an even-handed manner. Although holding that she had failed to demonstrate any valid mitigating factors, the court did conclude that her misconduct did not amount to moral turpitude, dishonesty, or corruption, and therefore did not constitute grounds for depriving her of her right to practice law in California. (Opinion by The Court.)

## HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c) **Judges § 6—Removal—Grounds.**—When viewed in the light of the absence of mitigating factors, removal of a judge from office was called for by the Supreme Court's findings, which were sustained by substantial evidence presented in hearings before special masters, indicating that she had engaged in 21 acts of wilful misconduct in office and 8 other acts constituting conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and that she lacked the temperament and ability to perform judicial functions in an even-handed manner.

(2) **Judges § 1—Discipline—Supreme Court's Prerogatives.**—It is for the Supreme Court, rather than its appointed special masters or the Commission on Judicial Qualifications to make the final findings of fact and conclusions of law in determining what discipline, if any, is to be imposed on a judge charged with judicial misconduct.

(3) Contempt § 3—Defenses—Attorney's Absence From Courtroom —Opportunity to Present Excuse.—An attorney must be afforded a reasonable opportunity to establish excuse before being held in contempt for absence from the courtroom.

(4) **Contempt § 6—Punishment—Direct Contempt—Statutory Requirements.**—Compliance with Code Civ. Proc., § 1211, relating to summary punishment for direct contempts and requiring the court to prepare an order reciting the facts of, and punishment proposed for, the alleged contempt, is jurisdictional. An order which assumes to punish summarily is void unless it shows facts sufficient to constitute a legal contempt on its face.

[See **Cal.Jur.3d**, Contempt, § 72; **Am.Jur.2d**, Contempt, § 86.]

(5) **Judges § 1—Discipline—Bad Faith.**—Bad faith of a judge charged with judicial misconduct was established by evidence that in citing public defenders for direct contempt, she wilfully failed to comply with the summary punishment requirements of Code Civ. Proc. § 1211, that she embarked on a program by which the defenders were charged and incarcerated as criminals despite her knowledge that they would be entitled to be released by extraordinary writ, that she cited them on grounds she never sought to establish, that she

demonstrated no convincing interest or judicial responsibility in the contempt proceedings after ascertaining that the defenders had been subjected to booking procedures, and that at times her conduct was vulgar, lacking in humane understanding, and grounded on retribution and hostility.

(6) **Judges § 1—Discipline—Bad Faith.**—The term "bad faith," as used in connection with disciplinary charges against a judge, implies that he intentionally committed acts which he knew or should have known were beyond his lawful power. It entails actual malice as the motivation for his acting ultra vires. The requisite intent must exceed mere volition; negligence alone, if not so gross as to call its genuineness into question, falls short of such "bad faith." The term also encompasses acts within a judge's lawful power but which are committed for a corrupt purpose.

(7) **Criminal Law § 84—Rights of Accused—Aid of Counsel—Discharge.**—The involuntary removal of the attorney representing defendant in a criminal case is a severe limitation on defendant's right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed.

(8) **Judges § 1—Discipline—Mitigating Factors.**—Extraneous circumstances cannot constitute mitigation for a judge's maliciously motivated unjudicial conduct.

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COUNSEL

Ruman & Spizer, I. Richard Ruman, Ball, Hunt, Hart, Brown & Baerwitz, Joseph A. Ball, Kaplan, Livingston, Goodwin, Berkowitz & Selvin, Herman F. Selvin and Sheldon W. Presser for Petitioner.

Dryden, Harrington & Swartz and George J. Franscell as Amici Curiae on behalf of Petitioner.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Kent L. Richland, Lynette A. Moore and James H. Kline, Deputy Attorneys General, for Respondent.

OPINION

THE COURT.— (1a) The Commission on Judicial Qualifications (the Commission) has unanimously recommended the removal from office of Judge Noel Cannon of the Municipal Court for the Los Angeles Judicial District of the County of Los Angeles. Judge Cannon has petitioned this court to modify or to reject the recommendation. We have independently reviewed the entire record and have adopted with slight modification the findings of the Commission.[1]

We conclude that petitioner has engaged in twenty-one acts constituting "wilful misconduct in office" and in eight other acts constituting "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[2] Although some of the specific acts charged and found may overlap as arising out of a particular course of conduct, the totality of petitioner's judicial misconduct nevertheless presents a compelling case against her. We deem to be particularly egregious the bad faith and maliciousness with which petitioner arbitrarily ordered the immediate incarcerations of deputy public defenders who displeased her, and denied the effective right of counsel to their clients who were required to defend against charges in on-going criminal proceedings with substituted counsel who were afforded no reasonable opportunity to prepare. As we find nothing to excuse or mitigate Judge Cannon's conduct we adopt the Commission's recommendation and order that she be removed from office.

Petitioner was appointed a judge for the Los Angeles Judicial District on April 10, 1963. The proceedings herein were initiated by the filing of a

[1]The make-up of the Commission is provided for in the California Constitution. (Cal. Const., art. VI, § 8; see *Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 782, fn. 1 [119 Cal.Rptr. 841, 532 P.2d 1209].)

In those instances wherein we have adopted Commission findings and conclusions we have substituted the word "petitioner" for "respondent." Judge Cannon was correctly designated respondent in proceedings before the Commission, but in proceedings before this court she is cast in the role of a petitioner seeking relief from the Commission's recommendation.

[2]This court is authorized to censure or remove a judge on recommendation of the Commission. The recommendation must be based on "action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, wilful and persistent failure to perform the judge's duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c).)

Rules for implementing the constitutional provisions are provided by the Judicial Council (Cal. Const., art. VI, § 18, subd. (e)) within the framework of the California Rules of Court. Judge Cannon has petitioned for modification or rejection of the Commission's recommendation pursuant to rule 920.

All references to specific rules herein are to California Rules of Court.

notice of formal proceedings on July 8, 1974 (rule 905), and thereafter petitioner filed her verified answer denying the allegations set out in the formal notice. We appointed three special masters who commenced evidentiary hearings on October 15, 1974. (Rule 907.)[3] The masters concluded hearings on November 6, 1974, and filed their report on November 19 unanimously recommending censure of petitioner. Both petitioner and the examiners designated by the Commission to prosecute the charges (rule 921(f)) filed written objections to the report (rule 913), and the objections were orally argued before the Commission on February 7, 1975 (rule 914). The Commission thereupon made its recommendation on March 3, based on findings of fact and conclusions of law as hereinafter appear (rules 918, 919). Petitioner, by virtue of the Commission's recommendation, is disqualified from acting as a judge for as long as that recommendation remains pending before this court. (Cal. Const., art. VI, § 18, subd. (a).)

The lengthy charges of petitioner's misconduct are summarized in the margin. We have omitted from that summary, however, those particular alleged specific acts of misconduct not sustained by the findings of the Commission and dismissed by it.[4]

[3]The special masters so appointed were: Charles H. Older, Judge of the Superior Court of Los Angeles County, Samuel L. Laidig, Judge of the Municipal Court for the Pasadena Judicial District of Los Angeles County, and Celia W. Baker, retired Judge of the Municipal Court for the West Orange County Judicial District.

[4]Petitioner was charged in count one with "wilful misconduct in office" (hereinafter wilful misconduct) and in count two with "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (hereinafter prejudicial conduct). The specifications of misconduct are the same as to each count, and are set forth hereinafter without reference to a particular count. The charged misconduct (pars. A through H) and the specific acts alleged in support of each charge are as follows:

"A. You have abused your contempt power, and thereby infringed upon the constitutional right of criminal defendants to effective assistance of counsel. . . ." Four instances are charged wherein petitioner held deputy public defenders appearing before her in preliminary hearings to be in direct contempt. For purposes of identification these contempt citations will hereinafter be referred to by the names of the deputies cited: Ridgeway (A-1), Ryan (A-2), Karagozian (A-3), and Putnam-Pine (A-4). The facts constituting the specific instances of alleged misconduct will hereinafter be set out in greater detail.

"B. You have unlawfully interfered with the attorney-client relationship by relieving counsel of record and appointing new counsel. . . ." There are charged the four instances (see par. A) wherein public defenders were cited for contempt and removed to the county jail, and different counsel were summarily appointed to represent the criminal defendants in ongoing preliminary hearings. Additionally, a fifth specification involves a public defender (Mrs. Henley) who displeased petitioner and was substituted out as counsel although not cited for contempt. (All five of the foregoing matters are designated in the formal notice under item B-1.) A sixth specification involves private counsel (Kroneberger) who was relieved at his request. Petitioner appointed and dismissed a public defender (Weiss) who questioned the defendant's financial eligibility to be

The masters found that all the specifications of the formal notice, as appearing in footnote 4, *ante*, to be proved to the extent that they

publically defended. Petitioner then appointed a second public defender (Fleishman) who, it is alleged, was intimidated into proceeding with the preliminary examination. (B-2.) A seventh specification involves a private counsel (Ingber) who was relieved upon attempting to file an affidavit of prejudice against petitioner. A deputy public defender was summarily appointed to proceed with the preliminary hearing. (B-3.)

"C. You have acted unreasonably and arbitrarily in matters of bail-setting and the issuance of bench warrants. . . ." It is charged that petitioner had been informed by a veterans hospital that an accused (Russo), who had been released on $500 bail, was unable to appear at a preliminary hearing because he was being evaluated in the hospital for meningitis. Petitioner issued an arrest warrant, set bail at $50,000, and had petitioner arrested at the hospital and removed over the doctor's objections. (C-1.) It is next charged that an accused (Brooks) against whom pending charges for want of prosecution were dismissed, was wrongfully ordered back into custody by petitioner when he would not stipulate to probable cause for his arrest. (C-3.) It is also charged that a juvenile (Alcorn) was certified to juvenile court by petitioner as to certain counts of a multiple count complaint. When the juvenile objected to continuing the preliminary hearing as to the remaining counts, petitioner vacated the certification and revoked bail. When the juvenile and his mother both uttered exclamations petitioner held both to be in contempt and set bail at $100,000 each. After both were in custody for an hour petitioner ordered the contempt charges quashed and reinstated the bail and certification. There was then no objection to the continuance. (C-4.) Petitioner is also charged with having arbitrarily increased bail from $3,000 in the case of an accused (Farrell) who, after being denied release on his own recognizance, indicated his displeasure and stated that he did not care what bail was set. Petitioner raised bail in steps to $5,000, to $10,000, and to $20,000. Petitioner then stated, "And if you want $50,000, we'll make it $50,000," which she did. (C-7.)

"D. You have engaged in conduct calculated to instill in defense attorneys a state of submissiveness and fear so as to expedite preliminary hearings, thereby infringing on a defendant's constitutional right to effective assistance of counsel. . . ." The Henley matter is again referred to (see par. B). The deputy public defender in that matter vainly attempted to ascertain the nature of inquiries petitioner objected to as proper cross-examination. In relieving her as counsel petitioner stated: "We have had the record read. If you can't tell from that, you are not qualified to represent the defendant." (D-1.) It is also charged that petitioner cautioned a deputy public defender (Dennison) in chambers not to ask certain "stupid" questions at a preliminary hearing, cautioning that "If you are thinking of any outlandish questions, check with the people in lock-up to see how they would recommend the food in county jail for the weekend." (D-2.)

"E. You have abused the prerogatives of your high office. . . ." It is charged in this paragraph that petitioner was "profane, vulgar, vicious and abusive" in confronting a police officer first at a street intersection and later when the officer (Fagin) was summoned to petitioner's chambers. (E-1.) The facts constituting this incident will be set out in greater detail in the text of the opinion. It is also charged that on another occasion petitioner verbally abused a police officer both in open court and in her chambers when the officer (Laird) inquired of a deputy district attorney why petitioner had interrupted a preliminary hearing to read a police report and dismiss charges. (E-4.) On still another occasion when deputy public defenders had been delayed in interviewing their clients at arraignment proceedings petitioner required the deputies (Ash-Hopkins) to state under oath their reasons for the delay, and ordered them to remain in the lock-up for more than four and a half hours while they conducted interviews. (E-5.)

"F. You have engaged in curt and rude conduct by deliberately ridiculing qualified members of the bar without cause. . . ." It is charged that petitioner became "very angry" when an accused refused after dismissal on preliminary hearing to stipulate to probable

constituted acts of either wilful misconduct or prejudicial conduct, with the exception of five matters: The Russo matter of paragraph C (C-1),

cause for his arrest. Petitioner challenged the accused's public defender (Klein), had him swear under oath that he had read the arrest report aloud to his client, inquired into his legal training and experience, and when it appeared that the deputy had been in practice but six weeks, stated: "Six weeks and you are telling me you know everything there is to know about the law?" (F-1.) On a second occasion petitioner engaged a private counsel (Shalant) in conversation in the court room after announcing noon recess. Petitioner stated to Shalant in the presence of his clients that she was ashamed of his poor representation and wished to report him to the State Bar. Before court reconvened, again in the presence of Shalant's clients, petitioner apologized to Shalant. In the afternoon session, petitioner required Shalant to submit a written offer of proof as to what he intended to establish in particular examinations of witnesses. After an hour and a half petitioner resumed the bench without indication that she had read the still incomplete written offer of proof. She next refused to accept a stipulation regarding facts to which a chemist would testify if called as a witness, but refused to advise why the stipulation was unsatisfactory, stating, "You will not cross-examine the court." She then required that the chemist appear as a witness, recessing until 8 p.m., but refused to honor Shalant's request to obtain food at a vending machine on another floor in the building. Finally, petitioner cut short with threats of contempt citations Shalant's attempts to argue in support of his motion to dismiss charges. (F-2.) The incidents hereinbefore referred to as the Putnam-Pine matter of paragraph A, the Kroneberger-Weiss-Fleishman matter of paragraph B, and the Henley matter of paragraphs B and D are also cited in support of the charge of this paragraph F (F-3, F-4 and F-5, respectively).

"G. You unlawfully ordered the court reporter to delete material from preliminary hearing transcripts. . . ." This charge is made in connection with the Putnam-Pine matter of paragraph A. The language sought to be deleted consisted of the following remarks by petitioner: "Now, Paul James [Public Defender] did that to me, and he had better not do that again, and none of you had better do that to me again, lying to me in open court. . . . I have had this practiced on me by Public Defender after Public Defender, and in particular participated in by Paul James of your office who lies to me in open court." (G-1.)

"H. You have engaged in bizarre conduct. . . ." A number of incidents are referred to in support of this charge. In 1967 the judges of petitioner's court passed a resolution criticizing petitioner for certain alleged exhibitionist conduct, including the display of a newly decorated pink chamber to the news media, and advocacy to the media that women should arm themselves against attack with derringers and hat pins. In response petitioner charged in the news media that her colleagues on the bench were guilty of judicial immorality, intemperance, inability, absenteeism and unpunctuality. Petitioner's conduct was the subject of a letter directed to her from the Commission in 1967. (H-1.) It is also charged that for a number of months in 1972 petitioner maintained a mechanical canary in her chambers. The chirping of the device was audible during proceedings in the courtroom through the partially open chamber door. (H-2.) Petitioner also, during the summer and fall of 1972 and early part of 1973, brought a small dog to the courtroom. She either held the dog or maintained it under the bench while the court was in session. (H-3.) Also between September 1972 and March 1973 petitioner arranged for a minister (Reverend William Blackstone) to use an interview room for the purpose of speaking with all persons in custody. Petitioner arranged that the minister be paid $700 to $800 a month from private sources to which she contributed. (H-4.) It is also charged that petitioner wrongfully refused to honor an expense voucher for a witness who came from Washington, D.C. to testify at a preliminary hearing. Petitioner stated to the district attorney's investigator who presented a voucher for petitioner's approval that the witness (Miss Belfrey) was an accomplice who was sexually interested in the defendant, that the investigator should not have an affair with the witness, and that he should not repeat any

the Hopkins-Ash matter of paragraph E (E-5), the alleged unlawful order to delete material from a transcript of paragraph G (G-1), the mechanical canary matter of paragraph H (H-2), and the matter involving Reverend Blackstone of paragraph H (H-4). The masters concluded that in each instance wherein they made affirmative findings petitioner had acted in bad faith and was guilty of wilful misconduct with the exception of the Brooks matter of paragraph C (C-3), the Laird matter of paragraph E (E-4), the Shalant matter of paragraph F (F-2), and all matters of paragraph H (H-1, 3, 5 and 6). The masters concluded as to those excepted matters that petitioner was guilty of prejudicial conduct, although they were of the view that her conduct in connection with the resolution of censure by her fellow judges (H-1) was too remote in time to constitute grounds for disciplinary action. The masters were also of the view that there were mitigating matters, hereinafter considered, which warranted censure rather than removal from office.

The Commission made independent findings consistent with the masters' findings as to all specifications except as to the five charges the masters had found not to have been proven. As to these the Commission concluded that the Russo matter (C-1) constituted an act of wilful misconduct, and that the Ash-Hopkins matter (E-5) and matters involving transcript deletions (G-1), the mechanical canary (G-2) and Reverend Blackstone (H-3) constituted acts of prejudicial conduct. In addition the Commission concluded that the Brooks matter (C-3) constituted an act of wilful misconduct rather than prejudicial conduct as concluded by the masters.[5] Finally, the Commission concluded that there were no factors in mitigation of petitioner's misconduct.

Petitioner concedes the propriety of many of the Commission's findings, although she disputes in almost every instance the Commission's conclusions. (2) It is for us, however, to make the final findings of fact and conclusions of law in determining what discipline, if any, is to be imposed. (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 276, 283-284 [110 Cal.Rptr. 201, 515 P.2d 1].) In doing so we will adopt particular findings of the Commission or of the masters but we will not, in all instances, set those findings out in detail when no purpose is served in doing so. Particular conduct, however, we deem to be of such significance that it must be fully exposed.

of petitioner's remarks. (H-5.) Finally it is charged that in 1974 petitioner summoned maintenance and security personnel to her apartment to lodge a complaint. During a half hour confrontation she directed profanities to the manager, including, "I'm going to shoot you, George, you son of a bitch. And you are going to slowly die."

[5]Attached hereto as an appendix is a chart displaying in graphic form the findings and conclusions by both the masters and the Commission.

Petitioner's conduct is particularly significant in her dealings with public defenders who appeared before her in preliminary hearings. We have set out in the margin extracts from court proceedings pertaining to the Ridgeway (A-1, B-1),[6] Ryan (A-2, B-1),[7] Karagozian (A-3, B-1),[8]

[6]1. On November 30, 1972, during cross-examination of a witness by Deputy Public Defender Tod Ridgeway in the preliminary hearing of People v. Harold Leroy Lovin and Donald R. Fisher, No. A-290837 (a burglary charge), the following occurred:

"Q [Mr. Ridgeway] Was the credit card that you saw after you removed his wallet—was it a Tropicana credit card?

"A I don't recall which card it was.

"Q [Mr. Ridgeway] I will call off the credit cards and try to—

"THE COURT [petitioner]: You will not name off the credit cards. Please proceed with another question.

"Q [Mr. Ridgeway] Was it a Sands credit card?

"THE COURT: Perhaps you didn't hear the Court's ruling, Mr. Ridgeway.

"MR. RIDGEWAY: I think—

"THE COURT: Answer the question. Did you or did you not hear the Court's ruling?

"MR. RIDGEWAY: Yes, your Honor. I heard the ruling. I think—

"THE COURT: Then are you asking—are you asking for what I think you are asking for? I have gone through this yesterday. You had your last chance. Today is the day, and I think now is the time. Are you ready?

"MR. RIDGEWAY: I don't understand, your Honor.

"THE COURT: Take Mr. Ridgeway into custody. Get another Public Defender forthwith.

"MR. RIDGEWAY: Your Honor, I would like to object for the record.

"THE COURT: Overruled.

"May we have Lovin and Fisher to the counsel table in that order, please?

"The record will reflect that defendant Lovin is now represented at this preliminary examination by Deputy Public Defender Sandra Wruck.

"Miss Wruck, are you ready to proceed or do you want more time for preparation?

"MISS WRUCK: Your Honor, I believe I am ready. May the record reflect I am—

"THE COURT: Are you or are you not ready?

"MISS WRUCK: I am ready."

2. Mr. Ridgeway was immediately removed from the courtroom and transported by deputy marshals to the county jail.

[7]About 10:15 a.m. on April 6, 1973, the preliminary hearing of People v. Payne, Glover, and Wells, Jr., No. A-295611 (an 11-count kidnap-rape case), was transferred into Division 36 of the Los Angeles Municipal Court.

2. Deputy Public Defender John L. Ryan was assigned to represent defendant Sylvester Payne.

3. The case was transferred to petitioner's division of that court about 10:45 a.m.

4. At 11:02 a.m. Mr. Ryan informed petitioner that he was not ready to proceed and needed more time to prepare. Mr. Ryan then departed for the court employees' lounge to begin his preparation of the case and to investigate a possible conflict of interest. Mr. Ryan did not inform petitioner that he was leaving the court or that he was concerned about a possible conflict of interest.

5. Petitioner called the case at 11:36 a.m. and Mr. Ryan was not present. Petitioner then ordered a bench warrant, $25,000 bail, for Mr. Ryan held until 2 p.m. Petitioner then attempted to telephone Mr. Ryan at his office. Mr. Ryan testified that the secretary who received the call told him that petitioner was on the telephone and "wanted to talk to me in chambers about the case." Mr. Ryan told the secretary to inform the judge. "I

[8]Footnote 8 commences on page 687.

did not speak about my cases off the record, nor did I speak about my cases in chambers."

6. Petitioner thereupon ordered the bench warrant served upon Mr. Ryan.

7. Mr. Ryan learned of the bench warrant and appeared in petitioner's court about noon. As Mr. Ryan entered the courtroom, petitioner made an order appointing Deputy Public Defender Maitland Montgomery to represent defendant Payne. Such order was made without consulting Mr. Ryan. Mr. Montgomery, or the defendant. Mr. Montgomery said he did not think he could be ready by 2 p.m. as directed.

8. Immediately thereafter, the following occurred:

"THE COURT: All right, now, I've had enough of this nonsense, Mr. Ryan.

"MR. RYAN: What nonsense, your Honor?

"THE COURT: Mr. Ryan, as it happens, I am not your witness. And you are not cross-examining the Court. I haven't yet heard an apology for your abominable behavior.

"MR. RYAN: I would apologize if I knew what that behavior was, your Honor.

"THE COURT: All right. You are held in contempt of court. Found in direct contempt of court in the immediate view and presence of the Court. And you are ordered into custody. Bail is set at $25,000.

"MR. RYAN: Thank you, your Honor.

"THE COURT: You're welcome.

"Now, am I going to have to appoint private counsel to represent Defendant Payne?

"MR. MONTGOMERY: I have—I have no idea, your Honor."

9. Mr. Ryan was taken into custody about noon and held in the court lockup for about 45 minutes until released on a writ of habeas corpus.

[1]. On May 3, 1973, in petitioner's division of the Los Angeles Municipal Court, Deputy Public Defender Michael Karagozian was representing the defendant in the preliminary hearing of People v. Robert Paul Dunn, No. A-296476 (two counts of passing bad checks.)

2. During cross-examination of a prosecution witness by Mr. Karagozian, the following occurred:

"Q [By Mr. Karagozian] What location in the restaurant did he sign these checks?

"A Two of the checks that we accepted were signed in front of me at the bar.

"Q Now, this is two separate occasions; isn't that correct?

"A The two that were given to me as evidence, those are two of—

"Q Well—

"THE COURT [petitioner]: Let him finish.

"Now, Mr. Karagozian, I don't want you continually interrupting the witness.

"MR. KARAGOZIAN: That answer isn't responsive to my question, your Honor.

"THE COURT: Mr. Karagozian, as I told you yesterday and as I have told you for the last time, that is for the Court to determine and not for you to determine. Do you understand that?

"MR. KARAGOZIAN: Yes, your Honor.

"THE COURT: Will you oblige with the question and the portion of the answer, please Miss Reporter?

[Question and Answer read.]

"THE COURT: Will you please finish your answer.

"THE WITNESS: The two that were given to me were given to me at the bar and signed in my presence.

"THE COURT: At one time or at two different times?

"THE WITNESS: Two different times.

"MR. KARAGOZIAN: May I continue, your Honor?

"THE COURT: You may.

"All right, Mr. Karagozian, did you bring your toothbrush? Are you ready to suffer the

Putnam-Price (A-4, B-1, F-3),[9] Henley (B-1, D-1, F-5),[10] Kroneberger-Weiss-Fleishman (B-2, F-4),[11] and Ingber (B-3)[12] matters. In some instances, we have included, in addition to extracts from the trial transcripts, factual statements in explanation of the circumstances then prevailing. Each of the extracts and the factual statements as related constitute a finding of fact made by the masters, by the Commission, and now by us. Petitioner does not challenge any of such findings.

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consequences for being contemptuous to the court, because that is what you are being?

"MR. KARAGOZIAN: Well, your Honor, at this point I would like to say that I am trying to give the best defense possible that I can to my client.

"THE COURT: Mr. Karagozian, why don't you try opening your ears and closing your mouth for a bit. I have warned you, and you take no heed.

"Please rise.

"MR. KARAGOZIAN: Yes, your Honor.

"THE COURT: Put your hands down to your sides.

"MR. KARAGOZIAN: Your Honor, at this time I would like to inform the Court that I am not a child, and that my demeanor—

"THE COURT: All right. You are held in contempt.

"Forthwith, Mr. Bailiff. Forthwith.

"Will you bring Mr. Kascoutas in, please. Take care of Mr. Karagozian forthwith.

"Mr. Kascoutas, will you please prepare Dunn forthwith.

"MR. KASCOUTAS: Yes, I am going to."

3. Mr. Karagozian was immediately taken into custody and booked in the county jail on a commitment stating he was held "upon a charge of contempt," which made no reference to bail in any amount and specified no punishment.

[9]1. On July 12, 1973, Deputy Public Defender Vernon L. Putnam was representing the defendant in the preliminary hearing of People v. Homer Moore, No. A-298498 (charges of violations of Health & Saf. Code, §§ 11378, 11351, 11357).

2. Mr. Putnam made a motion to petitioner to exclude a police officer. The deputy district attorney announced that the officer would not be called as a witness. Whereupon the following occurred:

"MR. PUTNAM: I would like him excluded, well, if not under 867 then perhaps the Court would permit me to clear the courtroom under 868. I may wish to call him.

"THE COURT: You know you are not going to call him. Please don't lie to me.

"MR. PUTNAM: I may wish to call him.

"THE COURT: Please don't make these phony motions, and don't lie to me in open court. Now, Paul James did that to me, and he had better not do that again, and none of you had better do that to me again, lying to me in open court. Is there anything further in support of your motion? Do you wish to clear the courtroom?

"MR. PUTNAM: Yes, I do, your Honor.

"THE COURT: The courtroom is cleared. I am tired of these obstructionist tactics. You have no intention whatsoever of calling that person. I have had this practiced on me by Public Defender after Public Defender, and in particular participated in by Paul James of your office who lies to me in open court. I am tired of this practice.

"All right, the court is in recess for five minutes. Nobody is to leave the courtroom, and nobody is to use the phone.

[Recess taken.]

"THE COURT: Mr. Putnam, you are held in contempt of court. Mr. Bailiff, will you

[10]Footnote 10 commences on page 689.

[11]Footnote 11 commences on page 690.

[12]Footnote 12 appears on page 692.

please take Mr. Putnam into custody.

"Mr. Pine, will you please prepare the case forthwith. I should advise you in advance that I will not put up with any more obstructionist policies. Will you please bring in the people.

"MR. PINE: I am ready at this time, your Honor.

"THE COURT: Thank you. You are still under oath, of course. Please state your name again for the record.

"THE WITNESS: Donald H. Barfield.

"THE COURT: Thank you. Please proceed.

[DIRECT EXAMINATION]

BY MR. MONTES

"Q Officer Barfield, directing your attention to June 24, 1973, would you state for the Court your occupation and assignment on that date.

"A Police Officer for the City of Los Angeles assigned to Wilshire Uniform Patrol.

"MR. PINE: Your Honor, at this time I really do intend to call the other officer.

"THE COURT: All right, Mr. Pine, you are held in contempt of court.

"Take Mr. Pine into custody.

"THE DEFENDANT: Pardon me, your Honor—

"THE COURT: Hold it.

"The court is in recess for five minutes. The same admonition to the bailiff. [Recess taken.]"

3. In holding Mr. Putnam and Mr. Pine in contempt, respondent did not make an order reciting the facts and prescribing the punishment.

[1]1. On July 6, 1973, Deputy Public Defender Maryanna Henley was representing the defendant in the preliminary hearing of People v. Earl Anthony Conway, No. A-297965 (charge of violation of Health & Saf. Code, § 11359).

2. During the examination of a police officer, Mrs. Henley stated that she wished to ascertain whether or not a narcotics informant would be available at the time of trial. Thereupon the following occurred:

"THE COURT [Petitioner]: Was he with you at the time of the arrest?

"THE WITNESS: No, your Honor. He was downstairs.

"THE COURT: Thank you.

"Please proceed with a proper line of questioning.

"MRS. HENLEY: Your Honor, may I state for the record that—

"THE COURT: I have ruled on this. It better not be something on this ruling.

"Please proceed with the proper question.

"BY MRS. HENLEY:

"Q Officer, did you inquire of Mr. Stevens as to his plans for the future regarding his residence, particularly whether he would be in the state or this particular location?

"THE COURT: Will you oblige with the question please, Mr. Reporter?

[The question was read.]

"THE COURT: Did you bring your toothbrush?

"MRS. HENLEY: I beg your pardon?

"THE COURT: Did you bring your toothbrush?

"MRS. HENLEY: To court today, your Honor?

"THE COURT: Yes.

"MRS. HENLEY: No, ma'am.

"THE COURT: I think you better get it right now.

"Have you heard the Court's ruling on this line of questioning? This line of questioning is not permitted.

"Will you please proceed with a proper line of questioning forthwith?

"MRS. HENLEY: Your Honor, am I to understand—

"THE COURT: You are to proceed with a proper line of questioning forthwith.

"MRS. HENLEY: Your Honor, I am somewhat at a loss here. May I inquire as to

specifically the line of questioning which I may not pursue?

"THE COURT: I can see you are not able to read, as indicated by your reference to the Evidence Code. Is it also true that you cannot hear?

"MRS. HENLEY: I am certain I heard what your Honor said, but I am equally certain I do not understand what—

"THE COURT: Will you oblige with the record, please, Mr. Reporter?

[The entire record was read.]

"THE COURT: Thank you.

"May we please proceed?

"MRS. HENLEY: Your Honor, it is not my intention to aggravate the Court; however, I am at a loss as to exactly what line of questioning it is that I may not pursue. If the Court would oblige—

"THE COURT: You heard the record. We have had the record read. If you can't tell from that, then you are not qualified to represent the defendant.

"Do you wish to be replaced?

"MRS. HENLEY: Following your Honor's line of logic—

"THE COURT: Will you answer the question, please?

"MRS. HENLEY: —the logic being if I do not understand I am—

"THE COURT: Be seated forthwith.

"Get Mr. Gits forthwith.

"MR. MAYMAN: Mr. Montes went up to get Mr. Gits.

"THE COURT: Thank you.

[Short pause.]

"THE COURT: Mr. Gits, you are substituted for Mrs. Henley.

"MR. GITS: Yes, your Honor.

"I will need time to prepare the case, your Honor.

"THE COURT: You will prepare right now.

"MR. GITS: Yes, your Honor.

"THE COURT: You will oblige with the record, Mr. Reporter.

"Please be seated in the back, Mrs. Henley.

"MR. GITS: Your Honor, may I have the record read?

"THE COURT: Yes."

3. Neither Mrs. Henley nor the defendant requested or agreed to a change of counsel.

[1]1. Private counsel Walter Louis Kroneberger, Jr., was retained by the defendant in the preliminary hearing of People v. Douglas Leroy Nelson, No. A-297879 (charge of violation of Pen. Code, § 502.7, subd. (a)(4), (e)), held on June 25, 1973.

2. Mr. Kroneberger stated to petitioner that he was not prepared to proceed for three reasons: (1) he had filed an affidavit pursuant to section 170.6 of the Code of Civil Procedure, (2) he needed a continuance to properly prepare this case, and (3) he was physically sick.

3. Petitioner ruled the affidavit was not in order and denied the motion for a continuance, whereupon the following occurred:

"MR. KRONEBERGER: I am not prepared to go to the preliminary hearing. I would ask to be relieved at this time.

"THE COURT: Thank you. You are relieved.

"Mr. Weiss, please prepare this case forthwith. You are ordered to prepare this case forthwith.

"MR. WEISS: Yes, your Honor.

"May I receive a copy of the arrest report?

"THE COURT: Yes, you may.

"MR. WEISS: May I request that this matter be trailed to 1:30?

"THE COURT: No.

"MR. WEISS: Your Honor, I also have information that the defendant is not entitled to the services of the Public Defender's office.

"THE COURT: You are ordered to prepare the case forthwith, please, Mr. Weiss.

"Mr. Weiss, you are relieved.
"Mr. Fleishman, you are ordered to prepare the case forthwith.
"MR. FLEISHMAN: I'm sorry, I would make the same motion.
"THE COURT: Please prepare the case, Mr. Fleishman. You are relieved, Mr. Weiss.
"MR. WEISS.: Thank you, your Honor.
"THE COURT: You're welcome.
"MR. FLEISHMAN: Does the Court wish to take a recess while I prepare the case?
"THE COURT: Start preparing.
"MR. FLEISHMAN: May I take the defendant in the conference room and speak to him, please?
"THE COURT: You may take him into the lockup.
"MR. WEISS: May I confer with Mr. Fleishman?
"THE COURT: No, you may not."

4. A few moments later the following occurred:
"THE COURT: The record will reflect that the defendant is represented by Deputy Public Defender Allen Fleishman.
"Will you please proceed to the case in chief.
"MR. FLEISHMAN: May I address the Court briefly?
"THE COURT: You may.
"MR. FLEISHMAN: This case involves a violation of a Penal Code which I am not perfectly familiar with. It is a violation of Section 502.7(a)(4)(e). It is not a section which commonly comes before the Public Defender's office. It involves the use of technical equipment.

"THE COURT: You advised me you are ready. Are you ready or not?
"MR. FLEISHMAN: Your Honor, I would have to say that to do my client justice—
"THE COURT: You have been over there talking to Mr. Weiss. Mr. Weiss has given you certain instructions; isn't that the case?
MR. FLEISHMAN: No, your Honor.
"THE COURT: You told me you were ready. I don't want to have any more nonsense in this matter. Are you ready or not?
"MR. FLEISHMAN: I would ask for a continuance until 1:30.
"THE COURT: The motion is denied. Are you ready or not?
"MR. FLEISHMAN: Your Honor, all I can say is, if your Honor orders me to proceed, I will proceed.
"THE COURT: Are you ready to proceed?
"MR. FLEISHMAN: I can do a better job if I had to 1:30.
"THE COURT: Are you ready to proceed?
"MR. FLEISHMAN: I guess I am not, your Honor.
"THE COURT: Why did you tell me you were?
"MR. FLEISHMAN: I wish at this time to address the Court to explain my predicament.
"THE COURT: Now, Mr. Fleishman, let's not have lying in open court like somebody in your office does.
"MR. FLEISHMAN: Your Honor, it is not my intention to deceive the Court. I really have had mixed feelings about this case. There is little defense that can be made.
"However, the District Attorney has enclosed opinions that, apparently, would justify the telephone company tapping the phone to see where the calls are going. I haven't read these cases, your Honor. There is a search warrant, a technical search warrant.
"THE COURT: No notice has been given.
"People may proceed.
"MR. MAYER: Call Mr. Schmidt to the stand, please."

5. In relieving Mr. Kroneberger respondent did not consult with defendant Nelson or obtain his consent or that of the Deputy Public Defenders Weiss or Fleishman.

Petitioner challenges the Commission's findings relating to paragraph A (A-1, A-3, A-4)[1] to the extent that it found that petitioner ordered the deputy marshals attached to her court to make special preparations to assert quick removal to the county jail of attorneys found in contempt by petitioner. The Commission found as to the Ridgeway matter (A-1) that the special preparations had been made a "week or two prior" to the date of the contempt citation. As to the other matters which occurred after the Ridgeway matter (Karagozian, A-3, and Putnam-Pine, A-4), the Commission found that such preparations had been made "prior to" the citations. Petitioner appears first to quibble that she made arrangements "three or four weeks" prior to the Ridgeway incident rather than a "week or two" prior thereto, but the record supports either version and the precise time period is not critical. Petitioner also asserts that she made no special arrangements for public defenders and wanted to be prepared "for any contemnor." There are no findings, however, that

[1] 1. Private counsel Joe Ingber was retained by the defendant in the preliminary hearing of People v. Robert Crane Hughes, No. A-298342 (three counts of bookmaking), held on August 27, 1973, in petitioner's division of the Los Angeles Municipal Court.

2. On that date Mr. Ingber filed an affidavit of prejudice under section 170.6 of the Code of Civil Procedure against petitioner. Petitioner refused to honor this affidavit, stating that it had not been filed timely. Whereupon the following occurred:

"MR. INGBER: May the record reflect I am standing mute on behalf of Mr. Hughes. I filed an affidavit which I believe to be properly and timely filed. Under the circumstances, I advised Mr. Hughes, I will not participate in the defense of this matter of the preliminary hearing.

"THE COURT: Thank you. The affidavit is not timely filed. The public defender is ordered to prepare Hughes forthwith.

"Mr. Hughes, you have not been excused.

"You are dismissed, if you wish, Mr. Ingber. You may represent the defendant or not as you choose.

"MR. INGBER: I advised Mr. Hughes as to what rights I believe are in his best interests.

"THE COURT: The public defender will please prepare Hughes forthwith.

"Mr. Hughes, you are ordered not to leave the courtroom. If you leave the courtroom a bench warrant will be issued; do you understand that, and your bail will be forfeited. Do you understand that Mr. Hughes?

"THE DEFENDANT: (No audible response.)

"THE COURT: Answer out loud.

"THE DEFENDANT: Yes."

3. A few moments later Deputy Public Defender Steven Hauser stated:

"MR. HAUSER: Excuse me, your Honor. May I at this time make the Court aware that it is my determination that the public defender does not qualify for the services of Mr. Hughes. He earns too much money by our guidelines.

"THE COURT: Thank you. Are you otherwise prepared in this matter?

"MR. HAUSER: Yes, your Honor."

4. Before any evidence was presented in this case, Mr. Hauser said:

"MR. HAUSER: For the record, may it be clear that I am being ordered by the Court to represent Mr. Hughes?

"THE COURT: So ordered."

petitioner made special arrangements for public defenders although there is evidence to that effect. Petitioner also complains of particular findings from which it may be inferred that she had a special interest in the treatment accorded those deputy public defenders held in contempt in her court. The record nevertheless supports findings that she inquired of her deputy marshal after his return from transporting Ridgeway to the county jail, "Did they look up his asshole?" and that when informed Ridgeway was a diabetic and would require special treatment if incarcerated she stated, "Fuck his diabetes, fuck his diabetes." Petitioner explained that her reasons for arranging that contemnors be immediately transported to the county jail was that "Past experience indicated that such persons would be writted out before—while they were in the court lockup, thereby serving no punitive function."

(3) (See fn. 13.) Petitioner's remaining objection to findings of paragraph A is to findings made as to the Ryan (A-2), Karagozian (A-3) and Putnam-Pine (A-4) matters that she had failed to make an order reciting the facts constituting the contempt and prescribing the punishment.[13] It is clear that she failed to make such orders. Her objection to the findings is in reality an objection to the conclusion which we next consider, that she was required to make such orders. We adopt as our findings as to paragraph A the findings of the Commission as to each specification thereof.[14]

Petitioner particularly complains of the Commission's conclusions as to each matter a part of paragraph A that she "acted wilfully, maliciously and in bad faith in the exercise of the contempt power and also failed to comply with the provisions of Code of Civil Procedure section 1211" and to the conclusion that "Such conduct constituted wilful misconduct in office." She contends as to each matter that the Commission seeks to hold her accountable for what is at worst an erroneous judicial ruling

[13]Petitioner's objection in the Ryan matter extends also to a finding that she did not afford him an opportunity for a hearing to explain the reasons for his absence from the courtroom. (See fn. 7, *ante*.) She does not address her argument to such finding, however. An attorney must be afforded a reasonable opportunity to establish excuse before being held in contempt for absence from the courtroom. (*Inniss* v. *Municipal Court* (1965) 62 Cal.2d 487, 490 [42 Cal.Rptr. 594, 399 P.2d 50]; *Arthur* v. *Superior Court* (1965) 62 Cal.2d 404, 409 [42 Cal.Rptr. 441, 398 P.2d 777].)

[14]Petitioner also urges that we adopt certain findings of the special masters not found by the Commission. Although in some instances such findings are factually supported, in no instance do we deem it necessary or even helpful to adopt them. The masters' findings generally help explain petitioner's conduct but cannot be deemed to excuse or even mitigate it.

and/or decision as distinguished from "judicial misconduct" within the meaning of the pertinent constitutional provisions.

Petitioner completely ignored proper procedures in punishing for a contempt committed in the immediate presence of a court, as provided in Code of Civil Procedure section 1211.[15] This, without more, constituted an act of bad faith in each instance. Petitioner's explanation that she cannot be deemed to have failed to comply with section 1211 because that section does not provide a time when the order is to be made is without merit. (See *In re Jones* (1975) 47 Cal.App.3d 879, 881 [120 Cal.Rptr. 914].) It does not appear in any instance that petitioner made any effort to make a proper order at any time at or after the time the attorneys were cited. (4) Compliance with section 1211 is a jurisdictional requirement, "and an order which assumes to punish summarily a direct contempt of court is void unless it shows on its face facts sufficient to constitute a legal contempt." (*Arthur* v. *Superior Court, supra,* 62 Cal.2d 404, 409.) Petitioner was an experienced judge, with more than nine years on the bench before the Ridgeway matter, and she had at hand reference works which dealt with proper contempt procedures. (Cf. *Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 800-801.)

(5) That petitioner's conduct constituted bad faith, moreover, is amply and independently demonstrated by clear and convincing evidence apart from her wilful failure to comply with section 1211 in citing deputy public defenders. Thus she embarked upon a program by which persons whom she knew would be entitled to release by extraordinary writ would nevertheless be subjected to the embarrassment and indignity of being charged and incarcerated as criminals; she arbitrarily cited such persons for contempt on grounds which she never sought to establish if in fact they could have been established; she demonstrated no continuing interest or judicial responsibility in the contempt proceedings after ascertaining that the public defenders had been subjected to the booking procedures;[16] and her conduct was sometimes vulgar, lacking in humane understanding and grounded on retribution and hostility.

[15]Section 1211 provides in pertinent part: "When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed."

[16]Ridgeway was released after four hours by a telephone call from petitioner, who later purged the contempt citation. Ryan was released on a writ of habeas corpus before booking. Karagozian was released on a writ of habeas corpus on the same day as his

(6) "The term 'bad faith' implies that the judge 'intentionally committed acts which he knew or should have known were beyond his lawful power.' [Citation.] As so used, 'bad faith' entails actual malice as the motivation for a judge's acting ultra vires. The requisite intent must exceed mere volition; negligence alone, if not so gross as to call its genuineness into question, falls short of 'bad faith.' 'Bad faith' also encompasses acts within the lawful power of a judge which nevertheless are committed for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties. In sum, 'bad faith' is quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly." (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 795-796.) The foregoing record compels the conclusion in the instant case that petitioner's primary concerns were first to inflict a completed punishment before the deputies were afforded a due process determination that punishment was warranted and, second, to accomplish her objectives in a manner to insure that such conduct would be insulated from judicial review and collateral attack. It is manifest that such a planned subversion of justice and misuse of the judicial power could be undertaken only in bad faith. We adopt as our own the conclusions of the Commission as to each matter of paragraph A.

Paragraph B, which charges unlawful interference with the attorney-client relationship by relieving and appointing new counsel of record in on-going criminal proceedings, is supported in subparagraph B-1 by the foregoing Ridgeway, Ryan, Karagozian and Putnam-Pine matters and also the Henley matter. We have considered and rejected petitioner's objections to findings relating to the first four of these matters in support of paragraph A, and as to the Henley matter petitioner makes no objection to those findings set out in footnote 10, *ante.* In addition petitioner accepts further findings by the Commission that as to all five of these matters neither counsel of record nor the concerned defendant made application for or consented to the change of counsel, and that petitioner "without warning and without affording to counsel or the defendant any opportunity for consultation, made an abrupt change of Deputy Public Defenders." We adopt as our own findings the findings of the Commission as to subparagraph B-1.

Petitioner takes issue with the following conclusion of the Commission as to subparagraph B-1: "The change of Deputy Public Defenders in

incarceration. Putnam and Pine were released on a writ of habeas corpus after five hours in the county jail and the contempt citations were purged by petitioner the following day.

each of the foregoing cases and the substitution of private counsel in [the Putnam-Pine matter] amounted to unlawful interference by [petitioner] with the attorney-client relationship and an unwarranted interference in the operation of the Public Defenders' Office. Therefore, her actions constituted wilful misconduct in office." Petitioner first contends that the conclusion regarding an "unwarranted interference in the operation of the Public Defenders' Office" should be stricken as irrelevant since no charge of such interference was contained in the formal notice. Petitioner was charged only with an unlawful interference with the attorney-client relationship, and we agree that the conclusion of unwarranted interference with the operation of the public defenders' office, although perhaps factually supported, is not contained within the charged misconduct. (See *In re Ruffalo* (1968) 390 U.S. 544 [20 L.Ed.2d 117, 88 S.Ct. 1222].)

Petitioner also contends that the Commission erred in concluding that she "unlawfully" interfered with attorney-client relationships, arguing that a judge does have the inherent power to remove an attorney from representation after he has been held in contempt. She relies on *Smith* v. *Superior Court* (1968) 68 Cal.2d 547 [68 Cal.Rptr. 1, 440 P.2d 65]. In that case a trial court first appointed an attorney for an indigent defendant and later concluded that the attorney was not qualified to represent a defendant against whom a charge had been filed which upon conviction could lead to a possible imposition of a death penalty. The defendant, however, was satisfied that the appointed counsel could best defend him. He accordingly refused to consent to the court's substitution of counsel and in fact vigorously resisted any such substitution. In granting a writ mandating the vacation of the order substituting counsel, we held that when both the attorney and the defendant objected it was beyond the power of a judge to discharge court-appointed counsel on the ground of the judge's evaluation that counsel was incompetent because of lack of experience in trying a particular type of case. We further held that although a trial judge must protect an accused's right to effective counsel, great care should be exercised to avoid infringing on a defendant's right to counsel of his choice and compromising the independence of the bar. We noted that a court has many tools available short of discharging counsel to insure that a defendant is not prejudiced by inadequate representation and that the court's *ultimate* weapon is the summary contempt power. "Yet that power too must be exercised with great caution, lest it stifle the freedom of thought and speech so necessary to a fair trial under our adversary system. That system is built upon the belief that truth will best be served if defense counsel is given the maximum possible leeway to urge in a respectful but nonetheless determined

manner, the questions, objections, or argument he deems necessary to the defendant's case . . . ." (*Id.* at p. 560.)

We also stated in *Smith* that the inhibition imposed on a defense attorney by a threat of removal "constitutes a serious and unwarranted impairment of his client's right to counsel. It is, in the . . . language of *People* v. *Crovedi* (1966) *supra,* 65 Cal.2d 199, 206 [53 Cal.Rptr. 284, 417 P.2d 868], 'an unreasonable interference with the individual's desire to defend himself . . . .' " (*Id.* at p. 561.) Finally, we held that a different rule could not be applied merely because counsel was an indigent represented by court-appointed counsel. "It follows that once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused." (*Id.* at p. 562.)

(7) *Smith* makes it abundantly clear that the involuntary removal of any attorney is a severe limitation on a defendant's right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed. Without determining whether any of petitioner's contempt citations were warranted in the instant case, it is nevertheless manifest that in none of such instances was the conduct of the deputy public defenders so flagrant that petitioner was justified in abruptly substituting counsel without the prior concurrence of the attorneys and defendants involved.[17] In making such substitutions petitioner also failed to allow reasonable time for the newly appointed counsel to prepare to defend.

It avails petitioner little to argue, as she does, that she committed no unlawful act in substituting one deputy public defender for another in the same office. The gravamen of petitioner's misconduct lies not only in the *fact* of the substitutions but also the *manner* in which they were accomplished. In some instances she thrust upon new counsel the immediate responsibility of representation in an on-going proceeding

[17]Code of Civil Procedure section 284 provides in pertinent part: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

"1. Upon the consent of both the client and attorney, filed with the clerk, or entered upon the minutes;

"2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

when, so far as appears, such counsel had no prior knowledge of or acquaintance with the accused, the evidence supporting the charges, the defenses which might be available or the trial tactics and intended strategy of the attorney who was summarily removed. The accused in such instances was afforded no opportunity to consent or to state his position. Indeed, he was not even permitted to communicate with the newly appointed counsel. The attorney-client relationship was as effectively infringed as if the newly appointed counsel had no prior relationship with the counsel for whom he was substituted as no opportunity was afforded for effective continuity in the attorney-client relationship or in defending against the charges. (Cf. *People* v. *Stroble* (1951) 36 Cal.2d 615, 628-630 [226 P.2d 330].) The accused's right to counsel was thus as seriously infringed as in *Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d 270, where upon the whim of the trial judge private counsel were substituted for deputy public defenders. We stated in that case: "No more fragile rights exist under our law than the rights of the indigent accused; consequently these rights are deserving of the greatest judicial solicitude. The ideal of our legal system is that the judicial should be equated with the just. Such an ideal cannot be achieved if one man clothed with judicial power may ignore with impunity such a basic institutional mandate as the sanctity of the attorney-client relationship merely because the attorneys are young deputy public defenders and their clients are indigent." (*Id.* at p. 286.)

In view of the foregoing, our conclusion as to subparagraph B-1 is as follows: The change of deputy public defenders in each of the foregoing cases and the substitution of private counsel in People v. Moore (the Putnam-Pine matter) amounted to unlawful interference by petitioner with the attorney-client relationship. Petitioner acted in bad faith. Therefore, her actions constituted wilful misconduct in office.

Petitioner also challenges the Commission's finding in the Kroneberger-Weiss-Fleishman matter (B-2, see fn. 11, *ante*) that she intimidated Fleishman into proceeding without adequate time to prepare in that case. The matters set forth in footnote 11, *ante,* constitute clear and convincing evidence in support of such finding, and we adopt the findings of the Commission as our own as to subparagraph B-2. We conclude, as did the Commission, that the actions of petitioner taken after the denial of Kroneberger's motion for continuance were in bad faith. Consequently, such actions constituted wilful misconduct in office.

Petitioner next objects to findings made by the Commission as to the Ingber matter (B-3, see fn. 12, *ante*) that the substitution of a deputy public defender for Ingber was without the consent of the accused or the attorneys involved, and that petitioner made no effort to ascertain that the accused, who had paid Ingber in full, was eligible to be represented by the public defender. The matters set out in footnote 12, *ante,* provide clear and convincing evidence in support of the findings of the Commission which we adopt as our own as to subparagraph B-3. We conclude, as did the Commission, that petitioner's actions, after refusing to honor the affidavit of prejudice, were taken in bad faith and constituted wilful misconduct in office.

Petitioner also contends that her conduct as to all matters charged in support of paragraph B of the formal complaint is not subject to reprimand as lying within the proper scope of an exercise of judicial discretion. As earlier discussed in connection with petitioner's similar argument urged as to the matters charged in support of paragraph A of the formal notice, we reject such contention for reasons of demonstrated bad faith of petitioner.

Petitioner is charged in paragraph C with having acted unreasonably and arbitrarily in matters of bail-setting and issuance of bench warrants. The conduct in support of paragraph C is fairly summarized in the charges set out in footnote 4, *ante.* Petitioner has accepted the findings in full as to all matters alleged except as to certain of the findings of the Russo matter (C-1). We have examined the record and agree in part with petitioner's contentions. Our findings as to the Russo matter are set forth in the margin.[18] We fail to find clear and convincing evidence that petitioner acted in bad faith, but conclude as follows: Petitioner's actions in issuing the bench warrant and setting bail at $50,000 constituted

[18]1. On March 23, 1973, Richard Russo (a.k.a. Frank Dariento) was scheduled to appear in petitioner's court for a preliminary hearing on No. A-294898 (two counts of receiving stolen property and two counts involving narcotic violations). Bail had previously been set at $500.

2. Defendant failed to appear on March 23, 1973, and a bench warrant was ordered held until April 2, 1973.

3. Sometime after March 24, 1973, petitioner received a letter from Dr. Jack E. Miller of the Veterans Administration stating that the defendant was in the Veterans Hospital and unable to appear in court. In this letter Dr. Miller mentioned a telephone call to petitioner's court on the morning of March 24, 1973, and indicated that defendant was undergoing evaluation of symptoms that appeared highly suggestive of a form of meningitis. Petitioner attempted to telephone Dr. Miller but was unable to talk with him on any of the calls originating from her office.

4. Before April 3, 1973, petitioner talked with Dr. Toomajian, the medical director of the hospital board of the county jail who, based on the contents of Dr. Miller's letter,

conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Petitioner does not take issue with the Commission's findings as to the remaining matters in support of paragraph C. Thus she does not challenge findings that she arbitrarily revoked a dismissal and remanded an accused (Brooks) to custody when he refused to stipulate to probable cause for his arrest (C-3); that she arbitrarily revoked certification of a minor (Alcorn) to juvenile court as to certain charges and revoked bail when he refused to stipulate to a continuance of a preliminary hearing as to other charges; and that she found both the accused and his mother in contempt of court, setting bail at $100,000 as to each, when they audibly protested the aforementioned acts of revocation (C-4); and that she arbitrarily increased bail from $3,000 in steps to $50,000 when an accused (Farrell) indicated his continuing displeasure because he was not released on his own recognizance (C-7). (See factual recitals set forth in charges appearing in fn. 4, *ante,* subpar. C.) As to each of these matters (C-3, C-4 and C-7) we conclude that petitioner acted in bad faith and that such acts constituted wilful misconduct in office, adopting as our own the conclusions of the Commission.

In paragraph D petitioner is charged with engaging in conduct calculated to instill in defense attorneys a state of submissiveness and fear, thereby infringing on a defendant's constitutional right to counsel. Two matters (Henley, Dennison) are charged herein. We have already considered the Henley matter and petitioner does not challenge the findings as set out in footnote 10, *ante.* Petitioner purports to challenge the findings as to the Dennison matter (D-2) but such challenge consists only of her stated inability to remember the events as testified to by Dennison. (See factual recitals summarized in charges, fn. 4, *ante,* par. D.) We adopt the findings of the Commission as our own, and conclude, as does the Commission in each instance, that petitioner's conduct was

advised that Russo's problem could be better treated at the county jail hospital.

5. On April 3, 1973, petitioner's clerk answered a telephone call and told petitioner it was from a doctor at the Veterans Hospital. Picking up the telephone, petitioner stated, "That is entirely unsatisfactory. Unsatisfactory."

6. After this telephone call, petitioner immediately took the bench, ordered the bench warrant served, and set bail at $50,000.

7. The defendant was brought to court on April 4, 1973, bail remained at $50,000 and the preliminary hearing was scheduled for April 17, 1973. When the defendant was taken into custody on the bench warrant, representatives of the sheriff's office furnished the Veterans Hospital with a written assumption of responsibility for the defendant's "health care."

8. At the preliminary hearing on April 17, 1973, the defendant was held to answer and bail was continued at $50,000.

arbitrary, unreasonable and in bad faith, and constituted wilful misconduct in office.

Petitioner is charged in paragraph E with abusing the prerogatives of her high office. We are particularly distressed by the Fagin matter (E-1) and have set out in the margin the findings and conclusions of the Commission, none of which is challenged by petitioner, and which we adopt.[19] Petitioner also does not challenge the Commission's findings as to any of the other matters in support of paragraph E. (See summary of factual matters set forth in charges, fn. 4, *ante,* par. E.) Thus petitioner

[19]About 7:45 a.m. on November 30, 1972, Police Officer Richard G. Fagin spoke to petitioner at the intersection of Spring and Arcadia Streets in Los Angeles about the excessive use by petitioner of her automobile horn at the preceding corner. The following conversation occurred between petitioner and Officer Fagin at that time.

"[Officer Fagin] She rolled down her window when I pulled up alongside her, at which time I said, 'Ma'am, there is no reason to honk your horn.'

"I said, 'The gentleman was just waiting for a pedestrian, like he should have.'

"At which time she told me she would honk her horn any time she damn well pleased.

"At that time I said, 'Ma'am, there is a Vehicle Code Section that covers excessive use of the horn.'

"At which time she told me, 'You go to hell, Officer.' "

2. Upon arriving in her chambers shortly thereafter petitioner said to her bailiff, Robert Douillard, "Find the son of a bitch; I want him found and brought in right away. Give me a gun; I am going to shoot his balls off and give him a .38 vasectomy."

3. At about the same time, petitioner said to her other bailiff, Steven Day, "God damn, get that son of a bitch here; find that bastard; I'm not going to start court until that son of a bitch is here; when I find him, I'm going to cut off his balls and have them hang over my bench; I'm going to castrate him; I'm going to give him a vasectomy with a .38." These statements were repeated to Officer Day several times.

4. Petitioner and Officer Day then went to the police officer's waiting room in the courthouse, where petitioner spoke to Sergeant Paul Holmes, stating, "God damn it, find him, find that son of a bitch for me. I am not going to take the bench until you find that male chauvinist pig."

5. Shortly thereafter, various police officers began to arrive at petitioner's chambers, including Sergeant Paul Holmes, Lieutenant James W. Holcomb, and Captain James D. Munger. At this time and with these police officers in her presence, petitioner instructed her bailiffs, "God damn it, no one is to leave, if anyone tries to leave, shoot the bastard." Petitioner appeared to be hysterical at this time and her voice was harsh and loud. While these officers remained in her chambers, petitioner said she could sound her "God damn horn any place in the city and no male chauvinistic officer" could tell her otherwise. Petitioner further stated, "I'd like to slap that mustache off that officer's face for what he did. We have too many of these motor officers out there laying their pecker on the line for their pay checks."

6. Later the same morning, Officer Fagin arrived at petitioner's court and stood outside the chambers. He could hear petitioner "yelling at Sgt. Holmes." After about 10 minutes he entered chambers. We find the following testimony of Officer Fagin to be true:

"Q And would you relate as best you can the substance of the conversation that took place at this time and place?

"A Yes, sir. I walked into the chambers and I stood behind my chair, and Judge Cannon said 'Good morning, Officer,' and I said, 'Good morning.'

"She said, 'Have a seat,' and I said, 'Thank you,' and I sat down, at which time we

acknowledges that she verbally abused a police officer (Laird) because he made inquiry as to the dismissal of a criminal complaint following petitioner's interruption of a preliminary hearing for the purpose of reading the police report of the arrest (E-4), and that she ordered deputy public defenders (Ash-Hopkins) into custody while they conducted interviews with clients prior to arraignment proceedings (E-5). Accordingly, we adopt the Commission's conclusion as to each of such matters (E-4, E-5) that petitioner's conduct constituted acts prejudicial to the administration of justice that brings the judicial office into disrepute.

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just—there was a momentary silence for about 30 seconds; we just looked at each other, because I did not know what to say or do.

"Her opening statement was, 'You've been a very naughty boy.'

"And I stated 'Well, if you say so, your Honor.'

"She said, 'What do you mean, if I say so?'

"I said, 'Well, you are the Judge.'

"At this time we just talked about things in general, such as public defenders and court cases and how the public defenders ask some ridiculous questions like, 'Officer, did you have your gun out when you did this? Did you have your gun out when you did this?'

"She said, 'There is nothing but a revolving door here,' she said, 'All of these people are going to be back, they just come in and out.'

"Then it was—she just changed. The conversation changed back and forth.

"Then she started talking about some religious seminar that she attended over some holiday, just a couple of weeks prior to this, I presume, and she started going through some religious pamphlets that she had, and told me that she wanted me to have a copy of it, and she looked for a copy of it and she could not find one. She gave me her own personal copy of a couple of these pamphlets and told me to look at the dog-eared pages of the pamphlets in my spare time.

"She also stated the guillotine had been used in France again; she wished it would be brought back in the United States.

"Q Now, did she ever ask you to apologize during this conversation?

"A No, sir.

"Q And did you leave with how many pieces of religious brochures?

"A Three or four.

"Q And later on did you receive a letter of commendation from Judge Cannon?

"A Yes, sir, I did.

"Q How many weeks after this incident was this?

"A Two weeks.

"Q And could you relate in essence the substance of this letter of commendation?

"A Yes, sir, it was just addressed to Chief Davis, Chief of Police, and it said the Los Angeles Police Department is the finest in the world, and the motor T.E.D. motor squad was the finest of L.A., and Officer Fagin was the finest of the fine, and it was signed Noel Cannon."

7. The police officers finally left petitioner's chambers that morning shortly before noon.

CONCLUSION:

Petitioner's conduct was arbitrary, unreasonable and in bad faith, and constituted wilful misconduct in office. Petitioner not only used profane, abusive and inexcusable language, but she also misused the authority of her office by ordering persons to appear in her court where no matters were pending requiring their attendance and by directing her bailiffs to use force if they attempted to leave.

[July 1975]

Paragraph F charges that petitioner engaged in curt and rude conduct by ridiculing qualified members of the bar. Petitioner concedes the truth of the Commission's findings that she deliberately ridiculed Deputy Public Defender Klein (F-1, see summary of factual matters set forth in charges, fn. 4, *ante,* par. F) and accepts the Commission's conclusion that her conduct was arbitrary, unreasonable and in bad faith, and constituted wilful misconduct in office. Petitioner also accepts the Commission's findings as to the Shalant matter but objects to the Commission's conclusion that her conduct was prejudicial to the administration of justice. The findings in the Shalant matter well support the charges as summarized in footnote 4, *ante,* paragraph F, and constitute clear and convincing evidence in support of the conclusions of prejudicial misconduct. We accordingly adopt the findings and conclusions of the Commission as our own as to the Klein and Shalant matters. We have heretofore made findings as to the Putnam-Pine matter (F-3), the Kroneberger-Weiss-Fleishman matter (F-4) and the Henley matter (F-5) and as to each of such matters we adopt the Commission's conclusion that petitioner engaged in curt and rude conduct by deliberately ridiculing these members of the bar, and that such constituted wilful misconduct in office.

Petitioner accepts the Commission's findings of paragraph G to the effect that she unlawfully ordered the court reporter to delete material from the transcript of a preliminary hearing matter. (See summary of factual matters set forth in charges, fn. 4, *ante,* par. G.) She objects, however, that the Commission has reached a conclusion which is not related to the charge of the formal notice. We do agree that a charge that petitioner unlawfully ordered the deletion of material from a transcript does not warrant the conclusion, as made by the Commission, that petitioner's direction to the reporter to turn over his notes to the clerk of the municipal court rather than the county clerk, was a violation of Government Code section 69955, subdivision (a). We agree with and adopt as our own, however, the Commission's further conclusion, as follows: Petitioner's conduct in ordering a portion of the record deleted in People v. Moore was a violation of Code of Civil Procedure section 274c, and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Paragraph H charges certain bizarre conduct on petitioner's part. We do not deem some of such admitted conduct, although bizarre in character and clearly improper in a judicial atmosphere, to constitute either wilful misconduct or prejudicial conduct. This includes the

maintenance at particular times of a mechanical canary in petitioner's chambers (H-2) and a small dog at her bench (H-3). The record fails to disclose that either the canary or the dog had any substantial effect on proceedings in petitioner's court. A more serious charge is that petitioner engaged in improper conduct in 1967 when she maligned her colleagues on the bench after they had censured her for certain exhibitionist conduct and statements to the media which she now recognizes as being "foolish." The Commission's findings which support the charge are accepted by petitioner. It appears, however, that such conduct was the subject of a letter from the Commission in 1967 and that petitioner has not engaged in similar conduct since that time. We elect not to include her 1967 conduct as a ground for further disciplinary action in these proceedings.

There is other bizarre conduct which we cannot ignore. Petitioner does not object to Commission findings that she arranged for Reverend Blackstone to use an interview room within the lockup area adjacent to petitioner's courtroom for the purpose of religious interviews with all persons in custody. Petitioner now acknowledges "that religion in any form should not be injected into the judicial process." We adopt as our own the Commission's findings and conclusions that petitioner's conduct was prejudicial to the administration of justice and brings the judicial office into disrepute.

Petitioner does not challenge Commission findings in support of the Belfry matter (see factual matters as set forth in charges as summarized in footnote 4, *ante,* par. H (H-5)), although she rejects the Commission's conclusion that she is guilty of prejudicial conduct as to that matter. As the findings are based on clear and convincing evidence and support the Commission's conclusion we adopt both the findings and conclusion as our own. Petitioner does object to Commission findings in support of the charge summarized in footnote 4, *ante,* paragraph H (H-6) that she threatened to shoot the manager of her apartment, but she objects only to a particular finding that a maintenance man who was present was frightened by petitioner's conduct. There is clear and convincing evidence in support of the Commission's finding and also the conclusion of prejudicial conduct, and we adopt both the findings and conclusion as our own. Petitioner's contention that conduct within the privacy of her apartment cannot constitute conduct which brings the judicial office into disrepute overlooks the fact that the charged misconduct was brought out of the privacy of her apartment when the apartment manager, the maintenance engineer and the security guard were summoned there and

detained by petitioner while she stated her complaints at length in a loud voice.

The foregoing numerous incidents of wilful misconduct and less serious prejudicial conduct[20] constitute compelling grounds for petitioner's removal from office. Petitioner urges in mitigation, first, "the unanimous conclusion of all who testified [in her behalf] that Petitioner was a hard working judge who puts in long hours because of a lengthy calendar." Also urged in mitigation are her "contrition for her admitted abrasive conduct," her "courteous and respectful attitude and demeanor" in most of her work, her "intelligence and capacity for continued growth" as a judge, her efficiency in managing a heavy case load, her capacity for impartial decisions and long working hours, her "unquestioned integrity," and the "inexperience and sometimes disrespectful attitude of public defenders" who appeared before her.[21]

Seventeen private attorneys, one deputy district attorney and a public official testified in behalf of petitioner. A consensus of the testimony of the attorneys was to the effect that in appearances before petitioner they had observed no conduct which constituted a denial of effective counsel or an interference with the attorney-client relationship, that she did not act in a curt, rude or biased manner, that she did not set unreasonable bails or arbitrarily issue arrest warrants, that she did not instill in defense attorneys fear or submissiveness, and that she was a well-qualified and conscientious judge. It appears, however, that all of such opinion evidence except, perhaps, the opinion that petitioner was a well-qualified and conscientious judge, has been established to the contrary by clear and convincing evidence in these proceedings. We cannot embrace such conclusionary expressions in view of a record which refutes each such expression in instances too numerous to permit us to speculate that petitioner was guilty of misconduct only in isolated occasions which might be individually explained and excused. None of the attorneys was

[20]"The more serious charge should be reserved for unjudicial conduct which a judge acting in his judicial capacity commits in bad faith, while the lesser charge should be applied to conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d 270, 284.)

[21]The special masters made the following statement in support of their recommendation for censure: "The Special Masters have concluded on the basis of all the evidence that [petitioner] is capable of continuing in her judicial position and functioning as a responsible, effective judge, and that she can and will avoid a repetition of the conduct which is the basis of the recommendation for censure. It is with that belief that the Special Masters make their recommendation."

present in petitioner's court on the occasion of any misconduct charged herein.

It is also urged that petitioner has heard far more than her fair share of preliminary hearings and arraignments during the period in which her conduct has been questioned; that she kept her court in session for long hours, generally convening by 8:30 a.m. and occasionally working through lunch or into evening hours, and that she has averaged only a few days' annual vacation and sick leave. There is no reason to doubt the truth of these assertions. Judge Spruance (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 801) unsuccessfully sought to mitigate his misconduct on grounds of overwork and unusual judicial pressures. Petitioner asserts that she often sought reassignments from other departments when her calendar had cleared; it thus does not appear that it was the pressures of her assigned work load which forced her into the improprieties charged and found. It is manifest in any event that a lack in the quality of justice cannot be balanced by the fact that justice, such as it is, is administered in large quantities.

Petitioner also seeks to mitigate her conduct on frustrations provoked by "inexperienced and sometimes disrespectful lawyers" from the office of the public defender. With one possible exception, however, the record simply does not support her claim that the numerous deputy public defenders involved in the misconduct charged and found to be true were disrespectful or that their inexperience reasonably could have frustrated petitioner or have provoked her unwarranted conduct. (See fns. 6-12, *ante.*) Nor does the record support a contention that the deputy public defenders engaged in a "vendetta" designed to provoke petitioner or to obstruct the administration of justice in her court. Punitive action against the deputy public defenders, including contempt citations, was petitioner's first and not as it should have been her last means of controlling proceedings in her courtroom. (See *Smith* v. *Superior Court, supra,* 68 Cal.2d 547, 560.) "[E]ven assuming arguendo that the evidence was clear and convincing, disrespect on the part of the public defender cannot serve to justify petitioner's injudicious response." (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 538 [116 Cal.Rptr. 260, 526 P.2d 268].)

(1b) We deem none of the foregoing or other matter urged by petitioner to constitute a factor which we may recognize in mitigation of petitioner's numerous acts of wilful misconduct. (8) We stated in

*Spruance,* with equal applicability here, that we cannot "conceive that there are circumstances in which bad faith itself can be excused by extraneous circumstances. There can be no mitigation for maliciously motivated unjudicial conduct. Since we have found petitioner to have acted in bad faith on numerous occasions, we obviously have given no credit to petitioner's asseverations of mitigating circumstances." (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 800.) **(1c)** Petitioner has engaged in a course of conduct which has maligned the judicial office and clearly establishes her lack of temperament and ability to perform judicial functions in an even-handed manner. Because it is our duty to preserve the integrity and independence of the judiciary (Cal. Code Jud. Conduct, canon 1), we order Judge Noel Cannon of the Municipal Court for the Los Angeles Judicial District of Los Angeles County removed from office.[22] This order is final forthwith.

As petitioner's unjudicial conduct did not amount to moral turpitude, dishonesty or corruption (cf. Bus. & Prof. Code, § 6106) justice will not be further served by prohibiting petitioner from resuming the practice of law. We therefore further order that notwithstanding her removal from

[22]The California Code of Judicial Conduct was adopted by the Conference of California Judges effective January 1, 1975. We do not rely on the code in ascertaining violations thereof as grounds for disciplining petitioner; discipline is imposed pursuant to the constitutional provisions and rules in implementation thereof heretofore noted and considered. However, we acknowledge the applicability of the code to any conduct we as judges participate in after its effective date. Canon 1 provides in part that "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."

We note that although the current California Code of Judicial Conduct has only recently been adopted, formal standards have nevertheless existed for more than 50 years. The original American Bar Association Canons of Judicial Ethics were adopted as modified in 1949 for application in California by the Conference of California Judges. The current California Code of Judicial Conduct is adapted from the ABA Code of Judicial Conduct which, after revision of the association's earlier code, was adopted by the ABA in 1972. (See Cal. Rules of Court, appendix, div. II, Cal. Code Jud. Conduct; *Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d 270, 281-282; *Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 796, fn. 17.)

Although as stated, petitioner is not charged with its violation we nevertheless note the content of canon 2, the substance of which has long been incorporated in various ABA canons of judicial conduct: "A judge should respect and comply with the law and shall conduct himself at all times in a manner that promotes public confidence in the impartiality of the judiciary." We stated in *Spruance* that "the canons of the American Bar Association's Code of Judicial Conduct might usefully be consulted to give meaning to the constitutional standards." (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 796.)

judicial office Noel Cannon shall, if otherwise qualified, be permitted to practice law in the State of California. (See Cal. Const., art. VI, § 18, subd. (d).)

## APPENDIX

### FINDINGS AND CONCLUSIONS BY MASTERS AND COMMISSION

| Paragraph, Formal Notice | Specific Charge Verbal Designation | Item No. | Findings/Conclusions By Masters | | | Findings/Conclusions By Commission | | |
|---|---|---|---|---|---|---|---|---|
| | | | Wilful Misconduct | Prejudicial Conduct | Neither | Wilful Misconduct | Prejudicial Conduct | Neither |
| A-Abuse of contempt power | Ridgeway | A-1 | X | | | X | | |
| | Ryan | A-2 | X | | | X | | |
| | Karagozian | A-3 | X | | | X | | |
| | Putnam-Pine | A-4 | X | | | X | | |
| B-Unlawful interference with attorney-client relationship | Ridgeway) Ryan) Karagozian) Putnam-Pine) Henley) Kroneberger-Weiss-Fleishman | B-1 | X | | | X | | |
| | Ingber | B-2 | X | | | X | | |
| | | B-3 | X | | | X | | |
| C-Arbitrary bail | Russo | C-1 | | | X | X | | |
| | Brooks | C-3 | | X | | X | | |
| | Alcorn | C-4 | X | | | X | | |
| | Farrell | C-7 | X | | | X | | |
| D-Instilling submissiveness in attys. | Henley | D-1 | X | | | X | | |
| | Dennison | D-2 | X | | | X | | |
| E-Abuse of prerogatives of office | Fagin | E-1 | X | | | X | | |
| | Laird | E-4 | | X | | | X | |
| | Ash-Hopkins | E-5 | | | X | | X | |
| F-Ridiculing members of bar | Klein | F-1 | X | | | X | | |
| | Shalant | F-2 | | X | | | X | |
| | Putnam-Pine | F-3 | (1) | | | X | | |
| | Kroneberger-Weiss-Fleishman | F-4 | (1) | | | X | | |
| | Henley | F-5 | (1) | | | X | | |

## APPENDIX

### FINDINGS AND CONCLUSIONS BY MASTERS AND COMMISSION

| Paragraph. Formal Notice | Specific Charge Verbal Designation | Item No. | Findings/Conclusions By Masters: Wilful Misconduct | Findings/Conclusions By Masters: Prejudicial Conduct | Findings/Conclusions By Masters: Neither | Findings/Conclusions By Commission: Wilful Misconduct | Findings/Conclusions By Commission: Prejudicial Conduct | Findings/Conclusions By Commission: Neither |
|---|---|---|---|---|---|---|---|---|
| G-Deletion of transcript material | | G-1 | | | X | | X | |
| H-Bizarre conduct | Resolution of censure | H-1 | | X | | | X | |
| | Canary | H-2 | | | X | | X | |
| | Dog | H-3 | | X | | | X | |
| | Rev. Blackstone | H-4 | | | X | | X | |
| | Belfry | H-5 | | X | | | X | |
| | Apt. manager | H-6 | | X | | | X | |

(1)—Not specifically found in indicated context but so found under an earlier listing.

Note—Specifications not found by the Commission and therefore dismissed are not dealt with in the text of the opinion nor included on this chart.

19 Cal.3d Spec. Trib. Supp.
19 Cal.3d Spec.Trib.Supp. 1, 564 P.2d 1, 138 Cal.Rptr. 459
**(Publication page references are not available for this document.)**
<YELLOW FLAG>

MARSHALL F. McCOMB, an Associate Justice of the Supreme Court, Petitioner,
v.
COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

S.F. No. 23585.

Supreme Court of California

May 2, 1977.

SUMMARY

In a special proceeding under Cal. Const., art. VI, §§ 8, 18, the Commission on Judicial Performance conducted an investigation and hearing on the fitness of an 82-year-old associate justice of the Supreme Court to continue in office. While the proceeding was pending, Cal. Const., art. VI, § 18, subd. (e), was amended to provide that a recommendation of the commission for the censure, removal, or retirement of a judge of the Supreme Court shall be determined by a tribunal of seven Court of Appeal judges selected by lot. On findings that, after 50 years as a judge, the associate justice was suffering from chronic brain syndrome (senile dementia) detrimental to the performance of his judicial duties, of wilful and persistent failure to perform such duties, and that his disability was (or was likely to become) permanent, the commission recommended that he be retired or removed from office.

On the justice's petition to the Supreme Court for writ of review, the duly selected tribunal, holding that specific instances of bizarre behavior on the justice's part were not wilful but merely symptomatic of senility, rejected the commission's alternative recommendation of removal from office, and, upholding the commission's finding of chronic brain syndrome, ordered that he be immediately retired and that such retirement be deemed voluntary. The tribunal held that, because its creation under the new constitutional provision constituted a change of procedure, not of substantive law, the justice's objection to its authority, as being an application of an ex post facto law, was without merit. Similarly the tribunal rejected the justice's objections that impeachment was the only constitutional way he could be removed from the court, and held that, because the instant proceeding was neither a criminal prosecution nor a proceeding that existed at common law or one for which a trial by jury was statutorily provided, he was not entitled to such a trial. Furthermore, the proper standard of proof in the special

proceeding was not proof beyond a reasonable doubt, as contended by the justice, but proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty. Other objections rejected by the tribunal related to the inclusion of two nonlawyers on the Commission for Judicial Performance, to the justice's alleged preclusion by Cal. Rules of Court, rule 906, from moving to dismiss the proceeding for lack of jurisdiction, and to other matters upon which the justice's contentions were held to be unsupported by the record or irrelevant. (Special Tribunal (Cal. Const., art. VI, § 18, subd. (e)).

Opinion by The Tribunal.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 4--Operation and Effect--Introduction of Tribunal to Review and Determine Recommendation of Commission on Judicial Performance-- As Procedural Change.
The 1976 amendment to Cal. Const., art. VI, § 18, subd. (e), providing that a recommendation of the Commission on Judicial Performance for the censure, removal, or retirement of a judge of the Supreme Court shall be determined by a tribunal of seven Court of Appeal judges selected by lot, constituted a change of procedure, not of substantive law. The application, therefore, of such constitutional provision to a pending proceeding inquiring into the mental fitness of an associate justice of the Supreme Court to continue in office did not constitute an application of an ex post facto law (U.S. Const., art. I, § 9, cl. 3, and § 10; Cal. Const., art. I, § 9).

(2) Judges § 6--Removal--Special Proceeding as Constitutional Alternative to Impeachment.
Though judges of state courts are subject to impeachment for misconduct in office (Cal. Const., art. IV, § 18, subd. (b); Gov. Code, § 3020), a constitutional alternative to the impeachment process was made available by the adoption of Cal. Const., art. VI, §§ 8, 18, specifying reasons for which the Supreme Court, on recommendation by the Commission on Judicial Performance, is expressly empowered to suspend, retire, censure, or remove a judge.

[See Cal.Jur.2d, Judges, § 24; Am.Jur.2d, Judges, § 17 et seq.]

(3) Judges § 6--Removal--Noncriminal Nature of Special Proceeding--Jury Trial Inapplicable.
The special proceeding to determine a recommendation by the Commission on Judicial Performance to retire, censure, or remove a judge (Cal. Const., art. VI, §§ 8, 18) is not a criminal prosecution in which the ordinary criminal procedural safeguards apply, and is therefore not a proceeding in which the judge is entitled to a trial by jury under U.S. Const., art. III, § 2, cl.

3, and the Sixth and Seventh Amendments or Cal. Const., art. I, § 16.

(4) Judges § 6--Removal--Special Proceeding as Not Constituting Civil Action--Jury Trial Inapplicable.
No statute provides for trial by jury in a special proceeding to determine a recommendation by the Commission on Judicial Performance to retire, censure, or remove a judge (Cal. Const., art. VI, §§ 8, 18), and such a proceeding did not exist at common law. Because, therefore, the right to trial by jury in civil actions or proceedings is the right as it existed at common law at the time the federal and California Constitutions were adopted, an associate justice of the Supreme Court, whose mental unfitness to continue in office was determined in such a proceeding, was not entitled to trial by jury as provided for civil actions.

(5) Judges § 6--Removal--Special Proceeding--Standard of Proof.
In a special proceeding under Cal. Const., art. VI, § 8, and § 18, subd. (e), as implemented by Cal. Rules of Court, rule 921, to inquire into and determine the mental and physical fitness of an associate justice of the Supreme Court to continue in office, due process and equal protection of the law did not require a standard of proof beyond a reasonable doubt, where he was neither charged with a crime nor threatened by confinement in a state mental institution. The proper standard of proof was by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty.

(6) Judges § 6--Removal--Special Proceeding--Inclusion of Non-lawyers in Commission on Judicial Performance.
In a special proceeding under Cal. Const., art. VI, § 8 and § 18, subd. (e), as implemented by Cal. Rules of Court, rule 921, to inquire into and determine the mental fitness of an associate justice of the Supreme Court to continue in office, the justice, in the initial investigation and hearing by the Commission on Judicial Performance, had no constitutional right to be judged by judges who were lawyers, and the fact that two of the nine members of the commission were neither judges nor lawyers was immaterial. In any event, the commission's recommendations were subject to ultimate determination by a tribunal of seven appellate court justices based on its independent review of the evidence.

(7a, 7b) Judges § 6--Removal--Special Proceeding--Objection to Jurisdiction--Procedural Due Process.
An objection to jurisdiction, if based on lack of jurisdiction of the subject matter, can be made at any time. Thus, in an investigation and hearing by the Commission on Judicial Performance (Cal. Const., art. VI, §§ 8, 18, subd. (e)), on the question of the mental fitness of an associate justice of the Supreme Court to continue in office, the fact that Cal. Rules of Court, rule 906, relative to such proceeding, provided that "The

notice of formal proceedings and answer shall constitute all the pleadings" and that "no motion or demurrer shall be filed against any of the pleadings" did not preclude the justice from moving to dismiss the proceeding for lack of jurisdiction, and he was not denied procedural due process where, after proper notice of the proceeding, he did in fact object to the commission's jurisdiction, and where he was given a complete hearing on the charges with full opportunity to question any alleged fact.

(8) Judges § 6--Removal--Special Proceeding--Objections to Notice of Proceeding.
With respect to investigations and hearings by the Commission on Judicial Performance involving recommendations for the censure, removal, or retirement of judges (Cal. Const., art. VI, §§ 8, 18), the apparent purpose of Cal. Rules of Court, rule 906, in providing that "The notice of formal proceedings and answer shall constitute all the pleadings" and that "no motion or demurrer shall be filed against any of the pleadings" is to require the respondent-judge to state his objections in his answer to the notice.

(9) Judges § 6--Removal--Special Proceeding--Retirement as Appropriate Disposition--Disability of Associate Justice of the Supreme Court.
On evidence that an 82-year-old associate justice of the Supreme Court, who had been on that court for 20 of his 50 years as a judge, was suffering from chronic brain syndrome (senile dementia) detrimental to the performance of his official duties, that the disability was (or was likely to become) permanent, and of specific instances of bizarre behavior on his part that, if viewed in isolation rather than as a symptom of senility, would have supported his removal from office for wilful misconduct prejudicial to the administration of justice, the appropriate disposition of his case, at the conclusion of a special proceeding under Cal. Const., art. VI, §§ 8, 18, subd. (e), as implemented by Cal. Rules of Court, rule 921, was to order his immediate retirement from the court (Cal. Const., art. VI, § 18, subd. (c)(1)), and that he should be considered to have retired voluntarily (Cal. Const., art. VI, § 18, subd. (d)).

COUNSEL

Eugene J. Majeski, Ropers, Majeski, Kohn, Bentley & Wagner, Gregory S. Stout and Wallace P. Douglass for Petitioner.

W. O. Weissich, Randolph E. Heubach and Weissich & Heubach for Respondent.

Henry W. Howard, A. James Robertson II, Jerome B. Falk, Jr., Howard, Prim, Rice, Nemerovski, Canady & Pollak, Thomas F. Overlander and Caplan & Overlander for conservator of the person and estate of Petitioner.

THE TRIBUNAL. [FN*]

FN* Before Taylor, J., Tribunal P. J., Tamura, J., Stephens, J., Thompson, J., Caldecott, J., Paras, J., and McDaniel, J.

The Commission on Judicial Performance (hereafter the Commission) has recommended the retirement or removal of Associate Justice Marshall F. McComb from the California Supreme Court (see Cal. Const., art. VI, §§ 8 and 18; Cal. Rules of Court, rules 901-922). The Commission's recommendation that the 82-year-old justice by retired is based on its findings and conclusions that he is suffering from a disability that seriously interferes with the performance of his judicial duties and that the disability is, or is likely to become, permanent (Cal. Const., art. VI, § 18, subd. (c)(1)). The Commission's recommendation that Justice McComb be removed is based on its findings and conclusions that he has wilfully and persistently failed to perform his judicial duties, and has engaged in conduct prejudicial to the administration of justice and conduct which brings the judicial office into disrepute (Cal. Const., art. VI, § 18, subd. (c)(2), before amend. eff. Nov. 2, 1976). [FN1]

FN1 While this matter was pending before the special masters for hearing in October and November 1976, the California electorate approved Proposition 7 at the general election on November 2, 1976, and thereby amended, as of that date, sections 8 and 18 of article VI of the state Constitution, as follows (deleted provisions are printed in type and new provisions are printed in italic type):

" SEC. 8. The Commission on Judicial Performance consists of 2 judges of courts of appeal, 2 judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; 2 members of the State Bar who have practiced law in this State for 10 years, appointed by its governing body; and 2 citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor and approved by the Senate, a majority of the membership concurring. All terms are 4 years.

"Commission membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

" SEC. 18. (a) A judge is disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging the judge in the United States with a crime punishable as a felony under California or federal law, or (2) a recommendation to the Supreme Court by the Commission on Judicial Performance for removal or retirement of the judge.

"(b) On recommendation of the Commission on Judicial Performance or on its own motion, the Supreme Court may suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is

found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. If the conviction is reversed, suspension terminates, and the judge shall be paid the salary for the judicial office held by the judge for the period of suspension. If the judge is suspended and the conviction becomes final the Supreme Court shall remove the judge from office.

"(c) On recommendation of the Commission on Judicial Performance the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission may privately admonish a judge found to have engaged in an improper action or a dereliction of duty, subject to review in the Supreme Court in the manner provided for review of causes decided by a court of appeal.

"(d) A judge retired by the Supreme Court shall be considered to have retired voluntarily. A judge removed by the Supreme Court is ineligible for judicial office and pending further order of the court is suspended from practicing law in this State. "(e) A recommendation of the Commission on Judicial Performance for the censure, removal or retirement of a judge of the Supreme Court shall be determined by a tribunal of 7 court of appeal judges selected by lot.

"(f) The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings."

Having undertaken an independent evaluation of the evidence, we concur in the Commission's finding that Justice McComb is suffering from a disability (chronic brain syndrome, senile dementia) that seriously interferes with the performance of his judicial duties and that the disability is, or is likely to become, permanent. We conclude also that the Commission's findings of wilful and persistent failure to perform judicial duties are not supported by the record and that no cause for discipline exists through conduct prejudicial to the administration of justice which brings the judicial office into disrepute. Accordingly, we order the retirement of Associate Justice Marshall F. McComb from the Supreme Court of the State of California.

(1) Justice McComb petitioned the Supreme Court for a writ of review, which was granted, and he has petitioned that court to reject or modify the Commission's recommendations (Cal. Rules of Court, rule 919(b)). Pursuant to article VI, section 18,

subdivision (e), of the state Constitution, as amended on November 2, 1976, seven California Court of Appeal justices were selected by lot to constitute a tribunal to review the Commission's recommendations and to determine the matter. [FN2] Petitioner has filed an objection to this tribunal's authority to make such determination, contending that section 18, subdivision (e) and the court rule implementing that section (rule 921), as to him, violate the federal and state prohibitions against ex post facto laws (U.S. Const., art. I, § 9, cl. 3, and § 10; Cal. Const., art. I, § 9). The objection, however, is without merit because section 18, subdivision (e) is merely a procedural change, as distinguished from a change of substantive law which adversely affects petitioner's rights and thus it is not an ex post facto law as applied to petitioner (see, generally, Beazell v. Ohio (1925) 269 U.S. 167 [ 70 L.Ed. 216, 46 S.Ct. 68]; Duncan v. Missouri (1894) 152 U.S. 377 [ 38 L.Ed. 485, 14 S.Ct. 570]; cf. Keiser v. Bell (E.D.Pa. 1971) 332 F.Supp. 608, 620-624).

FN2 Listed in alphabetical order, the seven Court of Appeal justices so selected are: Presiding Justice Thomas W. Caldecott, First Appellate District, Division Four (San Francisco); Associate Justice F. Douglas McDaniel, Fourth Appellate District, Division Two (San Bernardino); Associate Justice George E. Paras, Third Appellate District (Sacramento); Associate Justice Clarke E. Stephens, Second Appellate District, Division Five (Los Angeles); Associate Justice Stephen K. Tamura, Fourth Appellate District, Division Two (San Bernardino); Presiding Justice Wakefield Taylor, First Appellate District, Division Two (San Francisco); Associate Justice Robert S. Thompson, Second Appellate District, Division One (Los Angeles).

(2) Petitioner has maintained throughout this proceeding that impeachment is the only constitutional way he, as a duly elected justice, [FN3] may be removed from the court. Although judges of state courts are subject to impeachment for misconduct in office (Cal. Const., art. IV, § 18, subd. (b); Gov. Code, § 3020), impeachment is not the only procedure for removing a judge from a court. By adoption of article VI, sections 8 and 18 of the state Constitution, the people of this state have expressly empowered the Supreme Court, on recommendation by the Commission, to suspend, retire, censure, or remove a judge for the reasons stated in section 18 (see fn. 1, ante). This procedure is a constitutional alternative to the impeachment process (see Geiler v. Commission on Judicial Qualifications (1973) 10 Cal.3d 270, 282 [ 110 Cal.Rptr. 201, 515 P.2d 1], cert. den. 417 U.S. 932 [ 41 L.Ed.2d 235, 94 S.Ct. 2643]; cf. In re Kelly (Fla. 1970) 238 So.2d 565, 568-569, cert. den. 401 U.S. 962 [ 28 L.Ed.2d 246, 91 S.Ct. 970]; Cusack v. Howlett (1969) 44 I11.2d 233 [ 254 N.E.2d 506]; In re Terry (1975) 262 Ind. 667 [ 323 N.E.2d 192], rehg. den. 329 N.E.2d 38, cert. den. 423 U.S. 867 [ 46 L.Ed.2d 97, 96 S.Ct. 129]; In re Inquiry Relating to Rome (1975) 218 Kan. 198 [ 542 P.2d 676]; In re Haggerty (1970) 257 La. 1 [ 241 So.2d 469];

In re Diener and Broccolino (1973) 268 Md. 659 [ 304 A.2d 587], cert den. 415 U.S. 989 [ 39 L.Ed.2d 885, 94 S.Ct. 1586]).

FN3 Petitioner has been a judge on the courts of this state for nearly 50 years. He was appointed to the Supreme Court in 1956, and the electorate later approved a 12-year term on the court commencing in January 1967.

(3) Petitioner attacks the validity of this proceeding on broad constitutional grounds involving the alleged denial of due process and equal protection of the laws. His basic premise is that this proceeding is a "criminal prosecution" in which he is entitled to the same constitutional rights, privileges and immunities afforded defendants in criminal cases, particularly the right to trial by jury, the right to be presumed innocent until proven guilty beyond a reasonable doubt, the right to be judged by judges who are lawyers, and protection from ex post facto laws and bills of attainder.

In contending that this proceeding is a criminal prosecution, petitioner relies on Penal Code section 15, which was enacted in 1872, and defines a crime or public offense as "an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: "1. Death: [¶] 2. Imprisonment; [¶] 3. Fine; [¶] 4. Removal from office; or, [¶] 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State." (Italics added.) Citing this statute and cases that involved the removal of public officers from office pursuant to former Penal Code sections 758-771 (now Gov. Code, §§ 3060- 3073), [FN4] petitioner argues that since the Commission has recommended his removal from the court, he is being punished for an unlawful act, and therefore this proceeding is a criminal prosecution.

FN4 These statutes provide for removal of certain public officers by a procedure other than impeachment. It begins with a grand jury accusation (Gov. Code, § 3060) and is conducted as a criminal proceeding, including the right to trial by jury (Gov. Code, § 3070). Presumably, it was in light of this procedure for removal of public officers from office that the Legislature included removal from office in its definition of a crime or public offense (Pen. Code, § 15).

A criminal action is a proceeding in which a person charged with a public offense is accused and brought to trial and punishment (Pen. Code, § 683). In the instant proceeding, petitioner is not charged with unlawful acts which constitute criminal offenses. Nor is the proceeding designed to convict petitioner of a crime or to punish him for criminal acts. Rather, this proceeding is limited to an inquiry and determination whether petitioner is physically and mentally capable of performing his judicial duties, or whether he has wilfully and persistently failed to

perform those duties, or whether he has engaged in conduct prejudicial to the court and the administration of justice. These grounds for retirement or removal of a judge do not require proof of criminal misconduct. The ultimate objective is to protect the judicial system and the public which it serves from judges who are unfit to hold office. Accordingly, we hold that a proceeding to retire, censure, or remove a judge pursuant to article VI, sections 8 and 18 of the state Constitution, is not a criminal prosecution in which the ordinary criminal procedural safeguards apply (cf. In re Kelly, supra, 238 So.2d 565, 569; In re Inquiry Relating to Rome, supra, 218 Kan. 198; In re Haggerty, supra, 257 La. 1; In re Diener and Broccolino, supra, 268 Md. 659; In the Matter of Mikesell (1976) 396 Mich. 517 [ 243 N.W.2d 86, 90-91]; In re Crutchfield (1975) 289 N.C. 597 [ 223 S.E.2d 822, 825]; Sharpe v. State ex rel. Oklahoma Bar Association (Ct. on the Judiciary of Okla. 1968) 448 P.2d 301, cert. den. 394 U.S. 904 [ 22 L.Ed.2d 216, 89 S.Ct. 1011]; Keiser v. Bell, supra, 332 F.Supp. 608, 616-617). [FN5]

FN5 This proceeding is analogous to a State Bar disciplinary proceeding which is not a criminal action (see Prime v. State Bar (1941) 18 Cal.2d 56, 62 [ 112 P.2d 881]; Emslie v. State Bar (1974) 11 Cal.3d 210, 224 [ 113 Cal.Rptr. 175, 520 P.2d 911]. Proceedings before the State Bar are sui generis, neither civil nor criminal in character, and the ordinary criminal procedural safeguards do not apply (Yokozeki v. State Bar (1974) 11 Cal.3d 436, 447 [ 113 Cal.Rptr. 602, 521 P.2d 858]; Emslie v. State Bar, supra, 11 Cal.3d at pp. 225-226). The purpose of the State Bar disciplinary proceeding is not to punish the individual attorney, or determine whether the attorney is guilty of a crime, but to determine whether the attorney should be allowed to continue the practice of law. The principal objective of the proceeding is to protect the courts, the legal profession, and the public from persons unfit to practice law (In re Vaughan (1922) 189 Cal. 491, 495-496 [ 209 P. 353, 24 A.L.R. 858]; In re Rothrock (1940) 16 Cal.2d 449, 454 [ 106 P.2d 907, 131 A.L.R. 226]; Best v. State Bar (1962) 57 Cal.2d 633, 637 [ 21 Cal.Rptr. 589, 371 P.2d 325]; Zitny v. State Bar (1966) 64 Cal.2d 787, 790-791 [ 51 Cal.Rptr. 825, 415 P.2d 521], fn. 1; Black v. State Bar (1972) 7 Cal.3d 676, 686 [ 103 Cal.Rptr. 288, 499 P.2d 968]; Emslie v. State Bar, supra, 11 Cal.3d, p. 225; Wong v. State Bar (1975) 15 Cal.3d 528, 531 [ 125 Cal.Rptr. 482, 542 P.2d 642]; Segretti v. State Bar (1976) 15 Cal.3d 878, 886 [ 126 Cal.Rptr. 793, 544 P.2d 929]). Thus, an attorney who is the subject of a State Bar disciplinary proceeding does not have a right to a jury trial (Johnson v. State Bar (1935) 4 Cal.2d 744, 758 [ 52 P.2d 928]; In re Wharton (1896) 114 Cal. 367, 370 [ 46 P. 172]), and the standard of proof is clear and convincing evidence sufficient to sustain a charge to a reasonable certainty (Medoff v. State Bar (1969) 71 Cal.2d 535, 550 [ 78 Cal.Rptr. 696, 455 P.2d 800]).

Petitioner contends he was denied his constitutional right to a trial by jury (U.S. Const., art. III, § 2, cl. 3, and Amends. 6 and 7; Cal. Const., art. I, § 16). Because this is not a criminal action or proceeding, however, petitioner was not entitled to a jury trial as a defendant in a criminal prosecution (Sharpe v. State ex rel. Oklahoma Bar Association, supra, 448 P.2d 301; In re Inquiry Relating to Rome, supra, 218 Kan. 198; Keiser v. Bell, supra, 332 F.Supp. pp. 616-617). (4) The right to a trial by jury in civil actions or proceedings is the right as it existed at common law at the time the Constitutions were adopted (People v. One 1941 Chevrolet Coupe (1951) 37 Cal.2d 283, 286-287 [ 231 P.2d 832]; Cline v. Superior Court (1920) 184 Cal. 331, 339 [ 193 P. 929]; In re Inquiry Relating to Rome, supra). Because this special proceeding did not exist at common law, and no statute provides for trial by jury in this proceeding, petitioner was not entitled to a jury trial.

(5) Petitioner contends that he was improperly denied the presumption of innocence and the standard of proof beyond a reasonable doubt (Pen. Code, § 1096). He argues that if due process of law and equal protection of the law require a standard of proof beyond a reasonable doubt in a juvenile court proceeding (In re Winship (1970) 397 U.S. 358 [ 25 L.Ed.2d 368, 90 S.Ct. 1068]) and in a proceeding to determine whether a person is a mentally disordered sex offender (People v. Burnick (1975) 14 Cal.3d 306 [ 121 Cal.Rptr. 488, 535 P.2d 352]), due process and equal protection of the law require a standard of proof beyond a reasonable doubt in this proceeding. Although the juvenile court proceeding is not considered a criminal proceeding, the standard of proof beyond a reasonable doubt applies where, pursuant to section 602 of the Welfare and Institutions Code, the issue is whether the juvenile has committed an act which would be a crime if he were prosecuted as an adult. In mentally disordered sex offender proceedings (Welf. & Inst. Code, § 6300 et seq.), proof beyond a reasonable doubt is required because of possible indeterminate confinement in a prison-like state mental institution. In this proceeding, as previously discussed, petitioner is not charged with the commission of a crime. Nor is he threatened by confinement in a state mental institution. Accordingly, due process and equal protection of the law do not require proof beyond a reasonable doubt in this proceeding. The proper standard is proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty (Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d, p. 275).

(6) Petitioner contends that since the Commission includes two citizens who are not judges or lawyers who are members of the State Bar (Cal. Const., art. VI, § 8), he was denied his constitutional right to be "judged by judges who are lawyers." He cites Gordon v. Justice Court (1974) 12 Cal.3d 323 [ 115 Cal.Rptr. 632, 525 P.2d 72, 71 A.L.R.3d 551], cert. den. 420 U.S.

938 [ 43 L.Ed.2d 415, 95 S.Ct. 1148], which held that in criminal cases in which the defendant is charged with an offense carrying a possible jail sentence, the use of a nonattorney judge is a violation of due process of law unless the defendant consents thereto. He also relies on Colten v. Kentucky (1972) 407 U.S. 104 [ 32 L.Ed.2d 584, 92 S.Ct. 1953], North v. Russell (1976) 427 U.S. 328 [ 49 L.Ed.2d 534, 96 S.Ct. 2709], and Ludwig v. Massachusetts (1976) 427 U.S. 618 [ 49 L.Ed.2d 732, 96 S.Ct. 2781]. Again, petitioner's argument is based on the premise that the investigation and hearing conducted by the Commission was a criminal proceeding. The Commission, however, is not a court. It can render no judgment, civil or criminal, and thus could not "convict" petitioner of a criminal offense. Moreover, the ultimate decision in this proceeding must be made by this tribunal, based on its independent review of the evidence (Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d, p. 276). Accordingly, the presence of two nonlawyer citizens on the Commission did not deprive petitioner of due process or equal protection of the law.

(7a) Petitioner contends that California Rules of Court, rule 906, which precluded him from filing a motion or demurrer against the notice of formal proceedings, resulted in a denial of procedural due process and equal protection of the law. He argues that rule 906: (1) precluded him from objecting to the Commission's jurisdiction of his person and the subject matter and the sufficiency of the facts alleged in the notice; [FN6] and (2) rule 906 does not encompass procedures allowed an attorney in a State Bar disciplinary proceeding. (8) The apparent purpose of rule 906 is to require the respondent-judge to state his objections in his answer to the notice of formal proceedings (cf. Rules Proc. of State Bar, rule 15.10 [3B West's Ann. Bus. & Prof. Code (1974 ed. 1977 cum.supp.) foll. § 6087 (as amended Jan. 1, 1976); Deering's Cal. Codes Ann. Rules (1976 ed.) p. 658]). (7b) The rule, however, did not preclude petitioner from moving to dismiss the proceeding for lack of jurisdiction since that objection, if based on lack of jurisdiction of the subject matter, can be made at any time. Petitioner in fact objected to the Commission's jurisdiction, and thus he was not prejudiced by the lack of a rule providing for objection to the Commission's jurisdiction. Because petitioner was given proper notice of the proceeding and a complete hearing on the charges, with full opportunity to question any alleged fact, he was not denied procedural due process (cf. In re Robson (Alaska 1972) 500 P.2d 657, 661).

> FN6 Rule 905 provides for a written notice of formal proceedings which must specify the charges against the judge and the facts on which the charges are based. Rule 906 provides that the notice of formal proceedings and answer shall constitute all the pleadings, and "no motion or demurrer shall be filed against any of the pleadings."

Petitioner has made the following additional contentions which we have reviewed, find to be unsupported by the record, irrelevant or without merit, and warrant no further discussion:

(1) The Commission's denial of petitioner's motion to refer the matter back to the special masters for the taking of additional evidence pertaining to the sponsorship and drafting of Proposition 7 (see fn. 1) resulted in a denial of his constitutional right to confront and cross-examine the witnesses against him.

(2) The Commission's findings that petitioner wilfully and persistently failed to perform his judicial duties constitute a usurpation of the Legislature's constitutional prerogative to define crimes, and thereby violate the doctrine of separation of powers.

(3) This proceeding is an unconstitutional invasion of the independence of the judiciary.

(4) This proceeding violates the rule of judicial immunity from prosecution.

(5) This proceeding violates petitioner's First Amendment rights "not to speak," "not to associate," and "not to express an opinion" in the performance of his judicial duties.

(6) The Commission's finding that petitioner wilfully and persistently failed to perform his duties is based on an unconstitutionally vague standard (cf. Keiser v. Bell, supra, 332 F.Supp., pp. 612-615; see also, Sarisohn v. Appellate Div., Second Dept., S.Ct. of St. of N. Y. (E.D.N.Y. 1967) 265 F.Supp. 455; Napolitano v. Ward (N.D.Ill. 1970) 317 F.Supp. 79, 83).

(7) Failure of the Commission to state its reasons for its decisions constituted a denial of due process (see, generally, People v. Edwards (1976) 18 Cal.3d 796 [ 135 Cal.Rptr. 411, 557 P.2d 995]).

(8) Petitioner was denied his constitutional right to a trial by an unbiased tribunal.

(9) The retirement or removal of petitioner from the court because of senility constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

(9) Following the procedure and standard of review as set forth in Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d, pages 275-276, and Spruance v. Commission on Judicial Qualifications (1975) 13 Cal.3d 778, 784-785 [ 119 Cal.Rptr. 841, 523 P.2d 1209], footnote 5, we have made an independent evaluation of the evidence presented to the special masters and

the Commission, and we find clear and convincing evidence sufficient to sustain a charge "to a reasonable certainty," that petitioner is suffering from a disability which renders him unable to perform his judicial duties, and that the disability is, or is likely to become, permanent. [FN7]

FN7 We adopt the Commission's findings of fact as they relate to count Three of the notice of formal proceedings.

The record establishes specific instances of bizarre behavior by Justice McComb which, if viewed in isolation, would support discipline for conduct prejudicial to the administration of justice which brings the judicial office into disrepute. That conduct must be considered as symptomatic of the condition of chronic brain syndrome (senile dementia) which we find to exist. Balancing the gravity of the conduct against the reason for it and the public interest in an effective judiciary, we conclude that discipline in the form of removal from office or reprimand is not appropriate. The public interest is sufficiently served by the retirement of Justice McComb.

Similar factual analysis establishes that the Commission's findings of wilful misconduct on the part of Justice McComb are not supported by the evidence. The conduct in question was not wilful, but is symptomatic of senility. Accordingly, we disapprove the Commission's findings of wilful misconduct.

We conclude, therefore, that our constitutional responsibilities to maintain the integrity of the judicial system compel us to order the retirement of petitioner from the court (Cal. Const., art. VI, § 18, subd. (c)(1)). [FN8] Petitioner shall be considered to have retired voluntarily (Cal. Const., art. VI, § 18, subd. (d)). We hereby order the retirement of Associate Justice Marshall F. McComb from the Supreme Court of the State of California. This order is final forthwith.

FN8 Article VI, section 18, subdivision (c)(1) of the state Constitution was not changed by approval of Proposition 7 on November 2, 1976; therefore, it obviously is not an ex post facto law as applied to petitioner (see, generally, In re Valenzuela (1969) 275 Cal.App.2d 483, 486 [ 79 Cal.Rptr. 760]; cf. Matter of Heuermann (S.D. 1976) 240 N.W.2d 603, 607-608). Nor does the retirement of petitioner pursuant to section 18, subdivision (c)(1) constitute a bill of attainder (see, generally, Westmoreland v. Chapman (1968) 268 Cal.App.2d 1, 5 [ 74 Cal.Rptr. 363], and cases cited).

Cal. 1977.

McComb v. Commission on Judicial Performance

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**In re CHARLES ROBERT ROICK, a Judge of the Municipal Court, on Retirement**

**L.A. No. 31050.**

Supreme Court of California.

December 6, 1978.

SUMMARY

The Supreme Court adopted the recommendation of the Commission on Judicial Performance that a municipal court judge be retired for disability within the meaning of Cal. Const., art. VI, § 18, subd. (c)(1). The record indicated the judge, through his conservator, had waived review and had requested the immediate entry of an appropriate order. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Judges § 6--Removal--Retirement for Disability.
In a proceeding concerning the retirement of a judge, the Supreme Court adopted the recommendation of the Commission on Judicial Performance that a municipal court judge be retired for disability within the meaning of Cal. Const., art. VI, § 18, subd. (c)(1). The judge, through his conservator, had waived review and had requested the immediate entry of an appropriate order.

[See Cal.Jur.3d, Judges, § 62; Am.Jur.2d, Judges, § 17]

COUNSEL

No counsel listed for this case

THE COURT.

(1) In this proceeding, the Commission on Judicial Performance has filed its record and recommendation that Judge Charles Robert Roick be retired for disability within the meaning of California ***75** Constitution, article VI, section 18, subdivision (c)(1). Judge Roick, through his conservator, has waived review and requested the immediate entry of an appropriate order. Accordingly, it is hereby ordered that Judge Charles Robert Roick be retired from the Municipal Court, North County Municipal Court District, County of San Diego. (Cal. Const., art. VI, § 18, subd. (c)(1).) This order is final forthwith. ***76**

Cal.,1978.

In re Roick

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29 Cal.3d 615
630 P.2d 954, 175 Cal.Rptr. 420
**(Cite as: 29 Cal.3d 615)**
<RED FLAG>

JERROLD L. WENGER, a Judge of the Justice Court, Petitioner,
v.
COMMISSION ON JUDICIAL PERFORMANCE, Respondent

S.F. 24135.

Supreme Court of California.

Jul 13, 1981.

SUMMARY

The Supreme Court ordered that a justice court judge be removed from office after the court sustained nine charges of wilful misconduct and one charge of prejudicial conduct. The court held the number of wrongful acts was relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing lack of temperament and ability to perform judicial functions in an evenhanded manner. The court held the record established that the judge, instead of honoring peremptory disqualifications of himself, intruded into matters that had become another judge's responsibility and denounced the disqualification as an affront, that he groundlessly pried into counsel's advice or attempted to sway counsel from representing a party when annoyed by the party's conduct, that he interfered with law practice by threatening or purporting to exclude attorneys from his courtroom or sentencing an attorney to jail for appropriate advice to the client, that he overstepped limits on his power to resolve civil disputes by attempting to punish nonobedience to his informal directions as a contempt and unilaterally investigating facts, and that he disregarded or violated contempt procedural rules. The court held the aim of proceedings by the Commission on Judicial Performance is not punishment but protection of the judicial system and the public which it serves from judges who are unfit to hold office, and that faithfulness to that aim required the judge's removal. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Judges § 6--Removal--Review.
On review of a recommendation of the Commission on Judicial Performance that a justice ***616** court judge be removed, the Supreme Court must independently determine from an examination of the record which, if any, of the charges are supported by clear and convincing evidence. The court then decides whether to adopt,

modify, or reject the recommendation of removal. The court generally gives weight to the findings and conclusions of both the commission and the master appointed to investigate the charges. However, where several acts the commission had treated as wilful misconduct were found by the master to constitute only prejudicial conduct, special weight was given to the master's resolution of fact issues that turned on the credibility of testimony in his presence, while deference was accorded to the commission's inferences and conclusions.

(2) Judges § 6--Removal--Grounds--Wilful Misconduct and Prejudicial Conduct.
Prejudicial conduct by a judge is deemed less grave than wilful misconduct even though it may on occasion justify removal. Wilful misconduct requires that the judge in a judicial capacity has acted in bad faith, that is, that he committed acts he knew or should have known to be beyond his power, for a purpose other than faithful discharge of judicial duties. Bad faith acts not committed in a judicial capacity amount to no more than prejudicial conduct. Prejudicial conduct must be conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(3) Judges § 6--Removal--Grounds--Wilful Misconduct--Abuse of Contempt Power.
A justice court judge's initiation of contempt proceedings against an attorney who had disqualified the judge in a drunk driving case, for conduct the judge speculated to have occurred at the trial presided over by another judge, without contacting that judge or in any way ascertaining the actual facts, was an abuse of the contempt power and constituted wilful misconduct in office.

(4) Judges § 6--Removal--Grounds--Wilful Misconduct--Abuse of Contempt Power.
A justice court judge committed wilful misconduct by abusing his contempt power in a small claims proceeding in which he used the contempt power to enforce a supposed stipulation by defendant to pay damages, where, prior to any trial, he stated to defendant that the alternative to payment would be entry of judgment. The judge's policy of deferring entry of small claims ***617** judgments against defendants who would comply voluntarily with an informal decision was inapplicable once defendant's attorney announced defendant's refusal to comply.

(5) Judges § 6--Removal--Grounds--Wilful Misconduct--Disqualification.
A justice court judge's refusal to disqualify himself in a contempt proceeding involving a party and attorney with whom the judge was personally embroiled was not misconduct, where the contempt charged was noncompliance with a direction to pay money, not disrespect to the court.

(6) Judges § 6--Removal--Grounds--Wilful Misconduct.
A justice court judge was guilty of wilful misconduct, where the judge suspected an attorney of a contemptuous act in connection with a client's failure to report to jail as ordered and interrogated the attorney to obtain evidence for a contempt proceeding against him without informing him of the purpose of the interrogation. If the attorney had known the purpose of the interrogation he could have invoked his privilege not to testify. The judge's attempt to take him unawares was an abuse of the judicial process.

(7) Judges § 6--Removal--Grounds--Prejudicial Conduct.
A justice court judge was guilty of prejudicial conduct where, in an action for unlawful detainer of a dwelling in which defendants alleged a breach of implied warranty of habitability, the judge undertook a collateral investigation of the condition of the premises and thereby abdicated his responsibility for deciding the parties' dispute on the pleadings and evidence properly brought before him.

(8) Judges § 6--Removal--Grounds--Wilful Misconduct.
It is not misconduct for a judge to initiate contempt proceedings after hearing a case in which properly presented evidence indicates probable deliberate falsity in a verified pleading.

(9) Judges § 6--Removal--Grounds--Rude and Profane Conduct.
A justice court judge was not guilty of rude and profane conduct in referring to a criminal defendant as a "puke" and a "psychopath," where the words were not uttered from the bench but in one-to-one conversation in chambers and on the telephone with defendant's attorneys. The effect differed little from a description of defendant as a "hoodlum" or an "unsavory character." ***618**

(10) Judges § 6--Removal--Grounds--Wilful Misconduct.
A justice court judge committed wilful misconduct in office by attempting to dissuade two attorneys from representing a criminal defendant on appeal from contempt proceedings before the judge by attacking defendant's criminal background and stating that if the attorneys remained in the case they could never again practice before the judge. A judge must be on his guard neither to infringe on a defendant's right to counsel of his choice nor to compromise the independence of the bar.

(11) Judges § 6--Removal--Grounds--Wilful Misconduct.
A justice court judge was guilty of wilful misconduct, where he attempted to use the contempt power to enforce an order entered by him in a case in which he had been disqualified, and where the judge assigned to hear the matter was present in the courtroom on the date of the hearing but was prevented by the disqualified judge from taking the bench. The judge also committed prejudicial conduct in continuing to preside and to decide contested issues

in which a disqualification motion had been filed.

(12) Judges § 6--Removal--Grounds--Wilful Misconduct.
A justice court judge was guilty of wilful misconduct, where he backdated an affidavit in support of a hearing on contempt charges, where, though the motivation for the backdating was not clear, it was done deliberately and the judge knew or should have known that it would create a false impression that he had signed on the earlier date, and where, whatever the purpose, it was not a faithful discharge of judicial duties.

(13) Judges § 6--Removal--Grounds--Prejudicial Conduct.
A justice court judge's issuance of a no-bail arrest warrant against a person cited for traffic infractions, without the filing of a criminal complaint or initiation of a contempt proceeding, was prejudicial conduct.

(14) Judges § 6--Removal--Grounds--Wilful Misconduct.
A justice court judge did not wilfully abuse his contempt power by issuing an order finding an attorney in contempt for not appearing at an arraignment, where, though the attorney had filed a disqualification motion against the judge under Code Civ. Proc., § 170.6, there was merit to the judge's position that the disqualification did ***619** not cover arraignments and the attorney should contest it by superior court writ proceedings.

(15) Judges § 6--Removal--Grounds--Wilful Misconduct--Abuse of Contempt Power.
A justice court judge was guilty of wilful misconduct in refusing to consider an attorney's request that his client be released on his own recognizance unless the attorney withdrew a disqualification motion filed against the judge, and then charged the attorney with contempt for violating his duty to his client resulting in the client's being denied a hearing and being incarcerated, where the denial of the hearing and subsequent incarceration resulted from the judge's refusal to honor the attorney's request that the matter be heard by another judge who was then present to preside at the hearing.

(16) Judges § 6--Removal--Grounds--Wilful Misconduct--Abuse of Contempt Power.
A justice court judge was guilty of wilful misconduct for abuse of the contempt power by finding an attorney in contempt and sentencing him to jail for inducing a client charged with a traffic violation to request a change of venue on the ground he could not obtain a fair trial, where the genuineness of the client's belief that the judge would not give him a fair trial was consistent with its being based wholly on information received from the attorney about the strained relations between the judge and the attorney, and where the judge knew or should have known that the attorney's advice to his client was proper.

(17) Judges § 6--Removal--Grounds--Wilful Misconduct--Excluding

Attorney From Courtroom.
A justice court judge committed wilful misconduct in excluding a deputy district attorney from his courtroom in order to prevent her from reporting his conduct to the Commission on Judicial Performance. While the judge claimed his principal concern was that she did not consult him before reporting, consultation was not required and its absence did not justify the ban from his court.

(18) Judges § 6--Removal--Grounds--Number of Wrongful Acts.
Removal was the proper discipline for a justice court judge found guilty of nine charges of wilful misconduct and one charge of prejudicial conduct. The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing lack of temperament and ***620** ability to perform judicial functions in an evenhanded manner. The judge, instead of honoring peremptory disqualifications of himself, intruded into matters that had become another judge's responsibility and denounced the disqualification as an affront. When annoyed by a party's conduct, he groundlessly pried into counsel's advice or attempted to dissuade counsel from representing the party. He interfered with law practice by threatening or purporting to exclude attorneys from his courtroom or sentencing the attorney to jail for appropriate advice to the client. He overstepped limits on his power to resolve civil disputes by attempting to punish nonobedience to his informal directions as a contempt and by unilaterally investigating the facts. He also disregarded or violated contempt procedural rules. The aim of proceedings before the Commission on Judicial Performance is not punishment but to protect the judicial system and the public which it serves from judges who are unfit to hold office, and faithfulness to that aim required the judge's removal.

[See Cal.Jur.3d, Judges, § 62; Am.Jur.2d, Judges, § 19.]

COUNSEL

Mull & Mull and Richard M. Skinner for Petitioner.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Charles P. Just and Eddie T. Keller, Deputy Attorneys General, for Respondent.

THE COURT [FN*]

FN* Before Bird, C.J., Tobriner, J., Mosk, J., Richardson, J., Newman, J., Kaufman, J.,<<dagger>> and McDaniel, J.<<dagger>>
<<dagger>> Assigned by the Chairperson of the Judicial Council.

The Commission on Judicial Performance unanimously recommends that Justice Court Judge Jerrold L. Wenger of the El Dorado Judicial District, El Dorado County, be removed for "wilful misconduct in office" (hereafter wilful misconduct) and "conduct prejudicial to the administration of justice that brings the judicial office into ***621** disrepute" (hereafter prejudicial conduct) (Cal. Const., art. VI, § 18, subd. (c)). [FN1] The judge has petitioned this court for review. (Cal. Rules of Court, rule 919(b).)

FN1 Article VI, section 18, subdivision (c) provides in part: "On recommendation of the Commission on Judicial Performance the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

He was elected on March 4, 1975, took office on March 18, and was reelected for a six-year term beginning January 1977. The commission notified him in March 1978 and again in August that it had received and was investigating statements alleging his misconduct. (See rule 904.) In December 1978 he was served with a notice of formal proceedings (rule 905) that stated 24 charges of misconduct arising out of 13 incidents. In 1979 there were four amended notices, alleging five additional charges of misconduct in three incidents. The original notice was framed in two counts. The first alleged that all the charges constituted wilful misconduct; the second, that all constituted prejudicial conduct. The amended notices added a third count of persistent failure or inability to perform judicial duties.

From October 30 to December 4, 1979, 21 days of hearings were held before a master. [FN2] He made findings of fact and conclusions of law from the testimony and exhibits, without receiving closing briefs or hearing oral argument from counsel. Exceptions to his report were filed with the commission which, on February 28, 1980, heard oral argument. [FN3] It then filed here on March 19, 1980, its findings, conclusions, and recommendation of removal. ***622**

FN2 The master was Sacramento Superior Court Judge Rothwell Mason. Rule 907 provided for his appointment: "Upon the filing of an answer or upon expiration of the time for its filing, the Commission shall order a hearing to be held before it concerning the censure, removal, retirement or private admonishment of the judge, or the Commission may request the Supreme Court to appoint three special masters,

or with the consent of the judge involved one special master, in the event that two-thirds of the membership of the Commission vote that this procedure be followed in a specified case, to hear and take evidence in the matter, and to report thereon to the Commission. Special masters shall be judges of courts of record, except that when there are three special masters not more than two of them may be retired judges from courts of record. The Commission shall set a time and place for hearing before itself or before the masters and shall give notice of the hearing by mail to the judge at least 20 days prior to the date set."

FN3 Before the master and commission, evidence and argument to sustain the charges were presented by two deputy attorneys general acting as examiners. (See rule 922(f).) Here the commission is represented by the Attorney General, acting through those deputies. (See Spruance v. Commission on Judicial Qualifications (1975) 13 Cal.3d 778, 785, fn. 5 [119 Cal.Rptr. 841, 523 P.2d 1209] (explaining commission's dual function as (1) adjudicator in reaching conclusions and recommendations, and (2) adversary in defending those determinations as respondent in this court).)

The master's and commission's findings and conclusions are based on count one (wilful misconduct) and count two (prejudicial conduct). Count three (persistent inability or failure to perform) was rejected by the master. The commission explained that the charges in that count "were not reached and are dismissed in view of the Conclusions arrived at in Counts One and Two."

We are concerned only with the charges the commission sustained. ( Spruance v. Commission on Judicial Qualifications, supra, 13 Cal.3d 778, 784, fn. 5.) They are 14 charges of wilful misconduct and 6 of prejudicial conduct, arising out of 11 incidents. Each was pleaded as an instance of one of five kinds of misconduct: (A) petitioner's improper injection of himself into judicial proceedings, resulting in denial or apparent denial of fair hearing, (B) abuse of contempt power, (C) rude and profane conduct, (D) his improper failure to disqualify himself, and (E) obstruction of a public officer's performance of duty.

(1a) This court must independently determine from an examination of the record which, if any, of the charges are supported by clear and convincing evidence. Thence we decide whether to adopt, modify, or reject the recommendation of removal. (Geiler v. Commission on Judicial Qualifications (1973) 10 Cal.3d 270, 276 [110 Cal.Rptr. 201, 515 P.2d 1].) Generally we give weight to the findings and conclusions of both commission and master. ( Spruance, 13 Cal.3d at p. 799, fn. 18.) Here, though, their views vary as to factual details and as to application to the facts of grounds for removal. (2)(See fn. 4.) For example, several acts the commission treated as wilful misconduct were found by the

master to constitute only prejudicial conduct. [FN4] ***623**

> FN4 The distinction between the two grounds is elaborated in Geiler and Spruance: Prejudicial conduct is deemed less grave than wilful misconduct even though it may on occasion justify removal. ( Geiler, 10 Cal.3d at p. 284, fn. 11.) Wilful misconduct requires that the judge in a judicial capacity have acted in bad faith; i.e., that he (1) committed acts he knew or should have known to be beyond his power, (2) for a purpose other than faithful discharge of judicial duties. ( Geiler, 10 Cal.3d at pp. 283-284, 286; Spruance, 13 Cal.3d at pp. 795-796.) Bad faith acts not committed in a judicial capacity amount to no more than prejudicial conduct. ( Geiler, 10 Cal.3d at p. 284, fn. 11.) Prejudicial conduct must be "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Const., art. VI, § 18, subd. (c); italics added.) The italicized words do not require notoriety, but only that the conduct be "damaging to the esteem for the judiciary held by members of the public who observed such conduct." (McCartney v. Commission on Judicial Qualifications (1974) 12 Cal.3d 512, 534 [116 Cal.Rptr. 260, 526 P.2d 268].)

(1b) In light of that variation we give special weight to the master's resolution of fact issues that turn on the credibility of testimony in his presence. (See Geiler, 10 Cal.3d at pp. 275-276.) Yet, even though the commission heard no testimony, its own expertise and unanimity, plus the fact that it and not the master heard posthearing argument, suggest that deference be accorded to its inferences and conclusions.

Petitioner's Background and Working Environment

Many of the charges sustained involve petitioner's failure to follow proper procedure; e.g., abusing the contempt power and failing to disqualify. His background and working environment are relevant to those charges, and he testified as follows:

After graduating from McGeorge Law School in 1969 he was admitted to practice in 1970. Before then he had been a Sacramento County probation officer. After admission and until his election to the justice court in March 1975 he was a deputy district attorney of El Dorado County. In July 1975 he attended the two- week judge's college sponsored by California Judicial Education and Research (CJER). Subsequently he attended most of CJER's twice-yearly seminar sessions.

His court was on a rural road six miles from the courthouse in Placerville. His in-chambers library contained little more than the third series of California Reports and Appellate Reports (beginning in Oct. 1969), annotated California codes, texts on criminal law and evidence, and several procedure manuals. The

Placerville courthouse housed the county law library, two departments of the superior court (Judges Byrne and Fogerty), and the Placerville Justice Court (Judge Hamilton). The Georgetown-Divide Justice Court (Judge Smith) was an estimated 18 to 21 miles away over a "difficult road"; the other justice court was at South Lake Tahoe. As of January 1, 1977, "the jurisdiction of municipal and justice courts is the same and concurrent." (Code Civ. Proc., § 83.)

We turn to the wilful misconduct and prejudicial conduct charges sustained by the commission. They are discussed in connection with the 11 incidents whence they arose, now set forth in chronological order. ***624**

Renfro

In Renfro the commission concluded that petitioner committed wilful misconduct by abusing the contempt power and failing to disqualify himself. The master had concluded that both acts constituted prejudicial conduct; whether he found that the failure to disqualify also constituted wilful misconduct is unclear.

Attorney Stephen Keller represented Renfro on a drunk driving charge (Veh. Code, § 23102, subd. (a)). Trial was set for May 5, 1977. On April 29 Keller filed a motion for peremptory disqualification of petitioner (Code Civ. Proc., § 170.6). [FN5]

> FN5 A motion to disqualify a judge whose assignment is known 10 days before trial date must be filed at least 5 days before that date. (Code Civ. Proc., § 170.6, subd. (2).) "Peremptory" means that the motion results in disqualification "without any further act or proof." (Code Civ. Proc., § 170.6, subd. (3); see Solberg v. Superior Court (1977) 19 Cal.3d 182, 204, fn. 23 [137 Cal.Rptr. 460, 561 P.2d 1148].)

The jury trial then was assigned to Judge Hamilton in petitioner's court. Keller phoned Hamilton and said he had to appear that morning in another county and might be late for the trial. Hamilton said he would call the case and, if Keller were late, would decide what to do. Keller arrived at 10:30, and the case was tried.

While waiting for Keller, Hamilton discussed Keller's tardiness with petitioner, who expressed concern that Keller (1) had disqualified him, and (2) claimed an appearance in another county simply to get a continuance of the trial. Petitioner contends that the disqualification was motivated by his having denied Keller such a continuance. But Keller gave good reason for the disqualification: the undisputed fact that at pretrial conference petitioner expressed skepticism of Renfro's version of alcohol consumption in light of the blood report and indicated "the

standard fine would be imposed in case of a plea, but if he tries this thing and I think he lied, it'll be a whole lot more." That Keller did request a continuance is supported only by petitioner's uncorroborated testimony; it is not reflected in the court docket. However, the master (but not the commission) found that when Keller informed Hamilton of his probable tardiness he "did not disclose that [petitioner] had refused a request for additional continuance."

Petitioner ascertained from the district attorney's office the circumstances of Keller's arrival at and conduct of the trial. Without ***625** consulting Hamilton, petitioner on May 11 sent Keller a "Notice of Order to Show Cause Hearing" that purported to arise from a case in petitioner's court, "People v. Keller" (unnumbered), and announced a hearing on May 25 at 9 a.m. with no indication of the subject matter.

Petitioner concedes he issued that notice simply as a device to bring Keller in to discuss concerns about Renfro, namely Keller's (1) lack of candor about conflicting court appearances in relation to his need for a continuance, (2) failure to disclose petitioner's denial of the continuance request to Judge Hamilton, and (3) tardiness at the trial. The master (but not the commission) accepted petitioner's testimony that he tried to phone Keller before issuing the notice. Keller testified he phoned petitioner in response to the notice; petitioner denied that.

Keller on May 13 filed a motion to disqualify petitioner in People v. Keller (Code Civ. Proc., § 170.6). Petitioner replied by letter of May 17 that the motion "has been denied" and "a review of contempt procedures is suggested" for the noticed May 25 hearing. Keller, through counsel, on May 23 petitioned the superior court for a stay and writ of prohibition against the hearing. Judge Byrne issued a stay on May 23 and an alternative writ on May 25. Petitioner withdrew the order to show cause, and the writ matter was dismissed as moot.

Petitioner clearly abused the contempt process. That Judge Hamilton had power to treat misrepresentation to obtain a continuance or tardiness at trial as a direct contempt (In re Ciraolo (1969) 70 Cal.2d 389, 393 [74 Cal.Rptr. 865, 450 P.2d 241]; Arthur v. Superior Court (1965) 62 Cal.2d 404, 408-409 [42 Cal.Rptr. 441, 398 P.2d 777]; Vaughn v. Municipal Court (1967) 252 Cal.App.2d 348, 358 [60 Cal.Rptr. 575]) did not confer that power on petitioner. Nor is there evidence of any misrepresentation as to Keller's conflicting obligations in another court.

Both master and commission found that petitioner "was of the belief that his administrative responsibility for controlling the calendar of his court justified his intervention despite the assignment of a visiting judge for the trial." That belief did

not justify misuse of the contempt power. (3) We adopt the commission's conclusion that petitioner's "initiation of contempt proceedings against Keller for conduct he speculated to have occurred at the trial presided over by Judge Hamilton, without contacting Judge Hamilton or in any way ascertaining the actual facts, was an abuse of the contempt power and constitutes wilful misconduct in office." ***626**

The commission also concluded that failure to disqualify constituted wilful misconduct in that it was "an act which he should have known was beyond his lawful jurisdiction." He testified he denied Keller's motion to disqualify on May 13 because he "concluded that the 170 and 170.6 did not apply to a direct contempt proceeding." In light of Blodgett v. Superior Court (1930) 210 Cal. 1, 9-15 [290 P. 293, 72 A.L.R. 482], which holds that a judge may not be disqualified under Code of Civil Procedure section 170 from summary contempt proceedings, we dismiss the charge of failure to disqualify.

Rose v. LePeilbet

Lillian Rose sued her neighbor Leroy LePeilbet for cutting branches of her tree that overhung his land. Petitioner awarded judgment for $45, plus costs, on November 7, 1977. On appeal the superior court ordered judgment for defendant.

The commission sustained three counts of wilful misconduct in a contempt proceeding on July 29, 1977, wherein LePeilbet and Braunstein, his attorney, were charged with refusal to pay the $45 in violation of what petitioner perceived as a stipulation in open court. The three counts sustained were (1) petitioner's improper injection of himself into the proceeding, resulting in denial of fair trial, (2) abuse of contempt power, and (3) failure to disqualify himself. The master had sustained only the first count, finding the acts it charged to be both wilful misconduct and prejudicial conduct. He found that the acts charged in the second count were prejudicial conduct and that the third was not proved.

Rose had filed her complaint on April 22, 1977. A judge other than petitioner issued a temporary restraining order against pruning the tree and an order to show cause. Hearing was held on May 20; the evidence of what happened at the hearing is unclear and disputed. Petitioner overruled LePeilbet's jurisdictional objection based on insufficiency of service. It was established that LePeilbet had completed the pruning before being served with the restraining order. The remaining issue was damages. LePeilbet through Braunstein apparently agreed that the case should be handled as a small-claims matter, authorizing the judge to make an independent investigation (Code Civ. Proc., § 117).

Petitioner understood that LePeilbet also agreed to pay whatever damages the court found, and minutes in the docket reflect that

understanding. ***627** ("Both attorneys agreed to let court appoint a disinterested third party to establish the extent of damage done to the tree. Defendant to pay for damage, if any. Both attorneys stipulated that case subject to reopening at future date if necessary.") LePeilbet and Braunstein, however, each denied admitting liability. Their position from the outset was that LePeilbet had a privilege to prune branches overhanging his land.

Petitioner wrote LePeilbet on June 3 that he had "reviewed the oak tree" with the county agricultural commissioner and concluded that LePeilbet's "self help" caused damage amounting to $45. "Proof of corrective measures must be received by this court by July 1 or this matter will be reopened and an adverse judgment will be rendered on behalf of plaintiff .... Once you have met your obligation [for the $45] ... and I have received proof of such, this matter will be concluded once and for all."

Braunstein's reply on June 15 contained these statements and others in similar vein: "I was shocked by your letter .... [T]he matter heard by you was an Order to Show Cause re Preliminary Injunction. It was not a trial of the facts .... Your statement that my client must take corrective measures on or before July 1st or face an adverse judgment without benefit of trial, smacks of Star- Chamber, a process I thought abolished in this country .... [S]ince you have pre-decided the case, I think you must disqualify yourself from hearing any further proceedings in the matter."

On June 20 petitioner gave notice of a hearing on July 1. Braunstein replied on June 28 that he would be outside California on July 1 and had jury trials set for July 11 and 18, and he requested that the hearing be held no earlier than July 20. Petitioner wrote back that "in view of your position" the hearing would not be continued.

Braunstein on June 22 had moved to disqualify petitioner (Code Civ. Proc., § 170.6). Rose's attorney, Appelbaum, filed an opposing memorandum on June 30, arguing that petitioner's overruling of Braunstein's jurisdictional objection at the May 20 hearing was a ruling on a contested issue that made the disqualification motion untimely.

Only Rose and Appelbaum appeared at the July 1 hearing. Petitioner denied the disqualification motion. He expressed anger at Braunstein's June 15 letter ("Star-Chamber"), which he read aloud. He suggested ***628** that Appelbaum file appropriate affidavits if Rose wished to enforce the May 20 stipulation by contempt proceedings.

On July 7 petitioner issued a notice of "Order to Show Cause hearing regarding a contempt of court" to be held July 29. Declarations of Appelbaum and Rose were attached. The notice

cited section 1209.5 of the Code of Civil Procedure but was intended to refer to section 1209, subdivision 5, which provides that disobedience of a court order is contempt. Petitioner regarded LePeilbet's noncompliance with the May 20 stipulation (interpreted as an admission of liability) as contempt under that provision even though no judgment had been entered. His policy in small claims matters was to defer formal judgment, thus relieving voluntarily complying defendants from unnecessary difficulties.

At the July 29 hearing Braunstein denied statements in the Appelbaum and Rose declarations that LePeilbet had agreed at the May 20 hearing to pay damages fixed by the court. Petitioner elicited testimony of the Appelbaum version from his bailiff and clerk, then called LePeilbet to the stand. Braunstein invoked LePeilbet's privilege against self-incrimination. To overcome that objection, petitioner withdrew the contempt charge against LePeilbet. He then asked LePeilbet whether Braunstein had advised him not to comply with petitioner's order (the June 3 letter). Braunstein interposed the attorney-client privilege. Petitioner ordered LePeilbet to answer and denied his request to confer with counsel. Braunstein continued to raise the privilege, and petitioner threatened both with contempt. LePeilbet then testified about Braunstein's advice and other aspects of the case.

Petitioner reprimanded Braunstein for failing to advise his client to pay the damages. The parties then entered into a written stipulation that "the matter is deemed submitted as a motion for summary judgment. Judgment shall not be entered in excess of $45." Though the commission found the stipulation to have been coerced, Braunstein was satisfied with it as a means of obtaining an appealable judgment.

Petitioner testified before the master that he overruled the attorney-client privilege because it "does not apply where advice to violate a law is concerned." He contends here that he relied on Evidence Code section 956 (no privilege if lawyer's services were obtained to aid commission of crime or fraud). The master asked if petitioner saw any distinction between advice to commit a crime and advice on legal tactics to test the sufficiency of a court order in pending litigation. (See In re ***629** Berry (1968) 68 Cal.2d 137, 148-149 [65 Cal.Rptr. 273, 436 P.2d 273].) Petitioner answered that he "didn't feel there was any pending litigation, other than compliance with the agreement."

Appelbaum on October 7 wrote petitioner that, since no payment had been received, entry of judgment was requested. Petitioner scribbled on Appelbaum's letter: "If JB [Braunstein] wishes another encounter with the Court he need only disregard my instructions one more time." On October 21 petitioner wrote counsel that, since "Mr. Braunstein has failed to comprehend" petitioner's "preference for voluntary compliance in lieu of judgment," judgment was being rendered for plaintiff. From that

judgment Braunstein took his successful appeal.

(4) Clear and convincing evidence supports the commission's conclusion that at the July 29 hearing petitioner (1) improperly injected himself into the proceeding, and (2) abused his contempt power. As he now concedes, contempt was not a proper remedy to enforce the supposed stipulation to pay damages. His June 3 letter to LePeilbet stated that the alternative to payment would be entry of a judgment. His policy of deferring entry of small-claims judgments against defendants who would comply voluntarily with an informal decision was inapplicable once Braunstein announced LePeilbet's refusal to comply. The policy then became a purported justification for attempting to deprive LePeilbet of the rights of a judgment debtor. Moreover, petitioner wrongfully assumed a prosecutorial role. ( McCartney v. Commission on Judicial Qualifications, supra, 12 Cal.3d 512, 533.)

Petitioner justifiably was angered by the intemperate language of the June 15 ("Star-Chamber") letter and properly might have taken remedial steps; e.g., by demanding an apology. It appears that instead he sought vindication through misuse of the contempt power. Thus we agree with the commission that petitioner's improper injection of himself into the proceeding and his abuse of the contempt power were wilful misconduct. (See fn. 4, ante.)

We agree with the master that the charge of failure to disqualify was not sustained. There was at least enough merit in Appelbaum's opposition to the June 22 motion to make its denial reasonable. The commission argues that petitioner should have disqualified himself once he had become personally embroiled. (5) Personal embroilment may require disqualification to adjudge contempt for disrespect to the court. (Mayberry v. Pennsylvania (1971) 400 U.S. 455 [27 L.Ed.2d 532, 91 S.Ct. ***630** 499]; In re Buckley (1973) 10 Cal.3d 237, 255-257 [110 Cal.Rptr. 121, 514 P.2d 1201, 68 A.L.R.3d 248].) But the contempt charged here was noncompliance with a direction to pay money, not disrespect; and the refusal to disqualify was not misconduct.

Lee

Petitioner sentenced Lee to spend the weekend of July 22-24, 1977, in jail. A few hours before Lee was supposed to surrender he retained Keller to obtain a stay of execution because of his girl friend's illness. After Keller unsuccessfully attempted to obtain a stay from petitioner and other judges he advised Lee to report to jail.

Lee did not do so and was ordered to appear in petitioner's court the following Wednesday. Keller accompanied him and went into chambers while Lee waited outside. Petitioner questioned Keller about his advice to Lee, particularly whether he had advised Lee not to appear. He questioned Lee on the same subject,

found him in contempt, and sentenced him to five days in jail, to commence immediately. After sentencing, petitioner told Keller that if he thought Keller had played any role in Lee's not reporting for jail he would have held Keller in contempt. [FN6]

> FN6 According to Keller, petitioner said he would have sentenced Keller to jail on the spot. Petitioner testified he told Keller that probably he would have held him in contempt, but had in mind only to initiate contempt proceedings.

While being questioned about his advice to Lee, Keller had no idea that petitioner was considering contempt proceedings. Petitioner made the inquiry because "Mr. Keller had manifest[ed] his inclination in the Renfro matter to manipulate and lie and it was my opinion that he was again manifesting these inclinations." (Letter to commission, Sept. 21, 1978.) Petitioner testified that in Renfro he thought Keller had lied to the superior court when he said in his declaration that he had Judge Hamilton's permission to be late for the trial. Petitioner admitted never having asked Hamilton whether that was true.

The commission concluded that petitioner's actions "manifest a disregard of a suspect's rights in contempt proceedings and constitutes wilful misconduct in office." The master had declined to find misconduct in the "mere threat to consider contempt as against Keller."

(6) The evidence shows more than a "threat to consider" contempt. Petitioner now argues that Keller's advice to Lee was relevant to Lee's ***631** culpability. Nonetheless the inquiry was aimed principally at Keller, not Lee. Petitioner suspected Keller of a contemptuous act and interrogated him to obtain evidence for a contempt proceeding. If Keller had known the purpose of the interrogation he could have invoked his privilege not to testify. (See In re Martin (1977) 71 Cal.App.3d 472, 480 [139 Cal.Rptr. 451].) To attempt to take him unawares was an abuse of the judicial process. We agree with the commission that it constituted wilful misconduct.

Hill v. Martin

On September 30, 1977, Hill sued the Martins in petitioner's court for unlawful detainer of a dwelling. On October 5 the Martins, represented by Appelbaum, filed an answer setting up breach of implied warranty of habitability and enumerating serious defects in the premises. Petitioner reviewed the answer, thought it incredible that anyone would live in a house under the conditions alleged, suspected perjury, and without consulting the parties made inquiries of the county building and health departments.

On October 21 petitioner received a copy of a letter to Hill

from a county building inspector listing repairs required on pain of an order to vacate. Those repairs corresponded to some but not all defects alleged in the answer. Petitioner made notes of a call received from a health department employee on October 24. The employee said the house was "not substandard by any stretch of the imagination" but, except to report "water good" and "septic OK," did not expressly contradict the alleged defects.

At a pretrial conference on October 28 petitioner announced his investigation, declared his suspicion that the Martins' allegations were false, and indicated he might hold a hearing on whether they were in contempt. He said that because of the investigation he would disqualify himself from the trial of the merits. That trial was set for November 18.

Later on October 28 he wrote to the building department, enclosing a copy of the Martin answer and requesting "in order to determine whether or not perjury has been committed that one of your inspectors examine this house using the allegations in the answer as special points to check." He asked for a report by November 18. The county replied on November 3 that the building was vacant and would be posted as ***632** hazardous. Petitioner then abandoned the inquiry and telephoned Appelbaum to apologize. On Hill's motion the case was dismissed. [FN7]

> FN7 Both commission and master found that petitioner was less than forthright in describing this incident in correspondence with the commission. We discern no fraudulent intent in these admitted misstatements in his letter of September 21, 1978: (1) He did not inquire of the county until after the pretrial conference. (The inquiry preceded the conference.) (2) The building department's letters sent to petitioner support the conclusion that Martin attempted deception in the verified answer. (The letters were attached to petitioner's letter as exhibits and spoke for themselves.)

The commission found that petitioner "should have known that it was beyond his lawful authority to conduct an ex parte investigation into allegations of civil pleadings and attempt to transform an ordinary civil case into a contempt proceeding based upon [petitioner's] distorted view that perjury had been committed." It and the master both sustained charges that petitioner committed prejudicial conduct (but not wilful misconduct) by improperly injecting himself into the proceeding and abusing the contempt power.

(7) We agree with the finding that petitioner was guilty of prejudicial conduct. By undertaking a collateral investigation he abdicated his responsibility for deciding the parties' dispute on pleadings and evidence properly brought before him. However, we sustain only the charge of improperly injecting himself into a proceeding and not the charge of abusing the contempt power. (8)

It is not misconduct for a judge to initiate contempt proceedings after hearing a case in which properly presented evidence indicated probably deliberate falsity in a verified pleading. (See People v. Agnew (1947) 77 Cal.App.2d 748 [176 P.2d 724] (perjury in verified pleading).) Petitioner's mistake was abandoning his adjudicative role for an investigatory one.

Aldrich

In Aldrich the commission held that petitioner committed wilful misconduct by attempting to dissuade an inexperienced attorney from representing Robert Aldrich, whom petitioner had jailed for contempt, and that petitioner committed prejudicial conduct in commenting to the press about the superior court ruling setting aside his contempt order and telling the attorney that Aldrich was a "puke" and "psychopath."

On January 11, 1978, petitioner sentenced Aldrich to 24 hours in jail for contempt based on courtroom conduct. John Olson, who petitioner ***633** knew was a newly admitted attorney, was retained to represent Aldrich. He petitioned the superior court for habeas corpus and obtained an order to show cause that he served on petitioner in chambers on January 12. No one else was present. Petitioner told Olson that Aldrich was a "puke" and a "psychopath" and that there was no defense to the contempt order. He also said Olson should not be representing Aldrich and urged Olson to talk with experienced local attorneys who assertedly would advise him against getting involved in the case. Olson said he would consider the suggestions.

On January 18, preparing for the habeas hearing, Olson visited petitioner's court to examine the docket. They discussed the case for half an hour. Petitioner again tried to dissuade Olson from representing "that puke" (Aldrich) and had his clerk tell Olson of the events that led to the contempt order. Olson replied that the clerk's version was consistent with his own information but that he thought it was not a proper contempt case. Petitioner attacked Aldrich's "criminal background" and said that if Olson remained in the case he could never again practice before petitioner and probably not in western El Dorado County. He added that Olson's office associates also might have difficulties in practicing in his court. Olson asked what would happen if he did withdraw; petitioner replied that there would then be no problem.

Olson left the conversation confused and upset. He consulted his associates; they advised him not to withdraw. One of them, Mark Nielsen, who had known petitioner since 1971, phoned him that evening, hoping he would reconsider. To Nielsen's dismay, petitioner reiterated what he had told Olson who, petitioner added, had been duped by the scheme of Aldrich (the "puke") to embarrass petitioner's court. Though Olson did not withdraw from the case, neither he nor his colleagues experienced adverse consequences in later appearances before petitioner.

As a deputy district attorney petitioner had assisted in successfully prosecuting Aldrich for armed robbery and arson. According to the testimony of Judge Smith, Aldrich had a community reputation as a hoodlum and describing him as a "puke" was not unfair.

Between petitioner's two conversations with Olson, Aldrich harassed petitioner. He repeatedly drove past petitioner's home. When petitioner and his wife and bailiff went to lunch in a crowded restaurant, Aldrich and a friend continually hovered by petitioner's table, causing petitioner's party to leave. Petitioner obtained a shotgun and installed lights ***634** outside his house. A psychiatrist who examined petitioner on November 10 and 18, 1979, testified on November 20 that Aldrich's activities created a "stress reaction" that caused petitioner's outbursts to Olson and Neilsen on January 18, 1978.

At the habeas proceeding on January 20 petitioner appeared in propria persona. After hearing evidence Judge Fogerty explained from the bench his reasons for granting the writ. He began by describing the extreme caution with which the summary contempt power should be exercised. He opined that Aldrich had been jailed simply for accepting a bailiff's invitation to express an opinion. [FN8] He concluded:

> FN8 The opinion was stated as follows: "I don't understand how in the world a bailiff can involve himself in court proceedings and create a situation where an individual is asked to express an opinion, which, if the evidence is true, and it is not contradicted, that the judge called the preceding litigant an ass, and when asked to express an opinion, the individual does so and then finds himself in jail. [¶] Had he approached the judge and called him an ass without provocation, or had he approached the judge in some fashion and engaged in insulting conduct, that would be one thing."

"There have been serious efforts made in California to improve the qualities of the lower courts, and people with professional training are put in those positions and they are supposed to use that professional position to exercise restraint that permits an efficient administration of justice. [¶] It is not a chamber of terror, or it is not a place people should be frightened to go; and when they are asked for an opinion, they should be able to express it. What might be loud and belligerent language to someone might simply be a heated expression of an opinion of another. All of those who have been in the cauldron of the courtroom know that the expression of opinion sometimes is loud and emphatic language. [¶] It is wrong to put people in jail whether it is by the process of contempt or any other ex parte proceeding, except in extraordinary circumstances."

Finally, petitioner's request to reply in open court to Judge Fogerty's statement from the bench was denied. Immediately after the hearing, petitioner was interviewed by a reporter. A local newspaper published the Fogerty statement, followed by this concededly accurate account of what petitioner said:

"'It is unfortunate that the judge has taken the position he has,' said Wenger. [']Superior court judges sit in an insulated environment buffered from direct public contact by the attorneys who represent them. ***635** We in the justice courts are not as fortunate, since we maintain a toe-to-toe contact with the public and are therefore exposed to a much greater dilemma than upper levels. [¶] In the instance of my court, removed from the center of activity, completely unprotected, without media contact, without means of relief should a dangerous situation arise it is incumbent that the judge have the ability to control the conduct of those who may appear before him. [¶] 'The instant case is very typical of many that confront justice court judges each day,' Wenger continued. 'Many persons from distant metropolitan areas are required to appear for assorted violations, and many of them manifest a contemptuous and disrespectful attitude to not only law enforcement but likewise the courts where they must appear. To divest justice court judges of the dignity and ability to control this potentially explosive environment is to strip away the underlying foundations originally built into these courts. [¶] It's unfortunate for the law-abiding populace that are required to share the same quarters with dissidents and those who would wilfully disrupt the court proceedings. [¶] It is tragic that the courts which are designed and intended for the man on the street must be turned into an arena for those dissidents who have no respect for the law or consideration for others. [¶] This decision undoubtedly undermines the entire judicial structure on the lower levels, the people's courts." A result of the news story was a rift between Judge Fogerty and petitioner that ended their informal communications on professional matters.

(9) Of the three Aldrich charges sustained by the commission we begin with those found to be only prejudicial conduct. The tasteless use of "puke" and "psychopath" to describe Aldrich to Olson and Nielsen does not warrant discipline for "rude and profane conduct." The words were not uttered from the bench but in one-to-one conversation in chambers or on the telephone. The effect differed little from a describing of Aldrich as a "hoodlum" or an "unsavory character."

As for petitioner's statement to the press, he correctly points out that his making it did not violate the command of canon 3(A)(6) of the Code of Judicial Conduct to "abstain from public comment about a pending or impending proceeding in any court." The contempt litigation had been concluded.

The canon states that it "does not prohibit judges from making public statements in the course of their official duties or from

explaining for public information the procedures of the court." An ethics opinion that ***636** petitioner introduced states that "nothing in the Code of Judicial Conduct prevents a judge from making a dignified response to public criticism except as related to a case pending or about to be brought before the court." (Conference of Cal. Judges, Com. on Judicial Ethics, Opn. No. 24, Mar. 27, 1976.)

Was petitioner's statement to the press, however, more than "a dignified response to public criticism?" He did not merely recount a justice court's need of power to control unruly conduct while defending his contempt order as a proper exercise of that power. He declared: "To divest justice court judges of the dignity and ability to control this potentially explosive environment is to strip away the underlying foundations originally built into these courts .... This decision undoubtedly undermines the entire judicial structure on the lower levels, the people's courts."

Those words did misrepresent Judge Fogerty's ruling, which was narrowly based on a finding that the bailiff had invited Aldrich's conduct. (See fn. 8, ante.) But was petitioner's statement "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, subd. (c))? In the circumstances, we think not (Cf. United States v. Morgan (1941) 313 U.S. 409, 421 [85 L.Ed. 1429, 1435, 61 S.Ct. 999], re "a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press") and dismiss the charge.

(10) There remains the commission's determination of wilful misconduct in attempting to dissuade Olson from representing Aldrich. It is elementary that a judge "must be on his guard neither to infringe upon the defendant's right to counsel of his choice, nor to compromise the independence of the bar." (Smith v. Superior Court (1968) 68 Cal.2d 547, 559 [68 Cal.Rptr. 1, 440 P.2d 65] (trial court held without power to remove counsel as incompetent).) "Smith makes it abundantly clear that the involuntary removal of any attorney is a severe limitation on a defendant's right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed." (Cannon v. Commission on Judicial Qualifications (1975) 14 Cal.3d 678, 697 [122 Cal.Rptr. 778, 537 P.2d 898].) Petitioner does not claim to have questioned Olson's competence. ***637**

Petitioner's "stress reaction" from Aldrich's harassment does not excuse his conduct. (Cf. In re Fahey (1973) 8 Cal.3d 842, 850, fn. 4 [106 Cal.Rptr. 313, 505 P.2d 1369, 63 A.L.R.3d 465] (attorney misconduct).) He does not contend that his January 12 talk with Olson reflected the stress reaction. He argues that his attempts in that conversation to convince Olson that Aldrich's

case was meritless and that Olson should not handle it were not improper because petitioner then was simply "a party to the [superior court] lawsuit, not a judge who was to decide anything further." The argument is specious; his position was that of judge attempting to discourage the exercise of rights to obtain review of his contempt order. His statements to Olson and Nielsen on January 12 and 18, 1978, constituted wilful misconduct in office.

Kelly

In Kelly the commission concluded that petitioner committed wilful misconduct by failing to disqualify himself but dismissed charges of abusing the contempt power as "not sustained." Petitioner contends that the misconduct found was different from that charged in the notice of formal proceedings, which alleged: "In People v. Kelly, Docket No. 79645, attorney Roger Cline, on or about April 20, 1978, filed a motion disqualifying you under Code of Civil Procedure section 170.6. On or about April 21, 1978, you notified Mr. Cline that the motion for disqualification was denied as to arraignment; arraignment then proceeded as scheduled. [¶] On May 10, 1978, Cline and the defendant appeared for the pretrial conference. In chambers, you indicated to Cline that you had forgotten about the disqualification, and following some discussion, you told Cline he was disrespectful and unprofessional. Cline then briefly left chambers to confer with his client. Cline returned to your chambers and further discussion ensued. [¶] On or about May 11, 1978, Case No. 79645, you notified Cline to appear on May 15, 1978, for summary contempt proceedings. [¶] On May 15, 1978, purporting to act pursuant to Penal Code section 166, and over objection by Cline's attorney, you found Cline in contempt of court, imposed a $300 fine, and, unless Cline apologized, you banned him from all future appearances in your court except trials. When Cline indicated an unwillingness to pay the fine, you sentenced him to jail until the fine was paid; upon request, execution was stayed. A written order was filed on May 16, 1978, and assigned case No. 7681."

Petitioner's answer admitted the first three paragraphs of those allegations. As to the fourth, it was admitted that he found Cline in ***638** "summary contempt," fined him $300 and, on his refusal to pay, sentenced him to jail until the fine was paid. Also admitted were the stay and written order.

The commission concluded: "[Petitioner] sought to read implied withdrawal of disqualifications in the actions of attorneys obeying his specific orders, and he attempted to find an abuse of the disqualification process by questioning the good faith of the affiant. These were acts which he should have known were beyond his lawful power. They accordingly constituted wilful misconduct in office."

The conclusion was based on this evidence: Notifying Cline on April 21 that the disqualification motion was denied as to arraignment, petitioner wrote: "Inasmuch as an arraignment does not involve a contested issue of law or fact, it will be necessary for Mr. Kelly to appear in person, or by counsel at the arraignment [on April 25]." Cline's associate, Brunello, represented Kelly at the arraignment. At the May 15 contempt hearing against Cline petitioner said: "Mr. Brunello made no objection to the [pretrial] date setting, knowing that I would be the presiding judge, nor did he indicate that Mr. Cline would take over the case and would wish to pursue this disqualification as previously referred to. In other words, there was no reference whatsoever to lead me to believe that I would not be acceptable to sit on this case at future hearings."

Later in the hearing he declared, "[T]his is an example of an abuse of the disqualification process permitted under section 170.6 ... Mr. Cline is alleging that I might be prejudiced against the interests of his client, the defendant, and believes that the defendant cannot receive a fair trial. I do not know Mr. Kelly."

When Cline's attorney, Olson, pointed out that the ground for disqualification was that "defendant would be denied a fair hearing because of prejudice against the attorney, "petitioner replied, "I have no prejudice."

In Cannon v. Commission on Judicial Qualifications, supra, 14 Cal.3d 678, 696, this court refused to adopt the commission's conclusion of wilful misconduct consisting of "unwarranted interference in the operation of the Public Defenders' Office" because the judge had been "charged only with an unlawful interference with the attorney-client relationship." Similarly here, the conclusion of misconduct based on ***639** questionable statements about the effect of the disqualification motion was beyond the scope of the notice of formal proceedings. Accordingly the charge is dismissed.

Ellis

In Ellis the commission concluded that petitioner committed (1) wilful misconduct in abusing the contempt power by invoking it to enforce an order he made after being disqualified (Code Civ. Proc., § 170.6), and (2) prejudicial conduct in deciding contested issues after the disqualification. The master concluded that failure to disqualify was wilful misconduct but that petitioner's only abuse of the contempt power was negligent failure to follow correct procedures, amounting to prejudicial conduct.

Ellis, represented by Keller, was arraigned on burglary charges before petitioner on October 6, 1978. He pleaded not guilty, and preliminary hearing was set for October 16. Immediately after

arraignment Keller, against whom petitioner had sought to exercise the contempt power in Renfro and Lee, filed a section 170.6 motion to disqualify petitioner. Petitioner instructed his clerk to arrange for Judge Smith to sit at the preliminary hearing. The Ellis charges relate to the scheduling of that hearing. [FN9]

> FN9 Keller complained to the commission on May 3, 1978, about petitioner's conduct in Renfro and Lee. Petitioner contends that animosity against him made Keller deliberately disruptive, and he continually interprets Keller's conduct in that light. For example, he argues that Keller deliberately refrained from informing him of the planned disqualification motion during the arraignment, when petitioner could have taken it into account in scheduling the preliminary hearing.

Judge Smith returned from vacation on October 16. Petitioner's clerk called him at 9 a.m.; he said he could conduct the hearing on either October 19 (a.m.) or October 20 (p.m.). They agreed on October 19. The clerk called Keller's office; his secretary said that on October 19 he had an all day engagement in the San Francisco area. The clerk said Keller should appear in court at 11 a.m. that day (Oct. 16) and take the matter up with petitioner.

At Keller's direction his secretary then called Judge Smith and asked if the hearing could be held on a day other than October 19. Smith said October 20 was better for him anyway and asked the secretary to call petitioner's court and set the hearing for October 20. About 9:30 the ***640** secretary told petitioner's clerk that Keller's office had been in touch with Judge Smith and that he had set the hearing for October 20. The clerk again replied that Keller should take up the matter in court that morning (October 16).

At 11:15 Keller was in court, and petitioner opened the proceeding by scolding Keller for not giving notice of the section 170.6 disqualification at the time of arraignment. He then stated he understood Judge Smith would be available at 9 a.m. on the 19th. Keller said his office had been in touch with Smith who, Keller understood, "would be available at 1:30 on Friday" (the 20th). Petitioner replied that Keller's office "is in touch with far too many judges" such as Hamilton (an apparent reference to Renfro) and now Smith, "who has no standing in this case until such time that he is arranged for and confirmed by this court." He charged Keller with "twist[ing] the procedures" and asked if Keller was "prepared at this time to file a formal time waiver so that the matter may go over to the 19th for Judge Smith." Keller said he had not prepared a written waiver but would file one; petitioner demanded it before noon.

He then launched into a long lecture, excoriating Keller for

disrespect, manipulation, and dishonesty, and for filing a disqualification while knowing that "it is extremely difficult to find a substitute judge." He refused Keller's request to respond, [FN10] finally told him to leave, and ordered Ellis back at 9 a.m. on the 19th for a preliminary hearing at which Judge Smith would preside.

> FN10 Petitioner said: "I have heard all I want to hear. I know you disagree with me, and you can run back to the Council on Judicial Performance again. I think you have already been exposed to Council by a full realization of how you conduct yourself as a so-called attorney."

Petitioner contends his setting the hearing for October 19 was justified by Keller's failure to disclose his calendar conflict. The commission found that Keller had no opportunity to do so, and the finding is supported by testimony of the deputy district attorney and the transcript. The master did not decide the point. In any event, petitioner's clerk acknowledged being informed of the conflict more than an hour before the hearing.

On the 17th Smith had conversations with both Keller and petitioner that left him with the impression that the hearing would be held on the 20th. On the 18th petitioner informed Smith that, because of the number ***641** of witnesses subpoenaed and the inconvenience to all parties, he would prefer that the hearing be held the next morning. Later, Keller called Smith to say he still could not make it on the 19th. Smith told Keller to send Ellis to court so that Smith could take a waiver of time for the purpose of continuing the case.

On the 19th Smith was in petitioner's chambers, prepared to don his robe, call the case, take a waiver of counsel and of right to speedy preliminary hearing, and continue the case. He was "a little dumbfounded" when petitioner took the bench instead. The transcript shows that petitioner interrogated his clerk, Ellis, Judge Smith, and the district attorney at length about the scheduling of the hearing and particularly any communications with Keller about his absence. Petitioner then turned to the purportedly unlimited waiver of time for preliminary hearing that Ellis, through Keller, had filed on the 16th. Petitioner construed that waiver as effective only until the 19th and ordered a hearing on the 23d to "establish whether the time waiver will be forthcoming or whether we'll have to dismiss the complaint and refile and proceed with the arraignment again." He told Judge Smith he need not be present on the 23d.

Fearful of being jailed if he appeared before petitioner, Keller presented a petition to Superior Court Judge Byrne, who declined to issue a writ but telephoned petitioner.

On October 23, in place of Keller, Stambaugh appeared before petitioner as counsel for Ellis. Petitioner asked him if he were

prepared to file a waiver. Stambaugh said his and Keller's position was that the previously filed waiver was sufficient and, since the court disagreed, asked for a hearing on that issue before another judge, petitioner having been disqualified. Petitioner suggested that since the basis of disqualification was his prejudice against Keller, not Ellis, "we can now proceed to determine the question of fact." Stambaugh replied that in associating with Keller he joined all Keller's prior positions. Petitioner then ordered that the complaint be dismissed and that, on Ellis' rearrest on a new complaint, he be released on his own recognizance. Concededly the basis of that order was a ruling that the previously filed waiver was invalid. The hearing was markedly prolonged by petitioner's tirades against Keller and his "senseless manipulation."

Keller wrote petitioner on October 24 that he was "shocked and surprised" by the dismissal, which he considered void in view of petitioner's disqualification. ***642**

On November 6 petitioner sent Keller an order to show cause re contempt, to be heard November 13. Attached was petitioner's affidavit grounding the contempt charge on Keller's failure to appear on October 19. Petitioner declared: "That at no time during the proceedings on October 16th, or during the interim period of time between October 16th and October 19th, did Attorney Keller protest the date set for the preliminary hearing." Yet the October 19 transcript reports Judge Smith as stating that between the 16th and the 19th he had had two or three contacts with Keller, who said he could not attend on the 19th because of a calendar conflict and whom Smith then instructed to have Ellis appear on the 19th anyway, so that Smith could "get a time waiver."

Judge Fogerty issued an alternative writ of prohibition against the contempt hearing. [FN11] The writ proceeding was terminated by a settlement providing for (1) dismissal of contempt charges against Keller and (in Anderson) Cline, and (2) procedures enabling Keller and Cline to obtain on request a transfer of any matter in which they were attorneys from petitioner's courtroom to that of Judge Hamilton in Placerville.

> FN11 Petitioner effected a section 170.6 disqualification of Judge Fogerty.

Testifying before the master, petitioner said his reason for citing Keller for contempt was disobedience of petitioner's "order not to engage in calendaring with a judge that had no involvement with the court." Failure to appear on October 19 (the only ground given in the contempt affidavit) was just "the end result." Asked when he made such an order, petitioner pointed only to his statement at the October 16 proceeding that Keller's office "is in touch with far too many judges who have no particular standing in this case" such as Judges Hamilton and

Smith.

The commission founded its conclusion of wilful misconduct for abuse of the contempt power on two grounds: (1) error "in ordering the matter heard by himself almost a month after the event," and (2) error "in an attempt to use the contempt power to enforce an order entered by him in a case where he had been disqualified and the judge assigned to hear the matter was present in the courtroom on the date of the hearing but was prevented by [petitioner] from taking the bench."

The first ground is insufficient. Petitioner does appear to have been "personally embroiled" enough to have been required to recuse himself. (Mayberry v. Pennsylvania, supra, 400 U.S. 455, 465 [27 L.Ed.2d 532, 540]; In re Martin (1977) 71 Cal.App.3d 472, 480 [139 Cal.Rptr. ***643** 451].) Yet, there is no clear and convincing evidence that he intended to hear the contempt matter himself rather than calling in another judge.

(11) The second ground of wilful abuse must be sustained. Keller's reason for absence on October 19 had been fully explained to Judge Smith. It was proper for Keller to deal directly with Smith in making scheduling arrangements, which both understood to be subject to the availability of petitioner's courtroom and to the convenience of other counsel, parties, and witnesses. The contempt charge appears to have been made because of petitioner's animosity toward Keller rather than his good faith perception of any contemptuous conduct. Making it was wilful misconduct.

The commission found prejudicial conduct in petitioner's "action in continuing to preside and to decide contested issues in a case where a 170.6 disqualification had been filed." Petitioner must have known and now admits that he had no power to decide the validity of Ellis's time waiver. The charge is sustained.

Stern

In Stern the commission found wilful misconduct in petitioner's alteration of the date of an "Affidavit in Support of Hearing on Contempt" and prejudicial conduct in issuance of a no-bail arrest warrant unsupported by either a criminal complaint or a contempt affidavit. The master sustained both charges only as prejudicial conduct.

On October 25, 1978, Gary Stern appeared in petitioner's court on traffic infractions. He made remarks that petitioner deemed offensive. Petitioner partially dealt with Stern's case and then, according to petitioner, instructed Stern to remain until the end of the calendar. Stern testified he felt free to leave. During a recess Stern departed, taking with him the court docket on his case.

Petitioner immediately issued an arrest warrant, servable at night, citing the traffic offenses and also misdemeanors under Penal Code sections 166 (contempt) and 488 (theft). The warrant specified "no bail" and was on a form that stated, "A verified complaint was made before me on this day that the offense set forth above was committed." Apart from the traffic infractions, no complaint had been filed. ***644**

On October 26 Stern consulted Keller. Next day petitioner received in the mail from Stern the stolen docket, a letter making a "formal apology ... as ordered by you," and a check for $10, the original bail set on the citation. On November 3d Stern was arrested on the warrant; Keller filed for habeas corpus in superior court; and Stern was released on his own recognizance. Petitioner was served with that petition no later than November 6.

On November 7 the clerk typed, and petitioner signed, an "Affidavit in Support of Hearing on Contempt" in Stern, reciting that Stern had appeared on petitioner's traffic arraignment calendar on October 25, made disruptive remarks, stolen the docket, and departed contrary to court order. Also recited was receipt on October 27 of Stern's letter and check and the stolen docket.

The clerk first typed on the affidavit the current date, November 7. On petitioner's direction, she whited that out and inserted October 27. Petitioner's only explanation of the change is that October 27 was when he started the rough draft.

The commission described the date change as "alteration" of a document. Yet editing the draft was not alteration since the document was then unsigned and thus incomplete. The change is better described as "backdating."

The commission argues that petitioner changed the date to bolster his position in the habeas proceeding. Keller's clerk had examined the Stern file in petitioner's court on November 1 and ascertained the absence of any affidavit concerning contempt. At the habeas hearing on December 4 petitioner unhesitatingly admitted, under Keller's cross-examination, that the affidavit was typed November 7 and changed to the date of the rough draft.

Petitioner argues that backdating to October 27 would not cure the absence of documentary support for the October 25 arrest warrant. But the affidavit's reference to events of October 27 would have been inconsistent with any earlier backdating.

(12) We agree with the master that petitioner's motivation for backdating the affidavit is not clear. It was, though, done deliberately; and petitioner knew or should have known that it would create a false impression that he had signed on the earlier date. We infer that whatever ***645** petitioner's purpose it was

not the faithful discharge of judicial duties. Backdating the affidavit was wilful misconduct.

(13) We agree with the commission that issuance of the no-bail arrest warrant without the filing of a criminal complaint or initiation of a contempt proceeding (Code Civ. Proc., §§ 1211, 1211.5) was prejudicial conduct. Though conceding error, petitioner urges that he believed in good faith that he was acting within his summary contempt power. That consideration may have led the commission to refrain from finding wilful misconduct; it does not preclude our finding prejudicial conduct. (See fn. 4, ante.)

Anderson

In Anderson the commission concluded that petitioner "did wilfully abuse his contempt power." The nature of the abuse is implicit in findings on petitioner's (1) order of December 4, 1978, reciting five grounds of contempt by Attorney Cline, and (2) intent to preside at the contempt hearing despite admitted prejudice against Cline. Charges of failure to disqualify were dismissed. The master concluded that petitioner (1) wilfully abused the contempt power as to one of the grounds stated in his order, and (2) wilfully failed to disqualify himself.

A bench warrant was issued against Anderson for failing to appear in petitioner's court for arraignment on a charge of possessing a controlled substance. Cline, as Anderson's counsel, called petitioner on November 7, 1978, to ask for release of Anderson on his own recognizance (OR). Petitioner said he would consider OR release only after talking with Anderson in court. Cline consulted Attorney Keller and decided to disqualify petitioner (Code Civ. Proc., § 170.6). He then called Judge Smith, who said he was sitting in petitioner's court that afternoon and would meet Cline and Anderson there at 3 to consider OR or bail reduction.

At 3 p.m. Cline arrived at petitioner's court, filed the disqualification, and waited outside until Anderson arrived at 3:30. He took Anderson inside and met petitioner, Smith, and two attorneys emerging from chambers. Cline explained he was there to make an OR motion for Anderson. Petitioner said he could not consider it unless the disqualification were withdrawn. Cline suggested Judge Smith handle the matter. Petitioner asserted his authority in that courthouse, saying that Smith ***646** was not to hear anything and was just leaving. Smith departed; neither he nor Cline informed petitioner of their arrangement.

Cline asked petitioner to consider the OR request. Petitioner said he would do so only if Cline withdrew the disqualification. Referring to Kelly, petitioner said Cline was not welcome in petitioner's court until he offered an apology. Cline became impatient and aggressive; the confrontation was heated. Finally,

petitioner remanded Anderson into custody. Cline departed and obtained an OR order from Judge Fogerty that afternoon. [FN12]

> FN12 Petitioner testified that, if he had been informed of the Cline-Smith arrangement, he would have let Smith hear the matter. Smith testified that he had no "chance to work it into the conversation." Further, that petitioner said, "Judge Smith is leaving, aren't you, Judge Smith, and I, rather than raise a stink, I said sure, I'm leaving, and left."
> Cline had good reason for not disclosing the arrangement himself. He had just talked with Keller and inferably knew that only three weeks earlier, in Ellis, petitioner had berated Keller in open court for communicating directly with Smith on the scheduling of a hearing in petitioner's court for which petitioner had been disqualified. The master, however, found that "Cline's tactics that day, including secreting from [petitioner] the arrangements he had made with Judge Smith, manifested his intention to escalate the tenseness of the situation." Cline had complained about petitioner by letter to the commission on April 14, 1978.

On November 15 petitioner set Anderson's arraignment for November 28. Cline wrote petitioner's clerk on November 21, inquiring when the matter would be assigned to another judge and saying that, because petitioner had banned him from the court, he would not appear until such reassignment. On the 28th petitioner had his clerk advise Cline's office that one of Cline's associates (but not Cline) must appear with Anderson that morning for arraignment. No one appeared. Later that morning Cline called Sprunger, the county counsel, and suggested that the arraignment be put over so that Cline could talk with his client and a substitute attorney. Sprunger called petitioner, who reset the arraignment for the 30th.

Still later on the 28th, Cline called both Sprunger and petitioner and stated he would not appear for the arraignment until another judge was assigned. Petitioner made no attempt to obtain another judge. His position, stated to Cline then and earlier (see Kelly), was that he was authorized to hear an arraignment despite disqualification under section 170.6. [FN13]
***647**

> FN13 Petitioner reasonably points out that the orderly way to test his position would have been to apply to the superior court for a writ ordering him to refrain from hearing the arraignment. He contended that an arraignment hearing remained within his power because section 170.6 disqualifies a judge only from trying a case or hearing "any matter therein which involves a contested issue of law or fact." That view had at least enough merit to prevent the holding of it from constituting misconduct. (See Mezzetti v. Superior Court (1979) 94 Cal.App.3d 987 [156 Cal.Rptr. 802]

(disqualified judge held authorized to hold settlement conference); Fraijo v. Superior Court (1973) 34 Cal.App.3d 222 [109 Cal.Rptr. 909] (plea bargain). But see In re Byron B. (1979) 98 Cal.App.3d 300 [159 Cal.Rptr. 430] (acceptance of juvenile's admission of guilt); Lyons v. Superior Court (1977) 73 Cal.App.3d 625, 627 [140 Cal.Rptr. 826] (plea bargain).)

On December 1, petitioner served Cline with an "Order Adjudging Direct Contempt of Court" that stated five grounds of contempt based on attached affidavits and set a hearing for December 11. On December 8, Cline petitioned the superior court for mandate. On advice of the county counsel petitioner's order of December 1 was set aside on December 18 and replaced the same day by a similar order issued by a judge assigned from another county. The mandate and contempt proceedings both were dismissed on January 18, 1979, under the settlement that also concluded Ellis.

We see no misconduct in petitioner's including the first, third, fourth, and fifth grounds in his contempt order. The first was that during the November 7 confrontation Cline "address[ed] the court in a disorderly, insolent, hostile and disrespectful manner." Bystanders' testimony provides enough support for that ground to establish that its truth was a proper question of fact. (14) The third, fourth, and fifth grounds were based on Cline's nonappearances at the scheduled November 28 and 30 arraignment hearings. There is no contention that those grounds would have been improper in the absence of Cline's disqualification of petitioner under section 170.6, and the commission dismissed the Anderson charges of petitioner's failure to disqualify as "not sustained." Petitioner's position that (1) the disqualification did not cover arraignments, and (2) Cline should contest it by superior court writ proceeding was not so meritless as to amount to misconduct. (See fn. 13, ante.)

(15) The second-stated ground of contempt was that Cline violated his duty to his client and that as a result the client was denied a hearing and incarcerated. Petitioner's supporting affidavit indicated that the alleged violation occurred during the confrontation of November 7. Yet the affidavit omitted Judge Smith from its enumeration of persons present. It is undisputed that Smith was then authorized to hear cases in petitioner's court. [FN14] Petitioner's refusal to consider the OR request unless ***648** Cline withdrew the disqualification impliedly asserted the disqualification's validity. The denial of an OR hearing and subsequent incarceration resulted from petitioner's refusal to honor Cline's request that the matter be heard by Smith, not from Cline's refusal to withdraw the disqualification. To charge Cline with contempt for a consequence for which petitioner himself was responsible constituted wilful misconduct.

FN14 It was stipulated that an order of the Chairperson of the Judicial Council then in effect provided that a judge of

any justice court was authorized to sit in any other justice court "under an exchange assignment as defined by Rule 790, California Rules of Court" without prior approval of the Administrative Office of the Courts. In petitioner's deposition of January 11, 1979, taken in the Cline contempt matter, he testified that "Judge Smith is more or less obligated through his agreement with the Board of Supervisors to cover vacancies in the three other judicial districts, that being mine, the Placerville, and Lake Valley."

Petitioner concedes that, though prejudiced against Cline, he intended to preside at the hearing ordered for December 11, erroneously believing that contempt law permitted him to do so. The order seems to have conveyed that intent. [FN15] Its issuance therefore was prejudicial conduct, somewhat mitigated by petitioner's correcting the error when finally another judge was substituted on December 18.

FN15 After declaring the five grounds petitioner's order continued, "for which conduct I did then and there, and do now, adjudge said Roger F. Cline guilty of contempt of court, and I hereby order that said Roger F. Cline appear before this court on December 11, 1978 at 2:00 o'clock P.M. to show cause why he should not be punished for contempt as hereinabove stated."

Brooks

The commission concluded that in Brooks petitioner committed wilful misconduct by abusing the contempt power and failing to disqualify himself. The master found prejudicial conduct in abusing the contempt power, no more.

On October 27, 1978, Brooks was charged with two misdemeanors and an infraction under the Vehicle Code. Section 40517 provides that a person required to appear on such charges "before a justice court judge who is not at the county seat ... may demand a transfer of the case to a ... judge ... having jurisdiction of the offense at the county seat upon filing with such justice court judge an affidavit that he believes that a fair trial without excessive penalties cannot be had before such justice court judge. ... [¶] Thereupon the justice court judge with whom the affidavit is filed shall be without jurisdiction to proceed with the case and shall immediately transfer the case ...." ***649**

On advice of Attorney Keller and pursuant to statute Brooks executed a declaration under penalty of perjury that included the statement, "I believe that I cannot obtain a fair trial without excessive penalties in the above entitled court." In recommending that declaration Keller (then involved in Ellis and Stern) explained he was having personality conflicts with petitioner.

The declaration and accompanying motion were filed at Brooks' arraignment on November 14. Under questioning by petitioner, Brooks stated he had never met and did not know petitioner and had executed the declaration on his attorney's advice. Petitioner ordered a November 21 hearing on the motion, for which he requested points and authorities on the statute's applicability.

At that hearing petitioner accused Keller of filing a false declaration ("impugning and maligning the integrity of this court and myself as judge") by inducing Brooks to swear he could not obtain a fair trial without excessive penalties. Petitioner charged that Keller thereby committed a direct contempt of court and invited an explanation. Keller objected that (1) he had received no notice of the contempt charge, and (2) the charge should be heard before another judge. He readily conceded that Brooks' declared belief of inability to obtain a fair trial before petitioner had been formed because Keller "persuaded him to believe it."

After berating Keller, petitioner declared him in contempt and sentenced him to five days in jail beginning on November 24 (the 23d being Thanksgiving). Finally he asked, "Do you have anything further, Mr. Keller?" Keller said, "Yes, what is your ruling on the motion for change of venue?" Petitioner replied, "Oh, I have no objection to that; in fact, I welcome it."

Keller through Attorney Cline filed for a writ of certiorari with the superior court which, on November 22, stayed Keller's sentence. At the December 6 hearing on the writ petitioner appeared through County Counsel Sprunger. At the end of the hearing Judge Fogerty "without hesitation" granted the writ from the bench and said he was "appalled by these proceedings."

(16) Petitioner did abuse the contempt power. The genuineness of Brooks' belief that petitioner would not give him a fair trial was consistent with its being based wholly on information about strained relations ***650** between petitioner and Keller. Petitioner knew or should have known that Keller's advice to Brooks was proper. The contempt order and jail sentence appear motivated by personal animosity; rendering them was wilful misconduct.

The charge of failure to disqualify is dismissed. Brooks' case was duly transferred. Petitioner would have been entitled to deal with the filing in his court of a false affidavit before that transfer as a direct contempt. ( In re Ciraolo, supra, 70 Cal.2d 389, 393.) His position that such a contempt proceeding need not be transferred to another judge was sufficiently plausible to preclude a finding of misconduct based on lack of transfer. (See id. at p. 392; In re Buckley, supra, 10 Cal.3d 237, 256.)

The commission concluded that petitioner committed wilful misconduct in banishing Prosecutor Susan Disney from his court, thus limiting the district attorney's options in making personnel assignments. The master had reached a similar conclusion.

Disney was assigned to the court on being employed as a deputy in the fall of 1978 . She criticized petitioner's handling of the Rogers matter that October. They had a strained discussion of the incident but made efforts to get along and by March 1979 had developed a workable relation.

In March petitioner was served with the commission's first amended notice of formal proceedings; it charged misconduct in Rogers. (The charge was later rejected by the master and dismissed by the commission.) Petitioner believed Disney was the source of the charge. He told District Attorney Tepper that he felt betrayed and would prefer that Disney not be assigned to his court.

In April 1979 Disney was present in Judge Hamilton's court during proceedings in the May case, which had been transferred from petitioner's court. When May expressed dissatisfaction at petitioner's handling of the case Hamilton told May how to communicate with the commission. On April 17 petitioner was served with the commission's second amended notice charging misconduct in May. (That charge also was rejected by the master and dismissed by the commission.) Petitioner assumed Disney had steered May to the commission and again complained ***651** to Tepper. On learning that May's source of information was Hamilton, petitioner apologized to Tepper and Disney.

Petitioner had no further contact with Disney until July 11, when Tepper assigned her two cases in petitioner's court. Petitioner had no advance notice of the assignment. When she arrived he called her into chambers, criticized her complaining to the commission in Rogers, and told her she was not welcome in his court and was to leave. She asked about her cases; he said they would be handled in normal course. He refused her request to set out in the docket that she was forbidden to appear.

In fact the defendants never appeared, and bench warrants were issued. There is no evidence, however, that Disney was informed during the conversation that their nonappearance was the reason the cases would not proceed.

Petitioner called Tepper and tried to arrange a discussion of differences. Tepper testified, however, that petitioner's condition for resolution was "that he expected some apologies and that he expected that she wouldn't be involved in communicating incidents to third parties about the operation of his court." Tepper also stated he told petitioner that to have one of two deputies barred from petitioner's court "did create some problems for us." At the time of the hearings before the master Disney had

not returned to petitioner's court.

Petitioner argues that he properly disclosed his bias to enable Tepper to protect the People's right to an impartial judge. But what effect the disclosure might have on assignment of deputy district attorneys was for Tepper, not petitioner, to decide.

Petitioner also contends his conduct was equivalent to recusing himself for possible prejudice. Recusal, though, would require assigning cases to another judge; petitioner retained the cases and barred a particular prosecutor from his court.

(17) Petitioner's apparent purpose in excluding Disney was to prevent her reporting his conduct to the commission. He claims his principal concern was that she did not consult him before reporting. Consultation was not required; its absence did not justify the ban from his court, which we conclude was wilful misconduct. ***652**

Petitioner contends he was denied due process because the misconduct found by the commission varied materially from that charged. The commission concluded: "The effect of preventing Disney from performing her official duties, banishing her from his court, limited the District Attorney's options in making personnel assignments and thus did obstruct a public officer from performing official duties to that extent. This constituted wilful misconduct in office."

That conclusion was based on this allegation in the third amended notice: "You have willfully and unlawfully resisted, delayed and obstructed a public officer in the discharge or attempt to discharge the duties of his office in that on or about July 11, 1979, you refused, for improper personal reasons, to allow Susan Disney, a duly appointed deputy District Attorney of El Dorado County, to appear in the Justice Court, El Dorado Judicial District, on matters duly and lawfully assigned to her."

Petitioner argues that the charge (1) was not sustained because Disney's appearance on July 11 was thwarted not by his excluding her but by defendants' nonappearance, and (2) omitted the commission's conclusion that the effect of the exclusion was to limit the district attorney's personnel assignment options.

The notice may be reasonably understood to charge obstruction of the district attorney by not permitting his deputy to appear. Even if understood to refer only to obstruction of Disney, the allegation of interfering with her "attempt" to discharge official duties was proved. Further, there was interference with her actual performance of duty to ascertain and report back why the cases assigned to her did not proceed.

Petitioner argues that if he had known the commission's proposed conclusion he could have elicited evidence on the extent to which

his conduct limited Tepper's "options in making personnel assignments." Proof of a lesser administrative burden would not have excused petitioner's acts. He was not denied due process.

## Conclusion

Petitioner's conduct warrants discipline, and our choice is between removal (the commission's unanimous recommendation) and censure. ***653**

Addressing above the eleven incidents, we sustain charges of wilful misconduct in nine and prejudicial conduct in another. The charge in the remaining incident (Kelly) is dismissed because the commission's conclusion was procedurally defective.

(18) The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing "lack of temperament and ability to perform judicial functions in an even-handed manner." ( Cannon v. Commission on Judicial Qualifications, supra, 14 Cal.3d 678, 705, 707.) These patterns emerge:

Instead of honoring peremptory disqualifications of himself petitioner intruded into matters that had become another judge's responsibility (Renfro, Ellis, Anderson) and denounced the disqualification as an affront (Ellis, Brooks). When annoyed by a party's conduct he groundlessly pried into counsel's advice (Rose v. LePeilbet, Lee, Brooks) or attempted to dissuade counsel from representing the party (Aldrich). He interfered with law practice by threatening or purporting to exclude attorneys from his courtroom (Aldrich, Anderson, Disney) or sentencing the attorney to jail for appropriate advice to the client (Brooks). He overstepped limits on his power to resolve civil disputes by attempting to punish nonobedience to his informal directions as a contempt (Rose v. LePeilbet) and unilaterally investigating facts (Hill v. Martin). He disregarded or violated contempt procedural rules. (Lee, Stern, Anderson.)

There is no evidence that he neglected his work or used his office for illicit gain. As the master observed, "his fault lay more in his overzealous performance of his duties." Petitioner candidly admitted he had a "bull headed approach" and was "more concerned about substantiating my contentions in a matter than being correct."

By way of mitigation he contends he was a target of obstreperous and manipulative conduct and complains of a conspiracy between Keller and Cline to remove him from the bench. The misbehavior he confronted was manageable. Keller's and Cline's consultations, pointed to as conspiratorial, appear to be only exchanges of information on common problems.

Petitioner also contends that he was inexperienced and has

learned not to repeat his mistakes. His five years as a deputy district attorney in ***654** the same county should have acquainted him with criminal procedures. He had the benefit of continuing education through CJER. His abuses in the civil matters (Rose v. LePeilbet and Hill v. Martin) were too serious to be explainable by inexperience.

His final testimony before the master was laudably contrite. He had come to understand the truth of Judge Fogerty's remarks in Aldrich that contempt should be used with the greatest of discretion and temperance. At last he saw that the reasons for his making and repeating many mistakes lay in himself and in "that part of my personality that has blinded me to the realization that I'm not right. I've striven to support my position without realizing that there is more to it."

The difficulty with his professed enlightenment is its delayed arrival. He reacted to the commission's initial letter of March 1978 not by reconsidering his position but only with rationalizations and excuses. The second letter reached him in August; yet Ellis, Stern, Anderson, and Brooks occurred that fall, Disney the following spring and summer. Even while preparing for the master's hearing he "couldn't really get a realization" of his problems. It was only during the hearing itself, probably "when one of the witnesses referred to my general demeanor as egotistical," that the light began to dawn.

Mitigation of wrongdoing requires more than an unfulfilled intent to reform. A justice court judge has weighty responsibilities. ( Spruance v. Commission on Judicial Qualifications, supra, 13 Cal.3d 778, 802 (reviewing role of municipal court judge); Code Civ. Proc., § 83 (municipal and justice court jurisdiction the same).) The aim of commission proceedings is not punishment but "to protect the judicial system and the public which it serves from judges who are unfit to hold office." (McComb v. Commission on Judicial Performance (1977) 19 Cal.3d Spec. Trib. Supp. 1, 9 [138 Cal.Rptr. 459, 564 P.2d 1].) Faithfulness to that aim requires removal here.

We order that Judge Jerrold L. Wenger of the Justice Court of the El Dorado Judicial District be removed from office. Since the misconduct for which he is removed did not amount to grounds for disbarment, he shall, if otherwise qualified, be permitted to practice law. (Cal.Const., art. VI, § 18, subd. (d); see Geiler v. Commission on Judicial ***655** Qualifications, supra, 10 Cal.3d 270, 287; Spruance v. Commission on Judicial Qualifications, supra, 13 Cal.3d 778, 803, fn. 21.) This order is effective upon the finality of this decision. ***656**

Cal.,1981.

Wenger v. Commission on Judicial Performance

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[L.A. No. 31572. Feb. 7, 1983.]

MARIO P. GONZALEZ, a Judge of the Municipal Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

SUMMARY

The Commission on Judicial Performance charged a municipal court judge with numerous counts of wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Three special masters were appointed who conducted hearings and issued a report concluding that the judge had not engaged in such conduct. The commission heard oral argument and subsequently issued findings of fact and conclusions of law sustaining 21 counts of wilful misconduct and conduct prejudicial to the administration of justice. The commission recommended that the judge be removed from office.

The Supreme Court adopted the commission's recommendation and ordered that the judge be removed from office. The court held that 20 of the 21 charges were supported by clear and convincing evidence and that removal from office was appropriate, given the persistence and pervasiveness of the misconduct. However, since the misconduct did not rise to the level of moral turpitude, dishonesty, or corruption, the court held the judge was entitled to practice law, provided he passed the Professional Responsibility Examination. The acts of wilful misconduct the judge was found to have engaged in included intercession in criminal matters on behalf of friends and benefactors, improprieties in bail-setting and own-recognizance release, abuse of judicial authority and the conduct of court business in violation of proper procedures. The judge was also found to have made comments impugning the character of his judicial colleagues and to have made ethnic slurs both on and off the bench. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Judges § 6—Removal—Proceedings Before Commission on Judicial Performance—Extension of Time to File Objections to Masters' Report.**—In proceedings before the Commission on Judicial Performance regarding allegations of misconduct by a municipal court judge, examiners who were appointed to present the case were properly granted an additional 10-day extension to file objections to a report issued by special masters, beyond a 30-day extension initially granted, and the commission properly accepted the objections 2 days after expiration of the second extension. Although Cal. Rules of Court, rule 915, limits time extensions to 30 days in the aggregate, the judge was not prejudiced by the 12-day delay and in fact benefitted from the commission's liberality by requesting and receiving identical time to file his own objections. Further, as a matter of policy, it was unwise to forsake inquiry into the substance of serious allegations of judicial misconduct merely because of such a brief procedural delay.

(2) **Judges § 6—Removal—Proceedings Before Commission on Judicial Performance—Appellate Review.**—In reviewing a recommendation of the Commission on Judicial Performance that a municipal court judge be removed from office, it was the duty of the appellate court to independently review the evidence adduced by the masters appointed to take testimony in the matter and to determine whether the allegations were proved by clear and convincing evidence sufficient to sustain the charges of misconduct to a reasonable certainty.

(3) **Judges § 1—Standards of Judicial Conduct.**—The ultimate standard for judicial conduct is conduct which constantly reaffirms fitness for the high responsibilities of judicial office.

(4) **Judges § 6—Removal—Grounds—Wilful Misconduct.**—A charge of wilful misconduct connotes unjudicial conduct which a judge acting in his judicial capacity commits in bad faith. "Bad faith" is equivalent to actual malice and encompasses the intentional commission of acts which the judge knew or reasonably should have known were beyond his lawful power, as well as acts which, though within the ambit of lawful judicial authority, are committed for purposes other than the faithful discharge of judicial duties.

(5) **Judges § 6—Removal—Grounds—Conduct Prejudicial to Administration of Justice.**—A charge of conduct prejudicial to the administration of

justice that brings the judicial office into disrepute connotes conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. Such charge also includes wilful misconduct out of office, which is unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity.

(6) **Judges § 6—Removal—Grounds.**—A judge may be censured or removed from the bench only for wilful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(7) **Judges § 6—Removal—Grounds—Wilful Misconduct—Intercession in Criminal Matters on Behalf of Friends and Benefactors.**—The Commission on Judicial Performance properly sustained charges that a municipal court judge engaged in wilful misconduct in office and conduct prejudicial to the administration of justice, where there was clear and convincing evidence that the judge used his judicial office improperly by attempting to intercede in criminal matters on behalf of friends and benefactors. As a matter of law, such conduct also violated the Code of Judicial Conduct, canon 2B (prohibiting family or social relationships from influencing judicial conduct). The fact the judge "saw nothing judicially improper" about his conduct could not preclude a charge of wilful misconduct, since that term embraces intentional conduct that a judge should have known was beyond his judicial authority.

(8) **Judges § 6—Removal—Grounds—Wilful Misconduct—Improprieties in Bail-setting.**—The Commission on Judicial Performance properly found that a municipal court judge acted improperly, unreasonably, and arbitrarily in matters of bail-setting and own-recognizance (OR) release, where the record disclosed that on several occasions the judge offered to grant OR motions which he had originally denied if defense counsel would post a personal check payable to a charity which the judge would hold and return on termination of the case. Such conduct constituted wilful misconduct. Also constituting wilful misconduct was an instance in which the judge refused to hear an OR motion on the merits, instead offering to grant the requested release as a favor to the public defender. The judge also engaged in wilful misconduct by refusing to hear a bail motion after denial of the prosecution's motion to dismiss, where the evidence suggested the reason for such refusal was the public defender's previous objection to the judge's direct questioning of his client on the facts of the case.

(9) **Judges § 6—Removal—Grounds—Wilful Misconduct—Comments Impugning Character of Judicial Colleagues.**—The Commission on Judicial Performance properly found that a municipal court judge made insulting and derogatory comments from the bench and in chambers impugning the character and competence of his judicial colleagues, in violation of the Code of Judicial Conduct, canon 2A (requiring that judges conduct themselves in a manner promoting public confidence in integrity of judiciary), where there was uncontroverted evidence proving that on several occasions he made grossly unflattering remarks regarding the physical appearance, impartiality, and work habits of his fellow judges. Such criticisms and insults were manifestly uttered in bad faith while the judge was acting in his judicial capacity and thus constituted wilful misconduct.

(10) **Judges § 6—Removal—Grounds—Wilful Misconduct—Abuse of Judicial Authority.**—The Commission on Judicial Performance properly found that a municipal court judge engaged in a continuous course of overreaching and abuse of judicial authority, where the record disclosed he conducted court proceedings on three occasions in the absence of counsel for one or both of the parties. Although the judge may not have intended to harm the interests of any of the parties involved, he acted intentionally and in bad faith and had thus engaged in wilful misconduct. The record also disclosed another instance in which the judge improperly conditioned dismissal of a case on the defendant's stipulation to the validity of his arrest, even though the district attorney conceded the defendant had mistakenly been taken into custody. Such deliberate and unreasonable action was a form of judicial coercion and constituted wilful misconduct as a matter of law.

(11) **Judges § 6—Removal—Grounds—Wilful Misconduct—Conduct of Court Business in Violation of Proper Procedures.**—The Commission on Judicial Performance properly found that a municipal court judge conducted court business in violation of proper judicial procedures, to the detriment of the fair, orderly, and decorous administration of justice. The record disclosed the judge left the bench on several occasions during court proceedings, instructing counsel to continue adducing testimony in his absence, and that he disposed of another case by dismissing it on his own initiative and declaring the dog leash and license ordinance at issue unconstitutional on its face without affording the People notice or opportunity to be heard. The evidence also disclosed that the judge entered the jury room during deliberations without counsel for both parties and that he held a half-off sentencing "bargain day" for persons pleading guilty to

Vehicle Code violations and misdemeanors. Each of these actions constituted wilful misconduct.

(12) **Judges § 6—Removal—Grounds—Wilful Misconduct—Ethnic Slurs.** —The Commission on Judicial Performance properly found that a municipal court judge, both in open court and in private communications with persons associated with the court, improperly engaged in personal verbal attacks, indulged in indelicate sexual and ethnic remarks, and made comments that cast doubt on his appreciation of the nature and importance of his judicial duties. Ethnic slurs uttered from the bench constituted unjudicial conduct by the judge acting in his judicial capacity, despite his contention that the remarks were made in jest, and were therefore sanctionable as wilful misconduct. Other ethnic slurs made in a colleague's chambers and at a Christmas party for court personnel constituted the lesser offense of conduct prejudicial to the administration of justice.

(13) **Judges § 6—Removal—Grounds—Wilful Misconduct.**—A municipal court judge was ordered removed from office where clear and convincing evidence supported 20 of the 21 charges of wilful misconduct and/or conduct prejudicial to the administration of justice levelled against him by the Commission on Judicial Performance, and where his misconduct was persistent and pervasive. The judge's claim of mitigating circumstances was not entitled to significant weight, since there can be no mitigation for maliciously motivated judicial misconduct, and since it was found that on numerous occasions the judge in fact acted in bad faith. However, the misconduct at issue did not rise to the level of moral turpitude, dishonesty, or corruption, and the judge was thus permitted to practice law, provided he pass the Professional Responsibility Examination.

[See **Cal.Jur.3d,** Judges, § 62 et seq.; **Am.Jur.2d,** Judges, § 18.]

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COUNSEL

Albert C. S. Ramsey and Edward P. George, Jr., for Petitioner.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Robert F. Katz, Susan D. Martynec and Donald E. De Nicola, Deputy Attorneys General, for Respondent.

## OPINION

**THE COURT.***—Petitioner was appointed municipal court judge in May 1972. In June 1980 the Commission on Judicial Performance (Commission) notified petitioner, pursuant to rule 904 of the California Rules of Court, of certain allegations of judicial misconduct.[1] In November 1980 the Commission served petitioner with a notice of formal proceedings, as required by rule 905, consisting of seven counts and fifty-five subcounts of "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (hereinafter "wilful misconduct" and "conduct prejudicial," respectively).

We appointed three special masters to take testimony on this matter, and the Commission appointed examiners to present the case. After 17 days of confidential hearings the masters issued their report to the Commission in November 1981, concluding that petitioner had not engaged in wilful misconduct or conduct prejudicial. The Commission heard oral argument, and in May 1982 issued its findings of fact and conclusions of law, sustaining 21 counts of wilful misconduct and conduct prejudicial. The Commission recommended that petitioner be removed from office.

**(1)** Judge Gonzalez disputes the Commission's findings and recommendation, and petitions this court for review. Beyond challenging the merits of the Commission's conclusions, he raises a procedural objection that we dispose of at the outset. He claims that by granting the examiners an additional 10-day extension to file their objections to the report of the masters, beyond the 30-day extension initially granted, the Commission violated rule 915, which limits time extensions to 30 days "in the aggregate." In addition, he contests the Commission's acceptance of the objections, filed two days after the expiration of the second extension.

Although he does not request any specific form of relief, presumably petitioner contends this proceeding should have been terminated upon the examiner's failure to meet the filing deadlines. His claim is without merit. Not only was Judge Gonzalez not prejudiced by the 12-day delay (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 519 [116 Cal.Rptr. 260, 526 P.2d 268]), but in fact he benefitted from the Commission's liberality by requesting and receiving "identical time" to file his own objections. Furthermore, as a matter of policy, it would be unwise to forsake inquiry into the substance of serious allegations of judicial misconduct merely because of such a brief procedural delay.

*Before Bird, C. J., Mosk, J., Richardson, J., Kaus, J., Reynoso, J., Grodin, J., and McClosky, J.†

[1]Unless otherwise specified, all further rule references are to the California Rules of Court.

†Assigned by the Chairperson of the Judicial Council.

**(2)** We turn now to the merits of Judge Gonzalez' case and begin by summarizing the duties and standards governing our review. Initially it is our duty independently to review the evidence adduced by the masters. The standard of proof we must apply is well established: the allegations must be proved by "clear and convincing evidence sufficient to sustain a charge to a reasonable certainty." (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].) **(3)** We have also defined standards of judicial performance to guide our review of the Commission's disciplinary recommendation: "The ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office." (*Id.* at p. 281.)

**(4)** The charge of wilful misconduct connotes "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith, . . ." (*Id.* at p. 284.) "Bad faith" is equivalent to actual malice and encompasses the intentional commission of acts which the judge knew or reasonably should have known were beyond his lawful power, as well as acts which though within the ambit of lawful judicial authority are committed for purposes other than the faithful discharge of judicial duties. (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 796 [119 Cal.Rptr. 841, 523 P.2d 1209].)

**(5)** The lesser included charge of conduct prejudicial connotes "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office," as well as wilful misconduct out of office, "i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity." (*Geiler, supra,* 10 Cal.3d at p. 284 & fn. 11.) **(6)** A judge may be censured or removed from the bench only for wilful misconduct or conduct prejudicial.

In keeping with our obligation to scrutinize the record, we have examined in detail the full transcript of the hearings before the masters, the examiners' objection to the report of the masters, the report of the masters, the Commission's findings of fact and conclusions of law, as well as the briefs filed in this court. We concur in 20 of the Commission's 21 charges of wilful misconduct and/or conduct prejudicial, adopt its findings of fact on these counts as our own, and set out pertinent portions of its findings in the margin.[2] We summarize the fac-

[2]The Commission's findings, in pertinent part, are as follows:

"FINDINGS OF FACT

"*I. (Count III, Paragraphs 3c and 3a)*

"Respondent has used his judicial office improperly in influencing, or attempting to influence, law enforcement officers and officers of the court concerning criminal matters.

"1. In March, 1978, Respondent summoned Deputy District Attorney Joseph R. Martinez to his chambers to attempt to influence him to dismiss a case not then pending before Respondent, the case of *People* v. *Frank Jose Terrones* (M191676), in which defendant had already pleaded

tual determinations and legal conclusions reached.

1.

(7) First, we find clear and convincing evidence that Judge Gonzalez has

guilty and had been sentenced. Present in Respondent's chambers was Los Angeles County Deputy Sheriff Art Guerra, who regularly sought and received from Respondent dismissals of traffic cases on behalf of defendants, and who previously had requested such a dismissal from Mr. Martinez and had been refused.

"2. In May, 1978, Deputy District Attorney Joseph R. Martinez was contacted regarding a felony case, *People* v. *Kasparian* (A343101), by three people: the defendant's father; Mr. Semon Kasperoff, a wealthy, influential member of the community and long-time friend of Respondent's; and another person; concerning an immediate disposition of the case. Mr. Martinez told them that it was a good case which would proceed to preliminary hearing, and suggested that they seek the assistance of an attorney. Later that same day, Respondent telephoned Mr. Martinez about the *Kasparian* case, which was not then pending before Respondent, and asked if Mr. Martinez would discuss the matter in his chambers with the above-named persons. It was Mr. Martinez' belief, based on his prior experiences with Respondent, that Respondent wanted him present in his chambers to attempt to pressure him into a disposition of the case.

". . . . . .

"*II. (Count I, Paragraphs 1, 2, 3 and 5)*

"Respondent has acted improperly, unreasonably, and arbitrarily in matters of bail-setting and own-recognizance release.

"1. Respondent admitted that in three cases during his tenure on the bench, after he had denied motions to release on own recognizance, he had offered to grant such releases if defense counsel would issue personal checks for $25 to their favorite charity, which Respondent would hold and return to them after the cases had been terminated. Respondent advised defense counsel that if they had that much trust and confidence in their clients, they could prove that good-faith belief in their clients' integrity by advancing their own personal checks.

". . . . . .

"2. On or about December 17, 1975, in *People* v. *Larry Williams* (M175329), Deputy Public Defender Bruce Hoffman appeared before Respondent to request an own recognizance release for defendant Williams. Hoffman was appearing for the attorney of record, private counsel Stan Delnick. Respondent, without allowing argument on the merits, stated that defendant's motion would be denied unless Mr. Hoffman was requesting defendant's own recognizance release as a special favor, in which event the motion would be granted.

"3. On or about December 17, 1975, in the case of *People* v. *Larry Williams* (M175329), Stan Delnick, a private attorney appointed to represent defendant Williams, requested that Respondent release defendant on his own recognizance. Respondent refused to order an own-recognizance release for defendant Williams, who was then free on his own recognizance in two other pending cases, but agreed to release defendant upon Mr. Delnick personally posting $50 cash bail, in violation of Rule 5-104(A) of the Code of Professional Conduct, which was done.

"4. On or about February 3, 1975, in the case of *People* v. *Manuel Cruz Cerda* (M167759), defendant appeared before Respondent for arraignment. The charge was violation of Penal Code Section 148. Deputy District Attorney Richard Neidorf and the filing deputy for the District Attorney's office, Jess Cortez, both moved for dismissal of the case.

"Respondent then read the police report and inquired of the defendant as to certain factual matters, such as what defendant Cerda had allegedly done to violate the law. Deputy Public Defender Bruce Hoffman objected to the questioning. Thereupon, Respondent denied the motion to dismiss, set a pre-trial date for February 7, 1975, and set bail at $500.

"Mr. Hoffman moved for defendant's release on his own recognizance. Respondent refused to entertain the motion, indicating that he had lost jurisdiction in the case once it had been set for pre-trial. Respondent indicated that he would not entertain the motion because Mr. Hoffman had been the one who had opened his mouth when Respondent had attempted to question the defendant.

"*III. (Count VII, Paragraph 4)*

"Respondent repeatedly has made insulting comments from the bench about the judges with

used his judicial office improperly by attempting to intercede in criminal mat-

whom he shared the East Los Angeles bench. It is true that on occasions Respondent did critically remark as to the work habits of his judicial colleagues and did recklessly threaten and impugn the integrity of his colleagues.

"*IV. (Count III, Paragraphs 1a, 1b, 1b' and 2c)*

"Respondent has overreached his judicial authority by conducting court proceedings in the absence of counsel for one or both parties and exerting undue, improper pressure upon a defendant to plead guilty.

"1. In late 1974-early 1976, former Deputy Public Defender Vernon Putnam was involved in a proceeding in another division when he was summoned to appear in Respondent's courtroom. Mr. Putnam finished his appearance and proceeded to Respondent's courtroom where his client's motion to declare a prior conviction unconstitutional was on calendar. When Mr. Putnam entered Respondent's courtroom, he discovered his client seated in the witness chair giving testimony in response to questioning by either Respondent or the prosecutor.

"Mr. Putnam objected to the impropriety of commencing the hearing in his absence. Following argument between Respondent and Mr. Putnam, Respondent disqualified himself, and the matter was transferred to another division for a de novo hearing. Respondent's explanation was that his court was busy, Mr. Putnam had not responded to the summons, so Respondent had started without him.

"2. During a case heard by Respondent between 1975 and the first part of 1976, then Deputy Public Defender James Tucker arrived in Respondent's courtroom and discovered that the hearing on his client's motion to suppress evidence had commenced without him. When Mr. Tucker arrived, the police officer witness was on the witness stand being examined by Respondent, and the defendant was seated at counsel table. Mr. Tucker objected to Respondent's commencement of the hearing in his absence. Respondent offered to start over, but subsequently transferred the matter to another division.

"3. Between approximately April 1978 and October 1979, when the prosecutor was late returning to Respondent's courtroom after lunch, Respondent continued with the voir dire of the veniremen in the prosecutor's absence.

"4. On or about March 23, 1976, in the case of *People* v. *Frank O. Ortega*, the prosecution moved to dismiss the case against defendant Ortega, who had wrongfully been arrested and was being held in custody. Respondent said he would grant the motion to dismiss the case only if the defendant agreed not to sue the county for false arrest. When Deputy Public Defender Bruce Hoffman complained that his client was being coerced because he was in custody, Respondent replied that he was a taxpayer and that he was acting in the taxpayers' and the county's best interests.

"*V. (Count V, Paragraphs 2, 3, 9, and 15)*

"Respondent has repeatedly conducted court business in a manner which ignores procedures required by law and essential to the fair, orderly, and decorous administration of justice.

"1. Respondent has left the bench abruptly during proceedings in his courtroom. On two such occasions during 1977-1978, he instructed counsel for the parties to continue adducing testimony while he was gone and to note their objections to the testimony in writing so that he could rule on the objections when he returned to the bench. In each instance—once in a jury trial and once in either a court trial or a preliminary hearing—testimony continued during Respondent's absence from the court.

"2. On or about May 25, 1978, in the case of *People* v. *Rebecca Hernandez* (S.A.A.C. No. 6076), Respondent dismissed the charges and declared a county ordinance unconstitutional in a press release issued in chambers, outside regular court hours, without notice to or appearance by the prosecution and without appearance by the defendant.

"3. Between 1972 and 1977, Respondent occasionally entered the jurors' room during their deliberations and in the absence of either counsel for the People or for the defense, or both, and without valid legal cause. Inside, Respondent discussed issues material to the cases upon which the juries had been deliberating. Respondent admitted in testimony that he 'wasn't concerned if the District Attorney wasn't present . . . .'

"4. On one occasion, Respondent informed the Public Defender's office that, on the forthcoming Thursday, he would impose only one-half of his customary sentence or fine in cases

ters on behalf of friends and benefactors. (Finding I.[3]) In People v. Frank Terrones and in People v. Kasparian, Judge Gonzalez contacted the deputy in charge of the district attorney's office in East Los Angeles and attempted to induce him to dismiss criminal charges. In Terrones (Count III, ¶ 3(c)[4]) he acted at the behest of a law enforcement official; in Kasparian (Count III, ¶ 3(a)) he sought to help an influential friend whose son had been arrested. Though certain factual details were disputed, petitioner concedes that he often approached district attorneys to urge dismissal. The following quotation from his testimony epitomizes Judge Gonzalez' judicial philosophy on this issue: "[I]f [a legislator, a sheriff, a political chairman] . . . if anyone who helped me or a brother judge on the bench were to call me and say, 'Mike, what can you do for this

where the defendant pleaded guilty. All the deputy public defenders took advantage of Respondent's prospective offer, by advancing their cases on calendar to coincide with the appointed 'Bargain Day.' Respondent indeed imposed one-half the customary fines upon defendants pleading guilty on that day.

"On this occasion or a second, Respondent also announced the identical offer to a courtroom full of defendants. In neither announcement did Respondent limit his proposed deal to one-point vehicle infractions; on the contrary, it actually applied to misdemeanors.

"*VI. (Count VI, Paragraphs 1, 3, 4, 5, and 6)*

"Both in open court and in private communications with persons associated with the court, Respondent improperly engaged in personal verbal attacks, indulged in indelicate sexual and ethnic remarks, and made comments which cast doubt upon his appreciation of the nature and importance of his judicial duties and his ability to sit as a fair and impartial judge.

". . . . . .

"1. During pronouncement of a judgment on a tall, large male of Mexican extraction, on the charge of beating his wife, who was small in stature, the Respondent stated such a course of conduct may be tolerated in Mexico and Africa but would not be tolerated in America.

"2. During jury voir dire in a criminal case in June or July, 1979, while questioning an Asian venireman about inflation, Respondent commented that he did not know why he was speaking to a Japanese juror about inflation because 'What do fishheads and rice cost?'

"3. During jury voir dire in a criminal case in approximately August or September, 1980, a black woman on the panel responded that she was a clerk at Safeway, and Respondent next asked her, 'What is the price of watermelon per pound?' The deputy district attorney winced at the question, and later advised Respondent that the question could be offensive to some blacks. Respondent, however, repeated the same question to the same black woman upon her appearance among a subsequent group of panel members.

". . . . . .

"4. In Judge Gilbert R. Ruiz' chambers in April or May, 1980, Respondent answered Deputy District Attorney David Milton's disclosure of his wife's miscarriage by saying, 'Oh, good. One less minority,' or words to that effect. Thereafter, Respondent apologized.

"5 On December 19, 1979, at a Christmas party attended by most of the courthouse personnel, Respondent asked a Jewish deputy district attorney, Wendy Widlus, 'Tell me something, Wendy, with all the interbreeding that your people do, aren't you afraid that they will produce a race of idiots?' Ms. Widlus was offended, very angry, and considered the remark to be tasteless as well as anti-Semitic.

"*VII. (Count IV)*

"During the period of September, 1977 through April 1980, Respondent persistently made improper and unwanted sexual advances toward Maria Rody Moreno, an interpreter assigned to the East Los Angeles Municipal Court."

[3]"Findings" refer to the Commission's findings of fact and conclusions of law, rendered April 30, 1982.

[4]"Counts" refer to the original charges filed by the Commission in its notice of formal proceedings of December 22, 1980.

matter?' I'm going to tell them all the same thing, you know, that I can't dismiss it on my own motion. 'So let me refer you to the D.A. and see if what, if anything, he can do.' And I don't care whether the D.A. dismisses it. I don't care whether the D.A. tells me to go to hell. I don't care whether the D.A. calls up the Assemblyman and the doctor and the sheriff and tells them to go to hell.

"I have cemented relationships between the person who referred that individual to me. And that person, if he was in chambers . . . will go back and tell his judge friend, 'Judge, I appreciate your opening the door of Judge Number 45. And I certainly appreciate Judge Number 45 trying to do what he can, too. But it was that dirty no-good D.A.'

"The referring judge gets points with his friends. I make points with the judge, the D.A., the Assemblyman, the doctor, the sheriff, whoever it is. *And that's the little game we play in the criminal justice system.*" (Italics added.)

In Terrones and in Kasparian, Judge Gonzalez intentionally exploited his judicial office to attempt to influence the disposition of criminal matters. His conduct therefore constitutes wilful misconduct.[5] (*Spruance, supra,* 13 Cal.3d at p. 798.) As a matter of law he has also violated canon 2B of the Code of Judicial Conduct, which provides that "A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him . . . ." In *Spruance* we held a similar violation of canon 2B to constitute wilful misconduct. (13 Cal.3d at p. 798.) Petitioner's insistence that he "saw nothing judicially improper" about his conduct cannot preclude a charge of wilful misconduct, for that term embraces intentional conduct that a judge *should have known* was beyond his judicial authority. (*Geiler, supra,* 10 Cal.3d at p. 286.) Petitioner's patent misunderstanding of the nature of his judicial responsibility serves not to mitigate but to aggravate the severity of his misconduct.

2.

**(8)** The record also supports the finding that Judge Gonzalez has acted improperly, unreasonably, and arbitrarily in matters of bail-setting and own-recognizance (OR) release. (Finding II.) On two or three occasions, as petitioner has admitted, he offered to grant OR motions which he had originally denied if defense counsel—in each case a public defender—would post a personal check in the amount of $25, payable to counsel's favorite charity, which he would hold and return on termination of the case. (Count I, ¶ 1.) Similarly, in the case of People v. Williams, petitioner informed the private attorney ap-

[5]Where we find that petitioner's actions constitute wilful misconduct as a matter of law we also find that he has committed the lesser included offense of conduct prejudicial.

pointed to represent defendant that he would grant the OR motion on condition that the attorney post his own $50 in cash as bail. (Count I, ¶ 3.) Judge Gonzalez apparently reasoned that defense counsel could best prove trust and confidence in their clients by risking their personal funds. He further explained that his purpose was "both psychological and educational."

The legal impropriety of Judge Gonzalez' conduct on these occasions is obvious. He caused attorneys who did accede to the personal check policy to violate rule 5-104(A) of the Rules of Professional Conduct, which provides: "A member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent or sanction the representation that he will pay personal or business expenses by or for a client . . . ." On the other hand, a defense attorney's refusal or inability to post the necessary sum might seriously strain the attorney-client relationship by undermining the client's trust in his or her attorney. Moreover, by purporting to "educate" young public defenders to the realities of criminal defense practice, Judge Gonzalez impermissibly sought to use his judicial office to further a "purpose other than the faithful discharge of judicial duties." (*Spruance, supra,* 13 Cal.3d at p. 796.) For these reasons, his action clearly constitutes wilful misconduct.

The record further reveals that in 1975, in People v. Williams, Judge Gonzalez refused to hear an OR motion on the merits, but offered to grant the requested release as a special or personal favor to the public defender. (Count I, ¶ 2.) At the hearing before the masters the private attorney of record in the case, who had not appeared before petitioner on the matter but who had instead asked the public defender to make the motion in his place, corroborated the testimony of the complaining public defender. Although the examiners concede that the public defender was not the attorney of record, petitioner bogs down in irrelevant arguments concerning the identity of the attorney of record and fails to address the substance of the allegation itself. The fact remains that Judge Gonzalez offered to grant the requested OR release as a favor and refused to hear the argument on the merits. He was acting in his judicial capacity and knew or should have known that such conduct was beyond his lawful power. (*Geiler, supra,* 10 Cal.3d at p. 286.) Thus petitioner acted in bad faith and his action constitutes wilful misconduct.

Finally, in People v. Manuel Cruz Cerda, following a motion to dismiss by the People, Judge Gonzalez questioned the defendant directly on the facts of the case. When the public defender objected that his client was being interrogated on matters relating to guilt or innocence and instructed his client not to answer, he immediately fixed bail at $500, set a pretrial date, and refused to entertain the defendant's OR release motion. (Count I, ¶ 5.) Petitioner contends first that he does not remember the incident, and alternatively that Judge Ruiz, then in charge of the district attorney's office, must have requested that defendant

stipulate to probable cause. Again, however, petitioner's defense is speculative and unpersuasive, and again he fails to grasp the heart of the matter. Petitioner was not charged with unfairly demanding that the defendant stipulate to probable cause in return for a dismissal; he was charged with improperly refusing to hear the defendant's bail motion after turning down the prosecution's motion to dismiss. The evidence suggests petitioner refused to hear the motion because it was the public defender who had "opened his mouth" during the judge's questioning of the defendant. Such hostile, arbitrary, and unreasonable conduct jeopardizes the liberty of an indigent defendant for reasons not related to the merits of the case and therefore constitutes wilful misconduct. (*Spruance, supra,* 13 Cal.3d at pp. 795-797.)[6]

3.

**(9)** We also find ample support in the record for the conclusion that Judge Gonzalez has made insulting and derogatory comments from the bench and in chambers impugning the character and competence of his judicial colleagues. (Finding III; count VII, ¶ 4.) Respondent presents uncontroverted evidence proving that on several occasions petitioner made grossly unflattering remarks regarding the physical appearance, impartiality, and work habits of his fellow judges. He insinuated that one judge had accepted a bribe and admitted to calling another judge a "coward" to his face.

By his actions Judge Gonzalez has violated canon 2A of the Code of Judicial Conduct, which requires that judges conduct themselves "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Petitioner's brash criticisms and colorful insults were manifestly uttered in bad faith while petitioner was acting in his judicial capacity. (*Spruance, supra,* 13 Cal.3d at p. 796.) His actions therefore constitute wilful misconduct.

4.

**(10)** The record further reveals that Judge Gonzalez has engaged in a continuous course of overreaching and abuse of judicial authority. (Finding IV.) First, we find that petitioner conducted court proceedings on three occasions in the absence of counsel for one or both of the parties. (Count III, ¶¶ 1a, 1b, and 1b'.) Each of the three complaining attorneys testified that when he entered petitioner's courtroom he found that petitioner had actually begun proceedings without him.

[6]Furthermore, we have held that extended and improper examination of witnesses by a judge places the judge in the role of advocate and may detract from the public image of the court as an impartial tribunal. (*McCartney* v. *Commission on Judicial Qualifications* (1974) *supra,* 12 Cal.3d 512, 533.)

Judge Gonzalez denies the allegations but fails otherwise to impeach the attorneys' testimony. In a tone that rapidly grows tiresome, he reiterates a conspiracy theory typically raised as a defense in judicial misconduct investigations, and contends that the three attorneys simply fabricated their stories. As he does with virtually every allegation, Judge Gonzalez fundamentally misperceives the nature and gravity of the charge and instead views the entire matter as one of political disagreement or personality difference. His own testimony candidly displays his disdain for the three attorneys involved in this allegation: "I've never had a rapport as being an ex-cop and a judge in the very same courthouse wherein I was an ex-cop. I've never had a rapport with what I consider to be liberal-minded-orientated [*sic*] individuals, and [the three complaining attorneys are] those kinds of people. And a person of my background and philosophy could never cut it with [them]." Moreover, Judge Gonzalez repeatedly boasts an abhorrence of tardiness and may well have thought he was justified in penalizing recalcitrant attorneys by his actions.

It is obvious that conducting judicial proceedings in the absence of counsel for one of the parties seriously interferes with the attorney-client relationship and may also infringe on the right of the accused to effective representation by counsel. Though petitioner may not have intended to harm the interests of any of the parties involved, he acted intentionally and in bad faith. (*Spruance, supra,* 13 Cal.3d at p. 796; *Geiler, supra,* 10 Cal.3d at p. 286.) He has therefore engaged in wilful misconduct.

We also find that in the People v. Frank O. Ortega case Judge Gonzalez improperly conditioned dismissing a case against the defendant—who the district attorney conceded should not have been in custody—on the defendant's stipulation to the validity of the arrest. (Count III, ¶ 2c.) In fact the defendant in that case had mistakenly been arrested for failure to appear pursuant to a citation that did not call for his appearance until two days following the arrest. Because the defendant had spent two days in jail, the People acceded to the public defender's request that the charges be dismissed. Petitioner nonetheless conditioned dismissal on the defendant's stipulation to probable cause, explaining to the public defender that he was acting as a taxpayer in the best interest of the county. Despite some protestations that he did not remember the case, Judge Gonzalez essentially conceded the accuracy of the testimony on this allegation.

By way of defense or explanation petitioner relies on *Hoines* v. *Barney's Club, Inc.* (1980) 28 Cal.3d 603 [170 Cal.Rptr. 42, 620 P.2d 628]. But *Hoines* sustains the *prosecutor's* prerogative—not the court's—to condition consent to a dismissal of charges on a stipulation of probable cause for arrest. (*Id.* at p. 611.) Nothing in *Hoines* suggests that when a prosecuting attorney declines to request a probable cause stipulation because the defendant had mistakenly been taken into custody and held in jail for two days, a judge may compound

the injustice by insisting on the stipulation. Judge Gonzalez acted deliberately and unreasonably. His action is a form of judicial coercion and constitutes wilful misconduct as a matter of law.

5.

**(11)** Next, we find the record discloses that Judge Gonzalez has conducted court business in violation of proper judicial procedures, to the detriment of the fair, orderly, and decorous administration of justice. (Finding V, count V, ¶¶ 2, 3, 9, 15.) Specifically, petitioner has left the bench on several occasions during court proceedings, instructing counsel to continue adducing testimony in his absence and to note any objections in writing so that he might rule on them on his return. (Count V, ¶ 2.) As was customary in petitioner's chambers, on most of these occasions there was no court reporter to help reconstruct the questions asked or the objections taken. Judge Gonzalez denies the allegation and calls the examiners' witnesses "liars." His bailiff and clerk corroborated his denial.

As noted earlier, the standard of proof governing our review of the evidence is the "clear and convincing" standard first articulated by this court in *Geiler.* In resolving the credibility contest surrounding this allegation, we find, contrary to petitioner's claim, no evidence in the record that any of the examiners' three witnesses ever engaged in any "conspiracy" against petitioner. With no motive to lie or fabricate, each witness testified, under oath, to observing judicial conduct so unusual that even the casual observer would have remembered it plainly.

By leaving the bench during judicial proceedings Judge Gonzalez has demonstrated a flagrant lack of respect for his judicial office, in violation of the general provision and spirit of canon 3 of the Code of Judicial Conduct. If only for a few moments at any one time, on these occasions he abandoned his role in the adjudicative process in utter disregard for his obligation diligently to perform the duties of his office. As such, his unjudicial behavior rises to the level of wilful misconduct.

Judge Gonzalez further demonstrates his disregard for proper judicial procedures by his highly unorthodox and patently improper disposition of the case of People v. Rebecca Hernandez. (Count V, ¶ 3.) The facts regarding this matter are virtually undisputed. The defendant was cited for violating the county dog leash and license ordinance, and failed to appear on the appointed court date. In chambers, on the evening of May 25, 1978, petitioner on his own initiative dismissed the case and declared the ordinance unconstitutional on its face. No notice or opportunity to be heard was afforded the People; no motion had ever been made by the defendant. Judge Gonzalez merely issued what he described in his testimony before the masters as "an opinion in the form of a

press release." In an almost farcical misapplication of constitutional law, Judge Gonzalez declared that the dog leash/license ordinance violated the equal protection clause of the Fourteenth Amendment because it applied to dog-owners but not to owners of "(a) Canaries, (b) Chinchillas . . . (k) Mynah birds . . . (o) Squirrel monkeys, (p) Steppe legal [*sic*] eagles, (q) Toucans . . . " and so on. Although Judge Gonzalez sought to start the entire proceeding over so that any appeal taken might reach substantive issues, the district attorney refused to forego immediate review and petitioner's ruling was reversed because of its procedural impropriety.

Petitioner openly admits and defends his action: ". . . I did it under the theory that the statute was unconstitutional on its face, and a judge is permitted to do that if that be the case . . . . As for that, it can be ex parte. That is the law." Yet, not surprisingly, petitioner does not cite any legal authority for the untenable conclusion that a judge may dispose of cases and invalidate legislation without affording the parties an opportunity to participate. By his flagrant and deliberate disregard for even the minimal requirements of fairness and due process petitioner has far exceeded the bounds of his judicial authority. (*Geiler, supra,* 10 Cal.3d at p. 286; *Cannon* v. *Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 694 [122 Cal.Rptr. 778, 537 P.2d 898].) Furthermore, the facts strongly suggest that as a candidate for election to the superior court at the time of this ruling, Judge Gonzalez was motivated by a desire for preelection publicity. Though his "press release opinion" may indeed have earned him a certain political notoriety, such a blatant exploitation of the judicial office for political ends seriously and impermissibly undermines public esteem for the impartiality and integrity of the judiciary. While petitioner apparently fails to appreciate the gravity of his transgression, we hold his action to constitute wilful misconduct as a matter of law.

We also find that Judge Gonzalez has disregarded proper judicial procedures by entering the jury room during deliberations without counsel for both parties. (Count V, ¶ 9.) The examiners presented three witnesses who testified in significant detail that Judge Gonzalez repeatedly entered the jury room while the jury was deliberating. Petitioner admits he entered the jury room, but denies he ever did so in the absence of defense counsel: "I've never gone in by myself. I've never gone in without cause just to see what they're doing, not without exception of the times that I've gone into the jury room when one or both or all three of us were present. I wasn't concerned if the D.A. wasn't present, but I was always concerned if the defense attorney wasn't present."

Petitioner denies the impropriety of any of his entries into the jury room. He cites *People* v. *Vinson* (1981) 121 Cal.App.3d 80, 84 [175 Cal.Rptr. 123], for the proposition that a private communication between a judge and juror does not necessarily constitute reversible error. However, once again Judge Gon-

zalez fails to grasp the heart of the matter. He has not been charged with committing reversible error by his actions, nor is this the standard for determining whether his misconduct is sanctionable. Rather, petitioner was charged with having "conducted . . . court business in a manner demonstrating ignorance of and indifference to procedures required by law which are essential to the fair, orderly, and decorous administration of justice." It is of course well established that "private communication between court and jury are improper, and that all communications should be made in open court." (*People* v. *Alcalde* (1944) 24 Cal.2d 177, 189 [148 P.2d 627]; see also *Paulson* v. *Superior Court* (1962) 58 Cal.2d 1, 7 [22 Cal.Rptr. 649, 372 P.2d 641].) Although informal communications between judge and jury may not result in reversible error if an appeal is in fact taken, for our present purposes it is important to stress that such communications do interfere with the parties' right to the assistance of counsel and do undermine public esteem for the integrity and impartiality of the judicial office. The evidence in this case clearly establishes Judge Gonzalez' patent indifference and disrespect for settled judicial practices. He certainly should have known his jury room visits were beyond his lawful powers. (*Geiler, supra,* 10 Cal.3d at p. 286.) We, therefore, find these actions constitute wilful misconduct.

Finally, we find that Judge Gonzalez improperly disregarded judicial procedures by announcing in open court, and later holding, a so-called half-off sentencing "bargain day" for persons pleading guilty. (Count V, ¶ 15.) Petitioner admits he made the blanket offer but maintains it was limited to Vehicle Code violators. We find that in fact he extended the offer more broadly to include misdemeanants, some of whom were represented by public defenders who advanced their cases on the calendar to coincide with "bargain day." Judge Gonzalez defends his use of the *en masse* plea bargaining technique by pointing to the court's congested calendar and by claiming to have sought "a couple of dollars for the county and a conviction for the state."

By his wholesale plea bargaining scheme Judge Gonzalez has deliberately misused his otherwise lawful power to reduce sentences and fines in individual cases. As we pointed out in *Geiler,* even the admirable goal of expediting judicial procedures cannot justify the court's abrogation of its duty to determine each case on its own merits. (10 Cal.3d at p. 285.) Judge Gonzalez' further declared aims of filling the county coffer and scoring convictions for the state are of course completely extraneous to the administration of justice. Judge Gonzalez certainly should have known that his "bargain day" sentencing offer—even if limited to vehicular offenses—contravened the principle of individualized sentencing embodied in our Penal Code. (Pen. Code, § 1203 et seq.) We therefore find his action constitutes wilful misconduct as a matter of law.

6.

**(12)** The record also reveals that both in open court and in private communications with persons associated with the court Judge Gonzalez improperly engaged in personal verbal attacks, indulged in indelicate sexual and ethnic remarks, and made comments that cast doubt on his appreciation of the nature and importance of his judicial duties. (Finding VI.) On pronouncing judgment on a male of Mexican extraction on a charge of beating his wife, petitioner stated that although such behavior might be tolerated in Africa or Mexico, it would not be tolerated in America. (Count VI, ¶ 6.) During jury voir dire in a criminal case he questioned a Japanese venireman about inflation and then commented that he did not know why he was speaking to a Japanese juror about inflation, because "what do fishheads and rice cost?" (Count VI, ¶ 3.) During another jury voir dire in a criminal case petitioner asked a black woman on the panel who had said she worked as a grocery clerk if she knew the price of watermelon. (Count VI, ¶ 4.) In a colleague's chambers petitioner responded to the news that a black district attorney's wife had had a miscarriage by saying, in essence, "Oh good, one less minority." (Count VI, ¶ 1.) Finally, at a Christmas party attended by most of the court personnel petitioner asked a female Jewish district attorney whether "with all the inbreeding your people do, aren't you afraid that they will produce a race of idiots," or words to that effect. (Count VI, ¶ 5.)

Petitioner vigorously insists that any ethnic or sexual remarks he may have made were made in jest, and that in fact he has never treated ethnic or minority groups unfairly. However, Judge Gonzalez' subjective intent is not at issue. As a judge he is charged with the obligation to conduct himself at all times in a manner that promotes public confidence and esteem for the judiciary. Particular friends or associates may assure themselves that the judge's ethnic remarks are made in jest, but such facially blatant ethnic slurs as those Judge Gonzalez uttered from the bench are apt to offend minority members not familiar with petitioner's views and may be construed by the public at large as highly demeaning to minorities. Regardless of his personal feelings on racial harmony or the propriety of ethnic humor, Judge Gonzalez should have known that his admittedly "salty" courtroom comments were unbecoming and inappropriate. The ethnic slurs uttered from the bench constitute unjudicial conduct by a judge acting in his judicial capacity and are therefore sanctionable as wilful misconduct. (*Geiler, supra,* 10 Cal.3d at pp. 283-284.)

The comment made off the bench regarding the black district attorney's wife's miscarriage and the Christmas party Jewish remark pose a less serious threat to public esteem for the integrity of the judiciary. However, as held in *In re Stevens* (1982) 31 Cal.3d 403 [183 Cal.Rptr. 48, 645 P.2d 99], ethnic and racial epithets uttered in chambers do constitute the lesser offense of conduct

prejudicial. (*Id.* at p. 404.) Derogatory remarks, although made in chambers or at a staff gathering, may become public knowledge and thereby diminish the hearer's esteem for the judiciary—again regardless of the speaker's subjective intent or motivation. The reputation in the community of an individual judge necessarily reflects on that community's regard for the judicial system. We hold that petitioner's "one less minority" and inbreeding remarks constitute conduct prejudicial to the administration of justice.

7.

Finally, we review the Commission's finding that during the period of September 1977 through April 1980 Judge Gonzalez persistently made improper and unwanted sexual advance toward a court interpreter assigned to the East Los Angeles Municipal Court. (Finding VII; count VI.) Petitioner disputes the factual finding of sexual harassment. After close scrutiny of the entire record we are not persuaded that the charge is supported by clear and convincing evidence. This charge of conduct prejudicial is therefore not sustained.

We have sustained all eighteen of the Commission's charges of wilful misconduct and two of its three charges of conduct prejudicial. We turn now to our most important responsibility, the decision whether to adopt the Commission's recommendation that Judge Gonzalez be removed from office.

**(13)** In the final analysis Judge Gonzalez utterly fails to grasp either the substance or seriousness of the numerous charges levelled against him by the Commission. Despite multiple admonitions and the normal evidentiary limitations of the hearing process, Judge Gonzalez has treated this investigation as an attack on his character. Thus he boasts he is opinionated, outspoken, hardworking, and extroverted, but never prejudiced and always impartial. He persists in his theory that his adversaries conspired to record his every misdeed and regards virtually every allegation as personally motivated. Rather than respond affirmatively and convincingly to the specific charges, he expends most of his defense effort in attacking the character and credibility of the adverse witnesses. While he concedes there may be certain minor irregularities in his judicial manner and procedures, he denies he has ever deliberately abused his judicial office and generally refuses to admit he has done anything improper.

Judge Gonzalez reiterates his conspiracy theory and offers character evidence to mitigate punishment. Yet it is well established that there can be no mitigation for maliciously motivated judicial misconduct. (*Spruance, supra,* 13 Cal.3d at p. 800), and we have found that on numerous occasions Judge Gonzalez in fact acted in bad faith. We therefore give his claim of mitigating circumstances no significant weight.

Judge Gonzalez' misconduct has been persistent and pervasive. Because we recognize the important role that the municipal court judge plays in our judicial system, we cannot risk the recurrence of petitioner's misconduct. We therefore order that Judge Mario P. Gonzalez of the Municipal Court for the East Los Angeles Judicial District be removed from office effective on the date of finality of this decision.

We recognize that since the advent of the Commission on Judicial Performance the bench has been governed by a higher standard of conduct than the bar. (*Geiler, supra,* 10 Cal.3d at p. 287.) Because we do not find that Judge Gonzalez' misconduct rises to the level of moral turpitude, dishonesty, or corruption, we order that despite his removal from office he be permitted to practice law in California, on condition that he pass the Professional Responsibility Examination required of applicants seeking readmission or reinstatement to the bar. (Cal. Rules of Court, rule 952(d).) All attorneys who have been suspended from practice must pass this examination before being readmitted (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 890-891 [126 Cal.Rptr. 793, 544 P.2d 929]), and we see no reason to exempt from this requirement a judge who, on removal from office, is automatically suspended from practicing law. (Cal. Const., art. VI, § 18, subd. (d).)

[L.A. No. 32200. Oct. 29, 1987.]

ROBERT H. FUREY, JR., a Judge of the Justice Court, Petitioner,
v.
COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

## SUMMARY

The Supreme Court ordered that a justice court judge be removed from office after it sustained eight charges of willful misconduct against him arising out of four separate incidents and ten charges of prejudicial conduct. The record established that the judge had engaged in numerous incidents involving abuse of his contempt power, that he had improperly attempted to influence judges in proceedings from which he had been disqualified under Code Civ. Proc., § 170.6, and that he had engaged in reprisals against an individual who had reported his alleged improprieties to the Commission on Judicial Performance. It also established that he continued to do so, even after his attention was drawn to his improprieties. The court held that the judge's relative inexperience on the bench did not mitigate his conduct, since lack of prior experience cannot mitigate wilful misconduct. It held that, in light of the type and number of offenses, the interests of protecting the judicial system and those subject to the power of judges would best be served by removing the judge from office. (Opinion by The Court.)

## HEADNOTES

Classified to California Digest of Official Reports, 3d Series

**(1a, 1b) Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review.**—The Supreme Court independently reviews the findings of the Commission on Judicial Performance regarding judicial discipline, to ensure that there is clear and convincing evidence to sustain the charge to a reasonable certainty. In doing so, the court gives special weight to the factual determinations by the masters, who are best able to evaluate the truthfulness of witnesses appearing before them. The ultimate disposition rests with the Supreme Court.

(2) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct or Prejudicial Conduct.**—A judge's behavior must constantly reaffirm fitness for the serious responsibilities of judicial office. Censure or removal from office is appropriate only when the judge fails to meet that standard by engaging in willful misconduct or prejudicial conduct.

(3a, 3b) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Distinguished From Prejudicial Conduct—Malice.**—The charge of willful misconduct, in the context of judicial performance, refers to unjudicial conduct which a judge, acting in his judicial capacity, commits in bad faith. The critical distinction between willful misconduct and the lesser charge of prejudicial conduct is the presence of malice. The bad faith constituting malice requires that the judge have committed acts he knew or should have known to be beyond his lawful power, and that he committed them for a purpose other than faithful discharge of judicial duties.

(4) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct.**—The charge of prejudicial conduct, in the context of judicial performance, comprises that which a judge undertakes in good faith, but which would nonetheless appear to an objective observer to be unjudicial and harmful to the public esteem of the judiciary. It also refers to unjudicial conduct committed in bad faith by a judge not acting in an official capacity.

(5) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct.**—A justice court judge, who had occupied his office only one or two months, engaged in prejudicial conduct during proceedings to account for a probationer's community service, by abusing the contempt power and engaging in hostility. In response to the probationer's question why the judge was harassing him, the judge held him in contempt and remanded him on the spot, despite the probationer's explanation that he had a medical appointment and was in pain. At a later probation hearing, occurring over defense counsel's objection that there was no written notice of the claimed violation, the judge remanded the probationer to the county jail for 180 days when he brought a note from a doctor outlining his medical condition, on the basis of the probationer's alleged failure to obey the judge's earlier order to come in with something more than a perfunctory letter from a doctor.

(6) **Judges § 6—Removal, Censure, and Other Discipline—Duplicative Findings.**—Although there is no rigid formula for determining the proper outcome in a case alleging improprieties of a judge, the number

and quality of the charges found to be true assumes importance as one of the guidelines the Supreme Court applies in determining discipline. Duplicative findings should, for that reason, be avoided, since obviously such actions cannot be equated with the criminal law, in which each additional accusation exposes the defendant to increased punishment. Thus, although supported by facts, charges appearing to focus on the same misconduct as that underlying other allegations should be discounted by the Commission on Judicial Performance in deciding what discipline to recommend.

(7) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct.**—A justice court judge, who had been on the bench for less than half a year, engaged in two chargeable instances of prejudicial conduct by his abuse of contempt power and impatience and hostility toward an unrepresented defendant. After the judge refused a traffic defendant's request for more time to pay a fine, the defendant muttered the word "tremendous" under his breath and the judge immediately adjudged him to be in contempt of court without following the contempt procedures of Code Civ. Proc., § 1211, and sentenced him to five days in jail. The judge then again held him in contempt and imposed another sentence of five days when, in response to the first contempt sentence, the defendant articulated a long voiceless palatal fricative ("shhh"), that the judge believed was followed by "it."

(8) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct.**—A finding of malice and willful misconduct was supported against a justice court judge who, after disqualification in a matter under Code Civ. Proc., § 170.6, wrote an unsolicited note to the newly assigned judge, recommending a stiffer than standard sentence on account of the defendant's alleged bad attitude. However, despite the obvious and grave impropriety of the judge's action, in light of his inexperience he engaged only in prejudicial conduct.

(9a, 9b) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct.**—A justice court judge engaged in prejudicial conduct against a mentally imbalanced, indigent defendant, where he first ordered that a bag the defendant brought to court be searched, even though it was out of the defendant's reach, and then remanded him for violation of Pen. Code, § 171b, when the search disclosed some food and a small paring knife. The search of the bag on the basis of rumors regarding an earlier knife incident in court was itself questionable, as was the judge's overreaction to a small paring knife that was, in any event, beyond the defendant's reach. The judge then summarily found the defendant in contempt when he uttered

delusional remarks, and imposed a penalty effectively resulting in a sentence of approximately 65 days in jail. Such punitive measures bore virtually no relation to the defendant's almost trivial underlying offense of jaywalking and his obvious need for psychiatric care.

(10) **Contempt § 6—Punishment—Incarceration—Limits.**—A justice court judge abused the contempt power when, in proceedings in which an indigent defendant appeared to discuss his inability to pay a fine for jaywalking, the judge imposed a fine of $500, to be served at $30 per day, in addition to a sentence of five days in jail based on the defendant's alleged contempt in bringing a small paring knife into the courtroom in a bag containing some food. The transcript revealed that the judge was aware that the defendant was indigent and would be compelled to work the fine off at the daily rate. The judge thus increased the penalty for contempt far beyond the five days permitted by Code Civ. Proc., § 1218, to an effective period of incarceration of some 22 days simply to insure that the defendant would be held in jail long enough for a mental examination.

(11) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct.**—A justice court judge engaged in willful misconduct by failing to conduct himself in a manner promoting public confidence in the impartiality of the judiciary and denying a defendant's right to be heard. In order to coerce guilty pleas in traffic court and thereby expedite the calendar, he announced to the assembled defendants that he would always believe a police officer in the event of a discrepancy between their respective versions of the facts, because a policeman would not jeopardize his career by engaging in the felony of perjury over such an insignificant matter. He later cut off a defendant during the presentation of his defense, without permitting him an opportunity to cross-examine a police officer who testified for the prosecution and to make a closing argument.

(12) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct.**—A justice court judge engaged in willful misconduct by his response to a citizen's letter to the Commission on Judicial Performance and her public announcements alleging that he had her evicted from his courtroom and had ordered the bailiff to punch her in the mouth. He wrote to the citizen directing her to appear before him and, when she did so, ordered her to appear in the municipal court to show cause why she should not be held in contempt for what he claimed was defamatory language in her letter to the commission. He then stated that he would hold her in contempt if she again appeared in his courtroom unless she came as a party or a witness. Such conduct failed to comply with the contempt procedures of Code Civ.

Proc., § 1211, and exhibited malice, since it was done for a vindictive and punitive purpose.

(13a, 13b) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct.**—A justice court judge engaged in willful misconduct by abusing the contempt power and failing to conduct himself in court proceedings in a manner promoting public confidence in the impartiality of the judiciary, where he improperly summoned and questioned a criminal defendant regarding an uncharged collateral matter, and then held her in contempt and immediately jailed her when she timely invoked her constitutional right to remain silent.

(14) **Contempt § 1—Nature of Contempt Power.**—In contempt proceedings, the court is often the prosecutor, judge, and jury; the contempt power is unique because it permits a single official to deprive a citizen of his or her fundamental liberty interest without all of the procedural safeguards normally accompanying such a deprivation. The power of contempt is necessarily of an arbitrary nature, and should, therefore, be used with great prudence and caution. A judge should bear in mind that he is engaged not so much in vindicating his own character, as in promoting the respect due to the administration of the laws.

(15) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct.**—The right to disqualify a judge, guaranteed by Code Civ. Proc., § 170.6, would be undermined and perhaps vitiated if the disqualified judge were permitted to circumvent the disqualification by initiating advice to another judicial officer on how to decide the matter. Hence, a justice court judge engaged in willful misconduct where, despite his acknowledgment of the need to avoid influencing another judge and his admission to two deputy public defenders that he had acted improperly in a previous case by sending a letter to the new judge assigned to a case after his disqualification, he again gave unsolicited advice to a judicial officer who was assigned to a case from which he had been disqualified under Code Civ. Proc., § 170.6.

(16) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct.**—A justice court judge committed willful misconduct where, apparently out of an ongoing and growing animosity towards a courtroom spectator, he adjudged her in contempt for being improperly attired and then, as she was being led out of the courtroom, he ordered that she not be allowed to make a telephone call, in violation of Pen. Code, § 851.5, subd. (a), thereby jeopardizing her ability to obtain relief by a petition for habeas corpus. Singling the

spectator out for such treatment clearly did not serve to promote public confidence in the impartiality of the judiciary, notwithstanding the fact that the spectator may have been a controversial and difficult individual; a judge's prime responsibility is the evenhanded dispensation of justice, even for the controversial and difficult persons in society.

(17a, 17b) **Judges § 6—Removal, Censure, and Other Discipline—Removal—Numerous Incidents of Wilful Misconduct and Prejudicial Conduct.**—Removal was the proper discipline for a justice court judge found guilty of eight charges of willful misconduct arising out of four separate incidents and ten charges of prejudicial conduct. Despite the judge's alleged inexperience, offered in mitigation of the punishment, he engaged in serious, repeated acts constituting abuse of the contempt power, improper attempts to influence matters from which he was disqualified, and taking reprisals against one who complained of his conduct to the Commission on Judicial Performance. Moreover, he continued to engage in such conduct after his attention was drawn to his improprieties.

[See **Cal.Jur.3d,** Judges, § 62 et seq.; **Am.Jur.2d,** Judges, § 18 et seq.]

(18) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Application of Sanction—Consideration of Facts.**—Choosing the proper sanction for judicial misconduct is an art, not a science, and turns on the facts of the case at bar.

(19) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Application of Sanction—Temporary Suspension From Office.**—A temporary suspension from office is not available as a sanction for judicial misconduct. The Supreme Court possesses no authority to apply such a sanction, since the Constitution specifically empowers it only to censure or remove a judge in cases of misconduct (Cal. Const., art. VI, § 18, subd. (c)).

(20) **Judges § 6—Removal, Censure, and Other Discipline—Purpose.**—The purpose of judicial disciplinary proceedings is not to punish errant judges, but to protect the judicial system and those subject to the awesome power that judges wield.

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COUNSEL

Dennis A. Fischer for Petitioner.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, William R. Weisman, Patra Woolum and Susan D. Martynec, Deputy Attorneys General, for Respondent.

## OPINION

**THE COURT.***—The Commission on Judicial Performance recommended that Judge Robert H. Furey, Jr., of the Catalina Justice Court District, Los Angeles County, be removed for "wilful misconduct in office" (hereafter wilful misconduct) and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (prejudicial conduct). (Cal. Const., art. VI, § 18, subd. (c).) The judge petitions this court for review. (Cal. Rules of Court, rule 919.) As will appear, we adopt the recommendation.

The petitioner became a member of the State Bar in 1977. For somewhat over a year he engaged in private practice. Later he served as a deputy district attorney in Los Angeles County for approximately two years and then, again for about two years, as a deputy public defender.

Early in 1983 petitioner donned his judicial robe, having won election to the Justice Court of the Catalina Judicial District. The justice court on Santa Catalina Island (Catalina) is in session one day each week. By assignment of the Judicial Council, the judge spends the remainder of the week sitting in a variety of municipal courts on the mainland.

Responding to allegations of possible improprieties by petitioner, the Commission on Judicial Performance (Commission) conducted a preliminary investigation pursuant to rule 904 of the Rules of Court. It concluded that formal proceedings should be instituted and notified petitioner accordingly. (Cal. Const., art. VI, § 18; Cal. Rules of Court, rules 901-922.) The notice of formal proceedings charged petitioner with several acts of wilful misconduct, prejudicial conduct, and persistent failure or inability to perform his duties.

Subsequently, we appointed three special masters—all distinguished jurists, two retired, one active—to hear the evidence and report to the

* Before Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., Arguelles, J., Kaufman, J., and Low (Harry W.), J.†

†Presiding Justice, Court of Appeal, First District, Division Five, assigned by the Chairperson of the Judicial Council.

Commission. (Cal. Rules of Court, rule 907.) After 11 days of hearings, the masters announced their findings of fact and conclusions of law. Petitioner filed objections to the masters' report and presented his views to the Commission. After adopting the substance of the report, the Commission, by a vote of seven to one, recommended to us that petitioner be removed from office.

In his petition to review the recommendation the judge does not, for the most part, dispute its factual underpinnings. Rather, he maintains that the actions complained of lacked malice and thus constitute at most the lesser charge of prejudicial conduct. He further contends that in any event removal from office is too severe a penalty for what he characterizes as no more than "serious procedural shortcomings."

## I. STANDARD OF REVIEW

**(1a)** As is our duty, we independently review the findings of the Commission to ensure that there is clear and convincing evidence to sustain the charge to a reasonable certainty. (*Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 365 [188 Cal.Rptr. 880, 657 P.2d 372 ]; *Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].) We do, however, give special weight to the factual determinations by the masters, who are best able to evaluate the truthfulness of witnesses appearing before them. (*Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 34 [207 Cal.Rptr. 171, 688 P.2d 551]; *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 623 [175 Cal.Rptr. 420, 630 P.2d 954].)

**(2)** A judge's behavior must constantly reaffirm fitness for the serious responsibilities of judicial office. (*Geiler, supra,* 10 Cal.3d at p. 281.) Censure or removal from office is appropriate only when the judge fails to meet this standard by engaging in wilful misconduct or prejudicial conduct. **(3a)** The charge of wilful misconduct refers to "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith." (*Id.* at p. 284.) **(4)** The lesser charge of prejudicial conduct comprises that which the judge undertakes in good faith but which would nonetheless appear to an objective observer to be unjudicial and harmful to the public esteem of the judiciary. It also refers to unjudicial conduct committed in bad faith by a judge not acting in an official capacity. (*Geiler, supra,* 10 Cal.3d at p. 284 & fn. 11; *Gonzalez, supra,* 33 Cal.3d at p. 365.)

**(3b)** The critical distinction between wilful misconduct and prejudicial conduct is the presence of malice. Before reviewing the charged incidents of misconduct we must consider petitioner's contention that the masters and

the Commission applied an incorrect definition of this state of mind. The report of the masters, adopted in substantially unchanged form by the Commission, refers to bad faith as "the intentional commission of acts which the judge knew or should have known were beyond his lawful power, engaging in a pervasive course of conduct of overreaching his authority." (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531 [116 Cal.Rptr. 260, 526 P.2d 268]; *Geiler, supra,* 10 Cal.3d at p. 286.) A similar standard is articulated in *Gonzalez,* which declares that bad faith is "equivalent to actual malice and encompasses the intentional commission of acts which the judge knew or reasonably should have known were beyond his lawful power, as well as acts which though within the ambit of lawful judicial authority are committed for purposes other than the faithful discharge of judicial duties." (*Gonzalez, supra,* 33 Cal.3d at p. 365.) Admittedly, these cases might be understood as suggesting that malice for purposes of judicial discipline is solely a question of the judge's actual or constructive knowledge of the scope of his authority.

Other cases make it plain, however, that in the present context malice includes a second element: improper purpose. Our recent opinion in *Gubler, supra,* 37 Cal.3d at page 46, footnote 7, specifically rejected the single-pronged standard applied by the masters and Commission in the case at bar. We there observed that bad faith requires a "malicious or corrupt purpose beyond mere actual or constructive knowledge of lack of power." (*Id.* at p. 59.) In *Wenger, supra,* 29 Cal.3d at page 622, footnote 4, we made this two-pronged standard even more explicit by defining bad faith as requiring that the judge "(1) committed acts he knew or should have known to be beyond his power, (2) for a purpose other than faithful discharge of judicial duties." We reaffirm the latter test.

## II. CHARGED INSTANCES OF MISCONDUCT

Applying the above standards, we evaluate the various incidents found by the masters and the Commission to constitute wilful misconduct or prejudicial conduct.[1]

### *The Hatton Incident*

**(5)** On February 10, 1983, petitioner presided over a proceeding involving Autry Lee Hatton, who, a year previously, had been convicted of

[1] Count I in the notice of formal proceedings alleged various charges of wilful misconduct and count II instances of prejudicial conduct, often arising out of the same incident. For ease of reference we have organized the discussion by incident rather than by count or specific charge of wrongdoing. In addition, count III accused petitioner of persistent failure or inability to perform the judge's duties. This is a lesser charge as to which the masters made no findings; we do not further consider it here.

vehicular manslaughter and sentenced by another judge to summary probation for two years on the condition that he complete five hundred hours of community service during the first year. Hatton, who was to account for his community service, attempted to explain to petitioner that he had a medical appointment and was in pain, but petitioner interrupted him, directing him to return in the afternoon with his attorney. He further warned the defendant that if he had to tell him one more time, he would find him in contempt. Hatton replied "All right. I don't know why you are harassing me." Petitioner immediately held him in contempt of court for his utterance and remanded him "right now."

The matter was trailed into the afternoon, at which time counsel appeared on behalf of defendant Hatton. Counsel objected to petitioner's order that the matter be put over to the following day and requested him to set bail, arguing that the defendant was experiencing health problems and had a medical appointment for that day, that he was in any event eligible for release on his own recognizance, and that he had never failed to appear in the past. Petitioner set bail and ordered Hatton to remain in custody and to be medically examined at the county jail forthwith.

The following day petitioner purged Hatton's contempt following an apology for the incident. He then observed that his sentence seemed very lenient in view of the seriousness of the crime, and he noted that Hatton had apparently performed only about half of the required 500 hours of community service. After his counsel described the defendant's medical condition, petitioner—on the recommendation of the deputy city attorney—summarily revoked probation and set a formal probation violation hearing for the following month.

Petitioner presided over the probation hearing, which occurred despite defense counsel's objection that there was no written notice of the claimed violation. Although Hatton had a note from a doctor outlining his medical condition, petitioner chided him for his alleged failure to obey his earlier order to "come in with something more than a perfunctory letter from the doctor" and had him remanded to the county jail for 180 days. The appellate department of the superior court subsequently reversed the order revoking probation and the jail sentence, directing the municipal court to terminate all proceedings against Hatton.

Petitioner was charged with wilful misconduct for abuse of the contempt power, denying the defendant his full right to be heard according to law, failure to conduct himself in court proceedings in a manner that promotes public confidence in the impartiality of the judiciary, and engaging in a vengeful and punitive pattern of conduct toward the defendant. He was also

charged with prejudicial conduct in acting with unwarranted impatience, discourtesy, or hostility toward an unrepresented defendant.

The masters made no finding on the charge of vengeful and punitive conduct or on the alleged denial of the defendant's right to be heard. They concluded that the charge of prejudicial conduct for impatience or hostility toward an unrepresented defendant was true. But considering the mere one or two months that petitioner had occupied his office at the time of the incident and his understandable reliance on the representations of an experienced prosecutor, they determined that his behavior in the remaining matters (abuse of the contempt power and failure to conduct himself in a manner that promotes public confidence in the impartiality of the judiciary) was not sufficiently aggravated to constitute wilful misconduct, but was merely prejudicial conduct.

Petitioner has stipulated to the material facts of this incident and does not contest that his actions were prejudicial to the administration of justice. In any event we are persuaded that clear and convincing evidence supports the Commission's findings of fact on the point.

(6) We note, however, that there is considerable overlap in the three findings of prejudicial conduct. Obviously, actions such as these cannot be equated with the criminal law, in which each additional accusation exposes the defendant to increased punishment. Nonetheless, although there is no rigid formula for determining the proper outcome in a case alleging judicial impropriety, the number and quality of the charges found to be true assumes importance as one of the guidelines we apply in making the difficult decision of discipline. (*Wenger, supra,* 29 Cal.3d at p. 653; see also *Gonzalez, supra,* 33 Cal.3d at p. 377.) Duplicative findings should for that reason be avoided. The charges of abuse of the contempt power, as well as impatience and hostility toward Hatton, are two related but conceptually distinct allegations of prejudicial conduct that have properly been found true. But the charge that petitioner failed to conduct himself in a manner promoting public confidence in the judiciary, although supported by the facts, appears to focus on the same misconduct that underlies the other two allegations, and we therefore dismiss it.[2]

*The Kabbaze Incident*

(7) While petitioner was presiding in the Los Angeles County Municipal Court, Anthony Kabbaze appeared before him in propria persona to

[2]We do not wish to intimate that we object to the *bringing* of potentially overlapping charges; obviously, the Commission may make any charges justified by the evidence. But because the disposition of a case depends in large measure on the nature and number of charges found to be true, we should not consider overlapping findings in reaching our decision, nor should the Commission take them into account in making its recommendation.

request more time to pay a traffic fine. Another judge had previously imposed on him a sentence of $300 or 10 days in prison. Petitioner refused the request, telling him "it is $300 or 10 days today." Kabbaze pointed out that others in the court were obtaining continuances, but petitioner warned him to say nothing further and remanded him to serve the 10 days. As Kabbaze was being directed toward the lockup, he muttered the word "tremendous" under his breath. Petitioner immediately adjudged him to be in contempt of court and sentenced him to five days in jail. Kabbaze then articulated a long voiceless palatal fricative ("shhh") that petitioner believed was followed by "it"; he again held Kabbaze in contempt and imposed another sentence of five days. Later that day a deputy public defender interceded on his behalf and persuaded petitioner, on Kabbaze's apology, to purge the contempt and grant him a continuance to pay the balance of the fine.

The record supports the masters' conclusion that the above events are true. They further resolved that the charge of abuse of the contempt power as well as that of impatience and hostility toward an unrepresented defendant constituted merely prejudicial conduct in these circumstances. It is undisputed that petitioner did not follow the mandated contempt procedure (Code Civ. Proc., § 1211) and acted unjudiciously toward Kabbaze. But petitioner testified that he acted solely to maintain control of the crowded courtroom and that he did not intend that Kabbaze remain in custody beyond that afternoon. We note also that he had then been on the bench for less than half a year, and we therefore adopt the conclusion of the masters and the Commission that this incident reflects merely two charges of prejudicial conduct.

*The Hughes Incident*

(8) Defendant Bradley Hughes appeared before petitioner on Catalina and filed a motion to disqualify him under Code of Civil Procedure section 170.6. Petitioner ordered the case transferred to San Pedro. He then wrote an unbidden note to the judge of that court, advising him the "standard" sentence for the violation in question was $100 or three days in jail, but that he recommended a stiffer sentence on account of Hughes's alleged bad attitude.

The notice of formal proceedings included two charges of wilful misconduct arising out of this episode: offering unsolicited advice to another judge on a case from which he had been disqualified, and vengeful and punitive conduct. We dismiss the latter because it appears in this case merely to specify his motivation in the giving of the advice, thus duplicating the focus of the former charge.

The allegation of giving unsolicited advice is amply confirmed in the record. The masters found that the communication was for a vindictive and punitive purpose in view of the fact that petitioner was disqualified and had earlier placed Hughes in custody for inability to post bail on the offense; this would support a finding that he acted with malice and that sending the note thus constituted wilful misconduct. Despite the obvious and grave impropriety of petitioner's action, the masters and Commission legitimately concluded that in light of petitioner's inexperience and his admission soon afterwards that his action was wrong, he engaged only in prejudicial conduct.

*The Hamilton Incident*

**(9a)** Petitioner was presiding in the Los Angeles Municipal Court when John Hamilton appeared before him to discuss his inability to pay a fine. Petitioner had presided over his trial for failure, as a pedestrian, to yield the right of way to a vehicle. He knew that Hamilton was indigent and possibly mentally imbalanced. He also believed, on the basis of reports of prior incidents in the courthouse, that he was potentially violent. He thus ordered that Hamilton's bag (which was out of his reach) be searched. This revealed some food and a small paring knife with a thin serrated blade measuring barely four and one-quarter inches. Petitioner promptly found Hamilton in violation of Penal Code section 171b, which prohibits bringing into a courtroom a knife with a blade in excess of four inches, and had him remanded, setting bail at $10,000.

That afternoon, on petitioner's initiative, a deputy public defender appeared with Hamilton. Petitioner found Hamilton in contempt for entering the courtroom with a knife and sentenced him to five days in jail. He further ordered a mental evaluation under Penal Code section 4011.6. When the deputy public defender objected to the examination, petitioner imposed on Hamilton a $500 fine, to be served at the rate of $30 per day, while continuing to insist on a mental evaluation. Hamilton reacted by informing petitioner that he was "out of order" and "schizophrenic," and that he, Hamilton, was "God" and "part heir of the Giannini family." Petitioner found him guilty of two more counts of contempt, each of which was punished by a consecutive sentence of an additional five days, plus fines of $500 for each count, to be served at the rate of $30 per day. The punishment thus amounted to 15 days in jail and a total fine of $1,500. The superior court subsequently granted Hamilton's petition for a writ of habeas corpus.

The Commission charged petitioner with abuse of the contempt power (wilful misconduct) and unwarranted impatience, discourtesy and hostility towards an unrepresented defendant (prejudicial conduct). The masters and

the Commission concluded that petitioner's fears arising out of reports of a prior knife incident, as corroborated by the bailiff, mitigated petitioner's conduct, and they therefore found only prejudicial conduct.

We agree that the actions at the very least reflect conduct prejudicial to the administration of justice. Remanding Hamilton to custody initially could not be justified for failure to pay the fine for the underlying infraction nor was it appropriate as punishment for contempt for having a knife in the courtroom in the absence of written findings and an order. Indeed, the search of a bag on the basis of rumors regarding an earlier incident was itself questionable, as was petitioner's overreaction to a small paring knife that was in any event beyond the defendant's reach. (Cf. *In re Jasper* (1973) 30 Cal.App.3d 985 [106 Cal.Rptr. 754].)

**(10)** Even more troubling is the fact that when the deputy public defender later questioned the order for a mental observation because the examination might not be possible within the five-day period of incarceration, petitioner imposed a fine of $500, to be served at $30 per day, in addition to the original sentence of five days in jail. The transcript reveals that petitioner was aware that Hamilton was indigent and would be compelled to work the fine off at the daily rate. He thus increased the penalty for contempt far beyond the five days permitted by law (Code Civ. Proc., § 1218; *In re Antazo* (1970) 3 Cal.3d 100 [89 Cal.Rptr. 255, 473 P.2d 999]) to an effective period of incarceration of some 22 days simply to ensure that Hamilton would be held in jail long enough for a mental examination.

**(9b)** The ensuing two contempt counts, triggered by Hamilton's delusional remarks, suffer from all the shortcomings of the foregoing but are further defective because they impose consecutive sentences for a single course of conduct. (See, e.g., *In re Keller* (1975) 49 Cal.App.3d 663 [123 Cal.Rptr. 223].) The result is that a mentally disturbed, indigent defendant—who had the misfortune to have a small paring knife in his bag while requesting an extension of time to pay a $50 fine for jaywalking—was effectively sentenced by petitioner to approximately 65 days in jail. There is little doubt that Hamilton may have been unstable and in need of treatment, but these punitive measures bear virtually no relation to his almost trivial offense and his obvious need for care.

*The Anderson Incident*

**(11)** On February 14, 1984, petitioner was assigned to hear traffic infraction cases in the South Bay Judicial District. Upon taking the bench he made some preliminary remarks and then announced to the assembled defendants that if there was a discrepancy between their version of the facts

and that of a police officer, he would always believe the latter because perjury was a felony and a policeman would not jeopardize his career over such an insignificant matter.

Defendant Anderson appeared in propria persona to contest a traffic citation. A police officer testified for the prosecution. During his defense, Anderson commenced reading a Vehicle Code section. Petitioner, cut him short and found him guilty, imposing a fine and penalty assessment. The appellate department of the superior court later reversed the judgment because Anderson had been denied an opportunity to cross-examine the police officer and to make a closing argument.

The masters' conclusion, adopted by the Commission, was that petitioner's announcement to the assembled defendants constituted wilful misconduct, i.e., failure to conduct himself in a manner that promotes public confidence in the impartiality of the judiciary. Also found to be wilful misconduct was his denial of a defendant's right to be heard by preventing him from cross-examining the witness against him and making a closing argument. We note that both aspects of the incident interfered with fundamental precepts of our judicial system. In fact, petitioner does not dispute that he was or should have been aware that such actions would be highly improper. As both a former deputy district attorney and a former deputy public defender he could scarcely have avoided being intimately familiar with the presumption of innocence and the right of an accused to cross-examine the witnesses against him.

Thus the only issue is whether the second prong of the definition of malice is met. As noted above, there must be "clear and convincing evidence" that his purpose was "malicious or corrupt." (*Gubler*, supra, 37 Cal.3d at p. 59.) The Commission contends that his corrupt purpose was to coerce guilty pleas and thereby expedite the calendar. We therefore defer to its finding and conclude that petitioner was guilty of wilful misconduct.

*The Cuskaden Incidents*

**(12)** Several charges of misconduct relate to a Ms. Cuskaden, who resided on Catalina during much of the time during which petitioner occupied the bench on the island and was well known in the courtroom, both as litigant and spectator.

1. *August 19, 1983*

In mid-August 1983 petitioner became aware of a letter that Ms. Cuskaden wrote to the Commission in which she alleged that he had her evicted

from the courtroom and had ordered the bailiff, in doing so, to punch her in the mouth. There is evidence in the record that she posted these charges in various public places in Avalon. Petitioner wrote to Ms. Cuskaden and directed her to appear before him on August 19.[3] On that date he inquired of her whether the letter to the Commission bore her signature. When she invoked her right to remain silent, petitioner ordered her to appear in the Long Beach Municipal Court to show cause why she should not be held in contempt for the language in her letter to the Commission. He further informed her that if she were adjudged in contempt and remanded to custody, he would recommend a mental evaluation of her pursuant to Penal Code section 4011.6. Finally, unless she came as a party or a witness, he would hold her in contempt if she again appeared in his courtroom.

On the basis of the report of the masters, the Commission found two charges of wilful misconduct to be true: that petitioner had abused the contempt power and that he had failed to conduct himself in a manner promoting public confidence in the judiciary. It concluded that the acts involved malice in that he "intentionally committed acts which he knew or should have known were beyond his lawful power," engaging in a "pervasive course of conduct of overreaching his authority." (*Geiler,* supra, 10 Cal.3d at p. 286; see also *McCartney,* supra, 12 Cal.3d at p. 531.)

The Commission's findings are fully justified. Petitioner once again failed to follow the contempt procedures mandated in Code of Civil Procedure section 1211. Furthermore, petitioner should have known that his actions would undermine public confidence in the impartiality of the judiciary. His summoning Ms. Cuskaden into court at the very least suggests the appearance of singling her out to punish her for complaints about him to the Commission.

In addition, the conduct exhibited malice. Petitioner claims that he simply intended to ask her to retract the defamatory imputations of the posted letter.[4] Even if this explanation is true, the matter should have been handled by a judge who was not personally embroiled in it. (See *Wenger,* supra, 29 Cal.3d at p. 629.) And the masters characterized his actions as "vindictive" and "punitive." It stretches credulity to claim that summoning someone

[3] Ms. Cuskaden appears also to have posted copies of the letter from petitioner, adding to it her annotations. Beneath his signature she wrote that the judge was trying to "extradite" her from the island, stated that he had her thrown out of the courtroom and had his bailiff punch her, and reported that details were to be found in her new novel, "From House Shoes to Hand Grenades." She invited the community to come to the August 19 proceeding.

[4] His explanation is belied by his stipulation in lieu of testimony, which states that petitioner ordered Ms. Cuskaden to appear in Long Beach to show cause why she should not be held in contempt for the language of her letter. There is no mention of an intended request for a retraction.

into court and initiating a contempt proceeding for writing a letter to the Commission could be done for a proper judicial purpose.

In relation to this incident petitioner was also charged with wilful misconduct for engaging in a vengeful and punitive pattern of conduct by improperly summoning Ms. Cuskaden to appear before him and later attempting to banish her from his courtroom. The Commission adopted the finding of the masters that these charges constituted only prejudicial conduct. Because they largely duplicate the two charges of wilful misconduct that we have concluded are true, we lay aside these findings.

2. *Incident of September 23, 1983*

**(13a)** Petitioner again summoned Ms. Cuskaden into his courtroom by a letter dated September 15, 1983. When she appeared eight days later, she attempted to disqualify him by a motion pursuant to Code of Civil Procedure section 170.6. Petitioner denied the motion as inappropriate in a contempt hearing. A peace officer then testified that he had seen Ms. Cuskaden in line to board the ferry from the island to Long Beach at approximately 11:15 a.m. on September 12. Petitioner held Ms. Cuskaden in contempt for violating his order to appear at 9 a.m. that same day in Long Beach in connection with her letter to the Commission and the material she had posted in Avalon. He sentenced her to five days in jail and a fine of $500, which could be served at the rate of $30 a day. She was remanded forthwith.

Ms. Cuskaden was brought back to petitioner's courtroom that afternoon. He had learned that her teenage son might be living alone in a motel in Avalon. A local ordinance made it an offense to allow a motel room to be occupied solely by someone under the age of 18. When he questioned her about her son's age and residence, she invoked her right to remain silent. Petitioner forthwith held her in contempt and sentenced her to an additional $500 fine and five more days in jail. On September 28 the Los Angeles Superior Court released Ms. Cuskaden on a writ of habeas corpus, and the following month it ruled the contempt orders fatally defective because the timely order required by Code of Civil Procedure section 1211 had not been filed.

The Commission concluded this series of events constituted abuse of the contempt power, failure to conduct himself in court proceedings in a manner that promotes public confidence in the impartiality of the judiciary, and vindictive and punitive conduct in improperly questioning and jailing Ms. Cuskaden regarding an uncharged collateral matter over her timely invocation of the constitutional right to remain silent. The Commission further

found that the vindictive and punitive conduct in improperly summoning Ms. Cuskaden was prejudicial conduct.

The evidence once again supports these conclusions. Petitioner knew or should have known that his actions exceeded the bounds of his authority. The contempt orders were, as in the other instances, procedurally irregular. Furthermore, the masters found that Ms. Cuskaden had indeed appeared before Judge Simpson in the Long Beach Municipal Court on the day in question, and that the case was continued to September 26 for a hearing. Ironically, in his eagerness to ensure her presence in Long Beach, petitioner appears to have held her in contempt despite the fact that she went to the hearing on the appointed day, and by having her jailed for 10 days for the 2 alleged contempts on September 23 he prevented her from attending the continued contempt hearing in Long Beach on September 26.

Equally disturbing is petitioner's ordering her into his courtroom later to question her about her son's occupancy of a motel room and the addition of another count of contempt when she refused to testify on a matter over which he palpably had no jurisdiction. Finally, the imposition of fines that were sure in her case to lead to additional jail time violates the precepts of *In re Antazo, supra,* 3 Cal.3d at page 115.

**(14)** In contempt proceedings the court is often the prosecutor, judge, and jury. The contempt power is virtually unique in our system of justice because it permits a single official to deprive a citizen of his fundamental liberty interest without all of the procedural safeguards normally accompanying such a deprivation. Petitioner would have done well to recall the words of one of this court's first opinions, a case involving the future Justice Stephen J. Field: "The power [of contempt] is necessarily of an arbitrary nature, and should be used with great prudence and caution. A Judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws . . . ." (*People* v. *Turner* (1850) 1 Cal. 152, 153.)

**(13b)** We must, in determining whether malice existed, also assess petitioner's purpose. He suggests that summoning Ms. Cuskaden into court was a well-meaning attempt to teach her that there was no future in disobeying lawful orders of the court. The masters, however, once again found that petitioner had engaged in vindictive and punitive conduct. His eagerness to compel that Ms. Cuskaden be made to account for her letter criticizing him to the Commission and the inquisitorial proceeding regarding her son—who would be living alone only because his mother was wrongfully held in jail—support a strong inference that his motive was to punish her and perhaps to

drive her off the island. We therefore adopt the Commission's findings on this incident.

3. *The Letter to Judge Herrington*

**(15)** On March 28, 1984, Ms. Cuskaden appeared as a defendant in the Catalina Justice Court. She filed an affidavit of prejudice against petitioner under Code of Civil Procedure section 170.6. The case was then transferred to the South Bay Judicial District.

Petitioner subsequently wrote a letter to Judge Herrington of the latter court, advising her that the Cuskaden case would likely be heard in her division. The note continued that "since I have been papered, it goes without saying that I must use discretion and not attempt to influence you or any other judge." Ms. Cuskaden, he nevertheless reported, had recently been convicted by an Avalon jury but it was no longer possible to impanel an impartial group of jurors on the island. Furthermore, he warned Judge Herrington that "any statements made by this defendant should be viewed with skepticism. On at least two occasions, this defendant has libeled my bailiff and myself. . . . [H]er ability to distort and/or lie can be most persuasive."

The notice of formal proceedings contained two charges of wilful misconduct arising out of this occurrence: offering unsolicited advice to another judge on a case from which he had been disqualified, and vengeful and punitive conduct. Although the two charges focus on different aspects of the writing of the letter, they overlap considerably. We therefore adopt only one of the Commission's findings: that offering unsolicited advice to another judge constituted wilful misconduct. As we observed in *Gubler, supra,* 37 Cal.3d at page 54, "Since petitioner was disqualified under section 170.6 from hearing the . . . issue, it was highly improper for him to give unsolicited advice to another judicial officer on how to decide it. The right to disqualify a judge, guaranteed by section 170.6 [citations], would be undermined and perhaps vitiated if the disqualified judge were permitted to circumvent the disqualification by initiating advice to another judicial officer on how to decide the matter."

The masters observed that although in the similar Hughes incident they had found the rendering of unsolicited advice to be the lesser charge of prejudicial conduct owing to petitioner's contrition and lack of experience, in the present instance he not only should have known, but obviously was

actually aware, that his action was highly improper.[5] Petitioner does not dispute this finding. But he contends that his motivation was merely to warn Judge Herrington and protect the court from possible misrepresentation. The masters, to whom we customarily defer in questions of the credibility of witnesses, characterized his explanation as "disingenuous" and stated that the gratuitous transmission of his views to Judge Herrington following his disqualification was done for vindictive and punitive motives. (Cf. *Gubler, supra,* 37 Cal.3d at pp. 52-54.) We agree. Indeed, petitioner virtually condemned himself by acknowledging in his letter the need to avoid influencing another judge and then proceeding to do exactly that.

4. *The Dress Code Violation*

**(16)** Posted in the Catalina courtroom was a sign with the following text: "Notice!! All parties and witnesses appearing before the court will be properly attired. Long pants and shirt. No shorts, swim suits or bare feet allowed in court room at any time." This is understandable in a resort community.

On June 15, 1984, Ms. Cuskaden entered the court as a spectator, wearing shoes, jeans, and a sweatshirt that left a shoulder bare, revealing the strap of a piece of underclothing or a bathing suit. Before court was in session, petitioner asked his bailiff to inform her that she was improperly attired and would have to leave. She declined to do so. Petitioner then took the bench and told her that she was in violation of the dress code. When she refused to leave, he held her in contempt of court and sentenced her to five days in jail and a $500 fine. She was transported to a division of the Los Angeles County Jail on the mainland, only to be released on her own recognizance later that day after she petitioned the superior court for a writ of habeas corpus. A month later the superior court granted the petition and vacated the contempt order.

Following his adjudication that Ms. Cuskaden was in contempt, petitioner ordered that she not be allowed to make a telephone call. He contends that as she was being led out of the courtroom she shouted that she wished to make a call, and that he issued the prohibition because he interpreted her utterance as a request to use the telephone on the court clerk's desk. However, we are inclined to agree with the masters who found that petitioner meant to preclude her from making *any* telephone calls. It is clear that this interpretation was given petitioner's utterance by his bailiff, who wrote on the booking slip that "Judge orders no phone calls." Because the bailiff was

[5]Soon after the earlier Hughes incident, petitioner had met with two deputy public defenders, admitted that sending the letter had been improper, and promised not to do so again.

at the scene and had worked with petitioner for some time, his contemporaneous understanding of the meaning of the statement should be given substantial weight.

The Commission based two charges of wilful misconduct on this incident: abuse of the contempt power and failure to conduct himself in a manner that promotes public confidence in the impartiality of the judiciary. We concur in its conclusion that the evidence substantiates the charges. As to the contempt power, petitioner again failed to make the required written findings and an order. He seems to have learned nothing from the fact that several of his contempt orders had been set aside by higher courts for these procedural defects.[6] And once more he imposed a monetary fine on an indigent, ordering confinement if it was not paid and thus effectively quadrupling the permissible period of confinement. Furthermore, petitioner violated Ms. Cuskaden's statutory right to use the telephone (Pen. Code, § 851.5, subd. (a)), thereby jeopardizing her ability to obtain relief by a petition for habeas corpus. Singling her out for such treatment clearly does not serve to promote public confidence in the impartiality of the judiciary.

Moreover, we have seen ample confirmation of petitioner's growing animosity toward Ms. Cuskaden. These incidents do not merely reflect "procedural shortcomings," as he would have it, but are part of a disturbing pattern of wilful misconduct toward a litigant and courtroom spectator. As the masters noted, he was probably dealing with Ms. Cuskaden in a manner applauded by those who believe her to be a controversial and difficult individual. But a judge's prime responsibility is the evenhanded dispensation of justice, even for the controversial and difficult persons in society. We thus conclude that in indulging his animosity toward Ms. Cuskaden petitioner was guilty of wilful misconduct in office.

## III. DISPOSITION

**(1b)** We have seen that the Commission, by a vote of seven to one, recommended that petitioner be removed from office. While we give serious consideration to the recommendation and its near-unanimity, the ultimate disposition rests with this court. (*Spruance* v. *Commission on Judicial Qua-*

[6]Whether Ms. Cuskaden was truly in contempt is not clear because of this failure to make findings. If she was cited for her dress, the contempt was improper because the sign was not directed at spectators. On the other hand, petitioner maintains that the masters misconstrued the order and that Ms. Cuskaden was held in contempt for her refusal to obey the order to leave and her use of vulgar language in the courtroom. But he stipulated earlier that he "found her in contempt of his order setting forth the dress code." Furthermore, his bailiff testified that "she didn't go into profanity this time." Petitioner therefore cannot now argue that the facts were otherwise, especially because he is himself responsible for the lack of findings.

*lifications* (1975) 13 Cal.3d 778, 799-800 & fn. 18 [119 Cal.Rptr. 841, 532 P.2d 1209].)

**(17a)** We have sustained eight charges of wilful misconduct against petitioner, arising out of four separate incidents. In addition, we have sustained 10 charges of prejudicial conduct. **(18)** Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar. **(17b)** Nevertheless, it is worth comparing the charges sustained here with those in other judicial discipline cases.

Since 1964 this court has ordered the removal of five judges. The first such case was *Geiler, supra,* 10 Cal.3d 270, in which a judge was removed for several instances of wilful misconduct, including the use of vulgar language and sexual innuendo, prodding a deputy public defender with a dildo, curtailing cross-examination, and interfering with the attorney-client relationship. In *Spruance, supra,* 13 Cal.3d 778, a judge was removed from office for acting with hostility toward an attorney by failing to properly disqualify himself, maliciously attempting to prejudice a criminal defendant's case, trying to influence the disposition of criminal cases as a favor to friends and political supporters, and appointing friends and supporters as attorneys in cases in which the defendant was not entitled to counsel at public expense. We concluded in *Cannon* v. *Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 681 [122 Cal.Rptr. 778, 537 P.2d 898], that the petitioner had engaged in 21 acts constituting wilful misconduct and 8 instances of prejudicial conduct. Among the former were cases of abuse of the contempt power, unlawful interference with the attorney-client relationship, arbitrary setting of bail, instilling submissiveness in attorneys and ridiculing members of the bar, abusing the prerogatives of office, and several instances of bizarre behavior.

The next case in which a judge was removed was *Wenger, supra,* 29 Cal.3d 615. There we sustained 10 charges of wilful misconduct in 9 separate incidents. The wilful misconduct included failure of the judge to disqualify himself, abuse of the contempt power, and banishing a prosecutor from the courtroom because he suspected she had communicated with the Commission regarding his judicial performance. Finally, our sustaining of 18 charges of wilful misconduct and 2 charges of prejudicial conduct led to removal in *Gonzalez, supra,* 33 Cal.3d 359, 377. Among the incidents of wilful misconduct were interceding in criminal matters for the benefit of friends and benefactors, arbitrary bail-setting, impugning the character of his colleagues, abuse of judicial authority, making personal verbal attacks, and uttering ethnic and sexual slurs.

Petitioner's transgressions are not as numerous or as colorful as those in *Cannon,* for example, which is admittedly a rather egregious illustration of judicial malfeasance. His case exhibits many similarities with *Wenger,* however, both as to the number of sustained charges of wilful misconduct and the types of incidents. In both this case and *Wenger* the primary instances of misconduct consisted of abuses of the contempt power, failure of the judges to disqualify themselves, and by various means improperly injecting themselves into the adversarial process. And in each case the judge took reprisals against someone he knew or suspected had complained of his conduct to the Commission.

Petitioner concedes that some discipline is appropriate. But he maintains that the confluence of his inexperience on the bench and unusually trying circumstances mitigates his conduct. Several witnesses praised his energy and devotion. He further alleges that before the recommendation of sanctions by the Commission he became aware of his shortcomings and began attending judicial education meetings.

We have no doubt that petitioner was industrious, but hard work does not mitigate wilful misconduct. (*Wenger, supra,* 29 Cal.3d at p. 653.) As we stated in *Cannon, supra,* 14 Cal.3d at page 706, "It is manifest . . . that a lack in the quality of justice cannot be balanced by the fact that justice, such as it is, is administered in large quantities." Nor are petitioner's expressions of remorse especially persuasive. As in *Wenger,* "The difficulty with his professed enlightenment is its delayed arrival." (*Wenger, supra,* 29 Cal.3d at p. 654.) All the sustained charges of wilful misconduct occurred after he became aware that Ms. Cuskaden had been in contact with the Commission, and hence after he should have been on notice that an investigation of his conduct was possible. And he seems to have learned little from his mistakes: he improperly held Ms. Cuskaden in contempt after similar orders had twice been overturned by a higher court for procedural irregularities, and he sent an unsolicited letter to Judge Herrington even after he had been warned of its impropriety in the Hughes incident.

Petitioner urges leniency because of his inexperience. Here again an analogy with *Wenger* is apposite. Judge Wenger had been a deputy district attorney for five years and had been in office a mere three years before the Commission notified him that it was investigating his conduct; the Commission filed its recommendation for removal only five years after he took office. We rejected Judge Wenger's appeals to inexperience, noting that he should have known criminal procedure and that his abuses in civil matters were too serious to be explainable by lack of training. (*Wenger, supra,* 29 Cal.3d at pp. 653-654.) Like Judge Wenger, petitioner had been an attorney for five years, largely as a deputy district attorney and deputy public defend-

er, before assuming the bench. And in both cases the misconduct occurred during the first few years that the judges were in office. In any event, lack of prior experience simply cannot mitigate wilful misconduct: if petitioner did not have the legal background and temperament to avoid committing malfeasance in office, he should not have sought election to the court.

We recognize that all the sustained charges of wilful misconduct involved Ms. Cuskaden, a person described in the record as a foulmouthed and intentionally disruptive spectator and litigant. But the mitigating weight of Ms. Cuskaden's courtroom demeanor is slight. (Cf. *Wenger, supra,* 29 Cal.3d at p. 637.) It was petitioner's duty to deal with such difficulties by lawful and proper means. As Justice Douglas of the United States Supreme Court has written, "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." (*Craig* v. *Harney* (1947) 331 U.S. 367, 376 [91 L.Ed. 1546, 1552, 67 S.Ct. 1249].)

**(19)** Finally, petitioner suggests that instead of removal we order a temporary suspension from office, a sanction that has been applied in some of our sister states. (Cf. *Matter of Inquiry Concerning a Judge No. 693* (1984) 253 Ga. 485 [321 S.E.2d 743]; *Matter of Martinez* (1982) 99 N.M. 198 [656 P.2d 861]; *Matter of Hague* (1982) 412 Mich. 532 [315 N.W.2d 524]; *Matter of Ross* (Me. 1981) 428 A.2d 858.) We possess no such authority: the Constitution specifically empowers us only to censure or remove a judge. (Cal. Const., art. VI, § 18, subd. (c).)

**(20)** The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield. (*Wenger, supra,* 29 Cal.3d at p. 654.) For all the reasons stated herein, that purpose will best be served in this case by adopting the recommendation of the masters and of the Commission.

We order that Judge Robert H. Furey, Jr., of the Catalina Justice Court District, Los Angeles County, be removed from office. Because the misconduct for which he is removed does not amount to grounds for disbarment or suspension from the practice of law, he shall, if otherwise qualified, be permitted to continue to practice law (Cal.Const, art. VI, § 18, subd. (d); see *Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d at p. 654), but he shall be required to pass the Professional Responsibility Examination within one year (see *Gonzalez* v. *Commission on Judicial Performance, supra,* 33 Cal.3d at p. 378); *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891, fn. 8 [126 Cal.Rptr. 793, 544 P.2d 929]). This order is final forthwith.

Petitioner's application for a rehearing was denied December 17, 1987, and the opinion and judgment were modified to read as printed above.

[S.F. No. 25086. May 31, 1988.]

RICHARD RYAN, a Judge of the Municipal Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

SUMMARY

On review of a recommendation of the Commission on Judicial Performance that a municipal judge be removed from office, the Supreme Court adopted the recommendation and ordered the judge removed, holding the judge had committed four acts of willful misconduct and fourteen acts of prejudicial conduct. It held the judge's conduct exhibited a pattern of personal embroilment in the cases assigned to him, and showed a loss of temperance and objectivity on several occasions, resulting in prejudice to the parties appearing before him or an abuse of his contempt power. The court also held that the judge was given ample opportunity to conduct adequate discovery, and that admonishment by commission investigators to witnesses not to discuss the matter with the judge prior to the proceedings did not deny the judge due process. The court also rejected the contention the judge was denied due process because the commission limited argument to 45 minutes rather than the 2 hours he requested, noting the judge had the opportunity in his briefs to address every charge in detail. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Judges § 6—Removal, Censure, and Other Discipline—Commission on Judicial Performance—Court Review of Findings.**—In reviewing findings by the Commission on Judicial Performance, the reviewing court properly has before it only those charges that the commission sustained.

(2) **Judges § 6.4—Removal, Censure, and Other Discipline—Preliminary Investigations—Admonishment of Witnesses—Propriety.**—Prior to disciplinary proceeding against a judge, the Commission on Judicial

Performance properly admonished witnesses during the preliminary investigation that they were not to talk to anyone, including the judge, about the subject of the investigation. Such admonishments were mandated by Cal. Const., art. VI, § 18, and Cal. Rules of Court, rule 902(a), which require that preliminary investigations by the commission be strictly confidential. The judge was not deprived of his due process rights by the admonishments, which did not prevent him from conducting reasonable discovery after formal proceedings were brought against him.

(3) **Judges § 6.4—Removal, Censure, and Other Discipline—Admonishment of Witnesses—Propriety—Burden of Showing Prejudice.**—In a disciplinary action against a judge, in which the judge claimed that admonishments by the Commission on Judicial Performance to witnesses to be silent violated his due process rights, the commission correctly placed the burden on the judge to identify (1) which witnesses were admonished, (2) which witnesses refused to speak to the judge because of the admonishments, and (3) how such refusal prejudiced the judge's preparation for the hearing. The admonishments did not deny the judge due process, since the only showing made by the judge was that substantially all of the witnesses were admonished not to speak to anyone, that some of the witnesses were admonished not to speak to him personally, and that four witnesses did refuse to speak with him. Moreover, the judge later failed to subpoena witnesses who were reluctant to speak with him, and he refused the commission's offer of a continuance.

(4) **Judges § 6.4—Removal, Censure, and Other Discipline—Due Process Rights—Adequacy of Opportunity for Oral Argument.**—In a discipline proceeding against a judge, a 45 minute time limit for oral argument did not deprive the judge of his due process rights, where he had the opportunity in his briefs to address every charge in detail.

(5) **Judges § 6—Removal, Censure, and Other Discipline—Court Review of Findings—Standard of Review.**—In reviewing the findings of the Commission on Judicial Performance to insure that there is clear and convincing evidence to sustain the charge to a reasonable certainty, special weight is given to the factual determinations of the masters, and great weight is given to the legal conclusions of the commission.

(6a, 6b) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct.**—The charge of willful misconduct, as distinguished from prejudicial conduct, refers to unjudicial conduct which a judge acting in his judicial capacity commits in bad faith. To

prove bad faith, it must be shown that the judge intentionally committed acts he knew or should have known to be beyond his power, and that he committed them for a purpose other than faithful discharge of judicial duties. The test is an objective one.

(7) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct.**—The charge of prejudicial conduct comprises conduct which the judge undertakes in good faith but which would nonetheless appear to an objective observer to be unjudicial and harmful to the public esteem of the judiciary. It also refers to unjudicial conduct committed in bad faith by a judge not acting in an official capacity.

(8) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Unauthorized Contempt Procedure.**—A judge committed willful misconduct in holding an attorney in contempt for remarks made outside the judge's presence and after the court session had ended, where the order was both procedurally and substantively invalid, the judge was experienced and should have known proper contempt procedures, and, even after he realized his contempt order was invalid, he still pursued the matter with the district attorney and did not notify the alleged contemnor that the matter was dropped until two weeks later. The conduct of the attorney found in contempt, a heated discussion with the court clerk, did not rise to the level of contemptuous behavior, and did not interfere with court proceedings nor lower esteem for the judiciary.

[See **Cal.Jur.3d**, Judges, § 62; **Am.Jur.2d**, Judges, § 19.]

(9) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Contempt Procedures.**—A judge committed willful misconduct by abusing the contempt power in ordering a bailiff to take a party in a civil action into custody for contempt after she had protested his decision, summarily sentencing her to jail for 24 hours without notice or an opportunity to be heard, and relying on his bailiff for advice as to the statute to cite in his order. Willful ignorance of contempt procedures by an experienced judge constitutes bad faith.

(10) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Improper Sentence.**—A judge committed willful misconduct by sentencing a man convicted of driving under the influence to 30 days in jail, where the judge had told a deputy district attorney at the pretrial conference he would do so to teach the man's attorney a lesson for refusing the standard plea bargain and demanding a jury trial. The judge also refused to state his reasons for the

sentence in the record, but commented to the press that the sentence was intended to discourage costly and time-consuming jury trials. The judge also relied on a fabricated allegation of perjury as the reason for the sentence, as he had told the deputy district attorney he would do, despite the fact that perjury had never been charged or determined. A willingness to fabricate justifications for a challenged ruling is misconduct of the worst kind, evidencing moral turpitude and dishonesty.

(11) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Interference With District Attorney.**—A judge committed willful misconduct by calling a district attorney ex parte and urging him to pursue a sodomy charge as a felony rather than as a misdemeanor. Even though the misconduct did not prejudice the defendant, the judge attempted to intrude into the charging authority of the administrative branch of government and deprived a defendant of an impartial magistrate by advocating a harsher charge. The judge knew or should have known that his conduct was beyond his lawful authority and its purpose, viewed objectively, went outside the scope of the judicial function.

(12) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Criminal Trial—Ex Parte Investigation.**—A judge engaged in prejudicial conduct when, in the midst of a criminal trial involving a hit-and-run accident, the judge conducted his own investigation of the matter without notice to the parties and later interrupted the defense case and called a car parts manager as the court's own witness. The evidence presented by the judge was extremely damaging to defendant's case. By undertaking a collateral investigation the judge abdicated his responsibility for deciding the parties' dispute on the pleadings and evidence properly brought before him.

(13) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Dismissal of Criminal Charges—Improper Personal Reasons.**—On review by the Supreme Court, a judge was entitled to dismissal of charges that he had issued an order dismissing criminal charges against a female defendant for improper personal reasons. During a discussion in chambers with defendant and others, defendant, wearing a low-cut sweater, bent over several times to remove documents from her purse, and the judge, later responding to his clerk's query as to why he had dismissed the charges against defendant, replied, "she showed me her boobs." However, the judge contended that his comment was only a joke and that his decision was based on the documents the defendant removed from her purse, and the

testimony was evenly balanced on the question. Thus, there was not clear and convincing proof that the documents submitted by defendant did not provide an adequate basis for the judge's ruling.

(14) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Interference With Work-release Program.**—A judge's improper action in reinstating a defendant to a work-release program after she had been terminated therefrom by the probation department constituted prejudicial conduct. The judge did not have authority under Pen. Code, § 4024.2, to order defendant into the work-release program. The judge became personally embroiled in the case and exhibited bad faith in threatening to retain "the most expensive lawyer that he could find" to defend his actions.

(15) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Acting in Absence of Counsel.**—A judge committed prejudicial conduct when, without notice to a defendant's counsel, the judge asked defendant whether he wanted to proceed with sentencing without his attorney present and then sentenced defendant to jail after defendant had said he wanted to get it over with. The judge erred in failing to notify defendant's counsel of record prior to sentencing and in accepting an invalid waiver of counsel. However, given defendant's statement that he wanted to proceed without counsel, the judge's actions did not rise to the level of willful misconduct.

(16) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Ignoring Defendant's Request for Counsel.**—A judge committed prejudicial misconduct when, during a revocation of probation proceeding, the judge, without waiting for appointed counsel to arrive, asked defendant if he had done the acts alleged in the petition to revoke parole and, on defendant's admission, directed the probation officer to prepare a report and have it ready for defendant's sentencing. Although there was no evidence of bad faith, the judge's conduct in ignoring defendant's request for counsel and continuing to extract a confession from him was prejudicial.

(17) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Absence of Court Reporter.**—A judge's failure to provide a court reporter for criminal defendants appearing in propria persona, and his failure to instruct them that they had a right to a verbatim record, deprived them of a constitutional right and constituted prejudicial conduct.

(18) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Communication With Press.**—A judge, by

showing a decision to the press before it was in final form and by discussing his decision with the press before he had informed the parties of his ruling, engaged in prejudicial conduct.

(19) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Comments to Press—Pending Matters.**—A judge committed prejudicial conduct in discussing a contempt order against an attorney with the press while the matter was pending in the superior court on petition for writ of habeas corpus. The judge informed a newspaper reporter that he planned to vacate the order of contempt, but would ask another judge to review the matter, while the attorney only learned of the intention to vacate the order by reading the local newspaper; he did not receive formal notice of the order vacating contempt for another two weeks.

(20) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Comments to Press—Sufficiency of Evidence.**—In proceedings by the Commission on Judicial Performance, there was not clear and convincing evidence that a judge committed prejudicial conduct by defending his disposition in a "dog custody" case to the press, where all of the statements made by the judge and reported in the press were statements that he made from the bench while the press was present in the courtroom. The judge merely declared that the parties had reached a settlement and announced what amounted to an interlocutory judgment granting temporary joint custody of the dog to both parties. Although it was alleged the judge was "grandstanding" for the press during the court session, there was not clear and convincing evidence of any impropriety.

(21) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Comments to Press Explaining Sentence.**—It was prejudicial conduct for a judge, who had improperly imposed a 30-day jail sentence on a defendant charged with driving under the influence who requested a jury trial and was later convicted, to defend his sentence by discussing the pending matter with the press and writing a letter to the editor explaining his sentence.

(22) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Offensive Sexual Jokes.**—A judge committed two acts of prejudicial conduct when he told two sexual jokes to female attorneys who were in his chambers with others, which the attorneys found offensive. Although the judge intended the comments as jokes and later apologized to some of the individuals present, the fact the judge was acting in his official capacity when he told one of

the jokes provided ample support for the determination that the judge committed prejudicial conduct. The fact that they were told during a hearing in his chambers made little difference; his conduct was just as improper as if he had told the joke from the courtroom bench.

(23) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Absenteeism.**—A municipal judge's work routine amounted to prejudicial conduct on account of his practice of leaving the courthouse after his calendars were completed, usually in the early afternoon. Administrative duties must be discharged with the same diligence as adjudicative duties (Cal. Code Jud. Conduct, canon 3(B)(1)). It was therefore improper for the judge to leave the moment his adjudicative duties were completed, and the fact that police officers, deputy district attorneys, and other members of the public could not reach the judge in the afternoon supported the conclusion that the judge failed to fulfill certain aspects of his judicial function.

(24) **Judges § 6.4—Removal, Censure, and Other Discipline—Aggravating and Mitigating Circumstances.**—Aggravating and mitigating circumstances are appropriate factors to consider in determining judicial discipline.

(25) **Judges § 6—Removal, Censure, and Other Discipline—Willful Misconduct and Prejudicial Conduct—Removal.**—Removal from office was the appropriate disposition for a municipal judge found to have committed four acts of willful misconduct and fourteen acts of prejudicial misconduct, where his conduct exhibited a pattern of personal embroilment in the cases assigned to him. He had lost his temperance and objectivity on several occasions, resulting in prejudice to the parties appearing before him or an abuse of his contempt power. He also attempted to defend his position in the courts and in the media with little regard to procedure or judicial decorum. The purpose of protecting the judicial system and those subject to the awesome power that judges wield would best be served by removal of the judge from office.

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COUNSEL

Thomas J. Nolan, Kathleen C. Caverly and Nolan & Parnes for Petitioner.

John K. Van de Kamp, Attorney General, Raymond Brosterhous II and Eddie T. Keller, Deputy Attorneys General, for Respondent.

OPINION

THE COURT.—The Commission on Judicial Performance (hereafter the Commission) recommends that Municipal Court Judge Richard J. Ryan, of the Roseville-Rocklin Judicial District of Placer County, be removed for "wilful misconduct in office" (hereafter wilful misconduct) and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (hereafter prejudicial conduct). (Cal. Const., art. VI, § 18, subd. (c).) Judge Ryan petitions this court for remand to the Commission, alleging that he was denied due process of law because (1) numerous witnesses in these disciplinary proceedings were admonished not to speak to the judge or anyone, and (2) the Commission limited Judge Ryan's oral argument time to 45 minutes rather than the 2 hours he had requested. Judge Ryan also petitions for review,[1] alleging that the Commission's findings of fact and conclusions of law are not supported by clear and convincing evidence.

After independently reviewing the record, we conclude that Judge Ryan has not been deprived of due process in this disciplinary proceeding. Moreover, we conclude that the Commission's recommendation of removal is supported by clear and convincing evidence.

I. *Background Information.*

Judge Ryan is 39 years of age and was born in San Mateo, California. He served in the Air Force from 1965 to 1968 and graduated from San Diego State University in 1971. The judge attended the University of San Diego Law School and graduated from that institution in 1974. He was admitted to the California State Bar soon after.

Judge Ryan moved to Auburn, where he worked in a law office for two years and then went into sole practice for another two years. In 1978 he was elected as a judge of the Justice Court for the Foresthill Judicial District. In 1982 he became municipal court judge in the Roseville-Rocklin Judicial District, Placer County, where he has served to the present time.

The Commission served Judge Ryan with notice of formal proceedings on January 14, 1986. Three special masters (the masters) were appointed to take testimony on this matter, and the Commission appointed examiners to present the case. After 13 days of hearings, the masters found that Judge

[1] Judge Ryan's petition states that it is made pursuant to rule 920(c) of the California Rules of Court. However, rule 920 applies only to Commission determinations for private admonishment. Rule 919, on the other hand, applies to review of Commission recommendations of censure or removal from office. It therefore appears that Judge Ryan intended to file a petition for review under rule 919(b), and we treat the petition as so filed.

Ryan had engaged in numerous acts of wilful misconduct and prejudicial conduct. The Commission then heard oral argument in the matter and determined that Judge Ryan committed three acts of wilful misconduct in office and seventeen acts of prejudicial conduct. The Commission dismissed 17 other charges as not proven. (1) In reviewing the Commission's findings and conclusions, we are concerned only with the charges that the Commission sustained. (*Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 622 [175 Cal.Rptr. 420, 630 P.2d 954]; *Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 784, fn. 5 [119 Cal.Rptr. 841, 532 P.2d 1209].) The Commission recommended removal by a vote of five to two. The two commissioners in the minority espoused censure.

## II. *Petition for Remand Based on Alleged Due Process Violations.*

### A. *Propriety of Admonishments.*

Judge Ryan contends that he was denied due process of law because the examiners improperly admonished the witnesses during the preliminary investigation that they were not to talk to anyone about the subject of the investigation. The judge claims that this admonishment prevented him from adequately preparing for his defense because certain witnesses refused to speak with him.

The pertinent facts may be summarized briefly and are not in dispute. From September through December of 1985, the Commission conducted a preliminary investigation into the judicial performance of Judge Ryan. The investigation consisted of sworn interviews with over 100 people. After each interview, the examiners informed the interviewees of the confidential nature of the investigation and told them not to speak to anyone about it. Moreover, in some of the interviews the examiners admonished the interviewees specifically not to speak to Judge Ryan. While the preliminary investigation was being conducted, Judge Ryan wrote several letters to the Commission, objecting to the admonishments given to the witnesses. The Commission responded that it was not aware of any improprieties.

After the notice of formal proceedings was served, the judge received discovery information from the examiners from January through March, including tapes of the investigative interviews and lists of prospective witnesses. During this time Judge Ryan did not retain counsel or avail himself

of applicable discovery procedures that would have allowed him to compel information from hesitant witnesses.[2]

On March 31, 1986, the first day of hearings before the masters, Judge Ryan made a motion to dismiss or exclude evidence based on the allegedly improper admonishments. The masters placed the burden on the judge to identify which persons had been improperly admonished and which persons refused to speak to the judge as a result of the improper admonishments. The judge offered evidence that he had tried to speak to four witnesses, but that they had refused to speak with him. He claims he stopped seeking information at that point because the admonishments rendered his discovery futile.

Although Judge Ryan never proved that the admonishments caused the witnesses to refuse to speak with him, the masters nevertheless directed the examiners to send letters to those individuals who had been admonished, informing those witnesses that they were free to speak to the judge if they wished. The examiners initially sent letters only to those persons who had been admonished not to speak to Judge Ryan personally. However, on April 8, 1986, while the hearing before the masters was still pending, the examiners sent another 66 letters to every prospective witness they intended to call in the proceeding, informing those people that they could speak to the judge if they wished. The hearing before the masters continued through April 21, 1986.

On the third day of the hearings, the examiners indicated that they would agree to a continuance so that Judge Ryan could interview any witnesses he wished. The judge rejected a continuance, stating that the examiners should have to "live with" their errors. The masters then indicated that they would grant the judge a continuance at any time so that he could interview any of the witnesses that he claimed were improperly admonished, but the judge chose to stand on the record as it existed. During the remainder of the hearing, the masters began the practice of informing each witness who took the stand that they could speak to Judge Ryan. The masters subsequently denied the judge's motion for dismissal or exclusion of evidence.

(2) Article VI, section 18 of the California Constitution and rule 902(a) of the California Rules of Court require that preliminary investigations by the Commission be strictly confidential.[3] Such confidentiality protects a

[2]Rule 910 of the California Rules of Court gives the judge the right to subpoena witnesses. Moreover, Government Code section 68752 provides procedures to compel a witness to attend or testify, and section 68753 provides the authority for ordering depositions.

[3]Article VI, section 18, of the California Constitution provides for the suspension or removal of judges. Subdivision (f) of section 18 states: "The Judicial Council shall make rules

judge from premature public attention and also protects the witnesses from intimidation. (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 520-521 [116 Cal.Rptr. 260, 526 P.2d 268]; *Mosk* v. *Superior Court, supra,* 25 Cal.3d 474, 491.) In admonishing the interviewees as to the confidentiality of the proceedings, the examiners were faithful to the constitutional mandate of article VI, section 18. Moreover, newspaper articles published during the preliminary investigation indicate that the witnesses properly refused to speak to the press about the investigation because they had been admonished that the proceedings were confidential. Thus, the admonishments served their intended purpose.

Nevertheless, a judge certainly has the right to conduct a proper defense in disciplinary actions. Rule 910 of the California Rules of Court provides that "[i]n *formal proceedings* involving his censure, removal, retirement or private admonishment, a judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, and other evidentiary matter." (Italics added.) While the language of rule 910 specifies a judge's right to conduct an adequate defense, it also indicates that the right attaches once formal proceedings are instituted. A judge does not have the same right while the Commission is conducting its preliminary investigation.

As we stated in *McCartney, supra,* 12 Cal.3d at page 519, during the preliminary investigation stage the Commission has not yet begun its adjudicatory function, "but is merely attempting to examine citizen complaints in a purely investigatory manner." During this investigatory period the Commission must have the freedom to collect accurate and untainted information. The accuracy of the investigation could be compromised if the witnesses were allowed to discuss the matter with others, especially the judge. For this reason, the examiners conducting the investigation were correct in admonishing the witnesses not to speak to anyone.

Simply stated, a judge does not have the right to defend against a proceeding that has not yet been brought.

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implementing this section and providing for confidentiality of proceedings." Subdivision (f) has been held to *require* confidentiality in disciplinary proceedings before the Commission. (*Mosk* v. *Superior Court* (1979) 25 Cal.3d 474, 499 [159 Cal.Rptr. 494, 601 P.2d 1030].) Moreover, rule 902(a) of the California Rules of Court provides: "Except as provided in this rule, all papers filed with and proceedings before the Commission, or before the masters appointed by the Supreme Court pursuant to rule 907, shall be confidential until a record is filed by the Commission in the Supreme Court. Upon a recommendation of censure, all papers filed with and proceedings before the Commission or masters shall remain confidential until the judge who is the subject of the proceedings files a petition in the Supreme Court to modify or reject the Commission's recommendation or until the time for filing a petition expires."

Thus, the issue presented is limited to whether the admonishments prevented the judge from conducting reasonable discovery *after* formal proceedings were brought against him. Although we have no reason to disbelieve Judge Ryan's claim that several witnesses refused to speak with him, we nevertheless conclude that he has not made a sufficient showing of prejudice.

(3) The masters correctly placed the burden on the judge to identify (1) which witnesses were admonished, (2) which witnesses refused to speak to the judge *because* of the admonishment, and (3) how such refusal prejudiced the judge's preparation for the hearing. (*McCartney, supra,* 12 Cal.3d at p. 519 ["relief from . . . the Commission's failure . . . may be secured by petitioner only upon a showing of actual prejudice"].) The only showing made by the judge was that substantially all of the witnesses were admonished not to speak to "anyone," that some of the witnesses were admonished not to speak to him personally, and that four individuals actually did refuse to speak with him. This showing was insufficient in light of the clear need to protect confidentiality and accuracy in the preliminary investigation and the fact that the witnesses could have refused to discuss the matter with the judge for a variety of reasons not associated with the admonishment.

Moreover, once formal proceedings were brought, Judge Ryan had the power under rule 910 to subpoena witnesses who were reluctant to speak with him. He also had the power to compel depositions and testimony under Government Code sections 68752 and 68753. The judge never utilized these procedural tools.

Furthermore, the examiners and the masters made a tremendous effort to alleviate any prejudice that may have resulted from the admonishments. Judge Ryan rejected these efforts and refused the offer of a continuance.[4]

For these reasons, we conclude that Judge Ryan was given ample opportunity to conduct adequate discovery. The admonishments did not deny him due process.

B. *Rejection of Requested Argument Time.*

(4) Judge Ryan also contends that he was denied due process because the Commission refused to provide his counsel with adequate oral argument

[4]Judge Ryan argues that it would have been "absurd" to accept a continuance when it was offered to him during the hearing, because by that time the witnesses probably suffered from loss of memory due to the passage of time. It is therefore incongruous that he should ask us to remand his case *now* so that he can conduct proper discovery. Surely the witnesses' memories are not getting any better as time goes on.

time to present his defense. The judge requested 2 hours, but the Commission limited argument to 45 minutes for each side. The judge argues that 45 minutes was insufficient to address the numerous charges brought against him and asks that we remand his case to the Commission for further argument.

Rule 914 of the California Rules of Court provides: "[T]he Commission shall give the judge and the examiner an opportunity to be heard orally before the Commission . . . ." However, the rule does not specify a minimum time allotment for oral argument.

Nevertheless, 45 minutes for oral argument is certainly a reasonable time limit. Argument before this court is limited to 45 minutes even in automatic appeals, where the issues are often more numerous and complex. (Cal. Rules of Court, rule 22.)

Judge Ryan had the opportunity in his briefs to address every charge in detail. Moreover, as a result of the questioning by the Commissioners, Judge Ryan's counsel was allowed to argue for a total of 59 minutes. The Commission did not abuse its discretion in limiting the oral argument time. Judge Ryan's petition for remand is denied.

III. *Petition for Review of Commission's Findings and Conclusions.*

A. *Standard of Review.*

**(5)** We independently review the findings of the Commission to ensure that there is clear and convincing evidence to sustain the charge to a reasonable certainty. (*Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 365 [188 Cal.Rptr. 880, 657 P.2d 372]; *Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].) In doing so, we give special weight to the factual determinations of the masters, who are best able to evaluate the truthfulness of the witnesses appearing before them. (*Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 34 [207 Cal.Rptr. 171, 688 P.2d 551]; *Wenger, supra*, 29 Cal.3d at p. 623.) At the same time, we accord great weight to the legal conclusions of the Commission. (*Wenger, supra*, 29 Cal.3d at p. 623.)

**(6a)** Censure or removal from office is appropriate when a judge engages in wilful misconduct or prejudicial conduct. (Cal. Const., art. VI, § 18, subd. (c).) The charge of wilful misconduct refers to "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith." (*Geiler, supra*, 10 Cal.3d. at p. 284.) **(7)** The lesser charge of prejudicial conduct comprises conduct which the judge undertakes in good faith but

which would nonetheless appear to an objective observer to be unjudicial and harmful to the public esteem of the judiciary. It also refers to unjudicial conduct committed in bad faith by a judge not acting in an official capacity. (*Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1304-1305 [240 Cal.Rptr. 859, 743 P.2d 919]; *Gonzalez, supra*, 33 Cal.3d at p. 365; *Geiler, supra*, 10 Cal.3d at p. 284 and fn. 11.)

**(6b)** When a judge is acting in an official capacity, the critical distinction between wilful misconduct and prejudicial conduct is the presence of bad faith or malice. (*Furey, supra*, 43 Cal.3d at p. 1304.) In *Wenger* v. *Commission on Judicial Performance, supra*, 29 Cal.3d 615, we enunciated a two-prong test for the determination of bad faith or malice. It must be shown that the judge intentionally "(1) committed acts he knew or should have known to be beyond his power, (2) for a purpose other than faithful discharge of judicial duties." (*Id.* at p. 622, fn. 4.) Both prongs of the *Wenger* test apply an objective, rather than subjective, standard. The objective approach is consistent with our holdings in judicial discipline cases prior to the adoption of the *Wenger* two-prong test. (See *Geiler, supra*, 10 Cal.3d at p. 277.) The objective approach is also consistent with canon 2 of the California Code of Judicial Conduct, which provides that a judge should avoid the "appearance" of impropriety.

B. *Charged Instances of Misconduct.*

1. *The Starks Matter.*

**(8)** Dean H. Starks, an attorney, was in court for an unrelated matter when he observed a friend, Charles Jergo, appearing before Judge Ryan without counsel on several misdemeanor charges. Starks attempted to intervene on behalf of the defendant regarding the issue of release on bail. Judge Ryan thanked Starks, but stated he had already made his decision. Judge Ryan then left the courtroom. Once the court session had ended, Starks approached another attorney in the courtroom and jokingly asked when the next judicial election would be held. Judge Ryan's court clerk, Samantha Spangler, overheard Starks's question and stated that Starks's comment was inappropriate. Starks then began to explain his friendship with Jergo, while Spangler defended the judge's ruling. The conversation became heated and the bailiff had to intervene. Starks did not make any derogatory comments about the judge during the exchange, and the entire conversation occurred out of the judge's presence.

Spangler immediately went to Judge Ryan's chambers and informed him of what transpired. The judge called Starks into his chambers. Following an unsworn recitation of the facts by certain witnesses, Judge Ryan held Starks

in contempt of court and summarily sentenced him to a $200 fine or three days in jail. The judge gave Starks three days to pay the fine.

Starks immediately filed a petition for writ of habeas corpus in the superior court. Soon after, Judge Ryan told the press that he intended to drop the contempt charge. Nevertheless, Judge Ryan asked the district attorney to research contempt law for him and did not inform Starks that he was dropping the contempt order until two weeks later. The contempt order was later invalidated by the superior court.[5]

The masters concluded that Judge Ryan committed wilful misconduct in this matter. The Commission agreed. The Commission determined that Judge Ryan should have known his contempt order was both substantively and procedurally invalid. Moreover, the Commission determined that the judge's continued pursuit of the contempt case was done in bad faith and for an improper purpose.

Judge Ryan completely ignored the procedures required for issuing contempt orders. Starks could not be held in direct contempt because his statements were made outside the judge's presence and after the court session had ended. (Code Civ. Proc., § 1209, subd. (b).)[6] Moreover, the judge failed to follow the procedures for indirect contempt outlined in section 1211 of the Code of Civil Procedure. Section 1211 requires that an affidavit be presented to the judge reciting the facts constituting contempt. No such affidavit was presented. Judge Ryan found Starks guilty of contempt merely on the basis of the unsworn testimony presented in his chambers. Thus, the Commission was correct in concluding that Judge Ryan's contempt order was procedurally invalid.

The Commission also correctly concluded that the contempt order was substantively invalid. The comment made by Starks regarding the next judicial election was mild. Those who accept judicial office must expect and endure such criticism. As one court aptly stated, "the judge must be long of fuse and somewhat thick of skin." (*DeGeorge* v. *Superior Court* (1974) 40 Cal.App.3d 305, 312 [114 Cal.Rptr. 860].) Moreover, Starks's heated discussion with Spangler did not rise to the level of contemptuous behavior. Starks's conduct did not interfere with court proceedings, nor did it lower esteem for the judiciary.

[5]Judge Ryan dropped the contempt charge before the superior court heard the matter. Despite the apparent mootness of the issue, the superior court chose to decide the matter to redress any harm the contempt order had on Starks's reputation in the community.

[6]Section 1209, subdivision (b) provides: "No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

In *Cannon* v. *Commission on Judicial Qualifications* (1975) 14 Cal.3d 678 [122 Cal.Rptr. 778, 537 P.2d 898], we held that ignorance of proper contempt procedures, without more, constituted bad faith. (*Id.* at p. 694.) In *Cannon* we emphasized that Judge Cannon was an experienced judge, with more than nine years on the bench. Judge Ryan is also experienced, having served on the justice court bench for four years and on the municipal court bench since 1982. Judge Ryan should have known, or should have researched, the proper contempt procedures in this matter. His failure to do so constituted bad faith under the *Wenger* two-prong test.

However, Judge Ryan's ignorance of contempt procedure was not his only transgression in this matter. Judge Ryan testified that he knew he had made mistakes immediately after he held Starks in contempt. Nevertheless, even after the judge realized his contempt order was invalid, he still pursued the matter with the district attorney and did not notify Starks that the matter was dropped until two weeks later. This conduct also constituted bad faith. We agree with the Commission that Judge Ryan committed wilful misconduct.

2. *The Hiter Matter.*

**(9)** Maxine Hiter appeared as a defendant in a civil matter before Judge Ryan. The judge ordered Hiter to pay a judgment. Hiter was upset and protested the decision, but later apologized for her outburst. As she was leaving the courtroom she remarked, "you can't get blood out of a turnip." Judge Ryan heard the comment and ordered his bailiff to take her into custody for contempt. The judge summarily sentenced her to jail for 24 hours without notice or an opportunity to be heard. Judge Ryan then relied on his bailiff for advice as to the code section to cite in his order. The order improperly cited Penal Code section 166.1 and did not include a summary of facts constituting contempt. Hiter served 24 hours in the county jail.

This is another inexcusable example of Judge Ryan's abuse of the contempt power. Once again, the judge completely ignored contempt procedures. He failed to return Hiter to court to inform her that she was in contempt. Moreover, he never gave her a chance to respond to the contempt order. Judge Ryan also committed unjudicial conduct in relying on his bailiff for the legal citations to put in his order.

As we stated in the Starks matter, *ante*, wilful ignorance of contempt procedures by an experienced judge constitutes bad faith. Although the masters concluded that the judge's conduct was merely prejudicial, we agree with the Commission that Judge Ryan committed wilful misconduct in this matter.

### 3. *The Wiggins Matter.*

(10) David Wiggins appeared before Judge Ryan on a charge of driving under the influence. Judge Ryan offered him a "no time" disposition at the pretrial conference. Wiggins rejected the offer and requested a jury trial. The judge then privately told Deputy District Attorney Jess Bedore that he was going to teach Wiggins's attorney a lesson for seeking a jury trial. The judge said he would sentence Wiggins to 30 days in jail if the jury convicted him. When Bedore expressed reservations, Judge Ryan said the sentence would be for refusing the standard plea bargain. However, Judge Ryan added that he could further justify the long sentence by stating that Wiggins committed perjury during his trial.

Wiggins was convicted by the jury. Judge Ryan, in accordance with his pretrial statement to Bedore, sentenced Wiggins to 30 days in jail, plus fines and assessments. The sentence was unusually severe for such a conviction. Wiggins's attorney asked the judge to state his reasons for the sentence on the record. Judge Ryan refused. The next day the judge made comments to the press which appeared on the front page of the local newspaper. Judge Ryan told the press that the Wiggins sentence was intended to discourage costly and time-consuming jury trials and that "there had to be some incentive not to go to trial."[7]

Wiggins brought a habeas corpus action in the superior court challenging the sentence imposed. Judge Ryan hired a private attorney at county expense to defend his sentence. When Judge Ryan was ordered by the superior court to justify his sentence, but only after the judge had exhausted his appellate remedies, he stated that the sentence was justified because of Wiggins's perjury at trial.

The masters and the Commission both determined that the judge committed wilful misconduct in this matter.

In the case of *In re Lewallen* (1979) 23 Cal.3d 274 [152 Cal.Rptr. 528, 590 P.2d 383, 100 A.L.R.3d 823], we held that a judge is precluded from imposing a more severe sentence based on the accused's election to proceed to trial. Such conduct by a judge chills the exercise of the constitutional right to trial by jury. (*Id.* at p. 281.)

[7]Judge Ryan is separately charged with improperly communicating with the press. To avoid the danger of double-counting misconduct arising from the same activity, we discuss the details of the press charges *infra*. Nevertheless, we include some of Judge Ryan's statements to the press at this point because they provide evidence of his improper motives in sentencing Wiggins.

Although trial judges have broad sentencing discretion, clear and convincing evidence supports the Commission's determination that Judge Ryan based his sentence on improper factors. The judge stated to Bedore that he would teach Wiggins's attorney a lesson. He also refused to state his reasoning for the sentence to Wiggins's attorney, but admitted to the press that there had to be some incentive to plea bargain. Moreover, the judge privately told Bedore that he could support the sentence by claiming that Wiggins committed perjury during trial, even though the trial had not yet occurred. Then, when the superior court ordered the judge to justify the sentence, Judge Ryan relied on his fabricated allegation of perjury despite the fact that perjury had never been charged or determined.

The misconduct in this matter is especially serious because it indicates that the judge was willing to fabricate justifications for a challenged ruling. This is misconduct of the worst kind, evidencing moral turpitude and dishonesty. We agree with the Commission that Judge Ryan committed wilful misconduct.

### 4. *The Jacks Matter.*

**(11)** Robert Jacks appeared at a preliminary hearing in Judge Ryan's court to answer on a felony sodomy charge. After the preliminary hearing, the judge learned that the district attorney intended to prosecute on misdemeanor charges. The judge called the district attorney ex parte and urged him to pursue the matter as a felony.

The judge's misconduct did not prejudice the defendant. The district attorney did not follow the judge's suggestion to pursue the matter as a felony and the judge had nothing further to do with the case. Nevertheless, the fact that no harm was done to defendant does not lessen the judge's culpability.

Although the masters and the Commission both concluded that this conduct was merely prejudicial, we conclude that it constituted wilful misconduct. Judge Ryan attempted to intrude into the charging authority of the administrative branch of government. Moreover, he deprived the defendant of an impartial magistrate by advocating a harsher charge.

In *Gonzalez* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 359, we addressed similar misconduct. In that case Judge Gonzalez attempted to persuade the district attorney to drop charges in matters that were not before the judge. We concluded that such activity constituted wilful misconduct. (*Id.* at 369.)

Applying the *Wenger* test (*supra*, 29 Cal.3d 615) to the case at bar, Judge Ryan knew or should have known that his conduct was beyond his lawful authority, and the purpose of his conduct, viewed objectively, went outside the scope of the judicial function. Judge Ryan acted in bad faith and his misconduct was wilful.

5. *The Handcock Matter.*

**(12)** In the midst of a criminal jury trial involving a hit-and-run accident, Judge Ryan conducted his own investigation of the matter. Without notice to the parties, the judge directed his bailiff to contact a local auto dealer's parts manager. The judge wanted to obtain a rear light lens for the type of vehicle driven by defendant, so that he could compare the lens with trial evidence. The judge then went on a lunch break, sought out the parts manager with the lens, and determined that the lens matched defendant's car. Back in court, the judge interrupted the defense case and called the parts manager as the court's own witness. The judge did this with minimal notice to the parties and over objection from both sides. The evidence presented by the judge was extremely damaging to defendant's case.

Defendant's resulting conviction was later set aside by the appellate department of the superior court because of Judge Ryan's misconduct. (*People* v. *Handcock* (1983) 145 Cal.App.3d Supp. 25 [193 Cal.Rptr. 397].) The court found no authority for the judge's investigation. (*Id.* at p. Supp. 32.) Moreover, the appellate department also held that although a judge may call and examine witnesses (Evid. Code, § 775), the manner in which Judge Ryan placed his own witness on the stand (by interrupting the defendant's testimony) seriously prejudiced the defendant. (*Handcock, supra*, 145 Cal.App.3d at p. Supp. 31.)

The masters and the Commission both determined that the judge's conduct was prejudicial.

*Wenger* v. *Commission on Judicial Performance, supra*, 29 Cal.3d 615, involved similar misconduct. In that case Judge Wenger conducted his own investigation, suspecting that one of the parties had made false statements in the briefing. The Commission found that Judge Wenger " 'should have known that it was beyond his lawful authority to conduct an ex parte investigation . . . .' " (*Id.* at p. 632.) The Commission determined that Judge Wenger's conduct was prejudicial. We agreed, concluding: "By undertaking a collateral investigation [the judge] abdicated his responsibility for deciding the parties' dispute on pleadings and evidence properly brought before him." (*Ibid.*)

We conclude that Judge Ryan's handling of the Handcock case was improper and constituted prejudicial conduct.

### 6. *The Merkle Matter.*

**(13)** Madeleine Merkle was charged with various misdemeanor drug violations. Judge Ryan ordered her into the drug diversion program. Later, the probation department sought to have Merkle removed from the program, alleging that she was not complying with program rules. The probation department sought to have criminal proceedings reinstituted.

Merkle was called into the judge's chambers to discuss the matter. A deputy district attorney, a deputy public defender and the judge's clerk were also present. During the conversation, Merkle, who was wearing a low-cut sweater, bent over several times to remove documents from her purse. Thereafter the judge dismissed all criminal charges against her. When his clerk asked why the charges had been dropped, Judge Ryan replied, "she showed me her boobs."

Judge Ryan is charged with issuing his order to dismiss Merkle's criminal charges for improper personal reasons. The judge contends that his comment was only a joke and that his decision was based on the documents Merkle removed from her purse, which showed that she had successfully completed the drug diversion program.

The masters determined that the charge against Judge Ryan was not proven. However, the Commission disagreed, concluding that the charge was proven and that Judge Ryan's conduct was prejudicial.

Although there is much to find wrong with Judge Ryan's "joke," we nevertheless cannot exceed the scope of the formal charge brought against him. (*Wenger, supra*, 29 Cal.3d at pp. 638-639; *Cannon, supra*, 14 Cal.3d at p. 696.) We conclude that although Judge Ryan's comment was in very poor taste, the charge that he based his order on improper personal reasons has not been proven by clear and convincing evidence. While inferences may be drawn from the record that the documents presented by Merkle did not justify the judge's order,[8] we nevertheless agree with the masters that the

[8]The examiners enumerate the following facts in support of their position that Judge Ryan made his ruling for improper reasons: (1) the probation department reported to Judge Ryan that Merkle had not attended the counselling program and had failed to report regularly to the department; (2) the deputy public defender did not argue for dismissal of the case and did not believe Merkle's chances for reinstatement to the diversion program were good; (3) if Merkle did have proof of completion of the program, she did not bother to show it to her own attorney prior to the hearing; (4) the district attorney and the deputy public defender who were present at the time cannot remember what proof Merkle offered to the judge, and both

testimony is evenly balanced on the question. The witnesses present at the hearing testified that Merkle gave the judge documents that she said proved her completion of the diversion program. Those documents were not placed into evidence. Thus, we cannot find clear and convincing proof that the documents submitted by Merkle did *not* provide an adequate basis for Judge Ryan's ruling. We defer to the masters' findings of fact and dismiss the charge.

### 7. *The Mitchell Matter.*

**(14)** Deborah Mitchell pled guilty in Judge Ryan's court to a violation of the Vehicle Code (unlawful taking or driving of an automobile). Judge Ryan suspended execution of sentence and ordered two years probation. As a condition of probation, Judge Ryan committed Mitchell to the county jail for 20 days, but ordered that she serve the time in the work-release program.

The probation department subsequently terminated Mitchell from the work-release program because of an alleged back injury. Mitchell notified Judge Ryan of the termination and the judge scheduled a hearing in the matter. Over objection, Judge Ryan reinstated Mitchell into the program. When the probation department again terminated Mitchell from the program because she refused to comply with program rules, the judge again scheduled a hearing. After being advised by the deputy county counsel that he had no authority to act in the matter, Judge Ryan threatened to obtain "the most expensive lawyer that he could find" if his actions were challenged. Writ proceedings were pursued by the county counsel and Judge Ryan hired a private attorney to represent the court, failing to comply with a county requirement that he submit a written request to hire counsel. The judge later billed the county for counsel's services. The superior court subsequently determined that Judge Ryan had unlawfully ordered Mitchell into the work-release program. Both the masters and the Commission found the judge's conduct to be prejudicial.

Penal Code section 4024.2 provides that the administrative official in charge of county correctional facilities may offer a voluntary work-release program in lieu of jail time.[9] Subdivision (a) of section 4024.2 states that the

were surprised at the dismissal of the case; (5) the deputy public defender was so surprised by the dismissal that he consulted other members of the bar to determine his responsibilities; and (6) there is no documentary proof of Merkle's completion of the program in the court file.

[9]Penal Code section 4024.2 provides in pertinent part: "(a) Notwithstanding any other provision of law, the board of supervisors of any county may authorize the sheriff or other official in charge of county correctional facilities to offer a voluntary program under which any person committed to such facility may perform a minimum of 8 and a maximum of 10

program may only be offered to someone already committed to the correctional facility. Moreover, subdivision (c) provides that a person is eligible for the program at the discretion of the administrative official in charge of the program, subject to the fitness of the person for the program and compliance with the rules of the program.

As the superior court correctly held, Judge Ryan did not have authority under Penal Code section 4024.2 to order Mitchell into the work-release program. A judge has the power to commit a person to a correctional facility, but then the administrative official in charge of the facility has the discretionary power to offer work release if the person is deemed eligible under the rules of the program.

Thus, Judge Ryan erred in twice ordering Mitchell into the work-release program. Moreover, although the superior court admitted that the question of Mitchell's due process right to a hearing upon termination from the program was legitimately raised, the judge nevertheless should have appointed counsel for Mitchell so that *she* could seek habeas corpus relief. Instead, Judge Ryan hired a private attorney to defend his actions. He then billed the county for the attorney fees.

This is another instance where the judge became personally embroiled in a case before him. He exhibited bad faith in threatening to retain "the most expensive lawyer that he could find." Nevertheless, we do not find wilful misconduct here, because the record indicates that the judge may have been genuinely concerned with Mitchell's situation. We do conclude, however, that the judge's improper actions constituted prejudicial conduct.

### 8. *The Cabrera Matter.*

**(15)** Rick Cabrera, represented by the public defender, pled guilty to two misdemeanor counts in Judge Ryan's court. Cabrera subsequently failed to appear for sentencing and a bench warrant issued. After apprehension, Cabrera was again brought before Judge Ryan. Without notice to Cabrera's counsel, the judge asked Cabrera whether he wanted to proceed

hours of labor on the public works or ways in lieu of one day of confinement . . . . [¶] (b) The board of supervisors may prescribe reasonable rules and regulations under which such labor is to be performed and may provide that such persons wear clothing of a distinctive character while performing such work. . . . [¶] (c) Nothing in this section shall be construed to require the sheriff or other such official to assign labor to a person pursuant to this section if it appears from the record that such person has refused to satisfactorily perform labor as assigned or has not satisfactorily complied with the reasonable rules and regulations governing such assignment . . . . [¶] A person shall be eligible for work release under this section only if the sheriff or other such official in charge concludes that such person is a fit subject therefor."

with sentencing without his attorney present. Cabrera said, "I don't see if it's going to make any difference," and then indicated that he wanted to "get it over with." Judge Ryan sentenced Cabrera to jail. Cabrera's defense attorney then challenged the judge's action in a petition for writ of habeas corpus. In granting habeas corpus relief, the superior court held that counsel should have been formally notified of the sentencing and that Cabrera did not make a knowing and intelligent waiver of the right to counsel. Both the masters and the Commission found that the judge's conduct was prejudicial.

We agree that Judge Ryan erred in failing to notify Cabrera's counsel of record prior to sentencing. (*In re Haro* (1969) 71 Cal.2d 1021, 1028-1029 [80 Cal.Rptr. 588, 458 P.2d 500]; *In re Martinez* (1959) 52 Cal.2d 808, 813 [345 P.2d 449].) He also erred in accepting an invalid waiver of counsel. We held in *Gonzalez* v. *Commission on Judicial Performance, supra*, 33 Cal.3d 359, that conducting judicial proceedings in the absence of counsel constitutes judicial misconduct. (*Id.* at p. 372.) In that case, Judge Gonzalez conducted proceedings without waiting for counsel to arrive, claiming that he abhorred tardiness. We found Judge Gonzalez had committed wilful misconduct. (*Ibid.*)

Given Cabrera's statement that he wanted to proceed without counsel, we do not believe the judge's actions rise to the level of wilful misconduct. We conclude that the judge committed prejudicial conduct in this matter.

9. *The Burgess Matter.*

**(16)** Defendant Burgess was represented by counsel and pled guilty to a misdemeanor charge. He was placed on formal probation for three years. Many months later, the probation department petitioned for revocation of probation based on Burgess's subsequent criminal convictions. Burgess appeared in Judge Ryan's chambers for the revocation-of-probation proceedings. There was no court reporter present. The judge asked Burgess if he wanted an attorney. Burgess said that he *did*. The minute order indicates that Judge Ryan then appointed a public defender to represent Burgess. However, without waiting for appointed counsel to arrive, the judge asked Burgess if he had done the acts alleged in the petition to revoke parole. Burgess admitted that he had. The judge then turned to the probation officer, who was present at the hearing, and directed her to prepare a report and have it ready for Burgess's sentencing. With that, the hearing was concluded.

The masters and the Commission both determined that Judge Ryan's conduct was prejudicial. Although there is conflicting testimony in the

record as to whether Burgess actually requested counsel, the masters found that he did make such a request. We defer to the masters' finding of fact on this question. (*Gubler* v. *Commission on Judicial Performance, supra*, 37 Cal.3d 27, 34.) Thus, we conclude that the judge ignored Burgess's request for counsel and continued to extract a confession from him. Although there is no evidence of bad faith, the judge's conduct was prejudicial.

10. *Court Reporter Charges.*

(17) Judge Ryan is charged with three instances of prejudicial conduct for failing to provide a court reporter in criminal hearings. The pertinent facts surrounding these matters may be summarized briefly. The court administrator for Placer County advised all members of the court, including Judge Ryan, of the case of *In re Armstrong* (1981) 126 Cal.App.3d 565 [178 Cal.Rptr. 902], which held that it is a violation of due process and equal protection to deny a verbatim record upon request in all municipal court criminal proceedings. Funds were appropriated in January 1983, for reporters to serve the Municipal Court of Placer County on a daily basis. Judge Ryan took the position that reporters were not required and directed the clerk of his court to discharge the reporters assigned to his courtroom unless a timely request was made for their presence. To ensure that a court reporter would be present in Judge Ryan's courtroom, the district attorney's office began stamping a request for a court reporter on every pleading or motion filed. However, individuals appearing without counsel were not advised of their right to have a reporter, and hence did not know they had to request one.

In one incident, Judge Gilbert of the superior court remanded a matter to Judge Ryan because of Judge Ryan's failure to provide a reporter. Judge Ryan telephoned Judge Gilbert to express his disagreement with the latter's decision and stated that reporters were not required and their presence resulted in an unnecessary expense to the county.

In the Bremer matter, Judge Ryan accepted defendant's waiver of a preliminary hearing in the absence of a court reporter. The superior court remanded the case back to Judge Ryan because of the omission.

The Mitchell matter, discussed previously, involved the judge's unauthorized placement of Mitchell into the work-release program. In a separate disciplinary count against Judge Ryan arising from the same matter, the probation department had requested a reporter at the hearing. The request was denied by Judge Ryan as untimely, because no request had been made prior to the hearing.

Finally, the previously discussed Burgess matter involved the charge that Judge Ryan ignored Burgess's request for counsel. As a separate count of improper conduct, it was alleged that the judge failed to provide a court reporter upon return of the bench warrant and that he also sentenced Burgess without a reporter present.

In all three of the counts enumerated above (Bremer, Mitchell, and Burgess) the masters and the Commission concluded that the judge committed prejudicial conduct. Judge Ryan contends that *Armstrong, supra*, 126 Cal.App.3d 565, required verbatim records only upon request, and that he did provide court reporters whenever a timely request was made. Moreover, Judge Ryan points out that he eventually began to provide court reporters on a regular basis after the district attorney and the board of supervisors made it known that reporters were desired.

The judge correctly interprets *Armstrong* as requiring a court reporter upon request. However, he misperceives the significance of his failure to instruct defendants appearing in propria persona that they had a right to a verbatim record. The judge's stubborn and obstructionist attitude effectively denied those defendants their constitutional right to have a reporter present.

We concur with the masters and the Commission that Judge Ryan's conduct in these matters was prejudicial.

11. *Communication With the Press.*

The Commission determined that Judge Ryan made improper comments to the press in four pending cases before him. The Commission stated in its ruling that "[w]hen cases are pending it is entirely improper for a judge to use the media either as a platform or as a method of responding to criticism. In some instances, his comments have drawn unfavorable reaction from the press and in others, prejudiced litigants."

**(18)** In the Nutrition Site matter, Judge Ryan informed the parties that he would mail them his written decision. A short time later a newspaper reporter learned that the judge had finished his opinion in the case. The reporter came to Judge Ryan's chambers and asked if she could see the decision. Although the judge admitted to the masters that the decision was still only in draft form, he nevertheless showed it to the newspaper reporter and discussed his rationale for deciding the case. Judge Ryan's statements appeared in the local newspaper before the parties received copies of the decision.

The masters and the Commission both concluded that this was prejudicial conduct. We agree. Canon 3A(6) of the California Code of Judicial

Conduct provides: "Judges should abstain from public comment about a pending or impending proceeding in any court . . . ." By showing his decision to the press before it was in final form and by discussing his decision with the press before he had informed the parties of his ruling, Judge Ryan acted improperly.

(19) We have previously discussed the Starks matter, which involved the contempt order for Attorney Starks. In a separate count, Judge Ryan is charged with discussing his contempt order with the press while the matter was pending. Specifically, Judge Ryan informed a newspaper reporter that he planned to vacate his order of contempt, but would ask another judge to review the matter. Starks learned of Judge Ryan's intention to vacate the contempt order by reading the local newspaper. Starks did not receive formal notice of Judge Ryan's order vacating contempt for another two weeks.

After stating to the press that he intended to drop the contempt charge, Judge Ryan nevertheless went on to defend his contempt order in the press. He is reported as saying: "I was told [Starks] was really out of line, but since there was something negative said about me and since it involved my clerk, I don't want to appear biased and will let another judge decide." Judge Ryan added that Starks had said "some really rude and nasty things in court," and "[a] judge has to protect the integrity of the court, and it's not proper for loud, derogatory statements to [be] made in fron[t] of the whole courtroom as soon as the judge leaves."

Judge Ryan made his statements to the press while the validity of his contempt order was pending in the superior court on petition for writ of habeas corpus. As canon 3A(6) of the California Code of Judicial Conduct expressly states, the judge acted improperly in commenting on pending matters. We agree with the masters and the Commission that Judge Ryan's conduct was prejudicial.

(20) In the McGinnis matter, the judge is charged with defending his rather unique disposition in a "dog custody" case to the press.[10] The masters

[10]Judge Ryan argues in his response brief that the McGinnis matter is not properly before us because the Commission specifically incorporated into its decision certain exhibits (examiners' exhibits 14, 15, 16-22, 25, 26, 28-31) as the basis for its conclusion of prejudicial conduct, and none of those exhibits involve the McGinnis matter. Judge Ryan's argument is without merit. Exhibit 56 is a newspaper article pertaining to the McGinnis case. Although the Commission did not list this exhibit in making its determination, the Commission did state that it was relying on *four* charges of improper communication with the press. Moreover, because we independently review the record in disciplinary proceedings (*Furey, supra*, 43 Cal.3d at p. 1304), we are not limited by the Commission's failure to cite certain exhibits in support of its determinations.

and the Commission determined Judge Ryan's comments to be prejudicial. However, the record indicates that all of the statements made by the judge and reported in the press were statements that he made from the bench while the press was present in the courtroom. Judge Ryan merely declared that the parties had reached a settlement and announced what amounted to an interlocutory judgment granting temporary joint custody of the dog to both parties. Although the examiners allege that Judge Ryan was "grandstanding" for the press during the court session, we do not find clear and convincing evidence of any impropriety in this matter.

(21) Finally, in the previously discussed Wiggins matter, which involved the judge's imposition of a 30-day jail sentence because Wiggins requested a jury trial, the judge is separately charged with defending his sentence by discussing the pending matter with the press and writing a letter to the editor explaining his sentence. There is clear and convincing evidence to support the findings of the masters and the Commission, and we agree with the Commission that the judge committed prejudicial conduct.

12. *Offensive Jokes to Female Attorneys.*

(22) The Commission determined that Judge Ryan committed two acts of prejudicial conduct when he told offensive jokes to female attorneys in his chambers.

The judge admits telling the following joke while two female attorneys, among others, were present in his chambers: "It's during the period of creation and God has just gone ahead and has made—he's made the earth and the stars and the wind and some of the animals. He's still creating things. Adam and Eve have been created. They discover each other and they discover the physical portions of each other and they lay down and they make love. When they finish, Eve leaves for a little while and then returns. When she returns, she—or Adam says, where have you been? She says, I went to the stream to wash off. And Adam says, gee, I wonder if that's going to give a scent to the fish?" The two female attorneys were offended by the joke.

In another count, two female attorneys, among others, appeared before the judge in his chambers to conduct a preliminary hearing. Judge Ryan asked the two female attorneys if they knew the difference "between a Caesar salad and a blow job." When the attorneys responded that they did not know the difference, the judge said, "Great, let's have lunch." The attorneys were offended.

Judge Ryan intended these comments as jokes. He later apologized to some of the individuals present. The masters found that the judge had

indeed made the comments, but that his conduct was not prejudicial. The Commission disagreed, concluding that prejudicial conduct existed.

It is sometimes difficult to determine the line between "extremely poor taste" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Nevertheless, we believe the fact that the judge was acting in his official capacity when he told the Caesar salad joke provides ample support for the Commission's determination that the judge committed prejudicial conduct. When Judge Ryan told the Caesar salad joke, the two female attorneys were appearing before him for a preliminary hearing. The fact that the hearing was conducted in Judge Ryan's chambers makes little difference; his conduct was just as improper as if he had told the joke from the courtroom bench.[11]

In *Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d 270, we removed Judge Geiler from office because of his vulgar and profane statements and conduct, among other things. Two of Judge Geiler's vulgar comments are illustrative: (1) Referring to his female court clerk while she was present, Judge Geiler asked other men in his chambers, "How would you like to eat that?" (2) In conversations with his female clerk, the judge occasionally asked, "Did you get any last night?" We found the comments made by Judge Geiler to be prejudicial.

As we stated in *Gonzalez* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 359, "[d]erogatory remarks, although made in chambers or at a staff gathering, may become public knowledge and thereby diminish the hearer's esteem for the judiciary—again regardless of the speaker's subjective intent or motivation. The reputation in the community of an individual judge necessarily reflects on that community's regard for the judicial system." (*Id.* at p. 377.) We conclude that Judge Ryan's offensive and insensitive jokes constituted prejudicial conduct.

13. *Absenteeism.*

**(23)** The masters and the Commission also determined that Judge Ryan committed two counts of prejudicial conduct because of his practice of leaving the courthouse after his calendars were completed, usually in the early afternoon. The evidence shows that Judge Ryan regularly left the courthouse at 2 p.m. each day. On Fridays, he often left in the morning and did not return. Numerous witnesses testified that the judge's short hours made it necessary for police and deputy district attorneys to bring warrants

[11] It is unclear from the record why the attorneys were present when Judge Ryan told the Adam and Eve joke. Nevertheless, we conclude from the evidence available that telling such a joke in chambers constituted unjudicial conduct.

and other matters in the morning before the judge left. Moreover, many witnesses testified that the municipal court was in need of another judge, but that the board of supervisors refused to provide one until it was shown that all of the judges were currently working full-time.

In the Fitzpatrick matter, the Commission determined that the clerk had to tell members of the public that Judge Ryan was not available because he had gone for the day. In another count, the Commission found that the judge's abbreviated hours caused the presiding judge to issue an order providing that all judges had to advise the presiding judge if they completed their judicial business and intended to leave before 3 p.m.

Canon 3B(1) of the California Code of Judicial Conduct provides: "Judges should diligently discharge their administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials." As canon 3B(1) makes clear, administrative duties must be discharged with the same diligence as adjudicative duties. It was therefore improper for Judge Ryan to leave the moment his adjudicative duties were completed. The fact that police officers, deputy district attorneys and other members of the public could not reach the judge in the afternoons supports the conclusion that the judge failed to fulfill certain aspects of his judicial function.

We therefore agree with the Commission that Judge Ryan's work routine amounted to prejudicial conduct.

IV. *Aggravating and Mitigating Circumstances.*

**(24)** Aggravating and mitigating circumstances are appropriate factors to consider in determining judicial discipline. (See *Furey, supra*, 43 Cal.3d 1297, 1319-1320.) The record in this case does not provide evidence of aggravating circumstances. Although Judge Ryan presented mitigating evidence, such evidence is insufficient to reduce the level of discipline.

V. *Disposition.*

Petitioner's application for a rehearing was denied June 30, 1988, and the opinion was modified to read as printed above.

**(25)** We conclude that Judge Ryan has committed four acts of wilful misconduct and fourteen acts of prejudicial conduct. We dismiss two charges of misconduct that have not been proven by clear and convincing evidence.

The judge's conduct exhibits a pattern of personal embroilment in the cases assigned to him. He has lost his temperance and objectivity on several occasions, resulting in prejudice to the parties appearing before him or in

abuse of his contempt power. He has attempted to defend his position in the courts and in the media with little regard for procedure or judicial decorum.

"The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield." (*Furey, supra*, 43 Cal.3d at p. 1320.) That purpose will best be served by adopting the recommendation of the Commission that Judge Ryan be removed from office.

We order that Judge Richard Ryan, Municipal Court Judge of the Roseville-Rocklin Judicial District, Placer County, be removed from office. Because the misconduct for which he is removed does not amount to grounds for disbarment, he shall, if otherwise qualified, be permitted to practice law (Cal. Const., art. VI, § 18, subd. (d); see *Wenger* v. *Commission on Judicial Performance, supra*, 29 Cal.3d at p. 654), on condition that he pass the Professional Responsibility Examination (see *Gonzalez* v. *Commission on Judicial Performance, supra*, 33 Cal.3d at p. 378). This order is effective upon the finality of this decision.

Petitioner's application for a rehearing was denied June 30, 1988, and the opinion was modified to read as printed above.

[No. S007641. July 31, 1989.]

BERNARD P. McCULLOUGH, Petitioner, v.
COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

SUMMARY

The Supreme Court ordered that a justice court judge be removed from office based on findings that he had committed four acts of willful misconduct and one act of persistent failure to perform his judicial duties. There was substantial evidence that the judge had directed a guilty verdict against one criminal defendant, and had conducted a trial of two other defendants in one defendant's absence and in the absence of their attorneys. He had also used his office to benefit a personal friend by improperly dismissing a criminal charge against the friend. He had also failed to sign a judgment form for over six years after the motion for the judgment had been granted, and even after he had been publicly censured by the Supreme Court for such failure. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review.**—When disciplining a member of the judiciary, the Supreme Court undertakes an independent evaluation of the record in order to determine whether clear and convincing evidence supports the recommendation of the Commission on Judicial Performance. In so doing the court gives special weight both to the factual findings of the special masters, because of their ability to evaluate the credibility of the witnesses at the hearing, and to the conclusion of the commission, because of its expertise in matters of judicial conduct.

(2) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds.**—A judge may be censured or removed for engaging in willful misconduct in office, persistent failure or inability to perform his duties, habitual intemperance in the use of intoxicants or drugs, or conduct

prejudicial to the administration of justice that brings the judicial office into disrepute (Cal. Const., art. VI, § 18, subd. (c)). Willful misconduct, the most serious charge, occurs when a judge commits acts which he knows, or should know, are beyond his authority for reasons other than the faithful discharge of his duties. Though a judge must act in bad faith in order to commit willful misconduct, he need not necessarily seek to harm a particular litigant or attorney; disregard for the legal system in general will suffice. Unlike willful misconduct, the charge of prejudicial conduct does not require the presence of bad faith. It occurs when a judge, though acting in good faith, engages in conduct which adversely affects public opinion of the judiciary. Though "less grave" than willful misconduct, prejudicial misconduct may nevertheless, by itself, justify removal. Persistent failure, also an independent ground for removal, focuses on a judge's legal and administrative competence and omissions.

[See **Cal.Jur.3d**, Judges, § 62; **Am.Jur.2d**, Judges, § 19.]

(3) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Directing Guilty Verdict.**—A justice court judge who directed a jury to find guilty a defendant charged with a Vehicle Code violation was guilty of willful misconduct and abridgement of defendant's right to trial by an impartial jury. The judge clearly should have known that attempting to direct a jury to return a guilty verdict in a criminal action was beyond his judicial authority. The fact that the conviction was reversed on appeal did not justify or excuse the judge's action, which deprived defendant of his fundamental right to be tried by a jury and manifested disrespect for the constitutional protections of the legal system.

(4) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Using Power to Benefit Friend.**—It was willful misconduct for a justice court judge to use his judicial office to advance the private interests of a personal friend by continuing the friend's criminal case for over two years and then dismissing it without explanation, in violation of Pen. Code, § 1385, subd. (a). In addition, the judge failed to disqualify and recuse himself from the case. It was not a defense that the judge was waiting for some action by the district attorney's office and the action was dismissed because the office never took any action, since the responsibility for the arraignment rested with the judge, as the presiding judge, not with the district attorney's office. Using the power of the bench to benefit a friend is a casebook example of willful misconduct and the judge should have known that failing to arraign the friend, continuing the case several

times, and then dismissing it was improper. The evidence supported the conclusion that the judge's reason for taking those actions was not the faithful discharge of his judicial duties.

(5) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Ordering Trial in Absence of Defendant and Attorney.**—A justice court judge who violated two criminal defendants' right to representation by ordering their trials to proceed despite the absence of their attorneys was guilty of willful misconduct as to each case. Although the granting of continuances and the imposition of sanctions are discretionary, a judge must hold a hearing to determine whether a request for a continuance that did not comply with the court's rules was made in good faith, and the judge had failed to hold such a hearing. To enforce continuance rules, the judge should have given greater consideration to the statutory option of sanctioning defense counsel, rather than penalizing defendants by ordering their trials to proceed in the absence of their attorneys. Also, one defendant had been absent, too. Conducting judicial proceedings in the absence of the defendant and counsel seriously interferes with the defendant's right to representation under U.S. Const., 6th Amend.

(6) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Persistent Failure to Perform Duties.**—A justice court judge who failed to sign a judgment form for over six years after the motion for judgment had been granted, and after he had been censured for his failure, was guilty of persistent failure to perform his judicial duties.

(7) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Prejudicial Publicity.**—The presence of a prosecutor in the courtroom when the Commission on Judicial Performance served a justice court judge with its notice of formal proceedings, and the appearance of a newspaper article about the proceedings on the following day, did not, by themselves, show that the commission violated the rules of confidentiality relating to discipline of members of the judiciary.

(8) **Judges § 6—Removal.**—It was appropriate that the Supreme Court adopt the recommendation of the Commission on Judicial Performance that a justice court judge be removed from office where he had committed four acts of willful misconduct and one act of persistent failure to perform his judicial duties. The judge deprived criminal defendants of their constitutional rights by directing a guilty verdict against one defendant and conducting a trial of two others in one defendant's absence and in the absence of their attorneys, used his office to benefit a personal friend, and failed to perform the most basic of judicial duties. The judge's 10 years' experience as a district attor-

ney certainly acquainted him with the rules of court and criminal procedure. Moreover, the judge had failed to respond to a previous public censure, evidencing a lack of regard for the commission, the Supreme Court, and his obligations as a judge. Removal would best serve the purpose of the proceedings, which is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield.

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COUNSEL

David E. Pipal and Rusconi, Foster, Thomas & Pipal for Petitioner.

John R. Coughlin, Frank P. Borelli, Steven R. Sanders, Harry J. Tobias, James M. Paxton and John H. O'Brien as Amici Curiae on behalf of Petitioner.

John K. Van de Kamp, Attorney General, Aileen Bunney, Michael D. O'Reilley and Mark S. Howell, Deputy Attorneys General, for Respondent.

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OPINION

**THE COURT.**—The Commission on Judicial Performance (hereafter the Commission) unanimously recommends that we remove Bernard P. McCullough from his office as judge of the Justice Court of the San Benito Judicial District, San Benito County. Judge McCullough asks us to reject the Commission's recommendation, alleging that it is not supported by the evidence. The San Benito County Bar Association filed an amicus curiae brief in support of Judge McCullough's position. After reviewing the record and the judge's objections, we adopt the Commission's recommendation.

BACKGROUND

Judge McCullough was born and raised in Hollister, California. After practicing law in San Francisco for almost 10 years, he returned to Hollister in 1967 to serve as District Attorney of San Benito County. In 1977, he was appointed to the Justice Court, and has since been elected and reelected.

In April 1987, we publicly censured Judge McCullough for failing to decide a case for almost four years and for continuing to execute salary affidavits even though cases remained pending in his court for more than 90

days. (See discussion of count 6, *infra*, p. 197.) At that time, we noted that he had ignored three private admonishments from the Commission to act promptly on the cases before him. (*In re McCullough* (1987) 43 Cal.3d 534, 535 [236 Cal.Rptr. 151, 734 P.2d 987].)

In the instant matter, the Commission served Judge McCullough with a notice of formal proceedings on September 24, 1987, alleging six counts of misconduct. (Cal. Rules of Court, rule 905; all subsequent rule references are to the California Rules of Court.) Count 1 alleges that Judge McCullough abridged a defendant's right to trial by an impartial jury when he directed the jurors to find the defendant guilty. Count 2 alleges that he used his judicial office to advance the private interests of a personal friend by continuing the friend's case for over two years, and then dismissing it without explanation in violation of Penal Code section 1385, subdivision (a). The third and fourth counts allege that the judge violated defendants' rights to representation when he ordered their trials to proceed in the absence of their attorneys. Count 5 involved the judge's failure to advise convicted misdemeanants of their rights on appeal under rule 535. The sixth count alleges that he failed to perform his judicial duties by not disposing of a matter pending before him for over six years.

We appointed the Honorable Robert K. Barber, retired judge of the Alameda County Superior Court, the Honorable George H. Barnett, retired judge of the Santa Clara County Superior Court, and the Honorable Jane A. York, judge of the Fresno County Justice Court, to serve as special masters, to take evidence on the alleged counts of misconduct, and then to report their findings to the Commission. (Rule 907.) The hearing spanned four days in May 1988. (Rules 908, 909.) The special masters concluded that counts 1, 2, 3 and 4 constituted wilful misconduct in office, that count 5 did not constitute misconduct at all, and that count 6 constituted persistent failure by the judge to perform his judicial duty. (Rule 912.)

In October 1988, the Commission accepted the special masters' characterization of counts 1, 2, 4, and 6, dismissed count 5, but concluded that count 3 constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute rather than wilful misconduct. By a vote of eight to zero, it recommended removal of Judge McCullough. (Rule 917.) The judge then petitioned this court for review of the recommendation. (Rule 919(b).)

## STANDARD OF REVIEW

**(1)** When disciplining a member of the judiciary, we undertake an independent evaluation of the record in order to determine whether clear and

convincing evidence supports the Commission's recommendation. (*Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 530 [247 Cal.Rptr. 378, 754 P.2d 724].) In so doing, we give special weight both to the factual findings of the special masters, because of the masters' ability to evaluate the credibility of the witnesses at the hearing, and to the conclusions of the Commission, because of its expertise in matters of judicial conduct. (*Ibid.*)

(2) We may censure or remove a judge for engaging in "wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c).)[1] Wilful misconduct, the most serious charge, occurs when a judge commits acts (1) which he knows, or should know, are beyond his authority (2) for reasons other than the faithful discharge of his duties. (*Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1305 [240 Cal.Rptr. 859, 743 P.2d 919].) Though a judge must act in bad faith (*id.*, at p. 1304) in order to commit wilful misconduct, he need not necessarily seek to harm a particular litigant or attorney; disregard for the legal system in general will suffice. (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 286 [110 Cal.Rptr. 201, 515 P.2d 1].) Unlike wilful misconduct, the charge of prejudicial conduct does not require the presence of bad faith. (*Furey, supra,* 43 Cal.3d at p. 1304.) It occurs when a judge, though acting in good faith, engages in conduct which adversely affects public opinion of the judiciary. (*Geiler, supra,* 10 Cal.3d at p. 284.) Though "less grave" than wilful misconduct (*id.*, at p. 283), prejudicial conduct may nevertheless, by itself, justify removal. (*id.*, at p. 284, fn. 11.) Persistent failure, also an independent ground for removal, focuses on a judge's legal and administrative competence and omissions.

## COUNT 1—THE SUMAYA MATTER

(3) Count 1 alleges that Judge McCullough abridged Richard Sumaya's right to trial by an impartial jury by directing the jurors sitting on his case to find him guilty. Sumaya plead not guilty to a charge of riding a bicycle while under the influence of alcohol. (Veh. Code, § 21200.5.) The matter proceeded to trial. During the prosecution's closing argument to the jury, Judge McCullough interrupted the prosecutor, told him to "sit down," and then said to the jurors: "Ladies and gentlemen, I want you to go in that

[1] We will refer to "wilful misconduct in office" as "wilful misconduct," "persistent failure or inability to perform the judge's duties" as "persistent failure," and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" as "prejudicial conduct." "Habitual intemperance in the use of intoxicants or drugs" is not at issue in this case.

room and find the defendant guilty." Five minutes later, when the jurors returned with a guilty verdict, the judge commented that, "For a while there, ladies and gentlemen, I thought you were not going to follow my instructions." After conviction, the district attorney's office contacted Sumaya's counsel, advising him to appeal; following Sumaya's appeal, the appellate department of the superior court eventually reversed the conviction.

In response to this charge, Judge McCullough claims that he directed the jury to bring in a guilty verdict because Sumaya had admitted all elements of the offense on the witness stand. The record supports a finding, however, that Sumaya never actually testified at trial. He also asserts that, at the time of Sumaya's trial, he believed that federal law allowed a judge to direct a guilty verdict when the defendant's guilt is, in the view of the judge, undisputed. He now acknowledges that neither federal nor state law authorizes such an instruction, regardless of the judge's opinion of the defendant's guilt. Moreover, he clearly *should* have known that attempting to direct a jury to return a guilty verdict in a criminal action was beyond his judicial authority. (*Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 369 [188 Cal.Rptr. 880, 657 P.2d 372] ["Petitioner's patent misunderstanding of the nature of his judicial responsibility serves not to mitigate but to aggravate the severity of his misconduct."].)

The judge further argues that witnesses at the hearing before the special masters gave contradictory testimony regarding the number of witnesses who actually testified at Sumaya's trial and whether the police had subjected Sumaya to a blood-alcohol test. Resolution of these testimonial contradictions is irrelevant to the issue before us, however, because the Commission's charge of wilful misconduct did not rest on proof of those facts. Judge McCullough admits that he committed the act which formed the basis of the Commission's charge, i.e., that he directed the jury to find Sumaya guilty. Finally, the fact that Sumaya's conviction was reversed does not justify or excuse the judge's action. Depriving a criminal defendant of his fundamental right to be tried by a jury manifests disrespect for the constitutional protections of our legal system. We conclude that Judge McCullough's instruction to the jury directing a guilty verdict constituted wilful misconduct.

### COUNT 2—THE CERRATO MATTER

**(4)** Count 2 alleges that Judge McCullough used his judicial office to advance the private interests of Frank Cerrato, a personal friend of his, by continuing Cerrato's criminal case for over two years and then dismissing it without explanation, in violation of Penal Code section 1385, subdivision

(a). The criminal action against Cerrato arose out of a domestic dispute between Cerrato and his wife. The police went to the Cerrato home in response to a call; when Mrs. Cerrato refused to file a criminal complaint against her husband, the district attorney's office charged him with obstructing a police officer in the performance of his duties. (Pen. Code, § 148.)

Frank Cerrato and his twin brother Harold are lifelong friends of Judge McCullough; Harold was a member of the board of supervisors when the board first appointed the judge to the bench. The day before Frank's arraignment, the Cerratos went to the judge's home, where Frank told the judge the story of his arrest and asked the judge to excuse him from appearing on the next day. (The Cerratos owned an apricot orchard and Frank's arrest occurred in the midst of the harvest season.) Frank testified at the hearing before the special masters that Judge McCullough told him that the arresting officer had apparently "overreacted" and that he "should go home and pick his apricots." Frank did not appear in court on either the next day or any later date, and testified that he "presumed" the district attorney had dismissed the case when the court returned the bail money to his brother two years later.

The judge admits that he committed the acts that form the basis of the Commission's charge—that he had an improper ex parte conversation with Frank,[2] never arraigned him on the obstructing charge, continued the case approximately 20 times over a 2-year period, later took the case off calendar, and eventually dismissed the case, without ever explaining his actions or advising the district attorney's office.[3] In addition, he failed to disqualify and recuse himself from the case even though he stated that he planned to do so.

In his defense, the judge alleges that he continued the case 20 times because he was waiting for some action by the district attorney's office, and that he dismissed the case because the office never took any action.[4] How-

[2]During the Commission's investigation, the judge admitted in correspondence with the Commission that he had spoken about the case with Harold but failed to disclose his conversation with Frank.

[3]Under the calendaring system in use at the time, the district attorney's office did not attend arraignment calendars and did not track a case until the court completed arraignment and set the matter for pretrial hearing or trial. The court provided the district attorney's office with an advance copy of the arraignment calendar and, following completion of the calendar, would send another copy reflecting what action was taken on the matters on calendar for that day. A clerk in the district attorney's office notified the deputy assigned to the case only when a completed calendar showed that the court had arraigned the defendant and scheduled either a pretrial hearing or trial. By failing to arraign Cerrato, Judge McCullough effectively kept the case from being monitored by the district attorney's office.

[4]After he spoke to Frank at his home, Judge McCullough informally asked a prosecutor to "take a look at" the Cerrato case. The prosecutor told the judge he would review the com-

ever, the responsibility for the arraignment rested with Judge McCullough, as the presiding judge, not with the district attorney's office.[5]

Using the power of the bench to benefit a friend is a casebook example of wilful misconduct. (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 798 [119 Cal.Rptr. 841, 532 P.2d 1209]; see also Cal. Code Jud. Conduct, canon 2B ["Judges should not allow their families, social, or other relationships to influence their judicial conduct or judgment. Judges should not lend the prestige of their office to advance the private interests of others . . . ."].) Judge McCullough certainly should have known that failing to arraign Cerrato, continuing the case several times, and then dismissing it was improper. The evidence supports the conclusion that his reason for taking these actions was not the faithful discharge of his judicial duties. (*Gonzalez, supra,* 33 Cal.3d 359, 369.) Moreover, in view of his extrajudicial discussion with the Cerrato brothers about Frank's arrest and his long-term friendship with them, he should have promptly disqualified himself from the case. (Cal. Code Jud. Conduct, canon 3C(1) ["Judges should disqualify themselves in a proceeding in which . . . their impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party . . . ."].) We conclude that the judge's handling of the Cerrato case constituted wilful misconduct.

## COUNT 3—THE O'BRIEN MATTER

**(5)** Count 3 alleges that the judge violated Amelia O'Brien's right to representation when he ordered her trial to proceed despite the absence of herself and her attorney. O'Brien was charged with driving while under the influence of alcohol. (Veh. Code, § 23152, subd. (a).) On the day before her scheduled trial in San Benito County, a court in another county had ordered O'Brien's attorney to appear before it on the following day. Due to the trial conflict, O'Brien's attorney had his secretary telephone Judge McCullough's chambers to request a continuance of the O'Brien trial. A court clerk advised the secretary to contact the district attorney's office. The district attorney had no objection to the continuance but informed the attorney that the court normally required 48 hours' written notice of requests for continuances. Since he did not have sufficient time to prepare a

plaint, and decided to do so when the case appeared on the pretrial calendar. Since Judge McCullough kept the case off the pretrial calendar, the prosecutor never took any action on the case and testified that he had forgotten about it until it came up in the proceedings before the Commission.

[5]The actual dismissal of the case stemmed from the chief clerk's comment that she was "getting sick and tired of having to account for that $150 [bail money] each month." When she asked the judge how to handle the case, he told her to "Get rid of it" and she entered the dismissal on the docket.

written motion for a continuance, O'Brien's attorney arranged for a local attorney to make a special appearance at the trial to make the request. The local attorney, however, did not appear personally at the court on the following day, but instead telephoned the court with the request for a continuance.

Judge McCullough denied the request and ordered the trial to proceed—despite the absence of the defendant, her counsel of record, or the local attorney.[6] Moreover, the prosecutor on the case informed the judge that he did not object to a continuance, and suggested that the judge impose sanctions on O'Brien's attorney for failing to comply with the court's 48-hour rule instead of ordering the trial to proceed.[7] Later that day, O'Brien's counsel learned that the trial had proceeded without him or his client and made a motion for a new trial, which the judge granted.

Judge McCullough correctly asserts that the power to grant a continuance, along with the power to impose sanctions on parties who do not comply with the requirements for requesting a continuance, are discretionary under section 1050 of the Penal Code. Although section 1050 does make the granting of continuances and the imposition of sanctions discretionary, a judge *must* hold a hearing to determine whether the noncomplying request was made in good faith. Judge McCullough failed to hold such a hearing. The hearing would have been the proper forum for determining whether the court had already granted an excessive number of continuances in the case and whether the court could have reasonably expected defense counsel to appear on the scheduled date. Moreover, Judge McCullough should have given greater consideration to the statutory option of sanctioning defense counsel, rather than penalizing the defendant by ordering the trial to proceed in the absence of both her and her attorney. His stated goal of expediting the adjudication of cases in his court, though laudable, should not blind him to the fundamental elements of a fair criminal proceeding.

The special masters found that the allegations of count 3 constituted wilful misconduct; the Commission disagreed and concluded that count 3 constituted only prejudicial conduct. We agree with the special masters. Conducting judicial proceedings in the absence of the defendant and her counsel seriously interferes with the defendant's Sixth Amendment right to

[6]The judge does not argue, nor does the record reveal, that O'Brien waived her right to be present pursuant to Penal Code sections 977 and 1043.

[7]Subdivision (b) of section 1050 of the Penal Code requires a party to make a request for a continuance in writing two days before trial; subdivision (c) allows a party to request a continuance without complying with the requirements of subdivision (b), but also allows the court to impose sanctions for noncompliance. Subdivision (d) requires the court to hold a hearing to determine whether there was good cause for the party's noncompliance with subdivision (b).

representation. Though Judge McCullough may have intended to punish only O'Brien's attorney and not O'Brien, he acted intentionally and in bad faith. (*Gonzalez, supra,* 33 Cal.3d at p. 372 [attorneys on three occasions entered judge's courtroom and found proceedings had begun without them; court found judge's action constituted wilful misconduct].) We thus conclude that the judge's action in the O'Brien case constituted wilful misconduct.

### COUNT 4—THE ROBERTS MATTER

Count 4 alleges that the judge violated Rose Roberts's right to representation by ordering her trial to proceed even though her attorney of record was not present. Roberts was charged with driving while under the influence of alcohol. (Veh. Code, § 23152, subd. (a).) On the day before her scheduled trial in San Benito County, her attorney was involved in a trial in another county; when he realized that the trial would not end that day, he telephoned Judge McCullough's chambers to request a continuance of Roberts's case. A clerk informed him of the court's 48-hour written notice requirement. The attorney then contacted the district attorney, who told him that he did not object to the trial being continued. He thus arranged for a local attorney to make a special appearance at Roberts's trial and request a continuance.

The local attorney personally appeared in court along with Roberts and made the request. Judge McCullough denied the request and ordered the trial to proceed—even after the local attorney indicated that he would not represent Roberts at trial. Roberts broke into tears in response to the judge's insistence on proceeding to trial without her attorney of record, as she was unprepared to represent herself. She understandably did not call witnesses, cross-examine the prosecution's witnesses, or herself take the stand. She was convicted of the charge. When her attorney learned that the trial had proceeded without him, he moved for a new trial, which Judge McCullough denied.

Again, Judge McCullough claims that he simply followed the 48-hour requirement of section 1050, subdivision (b) of the Penal Code. He again ignores the hearing requirement of subdivision (d) and the availability of sanctions for noncompliance under subdivision (c). As occurred in the O'Brien matter, Judge McCullough allowed his impatience with a defendant's attorney to outweigh a defendant's right to a fair trial and representation of her choice. Moreover, we are concerned that the judge's rulings in the O'Brien and Roberts matters may have been the product of the friction he alleged existed between him and the district attorney's office rather than from his desire to maintain the court's calendar. (See *infra,* p. 198.) We

conclude that his actions in the Roberts case also constituted wilful misconduct.

COUNT 5

We do not consider charges of misconduct that the Commission has dismissed. (*Spruance, supra,* 13 Cal.3d at pp. 784-785, fn. 5.)

COUNT 6—THE BRASHEAR MATTER

(6) Count 6 alleges that the judge failed to perform his judicial duties by not disposing of a matter pending before him for over six years. Kathy Brashear was the codefendant and cross-complainant in the case of Oakley v. Cheadle. On February 2, 1982, Judge McCullough granted her motions for judgment against plaintiffs and cross-defendants.[8] A week later, Brashear's attorney sent the court a proposed judgment and request for costs and attorney's fees. Despite numerous telephone calls, written requests and trips to the court by Brashear's attorney over the next three years, Judge McCullough neither signed the judgment nor ruled on the request for costs and fees. The Commission eventually brought charges against the judge for his delay in this and other cases, and we publicly censured him in April 1987, finding that he had committed persistent failure and prejudicial conduct. (*In re McCullough, supra,* 43 Cal.3d at p. 535.)

We are especially concerned with the judge's failure to act on the Brashear matter even after public censure. Instead of signing the judgment after his censure, the judge cavalierly told his clerk that he wanted nothing more to do with the case. Not until March 1988, after the Commission had instituted the present proceedings and more than six years after he actually granted the motions, did he sign the judgment.

Judge McCullough offers the same argument in his defense that he made before us two years ago: Section 71610 of the Government Code, which compels a judge to act on a matter within 90 days of it submission, did not require him to sign the proposed judgment or rule on costs and fees because the motion was made and decided "in court." A judge must issue a written judgment, however, to give his oral decision legal force. (Code Civ. Proc., § 632; rule 520.) We conclude that Judge McCullough's failure to sign the judgment form constituted persistent failure.

[8]The case proceeded as to the remaining parties; they submitted posttrial briefs on February 16, 1982. Judge McCullough finally entered a decision in the underlying dispute in October 1985.

## SPECIAL DEFENSES

Judge McCullough asserts that the Commission violated his right to confidentiality by improperly disclosing information regarding the charges against him. (Rule 902.) (7) He claims that the presence of a prosecutor in the courtroom when the Commission served him with its notice of formal proceedings, and the appearance of a newspaper article about the proceedings on the following day, support his contention that the Commission improperly disclosed confidential information to the district attorney's office and the local media. The mere presence of a prosecutor and appearance of a news article, however, do not, by themselves, support an argument that the Commission violated the rules of confidentiality. Moreover, the Commission is authorized to issue announcements "confirming the hearing, clarifying the procedural aspects, and defending the right of a judge to a fair hearing" whenever it has instituted formal proceedings in a matter "in which the subject matter is generally known to the public and in which there is broad public interest, and in which confidence in the administration of justice is threatened due to lack of information concerning the status of the proceeding and requirements of due process . . . ." (Rule 902(b)(3); *Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 61 [207 Cal.Rptr. 171, 688 P.2d 551].)[9]

Also, the judge alludes throughout his petition to animosity toward him on the part of the district attorney's office.[10] Judge McCullough suggests that the district attorney's office was out to "get him." The Commission noted that the relationship between the district attorney and Judge McCullough was "far from harmonious." We agree with the Commission's conclusion, however, that the only relevance to the current proceedings of any acrimony in their relationship is its effect on the credibility of the witnesses at the hearing. In this regard, the special masters stood in the best position to judge the credibility of the witnesses at the hearing; we thus assume that they considered the trustworthiness of the testimony in formulating their factual findings.

## MITIGATING CIRCUMSTANCES

The Commission found that Judge McCullough is a hardworking judge who has critics but also friends in the community. Several parties testified to the judge's good character, and the San Benito County Bar Association filed

[9] We emphasize, however, that we have no evidence before us that the Commission actually submitted any material to the local media.

[10] We consider this contention here even though the judge does not specifically label it a "Special Defense."

an amicus curiae brief on his behalf. In addition, we take notice that the voters of San Benito County have twice elected him to judicial office.

## DISPOSITION

(8) We conclude that Judge McCullough has committed four acts of wilful misconduct and one act of persistent failure. He deprived criminal defendants of their constitutional rights, used his office to benefit a personal friend, and failed to perform the most basic of judicial duties. Ten years' experience as the District Attorney of San Benito County certainly acquainted him with the rules of court and criminal procedure. (*Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653-654 [175 Cal.Rptr. 420, 630 P.2d 954].) Moreover, his failure to respond to our public censure evidences a lack of regard for the Commission, this court and his obligations as a judge.

"The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield." (*Furey, supra,* 43 Cal.3d at p. 1320.) We conclude that that purpose is best served by adopting the recommendation of the Commission that Judge McCullough be removed from office.

We order that Judge Bernard P. McCullough, justice court judge of the San Benito Judicial District, San Benito County, be removed from office. He shall, however, if otherwise qualified, be permitted to resume the practice of law (Cal. Const., art. VI, § 18, subd. (d)) on the condition that he pass the Professional Responsibility Examination. He had a long career in private and public practice before coming onto the bench, and several parties have testified to his good character. Moreover, as an attorney, he will not have access to the power that he abused as a judge. (*Spruance, supra,* 13 Cal.3d at p. 803.) This order is effective upon the finality of this decision in this court.

[No. S003813. Mar. 8, 1990.]

DAVID M. KENNICK, a Judge of the Municipal Court, Petitioner,
v.
COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

SUMMARY

The Commission on Judicial Performance found that a municipal court judge had committed willful misconduct and conduct prejudicial to the administration of justice, and was culpable of a persistent failure or inability to perform his duties (Cal. Const., art. VI, § 18, subd. (c)). The commission recommended that the judge be removed from office. The judge filed a petition to modify or reject the recommendation and thereafter retired from office. He then sought to withdraw his petition and requested dismissal of the disciplinary proceeding as moot. The Supreme Court denied this request. The judge then informed the Supreme Court by letter of his willingness, as a basis for dismissal, to agree to his ineligibility for future judicial office and suspension from the practice of law.

The Supreme Court ordered that the judge be removed from office on the sole ground of his persistent failure or inability to perform his judicial duties, and it censured him for his willful misconduct in office and his conduct prejudicial to the administration of justice. The court held that the proceeding was not moot even though the judge had retired. The court further held that the judge's willful misconduct and prejudicial conduct (refusal to cooperate with police officers after being arrested for drunk driving; abusive behavior toward a deputy district attorney; treating witnesses in a demeaning and discourteous manner; favoring two attorneys, one of whom he owned property with, in his appointments of counsel; and improperly suggesting to a waitress in a restaurant that she should not worry about her drunk driving arrest) were insufficient to warrant his removal, even though they clearly supported the lesser discipline of censure. However, in light of evidence that the judge had not worked approximately 96½ days between March 8, 1985, and December 31, 1986, had stopped working without explanation at the beginning of 1987, and was not working in May 1987 at the time of his testimony before the special masters, removal from office on the ground of persistent failure or inability to perform his judicial duties was appropriate. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Judges § 6.4—Removal—Proceedings—Mootness—Retirement of Judge.**—A proceeding for removal of a municipal court judge was not rendered moot by the judge's retirement. The filing with the Supreme Court of the recommendation by the Commission on Judicial Performance that the judge be removed placed in issue whether the judge should continue in office, whether he should be eligible for any judicial office, and whether he should be suspended from legal practice. His retirement eliminated any possibility of his continuing in office but did not foreclose his future eligibility to serve as a judge and did not resolve whether he should be suspended from legal practice in California.

(2) **Judges § 6—Removal, Censure, and Other Discipline—Suspension From Law Practice—Due Process.**—In a proceeding for discipline of a municipal court judge, the question whether the judge should be suspended from legal practice was properly before the Supreme Court, notwithstanding the judge's contention that suspension by the court, rather than the State Bar, would violate his due process rights, in that he was not notified as to which of the charges underlying the removal recommendation by the Commission on Judicial Performance would be a basis for suspension from practice and there was no hearing on how these charges related to his right to practice law. The judge received the commission's notice of formal proceedings expressly charging him with conduct constituting grounds for removal from office and had notice from the California Constitution itself that a removed judge would be automatically suspended from legal practice unless and until the Supreme Court ordered otherwise (Cal. Const., art. VI, § 18, subd. (d)). He also knew, or should have known, that the Supreme Court, in responding to any recommendation of removal, would consider only the charges sustained by the commission.

(3) **Judges § 6—Removal, Censure, and Other Discipline—Suspension From Law Practice—Equal Protection.**—In a proceeding for discipline of a municipal court judge, the question whether the judge should be suspended from legal practice was properly before the Supreme Court, notwithstanding the judge's contention that suspension by the court rather than by the State Bar would deprive him of equal protection of the laws in that there is no rational basis for subjecting an attorney who happens to be a removed judge to disciplinary sanctions not applicable to other attorneys. California law makes a reasonable distinction between suspension from legal practice based on the

attorney's conduct while a judge, and suspension or disbarment that is based on other conduct and ordinarily arises out of proceedings before the State Bar.

(4a, 4b) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Mootness—Retirement of Judge—Stipulation as to Ineligibility for Office.**—A proceeding for discipline of a municipal court judge was not rendered moot by the judge's retirement and his willingness to stipulate to his ineligibility for judicial office and to the entry of an order of the Supreme Court suspending him from California law practice. The judge's stipulation did not preclude the possibility of a proceeding for reinstatement to practice, and a necessary foundation to any such proceeding would be a record of the reasons for the judge's suspension, which necessarily would inhere in the reasons for the event giving rise to the suspension, i.e., his removal from judicial office. There was no practicable way to create such a record except to go forward with the removal proceeding.

(5) **Attorneys at Law § 61—Discipline of Attorneys—Reinstatement—Criteria.**—In considering a recommendation of reinstatement after disbarment, the Supreme Court must consider the evidence of present character in the light of the moral shortcomings that resulted in the imposition of discipline.

(6) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct.**—A judge's willful misconduct in office within the meaning of Cal. Const., art. VI, § 18, subd. (c) (censure or removal of judge), has two elements: it must be willful, i.e., done with malice or in bad faith, and it must be committed in office, i.e., while acting in a judicial capacity. The element of bad faith, or malice, must meet a two-pronged test: the judge must have committed acts he knew or should have known to be beyond his power, and he must have done so for a purpose other than faithful discharge of judicial duties.

[See **Cal.Jur.3d,** Judges, § 62; **Am.Jur.2d,** Judges, § 19.]

(7) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct.**—Conduct prejudicial to the administration of justice, within the meaning of Cal. Const., art. VI, § 18, subd. (c) (censure or removal of judge), is generally less serious than willful misconduct and may be committed either while acting in other than a judicial capacity or while acting in a judicial capacity but in good faith and without malice. Prejudicial conduct while acting in a judicial capacity means conduct that the judge undertakes in good faith but

that nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. Prejudicial conduct while not acting in a judicial capacity may be committed in bad faith or with malice and thus fall short of willful misconduct only because not committed in a judicial capacity. Prejudicial conduct does not require notoriety, but only that the conduct be damaging to the esteem for the judiciary held by members of the public who observed such conduct.

(8) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review by Supreme Court—Scope**—In considering a report and recommendation by the Commission on Judicial Performance, the Supreme Court must independently review the record and sustain the charges against the judge only to the extent the court finds there is clear and convincing evidence sufficient to prove them to a reasonable certainty. The court must then determine, as a matter of law, what if any constitutional grounds for judicial discipline are established by each of the findings thus sustained and whether those grounds support the commission's recommendation of removal. In formulating these legal conclusions, the court gives great weight to the conclusions of the commission. In resolving disputed issues of fact, however, the court gives special deference to the determinations of the special masters, who were best able to evaluate the truthfulness of the witnesses appearing before them.

(9) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review by Supreme Court—Scope—Findings Outside Scope of Notice of Formal Proceedings.**—In a proceeding for discipline of a municipal court judge, the findings of the Commission on Judicial Performance were subject to consideration by the Supreme Court only for their bearing upon the charges that the amended notice of formal proceedings, together with the judge's answer, placed in issue, where some of the commission's findings expanded upon the charges in that notice. The Supreme Court will not adopt commission determinations of judicial misconduct based on findings outside the scope of a notice of formal proceedings, as amended.

(10) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Refusal to Cooperate Following Drunk Driving Arrest.**—In a proceeding for discipline of a municipal court judge, the findings of the Commission on Judicial Performance, that the judge had refused to cooperate with officers who stopped him for erratic driving by behaving in a rude and abusive manner and by refusing to complete field sobriety tests or submit to any chemical test, were

supported by clear and convincing evidence, and the commission properly concluded that this behavior constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of Cal. Const., art. VI, § 18, subd. (c). The judge contended that the testimony of the officers that he was rude and obnoxious should be disbelieved because they did not treat him as physically dangerous and took no precautions to restrain him while interviewing him or driving him home; however, the commission's findings pertained only to noncooperation and verbal abuse, not to physical threats or conduct.

(11) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Attempt to Obtain Preferential Treatment Following Drunk Driving Arrest.**—In a proceeding for discipline of a municipal court judge, the findings of the Commission on Judicial Performance, that the judge had attempted to obtain preferential treatment after being arrested for drunk driving, were supported by clear and convincing evidence. The judge's testimony, that the arresting officers sought an interview with the judge out of embarrassment stemming from a belief that the judge's arrest had been a big mistake, was not credible. However, for purposes of judicial discipline, willful misconduct can be committed only while acting in a judicial capacity. Thus, the commission erred in finding that the judge's actions constituted willful misconduct, in addition to prejudicial conduct, within the meaning of Cal. Const., art. VI, § 18, subd. (c), since the judge made his improper requests in a conversation that took place wholly outside any judicial setting and there was no evidence that he even referred to his judicial status on that occasion.

(12) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Nolo Contendere Plea.**—In a proceeding for discipline of a municipal court judge, the charge that the judge had been convicted on a plea of nolo contendere of the offense of drunk driving did not state a ground for discipline. Violation of Veh. Code, § 23152, subd. (a), the offense of which the judge was convicted, constitutes only a misdemeanor, and there was no finding or showing that the judge's commission of the offense involved moral turpitude. Thus, a ground for removal under Cal. Const., art. VI, § 18, subd. (b), was not stated, and the bare fact of a judge's conviction of a misdemeanor not involving moral turpitude, based on a plea of nolo contendere, cannot constitute prejudicial conduct warranting discipline within the meaning of Cal. Const., art. VI, § 18, subd. (c).

(13) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Taking Over Questioning From Counsel.**—In a

proceeding for discipline of a municipal court judge, the findings and conclusions of prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd. (c), by the Commission on Judicial Performance in connection with the judge's alleged taking over questioning from counsel and ordering counsel not to return, were not supported by clear and convincing evidence. The commission's finding of impropriety in the judge's judicial demeanor appeared to rest on a deputy district attorney's testimony of her impressions of his behavior, and the credibility of these impressions could best be judged by the special masters, who observed the witness, rejected the charge of impropriety in the judge's manner, and, even though the deputy thereafter refrained from appearing before the judge, found it not true that the judge had intimidated her.

(14) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Abusive Behavior Toward Deputy District Attorney.**—In a proceeding for discipline of a municipal court judge, the findings of the Commission on Judicial Performance, that the judge had behaved rudely, impatiently, and abusively to a deputy district attorney after curtailing her direct examination at a preliminary hearing and calling her to his chambers, and that he had later treated the occurrence as a laughing matter, were supported by clear and convincing evidence. The commission also properly found that the judge was acting in a judicial capacity and in bad faith, and that his actions therefore constituted willful misconduct in office as well as prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd. (c). However, the judge's view that he had discretion to curtail the preliminary examination, out of concern for security at the courtroom, once there was sufficient evidence to hold the defendant to answer, had enough merit to prevent the holding of it from constituting prejudicial misconduct, consisting of the denial of the right of a party or counsel to be heard.

(15) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Demeaning Treatment of Females.**—In a proceeding for discipline of a municipal court judge, the Commission on Judicial Performance properly concluded that the judge's use of the terms "sweetie," "sweetheart," "honey," or "dear," to address female attorneys and others appearing before him was unprofessional and demeaning and constituted prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd. (c). The commission's finding that the judge had used these terms in open court lacked the requisite evidentiary support, but it could be fairly inferred that the judge used the expressions in and about the courthouse during business hours to

people he knew principally or solely in connection with his judicial duties.

(16) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Behavior in Court—Toward Litigants.**—In a proceeding for discipline of a municipal court judge, the findings of the Commission on Judicial Performance, that the judge was discourteous, impatient, and demeaning to litigants appearing before him, were amply supported by the testimony of two deputy district attorneys and two deputy city attorneys, all of whom had appeared frequently in the judge's courtroom, and such conduct constituted prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd. (c). The fact that the judge proceeded properly and courteously on many, or most, occasions, did not excuse the instances of misconduct proved by testimony that the special masters found credible.

(17) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Behavior in Court—Toward Deputy City Attorney.**—In a proceeding for discipline of a municipal court judge, the findings of the Commission on Judicial Performance, that the judge had screamed in an abusive manner at a deputy city attorney in open court when she attempted to make a bail motion and in chambers when she suggested that some of the 11 conflict cases on the afternoon calendar be reassigned to other counsel in order to expedite the calendar, were supported by the evidence. However, the evidence did not establish clearly and convincingly that the conduct in question was committed for a purpose other than the faithful discharge of judicial duties and thus amounted to more than spontaneous outbursts. In the absence of a showing of bad faith requisite for willful misconduct, such conduct constituted only prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd. (c).

(18) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Behavior in Court—Toward Witnesses.**—In a proceeding for discipline of a municipal court judge, the findings of the Commission on Judicial Performance, that the judge was rude and intimidating to witnesses, were supported by the evidence, where another judge testified that the judge became loud, impatient, and abusive toward witnesses who hesitated in answering questions. Such intemperate judicial conduct was consistent with other of the judge's acts that were established by the findings, and there was no reason to disbelieve the other judge's testimony. The commission properly found that such conduct constituted prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd. (c), consisting of rude,

intimidating treatment of witnesses and denials of the right to be heard.

(19) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Bias in Appointment of Counsel.**—In a proceeding for discipline of a municipal court judge, the finding of the Commission on Judicial Performance, that the judge had committed prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd (c), by favoring two attorneys, one with whom he owned real property, in his appointments of counsel, was supported by clear and convincing evidence. However, in the absence of any contention or evidence that any of the judge's appointments were not fully justified under Pen. Code, § 987.2, and related sections, or that the attorneys were overpaid for their services, or that the judge acted in bad faith, the judge's conduct did not constitute willful misconduct within the meaning of Cal. Const., art. VI, § 18, subd. (c).

(20) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Ex Parte Meetings With Attorneys.**—In a proceeding for discipline of a municipal court judge, the findings of the Commission on Judicial Performance, that the judge, during private meetings in his chambers with appointed attorneys who were appearing before him, had improperly discussed cases in which the attorneys were appearing before him, were not supported by the evidence. However, the judge's practice of meeting alone in chambers with attorneys representing one side of a case pending before him in the absence of circumstances that would make ex parte communication proper gave rise to an appearance of impropriety and therefore constituted prejudicial conduct, bringing the judicial office into disrepute, within the meaning of Cal. Const., art. VI, § 18, subd. (c).

(21) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review by Supreme Court—Scope—As Affected by Specifications and Notice of Proceedings.**—The Supreme Court predicates its adoption, modification, or rejection of the disciplinary recommendations of the Commission on Judicial Performance solely upon those specifications in the notice of formal proceedings that the commission found both to have been proven as a matter of fact and to have constituted constitutionally sufficient grounds for the imposition of discipline.

(22) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Assurances Regarding Outcome of Prosecution.**—In a proceeding for discipline of a municipal court judge, the

finding of the Commission on Judicial Performance, that the judge improperly suggested to a waitress in a restaurant not to worry about her arrest for drunk driving, was supported by the evidence, and such conduct constituted prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd. (c). For a judge to give a layperson assurances about the outcome of a prosecution against the layperson may imply inside information and thus be inappropriate.

(23) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Evidence—Abbreviated Working Hours.**—In a proceeding for discipline of a municipal court judge, the finding of the Commission on Judicial Performance, that the judge had maintained abbreviated working hours, was not supported by clear and convincing evidence. The special masters had failed to find the charge true and, in light of numerous conflicts of testimony and the masters' observation of the witnesses, they were in a better position than the commission to resolve the matter.

(24) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Failure or Inability to Perform Duties.**—In a proceeding for discipline of a municipal court judge, the findings and conclusions of the Commission on Judicial Performance, that the judge had not worked approximately 96½ days between March 8, 1985, and December 31, 1986, that he had stopped working and was not working in 1987, and that such failure to work constituted a persistent failure or inability to perform judicial duties, were supported by clear and convincing evidence. Even if a substantial portion of the absences in 1985 and 1986 were excusable by illness or as vacation, there appeared no excuse for the judge's failure to work from the beginning of 1987 to May 14, 1987, the date of his testimony before the special masters. The conclusion that this failure to work constituted a persistent failure or inability by the judge to perform his judicial duties was clearly correct, particularly in view of the history of the elimination of willfulness as an element of this ground for removal (Cal. Const., art. VI, § 18, subd. (c)).

(25) **Judges § 6—Censure—Willful Misconduct and Prejudicial Conduct.**—In a proceeding for discipline of a municipal court judge, the findings of the Supreme Court that the judge had committed willful misconduct and prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd. (c), were insufficient to warrant his removal, even though they clearly supported the lesser discipline of censure. The judge had refused to cooperate with police officers, and later attempted to obtain preferential treatment, after being arrested for

drunk driving. He had treated a deputy district attorney abusively and treated witnesses in a demeaning and discourteous manner. Further, he had favored two attorneys, one with whom he owned real property, in his appointments of counsel, and had improperly suggested to a waitress in a restaurant that she should not worry about her drunk driving arrest. However, in light of testimony by numerous attorneys and court personnel that he was capable of being a competent, conscientious, and fair judge, the judge's misconduct did not appear so continuing or pervasive as to preclude his reform.

(26) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Failure or Inability to Perform Duties—Appropriate Discipline.**—Removal from office was the appropriate discipline for a municipal court judge whose conduct demonstrated a persistent failure or inability to perform judicial duties. The judge had not worked approximately 96½ days between March 8, 1985, and December 31, 1986, he had stopped working at the beginning of 1987, and he was not working in May 1987 at the time of his testimony before the special masters. His failure to work during 1987 without any explanation other than vague references to current medical treatment, and without any evidence that he might or could resume his duties thereafter, was alone sufficient to establish the ground of persistent failure or inability to perform judicial duties. Medical reports considered for purposes of mitigation by the Commission on Judicial Performance, even though technically inadmissible, merely confirmed the conclusion that since the beginning of 1987 the judge had been unable to perform his duties. Even if the reports were proved true, they would not have affected the Supreme Court's findings under other counts that the judge had also engaged in willful misconduct and prejudicial conduct within the meaning of Cal. Const., art. VI, § 18, subd. (c) (thereby resulting in the Supreme Court's censure of the judge).

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COUNSEL

Totaro, Engels & Shanahan, Totaro & Shanahan, Maureen J. Shanahan, Michael R. Totaro and Gilbert L. Flanders for Petitioner.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Robert F. Katz and Susan D. Martynec, Deputy Attorneys General, for Respondent.

## OPINION

**THE COURT.***—The Commission on Judicial Performance (commission) has filed in this court its recommendation that David M. Kennick, a judge of the Municipal Court for the Los Angeles Judicial District, be removed from office. (See Cal. Rules of Court, rule 919(a).[1]) Accompanying the petition were the commission's findings of fact and conclusions that the judge had committed "wilful misconduct in office" (willful misconduct) and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (prejudicial conduct), and was culpable of "persistent failure or inability to perform the judge's duties" (persistent failure) (Cal. Const., art. VI, § 18, subd. (c)).

In response, the judge (petitioner) filed a petition to modify or reject the recommendation. (See rule 919(b).) Thereafter, he retired from office (Gov. Code, § 75033.5). He then sought to withdraw his petition and requested dismissal of this proceeding as moot. We denied the request by a minute order dated February 23, 1989, in which we explained that to implement the constitutional provisions that make a removed judge ineligible for judicial office and suspend him or her from practicing law in California pending further order of this court (Cal. Const., art. VI, § 18, subd. (d)), it is necessary to determine whether removal of petitioner from office would have been warranted had he not retired and, if so, whether he should be permitted to practice law.

After the filing of that order, petitioner informed us by letter of his willingness, as a basis for dismissal, to agree to his ineligibility for future judicial office and suspension from the practice of law.[2] He now contends

*Before Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., Eagleson, J., Kennard, J., and Kaufman, J.†

†Retired Associate Justice of the Supreme Court sitting under assignment by the Acting Chairperson of the Judicial Council.

[1] All references to rules are to the California Rules of Court unless otherwise indicated.

[2] On December 8, 1988, before issuing the minute order denying dismissal, the court sent petitioner a letter inquiring whether he would agree to ineligibility for judicial office and suspension from law practice if this court were to "enter an order suspending petitioner from the practice of law and dismissing the proceeding without prejudice to reinstatement should petitioner seek either judicial office or to set aside the order suspending him from the practice of law." When no assent to the conditions was forthcoming, the court filed the order denying dismissal and resolved to defer further consideration of petitioner's mootness contentions until the hearing of this matter on the merits.

Petitioner thereafter sent us a personally signed statement, attached to his counsel's letter of March 22, 1989, reading as follows: "I, David M. Kennick, a retired judge of the Los Angeles Municipal Court, *pursuant to an offer I understand was made by the California State Supreme Court,* hereby agrees [*sic*] that I am ineligible for judicial office in the future and also

that this willingness creates an additional basis for dismissal based on mootness. He further contends his fitness to practice law should be determined in proceedings before the State Bar.

As will be explained, we have concluded that this proceeding is not moot and that we should proceed to a determination of the merits of the commission's report and recommendation of removal. We have further concluded, after independently reviewing the record, that petitioner should be censured for willful misconduct and prejudicial conduct and ordered removed from office on the sole ground of persistent failure or inability to perform his judicial duties, but that he should be permitted to practice law if he passes the Professional Responsibility Examination.

Petitioner was a judge of the Municipal Court, Los Angeles Judicial District, from June 1972 until his retirement in July 1988. Pursuant to a preliminary investigation (rule 904), the commission served him on December 10, 1986, with a notice of formal proceedings (rule 905) and on March 13, 1987, with an amended notice (rule 911), alleging facts charged to constitute willful misconduct, prejudicial conduct, and persistent failure. He filed an answer (rule 906), and in May 1987 three special masters held 10 days of evidentiary hearings on the issues thereby presented (rules 907-910). The masters' report to the commission (rule 912) found most, but not all, of the alleged facts to be true and concluded that each true fact, or set of facts, sustained a charge of willful misconduct, prejudicial conduct, or persistent failure.

The commission's report, filed with this court in January 1988, confirmed virtually all the masters' findings and found additional facts that the masters had concluded were not proved. The commission also differed from the masters in its assessment of particular acts as willful misconduct or prejudicial misconduct. The commission's findings of fact and conclusions of law were unanimous. The recommendation of removal was by a vote of eight to one.

The commission's findings, which are in eight counts, deal with five factual situations, beginning with the arrest and conviction of petitioner for

agrees [*sic*] to entry of an order suspending me from the practice of law." (Italics supplied.) His attorney's letter of March 21, referring to "the Court's proposal of December 8, 1988," makes clear that the mention of an "offer" in petitioner's statement was a reference to the court's aforementioned letter.

Still later, on April 17, 1989, petitioner sent us an additional signed statement as follows: "I, David M. Kennick, a retired judge of the Los Angeles Municipal Court, as an additional part of an agreement signed recently by me and mailed to the Supreme Court by my counsel, do hereby further stipulate that the agreement and/or stipulations are made by me, without my having the right of revocation of any part of the agreement or stipulations. I further stipulate that I will not in any way, move to re-open any part of my case, including, but not limited to, requesting that any order entered by the Supreme Court pursuant to the agreement, be set aside or modified."

drunk driving in August 1985. It is found that he was rude and abusive toward the arresting officers and refused to take field sobriety or blood-alcohol tests (count two), that he sought preferential treatment because of his judicial status and asked an officer if "the paperwork could get lost" before it reached the court (count one), and that he was convicted of driving under the influence of alcohol on a plea of nolo contendere (count three). A second group of findings specifies numerous instances of demeaning, rude, impatient, or abusive behavior, and denial of litigants' and attorneys' rights to be heard, both on the bench and in chambers (counts four and six). Next are findings that petitioner favored certain attorneys in appointing counsel for indigent defendants (count five). In another count it is found that in a long conversation with a waitress at a restaurant, petitioner implied she should not worry about a drunk driving arrest (count seven). Finally, it is found that petitioner's excessive absences from the courthouse, and his cessation of work altogether at the beginning of 1987, constituted persistent failure or inability to perform judicial duties (count eight).

### EFFECT OF PETITIONER'S RETIREMENT

**(1)** Petitioner contends his retirement has made this proceeding moot because we no longer can grant the relief sought by the commission, i.e., his removal from office. (See *Paul* v. *Milk Depots, Inc.* (1964) 62 Cal.2d 129 [41 Cal.Rptr. 468, 396 P.2d 924] [proceeding to enforce marketing regulation rendered moot by defendant's bankruptcy and cessation of business].) Article VI, section 18, subdivision (d), of the California Constitution, however, provides: "A judge removed by the Supreme Court is ineligible for judicial office and pending further order of the court is suspended from practicing law in this State." Thus, the filing in this court of the commission's recommendation of removal placed in issue (1) whether petitioner should continue in the judicial office which he then held, (2) whether he should be eligible for *any* judicial office, and (3) whether he should be suspended from the practice of law in California until further order of this court.

The statute under which petitioner retired provides that "[a]n election to retire" thereunder "shall be without right of revocation, and upon such filing [of the election] said judge shall be deemed retired with receipt of benefits deferred until herein provided, and the judicial office from which he or she has retired shall become vacant." (Gov. Code, § 75033.5.) Petitioner's election to retire therefore eliminated any possibility of his continuing in the judicial office he was holding at the time of the commission's recommendation. His retirement did not, however, foreclose his future eligibility to serve as a judge (see Cal. Const., art. VI, § 15 & 5th par. of § 6), and that eligibility remained for determination in this proceeding.

Further, petitioner's retirement did not resolve the question whether he should be suspended from the practice of law pending further order of this court. (2) Petitioner contends that the suspension issue is not properly before us and instead should be a matter for the State Bar. He claims that suspending him from law practice in this proceeding would violate his constitutional rights to due process and equal protection of the laws. Due process would be violated, he argues, because (1) he was not notified as to which of the charges underlying the removal recommendation would be a basis for suspension from practice or informed of the potential term of suspension, and (2) there has been no hearing on how these charges relate to his right to law practice.

No such notice was required. Rejecting a similar due process claim under a statute authorizing automatic suspension or disbarment of an attorney convicted of a crime involving moral turpitude, this court held that notice of the criminal proceedings was constitutionally sufficient. "The law informs [the accused attorney] that one of the results of his conviction will be his subsequent disbarment . . . . This answers the constitutional requirement that he shall have due process of law before he can be deprived of his right to practice." (*In re Collins* (1922) 188 Cal. 701, 708 [206 P. 990, 32 A.L.R. 1062]; accord *In re Rothrock* (1944) 25 Cal.2d 588, 592 [154 P.2d 392].) So here, petitioner received the commission's notice of formal proceedings expressly charging him with conduct constituting grounds for removal from office (Cal. Const., art. VI, § 18, subd. (c)) and had notice from the Constitution itself that a removed judge would be automatically suspended from law practice unless and until this court ordered otherwise (*id.*, art. VI, § 18, subd. (d)). Petitioner also knew, or should have known, that this court, in responding to any recommendation of removal, would consider only the charges sustained by the commission. (*Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 622 [175 Cal.Rptr. 420, 630 P.2d 954].) Whether the record of the commission's proceedings pertaining to those charges discloses grounds for declining to suspend petitioner from law practice upon removal from office is a legal question that petitioner can and does address before this court.

(3) Petitioner claims that suspension from law practice would deprive him of equal protection of the laws because, he argues, there is no rational basis for subjecting an attorney who happens to be a removed judge to disciplinary sanctions not applicable to other attorneys. To the contrary, California law makes a reasonable distinction between suspension from law practice based on the attorney's conduct *while a judge* and suspension or disbarment that is based on other conduct and ordinarily arises out of proceedings before the State Bar. Investigation of judges' conduct for purposes of judicial discipline is entrusted to the commission, and if this court

accepts the commission's recommendation of removal, the question of suspension is determined by this court from the record of proceedings before the commission, without the necessity for further factual investigation.

**(4a)** Finally, petitioner contends that even if his retirement alone did not make this proceeding moot, mootness does result from his retirement plus his willingness to stipulate to his ineligibility for judicial office and to the entry of an order of this court suspending him from California law practice. (See fn. 2, *ante*.) He claims he should be treated in the same manner as an attorney who seeks to resign from the State Bar while disciplinary charges against the attorney are pending. Such a resignation is effective only if accepted by this court on the State Bar's recommendation. (See rule 960.) Both an attorney whose resignation is accepted and a removed judge, however, are eligible for reinstatement to the bar upon a sufficient showing of rehabilitation. The attorney may resume practice by undergoing the proceedings required for reinstatement after disbarment. (See Rules Proc. of State Bar, rule 660 et seq.)

Reinstatement to law practice of the removed judge is authorized by article VI, section 18, subdivision (d), of the Constitution. That subdivision makes the removed judge "ineligible" for judicial office but merely "suspended" from law practice. Suspension, in contrast to ineligibility, connotes temporary rather than permanent disqualification. Also, the suspension is effective "pending further order of [this] court" and is therefore subject to our later reconsideration. The possibility that petitioner would be the subject of such a reinstatement proceeding before this court is not precluded by his supplementary offer to refrain from moving to reopen any part of his case and from requesting that any order suspending him from law practice be set aside or modified. (See fn. 2, *ante*.) An application for reinstatement to practice would not require setting aside or modifying the suspension *order* because the suspension itself imposes only a temporary disability that can be removed on the basis of subsequent events. Thus, even petitioner's augmented offer does not preclude the possibility of a reinstatement proceeding.

A necessary foundation to any such proceeding would be a record of the reasons for petitioner's suspension, which necessarily would inhere in the reasons for the event giving rise to the suspension, i.e., his removal from judicial office. There appears no practicable way to create such a record except to go forward with the present proceeding.

An analogy to State Bar proceedings is again instructive. An attorney who has been allowed to resign from the State Bar during the pendency of disciplinary proceedings may resume practice by undergoing the proceed-

ings required for reinstatement after disbarment, including a State Bar investigation, a public hearing before a hearing panel, a favorable recommendation to this court, and our acceptance of that recommendation. (See Rules Proc. of State Bar, rules 225, 660 et seq.) (5) In considering a recommendation of reinstatement after *disbarment,* this court must consider "the evidence of present character . . . in the light of the moral shortcomings which resulted in the imposition of discipline. [Citation.]" (*Roth* v. *State Bar* (1953) 40 Cal.2d 307, 313 [253 P.2d 969]; accord *Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 403 [165 Cal.Rptr. 829, 612 P.2d 919].) Yet if the attorney has been allowed to resign and thus avoid disciplinary proceedings, no such grounds for discipline will have been established. To fill this gap, acceptance of resignation may be conditioned upon perpetuation of testimony concerning the attorney's conduct pertinent to his or her fitness to practice law. (Rule 960(c); Rules Proc. of State Bar, rule 650 et seq.) This step makes it possible to consider a resigned attorney's application for reinstatement in light of *evidence* of the attorney's preresignation conduct, in lieu of findings on that subject.

(4b) Similarly, if we were to suspend petitioner from the practice of law and then dismiss this proceeding as he requests, he would be entitled to apply for reinstatement to practice. Determination of the application would require our consideration of whether petitioner had presented proof of rehabilitation sufficient to overcome the grounds for suspension (see *Tardiff* v. *State Bar, supra,* 27 Cal.3d 395, 403; *Roth* v. *State Bar, supra,* 40 Cal.2d 307, 313). A necessary foundation of that determination, of course, would be the ascertainment of what grounds, if any, had warranted suspension in the first place. That inquiry would necessitate resolution of the merits of the present proceeding, i.e., whether the commission's recommendation of removal from judicial office should be sustained and, if so, whether the grounds for removal also constituted grounds for suspending petitioner from law practice. The only practicable way to resolve the merits would be for the commission to appear before us in the reinstatement proceeding to defend its findings and recommendation of removal; yet the commission would then be burdened by all the adverse consequences of the delay between dismissal of the present proceeding and the hearing of the application for reinstatement, e.g., staleness of the record, the dimming of counsel's recollections, and changes in commission personnel.

Thus, to dismiss this proceeding simply because of petitioner's retirement and temporary acceptance of some of the consequences of removal from office might well result in our simply postponing, rather than forgoing, consideration of the merits of the commission's recommendation of removal and the question whether, if the recommendation is accepted, the conduct warranting removal calls for suspension of petitioner from the practice of

law in this state. Because of the practical difficulties such postponed consideration would raise, we decline to follow this course.[3]

In light of this conclusion, we need not consider the other reasons urged by the commission for immediately reaching the merits, e.g., protection of the integrity of the judicial system (see *Judicial Inquiry and Review Bd.* v. *Snyder* (1987) 514 Pa. 142 [523 A.2d 294, 298]; *Matter of Probert* (1981) 411 Mich. 210 [308 N.W.2d 773, 776]), preservation of public confidence in the judiciary (*Matter of Yaccarino* (1985) 101 N.J. 342 [502 A.2d 3, 30-31]), and provision of guidance to other judges (see *In re Weeks* (1983) 134 Ariz. 521 [658 P.2d 174, 176]).

## APPLICABLE STANDARDS

We turn to the merits of the commission's report and recommendation of removal. Removal may be justified by any of the three forms of dereliction found here: willful misconduct, prejudicial conduct, or persistent failure to perform duties, all as defined in article VI, section 18, subdivision (c) of the California Constitution (art. VI, § 18, subd. (c)).[4]

**(6)** Willful misconduct, or "wilful misconduct in office" (art. VI, § 18, subd. (c)), has two elements: it must be *willful,* i.e., done with malice or in bad faith, and it must be committed *in office,* i.e., while acting in a judicial capacity. (*Gonzales* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 365 [188 Cal.Rptr. 880, 657 P.2d 372]); *Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 283-284 [110 Cal.Rptr. 201, 515 P.2d 1].) The element of bad faith, or malice, must meet a two-pronged test: the judge must have "(1) committed acts he knew or should have

[3]Shortly before oral argument (at which petitioner did not appear), counsel forwarded to us a copy of a letter from petitioner to the State Bar, dated December 8, 1989, stating in pertinent part as follows: "I . . . hereby resign as a member of the State Bar of California and relinquish all right to practice law in the State of California and agree that in the event this resignation is accepted and I later file a petition for reinstatement, that the Supreme Court will consider in connection therewith all disciplinary matters and proceedings against me at the time this resignation is accepted, in addition to other appropriate matters. I further agree that upon filing of this resignation by the Office of the Clerk, State Bar of California, that I will remain on inactive membership of the State Bar. Because of this I shall be ineligible to practice law . . . . [¶] I further request that . . . due to my resignation from the State Bar that the Supreme Court of the State of California dismiss the proceedings against me. . . ."

This communication, addressed to the State Bar, does not alter our decision to proceed with consideration of the merits for the reasons stated in the text.

[4]Subdivision (c) provides in pertinent part: "On recommendation of the Commission on Judicial Performance the Supreme Court may . . . censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

known to be beyond his power, (2) for a purpose other than faithful discharge of judicial duties." (*Wenger* v. *Commission on Judicial Performance, supra*, 29 Cal.3d 615, 622, fn. 4; accord *Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1305 [240 Cal.Rptr. 859, 743 P.2d 919].)

(7) Prejudicial conduct, or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (art. VI, § 18, subd. (c)), is generally less serious than willful misconduct and may be committed either (1) while acting in other than a judicial capacity or (2) while acting in a judicial capacity but in good faith and without malice. Prejudicial conduct while acting in a judicial capacity means "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (*Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d 270, 284; accord *Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 530-531 [247 Cal.Rptr. 378, 754 P.2d 724, 76 A.L.R.4th 951].) Prejudicial conduct while *not* acting in a judicial capacity may be committed in bad faith or with malice and thus fall short of willful misconduct only because not committed in a judicial capacity. (*Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d 1297, 1304; *Geiler, supra,* 10 Cal.3d at p. 284, fn. 11.) The provision that prejudicial conduct must be that which "brings the judicial office into disrepute" (art. VI, § 18, subd. (c)) does "not require notoriety, but only that the conduct be 'damaging to the esteem for the judiciary held by members of the public who observed such conduct.' (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 534 [116 Cal.Rptr. 260, 526 P.2d 2681].)" (*Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d 615, 622-623, fn. 4.)

(8) In considering the commission's report and recommendation, we must independently review the record and sustain the charges against petitioner only to the extent we find there is clear and convincing evidence sufficient to prove them to a reasonable certainty. (*Ryan* v. *Commission on Judicial Performance, supra,* 45 Cal.3d 518, 530; *Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d 1297, 1304.) We must then determine, as a matter of law, what if any constitutional grounds for judicial discipline are established by each of the findings thus sustained and whether those grounds support the commission's recommendation of removal. (*Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d 270, 276.) In formulating these legal conclusions, we give great weight to the conclusions of the commission. (*Ryan, supra,* 45 Cal.3d at p. 530; *Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d at p. 623.) In resolving disputed issues of fact, however, we give special deference to the determina-

tions of the masters, who were best able to evaluate the truthfulness of the witnesses appearing before them. (*Ryan, supra,* 45 Cal.3d at p. 530; *Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d 1297, 1304.) Each of the three masters who heard petitioner's case was a judge or retired judge of the Los Angeles County Superior Court and thus experienced in assessing credibility.[5]

**(9)** Some of the commission's findings expand upon the charges in the amended notice of formal proceedings. We have repeatedly refused to adopt commission determinations of judicial misconduct based on findings outside the scope of a notice of formal proceedings, as amended. (*Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d 615, 638-639; *Cannon* v. *Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 696 [122 Cal.Rptr. 778, 537 P.2d 898].) Here, neither the masters nor the commission exercised their power under rule 911 to allow or require further amendments that would have enlarged the scope of the notice to encompass the commission's findings. We therefore consider the findings only for their bearing upon the charges that the amended notice, together with petitioner's answer, placed in issue (see rules 908(a), 912(a)).

## MISCONDUCT IN RESPONSE TO ARREST AND PROSECUTION FOR DRUNK DRIVING (Counts one, two and three)

The first three counts upheld by the commission pertain to events surrounding the arrest and prosecution of petitioner for driving under the influence of alcohol about 1 a.m. on August 21, 1985. Count one deals with petitioner's alleged efforts to have charges dropped, count two with the arrest itself, and count three with petitioner's conviction on a nolo contendere plea. The commission concluded that its findings pursuant to each of the three counts established prejudicial conduct, and that its findings on count one also established willful misconduct. We consider the counts in chronological order, beginning with count two.

### (a) *Rudeness and Noncooperation in Connection With Arrest* (count two)

**(10)** Count two charged that at the time of petitioner's arrest, he failed to cooperate by behaving in a rude and abusive manner toward the arresting officers, refusing to complete field sobriety tests, and refusing to submit to any chemical test of his blood, breath or urine despite the implied consent provisions of the Vehicle Code. The commission found all these charges to

[5]The three masters were Judges Parks Stillwell (retired), Max F. Deutz (retired), and Phillip F. Jones.

be true and further found that petitioner refused the chemical tests despite being advised five times about the implied consent provisions. The commission also found that the arresting officers and the officers at the sheriff's substation where petitioner was taken following the arrest observed objective symptoms indicating that he was under the influence of alcohol.

The arrest was made by California Highway Patrol (CHP) Officer Diane Rojas while directing traffic at the scene of an accident on a transition ramp between freeways 605 and 91. Petitioner was driving alone. Rojas testified she noticed that petitioner's car was running over some flares. She gave him three orders to stop before he did so and repeatedly instructed him to extinguish his cigarette, explaining that gasoline had spilled from an overturned vehicle. When he did not comply, she reached in his car and took the cigarette away. Smelling alcohol, she asked him to step outside. Again he did not comply with her repeated requests, so she opened the car door, pulled him out, and attempted to administer field sobriety tests, with which he refused to cooperate. Concluding from his speech, gait, and eyes that he was under the influence of alcohol, she placed him under arrest and advised him of his obligations under the implied consent law to submit to chemical tests for blood alcohol. (See Veh. Code, §§ 13353, 23157.) He repeatedly refused such tests. On the way to the sheriff's substation with Rojas and her partner, petitioner kept saying he couldn't believe he was being arrested by female officers, and that he wasn't drunk. During the booking process he was again uncooperative.

When Rojas and her partner discovered that petitioner's belongings included his business card as a judge, they called CHP Sergeant Bladow and had the jailer call his own supervisor, who was Sheriff's Sergeant Balch. Balch and Bladow both saw petitioner at the substation and corroborated that he was rude, uncooperative, and seemingly under the influence of alcohol. He again refused to take chemical tests, this time offered twice by Bladow. Balch and Bladow concluded that to avoid risks from exposing petitioner, as a judge, to other prisoners, Bladow should drive petitioner home. Bladow did so.

Petitioner testified that he had had no more than three and a half glasses of wine and that he was not uncooperative. He contends the officers' testimony that he was rude and obnoxious should be disbelieved because they did not treat him as physically dangerous. Thus, they took no precautions to restrain him while interviewing him outside the cell or while Bladow drove him home in the front seat of the patrol car. The commission's findings, however, pertain only to noncooperation and verbal abuse, not to physical threats or conduct.

The masters as well as the commission found that petitioner had refused to cooperate with the officers by behaving in a rude and abusive manner and by refusing to complete field sobriety tests or submit to any chemical test. The officers' testimony supporting these findings pursuant to count two is clear and convincing, and we adopt them as our own. We also adopt the commission's conclusion that petitioner's behavior described in the findings constituted prejudicial conduct.

(b) *Attempts to Obtain Preferential Treatment* (count one)

(11) Count one charges that on August 22, 1985, petitioner went to a CHP office and spoke with Sergeant Bladow about his arrest the previous day. Petitioner allegedly said he "would like to make a deal or something," and asked if the paperwork could get lost between the CHP and the court or if something could be worked out with the captain. It is charged that petitioner abused his authority as a judge to obtain preferential treatment. The masters found these charges to be true, and the commission's findings adopted them in substance.

Bladow testified that when he drove petitioner home from the sheriff's substation, petitioner said he wanted to file a complaint against the CHP officers for making a false arrest and on other grounds. Bladow replied that he would not then accept a complaint because of petitioner's intoxicated state, but that petitioner could call him at his CHP office, for which he left the telephone number.

The next day, August 22, petitioner phoned Bladow and made an appointment to come to Bladow's office that evening. At that meeting, petitioner was polite and apologetic about his actions following his arrest. He asked which court would hear his case. When told it would be the Los Cerritos Municipal Court in Bellflower, petitioner said that would be embarrassing, because people there knew him from his having appeared in that court as a deputy district attorney. He asked if the case could be transferred; Bladow said that would be up to the district attorney's office.

Bladow testified that during this conversation petitioner "made a request that maybe I [Bladow] could lose the paperwork or the paperwork could get lost somewhere between the office and the court." Bladow replied that "we" would not do that. He mentioned certain pending charges against two CHP officers for failing to process paperwork for the court and said he would not jeopardize his job by doing such a thing. Petitioner asked if Bladow's captain could help petitioner or maybe lose the paperwork. Bladow replied that Captain Whiteside "would not under any circumstances be involved in anything like that," but that petitioner was free to speak with him.

Petitioner's version of this incident is that Bladow, when taking petitioner home, initiated the idea of their meeting again to discuss the evening's events "when the smoke settles." Petitioner thought Bladow wanted a further discussion because Bladow was of the opinion that a mistake had been made, and wanted to clarify the matter as soon as possible. When petitioner first arrived at Bladow's office, he noticed a newspaper on the desk carrying a story about two highway patrol officers indicted for bribery in drunk driving cases. They briefly discussed the article; then petitioner asked in which court his case would be filed, and expressed disappointment when told it would be the Los Cerritos court. Bladow agreed to let petitioner see the reports on his case, but then said he could not find them. Finally, petitioner said he thought the CHP officers had made a major mistake in arresting him and asked whether there was any CHP procedure for holding a hearing to discuss the facts of a case. Bladow said he knew of no such procedure, but invited petitioner to discuss the matter with the captain. Petitioner then terminated the conversation. He denied seeking any preferential treatment or any diversion of the papers in his case.

The commission's findings upholding count one are supported by clear and convincing evidence. Petitioner's testimony, that Bladow sought the interview out of embarrassment stemming from a belief that petitioner's arrest had been a big mistake, is not credible. The count one findings are reinforced by the commission's findings on count two that the arresting officers and officers at the jail observed symptoms indicating petitioner was under the influence of alcohol. Those findings are amply supported by testimony and utterly discredit petitioner's version.

A closer question is presented by the commission's conclusion that in this incident petitioner "abused his authority as a judge in an attempt to obtain preferential treatment," and that his behavior constituted willful misconduct in office as well as prejudicial conduct. For purposes of judicial discipline, willful misconduct can be committed only while acting in a judicial capacity. (*Gonzales* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 359, 365; *Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d 270, 283-284.) The question, therefore, is whether petitioner was acting in a judicial capacity when he asked Sergeant Bladow for preferential treatment at the CHP office on August 22.

In support of its theory of willful misconduct under count one, the commission made an additional finding pertaining to an earlier incident that occurred when Sergeant Bladow was driving petitioner home from the sheriff's substation in the early morning hours of August 21, just after petitioner's arrest. At that time, states the finding, petitioner "referred to his judicial status and told the sergeant to remember that the Highway Patrol

had to come before him when he was on the bench." Bladow testified that this statement was made at the end of the 20-minute ride home, during which petitioner berated CHP personnel for arresting him and not letting him drive his own car home. The remark does not appear to have been accompanied by any request for special treatment. The incident confirmed what undoubtedly was already common knowledge on the part of Bladow and petitioner, that the latter was a municipal court judge before whom CHP officers might appear from time to time as witnesses.

The mere fact of this common knowledge is insufficient to establish that petitioner was acting in a judicial capacity during the conversation in which he made the requests for special treatment. The present case is clearly distinguishable from the two decisions cited by the commission on this issue, in each of which a judge committed misconduct by using the authority of his office for improper ends. Thus, in *Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 794, footnote 14, and 798-799 [119 Cal.Rptr. 841, 532 P.2d 1209], the judge had received a traffic citation and committed willful misconduct by entering the chambers of a fellow judge of the same court and prevailing upon the latter to prepare and sign a dismissal of the citation. In *Gonzales* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 359, 366-369, the judge summoned a deputy district attorney into his chambers and attempted to persuade the latter to dismiss charges in cases not before the judge. Here, in contrast, petitioner made his improper requests in a conversation that took place wholly outside any judicial setting. There is no evidence that he even referred to his judicial status on that occasion.

Accordingly, it has not been proved by clear and convincing evidence that petitioner was acting in a judicial capacity when he sought favorable treatment from Bladow. The conduct of a judge not acting in judicial capacity cannot amount to willful misconduct, for purposes of judicial discipline, regardless of the malice or bad faith involved. (*Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d 1297, 1304; *Gonzales* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 359, 365; *Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d, 270, 284, fn. 11.) We therefore hold that by engaging in the acts charged and proved under count one, petitioner committed prejudicial conduct but not willful misconduct.

(c) *Misdemeanor Conviction on Nolo Contendere Plea* (count three; dismissed)

**(12)** Count three charges that on October 1, 1985, petitioner was "convicted in the Los Cerritos Municipal Court, on a plea of nolo contendere, of

the offense of driving under the influence of alcohol on August 21, 1985." The masters and the commission upheld this charge and found additionally that there was no valid explanation for the nolo contendere plea other than petitioner's guilt. These additional findings must be disregarded in our consideration of this count, however, if the charge itself does not state a ground for discipline. We conclude that it does not.

Article VI, section 18, subdivision (b), of the Constitution provides for removal by this court of a judge who pleads guilty or no contest or is found guilty of a crime that is punishable as a felony or involves moral turpitude. Violation of Vehicle Code section 23152, subdivision (a), the offense of which petitioner was convicted, constitutes only a misdemeanor (Veh. Code, § 40000.15), and there was no finding or showing that petitioner's commission of the offense involved moral turpitude. The question therefore is whether the bare fact of a judge's conviction of a misdemeanor not involving moral turpitude, based on a plea of nolo contendere, can constitute prejudicial conduct warranting discipline.

In *Cartwright* v. *Board of Chiropractic Examiners* (1976) 16 Cal.3d 762 [129 Cal.Rptr. 462, 548 P.2d 1134], we held that the license of a chiropractor who had been convicted on a plea of nolo contendere of violating Penal Code section 316 (prohibiting the keeping of a "disorderly house") could not be revoked for "conviction of a crime involving moral turpitude" (Chiropractic Act, former § 10, subd. (b), 3 West's Ann. Bus. & Prof. Code (1974 ed.) p. 147). Our holding rested not on the statutory prohibition against using a nolo contendere plea as an admission in a civil suit (Pen. Code, former § 1016, subd. 3), but on judicial construction of the nolo contendere plea as the equivalent of a guilty plea for only the purpose of the criminal proceeding. (16 Cal.3d at p. 772; see *In re Hallinan* (1954) 43 Cal.2d 243, 247 [272 P.2d 768]; *Grannis* v. *Board of Medical Examiners* (1971) 19 Cal.App.3d 551, 557-560 [96 Cal.Rptr. 863]; *Kirby* v. *Alcoholic Bev. etc. App. Bd.* (1969) 3 Cal.App.3d 209, 218-222 [83 Cal.Rptr. 89]; *Caminetti* v. *Imperial Mut. L. Ins. Co.* (1943) 59 Cal.App.2d 476, 490-492 [139 P.2d 681].)

The practical impact of the *Cartwright* principle has been substantially narrowed by legislation expanding the legal effect of a nolo contendere plea. Penal Code section 1016, subdivision 3, now provides that the "legal effect of [a nolo contendere] plea, *to a crime punishable as a felony,* shall be the same as that of a plea of guilty *for all purposes.*" (Italics supplied; see also Evid. Code, § 1300.) A number of licensing statutes have been amended to specify a nolo contendere plea, or conviction based thereon, as a ground for discipline. (*Cartwright* v. *Board of Chiropractic Examiners, supra,* 16 Cal.3d at p. 771; *Arneson* v. *Fox* (1980) 28 Cal.3d 440 [170 Cal.Rptr. 778, 621 P.2d

817] [sustaining revocation of license of real estate broker, convicted after nolo contendere plea, under Bus. & Prof. Code, § 10177, subd. (b)].)[6]

The commission recognizes that in the absence of legislation altering the *Cartwright* principle, nolo contendere pleas should be excluded from administrative licensing proceedings, but contends that the rule should be otherwise in judicial disciplinary proceedings. The commission relies extensively upon *Matter of Killam* (1983) 388 Mass. 619 [447 N.E.2d 1233], but there a judge was censured for the *act* of driving under the influence of intoxicating liquor. Here, the commission chose to charge petitioner only with a *conviction* for such misconduct and not with the act itself.

The commission contends that our reliance in *Cartwright* v. *Board of Chiropractic Examiners, supra,* 16 Cal.3d 762, on the absence of any *legislative* provision for basing discipline on convictions following nolo contendere pleas, makes our holding inapplicable to *constitutionally* based judicial disciplinary proceedings. The Constitution itself, however, expressly provides for judicial discipline based on "no contest" (nolo contendere) pleas only if the plea is to a crime punishable as a felony or involving moral turpitude. (Cal. Const., art. VI, § 18, subd. (b).) The drafters of the constitutional provision seem to have recognized that a nolo contendere plea to a lesser crime may be "induced by factors collateral to the issue of guilt" (*Arneson* v. *Fox, supra,* 28 Cal.3d 440, 446). Indeed, if a judge considers himself or herself not guilty of a charged misdemeanor or infraction not involving moral turpitude, a nolo contendere plea may well be less "prejudicial to the administration of justice" or less likely to "[bring] the judicial office into disrepute" (art. VI, § 18, subd. (c)) than would the adverse publicity and the expenditure of time and money which would result from a plea of not guilty.

Thus, the sole charge in count three of the amended notice of formal proceedings, that petitioner was convicted, on a plea of nolo contendere, of the offense of driving under the influence of alcohol, fails to state a ground for discipline. Count three is therefore dismissed.

## JUDICIAL RUDENESS AND DENIAL OF DUE PROCESS
(Counts four and six)

Count four charges petitioner with demeaning, rude, impatient, and abusive behavior toward individuals appearing before him, and count six

[6] In apparent response to the *Cartwright* decision, section 10, subdivision (b), of the Chiropractic Act was amended in 1978 to authorize revocation of a practitioner's license because of "a plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or of any offense substantially related to the practice of chiropractic." (Stats. 1978, ch. 307, § 3, p. 640, approved at Gen. Elec. of Nov. 7, 1978.)

charges him with denying parties or their attorneys the right to be heard. Incidents exemplifying these charges are described in the following paragraphs under count 4. (We omit paragraphs e and g since the charges therein were dismissed by the commission.)

(a) *Taking over questioning and ordering counsel not to return* (par. a; dismissed)

Paragraph a charges: At a preliminary hearing on December 24, 1985, petitioner said to a deputy district attorney during her direct examination of an officer-witness, "I'm going to take this over, counsel. This is ridiculous." When counsel objected to petitioner's questions, petitioner became angry and told her she was "not to come in here again." Paragraph i alleges that at the hearing petitioner intimidated counsel and interrupted and took over questioning.

The masters found that the allegations of paragraph a were factually correct and that petitioner had improperly interrupted and taken over the questioning, but refused to find that petitioner had thereby intimidated counsel, had improperly curtailed questioning, had been demeaning, rude, impatient or abusive to persons appearing before him, or had conducted himself in a manner that reflects adversely on the judiciary. **(13)** The commission, on the other hand, dismissed the charge of improperly interrupting and taking over the questioning (par. i), but found that in responding to the deputy district attorney's objections to his questions, petitioner had become angry, sarcastic and abusive, and had thereby committed prejudicial misconduct. The commission also found that petitioner's order to the deputy "not to come in here again" was conduct reflecting adversely on the judiciary and constituted prejudicial conduct.

The commission's finding of impropriety in petitioner's judicial demeanor appears to rest on the deputy district attorney's testimony of her impressions that petitioner had a "fidgety, impatient" mannerism, "spoke in a shrill manner," and addressed her as "ma'am" in a sarcastic tone. The credibility of these impressions could best be judged by the masters, who observed the witness and rejected the charge of impropriety in petitioner's manner.

The commission contends that petitioner's ordering counsel not to return to his courtroom was parallel to the willful misconduct of Judge Wenger in banishing a deputy district attorney from his courtroom. Wenger, however, imposed the ban apparently to prevent the deputy from reporting his conduct to the commission. (*Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d 615, 650-652.) Here, the incident arose when the deputy

apparently objected to being addressed as "ma'am," was told by petitioner "not to come in here again," and replied, "Thank you very much. That's a privilege." Petitioner testified that the deputy spoke in a sharp tone and was insolent and disrespectful. Although she thereafter refrained from appearing before petitioner, the masters found it "not true that [petitioner] intimidated counsel." Giving due weight to the masters' assessment of credibility, we conclude that the commission's findings and conclusions of prejudicial conduct in connection with the conduct charged in paragraph a of count four are not supported by clear and convincing evidence. Accordingly, the charges based on that paragraph are dismissed.

(b) *Loud, angry behavior toward counsel in chambers* (par. b)

**(14)** Paragraph b alleges: In the summer of 1985, after a preliminary hearing in a robbery case at which petitioner sharply curtailed direct examination conducted by Deputy District Attorney Barbara Channell, petitioner called Channell into chambers and, without apparent cause, angrily accused her of creating a security hazard in the courtroom. He raised his voice and pointed his finger at Channell, who was astonished and upset. The masters found these allegations to be true and further found that petitioner jokingly referred to the incident later in the day, showing he had acted in bad faith. The commission adopted the substance of the masters' findings. Both the masters and the commission concluded that petitioner's behavior constituted willful misconduct.

Channell testified that she had been instructed to make an extensive record at the preliminary hearing because the victim was frightened and wanted to drop the charges. Petitioner ordered her to cease her examination even though she attempted to explain the situation to him. After holding the defendant to answer, he ordered her into his chambers, where he explained that continued examination of the victim was creating a security risk because of persons in the courtroom connected with the defendant. Petitioner testified that during the examination, the defendant and his friends continuously stared at the victim.

During the in-chambers conference, however, he yelled for three to five minutes, so loudly that a clerk testified she could hear his voice in the courtroom. The clerk saw Channell emerge in tears. Channell testified that she was extremely upset, notified her superiors, and never returned to petitioner's courtroom for any further preliminary hearings. At the time of her testimony in 1987, she had been a deputy district attorney for nine years.

Shortly after the incident, Channell visited the chambers of Judge Lorna Parnell and explained what had happened. Less than an hour later, as Judge

Parnell was leaving the courthouse, she walked past petitioner's chambers, where she saw and heard petitioner laughing and telling his clerk how funny it was that he had upset a deputy district attorney and made her run out of his courtroom. Petitioner testified that he did raise his voice during the meeting with Channell in chambers, but that he had no recollection of later laughing about the matter with the clerk.

Clear and convincing evidence supports the commission's findings that petitioner's behavior, as described in paragraph b of count four, was demeaning, rude, impatient and abusive, and was treated by him as a laughing matter. We also agree that he was acting in a judicial capacity and in bad faith, and that his actions therefore constituted willful misconduct in office as well as prejudicial conduct. We decline, however, to adopt the commission's conclusion that petitioner's curtailment of the deputy district attorney's cross-examination constituted prejudicial conduct consisting of a denial of the right of a party or counsel to be heard (count six, cross-referring to paragraph b of count four). Petitioner's view that he had discretion to curtail the preliminary examination, out of concern for security of the courtroom, once there was sufficient evidence to hold the defendant to answer, "had at least enough merit to prevent the holding of it from constituting misconduct" (*Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d 615, 647, fn. 13).

(c) *Addressing female personnel as "sweetheart"* (par. c)

**(15)** Paragraph c of count four alleges that petitioner addressed female attorneys and others appearing before him as "sweetie," "sweetheart," "honey," or "dear." The masters and the commission found this charge was true and that the expressions used were unprofessional, demeaning and unjustified by personal friendship or acquaintance.

Three attorneys, plus a deputy clerk and a police detective, all women, testified that petitioner had addressed them as "sweetheart," "sweetie," or "baby"; three of these witnesses stated that petitioner had also addressed female defendants as "sweetheart" or "sweetie." In his written answer to paragraph c, petitioner acknowledged that he had addressed many female acquaintances and friends, as well as members of his staff or of the clerk's office, as "dear," "honey," or "sweetheart," but asserted each of these was "meant as a warm, friendly word."

The commission found that petitioner had used these expressions in open court, but the masters found he had not done so. There was testimony that petitioner had used the terms "sweetie" or "sweetheart" to "females in the courtroom," but the witness did not specify whether court was then in

session. Thus, the commission's finding on this point lacks the requisite evidentiary support. It can fairly be inferred, however, that petitioner used the expressions in and about the courthouse during business hours to people he knew principally or solely in connection with his judicial duties. We agree with the commission that petitioner's use of these terms in addressing women under those circumstances was unprofessional, demeaning and sexist, and violated canon 3A(3) of the California Code of Judicial Conduct ("Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity . . . ."). We therefore adopt the conclusions of the masters and the commission that these acts constituted prejudicial conduct.

(d) *Rudeness to criminal litigants* (par. d)

Paragraph d of count four alleges that petitioner was discourteous, impatient, and demeaning to litigants appearing before him in criminal and civil cases. The masters and the commission found this charge true only with respect to criminal cases. The commission's findings state four examples: (1) Petitioner frequently failed to respond to questions from traffic and misdemeanor defendants or to allow such defendants to explain their conduct. (2) Petitioner sometimes interrupted misdemeanor defendants who were attempting to address the court and ordered them remanded, resulting in additional incarceration. (3) Petitioner frequently lost his temper and yelled at litigants, sometimes ordering them out of his courtroom. (4) Often, petitioner used a demeaning tone of voice to Asian-surnamed defendants appearing on fish and game violations and uttered such statements as, "You were catching fishy, fishy in the harbor here and you weren't supposed to? Were you a bad boy?" Petitioner also demeaned defendants who appeared to be alcoholics or transients by addressing them using slurred speech.

**(16)** The commission's findings are amply supported by the testimony of two deputy district attorneys and two deputy city attorneys, all of whom had appeared frequently in petitioner's courtroom. Petitioner called 28 witnesses, including attorneys, bailiffs, clerks and court reporters, who testified to being frequently present in petitioner's courtroom without observing any of this type of misbehavior. The fact that petitioner proceeded properly and courteously on many, or even most, occasions, however, does not excuse the instances of misconduct proved by testimony which the masters found credible. We adopt the commission's findings on paragraph d of count four, as well as its conclusion that the subject behavior constituted prejudicial conduct. We also agree with the commission that petitioner's refusal to listen to defendants who were attempting to address the court, as found under paragraph d of count four, amounted to prejudicial conduct consisting of the denial of parties' full right to be heard, as charged in count six.

(e) *Abusive screaming at counsel* (par. f)

Paragraph f of count four alleges that petitioner screamed in an abusive manner at Deputy City Attorney Carol Rose (1) in open court when she attempted to make a bail motion and (2) in chambers when she suggested that some of the eleven conflict cases on the afternoon calendar, all assigned to David Pantoja as appointed counsel, be reassigned to other counsel in order to expedite the calendar. The masters found these allegations true, as did the commission. The commission also found that petitioner's yelling at Ms. Rose in open court so intimidated her that she felt she could never make another bail motion before petitioner, and that his yelling at her in chambers frightened her and reduced her to tears.

**(17)** The findings are supported by the testimony of Rose, who said that both incidents occurred about 3:30 p.m. on different days between January and August 1985 but that she could not fix any exact dates. As to the second incident, Rose testified that by 3:30 p.m., Pantoja had interviewed only two of the eleven defendants he was scheduled to represent at arraignments that day. She approached a local attorney and ascertained that he would be willing to take some court appointments, then asked Pantoja if he would be willing to split the appointments with that attorney so they could all finish by 5 p.m. Pantoja agreed, and Rose said she would speak to petitioner about it. When she made the request to petitioner, he was furious and accused her of calling Pantoja incompetent.

Petitioner argues these are vague accusations made by a single attorney and contradicted by testimony of petitioner's consistently decorous behavior by numerous witnesses who were in his courtroom on a regular basis. The intemperate behavior found here, however, is consistent with petitioner's similar conduct established by the findings under paragraphs b, d, and h of count four. Moreover, Pantoja is one of the attorneys toward whom petitioner is found, in count five, to have shown favoritism in making appointments. As the commission points out, that fact may have made petitioner overly sensitive to the suggestion that some of those appointments be transferred to another attorney.

The masters concluded that the foregoing behavior, charged in paragraph f, constituted willful misconduct, but the commission decided it was only prejudicial conduct. The evidence does not establish clearly and convincingly that the acts in question were committed for a purpose other than the faithful discharge of judicial duties and thus amounted to more than spontaneous outbursts. In the absence of a showing of bad faith requisite for willful misconduct, we conclude that the findings under paragraph f of count four constituted prejudicial conduct. We also conclude that petition-

er's angry rebuff of counsel's attempt to make a bail motion denied counsel the right to be heard and, as determined by the commission, thereby constituted prejudicial conduct under count six.

(f) *Intimidation of witnesses* (par. h)

**(18)** Paragraph h of count four alleges that petitioner was rude and intimidating to witnesses, unnecessarily interrupted their testimony, at times harshly admonished them to "just answer the question," and caused them to become upset. The masters and the commission found this charge true.

The evidence supporting this charge was the testimony of Judge Lorna Parnell, who testified that her first judicial assignment, from August through December 1985, was in the San Pedro branch where petitioner was also sitting. Because she was new to criminal law, she sat in petitioner's courtroom on three occasions to observe preliminary hearings. She testified that petitioner became loud, impatient, and abusive toward witnesses who hesitated in answering questions. She was concerned about this behavior because most of the witnesses had been victims of crime.

Petitioner contends that this testimony lacks specific case names and dates, and is too vague. The intemperate judicial conduct found here, however, is consistent with other acts of petitioner established by the findings. There was no reason to disbelieve Judge Parnell's testimony. We find the charges of paragraph h of count four to be true and agree with the masters and the commission that the acts charged constituted prejudicial conduct consisting of both rude, intimidating treatment of witnesses (count four) and denials of the right to be heard (count six).

FAVORITISM TOWARD APPOINTED COUNSEL (Count five)

Count five charges that petitioner has "shown favoritism to private attorney Theordore Veganes, with whom [petitioner has] jointly owned property in Hawaii since 1976, and to private attorney David Pantoja by conduct which includes, but is not limited to, the following: . . . ." There follow four paragraphs charging misconduct. Paragraphs c and d were dismissed by the commission; therefore, only paragraphs a and b are considered here.

(a) *Favoritism in appointing counsel for indigent defendants* (par. a)

Paragraph a of count five charges petitioner with exercising his power of appointment on behalf of Attorneys Veganes and Pantoja in an extremely high number of cases during the years 1983 to 1986. The masters found that this charge was true and constituted prejudicial conduct.

The commission found favoritism not only toward Attorneys Veganes and Pantoja, as charged in count five, but also toward a third attorney, "Susan Anderson, an associate of Mr. Pantoja," and found under paragraph a that petitioner had overly used his appointive power on behalf of all three attorneys. The commission then made four subfindings, which we must consider for their bearing on paragraph a's charge of favoritism toward Attorneys Veganes and Pantoja. The first two of these subfindings are based on testimony and documents presented to the masters by an internal auditor for the Los Angeles County Controller's Audit Division, who had been directed to audit appointments of attorneys under Penal Code section 987.2 from the beginning of 1984 to March 1987 in the San Pedro courthouse, to which petitioner was assigned in January 1985.[7]

The first of the 2 subfindings is that from January 1986 to March 1987, petitioner appointed Attorneys Veganes, Pantoja, and Anderson to serve in 465 (approximately 58 percent) of the 801 cases in which he made appointments. The auditor also testified, however, that the 3 attorneys received 99 of 484 appointments made by judges other than petitioner during that period. Moreover, there was no testimony on how many of these appointments went to Anderson, who was specified as one of the recipients of favoritism in the commission's findings but not in the amended notice of formal proceedings.

The second subfinding was that in 1985 the three allegedly favored attorneys received 30.3 percent of all the money paid for appointments in the San Pedro courthouse, whereas in 1984 only 4.8 percent of such payments went to Veganes and none to the other two attorneys. The auditor, who testified to these figures, also stated that of the 30.3 percent of the payments in 1985, 6.8 percent went to Anderson, 7.2 percent to Pantoja, and 16.3 percent to Veganes. He did not say how many of these appointments were made by petitioner and how many by other judges. Moreover, the auditor testified that because attorneys usually did not submit their claims for two or three months, or sometimes even six months, there was no way of knowing how many of the payments in 1985 were for services performed in 1984, i.e., before petitioner took the bench in San Pedro. Veganes testified that it was his regular practice to allow requests for payment for services as appointed counsel to accumulate for three or four months and then submit them in one batch.

Petitioner's clerk testified that when appointments were necessary because the public defender was unavailable or declared a conflict, petitioner

[7]Though the audit extended to March 1987, our finding under count eight, paragraph b, establishes that petitioner did not work at all after the beginning of 1987.

would have her check the building for available attorneys, and if she could not find one she would make telephone calls to attorneys who had asked to be placed on the appointments list. She named nine attorneys (including the three in question) who were repeatedly appointed, and she denied that petitioner had ever told her to call only Veganes, Pantoja, and Anderson.

Five attorneys, other than those three, testified to receiving as many San Pedro appointments as they could handle. Both a deputy district attorney and a deputy city attorney, however, testified that after petitioner's arrival at the court, most (one said 90 percent) of the appointments went to Veganes, Pantoja, and Anderson. Petitioner testified that he frequently appointed Veganes and Pantoja because of their competence but that he did not keep track of how often he used them. He had served with both men in the same district attorney's office, and both testified that they contributed to petitioner's 1986 judicial reelection campaign.

Judge Trammell, who was presiding judge of the Los Angeles Municipal Court, testified that a directive had been sent by his predecessor to judges of the court pertaining to appointment of counsel. The directive, which is in evidence and dated July 31, 1985, states that its provisions for "appointment rotation via a list of eligible attorneys" is "not in effect at this time." Judge Trammell also testified that on several occasions he advised petitioner that he had discussed appointments of counsel with a county auditor and had received telephone calls on the subject from a newspaper reporter, and that he was concerned about the issue. Petitioner replied that he felt there were a number of people who were out to get him.

The commission's third subfinding under paragraph a of count five was that petitioner "never disclosed his joint ownership of property with Mr. Veganes to opposing counsel in cases before him in which Mr. Veganes represented defendants." The property in question was a condominium in Hawaii on which petitioner had always paid his share of the expenses. The commission contends the joint ownership violated the canon 5C(1) of the *California Code of Judicial Conduct*, admonishing judges to "refrain from financial and business dealings that tend to . . . involve them in frequent transactions with lawyers or persons likely to come before the courts on which they serve." Petitioner concedes that his failure to disclose his interest in the property to counsel opposing Mr. Veganes may have given the appearance of some impropriety.

Finally, the fourth subfinding is that "[w]hile assigned to the municipal court on Bauchet Street in Los Angeles, [petitioner] made Penal Code section 987.2 appointments to Mr. Pantoja in order to help Mr. Pantoja reestablish his private practice of law." The finding is based on a single

"yes" answer by petitioner on cross-examination, in response to a question whether he had done what the finding states. There is no other evidence of favoritism toward Pantoja at that time, which preceded petitioner's assignment to San Pedro.

**(19)** Both the masters and the commission concluded that petitioner had committed prejudicial conduct by favoring Veganes and Pantoja in his appointments of counsel. Giving due weight to the masters' assessment of credibility, we think this conclusion is supported by clear and convincing evidence. Though some of the evidence of favoritism, as already explained, lumped appointments of Veganes and Pantoja with the appointments of Anderson, the fact that Anderson was Pantoja's associate made Anderson's appointments somewhat probative of favoritism toward Pantoja.

The commission also concluded, however, that petitioner's favoritism in appointing counsel constituted willful misconduct. The commission relies for this conclusion on *Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, contending that that decision is directly in point. It is not. Judge Spruance committed willful misconduct by making "illegal and unjustified appointments of two attorneys" who were his friends and supporters. (*Id.* at p. 799.) "[N]o valid reason, such as conflict of interest, existed to justify [the 27] appointments [in question], nor does it appear that in each of the 27 cases a determination of the indigency of these defendants had been duly made as required by Government Code section 27707. [The attorneys] were compensated by Alameda County public funds in amounts not less than $150 for each court appearance without regard to the nature of the service performed or the time expended . . . ." (*Id.* at p. 795, fn. 15.) In the present case, by contrast, there is no contention or evidence that any of petitioner's appointments of the allegedly favored attorneys was not fully justified under Penal Code section 987.2 and related sections, or that the attorneys were overpaid for their services.

Nor do we find any other clear and convincing evidence that petitioner acted in bad faith, i.e., that he knew or should have known the appointments were beyond his powers and that he made them for a purpose other than the faithful discharge of his judicial duties (see *Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 45-46 [207 Cal.Rptr. 171, 688 P.2d 551]). There is evidence that petitioner was not given clear guidelines for allocating the appointments, and that he acted to provide competent counsel whenever needed without conscious favoritism. Though there was other evidence from which inferences of bad faith might be drawn, such evidence appears to have been rejected by the masters, who were best able to judge credibility. We therefore conclude that the conduct charged in para-

graph a of count five constituted prejudicial conduct but not willful misconduct.

(b) *Ex parte conversations with attorneys who were appearing on appointed cases* (par. b)

As a further instance of alleged favoritism toward Attorneys Veganes and Pantoja, paragraph b of count five charges petitioner with having "[e]x parte conversations in your chambers with these two attorneys on a number of occasions when they were appearing on appointed cases." Petitioner testified that these attorneys sometimes came into his chambers for social visits on days when they were appearing before him in court, but he denied that they ever discussed cases in which he was acting as judge.

**(20)** The masters' findings under paragraph b are consistent with petitioner's testimony. The masters found it not true that petitioner had ex parte conversations with the attorneys concerning cases on which they were appearing before him. The masters also found that petitioner "met privately with these attorneys in chambers on days when the attorneys were appearing before [him] as counsel in a case on his calendar, thereby giving the appearance of impropriety." The masters concluded this was prejudicial conduct.

The commission, however, found that during some of the meetings described in the masters' findings, petitioner "would improperly discuss cases in which the attorneys were appearing before him." The principal evidence supporting this finding was the testimony of Carol Rose, who had appeared before petitioner in San Pedro both as a deputy city attorney and as a deputy district attorney. Ms. Rose testified that on four or five occasions she saw Veganes, Anderson, or other defense counsel in chambers without a prosecutor present. She thereupon positioned herself at the chambers door, heard that they were discussing one of her own cases, and then went into chambers herself. Deputy City Attorney Sherry Tourino testified that in cases in which Veganes, Pantoja, or Anderson appeared before petitioner, she saw him invite the attorney into his chambers during the recess. She disclaimed any charge of actual impropriety but said it gave her "a feeling of impropriety."

Mr. Pantoja testified that he frequently visited petitioner in chambers during the lunch period, perhaps twice a week, and that most of the time they were alone. When asked whether during those visits he ever discussed cases in which petitioner had appointed him as counsel, he answered, "Yes." While supportive of the commission's finding, this testimony is literally consistent with the masters' finding that petitioner had no ex parte

conversations with the attorneys concerning cases "in which they were appearing" before him. Pantoja's answer could have referred to cases already finally disposed of by the court. Although the question is close, we defer to the masters' determinations of credibility and adopt their finding that petitioner had no ex parte conversations with attorneys about cases in which they were appearing before him. We conclude, however, that petitioner's practice of meeting alone in chambers with an attorney representing one side of a case pending before him in the absence of circumstances that would make ex parte communication proper (see, e.g., 6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, §§ 42-44) gave rise to an appearance of impropriety. It therefore constituted prejudicial conduct "that brings the judicial office into disrepute" (art. VI, § 18, subd. (c)).

### IMPROPER SUGGESTION TO WAITRESS NOT TO WORRY ABOUT DRUNK DRIVING ARREST (Count seven)

Count seven alleges that on the evening of February 22, 1985, petitioner "sat at a bar in Cigo's Restaurant in San Pedro for a period of several hours and during that period engaged in a conversation with Mary Davis, a waitress at the restaurant, in which [he] *repeatedly* implied that she should not worry about her recent arrest for drunk driving *because [he] could in some manner exert influence to affect the disposition of the case.*" (Italics added.) The masters found this allegation to be true and concluded that it amounted to willful misconduct. The commission's finding, however, adopted the allegation *except for* the italicized portions; thus, the commission declined to find that petitioner either (1) implied *more than once* that Davis should not worry about her arrest or (2) implied that he could exert influence on her behalf. The commission nonetheless concluded that the conduct described in its finding constituted prejudicial conduct.

Notwithstanding this limited scope of the commission's finding, the commission's brief in this court analyzes at length certain testimony from which it might be inferred that petitioner made repeated offers of improper assistance in the matter. None of that testimony is properly before us. **(21)** It is settled that we "predicate our adoption, modification, or rejection of the Commission's recommendation [to remove petitioner from his judicial office] solely upon those specifications in the [Amended] Notice of Formal Proceedings which the Commission found both to have been proven as a matter of fact and to have constituted constitutionally sufficient grounds for the imposition of discipline." (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 785, fn. 5.) Thus, on count seven, we are concerned factually only with the commission's finding that during his long conversation with the waitress, petitioner implied that she should not worry about her recent arrest for drunk driving.

(22) Petitioner testified that he recalled sitting at the bar named in count seven, next to a woman who told him about a drinking-and-driving offense. Though he could not identify the woman as Mary Davis, he was convinced from the testimony that she was the one. He did not comment on, and thus did not deny, the testimony that she was told he was a judge. He testified that he "spoke to her in terms of telling her not to worry about it; it is going to be all right; these things have a way of working themselves out." He said he had often spoken in those terms as he listened to people's problems, including "the facts of . . . their traffic cases and their drinking and driving cases." But he emphatically denied ever telling Mary Davis or anyone else that he would take care of that person's case or use any improper influence in the matter.

Petitioner concedes in his brief that in acting as he testified, he "may have acted inappropriately," and that "[a]t the worst, the evidence might give an appearance of possible impropriety meeting the standard of prejudicial conduct." We agree that for a judge to give a layperson assurances about the outcome of a prosecution against the latter may imply inside information and thus be inappropriate. We concur in the commission's conclusion that petitioner's conduct charged and found true by the commission under count seven constituted prejudicial conduct.

PERSISTENT FAILURE TO PERFORM DUTIES (Count eight)

Count eight alleges that petitioner "persistently failed to perform [his] judicial duties by being frequently absent from the courthouse, maintaining abbreviated working hours and delegating [his] judicial responsibilities to others," and that "this conduct rendered [him] unavailable for judicial services, placed a burden on [his] judicial colleagues, injured the administration of justice, and failed to promote public confidence in the integrity of the judiciary. This conduct is exemplified by, but not limited to, the following:" There follow two paragraphs, of which paragraph a deals with abbreviated working hours, and paragraph b deals with days absent from work.

The masters rejected paragraph a (abbreviated work hours) as not proved, but found that paragraph b (days absent) was true and accordingly upheld count eight only to the extent of its finding on paragraph b. The commission, however, made findings incorporating the substance of both paragraphs and sustaining the whole of count eight.

(a) *Abbreviated working hours* (par. a; dismissed)

(23) Paragraph a of count eight alleged that petitioner had "maintained abbreviated working hours, beginning work at 10:00 or 10:30 a.m., taking

lunch breaks of two to three hours and often stopping work at 4:00 p.m. or earlier." The commission, but not the masters, found this paragraph to be true.

Numerous attorneys and other witnesses testified that petitioner customarily did not take the bench until after 10 a.m., and some said he usually did not arrive at the courthouse until that hour. Petitioner himself testified that his "work hours" were "10 o'clock to noon and from 2 to—I suppose 5 o'clock basically," but that "in most instances" he did not leave the court until 6 or 7 o'clock in the evening because he had things to take care of that he could not get done during the day. He said that he sometimes was there on weekends. He also testified that he usually did not leave for lunch "until probably 12:30 or 1 o'clock" and that he "was back by quarter to 2 or so."

Elaine Markulis, one of petitioner's two courtroom deputy clerks, testified that petitioner usually arrived between 9:30 and 10 a.m. and was still there when she left between 6 and 6:30. The only witness who contradicted petitioner's statement of when he usually left for the day was Judge Parnell, who was at the San Pedro court from July through December 1985. She testified that she "share[d] the same corridor" with petitioner in the "small courthouse" and parked in the same area as he, that she was usually at the courthouse from 9 a.m. to 5 p.m., and that petitioner rarely arrived before 10 a.m. and usually, but not always, was gone when she left at 5 p.m.

Deputy Clerk Markulis explained that petitioner's division handled traffic, misdemeanor and felony arraignments, preliminary hearings, and small claims. She said she arrived at 8:30 a.m., and the courtroom doors were opened at 9 a.m., when the clerks would proceed to call the calendar, find out which defendants were present and which ones needed counsel, and "play a tape of the constitutional rights." Walk-in traffic-ticket arraignments would "come from the office" about 9:50 a.m. Thus, the morning calendar was not ready until 10 a.m. Petitioner's other deputy courtroom clerk, Kathleen McGee, on the other hand, testified that the traffic citations were ready to be heard by 9:15 a.m. The commission argues that petitioner could have heard these traffic citations as well as small claims cases before 10 a.m.

Markulis testified, however, that when petitioner was not on the bench, he was usually in his chambers busy with paperwork, including probation and sentencing reports, small claims cases (which he customarily took under submission), and applications for appointment or compensation of counsel. The commission contends, based on testimony of petitioner's friends, that he spent too much time in chambers socializing instead of working.

Markulis estimated that from 175 to 225 cases per day were dealt with in petitioner's courtroom. Her estimates included: traffic ticket appearances, 20 to 40 in the morning and 20 to 40 in the afternoon; "custodies" (misdemeanor), from 15 to 40 or 45; felony preliminary hearings, 4 to 10, averaging 6 or 7; felony arraignments, up to 4 or 5; and misdemeanor "bailouts," 20 to 40. In addition, there were cases "continued for arraignments." Markulis testified that petitioner always completed his calendar for the day, and Deputy District Attorney Rose testified that when there was a heavy preliminary hearing calendar, petitioner would sometimes go as late as 6 or 7 p.m.

The commission argues that some of petitioner's rude and impatient behavior found under count four may have been due to his failure to allow more time for court proceedings. The commission also asserts that this failure was the cause of petitioner's alleged policy, testified to by Deputy Clerk McGee, as well as by a deputy district attorney, of transferring to downtown Los Angeles any preliminary hearing estimated to last more than one hour. Markulis, however, emphatically denied the existence of any such policy.

Thus, the evidence on paragraph a's charge of abbreviated working hours included numerous conflicts of testimony that the masters who observed the witnesses were in a better position to resolve than the commission. Accepting the masters' resolution, reflected in their finding that rejected paragraph a, we conclude there is a lack of clear and convincing evidence that petitioner maintained abbreviated working hours and thereby shirked his judicial responsibilities. We therefore dismiss paragraph a of count eight.

(b) *Absences from work* (par. b)

**(24)** Paragraph b of count eight charges that petitioner "did not work approximately ninety-six and one-half days between March 8, 1985 and December 31, 1986; [petitioner] reported inability to work for health reasons on 21 of those days. [Petitioner] apparently ha[s] stopped working and [is] not working in 1987." This charge was found true by the masters and the commission, who also found "[t]here was no legal justification for [petitioner's] failure to work as such during 1987," and concluded that the conduct charged in paragraph b constituted persistent failure or inability to perform judicial duties.

Daily work sheets were introduced before the masters to prove petitioner's absence for 96½ days from March 1985 through 1986.[8] Petitioner testified that during that period he was absent only 95 days, of which 57 days were vacation at the recommended rate of 21 days per year—42 days for 1985 and 1986 plus 15 days carried over from 1984. He also said that during the same period he was sick on 27 days, not just the 21 days stated in the charge. He acknowledged that his figures left 11 days of absence unaccounted for. The commission contends this testimony is inconsistent with the statement in petitioner's answer to the amended notice of formal proceedings that he had not kept records of his vacation or sick time. He testified, however, that his testimony was based on old calendars on which he had noted the dates of his illnesses and his vacations.

Petitioner also testified that since January 5, 1987 (a Monday), he had not worked and had not been available for assignment. He named a doctor who was treating him for "blood pressure," a psychiatrist whom he had been seeing since the fall of 1986, and a psychologist he had consulted before that, but he introduced no expert testimony or reports concerning any limitations imposed by his health upon his ability to carry out his judicial duties. The presiding judge of the municipal court testified that he had planned to transfer petitioner away from San Pedro as of the first of January 1987, but did not do so because in mid-December 1986 petitioner said he was leaving on a vacation for the remainder of the month and thereafter would be taking a medical leave of absence on the advice of his physician.

Based on the foregoing, we agree with the masters and the commission that there is clear and convincing evidence to support the charges of paragraph b, and we so find. Even if a substantial portion of the absences in 1985 and 1986 were excusable by illness or as vacation, there appears no excuse for petitioner's failure to work from the beginning of 1987 to May 14, 1987, the date of his testimony before the masters. Nor does he claim to have made even an attempt to return to his duties from that time until his retirement in July 1988.

The masters and the commission also concluded that the conduct charged and found true under paragraph b constitutes a persistent failure or inability by petitioner to perform his judicial duties. This conclusion is clearly correct, particularly in view of the constitutional history of the elimination of willfulness as an element of this ground for removal.

[8]The commission's brief in this court describes testimony of three witnesses to the effect that petitioner failed to provide adequate advance notice of some of his absences. Any such testimony is beyond the scope of the charges against petitioner and therefore must be disregarded. It should not have been referred to in the brief.

From 1960 to 1976 judges could be removed for "*willful and persistent failure* to perform [the judge's] duties." (Italics added; Cal. Const., former art. VI, § 10b [adopted Nov. 8, 1960]; Cal. Const., former art. VI, § 18, subd. (c) [adopted Nov. 8, 1966].) In 1976 such removal became authorized for "*persistent failure or inability* to perform the judge's duties." (Italics added; art. VI, § 18, subd. (c).) The ballot pamphlet argument in favor of the 1976 amendment (Gen. Elec., Nov. 2, 1976) stated at page 31: "Proposition 7 will expand the powers of the Commission to deal with judicial officers who, due to disability, are no longer able to perform their judicial functions. Under current constitutional authority the Commission may only censure or remove a judge where the persistent failure to perform duties is willful. This Proposition will eliminate willfulness as grounds for removal and censure, enabling the Commission to more adequately deal with problems of age and health which may impede the efficiency and quality of justice." No argument against the amendment appeared in the ballot pamphlet.

Accordingly, we conclude that petitioner's excessive absences from work in 1985 and 1986 and his cessation of work altogether at the beginning of 1987, as set forth in our finding on paragraph b of count eight, constituted persistent failure or inability to perform his judicial duties.

## REMOVAL FROM OFFICE

The commission recommends that petitioner be removed from office. For the reasons heretofore explained, we must decide whether to adopt this recommendation even though petitioner voluntarily retired after it was made. The commission based its recommendation on three of the constitutional grounds for removal stated in article VI, section 18, subdivision (c): willful misconduct, prejudicial conduct, and persistent inability or failure to perform judicial duties. We begin by considering whether removal is called for on the first two of those grounds.

### (a) *Willful misconduct and prejudicial conduct as ground for removal*

**(25)** There is merit in petitioner's contention that our findings of his willful misconduct and prejudicial conduct are insufficient to warrant removal even though they clearly support the lesser discipline of censure.[9] Indeed, our findings against petitioner are similar in degree of gravity to those in two relatively recent cases in which only censure was imposed:

[9]The commission's recommendation of removal empowers this court to impose the lesser discipline of censure. (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512 [116 Cal.Rptr. 260, 526 P.2d 268].)

*Gubler* v. *Commission on Judicial Performance, supra,* 37 Cal.3d 27, and *Roberts* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 739 [190 Cal.Rptr. 910, 661 P.2d 1064].

In *Gubler, supra,* 37 Cal.3d 27, the judge made a variety of orders violative of statutory restrictions on enforcement of a defendant's obligation to pay the county for services of the public defender (Pen. Code, § 987.8). The orders unlawfully required defendants to appear for fee-collecting purposes, made fee payments an apparent condition of probation, extracted fees from deposits for bail and, in one instance found to be willful misconduct, doubled a fee because of the judge's irritation over counsel's objection to the fee's being made an apparent condition of probation. Judge Gubler also committed willful misconduct by writing a note to a court commissioner recommending disposition of a case in which the judge had been peremptorily disqualified (Code Civ. Proc., § 170.6). Finally, the judge on four occasions illegally released confiscated guns for sale to his courtroom bailiff, who was a close personal friend, or to purchasers brought in by the bailiff. (See Pen. Code, § 12028.)

In *Roberts* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 739, we held that an independent basis for our censure order was afforded by the judge's conviction (after jury trial) for obstructing a public officer (Pen. Code, § 148) under circumstances reminiscent of the present case. Uniformed officers stopped a car being driven erratically by the judge's son and began to give the son a field sobriety test. The judge emerged from the car, told the officers they had no business stopping the car, directed obscenities at them, handed them a card identifying himself as a judge, and finally struck an officer in the chest and grabbed his shirt. Another independent basis for the *Roberts* censure order was a matter in which the judge threatened a district attorney who had sought a writ against his ruling; advised the public defender, ex parte, " 'You'd better win this or I won't grant another motion for you' "; and then, after the Court of Appeal had granted the writ, telephoned the presiding justice before expiration of the time for rehearing, angrily protesting the decision. In another matter, involving child neglect, the judge " 'improperly acted as an advocate, prejudged issues, abusively curtailed the presentation of evidence, and treated witnesses, litigants and an attorney in a rude, intimidating and demeaning manner.' " (33 Cal.3d at p. 744.) Moreover, after making his ruling, the judge threatened to report losing counsel to the State Bar if she advised her client to appeal, and then after the appeal was taken made an ex parte request to substituted counsel to consider dismissing the appeal. Finally, during a felony trial, the judge called inexperienced defense counsel into chambers

and caused her to cry by loudly and angrily accusing her of being incompetent and quizzing her about her legal experience.

Petitioner's willful misconduct and prejudicial conduct, though egregious, is not significantly more so than the misdeeds found in *Roberts* and *Gubler.* Like Judge Roberts, he failed to cooperate with officers engaged in enforcing the law against driving under the influence of alcohol, and then attempted to obtain special treatment. On the other hand, petitioner's request that the CHP "lose the paperwork" on his case, though thoroughly reprehensible, did not go beyond the stage of inquiry; aside from his remark the previous evening that CHP officers occasionally appeared before him, he did not press his request with any threat or offer of favors.

Like Judges Roberts and Gubler, petitioner from time to time was demeaning, rude, impatient, and abusive to individuals appearing before him. These included witnesses, as well as traffic and misdemeanor defendants. He sometimes addressed women in the courthouse (though not in open court) with undue and demeaning familiarity. Twice, he yelled at and unjustly intimidated a deputy city attorney, and on another occasion he imparted similar treatment to a deputy district attorney and then was heard to express amusement that he had upset her.

Petitioner also exercised favoritism toward two friends in his appointments of counsel for indigent defendants, but we have concluded that this favoritism was not willful misconduct because petitioner made the appointments under pressure and without adequate guidelines for assuring impartiality among would-be appointees. His visits in chambers with the two favored attorneys while they had cases pending before him gave the appearance of impropriety even though the conversations were not about those cases. (It should be noted that Judge Gubler also exercised favoritism by illegally releasing confiscated guns for sale to or through his bailiff, a close friend. (37 Cal.3d at pp. 55-59.) Finally, petitioner gave the appearance of impropriety when he assured a waitress that she should not worry about her recent arrest for drunk driving.

All this judicial misbehavior by petitioner, though deplorable and clearly calling for censure, falls significantly short of the showings of willful misconduct and prejudicial conduct on which we have based orders removing judges. In *Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d 1297, we removed a judge after sustaining eight charges of willful misconduct arising out of four incidents, plus ten charges of prejudicial conduct; the charges included abuses of the contempt power and an attempt

to influence a case in which the judge had been disqualified. In that opinion, we reviewed five previous cases of judicial removal. (43 Cal.3d at p. 1318.)

Since then, three other judges have been removed. In one of those cases, the judge repeatedly abused his contempt power, personally embroiled himself in cases by ex parte communication or investigation, and regularly left the courthouse at 2 p.m., or even in the morning on Fridays. (*Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518 [247 Cal.Rptr. 378, 754 P.2d 724, 76 A.L.R.4th 951].) In a second case, the judge directed a guilty verdict, dismissed a criminal action against a lifelong friend whom the judge had failed even to arraign, ordered criminal trials to proceed in the absence of defense counsel, and failed to sign a judgment even after this court had formally censured him for failing to do so. (*McCullough* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 186 [260 Cal.Rptr. 557, 776 P.2d 259].) Finally, in the third case, removal was based on twenty-five findings of willful misconduct or prejudicial misconduct, including the following: ten incidents of prejudicial conduct over a four-year period reflecting a persistent pattern of rude, abusive behavior toward litigants, witnesses, counsel, and court personnel; abdication on five occasions of the judge's responsibility to ensure the rights of criminal defendants; five instances of abuse of the contempt power; three cases of the judge's personal involvement and failure to remain objective in matters before him; and two instances of abuse of the power to make fee orders. (*Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826 [264 Cal.Rptr. 100, 782 P.2d 239].)

Petitioner's willful misconduct and prejudicial conduct, though clearly calling for severe censure, was significantly less blameworthy than the misconduct in the removal cases. His inquiries whether the CHP could "lose the paperwork" on his arrest were reprehensible, yet he took no further steps to avoid being prosecuted. (Compare this with the repeated obstruction of criminal prosecution found in *Gonzales* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 359, 366-369, and *Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 794, fn. 14, 798-799.) His rude and demeaning behavior toward litigants, witnesses, and counsel who appeared before him undoubtedly had adverse effects on the proper disposition of cases, particularly where it improperly curtailed testimony or the functioning of counsel. Yet petitioner did not abuse the contempt power, attempt to influence the disposition of cases through ex parte communication or investigation, or intervene in cases in which he had been disqualified. (Cf., e.g., *Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d 615, 653.) As for his too frequent appointments of two close personal friends, and the associate of one of them, as counsel for indigent defendants,

we should not assume that if clear guidelines for rotating appointments had been laid down, petitioner would not have followed them.

The testimony of the numerous attorneys and court personnel who testified on petitioner's behalf, particularly in connection with count four, indicates that he was capable of being a competent, conscientious, and fair judge. Viewed as a whole, petitioner's misconduct does not appear so continuing or pervasive as to preclude his reform. (Cf. *Kloepfer* v. *Commission on Judicial Performance, supra,* 49 Cal.3d 826, 866). Thus, it seems likely that our public censure of each of petitioner's misdeeds would have led him to correct and improve his judicial behavior. (See *In re Rasmussen* (1987) 43 Cal.3d 536, 538 [236 Cal.Rptr. 152, 734 P.2d 988].) Accordingly, we decline to order him removed from office for willful misconduct or prejudicial conduct.

(b) *Persistent failure or inability to perform duties as ground for removal*

**(26)** The commission's recommendation of removal from office is grounded not only on petitioner's willful misconduct and prejudicial conduct, but also on his persistent failure or inability to perform judicial duties, based on the commission's finding, which we have adopted, under paragraph b of count eight. Petitioner's failure to work since the beginning of 1987 without any explanation other than vague references to current medical treatment, and without any evidence that he might or could resume his duties thereafter, is alone sufficient to establish this ground for his removal.

Petitioner asks us to take judicial notice of a writ proceeding concerning his application to the commission for disability retirement in March 1987, two months prior to the hearing before the masters. (See Gov. Code, § 75060 et seq.) He does not claim, however, that the application or the proceeding resulted in any administrative or judicial determination with respect to his ability to work. Hence, the proceeding in question appears irrelevant.

On November 17, 1987, petitioner requested that the commission consider certain exhibits, including six medical reports, at its hearing in this matter then set for December 4, 1987. He did not, however, request a hearing for the taking of additional evidence under rule 916. In objecting to the request on various grounds, the examiners pointed out that even if an evidentiary hearing were ordered, the medical reports would be excludable as hearsay under rule 909, which at that time allowed only "legal" evidence

to be received. The commission, however, adopted a resolution, concurrently with its findings, conclusions and recommendation, that the medical reports offered by petitioner, "although technically inadmissible, have nevertheless been considered by the Commission for the purposes of mitigation." Thus, the commission appears to have considered the reports as in the nature of an offer of proof and to have concluded that even if they were true they would not alter the recommendation of removal.

Five of the reports were addressed to petitioner's counsel; one of these was from a psychologist, dated October 13, 1986, and four were from a psychiatrist, with dates in January, August, September and October 1987. The other report, dated May 7, 1987, was from a different psychiatrist and addressed to the commission. All stated that petitioner had numerous symptoms from stress associated with a hard-fought campaign, beginning in February 1986, to be retained in office at the June 1986 election. Petitioner was said to be suffering from severe depression and numerous related difficulties that would interfere with his functioning as a judge. Thus, the reports, at most, merely confirmed the conclusion that since the beginning of 1987, petitioner had been unable to perform his judicial duties.

Nor would the medical reports, if proved true, affect any of our findings under the other counts. Since petitioner's reported medical difficulties did not commence until February 1986, they could have no bearing on any of the findings that occurred in 1985, i.e., our sole finding of willful misconduct (count four, par. b) and five of our findings of prejudicial conduct (counts one, two, and seven; pars. f and h of count four [included also in count six]).

The remaining counts of prejudicial conduct were either undated (count four, pars. d [included in count six] and c) or took place both before and after February 1986 (count five). But even as to misconduct committed after commencement of the troubles described in the medical reports, proof of the substance of those reports would not be a defense. Protection of the public and of the integrity of the judiciary precludes allowing petitioner's reported physical or emotional difficulties to bar a determination of "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Art. VI, § 18, subd. (c); see *Matter of Yaccarino, supra,* 101 N.J. 337 [502 A.2d 3, 30].)

## CONCLUSION

For the reasons stated, we order that as of the date this decision becomes final, David M. Kennick shall be removed from his office as judge of the Municipal Court for the Los Angeles Judicial District on the sole ground of

persistent failure or inability to perform his judicial duties. We also censure him for his willful misconduct in office and his conduct prejudicial to the administration of justice as determined in this opinion. He shall be permitted to practice law upon passing the Professional Responsibility Examination required of applicants seeking readmission or reinstatement to the bar. (*Gonzales* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 359, 378.)[10]

[10]Since petitioner Kennick's retirement has already terminated his tenure in office, the effects of our directing his removal are (1) to establish his ineligibility for judicial office generally and (2) to suspend him from practicing law in California pending further order of this court, thereby laying the foundation for the conditional permission to practice granted by our order. (See Cal. Const., art. VI, § 18, subd. (d).)

[No. S004893. Nov. 27, 1989.]

KENNETH LYNN KLOEPFER, a Judge of the Municipal Court, Petitioner, v.
COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

## SUMMARY

The Commission on Judicial Performance recommended that a judge of the municipal court be removed from office, based on findings by the commission that the judge had committed five acts of willful misconduct and twenty acts of conduct prejudicial to the administration of justice that brought the judicial office into disrepute (Cal. Const., art. VI, § 18, subd. (c)). The basis for the proceedings was incidents in which the judge was alleged to have displayed a lack of judicial temperament in dealing with litigants, attorneys, witnesses and attachés, thereby violating canon 3A(3) of the California Code of Judicial Conduct, and to have failed to ensure the rights of defendants in criminal cases who appeared before him.

The Supreme Court ordered that the judge be removed from office. The court rejected the judge's claims of prejudicial delay and denial of due process in the course of the commission's proceedings, and adopted the findings and recommendations of the commission, holding that four acts of willful misconduct and twenty-one acts of prejudicial conduct were established. The court held the record established by clear and convincing evidence that the judge's actions, almost all of which occurred on the bench, could not be characterized as occasional lapses or isolated instances of misconduct, but rather as a persistent pattern of abuse and arbitrary conduct as to which admonition or censure would not be adequate. It held the fact that the judge's conduct of other proceedings during his tenure on the bench had been unremarkable could not overcome the evidence of a continuing, pervasive pattern of misconduct, which occurred over the full span of his judicial career. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Prejudicial Conduct.**—Willful misconduct as a ground for discipline of a judge occurs when he commits acts (1) which he knows, or should know, are beyond his authority (2) for reasons other than the faithful discharge of his duties. Though a judge must act in bad faith in order to commit willful misconduct, he need not necessarily seek to harm a particular litigant or attorney; disregard for the legal system in general will suffice. Unlike willful misconduct, the charge of prejudicial conduct does not require the presence of bad faith. It occurs when a judge, though acting in good faith, engages in conduct which adversely affects public opinion of the judiciary.

(2) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review.**—On review of a recommendation by the Commission on Judicial Performance, the Supreme Court independently evaluates the evidence taken in the commission proceedings to determine if the findings of the commission are supported by clear and convincing evidence sufficient to sustain them to a reasonable certainty. The court gives special weight to the factual findings of the special masters before whom the evidence was presented, because they are better able to evaluate the credibility of the witnesses. The court then determines if the conduct found to have occurred is a basis for censure or removal and, if so, the appropriate action. In this aspect of its review of the commission recommendation, the court recognizes the expertise of the commission in matters involving judicial conduct and therefore gives special weight to its conclusions.

(3) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Due Process.**—The procedures of the Commission on Judicial Performance and the combination of investigatory and adjudicatory functions by the commission do not deny due process to judges subject to disciplinary recommendations. The initial investigation is by the commission staff, but once formal proceedings are instituted the prosecutorial function shifts to examiners from the office of the Attorney General. The special masters appointed by the Supreme Court then hear the evidence, make findings and conclusions based thereon, and recommend action to the commission, which itself reviews the evidence, independently makes findings and conclusions, and recommends appropriate discipline to the Supreme Court. The Supreme Court, however, is the final decision maker and must itself review the

evidence and independently assess its weight and relevance. The procedures do not create an unacceptable risk of bias either on the part of the commission, or on the part of the court as ultimate decision maker. That during the course of the initial investigation or thereafter the commission may become aware of the reports regarding the investigation is not a sufficient basis for believing that either the commission or the Supreme Court is not, or cannot be, an impartial decision maker.

(4) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Due Process—Delay.**—Cal. Rules of Court, Rules for Censure, Removal, and Retirement or Private Admonishment of Judges, rule 905(a), requiring written notice without delay to a judge advising him of the institution of formal proceedings to inquire into charges against him, does not create a right to notice equivalent to a statutory right to speedy trial, or require the Commission on Judicial Performance, once a decision to initiate formal proceedings with regard to any incident has been made, to proceed at once regardless of the number or gravity of other incidents that have come to light during the preliminary investigation and are themselves still being investigated. The procedure of giving notice to a judge that a preliminary investigation is underway is not compelled as a matter of due process, and the commission is not obliged to give notice of formal proceedings until the preliminary investigation is complete.

(5) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Prehearing Delay.**—A delay of 25 months between the service of notice of formal proceedings on a judge and the hearing by the Commission on Judicial Performance did not require dismissal of charges against the judge, where, since the judge had early notice of the charges, and the delay between formal presentation and hearing was not unduly prolonged, no presumption of prejudice from delay need or could be indulged in, and where there was no demonstration of actual prejudice.

(6a-6d) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Lack of Judicial Temperament.**—The conclusion of the Commission on Judicial Performance, that a municipal court judge be removed from office, was fully supported by evidence establishing four charges of willful misconduct and twenty-one charges of prejudicial misconduct occurring over the full span of the judge's judicial career, where the judge displayed a manifest lack of judicial temperament in dealing with litigants, attorneys, witnesses, and attachés, thereby violating canon 3A(3) of the California Code of Judicial Conduct, and failed to ensure the rights of defendants in criminal cases who ap-

peared before him. That the judge's conduct of other proceedings during his tenure on the bench had been unremarkable could not overcome the evidence of a continuing, pervasive pattern of misconduct, and the record did not suggest that the judge had, or would be able to, overcome this trait and that similar incidents would not recur. The judge's misconduct reflected adversely on the judiciary, had a negative impact on public esteem for the judicial process, and was prejudicial to the administration of justice.

[See **Cal.Jur.3d,** Judges, § 62; **Am.Jur.2d,** Judges, § 19.]

(7) **Judges § 6—Removal, Censure, and Other Discipline—Standards.**—While the canons in the California Code of Judicial Conduct do not have the force of law or regulation, they reflect a judicial consensus regarding appropriate behavior, and are helpful in giving content to the constitutional standards under which disciplinary proceedings are charged. It is expected all judges will comply with the canons, and failure to do so suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.

(8) **Criminal Law § 234—Trial—Course and Conduct of Trial—Power and Conduct of Judge—Examination of Witnesses.**—The trial court in a criminal case must not undertake the role of prosecutor or defense counsel if public confidence in the impartiality of the criminal justice system is to be maintained. It is fundamental that the trial court must refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias.

(9) **Judges § 17—Disqualification—Motion; Affidavit of Bias or Prejudice.**—A disqualification motion made under Code Civ. Proc., § 170.6, does not require a showing of actual prejudice. Under the statute, the defendant's right to peremptorily disqualify a judge on timely motion is automatic.

(10) **Judges § 8—Powers and Duties—Misuse.**—Ordering a person to appear in court when no matter requiring his attendance is pending constitutes serious misuse of the judicial office.

(11) **Judges § 8—Powers and Duties—Control of Courtroom—Contempt.**—Because it carries with it a heightened potential for abuse, the contempt power should be the last resort of a judge in maintaining control in his courtroom. It should be used with great prudence and caution, and never to intimidate litigants and witnesses, or in a man-

ner that interferes unnecessarily with a litigant's ability to consult with counsel.

(12) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Disobedience to Writ.**—Willful misconduct was not shown by a municipal court judge's failure to comply with a writ of mandamus requiring him to grant a continuance, where the writ was worded as an alternative writ, which gave the judge an option to comply or show cause before the issuing court why that court should not order the judge to grant the relief sought by the petitioner, rather than a peremptory writ on its face. Therefore, since the superior court did not order a stay of proceedings pending disposition of the petition for writ of mandate, the judge was free to continue the trial.

(13) **Bail and Recognizance § 8—Deposits in Lieu of Bond—Return.**—Bail posted by a nondefendant must be returned on demand pursuant to Pen. Code, § 1297, which authorizes the court to order bail deposits made by a defendant be applied to fines and costs if the funds remain on deposit at the time of judgment. Even that authorization does not permit application of such funds to attorney fees absent consent of the defendant.

(14) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Purpose.**—The purpose of proceedings by the Commission on Judicial Performance is not punishment, but protection of the public, ensuring evenhanded and efficient administration of justice, and the maintenance of public confidence in the integrity of the judicial system (Cal. Const., art. VI, § 18, subd. (c)). The Supreme Court's purpose is to determine the nature of the discipline, if any, that is necessary to achieve these goals. The court therefore considers evidence offered by the judge in explanation and/or mitigation of his conduct. There can be no mitigation for maliciously motivated judicial misconduct, however.

(15) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Mitigation.**—Since honesty and good legal knowledge are minimum qualifications which are expected of every judge, neither these qualities nor a judge's administrative skills can mitigate either willful misconduct or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(16) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Mitigation.**—On Supreme Court review of proceedings of the Commission on Judicial Performance finding a judge seriously lacking in judicial temperament, the testimony of persons who were not pre-

sent at the time of the incidents, and thus were unable to assess the serious nature of the incidents of misconduct, but nevertheless believed the judge to be a fair and patient person whose judicial temperament was appropriate, was not persuasive.

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## COUNSEL

Canty & Canty, Jones, Mahoney & Brayton and Thomas C. Brayton for Petitioner.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Edward T. Fogel, Jr., Assistant Attorney General, Louis R. Hanoian and Marc E. Turchin, Deputy Attorneys General, for Respondent.

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## OPINION

**THE COURT.***—The Commission on Judicial Performance (Commission) has recommended that Judge Kenneth Lynn Kloepfer, a judge of the San Bernardino Municipal Court District, be removed from office. On petition by Judge Kloepfer, we consider that recommendation which is based on findings by the Commission that Judge Kloepfer committed five acts of wilful misconduct and twenty acts of conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (Cal. Const., art. VI, § 18, subd. (c). [hereafter section 18(c)];[1] Cal. Rules of Court, Rules for Censure, Removal, Retirement or Private Admonishment of Judges, rule

*Before Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., Eagleson, J., Kennard, J., and Lillie (Mildred L.), J.†

†Presiding Justice, Court of Appeal, Second Appellate District, Division Seven, assigned by the Chairperson of the Judicial Council.

[1]Section 18(c): "On recommendation of the Commission on Judicial Performance the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission may privately admonish a judge found to have engaged in an improper action or a dereliction of duty, subject to review in the Supreme Court in the manner provided for review of causes decided by a court of appeal."

919(b).)[2] In this proceeding we also consider petitioner's claims that the procedures by which disciplinary proceedings against judges are commenced and prosecuted deny due process, and that he suffered prejudice as a result of the delay in instituting proceedings against him.

(1) As we explained in *McCullough* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191 [260 Cal.Rptr. 557, 776 P.2d 259], wilful misconduct occurs when a judge "commits acts (1) which he knows, or should know, are beyond his authority (2) for reasons other than the faithful discharge of his duties. [Citation.] Though a judge must act in bad faith . . . in order to commit wilful misconduct, he need not necessarily seek to harm a particular litigant or attorney; disregard for the legal system in general will suffice. [Citation.] Unlike wilful misconduct, the charge of prejudicial conduct does not require the presence of bad faith. [Citation.] It occurs when a judge, though acting in good faith, engages in conduct which adversely affects public opinion of the judiciary."

(2) On review of a recommendation by the Commission this court independently evaluates the evidence taken in the Commission proceedings to determine if the findings of the Commission are supported by clear and convincing evidence sufficient to sustain them to a reasonable certainty. (*Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 530 [247 Cal.Rptr. 378, 754 P.2d 724, A.L.R.4th 2066]; *Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].) We do, however, give special weight to the factual findings of the special masters before whom the evidence was presented because they are better able to evaluate the credibility of the witnesses. (*Ryan* v. *Commission on Judicial Qualifications, supra,* at p. 530.)

We then determine if the conduct found to have occurred is a basis for censure or removal and, if so, the appropriate action. In this aspect of our review of the Commission recommendation we recognize the expertise of the Commission in matters involving judicial conduct and therefore give special weight to its conclusions. (*McCullough* v. *Commission on Judicial Performance, supra,* 49 Cal.3d at p. 191; *Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1304 [240 Cal.Rptr. 859, 743 P.2d 919]; *Mardikian* v. *Commission on Judicial Performance* (1985) 40 Cal.3d 473, 476-477 [220 Cal.Rptr. 833, 709 P.2d 852].)

Having done so, we reject petitioner's claims of prejudicial delay and denial of due process, and adopt the findings and recommendations of the

[2] All references to rules herein are to those rules unless otherwise noted. Rule 919(b) authorizes a petition to this court for modification or rejection of a recommendation of the Commission.

Commission. The record establishes by clear and convincing evidence that petitioner's actions, almost all of which occurred on the bench, cannot be characterized as occasional lapses or isolated instances of misconduct. Rather, as the Commission concluded, a persistent pattern of abuse and arbitrary conduct appears as to which admonition or censure would not be adequate.

## I.

### DUE PROCESS: INVESTIGATIVE FUNCTIONS OF COMMISSION STAFF

(3) Petitioner contends in essence that the Commission, which is charged with the duty to take evidence and make findings of fact and conclusions of law incident to making disciplinary recommendations to this court, is not a neutral forum. He argues that the Commission is inevitably influenced by matters outside the record since its own staff makes the initial investigation into, and recommendation to initiate formal proceedings as a result of, complaints regarding the conduct of a judge. This occurs, in the view of petitioner, because the accusatory, investigatory, and adjudicatory functions are combined during proceedings in the Commission.[3]

Petitioner asserts more specifically that in the instant proceeding the Commission staff not only initiated correspondence and investigation prior to the decision to institute formal proceedings, but thereafter continued an investigation parallel to that of the examiners from the office of the Attorney General. The director and the chief counsel of the Commission assertedly participated in the investigation. This involvement and the reliance of the Commission on staff during the ensuing proceedings, petitioner asserts, makes the association of the director, the staff, and the members of the Commission too close "to allow the adjudicatory process to comport with generally accepted standards of due process."

Petitioner identifies no actual bias on the part of the members of the Commission, and offers no authority to support his argument that the procedures to which he objects are constitutionally impermissible. That omission is easily understood for his claim is contrary to existing authority

[3]The Commission argues that because petitioner made no prior objection to the proceedings on this basis, he is foreclosed from doing so now. He was not required, however, to engage in the presumptively futile exercise of objecting to procedures adopted by the Judicial Council pursuant to the command of article VI, section 18, subdivision (f), of the California Constitution. The Commission lacks authority to declare those rules invalid. (Cf. Cal. Const., art. III, § 3.5.)

To the extent that petitioner claims that any member of the Commission or its counsel was biased, that claim is waived since he made no effort to disqualify those officers prior to or at the hearing. (Cf. Gov. Code, § 11512, subd. (c).)

upholding similar due-process-based challenges to administrative adjudication pursuant to procedures in which the relationship between the decisionmaking, investigating, and prosecutorial functions is much closer. (See 1 Koch, Administrative Law and Practice (1985) p. 448, § 6.8; Schwartz, Administrative Law (2d ed. 1983) p. 495 et seq.; 3 Davis, Administrative Law Treatise (2d ed. 1980) § 18:2, p. 343 et seq.)

The Supreme Court rejected a due-process-based challenge to the combination of investigatory and adjudicatory functions of a medical licensing board in *Withrow* v. *Larkin* (1975) 421 U.S. 35 [43 L.Ed.2d 712, 95 S.Ct. 1456]. There the board heard evidence during the investigatory stage, determined if probable cause existed for license revocation proceedings, and subsequently conducted a contested hearing to determine if prohibited acts had occurred and, if so, if the license should be revoked. The Supreme Court recognized that a " 'fair trial in a fair tribunal is a basic requirement of due process' " (*id.* at p. 46 [43 L.Ed.2d at p. 723]), but nonetheless upheld the administrative adjudication procedure.

The Supreme Court explained: "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' [Citations.] In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

"The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." (*Withrow* v. *Larkin, supra,* 421 U.S. at pp. 46-47 [43 L.Ed.2d at pp. 723-724].)

After reviewing the several earlier cases in which due-process-based challenges to administrative adjudication had been rejected, the Supreme Court concluded that the procedures under review did not create an unacceptable risk of bias. (*Withrow* v. *Larkin, supra,* 421 U.S. at p. 54 [43 L.Ed.2d at pp. 727-728].) Manifestly the procedure to which petitioner here objects in-

volves even less potential for biased decisionmaking. The initial investigation is by the Commission staff, but once formal proceedings are instituted the prosecutorial function shifts to examiners from the office of the Attorney General. The special masters appointed by this court then hear the evidence, make findings and conclusions based thereon, and recommend action to the Commission, which itself reviews the evidence, independently makes findings and conclusions, and recommends appropriate discipline to this court. The court, however, is the final decision maker and must itself review the evidence and independently assess its weight and relevance.

The procedures do not create an unacceptable risk of bias either on the part of the Commission, or on the part of the court as ultimate decision maker. That during the course of the initial investigation or thereafter the Commission may become aware of the reports regarding the investigation is not a sufficient basis for believing that either the Commission or this court is not, or cannot be, an impartial decision maker. (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 519-520 [116 Cal.Rptr. 260, 526 P.2d 268].)

## II.

## DUE PROCESS: PREJUDICIAL DELAY

Commission staff commenced a preliminary investigation into petitioner's conduct following the receipt of complaints in April 1985. In June 1986, he was advised by letter that formal proceedings were to be initiated. Between that date and the filing of formal charges, both the Commission's staff and that of the Attorney General conducted investigations. The formal proceedings commenced with the December 17, 1986, service on petitioner of a notice of formal proceedings, followed by his acceptance of service on January 5, 1987, and submission of an answer on February 20, 1987. Pursuant to rule 907, this court then appointed special masters[4] to hear and take evidence, and report to the Commission.

Petitioner complains both of the delay prior to the notice of formal proceedings, and the subsequent delay of two years until the date of the hearing. He asserts both a violation of the procedural rules governing the Commission, and prejudice from the inability to adequately cross-examine

[4]The Honorable Bernard S. Jefferson, retired justice of the Court of Appeal, Thomas T. Johnson, judge of the Los Angeles County Superior Court, and Celia W. Baker, retired judge of the Orange County Municipal Court, West Orange District, were the appointed special masters.

witnesses whose memory of the events had faded, and from his own lack of recall.[5]

A. RULES OF PROCEDURE

Rule 904 directs that an inquiry be made by the Commission staff into verified complaints of misconduct that are not obviously frivolous or unfounded, followed if appropriate by a preliminary investigation to determine if formal proceedings should be instituted. The Commission is also allowed to make such inquiry and investigation on its own motion without receipt of a verified statement.

Pursuant to rule 904.2 the judge is to be notified if a preliminary investigation is undertaken. Petitioner complains of the delay by the Commission, once these proceedings were undertaken, in complying with rule 905(a): "After the preliminary investigation has been completed, if the Commission concludes that formal proceedings should be instituted, the Commission shall without delay issue a written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him. . . ." (4) He infers that rule 905(a) notice had to be given no later than the date on which the decision to initiate formal proceedings on any charge had been made, i.e., at the time he was informally advised by letter that proceedings would be instituted.

Petitioner acknowledges that during the period prior to institution of formal proceedings the preliminary investigation was ongoing. Indeed, he concedes that between August 19, 1985, and September 18, 1986, he received seven letters from the Commission asking that he reply to potential charges involving fifty-five incidents. He argues, however, that rule 905(a) creates a right to notice equivalent to a statutory right to speedy trial. Implicit in his claim is an argument that once a decision has been made to initiate formal proceedings with regard to any incident, the Commission must proceed at once regardless of the number or gravity of other incidents that have come to light during the preliminary investigation and are still themselves being investigated.

We reject both claims. Rule 905(a) mandates neither premature institution of formal proceedings nor dismissal for failure to give "prompt" notice with regard to a decision to include one or more incidents in formal charges while the preliminary investigation of other incidents continues. Manifestly petitioner was not prejudiced by the Commission's decision to continue the

[5]Petitioner has preserved this issue by filing a petition with the Commission to dismiss the formal proceedings, and in argument before the special masters.

investigation prior to giving notice of formal charges. He was aware of the 55 incidents that were under investigation and thus cannot complain of actual prejudice flowing from this decision.

We have observed before that the procedure of giving notice to a judge that a preliminary investigation is underway is not compelled as a matter of due process. (*McCartney* v. *Commission on Judicial Qualifications, supra,* 12 Cal.3d at p. 519.) It is unreasonable to assume, therefore, that rule 905(a) mandates dismissal simply because notice of formal proceedings is not given on a piecemeal basis. The Commission is not obliged to give notice of formal proceedings until the preliminary investigation is complete.

B. DELAY PRIOR TO HEARING

**(5)** Twenty-five months ensued between the service of notice of formal proceedings and the hearing in this matter. As noted above, however, petitioner had been advised of the charged incidents during the preliminary investigation. That investigation necessarily included interviews with the persons who were to be called as witnesses. We therefore reject petitioner's claim that this delay was prejudicial to the extent that he implies that any lack of recall should be attributed solely to this delay.

Moreover, the record fails to support petitioner's claims that he or any witness was unable to recall relevant details regarding some incidents, such as the Lucchesi matter. His own testimony that he recalled the incident, testimony that included reference to the case that was being tried when it occurred, refutes any suggestion of prejudice. As to other incidents in which petitioner claims "details" could not be recalled by petitioner or the witnesses (e.g., the Tricinella and Shepherd incidents), no prejudice can be shown. The reporter's transcript and documentary evidence in the form of court records of those proceedings accurately established not only what petitioner said or did, but the circumstances in which he acted. Still other attempts by petitioner to demonstrate that witnesses had testified falsely as a result of the passage of time, fail because he does not identify where in the record the testimony may be found, cannot substantiate his claim that a particular witness was "incorrect in many particulars," or relies on matters that are clearly outside the record.

Since petitioner had early notice of the charges, and the delay between formal presentation and hearing was not unduly prolonged, no presumption of prejudice from delay need or can be indulged in. Petitioner having failed to demonstrate actual prejudice, no basis for dismissal of any charge exists.

## III.

### FORMAL PROCEEDINGS BEFORE THE COMMISSION

**(6a), (7)** (See fn. 6.) The basis for these proceedings may be summarized as incidents in which Judge Kloepfer is alleged to have displayed a lack of judicial temperament in dealing with litigants, attorneys, witnesses, and attachés, thereby violating canon 3A(3) of the California Code of Judicial Conduct,[6] and to have failed to ensure the rights of defendants in criminal cases who appeared before him. All of the incidents occurred while petitioner was sitting in the West Valley Division of the San Bernardino Judicial District Municipal Court, a division located in Ontario.

The notice of formal proceedings charged petitioner in five counts. The first charged petitioner with abdicating his judicial responsibility to be patient, dignified and courteous to litigants, witnesses, attorneys and others with whom he had dealt in his official capacity. The charge was alleged to be exemplified by, but not limited to, 14 incidents occurring between 1981 and 1985. Petitioner's conduct in 10 of these incidents was found by the special masters and the Commission to be supported by clear and convincing evidence, and to constitute prejudicial conduct.[7]

The second count charged petitioner with abdicating his responsibility to ensure the rights of defendants who appeared before him in criminal cases. Five of the six incidents alleged in support of this count were found true.

The third count charged petitioner with abuse of the contempt power and the power to issue orders to show cause and bench warrants. Six incidents were alleged to support this charge, of which five were found true.

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[6] All references to the canons herein are to this code. Canon 3A(3): "Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity, and should require similar conduct of lawyers, and the staff, court officials, and others subject to their direction and control."

The California Code of Judicial Conduct, adapted from the American Bar Association Code of Judicial Conduct of 1972, was adopted by the California Conference of Judges on September 10, 1974, to become effective January 1, 1975. While the canons do not have the force of law or regulation, they reflect a judicial consensus regarding appropriate behavior, and are helpful in giving content to the constitutional standards under which disciplinary proceedings are charged. (*Cannon* v. *Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 707, fn. 22 [122 Cal.Rptr. 778, 537 P.2d 898]; *Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 796 [119 Cal.Rptr. 841, 532 P.2d 1209].)

We therefore expect that all judges will comply with the canons. Failure to do so suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.

[7] In determining whether the Commission recommendation should be followed, we consider only the charges sustained by the Commission. (*Ryan* v. *Commission on Judicial Performance, supra,* 45 Cal.3d at p. 526.)

The fourth count charged petitioner with abdicating his judicial responsibility to remain an objective and impartial arbiter, and acting beyond his authority on the basis of unseemly personal involvement in matters before him. Three of the five incidents alleged in support of this count were found true.

The fifth count charged abuse of power in ordering criminal defendants to pay attorney fees, citing 10 such orders in support of the count. Two were found true.

Hearings were held before the special masters in April and June 1987. The special masters submitted their proposed findings and conclusions to the Commission on July 31, 1987. On July 31, 1987, the examiners' objections, and on October 21, 1987, petitioner's objections, to the proposed report were forwarded to the Commission. The final report of the special masters was forwarded to petitioner and the examiners on December 30, 1987. In that report the special masters found 11 incidents of wilful misconduct and 14 incidents of prejudicial conduct.

After consideration of the objections of petitioner and the examiners to the final report of the special masters, and oral argument before it on March 10, 1988, the Commission found that only five of the acts underlying the recommendation of the special masters constituted wilful misconduct and that twenty acts constituted prejudicial conduct. It recommended, however, that petitioner be removed from office.

The conduct underlying each of the counts on which the Commission bases its recommendation follows.[8]

## A. COUNT 1: PREJUDICIAL CONDUCT

The Commission based its unanimous finding that petitioner had engaged in prejudicial conduct by failure to comply with canon 3A(3) in 10 incidents occurring during the 1981-1985 period, each of which was independently found to constitute prejudicial conduct, and to reflect together a persistent pattern of rude, abusive, and hostile behavior. These incidents were, in chronological order:

[8]As will be apparent, petitioner's actions during one incident are, in some cases, the basis for findings under more than one count. We do not consider the total number of incidents determinative of the appropriate action, although the number is relevant. (*Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d at p. 1307.) In this matter, there is overlap, but the findings on these charges are considered only as evidence that petitioner's conduct offended more than one of the standards to which a judge must conform.

1. *Lucchesi*

A pro tem. shorthand reporter was assigned to work in petitioner's courtroom four mornings a week in 1981. She returned for the afternoon if the calendar required it. On the Monday in 1981 on which this incident occurred a jury trial that had recessed the prior Thursday was to continue before petitioner. Because petitioner conducted small claims proceedings prior to his regular calendar, and those proceedings were not reported, the reporter had gone to another courtroom to report a preliminary hearing while the regular reporter was reading back testimony to the jury in another case. Petitioner expected her in his courtroom and was unaware of the reason for her absence.

Policy in the Ontario branch of the municipal court required that a reporter regularly assigned to a judge obtain permission from that judge before being released to work in another courtroom. Noemi Lucchesi, a shorthand reporter assigned to the courtroom of Judge Merriam, received a call from petitioner's bailiff on that Monday asking if she was available to report proceedings in petitioner's court as his reporter was unavailable. In conformity with the court policy, Ms. Lucchesi told the bailiff she might be able to do so, but would have to check with Judge Merriam. The pro tem. reporter who had been reporting the trial in petitioner's court returned to her office next door to that of Ms. Lucchesi, while Ms. Lucchesi was awaiting permission. Ms. Lucchesi informed her that Judge Kloepfer needed a reporter, and she went at once to his court, apologized for being late, and explained the reason to him.

After his reporter explained the reason for her delayed appearance, petitioner called Ms. Lucchesi and accused her of being responsible for the delay of proceedings in his court. He told her this "was not to happen again," and said he would not be treated as a second-class citizen. Ms. Lucchesi understood petitioner to be complaining about her failure to comply with his request that she come to his courtroom to report the trial proceedings and attempted to explain the court policy on obtaining permission to work in another court, but Judge Kloepfer refused to hear Ms. Lucchesi's explanation. Ms. Lucchesi was so upset by petitioner's reprimand and the manner in which it was delivered that she cried and was still distraught later in the afternoon when she told her judge about the incident. She testified that she believed Judge Kloepfer to be generally unpredictable and volatile. He had a reputation of being abusive to employees and to witnesses.

When Judge Merriam later told petitioner of his concern when members of his staff were upset, Judge Kloepfer apologized to Judge Merriam. He apologized to Ms. Lucchesi the day after he had his conversation with her.

Petitioner, admitting that he was "irritated," but denying that he was abusive, explained his conduct. He testified that he had a jury trial in progress, and expected that his reporter would be present. When she arrived he had been waiting an hour. He testified that he learned from her that it was Ms. Lucchesi who had directed her to go to another court to report. He telephoned Ms. Lucchesi because he believed she did not have the authority to direct his reporter to report elsewhere.

The Commission found petitioner's explanation to be inaccurate and disingenuous. The Commission rejected his assertion that he simply made an "appropriate comment" to a court employee. Judge Kloepfer's reporter had testified that she did not recall telling him that Ms. Lucchesi instructed her to go to another department. Ms. Lucchesi was not her supervisor, she did not seek the advice of Ms. Lucchesi on where to report, and Ms. Lucchesi gave her none. The Commission concluded that even accepting petitioner's explanation for his conduct, however, he was rude and abrasive to a court employee, and thereby violated canon 3A(3).

In this incident, as in the majority of those supporting the Commission's recommendation, petitioner challenges both the sufficiency of the evidence to support the findings and the legal conclusion that the actions constitute prejudicial conduct. The record, however, supports the findings of the special masters and the Commission that petitioner angrily berated Ms. Lucchesi, reducing her to tears. While the evidence does not clearly support the finding that he did so because he felt she did not respond quickly enough to his request that she report proceedings in his courtroom, it does support a conclusion that he angrily berated a court attaché, doing so without sufficient inquiry to know whether even a mild reprimand was warranted, because he believed that she was responsible for his not having a reporter and the consequent delay. Petitioner argues that his belief was reasonable. Be that as it may, his response was not. It was, as the Commission concluded, inappropriate and prejudicial conduct. While this incident alone might not warrant discipline it is clearly relevant evidence of a pattern of conduct reflecting a lack of judicial temperament, i.e., an inability to deal evenhandedly with persons with whom he comes in contact in carrying out his judicial duties.

2. *Bartell*

Deputy District Attorney Bartell, who had not previously appeared before petitioner or in the Ontario courthouse in which he sat, was assigned in

August 1982 to the misdemeanor jury trial calendar before petitioner and to handle a case in which another deputy had negotiated a plea bargain. Petitioner asked Bartell the reason for the negotiated disposition. She replied that she did not know, but would be glad to contact the responsible deputy during a recess to find out.

Petitioner responded: "Miss Bartell, you are an embarrassment to the People of the State of California and it's frightening to think that you represent their interests." The statement was made in a reproving tone in a courtroom full of people. Petitioner acknowledged that it was possible that he had said something critical.

3. *Elizalde*

In 1982 petitioner questioned Michelle Elizalde, a deputy district attorney, about the written disposition she had submitted to the court, after which he stated in open court that he was appalled that the interests of the People of the State of California rested in her hands, thereby humiliating and embarrassing her.

Although petitioner argues that he has modified the method by which he delivers criticism, and has changed his sometimes hostile and intimidating approach, the Commission noted testimony by witnesses heard in relation to other counts in this proceeding that he continued to be rude, abusive, and hostile. It therefore rejected petitioner's suggestion that it would be appropriate to take no action in this matter.[9]

4. *Taylor*

Pro Tem. Reporter Taylor asked a defendant whose guilty plea was being taken in February 1983 to make her responses audible, stating when the defendant nodded her head: "Excuse me. Is that a yes?" Petitioner said to Ms. Taylor: "I'll keep the record in my courtroom. I don't need any court reporter," and went on to berate Ms. Taylor before a courtroom full of people. Ms. Taylor became upset, nervous, and scared at petitioner's "out-

[9]Former Deputy District Attorney Goldman testified that when she appeared before petitioner in 1984 he occasionally exploded into "bursts of fury" at witnesses and defendants, and became irrationally angry over things that were not their fault. Deputy District Attorney Guzzino testified that at the time of the hearing petitioner had a reputation in the legal community as lacking judicial temperament. Deputy Public Defender Zavidow testified that between 1981 and 1985 petitioner was rude and intimidating to persons who appeared before him, had an "imperial attitude," and was intolerant and impatient with persons unfamiliar with court procedure.

The Commission findings as to incidents 7, 8, 10, 12, and 13 of the first count also suggest that petitioner did not modify his courtroom attitude after the *Bartell* and *Elizalde* incidents.

burst." Petitioner had never directed the defendant to speak up. His own court reporter testified that when a witness was not giving an audible response she was permitted to ask: "What did you say."

Petitioner had no recollection of Ms. Taylor reporting in his courtroom. He contends now that the proceeding was not one in which the reporter was required, and that there is no evidence that his directives to the court reporter were "inappropriate," and that his conduct was not the type of conduct affecting public esteem for the judicial office. Whether the reporter was required is irrelevant, of course. She was present for the purpose of recording the proceedings. The record established by clear and convincing evidence that petitioner's conduct was inappropriate and was of a nature that affects public esteem for the judicial office. Rather than explaining to the defendant that she must answer audibly, petitioner castigated the shorthand reporter for following a customary practice.

5. *Nehmeh*

On February 14, 1984, Attorney Nehmeh's motion on behalf of her client for a continuance of a misdemeanor drunk driving trial was denied in the master calendar court, and the case assigned to petitioner's court. Her motion to disqualify petitioner (Code Civ. Proc., § 170.6) was denied by the master calendar judge as untimely, and she renewed both motions before petitioner. Petitioner denied the disqualification motion as untimely and then questioned Nehmeh as to the reason the continuance was requested. Although she explained that an out-of-state witness was not available, petitioner asked: "Isn't it true you are psychologically afraid to take a case to trial?" He then asked her how many cases she had tried, and demanded that she name them and the courts in which they had been tried. His tone was angry and insulting. Attorney Nehmeh was embarrassed because her client was present.

The deputy district attorney present in the courtroom corroborated Nehmeh's testimony and recalled petitioner saying that Nehmeh did not try cases, and that she took her client's money without representing them. Petitioner's comments directed at Nehmeh's legal skills were uncomplimentary.

Petitioner recalled the case, and explained that he was concerned whether the case would ever go to trial. From prior discussions he believed that Nehmeh had never tried a case, and he was concerned about her intent and the possible need to grant a further continuance if she did not intend to try the case. He disputes Nehmeh's claim that her client was present when this incident occurred. Regardless of whether the client was present, petitioner

manifested his concern about possible trial delay in an inappropriate and injudicious manner, publicly suggesting that an attorney was incompetent to represent her client.

6. *Cooke*

In May 1984, petitioner interrupted a defense witness in this criminal case who had been asked only two questions. He told her that "we have rules in terms of how we proceed here. And you have to understand them. And I don't want to have to re-explain them and have objections.

"First of all, stop, and don't say anything ... First rule is you keep your mouth shut."

The reprimand was given when the witness tried to elaborate on or explain her answer to a question. Petitioner's tone was described as "impatient and angry" and "forceful and intimidating."

Petitioner challenged the accuracy of the reporter's transcript and of the reporter who testified. He believed the witness had been nervous and had made a comment not reflected in the transcript. He wanted to stop her from continuing to talk, but would no longer admonish a witness in this manner. He would instead try to help a witness relax and understand the procedures, and would not make her feel threatened by the rules.

Petitioner argues that in context his direction to the witness to keep her mouth closed was not rude or inappropriate. Our review of the record suggests otherwise. In this incident, as in others, the manner in which petitioner addressed lay witnesses reflects impatience, anger, and an intimidating lack of courtesy in explaining court procedure.

7. *Shepherd*

The Commission unanimously found that during a nonjury trial of this criminal case on August 13 and 14, 1984, petitioner was hostile to, criticized and chastised a defense witness, made clear by cross-examining the witness that he disbelieved him,[10] and inappropriately threatened the witness with sanctions.[11] Petitioner was openly hostile to the defense during the

[10] Petitioner claimed that it was appropriate for him to admonish the witness for failing to follow proper "procedure" in answering questions, and to warn him that he might be held in contempt if he persisted in doing so. As the Commission observes, however, contempt procedures are not appropriately invoked against an inexperienced lay witness whose answers are merely nonresponsive.

[11] The special masters found all of the allegations of misconduct related to this count to be true except the charge that petitioner had been rude and hostile toward that defense witness.

During the trial petitioner twice held the defendant in contempt for attempting to say something to the court; sentenced the defendant to two days in jail on each contempt finding;

trial, acted in an intimidating manner toward defense counsel,[12] was personally abusive and insulting to the defendant, and made rude references to the physique and personality of the defendant at sentencing. The Appellate Department of the San Bernardino County Superior Court reversed the judgment of conviction for the reason that petitioner had displayed such animosity toward the defendant that the defendant had been denied "even the semblance of a fair trial."

Although the special masters did not include petitioner's cross-examination of the witness in this case as a basis for their recommendation, the record supports the finding of the Commission that petitioner's cross-examination reflected hostility and disbelief. He did not limit himself to questions directed to eliciting clarifying testimony. He told the witness his testimony did not make sense, and engaged in argumentative dialogue, all of which supports the finding of the Commission. **(8)** Addressing the trial court's overly aggressive examination of a witness in a similar situation, we cautioned that the court must not undertake the role of prosecutor or defense counsel if public confidence in the impartiality of the criminal justice system is to be maintained. We emphasized there that: "It is fundamental that the trial court . . . must refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias." (*People* v. *Carlucci* (1979) 23 Cal.3d 249, 258 [152 Cal.Rptr. 439, 590 P.2d 15].)

The Commission rejected petitioner's explanation that by his remarks to the defendant at sentencing he was just scolding the defendant to deter future misconduct and his claim that discipline was unnecessary as he had already been sufficiently criticized in the unpublished appellate department opinion reversing the judgment of conviction, a decision that was widely circulated among members of the local bar. The Commission noted that while petitioner asserted that, as a result of those events, he will never again

and lectured the defendant in an insulting and demeaning manner about his physique and appearance. He referred to or described the defendant variously as one of the "Magnificent Seven bad guys"; "macho"; "a person on an egotistical trip that believes 'hey it's all right if I can get away from it—I'm a big guy and I have to answer to nobody' "; "your hormonal situation and your attitudes are so high that you feel you can get away with those things"; "you have biceps that are probably as big as my thigh."

[12] Both the attorney representing the defendant in this matter and Court Reporter Lucchesi (count 1) testified that petitioner's abusive and intimidating behavior deterred them from questioning or challenging his actions because they feared they would be placed in custody. In this latter proceeding, the effect of petitioner's intimidation may well have affected the adequacy of defense counsel's representation of the defendant. Counsel testified that he was intimidated to the point that he felt compelled to withdraw a request to recall a witness, and did not challenge the propriety of the contempt citations directed to this client when they were made.

deliver that type of lecture when sentencing, petitioner has not acknowledged any wrongdoing and has not demonstrated an understanding of the need to reform his conduct.

8. *Tricinella*

In September 1984, Andrew Tricinella appeared as a prosecution witness in a criminal case being tried before petitioner. He had never been in a courtroom before. Although an attorney had interposed an objection to a question put to Mr. Tricinella almost immediately after he began his testimony, Mr. Tricinella began to answer. Petitioner interrupted, and the following "dialogue" ensued:

PETITIONER : "Mr. Tricinella, when someone makes an objection, they are talking to me, not you. If you interrupt again, I would—"

THE WITNESS : "I have never been here before."

THE COURT : "You can be punished with a fine or jail. Keep your mouth shut. It is not directed to you. If there is an objection, it is directed to me. I am the Judge here. You are not. I have to rule on the objection without flak coming from the side. Please remain silent until I ask you to answer the question or sustain the objection, at which point you may not answer the question."

Mr. Tricinella testified that he believed petitioner was going to send him to jail. As a result of the reprimand, he did not want to be involved with the court system again. He felt as if he were on trial. A court reporter who viewed and heard the incident testified that petitioner's remarks were made in an angry and demeaning tone, and that although Mr. Tricinella had tried to answer the question put to him as best he could, petitioner treated him as if he were stupid. This witness also testified that petitioner had a reputation as being rude, impatient and demeaning to witnesses. She had personally observed him to be rude to witnesses on many occasions.

The prosecutor who witnessed this incident testified that petitioner became "furious" with Mr. Tricinella and exploded into a rage. She had never seen a judge become so angry and impatient with a witness who simply did not understand court procedure. Mr. Tricinella told her afterward that he never wanted to come to court again, or to be embarrassed and humiliated that way again. He felt that he was an honest citizen who witnessed a crime, but was made to feel like a criminal. This prosecutor had appeared before

petitioner frequently between March and October 1984. She testified that the incident was not unusual. Petitioner occasionally exploded into bursts of fury at witnesses and defendants, and treated them irrationally, becoming angry at things that were not their fault.

Petitioner claimed that the transcript did not accurately report all of Mr. Tricinella's statements, but conceded that his admonition to the witnesses was "too long" and "maybe a little too harsh." He now argues that admonishing a witness to keep his mouth shut, when coupled with an appropriate explanation of the procedure, while too harsh is neither rude nor misconduct. Again, we adopt the finding of the Commission. In this incident, as in others, petitioner was impatient and discourteous in dealing with a lay witness who obviously did not understand the manner in which testimony is elicited in a judicial proceeding. Such conduct reflects adversely on the judiciary, has a negative impact on public esteem for the judicial process, and is prejudicial to the administration of justice.

9. *Mendez*

Jaime Mendez was a defendant in a criminal matter pending before petitioner on February 21, 1985. Because he had arrived late his attorney had not had an opportunity to adequately discuss the case with Mendez, who was Spanish speaking. Counsel therefore requested a continuance at pretrial hearing scheduled for that date. When petitioner learned the reason for the request, he threatened the defendant with incarceration.

Both an audiotape and a written transcript establish that petitioner asked the defendant, through an interpreter, whether he understood that the only way the court could ensure that the defendant would comply with the procedures of the court was to put him in custody. When the defendant failed to reply, petitioner remanded him to custody stating: "Either he does understand or he doesn't, and if he sits there and looks like a bump on a log and has no ability to respond to me that he understands intelligently what is being interpreted to him in Spanish, I have no confidence that he will follow the directions of the court, and therefore I will cage him, in effect, in jail and bring him back . . . uh . . . manacled and he will appear when I order him to appear." Petitioner did not question the defendant prior to threatening him with custody to determine what it was that the defendant did not understand.

Counsel had explained to petitioner that it had not been clear to the defendant, who came from Los Angeles, that he was to report first to the office of the public defender, and that he, the deputy public defender, had

not been able to find an interpreter. Petitioner eventually acquiesced in the request for a continuance and the defendant remained free.

Petitioner conceded that his language might have been inappropriate, but maintained that he was simply attempting to convey to the defendant the idea that "bad things" could happen if he was not able to understand the court proceedings. The Commission unanimously concluded that this incident constituted prejudicial conduct. We agree, and note again that while this incident alone might merit no more than a private admonition, it is evidence of a continuing pattern of misconduct which reflects poor judgment and lack of judicial temperament.

10. *Saxe*

Defendant Saxe appeared before petitioner with his attorney, on October 1, 1985, for a stipulated continuance. During the proceeding, petitioner took a waiver of potential conflict because counsel for Saxe also represented a codefendant. When petitioner asked Saxe if he waived the conflict, Saxe whispered to his attorney that he did not understand what the judge was telling him. Counsel whispered back an explanation, at which point petitioner threatened the defendant with a contempt citation, stating: "Mr. Saxe, I am talking to you, sir, and when I talk to you I expect you to pay attention with [*sic*] me and not start a conversation with your attorney. Do that again sir, I am going to hold you in contempt of court and jail you."

When the defendant's attorney explained the exchange, petitioner told the defendant that if he did not understand, he was to talk to petitioner. Petitioner's tone was loud and threatening. The defendant believed petitioner was going to send him to jail.

Petitioner testified that he made the statements because he believed the defendant had "tuned him out" and begun talking to his attorney. He also claimed that the attorney involved, who had testified regarding the incident, had a "mistaken recollection" of the events, although the testimony was corroborated by a reporter's transcript.

Once again, petitioner claims that his conduct was not inappropriate, and once again he fails to recognize the injudicious nature of his assumption that the defendant should have known better than to refer to his attorney for a clarification of the explanation being given by petitioner, and of his immediate threat to impose contempt sanctions on the defendant for this perceived transgression. Petitioner's argument that no one was harmed reflects his inability to appreciate the manner in which impulsive, discourteous, threatening, and arbitrary statements by a judge affect public percep-

tion of the judiciary and the justice system. Misconduct of this nature is prejudicial to the administration of justice because it leads the public to question whether justice is administered evenhandedly by the court.

**(6b)** Together these incidents reflect a continuing, pervasive pattern of conduct prejudicial to the administration of justice, and an inability on the part of Judge Kloepfer to appreciate the grave nature of the misconduct, thus casting doubt on his protestations that such misconduct will not recur. We adopt as our own the findings and conclusion of the Commission with regard to count 1.

## B. COUNT 2: FAILURE TO ENSURE CRIMINAL DEFENDANTS' RIGHTS

Again by unanimous vote, the Commission found that on five occasions during the 1985-1986 period petitioner abdicated his responsibility to ensure the rights of criminal defendants. The special masters found wilful misconduct in each instance, but the Commission concluded that in three only prejudicial conduct occurred. These incidents were, in chronological order:

### 1. *Dyer*

Defendant David Dyer appeared before petitioner on February 8, 1985, for arraignment on criminal charges and probation violation in four cases, three of which went back to 1980 and 1981. The delay in disposition occurred because the defendant had failed to appear, and in one of the cases counsel had not been appointed for that reason. The defendant appeared without counsel and advised petitioner that he wished to plead guilty. Petitioner failed to notify counsel who had been appointed in two of the cases and proceeded in their absence. He accepted a guilty plea and an admission of probation violation without eliciting proper waivers, and sentenced the defendant without obtaining a probation report or notifying counsel.

Counsel was not appointed or asked to advise the defendant in any of the cases. No presentence report was requested. A total of 1,171 days in custody was imposed.

Based on the record of this proceeding, petitioner's disingenuous claim that the defendant wanted to proceed and that petitioner believed the public defender's representation had concluded earlier, and petitioner's assertion that the probation report would not tell him anything he did not know, the Commission concluded that petitioner's actions constituted wilful misconduct.

While petitioner argues that his omissions in this case amounted to no more than procedural error, the Commission could conclude on this record that petitioner knowingly failed to ensure the constitutional rights of a criminal defendant and did so to avoid the burden of proceedings in which the defendant would have adequate representation. The record supports the conclusion of the Commission that petitioner's actions constituted wilful misconduct.

2. *Clark*

Kenneth Clark appeared before petitioner on February 21, 1985, for a misdemeanor pretrial conference. After appearing in propria persona at his prior appearance before petitioner the defendant had retained an attorney, but he had not spoken with the district attorney. Petitioner thereupon remanded the defendant to custody for failing to comply with the court's earlier direction that he report for an interview with an organization that screened for appointment of counsel and for not speaking with the district attorney. When the defendant asked if he might say something, petitioner replied: "You may not."

Clark did not report for an interview because he had retained counsel whom he had arranged to meet at the courthouse for the pretrial conference. Because of a miscommunication he did not meet the attorney, but he did appear as required. He was unaware of the requirement that he speak with the district attorney about a possible disposition. Petitioner did not permit the defendant to explain.

Bail was set for the defendant without the opportunity for a hearing and in the absence of his attorney. He was jailed until he was able to post bail.

The special masters found that petitioner had acted in bad faith in this incident, and therefore concluded that his actions constituted wilful misconduct. The Commission found the actions to be only prejudicial conduct.

Petitioner concedes that he should have permitted the defendant to speak, and regrets making the order remanding him to custody without opportunity to explain. He claims, however, that his conduct was atypical and is unlikely to recur. We disagree with petitioner's characterization of his conduct as atypical. To the contrary, it is all too typical of his pattern of discourteous remarks, threats and intimidation, and punitive rulings made on the basis of unfounded assumptions. The findings of the Commission and its conclusion that this incident constituted prejudicial conduct is supported by clear and convincing evidence.

3. *Pearson*

Counsel for defendant Pearson appeared before petitioner on February 22, 1985, for a scheduled hearing on a suppression motion. He had made all appearances on behalf of the defendant who had not been ordered to appear in court, and counsel had advised petitioner at this proceeding that "under the code I can appear even though if [*sic*] she's not here." Petitioner nonetheless issued a $5,000 bench warrant for the arrest of the defendant.

Petitioner now claims that he lacked confidence in counsel's authority to appear on behalf of the defendant, but did not offer this explanation earlier. He argues that based on counsel's representation regarding two other clients on behalf of whom he had appeared before the Pearson matter was called, he reasonably believed that the defendant had not authorized counsel to appear. He does not satisfactorily explain, however, why his doubts regarding counsel's veracity justified issuance of a bench warrant for the client, rather than a continuance and an order that the defendant appear. Petitioner's suggestion that he was justified in issuing the warrant because the attorney said he might as well issue a warrant is also unavailing as is his suggestion that because the warrant was not issued immediately counsel could have produced his client and caused the warrant to be withdrawn. Issuance of the warrant was proper only if the defendant had been ordered to appear and failed to do so. (See Pen. Code, § 978.5.) Petitioner's explanation suggests an abdication of his responsibility to determine whether the presence of the defendant was necessary before her presence was required, and an abuse of his power to issue warrants.

The special masters found that this action constituted wilful misconduct. The Commission found only prejudicial misconduct.[13] Clear and convincing evidence supports the finding and conclusion of the Commission.

4. *Dow*

On August 26, 1985, when petitioner assigned this criminal case to another judge for trial, the defendant's counsel advised petitioner that he planned to file an affidavit of prejudice against that judge during the recess. Counsel did not have the preprinted form with him, and petitioner refused him an opportunity to get the form. Petitioner invited counsel to make the motion orally, and heard counsel's sworn statement that he believed the

[13] Counsel for the Commission argue that petitioner acted as he did in order to punish counsel, who had not been adequately prepared in representing defendant in matters heard earlier. The brief concedes, however, that the Commission "apparently accepted petitioner's claim that he did not act in bad faith. . . ."

judge was prejudiced and should be disqualified. Counsel cited "Penal Code section 170.6," rather than Code of Civil Procedure section 170.6.

Petitioner denied the motion even though he assumed it was made under the correct section, had not advised counsel of the manner in which the motion was deemed insufficient, and knew what counsel was attempting to do on behalf of his client. In these proceedings he explained that the motion was defective because counsel had stated that the judge he sought to disqualify was "prejudiced," rather than stating in statutory language that the defendant believed he "could not receive a fair trial" before that judge. He did not believe that trial before a prejudiced judge should be equated to inability to obtain a fair trial. He continues to assert that his denial of the motion was proper.

The Commission found this to have been prejudicial conduct, reducing the severity of the finding from that of the special masters who found the action to have been taken in bad faith. We agree that this conduct was at least prejudicial conduct. **(9)** A disqualification motion made under Code of Civil Procedure section 170.6 does not require a showing of actual prejudice. Under the statute, the defendant's right to peremptorily disqualify a judge on timely motion is automatic. (*McCartney* v. *Commission on Judicial Qualifications, supra,* 12 Cal.3d at p. 531.) After denying counsel the opportunity to obtain the preprinted form on which to make his motion, petitioner denied the oral motion he invited on the wholly irrelevant ground that the motion was not worded in the exact language of the statute.

5. *Padilla*

Defendant John Padilla appeared in propria persona before petitioner on December 6, 1985, in a probation violation matter that had already been continued several times pending resolution of a "driving under the influence" case then pending in the Los Angeles County Judicial District. The same conduct was alleged as the basis for each proceeding. Petitioner granted another continuance, but ordered the prosecutor to obtain the police reports and be prepared to prove the probation violation on January 10, 1986.

Defendant appeared on January 10, 1986, again representing himself, and presented a copy of a docket sheet reflecting dismissal of the Los Angeles matter on January 6, 1986, on motion of the prosecutor. The probation violation hearing then commenced even though the defendant explained to petitioner that the Los Angeles matter had been dismissed because the defendant had not been the driver of the car. The arresting officer gave hearsay evidence in an effort to establish that the defendant had been the

driver. When petitioner then asked the defendant if he had any questions to put to the prosecution witness, the defendant stated that he needed counsel and had been advised by the public defender in the Los Angeles matter that the probation violation would be disposed of when he advised the court of the dismissal.

Defendant had never waived counsel. Petitioner nonetheless denied defendant's repeated requests for counsel, found the charged violation true, and remanded the defendant to custody. The public defender was appointed only when the defendant appeared for sentencing, and on January 17, 1986, petitioner sentenced the defendant to six months in the county jail.

The defendant filed both a notice of appeal and a petition for writ of habeas corpus. Notwithstanding the pendency of the appeal, but pursuant to a stipulation by counsel, petitioner reasserted jurisdiction in the matter, set aside the sentence, and released the defendant from custody. On February 14, 1986, the public defender filed an affidavit of prejudice against petitioner which petitioner denied even though he recognized that this was the first appearance by counsel. He then set the probation violation matter for a new hearing before himself on March 7, 1986. After a hearing on that date, at which only hearsay evidence supported the violation charge, and three witnesses testified that the defendant had not been driving the car, petitioner again found the defendant to be in violation of probation and sentenced him to four months in jail. Petitioner imposed sentence without arraigning the defendant for judgment or permitting counsel an opportunity to argue the sentencing issue.

Witnesses who observed the initial hearing testified that the defendant was clearly unable to effectively represent himself at the hearing, during the course of which he made additional requests for counsel, acknowledged that he had been "intoxicated," but denied that he had been driving the vehicle involved in the Los Angeles prosecution.

The Commission rejected petitioner's explanation that because the defendant had appeared without counsel when he pleaded guilty to the charge on which probation was granted, he believed in good faith that counsel had been waived at the time of the revocation hearing, and found petitioner's actions in this proceeding constituted both wilful misconduct and prejudicial conduct.[14]

[14]Counsel for the Commission go far beyond the findings of the special masters or the Commission in speculating as to petitioner's motives in this and other incidents. Here they argue that petitioner improperly asserted jurisdiction over the case and entered the order setting aside the judgment in order to shield himself from appellate review of his conduct and to ensure that he would retain the power to hear the matter and impose judgment.

The same deputy attorneys general who prosecute matters before the Commission act as counsel for the Commission when review of a Commission recommendation is before this

Petitioner contends that none of these actions constituted misconduct, including his failure to inquire before proceeding with the revocation hearing whether the defendant waived the right to counsel. His argument, that he reasonably assumed the defendant's prior appearances without, counsel reflected a continuing waiver is unpersuasive. It is apparent that, since the defendant had expected a dismissal, was unprepared for the hearing, and the hearing involved contested factual issues, it was unlikely that the defendant would be able to competently represent himself. Petitioner's insistence on proceeding to hearing without obtaining a waiver of counsel, his subsequent refusal to appoint counsel, and the means by which he reasserted jurisdiction over the case after recognizing his error,[15] all support the conclusion of the Commission.

### C. COUNT 3: ABUSE OF CONTEMPT POWER AND POWER TO ISSUE ORDERS TO SHOW CAUSE AND BENCH WARRANTS

The Commission's finding that petitioner abused his contempt power, and his authority to make orders to show cause and issue bench warrants, is based on five incidents during 1984 and 1985, some of which also underlie prior counts and are considered here not as independent incidents, but as evidence relevant to the appropriate discipline. As to the first four incidents involving the contempt power, the Commission found that petitioner had engaged in prejudicial conduct. In the fifth, involving issuance of orders to show cause and bench warrants, the Commission found both wilful misconduct and prejudicial conduct.

court. They repeat the reasoning and argument urged before the special masters to support discipline, even when the Commission did not agree with the findings of the special masters or gave petitioner the benefit of the doubt as to sufficiency of the evidence on issues such as bad faith.

We hesitate, therefore, to characterize some of the argument as that of the Commission, and have omitted reference to most of the speculative effort to ascribe improper motives to petitioner's conduct. It is true, however, that petitioner had no jurisdiction to set aside the judgment once the notice of appeal had been filed. Since the municipal court has no jurisdiction in habeas corpus, petitioner could not act on the assumption that, because he could grant that relief, it was proper to accelerate the process by reasserting jurisdiction over the probation violation matter.

[15] By reasserting jurisdiction over the matter, notwithstanding the pendency of the appeal, petitioner denied the defendant the right he would otherwise have had upon reversal to peremptorily disqualify him from hearing further matters in the case. (See Code Civ. Proc., § 170.6, subd. (2).) While petitioner's actions in this and other cases might permit an inference that he intended to deny this defendant that opportunity, and thus engaged in wilful misconduct, we cannot say that the evidence of such intent is clear and convincing. His conduct of the initial revocation hearing in which the defendant's requests for counsel were denied is independent support for the conclusion of the Commission that this incident constituted wilful misconduct, however.

1. *Shepherd*

On August 14, 1984, petitioner summarily adjudged a criminal defendant appearing before him (see *ante,* at p. 844) to be in contempt. He did so when the defendant asked "how come" after his request to say something was rebuffed by petitioner. Without prior warning or explanation, petitioner ordered: "You are in contempt of court. I cite you for contempt of court. I will fine you at the end of these proceedings." In further response to the defendant's protestation "but—," petitioner said: "Sir, you are again in contempt of court."

The defendant had apologized to the court, explaining that he did not know how court procedures operated and did not know he was not allowed to speak. The defendant's attorney also apologized on his behalf. Petitioner nonetheless sentenced the defendant to two days in jail on each contempt finding.

Petitioner testified that the defendant had spoken in an angry tone of voice and "looked like he was fuming." He believed it was inappropriate for the defendant to speak out after the verdict was given, and citing the defendant for contempt "did the trick."

Other witnesses in the courtroom at the time testified, however, that the defendant was "quite humble" and did nothing to warrant the contempt citation. He was not loud, angry, or disrespectful when he asked to address petitioner. The defendant's attorney testified that his client had been surprised and confused by the court's verdict that had been just announced and wanted to make an inquiry of the court. Petitioner's tone was described as angry and demeaning.

2. *Tricinella*

In this matter, described above on page 846, on September 11, 1984, petitioner threatened a witness with fine or jail when defense counsel objected that his answer to the prosecutor's question was not responsive. He may have done so because the witness continued to speak after the objection was interposed, but the reporter's transcript of the trial does not reflect any statement by the witness made after the objection and before the threat.

3. *Cotterman*

Lynn Cotterman was in defendant's courtroom as a spectator on January 8, 1985, because a preliminary hearing was to be heard in a matter in which her brother was the defendant. During sentencing in an unrelated case, she

stood up to leave the courtroom but tripped over her son's feet and struck her knee on a bench. Petitioner cited her for contempt when she said "shit," ordered her held in custody, and shortly thereafter heard her explanation and apology.[16] He nonetheless found her in contempt and ordered her to serve six hours in jail. She was subsequently released with four and one-half hours of the sentence set aside after her brother's attorney interceded on her behalf.

Petitioner explained that he believed Ms. Cotterman's expletive was a comment on the proceedings before the court at the time. Had he believed her explanation that her comment was a reflexive response to tripping and hitting her knee, he would have absolved her of the contempt citation. He sentenced her, however, without making any inquiry to clarify or confirm the inference he drew. The special masters and the Commission necessarily rejected petitioner's explanation in finding this conduct to be an abuse of the contempt power and, as such, prejudicial conduct.

4. *Day/Follman*

Misdemeanor defendant Day was released on posting 10 percent bail on August 17, 1985,[17] notwithstanding a docket entry stating she was not eligible for release on that basis. The bail was posted in her name. She signed for it. Follman, who had apparently provided the funds, but had not agreed that the money could be used to pay any fine imposed on the defendant, was given the receipt for the bail.

On September 3, 1985, Day failed to appear. Petitioner issued an order to show cause to Follman, directing him to show cause why he should not be required to post the balance of the bail. Notice was sent to Follman that a hearing was set for September 16, 1985, and when he did not appear, petitioner issued a $1,000 bench warrant for his arrest.

[16] As Ms. Cotterman regained her balance and began to walk out, petitioner told his bailiff to "grab that blonde lady for contempt of court." The bailiff did, and Ms. Cotterman was taken to the jury box where she was scared and began to cry. After her explanation that she had tripped over her son, and her apology, she was sentenced, taken to the county jail handcuffed to another woman, and held for one and one-half hours until being returned to the courtroom. Petitioner released her, stating that she would not have to serve the rest of the time because her son was upset, but if it happened again she would be sentenced to five days in jail.

[17] Former section 1269d of the Penal Code then authorized the release of persons held pending trial on misdemeanor charges upon posting of 10 percent of the amount of bail fixed for the offense. The defendant was required to execute a release agreement, appearance bond, and, if required by the court, an agreement to specified terms or conditions to assure his appearance in court. Having done so and deposited the appropriate sum, the defendant was entitled to be discharged from custody.

Petitioner explained that when he learned that his order prohibiting 10 percent bail had not been complied with he undertook to inquire into the reason, discovered that Follman had provided the funds for the 10 percent bail, and believed that Follman had acted illegally by posting the bail because even if the 10 percent provision had been applicable, the sum must be posted by the defendant. He ordered Follman to appear because he wanted to find out the address of the defendant and why that happened.

Court records, however, indicated the probable reason for the release—the courtroom clerk had not entered the restriction on 10 percent bail on the order committing the defendant to the custody of the sheriff. Nothing in the record supported petitioner's belief that Follman had acted as an "unlicensed bondsman" or gave reason to believe that he was a person subject to the court's jurisdiction or power simply by reason of having possibly supplied a defendant with funds to pay a bail fee. (See Code Civ. Proc., § 128.)

The Commission concluded, as had the special masters, that because petitioner knew, or should have known, that his assertion of jurisdiction over Follman was beyond his authority, and he acted in bad faith, this conduct was wilful misconduct. We agree. **(10)** Ordering a person to appear in court when no matter requiring his attendance is pending constitutes serious misuse of the judicial office. (See *Cannon* v. *Commission on Judicial Qualifications, supra,* 14 Cal.3d at pp. 701-702, fn. 19.)

5. *Saxe*

In this incident (see *ante,* at p. 848), in October 1985, petitioner threatened a criminal defendant with contempt because he whispered to his attorney. The Commission concluded that petitioner engaged in prejudicial misconduct under this charge also.

**(6c)** We adopt the findings and conclusion of the Commission as to each of the incidents in which petitioner used or threatened to use the contempt power. In the Saxe incident petitioner assumed without inquiry that the defendant was being disrespectful and resorted to a threat to use his contempt power as the means by which to force a termination of the communication. In the Cotterman incident he assumed erroneously, and again without inquiry, that Ms. Cotterman was being disrespectful and that her comment was directed to the proceedings. He exercised his contempt power in circumstances in which a reprimand, or at most exclusion from the courtroom, should have been sufficient to maintain order and prevent disruption. And rather than explaining or affording counsel the opportunity to explain to Tricinella, a lay witness, why his testimony was not responsive, petitioner treated the objectionable answer as a contempt. In the Shepherd matter the

defendant was held in contempt for attempting to speak when a simple admonition that he should address the court through counsel or should seek leave to address the court should have been sufficient.

(11) Because it carries with it a "heightened potential for abuse" (*Taylor* v. *Hayes* (1974) 418 U.S. 488, 500 [41 L.Ed.2d 897, 908, 94 S.Ct. 2697]), the contempt power should be the last resort of a judge in maintaining control in his courtroom. It should be used with "great prudence and caution" (*Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d at p. 1314; *People* v. *Turner* (1850) 1 Cal. 152, 153), and never to intimidate litigants and witnesses, or in a manner that interferes unnecessarily with a litigant's ability to consult with counsel. Petitioner's injudicious response in these incidents abused the contempt power and the power to issue orders to show cause. As such it was prejudicial misconduct, and in the Follman incident, wilful misconduct.

## D. COUNT 4: FAILURE TO REMAIN OBJECTIVE

The Commission found that petitioner failed to remain objective and became personally involved in matters before him on the basis of three incidents.

### 1. *Giella*

On May 7, 1981, after the prosecutor moved to dismiss a receiving stolen property charge against a criminal defendant, believing that the charges could not be sustained without evidence that had been ordered suppressed, petitioner refused to dismiss this case. He told the prosecutor that he had read the police report and there was enough evidence available to permit the trial to continue. Petitioner also stated that he felt the defendant was guilty, but denied an oral disqualification motion that was then made by defendant's counsel.

The Commission finding of prejudicial misconduct[18] in this matter is based on petitioner's refusal to disqualify himself even though he had prejudged the case. In so doing, the Commission implicitly rejected petitioner's testimony that he did not recall expressing a view regarding the defendant's guilt,[19] and petitioner's argument that because counsel stated the motion

[18]The special masters had found wilful misconduct.
[19]The disqualification motion was made in chambers in the absence of the court reporter.

was made under Code of Civil Procedure section 170.5, it was properly denied as untimely.[20]

2. *Bowman*

The deputy district attorney prosecuting this misdemeanor embezzlement case was called away by a family emergency after the first day of trial. The deputy assigned to take over the case requested a continuance to prepare, but three jurors indicated that they would be inconvenienced if the matter were put over to the following Monday. Without inquiring as to the nature of the inconvenience, petitioner expressed his view that the case was not complex and that it should not take counsel more than one-half hour to prepare. He denied the requested continuance, but declared a recess until 1:30 p.m. of the same day.

During the recess the People sought to compel the granting of the motion by filing a petition for writ of mandate in the superior court. Counsel advised petitioner after the recess that a writ was coming, but petitioner ordered a witness to take the stand, denied another request for a continuance, and threatened the prosecutor with a contempt citation if the matter were raised again.

An alternative writ was issued, and was served on petitioner shortly thereafter. Petitioner declared a recess and announced that he was going to call the superior court judge who had issued the writ. When he was unable to do so, he declared a recess until the following morning, not to the date requested and stated in the alternative writ. After the prosecutor advised petitioner that he might have to seek further relief, petitioner criticized him and the office of the district attorney for their lack of preparation and the filing of the petition for writ of mandate, and expressed regret that he had granted the continuance.

The prosecutor sought and, on the next day was granted, a second alternative writ ordering petitioner to grant the requested continuance or show cause why he should not be ordered to do so. Petitioner then excused the

[20] Former section 170, subdivision (5) (now § 170.1, subd. (a)(6)), required a judge to disqualify himself or herself if the judge believed for any reason that he could not be impartial. No motion was or is necessary to trigger this obligation, which is one independently imposed by canon 3C(1): "Judges should disqualify themselves in a proceeding in which their disqualification is required by law, or their impartiality might reasonably be questioned, including but not limited to instances where:

"(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings."

jury, attributing to the prosecutor responsibility for any hardships the jurors might suffer as a result. Two of the jurors then explained that they had planned to be out of town on the Monday to which the continuance had been requested, and the parties agreed to a mistrial.

Petitioner later "angrily" asked the chief deputy district attorney why the writ had been sought, called a meeting with senior members of the branch office of the district attorney to express his displeasure with the handling of the Bowman case which made him "look bad," and remained angry at the office for "pulling a fast one" on him. Finally, on April 29, 1983, petitioner distributed to all judges in the county, the public defender, and the district attorney, a memorandum he had authored on the topic of extraordinary writs. The memorandum was critical of the district attorney for seeking, and the superior court for granting, the writ.

The Commission found that petitioner had wilfully failed to comply with the alternative writ, and had thereafter displayed unseemly personal involvement in the matter. It concluded that the acts constituted wilful misconduct and prejudicial misconduct. **(12)** We conclude, however, that the evidence supports only a finding of prejudicial conduct.[21]

3. *Marshall*

On June 6, 1984, petitioner stated at the end of a preliminary hearing on a felony complaint charging this defendant with 13 theft-related offenses,

[21] The special masters found that misconduct was not shown by clear and convincing evidence in this matter.

Counsel for the Commission speculate that they did so because petitioner *might* have been justified by the fact that the prosecutor improperly made his motion for a continuance and presented the writ to petitioner in the presence of the jury.

This incident does reflect unseemly personal involvement, and prejudicial conduct, when petitioner undertook to criticize the office of the district attorney for exercising its right to seek extraordinary relief. However, the record does not establish misconduct in a wilful refusal to obey the writ. Notwithstanding the argument of the Commission that the writ was a "peremptory writ on its face" because the return date fell after the date to which the trial was to be continued, an alternative writ is just that. It gives the respondent an option to comply, or to show cause before the issuing court why the court should not order the respondent to grant the relief sought by the petitioner. Therefore, unless the superior court had ordered a stay of proceedings pending disposition of the petition for writ of mandate, petitioner was free to continue the trial. While the Commission argues that the evidence supports an inference that petitioner understood the writ as requiring him to continue the matter for the full period, the fact that it was worded as an alternative writ and set forth a return date casts doubt on whether it should have been treated as a peremptory writ. This precludes finding clear and convincing evidence of wilful misconduct in petitioner's failure to obey the writ.

We note, however, that since petitioner was the respondent in the writ proceeding, his attempt to communicate ex parte with the judge before whom that matter was pending was itself improper. (Gov. Code, § 68070.5, subd. (b).)

that the defendant was "fraudulent, a liar, and deceitful." He increased the $13,000 bail that had been posted by the defendant's grandmother to $150,000, and ordered that attorney fees of $1,500 for representation by the public defender be paid and taken from the bail already posted. When advised of the source of the bail, petitioner responded that perhaps she was another victim.

The bail was increased even though the prosecutor had advised that the defendant's record did not indicate that he was a flight risk, and had not requested the increase in bail. The defendant had made all court appearances. He was married and had a young child. He had no criminal record or prior contacts with law enforcement.

**(13)** (See fn. 23.) At the time petitioner ordered payment of attorney fees, the public defender's office continued to represent the defendant,[22] and the court's docket reflected that the person who posted the bail had refused permission to use the funds for costs.[23] The fee award was nonetheless taken from that bail pursuant to petitioner's order.

Implicit in the inclusion of this incident in count 4 is a conclusion by the Commission that petitioner's actions in this matter reflected a personal involvement, or distaste for the defendant which overrode objectivity. The Commission concluded that petitioner's actions in this matter constituted prejudicial misconduct. The special masters had concluded that wilful misconduct was established by the evidence.

## E. COUNT 5: ABUSE OF POWER TO MAKE FEE ORDERS

The Commission relied on two incidents to support its finding that petitioner had abused his power to make fee orders.

[22] Penal Code section 987.8, subdivision (b), authorizes a fee hearing "upon conclusion of the criminal proceedings in the trial court." That language had been construed in *People* v. *Spurlock* (1980) 112 Cal.App.3d 323, 328 [169 Cal.Rptr. 320] as referring to the date of judgment. In conducting the preliminary hearing petitioner had acted as a magistrate, but argued that he believed the hearing was authorized because criminal proceedings in his court had concluded.

[23] The bail had actually been posted by defendant's relatives in the name of his father. Bail posted by a nondefendant must be returned on demand. (Pen. Code, § 1297.) That section authorizes the court to order bail deposits made by a defendant be applied to fines and costs if the funds "remain[ ] on deposit at the time of a judgment." Even that authorization does not permit application of the funds to attorney fees absent consent of the defendant. (*Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 42 [207 Cal.Rptr. 171, 688 P.2d 551].)

1. *Black*

Richard Black was represented by a deputy public defender at a five-day jury trial after which he was convicted of driving under the influence and found to have suffered two prior convictions. The public defender had made only one pretrial appearance on his behalf, to announce readiness for trial. On February 24, 1984, Black was sentenced to 150 days in the county jail, and a fine of $586 with a $30 assessment was imposed on February 24, 1984. Then, without advising the defendant of his right to a hearing, and without taking any evidence on the cost of the services or the ability of the defendant to pay, petitioner ordered him to reimburse the county $2,000 for the services of the public defender. When the public defender protested that the amount was excessive and asked for a hearing, petitioner responded that "you've had it" and chastised counsel for misuse of county funds in making the inquiry on behalf of the defendant.[24] Petitioner told the defendant that if he did not pay the attorney fees he would remain in jail, and later told counsel, who had inquired again, that the defendant could sell his car to pay the fees since he was to lose his right to drive for three years.

The defendant's 10-year-old car was owned by his parents. The defendant had no money of his own. A declaration subsequently filed by the public defender calculated the cost of representing the defendant as $715. A modification hearing was held on August 27, 1984, at which petitioner made no inquiry into the ability of the defendant to reimburse the county. When the public defender argued that the cost to the county for the representation was substantially less than the reimbursement ordered, petitioner told him that the subject of the hearing was civil in nature and that his expenditure of time was an abuse of county funds. The fee award was reduced to $750. Petitioner did not inform the defendant of his right to seek modification. The defendant's parents paid the county $750.

Petitioner did not dispute his failure to comply with the statutory prerequisites to a fee award. He explained that he had based his order on his knowledge that the defendant owned a sports car worth between $8,000 and $12,000, and evidence at trial which led him to conclude that the defendant raised and sold livestock. In fact, the evidence at trial did not establish that

[24] Penal Code section 987.8, subdivision (a), requires notice and hearing before a fee reimbursement order is made. The notice must specify the cost of legal assistance provided, and advise the defendant of his procedural rights. (*id.*, subd. (d).) At the hearing the defendant is entitled to be heard in person, to present evidence, to confront and cross-examine witnesses, to have the evidence disclosed to him, and to receive a written statement of the findings of the court. (*id.*, subd. (e).) The court must find that the defendant has the present ability to pay before making a reimbursement order.

the defendant owned the car free and clear, or that he owned and traded in livestock. As noted, he did not own the car. His parents, who had purchased it for $2,500, did. His livestock consisted of a leased mare he hoped to breed.[25]

The Commission found that petitioner acted in bad faith in this matter and concluded that his actions constituted wilful misconduct.

2. *Marshall*

Petitioner's conduct in this matter is also the subject of the third incident in count 4. On June 6, 1984, at the close of a preliminary hearing, petitioner conducted a hearing in which he assessed attorney fees of $1,500 to be paid by the defendant and ordered that it be taken out of the bail the defendant had posted.

Petitioner had given the defendant no notice that the hearing was to be held, or of his rights, and made the order without regard to the ability of the defendant to pay for attorney services. No evidence was presented on the cost of public defender services. The deputy who had represented the defendant had made five brief appearances other than the preliminary hearing, and had done very little preparation. Petitioner concluded that 20 hours had been spent on the case, and charged the defendant $75 per hour.

The special masters found that this incident was wilful misconduct, but the Commission concluded that petitioner's actions constituted only prejudicial conduct. In so doing the Commission may have accepted petitioner's claim that he did not act in bad faith because he believed that Penal Code section 1297 authorized withholding of attorney fees from bail deposits. In concluding otherwise in *Gubler* v. *Commission on Judicial Performance, supra,* 37 Cal.3d at page 42, this court recognized that prior reliance on the

[25] At the hearing petitioner stated that he had calculated the cost of services of the public defender at $50 per hour. The deputy assigned was paid at a rate of $14 to $15 per hour. The Commission argues that petitioner could not have believed in good faith that the cost of a deputy public defender's services in San Bernardino County could be $50 per hour, but offers nothing to support this assertion other than the earning rate of the particular deputy. We need not decide here whether a reimbursement order must be tied to the cost of the particular deputy's service or may be based on an average cost of providing service. We note in this regard that the county's costs are not limited to the salary of the assigned deputy. They include the expense of supervisory and clerical personnel, investigators, general office expenses, and many other items of overhead.

It is arguable, therefore, that the cost might be measured by hours devoted to the particular defendant in relation to the total number of hours of client representation furnished by the office of the public defender to all clients during the fiscal year.

statute as authority for such orders would not constitute misconduct. As in *Gubler,* however, this incident involved not only the improper withholding order, but the summary manner in which the hearing was announced and conducted.

Petitioner's attempt to justify the procedure on grounds that neither the defendant nor his attorney objected, requested a continuance, or offered any evidence suggesting that the defendant was unable to pay, is unavailing. It is manifest that petitioner made no effort to accord basic procedural fairness to the defendant. Even assuming that petitioner was unaware of the substantive requirements of Penal Code section 987.8,[26] and that his conduct in that regard was simply judicial error, the manner in which the proceeding was conducted alone supports the Commission's conclusion.

Notwithstanding the initial determination that the defendant was eligible for public defender services, petitioner assumed that the bail posted in defendant's name was his, and ordered withholding without any evidence regarding the defendant's future needs.

The Commission findings and conclusion in this matter, as in the foregoing, are supported by clear and convincing evidence.

## IV.

## MITIGATION

**(14)** The purpose of Commission proceedings is not punishment, but protection of the public, ensuring evenhanded and efficient administration of justice, and the maintenance of public confidence in the integrity of the

[26] Penal Code section 987.8 defines the term: " 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following:

"(A) The defendant's present financial position.

"(B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.

"(C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing.

"(D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.

". . . ."

judicial system. (§ 18(c); *Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d at p. 1320.) Our purpose is to determine the nature of the discipline, if any, that is necessary to achieve these goals. We therefore consider evidence offered by the judge in explanation and/or mitigation of his conduct. There can be no mitigation for maliciously motivated judicial misconduct, however. (*Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 377 [188 Cal.Rptr. 880, 657 P.2d 372].)

Petitioner was admitted to the bar in 1969 and served thereafter as a deputy district attorney in the office of the San Bernardino County District Attorney, becoming a chief deputy in 1976. He is married and has two children. He was elected to the bench and took office in January 1981. He was reelected in a contested election on June 3, 1986. He was elected presiding judge of the San Bernardino Municipal Court District for 1986 and was reelected for 1987.

Several witnesses, including colleagues on the bench and attorneys who appear before him, testified that petitioner is a person of unquestioned honesty and integrity. None of the charges against petitioner suggest otherwise. **(15)** This evidence, and that which confirms that petitioner had a good reputation for legal knowledge and administrative skills are not mitigating, however.[27] Honesty and good legal knowledge are minimum qualifications which are expected of every judge. (Cal. Code Jud. Conduct, canons 1 and 3.) Neither these qualities nor a judge's administrative skills can mitigate either "wilful misconduct" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (§ 18(c).)

Moreover, petitioner's experience as a deputy district attorney suggests that he was well acquainted with the constitutional and procedural rights of criminal defendants. (*McCullough* v. *Commission on Judicial Performance, supra,* 49 Cal.3d at p. 199; *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653-654 [175 Cal.Rptr. 420, 630 P.2d 954].) His conduct in the incidents in which defendants' rights were violated, in issuing orders to show cause and in the imposition of contempt sanctions, suggest that rather than using his knowledge and experience to ensure the

[27] Petitioner has filed motions to submit additional evidence in this court in the form of evidence that his sentence in the Dyer incident was not disproportionate in light of the defendant's prior record, which was known to petitioner. The motion is denied. Not only should such evidence have been presented at the hearing before the special masters, but it is irrelevant to the charge that petitioner failed to ensure the defendant's right to counsel, did not elicit proper waivers of the defendant's constitutional rights prior to accepting his guilty plea, and failed to obtain a presentence report.

rights of persons appearing in his courtroom, petitioner was impatient and frustrated by the need to comply with, and sought to avoid, procedures we deem necessary to the fair and evenhanded administration of justice.[28]

**(16)** The testimony of persons who were not present, and thus cannot assess the serious nature of the incidents of misconduct, but nonetheless believe petitioner to be a fair and patient person whose judicial temperament is appropriate, also is not persuasive. (*Cannon* v. *Commission on Judicial Qualifications, supra,* 14 Cal.3d at pp. 705-707.) The record belies petitioner's claim that he has learned from past experience and has modified his courtroom behavior.[29] It demonstrates instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in *every* case.

**(6d)** That petitioner's conduct of other proceedings during his tenure on the bench has been unremarkable cannot overcome the evidence of a continuing, pervasive pattern of misconduct. (*Gonzalez* v. *Commission on Judicial Performance, supra,* 33 Cal.3d at pp. 377-378.) Four charges of wilful misconduct and twenty-one charges of prejudicial conduct[30] have been established. The incidents underlying these charges occurred over the full span of petitioner's judicial career, continuing until and after receipt by the Commission of the first complaint in 1985. Petitioner's lack of judicial temperament is manifest.

The record does not suggest that petitioner has, or will be able to, overcome this trait and that similar incidents will not recur. For this reason

[28] Petitioner offered evidence in the form of the opinion of Judge Martin A. Hildreth, presiding judge of the county, who has been a judge of the municipal court since 1973, that petitioner was the "finest administrator we've ever had as a Presiding Judge." Qualities as an administrator, however, do not translate into an ability in the individual case before the judge to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity" (canon 3A(3)), and to accord "every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law . . . ." (Canon 3A(4).)

[29] We acknowledge, in this regard, the testimony of Attorney Thomas B. Ritchie, a past president of the Western San Bernardino Bar Association, that petitioner has matured in office, has become one of the finer judges sitting in the West Valley court, and is now well respected. The same witness offered evidence that petitioner has served the community off the bench as a director of the Inland Mediation Board, and in bench/bar committee work.

Numerous attorneys and judges offered evidence of their experience in petitioner's court and their observations of his performance, all expressing admiration and a view that he should be commended for the quality of his service on the bench, rather than censured or removed.

[30] This number does not include those acts of prejudicial conduct also found to be wilful misconduct.

comparison of the discipline imposed in other cases, as petitioner suggests, is not fruitful. Our role is to determine, in the individual case, the action necessary to protect the public and the reputation of the judiciary. The evidence fully supports the conclusion of the Commission that this purpose requires that petitioner be removed from the bench.

## DISPOSITION

We order that Judge Kenneth Lynn Kloepfer, judge of the San Bernardino Municipal Court District, San Bernardino County, be removed from office. He shall, however, if otherwise qualified, be permitted to resume the practice of law (Cal. Const., art. VI, § 18, subd. (d)) on condition that he pass the Professional Responsibility Examination. This order is effective upon the finality of this decision in this court.

Petitioner's application for a rehearing was denied January 25, 1990. Kaufman, J., did not participate therein.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED MAY 2, 1990

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|---|---|
| In re CHARLES D. BOAGS, | ) |
| A Judge of the Municipal Court, on Suspension | ) |

BY THE COURT:

Charles D. Boags, Judge of the Municipal Court of Beverly Hills, his conviction of conspiracy to obstruct justice (Pen. Code, §182, subd. (5)), a crime involving moral turpitude, having become final, is hereby removed from office. (See Cal. Const., art. VI, § 18, subd. (b).) Broussard, J. and Arabian, J. did not participate.

[No. S042149. July 20, 1995.]

G. DENNIS ADAMS, a Judge of the Superior Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

## SUMMARY

On the recommendation of the Commission on Judicial Performance, the Supreme Court ordered that a superior court judge be removed from office. Preliminarily, the court held that the commission's combined roles as investigator, prosecutor, and adjudicator, as well as litigation adversary in proceedings by the judge challenging the commission's decision to hold open hearings, did not create an unacceptable risk of actual bias on the part of the commission so as to deny the judge his right to due process. Neither did the commission's vigorous opposition to the judge's attempt to vacate the open-hearing order, using as legal counsel the same attorneys who were prosecuting the charges, inevitably prejudice the commission against him with respect to the merits of the charges, so as to create a strong probability of bias against him. The court held that removal from office was the appropriate discipline for the judge, who engaged in successive extrajudicial transactions with a litigant who had obtained a substantial damage award in a court trial presided over by the judge, and attorneys who appeared before him over a significant period of time, creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary—a consequence the judge either deliberately ignored or was unable to appreciate. The court held that clear and convincing evidence supported the charge that the judge engaged in seven separate instances of prejudicial conduct in his transactions with the litigant, a car dealer, four of which transactions involved the attorney representing the litigant, which attorney frequently appeared before the judge. Such conduct could be construed, from the viewpoint of an objective observer, as improperly using the judicial office to advance the judge's personal interest and permitting the appearance of special influence. Clear and convincing evidence also supported two charges that the judge engaged in prejudicial conduct in accepting gifts or financial benefits from attorneys or their law firms whose interests had come and were likely to come before the judge, and that in four separate instances the judge assisted or otherwise communicated with members of a law firm regarding matters pending before the court. Finally, the court held that the

charge that the judge made material misstatements or omissions to the Commission on Judicial Performance in four instances was also supported by clear and convincing evidence, which charges, in particular, warranted the judge's removal from office. (Opinion by The Court. Separate dissenting opinion by Mosk, J.)

## HEADNOTES

Classified to California Digest of Official Reports

(1) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Willful Misconduct—Elements.**—Under Cal. Const., art. VI, § 18, former subd. (c)(2), "willful misconduct in office" by a judge has two elements: the judge's misconduct must be willful, i.e., done with malice or bad faith and it must be committed in office, i.e., while acting in a judicial capacity. The element of malice or bad faith, in turn, must meet a two-pronged test: the judge must have (1) committed acts he or she knew or should have known to be beyond his or her power; (2) for a purpose other than faithful discharge of judicial duties.

(2) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Prejudicial Conduct.**—Prejudicial conduct, or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, former subd. (c)) may be committed by a judge while acting either in a judicial capacity or in other than a judicial capacity. The provision that the conduct must be that which "brings the judicial office into disrepute" does not require actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office. Unlike willful misconduct, prejudicial conduct does not require the presence of bad faith, but may occur when a judge, though acting in good faith, engages in conduct that adversely would affect the esteem in which the judiciary is held by members of the public who become aware of the circumstances of the conduct. The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred under this standard. Although a judge may perform the necessary judicial functions diligently, competently, and impartially, his or her inability to discern (and thus to avoid) extrajudicial activities that reasonably would be perceived as damaging to the judiciary may place that judge's fitness for judicial office in doubt.

(3) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Prejudicial Conduct—Canons of Judicial Conduct.**—The canons

set forth in the California Code of Judicial Conduct are relevant to the determination whether a judge's actions constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, former subd. (c)) in that the canons reflect a consensus as to the standards of conduct and appropriate behavior to which judges properly should be held. The failure of a judge to comply with the canons suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.

(4) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Acceptance of Gifts.**—Under Cal. Code Jud. Conduct, former canon 5C(4), providing that in general judges should not accept gifts if the donor is a party or other person whose interests have come or are likely to come before the judge, subject to specified exceptions, a judge's acceptance of gifts from those whose interests appear before the court bears an obvious appearance of impropriety, it is inherently wrong, and it has a subtle, corruptive effect, no matter how much a particular judge may feel that he or she is above improper influence. In determining the propriety of activity that arguably might qualify as social hospitality, an exception to the prohibition against acceptance of gifts, the focus is on the reasonable perceptions of an objective observer, rather than the motive or intent of the judge.

(5) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review by Supreme Court.**—In reviewing a report and recommendation by the Commission on Judicial Performance concerning the discipline of a judge, the Supreme Court independently evaluates the evidence taken in the commission proceedings and must sustain the charges of misconduct if there is clear and convincing evidence sufficient to prove them to a reasonable certainty. In resolving disputed issues of fact, the court gives special deference to the determination of the special masters, who are best able to evaluate the credibility of the witnesses appearing before them. The court must then determine whether the conduct found to have occurred is a basis for censure or removal and if so, the appropriate sanction. In making the latter determinations, the court accords great weight to the conclusions of the commission, recognizing its expertise in matters involving judicial conduct.

(6) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Role of Commission on Judicial Performance—Multiple**

**Functions as Creating Inherent Bias.**—In disciplinary proceedings against a judge by the Commission on Judicial Performance, the commission's combined roles as investigator, prosecutor, and adjudicator, as well as litigation adversary in proceedings by the judge challenging the commission's decision to hold open hearings, did not create an unacceptable risk of actual bias on the part of the commission so as to deny the judge his right to due process. Neither did the commission's vigorous opposition to the judge's attempt to vacate the open-hearing order, using as legal counsel the same attorneys who were prosecuting the charges, inevitably prejudice the commission against him with respect to the merits of the charges, so as to create a strong probability of bias against him. The exchange of remarks between the judge's counsel and the commissioners at oral argument concerning an argument by the judge about public confidence in the proceedings merely reflected the commissioners' unwillingness to let the argument of the judge's counsel pass without testing the basis for that argument and assessing whether the judge's actions, in view of his opposition to public hearings, were truly consistent with his counsel's position. The colloquy demonstrated a normal function of oral argument and provided no basis for the conclusion that the commission penalized the judge for challenging the open-hearing order.

(7) **Judges § 6.2—Removal—Grounds—Automobile Transaction With Litigant.**—The Commission on Judicial Performance properly found a judge guilty of prejudicial conduct (Cal. Const., art. VI, § 18, former subd. (c)) by initiating an automobile transaction with, and actively soliciting the assistance of, a car dealer who was a litigant in favor of whom the judge had rendered an exceedingly large monetary judgment, and whose interests remained before the judge while the case was pending on appeal. The nature of the transaction was significant in that it involved the sale of a used vehicle, generally providing leeway for bargaining and flexibility in setting the purchase price. In so acting, the judge violated the proscription against conduct giving rise to the appearance of impropriety, including extrajudicial activities that may cast reasonable doubt on the individual's capacity to act impartially as a judge, and business dealings that reasonably may be perceived as exploiting the judge's position. To an objective observer of the transaction, the judge would appear to have been seeking to use his office to collect for past deeds, and to procure a benefit for himself.

(8) **Judges § 6.2—Removal—Purchase of Vehicle From Litigant With Assistance of Litigant's Attorney.**—The Commission on Judicial Performance properly found a judge guilty of prejudicial conduct in

violation of Cal. Code Jud. Conduct, former canons 2 and 5, proscribing conduct giving rise to the appearance of impropriety, by initiating a vehicle purchase with an automobile dealer who had been a successful litigant in a court trial presided over by the judge. Moreover, the litigant's attorney paid the balance owed on the purchase price, and that attorney's firm frequently came before the judge. The judge's conduct readily could be construed as an attempt to collect for judicial services rendered in the litigation, and otherwise to use his judicial office to advance his personal interests.

(9) **Judges § 6.2—Removal—Grounds—Attendance at Dinner Celebrating Litigant's Victory.**—The Commission on Judicial Performance properly found that a judge's attendance at a dinner given in celebration of a satisfaction of a judgment in litigation presided over by the judge in a court trial constituted prejudicial conduct. Regardless of the judge's motives, or whether he was biased or impartial in the judicial proceedings, his attendance at the dinner indisputably gave rise to the appearance of partiality in favor of a litigant and the litigant's attorney whose very substantial interests had come before him. Under these circumstances, the dinner could not be characterized as ordinary social hospitality within the meaning of Cal. Code Jud. Conduct, former canon 5C(4)(b).

(10) **Judges § 6.2—Removal—Grounds—Acceptance of Favor From Attorney—Repair of Vehicle.**—The Commission on Judicial Performance properly found a judge guilty of prejudicial conduct in relying, for the financial arrangements for the repair of a vehicle, on an attorney whose interests frequently came before the judge, and in favor of whose client the judge had rendered a substantial verdict in a recent court trial. Regardless whether the judge had knowledge of the attorney's payment for the repairs, his failure to obtain a bill for the repairs directly from the car dealer and his reliance on the attorney to verify the cost reflected that the judge turned a blind eye toward the possibility of receiving special treatment, whether from the car dealer or the attorney, or both. To an objective observer, the judge would appear to have been seeking to use his judicial office to advance his personal interests, placing in doubt both his independence and his integrity.

(11) **Judges § 6.2—Removal—Grounds—Acceptance of Sweater From Successful Litigant.**—The Commission on Judicial Performance properly found a judge guilty of prejudicial conduct in accepting a sweater worth $150 from a litigant who had shortly before received satisfaction

of a large judgment in a court trial conducted by the judge. Although the judge did not solicit the gift, under the circumstances it was incumbent on him to return it to the litigant in order to avoid any doubt regarding the judge's independence or any appearance of impropriety.

(12) **Judges § 6.2—Removal—Grounds—Acceptance of Dinner Invitation and Loan of Computer From Attorney.**—A judge who awarded a multimillion dollar judgment to a litigant in a court trial was guilty of improper action in accepting a "rain check" dinner invitation from the litigant's attorney, who had proffered the invitation following the judge's inability to present the attorney with an award at a dinner celebrating his success in the litigation over which the judge had presided. Under the circumstances, the dinner could not be viewed as ordinary social hospitality within the meaning of Cal. Code Jud. Conduct, former canon 5C(4)(b). The judge was also guilty of improper action in accepting a loan of a computer from the attorney. However, the conduct in accepting the dinner invitation did not constitute prejudicial misconduct, since simply allowing the attorney to "pick up the tab" for dinner would not have placed in doubt, from the prospective of an objective observer, the independence and impartiality of the judge. Similarly, because the attorney had agreed to collaborate on the writing of a novel by the judge, the computer loan would not have appeared to an objective observer to be a special favor conferred as a result of the judge's judicial office.

(13) **Judges § 6.2—Removal—Grounds—Acceptance of Fee Write-off From Law Firm Appearing Before Judge.**—A judge's receipt of a fee write-off in a fairly substantial amount from a law firm that regularly appeared before him constituted prejudicial conduct, violating both the general proscription against a judge's acceptance of gifts from attorneys who are likely, or whose firms are likely, to appear before the judge, and the proscription against conduct permitting the inference of special influence over a judge. To an objective observer, the conduct would have compromised the independence and integrity of the judiciary.

(14) **Judges § 6.2—Removal—Grounds—Acceptance of Use of Senior Partner's Vacation Condominium and Fishing Trips Sponsored by Law Firm.**—A judge's acceptance of the use of a desert resort condominium that was owned by a senior partner of a law firm that regularly appeared before the judge constituted improper action, although the misconduct did not rise to the level of prejudicial conduct, given the

circumstance that the condominium was offered free of charge to any member of the public interested in purchasing it. However, the judge's participation in fishing trips sponsored by the law firm did constitute prejudicial misconduct in violation of the general proscription against the acceptance of gifts. The circumstances that the activities were provided by law firms, rather than a bar association or other legal association, cast doubt on the judge's independence, as it may be assumed that law firms do not as a general rule sponsor fishing trips for the benefit of the general public.

(15a, 15b) **Judges § 6.2—Removal—Grounds—Failure to Disclose or Disqualify Self—Matters Relating to Attorneys With Whom Judge Had Relationship.**—The Commission on Judicial Performance properly determined that a judge who had a personal relationship with an attorney with whom he collaborated on a novel, and from whom he accepted a dinner and a laptop computer, was disqualified with respect to any matter involving the attorney or his law firm. Likewise, the judge was disqualified with respect to any matter involving a law firm with whom the judge had a long-standing relationship and from whom he accepted a legal fee write-off. The judge was also disqualified with respect to a firm from whose senior partner the judge accepted a free stay at a condominium, which partner the judge regularly appointed as a special master. Under the circumstances, a person aware of the gifts and favors reasonably might entertain a doubt as to the judge's independence and ability to remain completely impartial with respect to matters involving the attorneys or their respective firms. With respect to matters as to which the judge's role was solely to preside over settlement conferences or settlement-related matters, his failure to disclose did not constitute improper action under Code Civ. Proc., § 170.1, subd. (6), but his failure to disclose or obtain a written waiver of disqualification (Code Civ. Proc., § 170.3) before presiding in a capacity other than as a settlement judge constituted improper action.

(16) **Judges § 12—Disqualification—Grounds—Relationship to Party or Counsel—Nature of Proceedings—Duty of Disclosure.**—The Code of Civil Procedure does not provide for any specific obligation of on-the-record disclosure of grounds for disqualification under circumstances in which the judge performs one of the limited functions permitted of a disqualified judge. Even when the ground for disqualification is a judge's receipt of gifts from one of the parties or their attorney, a judge's failure to disclose the ground for disqualification is not required when conducting a limited function permitted under Code Civ. Proc., § 170.4, such as presiding over a settlement conference.

(17) **Judges § 6.2—Removal—Grounds—Providing Legal Advice to Attorney and Members of Attorney's Law Firm.**—The Commission on Judicial Performance properly found that a judge who provided legal advice to an attorney and members of the attorney's law firm on cases being handled by that firm, failed to promote public confidence in the integrity and impartiality of the judiciary and was guilty of prejudicial conduct. The judge's active participation, regardless of motive, in the preparation of two settlement conference briefs in cases that were to come before another member of the court on which the judge served also demonstrated a disregard for the integrity of the bench and constituted prejudicial misconduct. The judge's review and approval of a motion in another case that was to come before one of the judge's judicial colleagues, and his action in soliciting a copy of a special verdict in a case similar to one over which he was presiding, and imparting his opinion to the attorney representing a litigant in the case before the judge, was prejudicial conduct.

(18) **Judges § 6.2—Removal—Grounds—Misrepresentations and Omissions in Response to Inquiries by Commission on Judicial Performance.**—The Commission on Judicial Performance properly found that a judge engaged in willful misconduct by making material omissions and misrepresentations, and demonstrating a lack of candor, in response to inquiries by the commission regarding complaints of misconduct. In each instance in which the judge responded to the commission's inquiries, he was acting in a judicial capacity. The inquiry was directed to the judge because he was a judge, and his reply was required as one of his judicial functions. The judge demonstrated bad faith because in his response he made material omissions that he knew or should have known were "beyond his authority," and for a purpose other than the faithful discharge of his judicial duties.

(19) **Judges § 6.4—Removal—Proceedings—Mitigation.**—Although evidence of a judge's qualifications for and contribution to the judicial system during the course of a lengthy judicial career does not mitigate or excuse willful misconduct or prejudicial conduct, the Supreme Court may take those factors into account in considering the totality of the circumstances that are pertinent to its determination of the appropriate discipline. In making that determination, the court considers the purpose of a disciplinary proceeding, which is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

(20) **Judges § 6.4—Removal—Proceedings—Evidence in Support of Removal as Appropriate Sanction.**—Removal from office was the appropriate discipline for a judge who engaged in successive extrajudicial transactions with a litigant who had obtained a substantial damage award in a court trial presided over by the judge, and attorneys who appeared before him over a significant period of time, creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary (Cal. Const., art. VI, § 18), a consequence the judge either deliberately ignored or was unable to appreciate. Clear and convincing evidence supported the charge that the judge engaged in seven separate instances of prejudicial conduct in his transactions with the litigant, a car dealer, four of which transactions involved the litigant's attorney, who frequently appeared before the judge. Such conduct could be construed, from the viewpoint of an objective observer, as improperly using the judicial office to advance the judge's personal interest, and permitting the appearance of special influence. Clear and convincing evidence also supported two charges that the judge engaged in prejudicial conduct in accepting gifts or financial benefits from attorneys or their law firms whose interests had come and were likely to come before the judge, and that in four separate instances the judge assisted or otherwise communicated with members of a law firm regarding matters pending before the court. The charge that the judge made material misstatements or omissions to the Commission on Judicial Performance in four instances was also supported by clear and convincing evidence, which charges, in particular, warranted the judge's removal from office.

[See 2 **Witkin,** Cal. Procedure (3d ed. 1985) Courts, § 35.]

## COUNSEL

Lewis, D'Amato, Brisbois & Bisgaard, Douglas R. Reynolds, James E. Friedhofer, Susan E. Leonard, Wingert, Grebing, Anello & Brubaker and Charles R. Grebing for Petitioner.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Laura Whitcomb Halgren, Deputy Attorneys General, for Respondent.

## OPINION

**THE COURT.**—The Commission on Judicial Performance (Commission) has filed in this court its recommendation that G. Dennis Adams, a judge of the Superior Court of San Diego County (petitioner), be removed from office. (See Cal. Rules of Court, rule 919(a).)[1] In support of its recommendation, the Commission submitted findings of fact and conclusions of law determining that petitioner had committed a variety of actions that constituted wilful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and improper action. (Cal. Const., art. VI, § 18, former subd. (c).)[2] In response, petitioner filed a petition to modify or reject the recommendation (see rule 919(b)) or, in the alternative, for remand for a new hearing before the Commission, on the ground that petitioner was denied due process of law at his hearing.

We conclude, after independently reviewing the record, that petitioner's due process challenge to the disciplinary proceedings before the Commission has no merit, and that the record supports all of the charges of wilful misconduct and most (but not all) of the charges of prejudicial conduct, and also establishes improper action. With respect to the appropriate discipline, we uphold the recommendation of the Commission that petitioner be removed from office.

### I

Petitioner was a judge of the Municipal Court of San Diego County, El Cajon Judicial District, from December 16, 1975, to March 9, 1979, was appointed to the Superior Court of San Diego County in 1979, and was elected and reelected to the superior court for successive terms in 1980, 1986, and 1992.

On December 10, 1992, following an extensive preliminary investigation (rule 904.2), the Commission filed a notice of formal proceedings against petitioner, alleging (in four counts) facts charged as constituting both wilful misconduct and prejudicial conduct. Petitioner filed an answer denying the

[1]All further references to rules are to the California Rules of Court.

[2]All further references to article VI are to article VI of the California Constitution. References to wilful misconduct connote wilful misconduct in office; those to prejudicial conduct connote conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and those to improper action connote improper action or a dereliction of duty, all within the meaning of article VI, section 18, former subdivision (c).

charges. Thereafter, the Commission filed a first amended and second amended notice,[3] and petitioner answered, again denying the charges.[4]

In October and November 1993, three special masters[5] appointed by this court held a seventeen-day evidentiary hearing on the issues presented (rules 907-908). The examiners (in this case, deputies of the Office of the Attorney General)[6] prosecuted the charges against petitioner, who was represented by private counsel. Following the conclusion of the hearing, the special masters transmitted to the Commission their proposed report, together with findings of fact and conclusions of law. As to count 1, the masters concluded that the allegations of petitioner's receipt of special benefits had not been established, but that the alleged facts that were found to be true sustained most (but not all) of the charges of separate instances of prejudicial conduct; as to counts 2 and 3, the masters found that certain of the alleged facts had not been established, and the alleged facts that were found to be true did not sustain the charges of either wilful misconduct or prejudicial conduct; and as to count 4, the masters found the alleged facts that were found to be true demonstrated "negligent" prejudicial conduct,[7] but not wilful misconduct. The special masters concluded in their report that petitioner was not guilty of wilful misconduct and that in no instance had he acted in bad faith, but that he was guilty of prejudicial conduct.

[3]Third, fourth, and fifth amended notices subsequently were filed.

[4]The Commission concluded that the charges involved moral turpitude, corruption, or dishonesty (within the meaning of former subdivision (f) of article VI, section 18), and that opening the hearing to the public on the charges would serve to maintain public confidence in the judiciary and would further the interests of justice. (Art. VI, § 18, former subd. (f)(3); rule 907.2(c).) On these grounds, the Commission determined to open the hearing to the public, notified the parties of its decision, and scheduled a press release. In response, petitioner filed in this court, in the first instance, a petition for writ of mandate (or other appropriate relief), seeking to stay issuance of the press release and to maintain the confidentiality of the proceedings before the Commission. After we transferred the matter to the Court of Appeal, Fourth Appellate District, the Commission determined to proceed with a closed hearing on the formal charges and otherwise to maintain the confidentiality of the proceedings.

In transferring the matter to the Court of Appeal, we ordered that the Commission maintain the confidentiality of the proceedings and that the record remain sealed during the pendency of the proceedings in that court. The Court of Appeal issued an order to show cause and subsequently filed an opinion granting in part and denying in part the relief sought by petitioner. On petition of both parties, we granted review and ultimately upheld in its entirety the Commission's order authorizing a public hearing. (*Adams* v. *Commission on Judicial Performance* (1994) 8 Cal.4th 630 [34 Cal.Rptr.2d 641, 882 P.2d 358] (*Adams I*).)

[5]The special masters were Patti S. Kitching (associate justice, Court of Appeal), Spurgeon Avakian (superior court judge, retired), and Charles E. Goff (municipal court judge, retired).

[6]The term "examiner" refers to "the counsel designated by the Commission to gather and present evidence before the masters or Commission with respect to the charges against a judge." (Rule 922(f).) Government Code section 68702 directs the Attorney General to act as the Commission's counsel generally, and in investigations or proceedings upon request.

[7]The term "negligent," modifying prejudicial conduct, does not appear in the pertinent constitutional provision.

The examiners filed a lengthy statement of objections to the report of the special masters, disputing in particular the conclusion that certain facts had not been proved and that other facts did not amount to wilful misconduct or prejudicial conduct. The report of the Commission, filed with this court in September 1994, confirmed the special masters' findings with respect to the alleged facts found by the special masters to be true, and found true additional allegations that the masters had concluded had not been proved. The Commission differed significantly from the masters in assessing particular acts as wilful misconduct or prejudicial conduct, concluding that the facts found to be true sustained charges of four separate instances of wilful misconduct and thirteen separate instances of prejudicial conduct, as well as several instances of improper action. By a vote of six to two, the Commission recommended that petitioner be removed from office.

II

In *Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297 [267 Cal.Rptr. 293, 787 P.2d 591, 87 A.L.R.4th 679], we summarized the applicable standards governing our review of a disciplinary recommendation of the Commission. Under the California Constitution, a judge may be censured publicly or removed from office for action that constitutes "wilful misconduct in office" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," and may be admonished privately if found to have engaged "in an improper action or a dereliction of duty . . . ." (Art. VI, § 18, former subd. (c)(2).)[8]

(1) "Wilful misconduct in office" has two elements: the judge's misconduct must be *wilful*, i.e., done with malice or in bad faith, and it must be committed *in office*, i.e., while acting in a judicial capacity. The element of malice or bad faith, in turn, must meet a two-pronged test: the judge must

[8]Former subdivision (c) of article VI, section 18 (the constitutional provision in effect at the time of the instant proceedings), provided in part: "On recommendation of the Commission on Judicial Performance the Supreme Court may . . . (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission on Judicial Performance may privately admonish a judge found to have engaged in an improper action or a dereliction of duty, subject to review in the Supreme Court in the manner provided for review of causes decided by a court of appeal."

With the passage of Proposition 190 at the November 8, 1994, election (operative March 4, 1995) section 18 of article VI was amended in several significant respects. Among other amendments to this constitutional provision, former subdivision (c) was amended and redesignated as subdivision (d).

have (1) committed acts he or she knew or should have known to be beyond his or her power, (2) for a purpose other than faithful discharge of judicial duties. (*Kennick* v. *Commission on Judicial Performance, supra*, 50 Cal.3d at pp. 313-314; *Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 832 [264 Cal.Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235].)

(2) Prejudicial conduct, or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (art. VI, § 18, former subd. (c)), may be committed by a judge either while acting in a judicial capacity, or in other than a judicial capacity. (*Kennick* v. *Commission on Judicial Performance, supra*, 50 Cal.3d at p. 314.) The provision that the conduct must be that which "brings the judicial office into disrepute" does not require actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office. (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284 [110 Cal.Rptr. 201, 515 P.2d 1].) Unlike wilful misconduct, prejudicial conduct does not require the presence of bad faith, but may occur when a judge, though acting in good faith, engages in conduct that adversely would affect the esteem in which the judiciary is held by members of the public who become aware of the circumstances of the conduct. (*Kloepfer* v. *Commission on Judicial Performance, supra*, 49 Cal.3d 826, 832; *McCullough* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191 [260 Cal.Rptr. 557, 776 P.2d 259].) The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred under this standard. (*Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 376 [188 Cal.Rptr. 880, 657 P.2d 372].) Although a judge may perform the necessary judicial functions diligently, competently, and impartially, his or her inability to discern (and thus to avoid) extrajudicial activities that reasonably would be perceived as damaging to the judiciary may place that judge's fitness for judicial office in doubt.

(3) The canons set forth in the California Code of Judicial Conduct are relevant to the determination whether a judge's actions constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," in that the canons reflect a consensus as to the standards of conduct and appropriate behavior to which judges properly should be held. (*Adams I, supra*, 8 Cal.4th at pp. 661-662.) "The failure of a judge to comply with the canons 'suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.'" (*Id.* at p. 662.)

The acts of misconduct charged in the present proceeding are alleged to have occurred while the 1975 version of the Code of Judicial Conduct was in

effect, prior to adoption of the 1992 version of that code, and thus our assessment of petitioner's conduct is governed by the earlier version of the code. We therefore shall review those pertinent canons as they appeared in the 1975 version. (The pertinent text of the prior version of the canons was adopted in substance in the 1992 version of the code, except where otherwise noted. All references to canons refer to the canons of the Code of Judicial Conduct.)[9]

Former canon 2 provided that a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities and, as a consequence, must accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen. Former canon 2B provided that judges "should not lend the prestige of their office to advance the private interests of others; nor should judges convey or permit others to convey the impression that they are in a special position to influence them." Former canon 5C(1) provided that judges "should refrain from financial and business dealings that tend to reflect adversely on their impartiality, interfere with the proper performance of their judicial duties, exploit their judicial position, or involve them in frequent transactions with lawyers or persons likely to come before the courts on which they serve."

A significant portion of the charges against petitioner involve petitioner's alleged acceptance of gifts, financial benefits, or preferential treatment from attorneys or law firms that appeared before petitioner, and from a litigant in a case over which petitioner presided. The canons, as well as other rules and regulations, pertaining to and governing the propriety of the acceptance of gifts by judges, are therefore particularly apposite to our review of the charges in the present case. (4) Former canon 5C(4) provided that, in general, judges should not accept gifts if the donor is a party or other person whose interests have come or are likely to come before the judge, subject to specified exceptions. Recently, in our decision in *Adams I*, we noted that a judge's acceptance of gifts from those whose interests appear before the court bears an obvious appearance of impropriety, " 'is inherently wrong,' " and " 'has a subtle, corruptive effect, no matter how much a particular judge may feel that he is above improper influence.' " (*Adams I*, *supra*, 8 Cal.4th at p. 663.)

One of the specified exceptions under former canon 5C(4) to the prohibition against acceptance of gifts from those whose interests have (or are likely

[9]In its report containing its findings and conclusions, the Commission referred to the canons as they are designated under the 1992 version of the Code of Judicial Conduct. The differences between the 1975 and 1992 versions of the canons are not substantively significant insofar as the present proceedings are concerned.

to) come before the court, is "ordinary social hospitality." (Former canon 5C(4)(b).) The Judicial Ethics Committee of the California Judges Association has defined ordinary social hospitality as follows: "It is that type of social event or other gift which is so common among people in the judge's community that no reasonable person would believe that (1) the donor was intending to or would obtain any advantage or (2) the donee would believe that the donor intended to obtain any advantage." (Cal. Judges Assn., Jud. Ethics Com., Opn. No. 43 (1994) at p. 4, published in Rothman, Cal. Judicial Conduct Handbook.) Again, in determining the propriety of activity that arguably might qualify as social hospitality, the focus is upon the reasonable perceptions of an objective observer, rather than the motive or intent on the part of the judge.

The California Political Reform Act of 1974 requires that any gift in excess of $50 be reported on a statement requiring disclosure of "[a]ssets and income of public officials which may be materially affected by their official actions . . . ." (Gov. Code, § 81002, subd. (c); see *id.*, §§ 81000, 87207.) As will be shown, petitioner reported on several occasions his receipt of gifts on his yearly financial disclosure statement.

(**5**) In reviewing the report and recommendation by the Commission, this court independently evaluates the evidence taken in the Commission proceedings and must sustain the charges of misconduct if there is clear and convincing evidence sufficient to prove them to a reasonable certainty. (*Kennick* v. *Commission on Judicial Performance*, *supra*, 50 Cal.3d at p. 314.) In resolving disputed issues of fact, we give special deference to the determinations of the special masters, who were best able to evaluate the credibility of the witnesses appearing before them. (*Id.* at pp. 314-315.) We must then determine whether the conduct found to have occurred is a basis for censure or removal and, if so, the appropriate sanction. In making the latter determinations, we accord great weight to the conclusions of the Commission, recognizing the expertise of the Commission in matters involving judicial conduct. (*Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 832; *McCullough* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 191.)

## III

Before turning to the specific evidence against petitioner and the merits of the Commission's findings and conclusions, we shall address petitioner's threshold contention that the disciplinary proceedings before the Commission were tainted by a lack of neutrality and a strong probability of bias

against him on the part of the Commission, resulting in a denial of his right to due process of law.

(6) Petitioner contends that the Commission's combined roles as investigator, prosecutor, and adjudicator, as well as litigation adversary, created an unacceptable risk of actual bias on the part of the Commission, thereby denying him his right to due process. He maintains that the administrative procedures governing the proceedings before the Commission, in conjunction with the Commission's efforts (collateral to its determination of the merits of the charges) to validate its order opening the proceedings to the public, resulted in an unconstitutional risk of a biased decisionmaker, because the Commission did not remain a neutral body but assumed an adversarial role during the investigatory and adjudicatory stages.

Petitioner acknowledges that we rejected a somewhat similar argument in *Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at pages 833-835, in which the subject of judicial disciplinary proceedings raised a due process challenge to the Commission's role in the disciplinary proceedings. The judge in *Kloepfer* complained, as does petitioner, that the Commission did not provide a neutral forum, because the accusatory, investigatory, and adjudicatory functions were combined so that the adjudicatory process did not comport with generally accepted standards of due process.

In examining this argument in *Kloepfer*, we turned to the principles articulated by the United States Supreme Court in *Withrow* v. *Larkin* (1975) 421 U.S. 35 [43 L.Ed.2d 712, 95 S.Ct. 1456]. In *Withrow*, the court observed that, in order to prevent unfairness, our legal system refuses to tolerate proceedings in which the risk of actual bias on the part of the decisionmaker is inconsistent with the guarantee of due process. In *Withrow*, itself, however, the court rejected a challenge to the procedures of a medical licensing board that possessed both investigatory and adjudicatory functions, concluding that, in general, it is appropriate to presume the integrity of those serving as adjudicators in an administrative proceeding, and, accordingly, that a challenge on such a ground carries a very high burden of persuasion. (421 U.S. at pp. 47 [43 L.Ed.2d at pp. 723-724].)

We concluded in *Kloepfer* that the challenged procedures of the Commission involved even less potential for biased decisionmaking than those upheld by the high court in *Withrow*. We noted that the prosecutorial function rested largely with examiners from the Attorney General's office, that the Commission independently reviews the evidence and makes its own findings and conclusions, and that this court is the final decisionmaker and

must review the evidence and independently assess its weight and significance. (49 Cal.3d at p. 835.) We therefore concluded that the procedures to which the judge objected did not create an unacceptable risk of bias either on the part of the Commission or on the part of the court as the ultimate decisionmaker.

Petitioner contends that the circumstances in the present case, in which petitioner challenged the Commission's open-hearing order in a collateral writ proceeding (see *Adams I*, *supra*, 8 Cal.4th 630), created a significantly greater risk of bias against him than the risk of bias present in *Kloepfer*. He argues that the Commission's role as his opponent in that collateral proceeding, in seeking to validate the open-hearing order, converted the Commission from a neutral forum to an adversarial party. He argues that the Commission's vigorous opposition to his attempt to vacate the open-hearing order, using as legal counsel the same attorneys who were prosecuting the charges, inevitably prejudiced the Commission against him with respect to the merits of the charges, creating a strong probability of bias against him.

The Commission ordered open the hearing for the purpose, and in the interest, of maintaining public confidence in the judiciary and its disciplinary procedures, pursuant to the provisions of article VI, section 18, former subdivision (f). Having determined that the charges against petitioner involved moral turpitude, dishonesty, or corruption, and that an open hearing would best serve public confidence and the interests of justice, the Commission was bound to seek implementation of the open-hearing procedures, as one of the duties required of it under the foregoing former provision of the California Constitution predating Proposition 190. The Commission's use of the Attorney General as legal counsel for this purpose was appropriate under Government Code section 68702, and did not create any risk of bias on the part of the Commission greater than if different counsel had been employed—any counsel retained by the Commission for this purpose would have assumed the role of advocate in representing the Commission.

Not surprisingly, petitioner cites no authority in support of his contention that the Commission's defense of its open-hearing order rendered the Commission a biased tribunal. Petitioner's premise would lead to the absurd consequence that an administrative agency charged with adjudication of a claim in an administrative proceeding would be disqualified from performing its function whenever it was required to assert or defend its position against the claimant in a matter preliminary to a final determination of the merits of the claim. Such a result would be inconsistent with a large body of decisional law relating to administrative proceedings (see, e.g., *Summers* v.

*City of Cathedral City* (1990) 225 Cal.App.3d 1047 [275 Cal.Rptr. 594]; *Park Motors, Inc.* v. *Cozens* (1975) 49 Cal.App.3d 12 [122 Cal.Rptr. 337]) and essentially would emasculate the ability of an agency to serve many of the functions for which it is responsible. As the high court explained in *Withrow,* in all adjudicatory proceedings the judge or other decisionmaker frequently renders preliminary or interlocutory orders (e.g., issuing arrest warrants based upon a finding of probable cause, or a preliminary injunction) that, except in unusual circumstances, do not give rise to a presumption of bias precluding that decisionmaker from making a finding of guilt or innocence in a criminal proceeding or a final adjudication of the merits of a dispute in a civil proceeding. (421 U.S. at p. 56 [43 L.Ed.2d at pp. 728-729].)

In a related argument, relying upon remarks made by a number of Commission members during oral argument before the Commission, petitioner appears to contend that the record establishes actual bias or prejudice on the part of particular Commission members.

During the course of his argument before the Commission, petitioner's counsel noted that the disciplinary proceeding raised questions regarding public perception of the judiciary and suggested that public confidence in the proceedings would best be served if the Commission accorded serious weight to the findings and conclusions of the special masters, who diligently had heard all the evidence.

Commissioner Andy Guy questioned petitioner's counsel regarding that suggestion, asking: "If you were so interested in the public, the public outrage, why did you try to keep this thing secret from the public all the way through? No open hearing?" Commissioner Essegian noted shortly thereafter, with regard to Commissioner Guy's comments, that "there has been a real effort here to keep everything confidential." In closing argument, the examiner suggested that the reason petitioner had not sought to open the proceedings to the public was that he knew the public would be outraged by the truth.

Petitioner contends the foregoing comments of the Commission members, considered in conjunction with the examiner's argument, reflect the Commission's improper consideration of the earlier writ proceeding in formulating its disciplinary recommendation. He argues that the Commission's consideration of this collateral matter constituted an abuse of the Commission's discretion and "tainted" the proceedings.

The record fails to establish that the determination by the Commission of the appropriate disciplinary recommendation was based upon a desire improperly to penalize petitioner for having challenged the open-hearing order.

The issue whether the Commission properly issued its open-hearing order was resolved in the collateral writ proceeding that remained separate in all respects from the hearing and determination of the charges on the merits. The Commission's findings and conclusions that led to its disciplinary recommendation are based upon the evidence adduced at the hearing on the merits of the charges. The exchange between petitioner's counsel and the commissioners at oral argument simply reflects the commissioners' unwillingness to let counsel's argument pass (as to how the public confidence best would be served) without testing the basis for that argument and assessing whether petitioner's actions were truly consistent with his counsel's position. The colloquy demonstrates a normal function of oral argument and provides no basis for the conclusion that the Commission penalized petitioner for challenging the open-hearing order.

For these reasons, we conclude the record fails to support petitioner's claim that the Commission proceedings were tainted by actual bias or prejudice against him (or by an unacceptable risk thereof), in violation of due process requirements.

IV

Turning to the charges against petitioner and the merits of the Commission's findings and conclusions, we first set forth the uncontroverted factual scenario underlying a substantial portion of the allegations of misconduct.

From August through October of 1985, petitioner presided over the trial in a complex civil case, Security Pacific National Bank v. Williams (Super. Ct. San Diego County, 1985, Nos. 457727 and 457728), between the named bank and James Williams, an automobile dealer. The litigation involved an action by the bank against Williams to enforce personal guaranties for indebtedness that had been executed by Williams, and a related cross-action by Williams against the bank, seeking tort damages for alleged fraud and other misconduct in the course of his transactions with the bank. Williams was represented in the litigation by Attorney Patrick Frega.

The trial commenced as a jury trial but concluded as a court trial. Following the presentation of evidence, petitioner devoted approximately 100 hours to drafting his written decision. In early 1986, petitioner rendered the decision, awarding judgment in favor of Williams in the amount of approximately $5 million, expressly reserving jurisdiction to determine attorney fees and costs on appeal. Security Pacific appealed from the judgment.

The matter was pending on appeal from mid-1986 to August 31, 1989, when the judgment was affirmed by the Court of Appeal in an unpublished

opinion. (*Security Pacific National Bank* v. *Williams* (Aug. 31, 1989) D004365).) On January 9, 1990, the appellate court issued its remittitur. On January 22, 1990, Patrick Frega filed in the trial court a motion for attorney fees and costs on appeal. The motion was scheduled to be heard on February 27, 1990, in petitioner's courtroom. In late January 1990, Security Pacific paid the judgment in full, including interest, in a total amount exceeding $7 million. On January 29, 1990, Frega signed an acknowledgment of satisfaction of judgment in full, as well as a waiver of attorney fees, and caused to be removed from the trial calendar the motion for fees and costs.

From 1989 through 1991, petitioner engaged in five business transactions with Williams and his dealership, involving the purchase and repair of automobiles. Four of these five transactions also involved Attorney Frega.

We shall consider the charges that were upheld by the Commission as framed in the four counts set forth in the notice of formal proceedings,[10] first reciting the specific allegations and then reviewing the evidence presented before the special masters, the findings and conclusions of the special masters, and the findings and conclusions of the Commission.

*Count 1*: Count 1 alleges that petitioner and members of his family received gifts and financial benefits from Williams, including discounts and favorable prices for the purchase of automobiles and for repairs. Count 1 sets forth seven separate incidents, including five automobile-related transactions, a celebration dinner, and the gift of a sweater.

(A) *The purchase of the 1986 Mercedes.*

Subcount (a) alleges that in early 1989, while the Security Pacific case remained pending on appeal, petitioner personally contacted Williams, requesting that the car dealer search for a used Mercedes automobile for petitioner's wife. Williams sold a 1986 Mercedes 300E to petitioner in March 1989, personally setting the sales price at $20,537, an amount that allegedly appeared to be favorable to petitioner.

The record reflects that in 1989, approximately three years following entry of judgment in the Security Pacific case, but while the case remained pending on appeal, petitioner contacted Williams, indicating that he was looking for a used automobile for his wife. At the time, petitioner had no

[10]We do not review the subcounts of charges that were dismissed by the Commission. (*Kennick* v. *Commission on Judicial Performance*, *supra*, 50 Cal.3d at p. 332; *Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 785, fn. 5 [119 Cal.Rptr. 841, 532 P.2d 1209].)

personal or other relationship with the car dealer, other than having seen him on occasion at social events. In his answer to the formal notice, petitioner explained his motive in contacting this particular car dealer: "I contacted Mr. Williams because I did not want to deal with used car salesmen who would try to hassle or negotiate a price. I simply indicated to Mr. Williams . . . that I expected to pay fair value for it." Williams testified that petitioner told him that he did not want any "special deal" and that Williams should "make money" on the transaction. Williams thereafter delivered to petitioner a used Mercedes 300 E, bearing approximately 57,000 miles, that had been traded in to the dealership. At the time, petitioner did not inquire regarding the purchase price. Petitioner later telephoned Williams to inform him that his wife was pleased with the Mercedes and asked Williams to inform him as to the amount that he owed. Williams personally set the base sales price at $20,537. Petitioner paid the total purchase price of $22,532.15, without further inquiry or negotiation, and without investigating the prices of comparable vehicles or otherwise attempting to determine the fair market value of the Mercedes. He indicated to Williams that he would rely upon the auto dealer's professional judgment "if you think it's a good car and a good deal."

Expert testimony was presented regarding the fair market value of the Mercedes, establishing that used automobile prices are determined by a number of factors, including the "Kelly Bluebook" value, the type of dealership, the mileage and condition of the vehicle, and the profit margin for the dealership. The examiners presented evidence that the sales price of $20,537 was approximately $5,000 below market value. The testimony of the former Mercedes owner, however, among other evidence, indicated that as a result of the terms of the sale of a new vehicle to the former Mercedes owner, the actual cost of the Mercedes to Williams was $18,000. At this cost, after servicing the vehicle prior to sale, the dealership realized a total profit in the range of $2,000, an amount in excess of the average profit realized on a retail used-automobile sale for the dealership.

The special masters found that Williams did not confer any special benefit upon petitioner with respect to the purchase price charged for the Mercedes. In this regard, the special masters found that the amount of profit realized by Williams on the transaction was critical to the determination of whether he gave petitioner a "good deal," and that even the examiners acknowledged that a profit in excess of $2,000 would be commercially reasonable. For these reasons, the masters concluded that the price set by Williams was not unduly favorable. The masters nevertheless concluded that petitioner's actions in engaging in a business relationship with Williams—after rendering an enormous judgment in favor of this litigant—undermined public confidence in the judiciary, because a person aware of the circumstances of the

transaction reasonably might entertain a doubt as to whether it was "tilted in [petitioner's] favor by reason of the decision he had made."

The Commission found that petitioner initiated the Mercedes transaction with Williams with the expectation of receiving favorable treatment, and that petitioner purchased the Mercedes on terms more favorable than those normally made available to members of the general public. In this regard, the Commission found, contrary to the finding of the special masters, that the amount of profit realized by Williams on the transaction was not determinative of whether petitioner was charged a favorable price by the automobile dealer.

The Commission concluded it was improper for petitioner to engage in a business transaction with Williams after awarding him a multimillion dollar judgment in a court trial, and while the case remained pending on appeal with jurisdiction reserved by petitioner for the determination of attorney fees and costs on appeal. The Commission concluded petitioner's actions were contrary to canons 2A and 4D(5) of the Code of Judicial Conduct and characterized this misconduct as an abhorrent disregard for the integrity of the judicial office that was harmful to public confidence in the judiciary. The Commission unanimously concluded petitioner's actions constituted prejudicial conduct.

We conclude the record does not contain clear and convincing evidence that petitioner initiated the transaction with the expectation of receiving a financial favor. Petitioner's explanation for contacting Williams rather than some other used automobile dealer (he did not wish "to deal with used car salesmen who would try to hassle or negotiate a price") is plausible and supported by the testimony of Williams that petitioner affirmatively stated he did not seek any "special deal."

We also agree with the finding of the special masters that the record fails to provide clear and convincing evidence that petitioner paid a price for the purchase of the Mercedes that was unduly favorable to him and that would not have been offered to members of the public. The Commission's expert testimony that the purchase price was approximately $5,000 below market value was controverted in part by expert testimony presented by petitioner, establishing that when a used Mercedes is traded to a non-Mercedes dealership, the dealership generally will seek to wholesale the vehicle as quickly as possible, rather than sell it to the general public, in order to recover immediately the dealer's cash investment.

(7) Regardless whether petitioner received a discount or other financial benefit, however, the foregoing circumstances establish that petitioner initiated a business transaction with, and actively solicited the assistance of,

Williams, a litigant in favor of whom petitioner had rendered an exceedingly large monetary judgment and, even more significantly, whose interests remained before petitioner while the case was pending on appeal. The nature of the transaction also is significant—the sale by an automobile dealership of a used vehicle, generally providing leeway for bargaining and flexibility in setting the purchase price. In so acting, petitioner violated the general proscription against conduct giving rise to the appearance of impropriety (former canon 2), including extrajudicial activities that may cast reasonable doubt upon the individual's capacity to act impartially as a judge, and business dealings that reasonably may be perceived as exploiting the judge's position (see former canon 5(C)). To an objective observer of the transaction, petitioner would appear to have been seeking to use his office to collect for past deeds, and to procure a benefit for himself. Both the size of the purchase, and the flexibility of the pricing in particular, likely would render the transaction questionable from the perspective of an objective observer. Petitioner's actions would have placed in doubt his ability to act with integrity, independence, and impartiality. We therefore uphold the charge of prejudicial conduct set forth in subcount (a).

(B) *The celebration dinner and purchase of the Jeep.*

Subcount (b) alleges that in approximately February 1990, petitioner attended a dinner hosted by Frega in celebration of the satisfaction (in January 1990) of the judgment in the Security Pacific litigation (a judgment totaling, with accrued interest, in excess of $7 million). The dinner was attended by approximately 25 guests, including Williams, Frega, and members of Frega's law firm. Frega paid for the dinner at a cost of approximately $1,500.

The evidence established that Frega hosted the celebratory dinner at a restaurant. Petitioner and his wife arrived late, stayed approximately 45 minutes, and then departed. While there, they each consumed some food but no alcoholic beverages.

Subcount (b) further alleges that, approximately two months after satisfaction of the judgment, and following his attendance at the celebratory dinner, petitioner contacted Williams, asking the automobile dealer to locate a used vehicle for his daughter. On or about March 22, 1990, Williams delivered a 1988 Jeep Cherokee to petitioner, setting the sales price at $13,500, totalling $14,796.74 with tax and license—an amount that allegedly appeared to be unduly favorable to petitioner. At that time, the sole consideration tendered by petitioner for the Jeep was the trade-in of a 1983

Oldsmobile, reflected on the sales invoice as having a value of $800. On April 16, 1990, petitioner paid an additional $5,000 for the Jeep. On or about June 4, 1990, "Patrick Frega, counselor at law, a professional corporation," issued a check to Williams for $9,796.74, a sum equal to the total sales price of $14,796.74, less the $5,000 paid on April 16. A notation on the check indicated that the payment related to "Williams v. Security Pacific National Bank." By check dated June 7, 1990, petitioner wrote a check to Frega personally in the amount of $5,672.40. The check indicated that it was a "payoff" on the Jeep.

The record reflects that at the time he contacted Williams regarding the Jeep, petitioner told the dealer he could afford to pay approximately $5,000 to $5,500 plus the trade-in value of the 1983 Oldsmobile. Williams testified petitioner emphasized that he did not want "any favors" and that the dealer should "make money" on the transaction. Williams was aware, however, that petitioner was experiencing financial difficulties as a result of the dissolution of his marriage. Approximately two weeks later, Williams delivered a 1988 Jeep Cherokee to petitioner. At the time, petitioner was aware that the value of the vehicle likely exceeded the amount he had indicated to Williams he could afford. He did not raise this issue with Williams or otherwise inquire regarding the purchase price. A few days later, petitioner telephoned Williams to confirm that he would purchase the vehicle.

An invoice for the transaction dated March 22, 1990, was prepared by the dealership, listing the base price of the Jeep at $13,500, with a total sales price of $14,796.74. The invoice reflected a credit in the amount of $800 for the Oldsmobile. On May 7, 1990, the dealership sold the Oldsmobile for $800.

At the time he confirmed he would purchase the Jeep, petitioner was neither presented with a sales invoice nor asked to sign any contract; no arrangements were made with Williams for payment or for financing the purchase, and petitioner was not sent a bill. Apart from the trade-in of the Oldsmobile, petitioner made no payment on the purchase price until April 16, 1990, when he paid the dealership $5,000 that he had borrowed from his father. At that time, petitioner inquired of Williams regarding the balance owed on the purchase price. Williams insisted (incorrectly) that the balance had been satisfied by the trade-in of the Oldsmobile. Petitioner testified that he simply "could not get a number out of [Williams]" but was aware that additional sums were owed.

In late May, petitioner requested that Frega ascertain the balance due on the purchase of the Jeep. A few days later, when Frega reported back that

petitioner owed $5,672.40, petitioner wrote a check to Frega personally for that amount. Frega testified he did not inform petitioner of the true balance owed, because Frega was aware of petitioner's financial difficulties as a result of the pending dissolution of petitioner's marriage. Frega therefore made a unilateral decision to "loan" petitioner the approximate $4,000 additional amount owed, with the intention of recovering the loan at a later date, and wrote a check to the dealership in the amount of $9,796.74.

Williams testified that prior to the Jeep purchase transaction he had had a long-standing, ongoing "understanding" with Frega that, with respect to any customer referred by Frega to Williams, if Williams felt that "I [Williams] didn't make enough money or if I was going to get stuck on the hook or if it was maybe the difference between wholesale and retail, that he [Frega] would take care of the difference." At the time of the Jeep transaction, Williams considered petitioner to be a customer referred by Frega and thus covered by this understanding.

The special masters found that in purchasing the Jeep from Williams, petitioner had not been seeking any financial advantage from the dealer, and concluded that petitioner had been unaware of the gift conferred upon him by Frega until after the commencement of the Commission investigation. The special masters concluded, however, that under the circumstances petitioner should have been alerted to the risk that his conduct might have endangered the public esteem in which the judiciary was held, and that his actions therefore amounted to prejudicial conduct.

The Commission found that the total amount paid by petitioner (the $800 value of the Oldsmobile trade-in plus the cash payments of $5,000 and $5,672.40) was below the fair market value of the Jeep. The Commission concluded that it was misconduct for petitioner to engage in the Jeep transaction with Williams in light of the circumstances that petitioner had entered a multimillion dollar judgment in favor of Williams that recently had been paid in full and recently had attended a celebration dinner occasioned by satisfaction of the judgment. Contrary to the finding of the special masters that petitioner had not been seeking any financial advantage, the Commission found that petitioner had initiated this transaction with Williams in the expectation of receiving favorable treatment, and that in fact he received benefits that a member of the general public would not have received, both in the manner in which the transaction was conducted and the price that was charged.

The Commission unanimously concluded that petitioner's actions both with regard to his purchase of the Jeep and his attendance at the celebratory

dinner were contrary to current canons 2A and 4D(5) and constituted prejudicial conduct.

(8) Clear and convincing evidence supports the charges of misconduct alleged in subcount (b) of count 1, and we adopt the conclusion of the Commission that petitioner engaged in prejudicial conduct. As with the transaction involving the purchase of the 1986 Mercedes, petitioner's conduct in initiating a transaction with the automobile dealer, in this instance shortly following the payment in full of the substantial judgment in the Security Pacific litigation, violated the proscription of former canons 2 and 5 against conduct giving rise to the appearance of impropriety. Petitioner's testimony that he thought he would be getting a "fair deal" from the dealer (rather than a "special deal") is not inherently incredible, and we defer to the findings of the special masters that petitioner did not initiate the transaction with the expectation of receiving favorable treatment. To a member of the public, however, petitioner's actions, shortly following the euphoria surrounding satisfaction of a multimillion dollar monetary judgment rendered by petitioner in a court trial, readily could be construed as an attempt by petitioner to exploit his judicial office for personal advantage. Although petitioner insisted that he wished to pay fair market value for the Jeep, his insistence could well be viewed as disingenuous under the circumstances, particularly where Williams had delivered the vehicle to him without presenting a sales contract or otherwise setting the purchase price, and did not require immediate payment. Furthermore, the record provides clear and convincing evidence that petitioner received favorable terms in the manner in which the transaction was handled—terms that would not have been afforded to members of the public. He was not required to sign a sales contract, and he made payment on the purchase price on a schedule of his own choice rather than in accordance with the method of payment generally required by the dealership for similar purchase transactions.

Regardless whether petitioner had actual knowledge that he had not paid fair market value for the Jeep, or that Frega had paid the balance owed on the purchase price, petitioner's reliance upon Frega to finalize the transaction strongly suggested impropriety. Frega represented Williams, the litigant in favor of whom petitioner had awarded the multimillion dollar judgment following a court trial, and, pursuant to a contingency fee arrangement, Frega had a 40 percent interest in the amount of the final judgment following affirmance on appeal. Additionally, matters involving the Frega firm frequently came before petitioner. The record establishes that, in placing himself in Frega's hands, petitioner deliberately ignored the strong possibility that Frega ultimately would arrange for petitioner to pay less than fair

market value for the Jeep, a favor that Williams already had attempted to confer upon him. Thus petitioner's conduct readily could be construed as an attempt to collect for judicial services rendered in the Security Pacific litigation, and otherwise to use his judicial office to advance his personal interests. To an objective observer, petitioner's integrity and impartiality would appear to have been placed in doubt.

(9) We also adopt the conclusion of the Commission that petitioner's attendance at the dinner given in celebration of the satisfaction of the judgment in the Security Pacific litigation constituted prejudicial conduct. Again, regardless of petitioner's motives, or of whether he was biased or impartial in the judicial proceedings involving the Security Pacific litigation, his attendance at the dinner indisputably gave rise to the appearance of partiality in favor of a litigant and his attorney whose very substantial interests had come before him. Under these circumstances, the dinner could not be characterized as ordinary social hospitality within the meaning of former canon 5C(4)(b).

(C) *The Jeep repair.*

Subcount (c) alleges that in or about November and December 1991, Williams's dealership performed repairs on petitioner's daughter's Jeep. The dealership discounted by 10 percent the cost of parts and labor, resulting in a balance due of $8,500. On December 9, 1991, petitioner paid Williams $7,000. On that same day, "Patrick Frega, counselor at law, a professional corporation," issued a check to Williams's dealership in the amount of $1,500 toward payment of the bill.

The evidence established that the Jeep had been severely damaged in an accident. Petitioner contacted Williams regarding the cost to repair the vehicle and was informed it would range from $8,000 to $8,500. Petitioner expressed his displeasure with the estimate, indicating it would make more sense economically to scrap the vehicle for salvage value. Williams replied he would investigate the availability of used parts, which would lower the cost of repairs. Williams ultimately directed the preparation of a repair order estimate that would not exceed $8,500.

Frega subsequently informed petitioner that Williams had advised him the repairs could be performed at a cost of $7,000. Because of his earlier conversation with Williams, petitioner assumed Williams had found used

parts for the repairs. He telephoned Williams and authorized him to proceed.[11] Williams's dealership sent a bill in the amount of $8,500 to petitioner's former residence, where his ex-wife continued to reside with their children. In December 1991, three weeks after the Jeep was delivered to petitioner's daughter, petitioner paid Williams $7,000. Without petitioner's knowledge, Frega wrote a check to the dealership in the amount of $1,500 for the balance owing.

The special masters found that Williams had billed the cost of repairs at $8,500 but had not sent the bill to petitioner, and that petitioner reasonably believed the cost of repairs was $7,000. The masters further found that the $8,500 bill resulted in a substantial gross profit for Williams, and that even at a charge of $7,000, Williams still would have realized a gross profit of more than $1,700, so that Williams had not conferred any special benefit upon petitioner. The masters further found that prior to the investigation petitioner had not had any knowledge of the $1,500 payment made by Frega. The masters finally concluded, however, that petitioner's actions constituted prejudicial conduct because of the risk of the appearance of impropriety.

The Commission concluded that the Jeep repair transaction was "not handled in the manner that repair transactions involving members of the general public were handled," noting the circumstances that petitioner had not been required to make payment immediately upon delivery of the vehicle, and that Frega had been involved in the transaction. The Commission found that petitioner initiated this transaction with the expectation of receiving favorable treatment, and concluded that it was improper for petitioner to engage in a business transaction with Williams, particularly in view of the circumstance that petitioner was aware that Williams previously had attempted to confer a special favor upon him in connection with the purchase of the Jeep.

The Commission concluded that petitioner's actions with regard to the Jeep repair were contrary to canons 2A and 4D(5), demonstrated a lack of integrity, and constituted prejudicial conduct.

We conclude the record fails to provide clear and convincing evidence that petitioner initiated this transaction with Williams with the expectation of

[11]In his declaration set forth in his answer to the formal notice, petitioner explained that, when advised the cost of repairs likely would exceed $8,000, he "decided to dispose of the Jeep for salvage at this point, in essence, junking it, and told Mr. Williams this fact. Mr. Williams stated that he would check into getting used parts from an autodismantler to see if the Jeep could be repaired for less. Several weeks later, I was informed that the repair of the Jeep could be accomplished for $7,000."

receiving favorable treatment. Petitioner's choice of Williams to perform the repairs was logical in light of the circumstance that Williams's dealership had sold him the Jeep and the urgency of the situation (the Jeep had to be towed from the scene of the accident to a body shop). The record also supports the finding of the special masters that petitioner reasonably believed that the cost of the repairs was $7,000, in light of his previous conversations with Williams.

We also defer to the finding of the special masters that the $7,000 price paid by petitioner was commercially reasonable, in light of the evidence indicating that it resulted in a substantial markup for Williams above cost. A colloquy between petitioner's counsel and Williams at the hearing before the masters is illuminating in this regard: "[Counsel]: How far would you go down on a deal in an ordinary business setting, you know, somebody you didn't know that brings a car in for repair that they've purchased from you, what percentage of mark-up over your cost would you go down to before you'd let them take the deal—the repair somewhere else? [¶] [Williams]: *If I got involved, I would let them come down to somewhere in the neighborhood of around 40 percent.* [Counsel]: *Okay, so you could make 15, $1,800 on a repair like this, rather than lose the deal, you'd take that?* [Williams]: *Sure.*" (Italics added.) We also defer to the finding of the special masters that petitioner was truthful in his testimony that he was unaware of Frega's $1,500 contribution toward the repair bill.

**(10)** As with the Jeep purchase transaction, however, petitioner's reliance upon Frega for the financial arrangements, in view of his relationship with this attorney and the frequency with which Frega's interests came before petitioner, clearly was improper. Regardless whether petitioner had knowledge of Frega's payment, his failure to obtain a bill for the repairs directly from Williams, and his reliance upon Frega to verify the cost, reflect that petitioner turned a blind eye toward the possibility of receiving special treatment, whether from Williams or Frega, or from both men. To an objective observer, petitioner would appear to have been seeking to use his judicial office to advance his personal interests, placing in doubt both his independence and his integrity. We therefore conclude the record supports the charge of prejudicial conduct with regard to this incident.

(D) *Rental car.*

Subcount (d) alleges that in 1991, Williams's dealership and Frega arranged for a rental car for petitioner's daughter while her Jeep Cherokee was being repaired. In January 1992, Frega paid the $1,063.53 bill for the car rental.

The evidence established that, after petitioner's daughter visited Williams's dealership to discuss the repair of the Jeep, she was transported in a shuttle bus from the dealership to a rental car agency. After the agency informed her that because she "wasn't old enough, that there might be problems" in obtaining a rental car, she returned home (where she resided with her mother, petitioner's ex-wife). She later telephoned petitioner at the courthouse to inform him that she had been unsuccessful in obtaining a vehicle for her use while the Jeep was being repaired. Petitioner telephoned Frega, inquiring whether Williams's dealership had "loaner cars," and Frega responded that they did, advising that he would look into the matter. Frega subsequently arranged for a rental in his name, authorizing use of his American Express card as security for the bill. Petitioner was aware his daughter had been provided with a vehicle for use during the course of the repairs but testified that prior to the investigation he had been unaware of the financial arrangements.

The special masters concluded that petitioner's conduct relating to the automobile rental constituted prejudicial conduct.

The Commission found that petitioner had engaged in misconduct in contacting Frega regarding the rental, and specifically in asking the attorney to intervene under circumstances where a "loaner" previously had been refused to petitioner's daughter. The Commission further found that petitioner had received a special benefit in the manner in which the rental transaction was handled. The Commission concluded that petitioner's actions with regard to the automobile rental were contrary to canons 2A and 4D(5), demonstrated a lack of integrity, and constituted prejudicial conduct.

Clear and convincing evidence supports the Commission's findings, which in turn support the conclusion that petitioner engaged in prejudicial conduct. Regardless whether petitioner had knowledge of the financial arrangements involved in the automobile rental, including Frega's payment of the bill, petitioner's actions in contacting Frega and permitting him to intervene in a transaction involving Williams strongly suggest that petitioner was seeking to use his judicial office to advance his personal interests and those of a family member. Petitioner's conduct also permitted the inference that Frega was in a special position to influence petitioner, another violation of the Canons of Judicial Ethics.

(E) *The detailing and rims for the 1981 Mercedes.*

Subcount (e) alleges that in 1991, Williams gave petitioner "a set of wheels" for petitioner's 1981 Mercedes. In May 1991, when Williams's

dealership had detail, refinish, and polish work performed on the Mercedes at a cost of $511.82, Frega paid the bill.

The evidence established that in May 1991, shortly before petitioner and his wife left for a one-month vacation abroad, petitioner arranged to leave the 1981 Mercedes at Williams's dealership to have detailing work performed in his absence. He arranged for Frega to meet him at the dealership so that Frega could drive him home. When petitioner and Frega met with the "fleet manager," petitioner advised the manager to contact Frega if any questions arose in his absence regarding the work to be performed. The job was completed at a cost of $511. Without authorization, Williams also had an old set of Mercedes rims placed on the vehicle. The fleet manager instructed the body work department to bill Frega, and a bill for $511 for buffing and polishing was sent to him. Frega paid the bill in July 1991. After the vehicle was delivered to petitioner's residence, petitioner upon his return from vacation noticed the replacement rims. He then telephoned Williams, told him the work was acceptable, and asked him to send a bill. Petitioner, however, never was billed and never paid for any of this work.

The special masters concluded that petitioner's conduct amounted to prejudicial conduct. As with the prior transactions with Williams, the Commission also determined that petitioner had engaged in misconduct, particularly in making no effort to ensure that he received a bill or paid for this work. The Commission concluded that petitioner's actions with regard to this transaction were contrary to canons 2A and 4D(5), demonstrated a lack of integrity, and constituted prejudicial conduct. Clear and convincing evidence, set forth above, supports the findings and conclusions of the Commission, which we adopt as our own.

(F) *The gift of a sweater from Williams.*

**(11)** Subcount (f) alleges that in December of 1990 (the year Williams received satisfaction of his multimillion dollar judgment), Williams gave petitioner a gift of a sweater, which petitioner accepted. Petitioner reported the gift of the sweater, valuing it at $150, on his financial disclosure statement.

The special masters concluded that the incident was of de minimis importance and that petitioner's mere failure to return the gift did not amount to prejudicial conduct.

The Commission reached a different conclusion, observing that because the gift was from a litigant in favor of whom petitioner had awarded a

multimillion dollar judgment, and was given the same year the judgment was paid (shortly after petitioner attended a dinner in celebration of that payment), petitioner's acceptance of the gift constituted prejudicial conduct.

We agree with the conclusion of the Commission. Although petitioner did not solicit the gift, under the circumstances it was incumbent upon him to return it to Williams in order to avoid any doubt regarding the judge's independence or any appearance of impropriety.

In conclusion, we find that clear and convincing evidence supports the numerous charges of prejudicial conduct set forth in count 1 that were sustained by the Commission.

*Count 2*: Count 2 alleges that petitioner received gifts from attorneys, including Frega, whose interests had or were likely to come before the judge. In proceedings (including settlement conferences) involving these attorneys, petitioner failed to disqualify himself or make full disclosure on the record of his relationship with these attorneys or their firms, or to obtain a written waiver of disqualification. In particular in cases where petitioner's sole involvement was to preside over settlement conferences, he failed to make adequate disclosure of his relationship with these attorneys or the gifts he had received from them.

We shall address each of the instances of charged misconduct that were sustained by the Commission.

(A) *Gifts and favors from Frega.*

In 1987, Frega was honored by the San Diego Trial Lawyers Association as "trial lawyer of the year," as a result of his success in the Security Pacific litigation. Frega asked petitioner to present the award to him at an awards dinner. Petitioner was unable to attend the dinner but agreed to take a "rain check." Frega and his wife took petitioner and his wife to the "rain check" dinner (the term alleged in count 2) on July 2, 1987. On his financial statement filed for that year, petitioner reported the value of the dinner at $100.

Count 2 further alleges that petitioner reported accepting a loan of Frega's computer from December 1, 1987, to June 30, 1988, and from November 1, 1989, to December 31, 1990, valuing the loans at $1,300.

Count 2 additionally alleges the monetary gifts and payments made by Frega in connection with the automobile-related transactions that comprise the charges set forth in count 1.

The record reflects that at the "rain check" dinner, petitioner discussed with Frega a novel that petitioner was writing, and the two men agreed informally to collaborate on the novel. At the time of this dinner, the Security Pacific case was pending on appeal, with petitioner having reserved jurisdiction to determine attorney fees and costs on appeal. Additionally, petitioner was acting as the settlement judge in a case involving the Frega firm, and was assigned as judge for all purposes in another case in which Frega's firm represented several of the plaintiffs. Previously, in 1986 and 1987, petitioner had been the settlement judge in a case involving the Frega law firm, in which Frega's clients received in excess of $500,000 in settlement proceeds.

To facilitate the writing of the book, petitioner accepted the loan of Frega's laptop computer, reporting the value of the loan in the financial disclosure statements filed by petitioner for consecutive years.

During the period of the loan of the computer to petitioner, a personal friendship developed between the two men, and six cases in which one or more of the parties were represented by Frega's law firm were pending before petitioner. All six of these actions were settled on terms under which the parties represented by Frega's law firm received substantial, and in some cases multimillion dollar, sums in settlement proceeds.

In 1988, after their personal friendship had developed, petitioner informed Frega that he no longer would preside over any matter in which Frega appeared. Frega paraphrased petitioner as informing him that " 'I've gotten to the point where I don't believe I can hear your cases. So what I'll do is since I've got settlement conferences or cases for your partner, Tiffany, I will hear cases until there's a contested motion or ruling I have to make as to questions of fact, and I will recuse myself.' "

The special masters found that the "rain check" dinner was part of an exchange of social amenities among personal friends and did not amount to misconduct. They found the computer loan amounted to at most "improper action."

**(12)** The Commission concluded that petitioner's acceptance of the "rain check" dinner, after awarding Frega's client a multimillion dollar judgment that was pending on appeal following a court trial, and while cases handled by Frega's law firm either had come or were likely to come before petitioner, amounted to prejudicial conduct.

The Commission concluded that the computer loan could not properly be characterized as an exchange of social amenities, and that in light of the

circumstance that the loan was made while Frega's law firm was handling cases that were pending before petitioner, petitioner's acceptance of the loan constituted prejudicial conduct.

We conclude that petitioner's conduct in accepting the "rain check" dinner and the computer loan constituted improper action. In both instances, petitioner violated the general proscription against a judge's acceptance of gifts under former canon 5C(4). The "rain check" dinner cannot be viewed as ordinary social hospitality within the meaning of former canon 5C(4)(b) where, prior to the dinner, petitioner had had no personal relationship with Frega, and the dinner was occasioned by Frega's having prevailed in a court trial over which petitioner had presided. Simply allowing Frega to "pick up the tab" for a dinner, however, in and of itself, would not have placed in doubt, from the perspective of an objective observer, the independence and impartiality of petitioner, and his acceptance of this favor therefore did not rise to the level of prejudicial conduct. Similarly, because Frega had agreed to collaborate on the writing of petitioner's novel, the computer loan would not have appeared to an objective observer to be a special favor conferred as a result of petitioner's judicial office and thus did not constitute prejudicial conduct.

The Commission made no separate findings or conclusions with regard to the alleged receipt of gifts from Frega in connection with the Jeep purchase, Jeep repairs, car rental, and detailing of the 1981 Mercedes. As indicated previously, we conclude the record lacks clear and convincing evidence that petitioner was aware of Frega's contributions in connection with these transactions, although, as indicated above, petitioner's reliance upon Frega's involvement in the transactions constituted prejudicial conduct.

(B) *Gifts and favors from the law firm of Ault, Midlam & Deuprey.*

**(13)** Count 2 further alleges that in 1985, petitioner was represented in a legal proceeding by the law firm of Ault, Midlam & Deuprey. Petitioner was a personal friend of Tom Ault, a senior partner of the firm. In December 1986, petitioner accepted a legal fee write-off of $600 from the firm, which he reported on his financial disclosure statement. After 1986, members of the law firm appeared before petitioner in numerous cases.

The record reflects that on December 31, 1985, the Ault firm billed petitioner for legal services in the amount of $1,000. Between January 15, 1986, and September 8, 1986, petitioner made monthly payments of $50 toward this account. In December 1986, the Ault law firm wrote off the remaining balance of $600 and informed petitioner of this fact. Petitioner

reported the fee write-off on his financial disclosure statement, overvaluing it at $800.

Both the special masters and the Commission concluded that the fee write-off could not be characterized as an exchange of social amenities among friends and that it constituted improper action.

We conclude that petitioner's receipt of a fee write-off in a fairly substantial amount from a law firm that regularly appeared before him constituted prejudicial conduct, violating both the general proscription against a judge's acceptance of gifts from attorneys who are likely, or whose firms are likely, to appear before the judge, and the proscription against conduct permitting the inference of special influence over a judge. To an objective observer, petitioner's conduct would have compromised the independence and integrity of the judiciary.

(C) *Gifts and favors from the law firm of Duckor & Spradling.*

**(14)** Count 2 alleges that in October 1989, petitioner accepted the use of a desert resort condominium owned by Michael Duckor, a senior partner of the law firm of Duckor & Spradling, for a three-night stay. Since 1989, members of the Duckor firm have appeared before petitioner in a number of cases, and petitioner regularly has appointed Michael Duckor as a special master.

The evidence established that in approximately June 1989, petitioner began to appoint Duckor as a special master in cases involving construction defects, the attorney having acquired a reputation for exceptional skill in the resolution of these cases. Within a year, Duckor's special master activities comprised 50 percent of his practice. In 1989, approximately two-thirds of his special master activities, and in 1990 approximately 20 percent, resulted from appointment by petitioner.

Duckor testified that in the fall of 1989, he informed petitioner that he had placed his desert resort condominium on the market for sale. The condominium was made available to all prospective buyers free of charge. Petitioner testified that he spent the weekend at the condominium because he and his then fiancée were considering buying such a unit as a "weekend getaway." Ultimately petitioner decided not to purchase the condominium, and he and his fiancee subsequently purchased a resort condominium in Mexico. Duckor later sold his condominium to an unrelated party.

The condominium had a rental value of approximately $100 to $250 per day. Petitioner reported this condominium stay on his financial disclosure statement, listing its value as $220.

Count 2 further alleges that petitioner was a guest of the Duckor firm on a day fishing trip. The evidence established that on two occasions, once in 1989 and again in 1990, petitioner, together with approximately thirty other persons, was a guest on these trips sponsored by the Duckor firm and another firm, during which petitioner did not fish but read books and socialized with other judges and attorneys who were present. Each trip cost the firms approximately $130 per person.

The special masters concluded that petitioner's acceptance of the condominium stay and the fishing trips were exchanges of social hospitality and did not constitute misconduct. The Commission concluded, however, in light of the circumstance of Duckor's appointment as special master by petitioner in construction-defect cases, that petitioner's acceptance of the condominium stay and fishing trips constituted "improper action."

We adopt as our own the conclusion of the Commission that petitioner's use of Duckor's condominium constituted improper action. The California Judges Association Judicial Ethics Committee has declared the acceptance of such a gratuity to be improper: "A judge should decline the use of a boat or vacation home offered by an attorney who appears regularly in the judge's court, because such use would constitute a gift, but the judge may rent the boat or home from the attorney for the reasonable value of its use." (Cal. Judges Assn., Jud. Ethics Com., Judicial Ethics Update (Oct. 1989) p. 2, published in Rothman, Cal. Judicial Conduct Handbook.) This instance of misconduct did not rise to the level of prejudicial conduct, given the circumstance that the condominium was offered free of charge to any member of the public interested in purchasing the resort condominium.

We further conclude that petitioner's participation in the fishing trips constituted prejudicial conduct. Accepting these outings, cosponsored by a law firm whose interests regularly came before petitioner, violated former canon 5C(4)'s general proscription against the acceptance of gifts. The circumstances that these recreational activities were provided by law firms, rather than a bar association or other legal association (whose sponsorship of such an event for the benefit of judges generally would be appropriate) cast doubt upon petitioner's independence. We may assume that law firms do not as a general rule sponsor fishing trips for the benefit of the general public.

(D) *Failure to disclose or disqualify.*

Count 2 further alleges that in proceedings before petitioner, in which the Frega, Ault, and Duckor firms appeared, petitioner improperly failed to disqualify himself, make adequate disclosure on the record of his

relationship with the members of these firms, or obtain a written waiver of disqualification.

Before turning to the findings and conclusions of the special masters and the Commission regarding this allegation, we shall review the rules governing a judge's obligations of disclosure and disqualification.

Code of Civil Procedure section 170.1 provides that a judge shall be disqualified under a variety of circumstances, including (but not limited to) circumstances where (1) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding, (2) the judge has served as a lawyer in the proceeding, (3) the judge has a financial interest in the subject matter of or in a party to the proceeding, (4) the judge, his or her spouse, or a close relative is a party to the proceeding, (5) a lawyer, or a spouse of a lawyer, in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse, or (6) "*[f]or any reason . . . a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.*"[12] (Code Civ. Proc., § 170.1, subd. (a)(6), italics added.)

Code of Civil Procedure section 170.3 sets forth the procedure to be followed in the situation where a judge determines himself or herself to be disqualified. The judge must not participate further in the proceeding, except as provided in section 170.4, unless his or her disqualification is waived by the parties. (§ 170.3, subd. (a).) Subdivision (b) of section 170.3, setting forth the procedure for waiver, provides in pertinent part: "A judge who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification . . . . A waiver of disqualification shall recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record." (Code Civ. Proc., § 170.3, subd. (b)(1).)

[12]The 1992 version of canon 3E provides that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, or in a proceeding in which disqualification is required by law." The commentary to this canon explains that the reference to "required by law" pertains to the disqualification provisions of the Code of Civil Procedure.

The prior version of canon 3 pertaining to disqualification (which governed petitioner's obligations of disclosure and disqualification under the circumstances alleged in the formal notice) did not contain the following commentary, which appears in the 1992 version: "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification."

Even in the event a judge is disqualified in a particular case or proceeding, however, he or she is permitted to perform limited judicial functions, including presiding over settlement conferences (Code Civ. Proc., § 170.4, subd. (a)(6)), without any statutory obligation of disclosure.

The special masters found that between 1985 and 1991, petitioner was assigned the majority of construction-defect cases filed in the San Diego County Superior Court, having established an efficient standard operating procedure for their processing which frequently resulted in their early resolution (usually by means of settlement). These cases generally were handled by a limited number of local attorneys—approximately 150. Petitioner developed an expertise in managing these construction-defect cases and was in great demand as a settlement conference judge. The cases often were complex, involving multiple parties, and it was not uncommon for as many as 50 attorneys to attend a hearing or conference in a single case. As a result, attorneys generally noted their attendance on a sign-in sheet instead of announcing their names orally on the record, and accordingly petitioner frequently was unaware of a particular attorney's affiliation with a specific law firm. The masters expressly found that petitioner acted reasonably in not ascertaining the name and firm association of each attorney in attendance at these mass conferences. The masters also found that the evidence (including the testimony of many of the attorneys who had attended the proceedings before petitioner involving one of the three law firms) reflected there was no indication of any bias or prejudice on the part of petitioner in favor of or against any attorney.

The special masters further found that petitioner's personal relationships with Frega and Ault generally were known among the attorneys who appeared before petitioner, and that he frequently made affirmative reference to these relationships. On occasion, attorneys appearing before petitioner orally waived potential grounds for disqualification. The masters concluded that the disclosures made by petitioner were reasonable under the circumstances, and that petitioner reasonably concluded that persons aware of the facts would not entertain a doubt as to whether he would be impartial in matters that he heard involving the law firms of these attorneys.

The Commission's determination differed substantially from the special masters' assessment of the circumstances of petitioner's limited disclosure and failure to disqualify himself. The Commission concluded that petitioner's relationship with the three attorneys (Frega, Ault, and Duckor) and their law firms, including petitioner's receipt of gifts from them, was such that a person aware of these circumstances reasonably might entertain a doubt as to

petitioner's ability to be impartial in presiding over proceedings involving the firms in question. The Commission found that, although in some cases petitioner orally disclosed the nature of his relationship with these firms, such as the Ault firm's representation of petitioner, he did not disclose any of the financial benefits and gifts that he had received, such as the legal-fee write-off, and in no case did he obtain a written waiver of disqualification. In cases in which petitioner's sole involvement was presiding over settlement conferences, the Commission concluded that petitioner failed to make adequate disclosure of his relationship with the attorneys and their law firms and the gifts he had received from them. The Commission identified specific cases involving the three law firms and concluded that petitioner's failings with regard to his obligations of disclosure and disqualification in these cases constituted improper action.[13]

**(15a)** We agree with the conclusion of the Commission that, in light of the circumstances of petitioner's personal relationship with Frega commencing in late 1987 with their collaboration on the novel, petitioner's acceptance of the "rain check" dinner, and the loan of the laptop computer, petitioner thereafter was disqualified with respect to any matter involving Frega or his law firm. We similarly conclude that in light of petitioner's long-standing relationship with Ault, and petitioner's acceptance of a legal-fee write-off from his firm in December 1986, petitioner was disqualified with respect to any matter involving Ault or his firm as of the date of the write-off. We also conclude that following petitioner's acceptance of the 1989 condominium invitation from Duckor, whom petitioner regularly appointed as a special master, petitioner was disqualified from any matter involving the Duckor firm. We previously have concluded that petitioner's acceptance of these gifts and favors constituted improper action, if not prejudicial conduct. Under the circumstances, a person aware of these gifts and favors reasonably might entertain a doubt as to petitioner's independence and ability to remain completely impartial with respect to matters involving the three attorneys or their respective firms. (Code Civ. Proc., § 170.1, subd. (a)(6).)

**(16)** As we have explained, the fact of petitioner's disqualification in a particular matter did not preclude his presiding over settlement conferences (§ 170.4, subd. (a)(6)), and the record reflects that in the majority of the cases involving the Frega and Ault firms that were identified by the Commission, petitioner's role appears to have been limited generally to conducting or coordinating settlement conferences or the consummation of settlement agreements. As explained above, the Code of Civil Procedure does not

[13]The record reflects that petitioner ultimately did recuse himself in certain of these cases identified by the Commission.

provide for any specific obligation of on-the-record disclosure under circumstances in which the judge performs one of the limited functions permitted of a disqualified judge.

The Commission urges that, when the ground for disqualification is a judge's receipt of gifts from one of the parties or their attorney, a judge's failure to disclose the ground for disqualification, even when conducting a limited function permitted under Code of Civil Procedure section 170.4, such as presiding over a settlement conference, is inconsistent with the requirement of canon 2A that judges at all times "promote[] public confidence in the integrity and impartiality of the judiciary." The Commission accordingly proposes that a judge's receipt of gifts from an attorney necessitates the judge's on-the-record disclosure of that circumstance in all instances in which that attorney or his or her law firm appears before the judge.

In the absence of any specific statutory requirement or canon governing a judge's obligation of disclosure under these circumstances, however, we conclude that such a prophylactic requirement of disclosure more appropriately should be promulgated by the adoption of a statutory enactment or a specific canon of ethics. Although the commentary to the 1992 version of canon 3E recommends that a judge disclose information that the parties or their attorneys *might* consider *relevant* to the issue of disqualification (even if the judge believes there are no actual grounds for disqualification or other circumstances precluding the judge from proceeding in the particular matter) (see fn. 12, *ante*), that particular permutation of the duty of disclosure was not in effect at the time of petitioner's alleged omissions in the present case, and we decline to hold petitioner to a standard beyond the general proscription against conduct creating the appearance of impropriety under canon 2.

**(15b)** We conclude, with respect to matters as to which petitioner's role was solely to preside over settlement conferences or settlement-related matters, that petitioner's failure to disclose on the record his relationship with the three firms did not constitute improper action under the Code of Civil Procedure or the Code of Judicial Conduct. Under different circumstances, a judge's relationship with an attorney or law firm might be such that his or her role in presiding over a settlement conference *might* create an appearance of impropriety. We defer to the findings of the special masters in this regard, however, concluding that the record lacks clear and convincing evidence of circumstances giving rise to an appearance of impropriety on petitioner's part in settlement-related proceedings.

With respect to cases in which petitioner acted in a capacity other than as settlement judge, the circumstance of his disqualification necessitated that he

disclose on the record the grounds for his disqualification and obtain a written waiver of disqualification in accordance with Code of Civil Procedure section 170.3 before proceeding. Because the record reflects that in certain cases, involving the Frega, Ault, and Duckor law firms, petitioner's role exceeded the scope of presiding over settlement-related matters or of performing other limited permissible functions, we conclude that his failure to disclose on the record in general terms the nature of his relationship with the three firms (or to obtain a written waiver of disqualification) violated the requirements of section 170.3 and therefore constituted improper action.

*Count 3*: Count 3 alleged that petitioner provided legal advice to Frega and members of Frega's law firm on cases being handled by that firm, in a manner that failed to promote public confidence in the integrity and impartiality of the judiciary, in the following alleged instances:

(i) In late 1988 or January 1989, petitioner assisted George Manning, an associate of Frega's firm, in the preparation of a settlement conference brief in an action that was pending in the San Diego County Superior Court.

(ii) In 1989, petitioner again assisted Manning in the preparation of a settlement conference brief in an action that was pending in the San Diego Superior Court.

(iii) In 1989, petitioner met with Frega to discuss a case that was pending in the San Diego County Superior Court in which Frega's firm represented the plaintiff. Petitioner provided advice with regard to a contemplated "*Tarasoff* motion" (*Tarasoff* v. *Regents of University of California* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166], involving the special relationship between doctor and patient giving rise to a duty to warn foreseeable victims) prepared by the Frega firm, which subsequently was filed.

(iv) Between February 1988 and April 1988 (while the Security Pacific National Bank v. Williams litigation was pending on appeal), petitioner communicated with Frega regarding a case entitled Security Pacific National Bank v. Gustafson that was pending in the Los Angeles County Superior Court, involving the same plaintiff and cross-defendant—and similar issues relating to lender liability—as in the Security Pacific National Bank v. Williams case, which then was pending on appeal. At Frega's request, petitioner reviewed and provided his opinion regarding a special verdict rendered in that case.

The record reflects, with respect to subcounts (i) and (ii), that petitioner and Manning were close friends. Petitioner had assisted Manning in obtaining employment with the Frega firm, and petitioner was concerned about

Manning's diminishing confidence and difficulties in his relationship with Frega. Motivated by this concern, petitioner assisted Manning in the preparation of settlement conference briefs in two cases, in one case drafting an "issue analysis" that Manning incorporated almost verbatim into a brief.

With respect to subcount (iii), the record reflects the Frega firm represented the plaintiff in a medical malpractice case that had been assigned to Manning and another associate in the firm, Paula Tupper. In 1989, petitioner discussed the case with Manning, suggesting the filing of a "*Tarasoff in limine* motion." Manning related his discussion with petitioner to Tupper, who already had considered filing such a motion, independently of petitioner's suggestion. Petitioner reviewed the written motion drafted by Tupper, commenting that she had "done a good job."

With respect to subcount (iv), the record reflects petitioner communicated with Frega regarding the Gustafson case and asked Frega to send him a copy of the special verdict rendered in that case. Petitioner later volunteered to Frega his view that it appeared Frega had lost the case.

The special masters concluded the evidence failed to sustain the charges of misconduct alleged in count 3. The masters found that in assisting Manning, petitioner simply was acting out of a compassionate concern for a friend, attempting to bolster Manning's confidence in himself as a lawyer and his ability to try cases effectively. With respect to petitioner's communications with Frega, the masters concluded that, in the absence of clear and convincing evidence that petitioner had discussed any of the legal issues presented in the cases, neither wilful misconduct nor prejudicial conduct was shown.

**(17)** The Commission reached a significantly different assessment of petitioner's conduct, concluding that petitioner engaged in misconduct as charged in count 3, having improperly assisted and communicated with Frega and members of his firm in pending cases, contrary to canon 2A. The Commission found that petitioner's active participation in the preparation of settlement conference briefs in cases that were to come before another member of the court upon which petitioner served, demonstrated a disregard for the integrity of the bench and constituted prejudicial conduct. The Commission further concluded that petitioner's review and approval of a *Tarasoff* motion in another case that was to come before one of petitioner's judicial colleagues amounted to egregious misconduct, demonstrating a disregard for the integrity of the bench, and constituted prejudicial conduct. The Commission finally concluded that petitioner's conduct in soliciting a

copy of the special verdict in the Security Pacific National Bank v. Gustafson case and volunteering his opinion that Frega appeared to have lost the case, at a time when the case of Security Pacific National Bank v. Williams—which involved one of the same attorneys, the same plaintiff and cross-defendant, and issues similar to those in the Gustafson case—remained pending on appeal, amounted to prejudicial conduct.

We conclude that clear and convincing evidence establishes four instances of prejudicial conduct, as charged in count 3. Motive aside, in assisting Manning in the preparation of settlement conference briefs, and discussing with Frega or members of his firm the *Tarasoff* motion, petitioner violated the canons of judicial ethics that proscribe conduct giving rise to the appearance of a party's special influence over a judge, or the judge's bias against or prejudice in favor of an attorney. From the perspective of an objective observer, and particularly from the viewpoint of opposing counsel in these cases, petitioner's conduct could be construed as relating information known or peculiarly available to members of the San Diego County Superior Court bench that was not known or made available to other attorneys. Petitioner's act of soliciting the special verdict in the Security Pacific National Bank v. Gustafson case, and providing his view as to its significance, cast doubt upon his independence and impartiality with respect to the Security Pacific National Bank v. Williams litigation, which remained pending on appeal, particularly from the perspective of opposing counsel in that case.

*Count 4*: Count 4 alleges that, in response to inquiries by the Commission regarding complaints of misconduct, petitioner made material omissions and misrepresentations and demonstrated a lack of candor, as follows:

(i) In the course of its investigation, the Commission inquired of petitioner by letter dated October 18, 1991, regarding the gift (which the judge had declared) of the $150 sweater received from Williams (discussed, *ante*), asking him to comment and supply information "regarding any appearances before [petitioner] by any of the donors [of gifts], or any attorney or entity associated with a donor, since January 1, 1985." Petitioner was directed to "[p]lease describe any appearance by a donor or associate, and indicate whether you have taken any legal action affecting a donor or associate, or whether you have recused yourself from a case involving a donor or associate." Petitioner responded by letter that the sweater "was a Christmas gift from Williams who is a personal friend and has no business before me." Petitioner failed to disclose that Williams had been a litigant who had appeared before petitioner in 1985 and 1986, and in favor of whom petitioner had awarded a judgment of approximately $5 million following a court trial.

(ii) The Commission inquired by letter dated October 18, 1991, regarding petitioner's declaration of a gift of legal services by the law firm of Ault, Midlam & Deuprey, requesting information regarding any appearances by that law firm in cases before petitioner. Petitioner responded by letter dated November 1, 1991: "Because of our friendship, Tom Ault has never appeared in front of me," failing to disclose that members of the law firm had appeared before petitioner on several occasions since January 1, 1985.

(iii) The Commission inquired by letter dated October 18, 1991, regarding declared gifts from Frega, requesting information as to any appearances by Frega or other members of Frega's law firm in cases before petitioner. Petitioner responded that "Pat Frega does not appear in front of me and I will not hear one of his cases." He also stated, "I will not hear a Frega case." In a follow-up letter, the Commission inquired whether Frega had appeared before petitioner prior to giving him the gifts. Petitioner falsely responded that "Mr. Frega last appeared before me in 1984." Petitioner failed to identify numerous cases involving Frega or his firm that had come before petitioner since 1984, including the Security Pacific National Bank v. Williams litigation.

(iv) The Commission inquired by letter dated October 18, 1991, regarding petitioner's declared stay at Duckor's desert condominium. Petitioner responded: "I recuse myself from all Duckor matters although the court uses him as a special master in cases involving construction defects." He failed to disclose that the Duckor & Spradley firm had appeared before him in three cases.

Both the special masters and the Commission determined that petitioner was acting in a judicial capacity in responding to the inquiries of the Commission. The special masters concluded that in his responses petitioner, although demonstrating a lack of candor, had not acted in bad faith, and that in each instance petitioner had committed "negligent" prejudicial conduct, but not wilful misconduct.

**(18)** The Commission, however, reached a different assessment of petitioner's dereliction, concluding that on each occasion petitioner demonstrated bad faith because in his responses he made material omissions that he knew or should have known were "beyond his authority," and for a purpose other than the faithful discharge of his judicial duties. The Commission concluded that in each instance petitioner engaged in wilful misconduct.

With respect to petitioner's response set forth in subcount (i), the Commission specifically found that petitioner's explanation that he believed the

Security Pacific National Bank v. Williams trial to have taken place in 1984 was inherently incredible. The case was a "cause celebre" that received widespread press coverage and involved the largest nonjury award that petitioner had entered up to that time. Petitioner's "Trial Judge of the Year" award from the San Diego Trial Lawyers Association in 1986 was the result of petitioner's role in that litigation. The Commission concluded that petitioner's omission in this regard was material.

With respect to petitioner's response set forth in subcount (ii), the Commission concluded that, at the time he submitted his written reply, petitioner must have known that the import of the Commission's inquiry called for him to disclose that the Ault firm had appeared before him in several cases. By his reply, petitioner demonstrated a lack of candor.

With respect to petitioner's response set forth in subcount (iii), the Commission concluded that it was unreasonable for petitioner to assume he was obligated to disclose only those instances in which Frega personally appeared before him, and not instances in which a member of Frega's firm regularly appeared before him. At the time petitioner submitted his written reply, he knew that the import of the Commission's inquiry required that he disclose all responsive material information and at the least that the Frega firm had appeared before him in several matters, including the Security Pacific National Bank v. Williams case.

Similarly, with respect to petitioner's response set forth in subcount (iv), the Commission found that at the time he submitted his written reply, petitioner must have been aware that the import of the Commission's inquiry called for him to disclose that the Duckor & Spradley firm had appeared before him in several cases.

We agree with the conclusion of the Commission that in each instance, in responding to the Commission's inquiries, petitioner was acting in a judicial capacity. The Commission's inquiry was directed to petitioner because he is a judge, and his reply was required as one of his judicial functions. We also agree that in each instance petitioner's conduct demonstrated bad faith, as defined, *ante*. Petitioner either knew or should have known that his responses were either inaccurate or incomplete. Although it may not be expected that petitioner would be able to identify the name of every case involving the three law firms that had come before him since 1985, petitioner reasonably should have been expected to disclose that the firms had appeared before him since January 1, 1985, and to identify at least some of their cases in some fashion. Petitioner's act of providing false and

misleading information to the Commission—the governmental entity charged with the protection of the public from judicial corruption—obviously was made for a purpose other than the faithful discharge of his duties. We therefore uphold the charges of wilful misconduct in count 4 that were sustained by the Commission.

V

Petitioner presented substantial evidence in mitigation of the charges, relating to his competence, diligence, and dedication in the performance of his judicial functions over the course of his judicial career. When appointed to the municipal court, petitioner devoted significant time and effort to the "El Cajon Experiment," a project authorizing municipal court judges to perform certain functions of a superior court in the El Cajon Municipal Court facility. When appointed to the superior court in 1979, for several years petitioner was assigned to the juvenile department, where he participated in establishing programs providing juveniles with an alternative to placement in the California Youth Authority, and activities diverting them from involvement in delinquency. In 1987, petitioner began to devote his efforts to the management of construction-defect cases, which comprised a significant portion of the matters pending in the San Diego County Superior Court. This type of litigation often was complex, involving numerous parties and attorneys, extensive discovery, and other pretrial procedures. Petitioner developed a standard operating procedure for the management of these cases, and by 1988 was considered by counsel to be the "judge of choice" for assignment of such matters.

Several judges and numerous attorneys testified to their perception of petitioner's outstanding legal and administrative skills, noting his significant contributions toward streamlining the court system and implementing a "fast-track" system.

Finally, petitioner testified before the special masters that, although at the time of the various instances of misconduct it was his perception that he had not sought out, and had not received, any special favors or benefits by reason of his judicial office, he ultimately has recognized that his conduct might have created an appearance of impropriety, damaging the prestige of his judicial office, further recognizing that therefore he had acted improperly. Petitioner's testimony further emphasized that, in hindsight, his personal relationship with Frega and his social relationship with Williams were inappropriate and inconsistent with the standards of conduct called for by his judicial office, and that he "had learned his lesson."

**(19)** The foregoing evidence of petitioner's qualifications for and contribution to the judicial system, during the course of a lengthy judicial

career, does not mitigate or excuse petitioner's wilful misconduct or prejudicial conduct. (*Spruance* v. *Commission on Judicial Performance*, *supra*, 13 Cal.3d 778, 800.) We may, however, and do take these factors into account in considering the totality of the circumstances that are pertinent to our determination of the appropriate discipline. (See *McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 539-540 [116 Cal.Rptr. 260, 526 P.2d 268].)

VI

The special masters found that, although petitioner had failed to appreciate the possible perception by the public of his business and social dealings, there was no evidence that petitioner's rulings or other actions executed in the exercise of his judicial duties were based upon any criteria other than the merits of the matters before him. In the course of the testimony of 57 witnesses,[14] in addition to the other evidence presented, there was no suggestion that petitioner had demonstrated any improper bias or prejudice in favor of or against any attorney or litigant. Without rendering a specific disciplinary recommendation, the masters noted their view of petitioner "as an unusually competent and innovative judge who used poor judgment in certain instances, rather than as a scoundrel who has disgraced the Bench."

In rendering its disciplinary recommendation of removal, the Commission noted specifically that it had taken into account petitioner's generally successful tenure as a judge, but emphasized that the charged misconduct began in 1987 and continued for a significant portion of petitioner's judicial career.

VII

In making our independent determination of the appropriate disciplinary sanction, we consider the purpose of a Commission disciplinary proceeding—which is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. (*Adams I*, *supra*, 8 Cal.4th at p. 637; *Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at pp. 864-865.)

In past judicial disciplinary proceedings that have resulted in a judge's removal from office, the misconduct that we have determined justified this most severe of disciplinary sanctions generally has involved a pattern of arbitrary, irrational, and inappropriate conduct of the judge while acting on

[14]Statements of 23 additional witnesses were presented in the form of written declarations.

the bench in dealings with litigants, attorneys, witnesses, and other persons, or while otherwise performing his or her judicial functions, and an abuse of his or her judicial powers and authority. In *Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d 826, for example, the judge had engaged in persistent rude, abusive, hostile, and irrational behavior in dealings with litigants, attorneys, witnesses, and court personnel, often humiliating or demeaning them in the courtroom setting, and regularly abrogated the rights of criminal defendants, accepting guilty pleas from and sentencing defendants in the absence of defense counsel, and arbitrarily adjudging criminal defendants in contempt. In *McCullough* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d 186, the judge previously had been censured publicly for failing to decide a case that had been pending before him for six years, and the judge thereafter engaged in misconduct by directing a jury to find a defendant guilty in a criminal proceeding, and conducting the trial of two other defendants in the absence of their attorneys, among other derelictions on the bench. In *Spruance* v. *Commission on Judicial Qualifications*, *supra*, 13 Cal.3d 778, the judge was found to have conducted his court in a bizarre and unjudicial manner, engaging in a pervasive course of acting vindictively toward attorneys who sought to have the judge disqualified or who appealed from his decisions, and to have permitted his business relationships and social friendships improperly to influence his judicial rulings (e.g., according preferential treatment to his longtime friends and political supporters). (See also *Cannon* v. *Commission on Judicial Performance* (1975) 14 Cal.3d 678 [122 Cal.Rptr. 778, 537 P.2d 898] [the judge committed 21 acts of wilful misconduct and 8 other acts of prejudicial conduct, including an egregious abuse of the contempt power, often arbitrarily ordering the incarceration of public defenders and thereby depriving their clients of effective assistance of counsel].)

**(20)** To summarize our conclusions regarding the misconduct committed by petitioner:

With respect to count 1, we conclude clear and convincing evidence supports the charges that petitioner engaged in seven separate instances of prejudicial conduct in his transactions with Williams (four of which involved Frega), in petitioner's attendance at the celebratory dinner, and in his acceptance of the sweater. As we have indicated, however, the record does not support the allegations that petitioner received any special financial benefit in the Mercedes purchase transaction, or that he initiated any of these transactions with the expectation of receiving favorable treatment. We also conclude the record fails to establish by clear and convincing evidence that petitioner solicited or had any knowledge of Frega's financial contributions

in these transactions. His reliance upon Frega, however, manifests negligent if not deliberate ignorance of the likelihood that Frega would confer some financial favor or other special benefit upon him. In all instances, petitioner's conduct could be construed, from the viewpoint of an objective observer, as improperly using his judicial office to advance his personal interests, and permitting the appearance of special influence over the judge.

With respect to count 2, clear and convincing evidence supports two of the charges that petitioner engaged in prejudicial conduct in accepting gifts or financial benefits from attorneys or their law firms whose interests had come and were likely to come before petitioner, and also establishes that petitioner engaged in three separate instances of improper action. Once he was disqualified in any matter involving these attorneys or law firms, to the extent petitioner acted in a capacity other than settlement conference judge his failure to disclose on the record the grounds for disqualification and obtain a written waiver constituted improper action.

With respect to count 3, clear and convincing evidence supports the charges that petitioner engaged in four separate instances of prejudicial conduct in assisting or otherwise communicating with members of Frega's firm regarding matters pending before the San Diego County Superior Court, as well as a matter before another court involving parties, attorneys, and issues related to those involved in the Security Pacific National Bank v. Williams litigation.

Finally, with respect to count 4, clear and convincing evidence supports the charges that petitioner engaged in four separate instances of wilful misconduct in making material misstatements or omissions to the Commission. These sustained charges, in particular, warrant petitioner's removal from office. There are few judicial actions in our view that provide greater justification for removal from office than the action of a judge in deliberately providing false information to the Commission in the course of its investigation into charges of wilful misconduct on the part of the judge.

The record accordingly establishes that petitioner engaged in successive extrajudicial transactions that extended over a significant period of time, creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary—a consequence petitioner either deliberately ignored or was unable to appreciate. Under these circumstances, we uphold the disciplinary recommendation of the Commission that petitioner be removed from office.

## VIII

We order that Judge G. Dennis Adams, judge of the San Diego County Superior Court, be removed from office. He shall, however, if otherwise

qualified, be permitted to resume the practice of law (art. VI, § 18, subd. (d)) on condition that he pass the Professional Responsibility Examination. Our order is effective upon finality of this decision in this court.

**MOSK, J.**—I dissent.

G. Dennis Adams has been a good judge for his 20 years on the bench. Of that there is no doubt. The special masters—three experienced jurists—so found. The underlying evidence was compelling.

"[Judge Adams] attended high school in San Diego and was graduated from the University of San Diego Law School in 1965. He was number two in his class academically, received the highest grade in his classes numerous times, worked on the Law Review, and was designated the outstanding graduate of 1965. In 1983 he received the alumnus of the year award from his law school. After law school he received a Ford Foundation Fellowship Scholarship Stipend in Political Science and went to work for [Senator] Mark Hatfield of Oregon as a speech writer. He then served in the military, worked for a future Attorney General of Oregon and then returned to San Diego to practice law. He practiced as a Federal Public Defender for six months and then joined his father in a law practice for approximately seven years. [Citation.]

"[Judge Adams] was appointed to the San Diego Municipal Court in 1975. While on that court he became heavily involved in the design of courts, spending many hours developing the East County Regional Center and lobbying that project through the Board of Supervisors. Beginning in 1975, [he] also participated in the so-called El Cajon Experiment, which project authorized Municipal Court Judges in El Cajon to perform certain superior court functions, both civil and criminal, in the El Cajon Municipal Court facility. This avoided the apparent necessity of establishing a branch superior court in El Cajon. [He] redrafted a bill to establish this experiment and lobbied it through the California Legislature. This project increased court efficiency in both criminal and civil matters and is still being utilized.

"[Judge Adams] was appointed to the superior court in 1979 and elected and re-elected for successive terms in 1980, 1986, and 1992. After about one year in the domestic relations department, [he] was assigned to juvenile court for several years. There, he became actively involved with legislation and programs to keep children out of the California Youth Authority. One, called 'Children In Placement[,'] involved several hundred volunteers, each assigned to monitor two or three cases for the juvenile court. This program is still operating.

"In a further attempt to help children in the juvenile justice system, [Judge Adams] initiated cooperation between the court and Vision Quest, an organization which works with children, providing them with alternative activities to delinquency involvement. The San Diego Juvenile Court is still using this means of delinquency prevention and rehabilitation.

"[Judge Adams] served in various trial departments until 1987, when he became heavily involved in cases alleging construction defects in residential housing tracts, which comprised a very important part of the case load in San Diego county in ensuing years. These cases involved numerous parties and attorneys, called for extensive discovery and other pretrial procedures, and placed a premium on skillful and diligent case management and settlement efforts. By 1988, he was generally considered the judge of choice by counsel on all sides of construction defect cases, and all such cases were assigned to him for management purposes. . . .

"During his time on the bench, [Judge Adams] has also taught in several law schools. He taught trial technique for five years at the University of San Diego Law School, later taught juvenile law at California Western University, and then constitutional law for five years at National University. He has also taught at a number of Continuing Education of the Bar and Rutter Group programs.

". . . . . .

"While we are concerned about [Judge Adams's] behavior in certain respects—especially as to the charge in Count Four regarding his responses to the Commission [on Judicial Performance's] staff, and as to Count One his failure to appreciate, at the time, the possible public interpretation of his engaging in business dealings with an auto dealer [James Williams] and an attorney [Patrick Frega] in whose favor he had previously rendered a huge judgment, we have seen no evidence that his judicial work was based on anything other than the merits of the matters he was handling. We see him as an unusually competent and innovative judge who used poor judgment in certain instances, rather than as a scoundrel who has disgraced the Bench. This proceeding does not involve an evaluation of his total performance as a judge, but to the extent that the evidence from 57 witnesses has touched on that question, it suggests that he might come out well on such a test."

Just as there is no doubt that Judge Adams has been a good judge for his 20 years on the bench, there is also no doubt that he has subjected himself to discipline by certain of his acts and omissions off the bench. Indeed, he concedes the point.

But what discipline is appropriate for Judge Adams? Removal from office? I think not.

In determining appropriate discipline under former subdivision (c) of section 18 of article VI of the California Constitution, which governs the proceedings here, we seek as our "ultimate objective . . . to protect the judicial system and the public which it serves from judges who are unfit to hold office." (*McComb* v. *Commission on Judicial Performance* (1977) 19 Cal.3d Spec. Trib. Supp. 1, 9; accord, *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 654 [175 Cal.Rptr. 420, 630 P.2d 954]; *Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1320 [240 Cal.Rptr. 859, 743 P.2d 919]; see *Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 864-865 [264 Cal.Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235].)

The discipline that is appropriate for any given judge is the sanction that is necessary to achieve the goal of protecting the public and the judicial system itself. (See *Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 865.)

As to Judge Adams, removal is not necessary for that purpose. From all that appears, public censure would be adequate: he has shown himself to be willing and able to reform.

Let us focus on what all apparently agree to be the most serious charges, those contained in count 1 and count 4.

It cannot be denied that Judge Adams deserves discipline for his acts and omissions in count 1. The incidents involving automobile dealer James Williams and Attorney Patrick Frega were several. But, as the majority show, all of them occurred within a period of time that was relatively brief. And, as the majority effectively concede, none of them was tainted by venality.

Neither can it be denied that Judge Adams deserves discipline for his acts and omissions in count 4. His responses to inquiries by the Commission on Judicial Performance were in fact inaccurate and incomplete.

Contrary to the majority's conclusion, however, they did *not* constitute wilful misconduct.

Wilful misconduct has been defined simply as "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith . . . ." (*Geiler* v.

*Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284 [110 Cal.Rptr. 201, 515 P.2d 1].)

The majority assert that Judge Adams was "acting in his judicial capacity" when he made his responses. (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 284.) He was not. A physician is not providing medical services when he participates in an investigation into his conduct by the Medical Board's Division of Medical Quality. Similarly, a judge is not performing judicial functions when he participates in an investigation into his conduct by the commission.

The majority also assert that Judge Adams made his responses "in bad faith." (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 284.) He did not. The question, of course, goes to his state of mind. The special masters, who saw him testify and heard his testimony, found in his favor. The majority have no basis to do otherwise. They ought to give such a finding "special weight," reflecting as it does the special masters' evaluation of his credibility. (*Fitch* v. *Commission on Judicial Performance* (1995) 9 Cal.4th 552, 556 [37 Cal.Rptr.2d 581, 887 P.2d 937].) Instead, they give it no weight at all. Furthermore, they totally ignore the following undisputed fact, which the special masters evidently considered of critical import in this regard. At the time pertinent here, Judge Adams's fiancée, now his wife, was suffering from life-threatening breast cancer, for which she was subjected to various surgical procedures, and she then faced the prospect of life-threatening radiation treatment as therapy against the malignancy. Judge Adams had given himself over to caring for her, and was altogether preoccupied with her condition. Perhaps if these circumstances had not obtained, the majority's claim that he "either knew or should have known that his responses were either inaccurate or incomplete" might be sound. (Maj. opn., *ante*, at p. 910.) But since they did, their assertion is undermined by common human experience.

As to Judge Adams, as I stated above, removal is not necessary to protect the public and the judicial system itself. Certainly, such a sanction would be sharply out of line with our prior decisions. The majority recognize as much. "*In past judicial disciplinary proceedings that have resulted in a judge's removal from office*, the misconduct that we have determined justified this most severe of disciplinary sanctions generally has involved a pattern of arbitrary, irrational, and inappropriate conduct of the judge while acting on the bench in dealings with litigants, attorneys, witnesses, and other persons, or while otherwise performing his or her judicial functions, and an abuse of his or her judicial powers and authority." (Maj. opn., *ante*, at pp. 912-913,

italics added.) Judge Adams, obviously, has not engaged in a "pattern of arbitrary, irrational, and inappropriate conduct . . . while . . . performing his . . . judicial functions," nor has he "abuse[d] . . . his . . . judicial powers and authority." Quite the opposite. He has been a good judge for his 20 years on the bench.

All that the majority can say in support of removal is that, in their view, Judge Adams's "extrajudicial transactions" have "creat[ed] an appearance of serious impropriety" and have "thereby tend[ed] to diminish the public esteem of the judiciary . . . ." (Maj. opn., *ante*, at p. 914.) In so many words, they announce that he must be removed because of certain of his acts and omissions off the bench, even though he has in fact properly performed his judicial functions during his long tenure and, as the record shows, has actually increased his community's confidence in its judges. No reasonable person could agree. I surely cannot.

Because the appropriate discipline for Judge Adams is not removal but public censure, I must, and do, dissent.

Petitioner's application for a rehearing was denied September 14, 1995. Mosk , J., was of the opinion that the application should be granted.

[No. S043789. Oct. 5, 1995.]

GLENDA KRAFT DOAN, a Judge of the Municipal Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

## SUMMARY

Following a report by special masters appointed by the Supreme Court, the Commission on Judicial Performance recommended, pursuant to Cal. Const., art. VI, § 18, former subd. (c), that the court remove a municipal court judge from office for willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and persistent failure or inability to perform her duties.

The Supreme Court concluded that the judge should be removed from office, and denied her request for permission to resume the practice of law, since her conduct was found to have involved moral turpitude, dishonesty, and corruption. The court held that the commission properly concluded, on the basis of clear and convincing evidence, that the judge engaged in willful misconduct in a matter relating to a criminal defendant to whom she owed money and in a matter relating to a criminal defendant who was a nephew of a close personal friend. Further, the commission properly concluded, on the basis of clear and convincing evidence, that the judge engaged in conduct prejudicial to the administration of justice in a matter relating to another criminal defendant who was also a nephew of her close personal friend and in a matter relating to the same friend when she was charged with criminal conduct. Similarly, the commission properly concluded that the judge engaged in conduct prejudicial to the administration of justice by failing to report loans obtained from three friends in her annual statements of economic interests as required by Gov. Code, § 87200 et seq., by accepting a loan from a court clerk who was under her practical supervision, by accepting a loan from a lieutenant in the police department who served as the department's court liaison officer, by failing to list all creditors in a bankruptcy petition filed jointly with her husband, and by offering to provide legal services for her friend's husband, who had been convicted of, and imprisoned for, federal felony narcotics trafficking offenses, after the judge had borrowed substantial sums of money from the friend. With respect to conduct prejudicial to the administration of justice, the court held that,

although it is sufficient that "actual observers," as opposed to "objective observers," view the conduct in question to be prejudicial, it is not necessary. Moreover, the court held that the commission properly concluded, on the basis of clear and convincing evidence, that the judge persistently failed to perform her duties in a diligent fashion by her habitual tardiness in commencing court sessions. The court also held that the judge was proven by clear and convincing evidence to have engaged in willful misconduct by requesting two friends, during the course of the commission's preliminary investigation of her, not to give their cooperation to its agents, and that the specific request that the friends not discuss loans she had obtained from them was not merely conduct prejudicial to the administration of justice. Finally, the court held that removal of the judge from office was warranted, since it was the only sanction that would guarantee protection of the public and the judicial system. (Opinion by The Court.)

## HEADNOTES

Classified to California Digest of Official Reports

(1a-1c) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct.**—Willful misconduct such as to warrant discipline of a judge pursuant to Cal. Const., art. VI, § 18, former subd. (c), means unjudicial conduct which a judge acting in his or her judicial capacity commits in bad faith. "Bad faith" on the part of a judge entails either an intent, motivated by actual malice, to commit an act that he or she knows or should know is beyond his or her lawful power or an intent to commit an act, even within his or her lawful power, for a corrupt purpose, that is, for any purpose other than the faithful discharge of judicial duties. A view that the "bad faith" required for willful misconduct does not encompass an intent by a judge to commit an act for a corrupt purpose if such act is within his or her lawful power would yield untenable results.

[See 2 **Witkin,** Cal. Procedure (3d ed. 1985) Courts, § 23 et seq.]

(2a-2c) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Conduct Prejudicial to Administration of Justice.**—Conduct prejudicial to the administration of justice such as to warrant discipline of a judge pursuant to Cal. Const., art. VI, § 18, former subd. (c), means either conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the

judicial office or willful misconduct out of office, that is, unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. Although it is sufficient that "actual observers," as opposed to "objective observers," view the first type of conduct to be prejudicial to the administration of justice, it is not necessary. (Disapproving language in *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 622-623 [175 Cal.Rptr. 420, 630 P.2d 954]; *McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 534 [116 Cal.Rptr. 260, 526 P.2d 268]; *Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314 [267 Cal.Rptr. 293, 787 P.2d 591]; *Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 46 [207 Cal.Rptr. 171, 688 P.2d 551]; and *Roberts* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 739, 748 [190 Cal.Rptr. 910, 661 P.2d 1064] to the extent it suggests that it is necessary that the "actual observers" view the conduct in question to be prejudicial to the administration of justice.)

(3) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Persistent Nonperformance of Duties.**—Persistent nonperformance of duties such as to warrant discipline of a judge pursuant to Cal. Const., art. VI, § 18, former subd. (c), entails a pattern of legal or administrative omissions or inadequacies in the performance of a judge's duties. It does not entail any intentional disregard of such duties.

(4) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Misconduct—Judges' Standard of Conduct—As Based on Code of Judicial Conduct.**—The question of misconduct such as to warrant discipline of a judge pursuant to Cal. Const., art. VI, § 18, former subd. (c), implicates the standard of conduct to which judges are held. That standard is manifested, in part, in the California Code of Judicial Conduct and its canons. Adopted by California judges themselves, the code does not have the force of law or regulation. Nevertheless, its canons reflect a judicial consensus regarding appropriate behavior, and are helpful in giving content to Cal. Const., art. VI, § 18, former subd. (c).

(5a, 5b) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Function of Supreme Court.**—In determining the ultimate issue whether to remove a judge from office for misconduct under former Cal. Const., art. VI, § 18, former subd. (c), the Supreme Court proceeds independently. It is true that the Commission on Judicial

Performance has the power to make a recommendation of removal (Cal. Const., art. VI, § 18, former subd. (c)), and that its making of such a recommendation is a prerequisite to a subsequent order to that effect on the part of the court. However, it is the court that removes, not the commission, although the court does give special weight to the commission's recommendation. In determining the issues that underlie the removal of a judge from office under Cal. Const., art. VI, § 18, former subd. (c), the court also proceeds independently. It may remove a judge only for certain specified kinds of misconduct, and may find such misconduct only if it is proved by clear and convincing evidence, with the burden resting on the examiners for the commission. In this regard, the court itself makes findings of fact and conclusions of law, giving weight to the findings and conclusions of both the special masters and the commission. When they vary, the court favors the conclusions of the commission over those of the special masters due to the commission's expertise in matters of judicial conduct, whereas it favors the findings of the special masters over those of the commission due to the special masters' ability to evaluate the credibility of witnesses. Finally, in deciding whether to impose discipline under Cal. Const., art. VI, § 18, former subd. (c), and, if so, what form such discipline should take, the court seeks as its ultimate objective to protect the judicial system and the public which it serves from judges who are unfit to hold office, determining what sanction, if any, is necessary to achieve this goal.

(6a-6c) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Personal Involvement in Criminal Case as Advocate for Defendant—Failure to Disqualify Self From Conduct of Bail Review Hearing or to Disclose Relationship With Defendant.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a judge engaged in willful misconduct within the meaning of Cal. Const., art. VI, § 18, former subd. (c), in a matter relating to a criminal defendant to whom she owed money. The judge's cited acts and omissions included: ex parte contacts with the defendant, his wife, and two police officers involved in the defendant's case; personal involvement in the case as an advocate for the defendant in violation of Cal. Code Jud. Conduct, former canon 2B (judges not to allow family, social, or other relationships to influence judicial conduct or judgment); initiation of an "investigation" as to the propriety of an own-recognizance release for the defendant by contacting one of the police officers; questioning both officers as to whether they believed the defendant was guilty; failure to

disqualify herself from the defendant's bail review hearing or at least to disclose her pertinent relationships and activities, in spite of her implicit recognition that such action was necessary; and manipulation of the hearing through intentional misstatements and omissions of material fact in order to achieve an own-recognizance release for the defendant. This was more than conduct prejudicial to the administration of justice, since the "bad faith" required for willful misconduct encompasses an intent by a judge to commit an act for a corrupt purpose if such act is within his or her lawful power.

[Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, note, 82 **A.L.R.4th** 567.]

(7) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Failure to Disqualify Self From Conduct of Pretrial Conference in Criminal Matter or to Disclose Close Personal Relationship With Defendant's Aunt.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a judge engaged in willful misconduct within the meaning of Cal. Const., art. VI, § 18, former subd. (c), in a matter relating to a criminal defendant whose aunt was a close personal friend. The judge had borrowed substantial sums of money from the friend and, in turn, had done legal work in an effort to free the friend's husband from prison. The judge's cited acts and omissions included: failure to disqualify herself from conducting the defendant's pretrial conference or to disclose her relationship to the defendant's aunt or several discussions they had about the case; and use of the authority of her judicial office to attempt to influence the outcome of the pretrial conference by exerting pressure on the deputy district attorney to reduce the charges for the corrupt purpose of further ingratiating herself with her friend in order to advance their relationship. Although a second judge who heard the defendant's case when the first judge eventually disqualified herself testified that the charges originally brought against the defendant were not appropriate, what was dispositive was not the correctness of the first judge's legal opinion but the impropriety of her surrounding behavior.

(8a-8c) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Conduct Prejudicial to Administration of Justice—Failure to Disqualify Self From Conduct of Pretrial Conference in Criminal Matter or to Disclose Close Personal Relationship With Defendant's Aunt.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a

judge engaged in conduct prejudicial to the administration of justice within the meaning of Cal. Const., art. VI, § 18, former subd. (c), in a matter relating to a criminal defendant whose aunt was a close personal friend. The judge had borrowed substantial sums of money from the friend and, in turn, had done legal work in an effort to free the friend's husband from prison. The judge's cited acts and omissions included the failure to disqualify herself from conducting the defendant's pretrial conference or at least to disclose her relationship to the defendant's aunt or the discussions they had about the case—an omission that gave rise to the appearance of impropriety. Because the judge's community was small an "objective observer" might not have viewed as prejudicial to the administration of justice the fact that she had a relationship with the defendant's aunt or even engaged in discussions with her about the case. But he or she would have seen matters differently as to the judge's failure to at least disclose the relationship and the discussions. Also, even if "actual observers" among the voters who reelected the judge after the conduct in question did not view her acts and omissions as prejudicial to the administration of justice, they apparently had only limited knowledge of her improprieties. Nor was it necessary to a finding that her conduct was prejudicial that actual observers viewed it as such.

(9) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Conduct Prejudicial to Administration of Justice—Giving Assurances to Friend as to Outcome of Criminal Prosecution Against Her.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a judge engaged in conduct prejudicial to the administration of justice within the meaning of Cal. Const., art. VI, § 18, former subd. (c), in a matter relating to a close personal friend who had been charged with criminal conduct. At all times pertinent to the conduct, the friend was providing small loans and meals to the judge and her family. The judge's cited acts and omissions included: the giving of assurances to the friend as to the outcome of the prosecution against her, with an implication of inside information and influence; and an apparent intent to mislead the friend in order to continue to obtain money and food. At the evidentiary hearing before special masters, the judge's testimony was favorable to her position, but that of the friend, her sister-in-law, and another mutual friend was not, and, as against the commission and the special masters, there was no reason to generally believe the judge and disbelieve the others. Further, it was not necessary to a finding that her conduct was prejudicial to the administration of justice that "actual observers"

viewed it as such. Also, the judge's assertion that any assurances she may have given to the friend as to the outcome of the prosecution against her proved ineffective in view of the fact that she eventually paid no heed to them but chose to retain counsel was not relevant.

(10) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Conduct Prejudicial to Administration of Justice—Violation of Statutory Obligation to Report Loans in Annual Statement of Economic Interests.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a judge engaged in conduct prejudicial to the administration of justice within the meaning of Cal. Const., art. VI, § 18, former subd. (c), by failing to report loans obtained from three friends in her annual statements of economic interests as required by Gov. Code, § 87200 et seq. The judge's cited acts and omissions included the violation of an obligation imposed on her as a public official by statute, which (it appeared) had to be viewed as flagrant and deliberate in light of the fact that she had been publicly reproved for similar acts and omissions in the past. The judge testified that she had failed to disclose one of the loans because she had forgotten to do so, but the failure to report the other loans was intentional. Although one of the loans was in the form of a line of credit, the statutory exception allowing nondisclosure of loans in the form of retail installment or credit card transactions under $10,000 on an account maintained in the creditor's regular course of business was inapplicable, since the judge's debt was not to the holder of such an account, but to her friend. Also inapplicable was the exception for loans from certain close family members, since, although the judge testified at the evidentiary hearing before special masters that her friend was "like a sister," she was not a member of her family. Further, it was not necessary to a finding that the judge's conduct was prejudicial to the administration of justice that "actual observers" viewed it as such.

(11) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Conduct Prejudicial to Administration of Justice—Financial Dealings Reasonably Perceived as Exploiting Judicial Position—Acceptance of Loan From Member of Court Staff.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a judge engaged in conduct prejudicial to the administration of justice within the meaning of Cal. Const., art. VI, § 18, former subd. (c), by accepting a loan from a court clerk who was under her practical supervision. Although the loan was "secured" (the

judge had written a postdated check in the amount of the loan payable to the clerk), of small amount, and had a short term, the judge had been on notice that she could not properly borrow money from the clerk, since she had been privately admonished for doing so three years earlier. The judge's cited acts and omissions included obtaining a loan from the clerk, a member of the court staff, in violation of Cal. Code Jud. Conduct, canon 4D(1)(a), which counsels judges not to engage in financial and business dealings that may reasonably be perceived as exploiting their judicial position. It was not necessary to a finding that the judge's conduct was prejudicial to the administration of justice that "actual observers" viewed it as such.

(12) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Conduct Prejudicial to Administration of Justice—Financial Dealings Involving Frequent Transactions With Persons Likely to Come Before Court—Acceptance of Loan From Police Department's Court Liaison Officer.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a judge engaged in conduct prejudicial to the administration of justice within the meaning of Cal. Const., art. VI, § 18, former subd. (c), by accepting a loan from a lieutenant in the police department who served as the department's court liaison officer. The judge's cited acts and omissions included obtaining a loan from the lieutenant, who routinely presented her with complaints and warrant applications, in violation of Cal. Code Jud. Conduct, canon 4D(1)(b), which counsels judges not to engage in financial and business dealings that involve them in frequent transactions or continuing business relationships with persons likely to come before their court. Although the judge asserted that the loan was made to her family trucking business and not to her personally, and testified as such at the evidentiary hearing before special masters, the lieutenant testified otherwise, and both the special masters and the commission believed the lieutenant. Further, it was not necessary to a finding that the judge's conduct was prejudicial to the administration of justice that "actual observers" viewed it as such.

(13) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Conduct Prejudicial to Administration of Justice—Failure to List All Creditors in Bankruptcy Petition.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a judge engaged in conduct prejudicial to the administration of justice within the meaning of Cal. Const., art. VI, § 18, former subd. (c), by failing to list all creditors in a bankruptcy

petition filed jointly with her husband. In supporting declarations, she stated that all creditors had been listed, but, in fact, she knowingly and intentionally omitted various creditors. Although prior to filing the petition, she and her husband had retained a bankruptcy attorney who advised her that she was not required to list all creditors, such as those to whom she owed small amounts of money for household goods and services, she informed him of only one of her unlisted debts, and told some of the unlisted creditors that she would omit or had omitted them because she wanted to make repayment in full. The judge's cited acts and omissions included the filing of her bankruptcy petition with its incomplete list of creditors. She could not reasonably have relied on the advice of the attorney that she was not required to list all creditors because (it appeared) she only informed him of one of the debts in question. The other debts were not for small amounts of money for household goods and services, but were for relatively large sums and/or business expenses. The judge's conduct did not enhance the esteem for the judicial office on the theory that the only way for her to have taken responsibility for the debts in question was to fail to list creditors in her bankruptcy petition, since she need only have reaffirmed.

(14) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Persistent Nonperformance of Duties—Habitual Tardiness in Commencing Court Sessions.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a judge persistently failed to perform her duties in a diligent fashion within the meaning of Cal. Const., art. VI, § 18, former subd. (c), as a result of her habitual tardiness in commencing court sessions. On some occasions, she arrived at the courthouse late. On others, she arrived on time but attended to separate matters. On yet others, because she preferred to take the bench only once each session, she simply declined to do so until all parties in all actions were ready to proceed. She inconvenienced attorneys, parties, and witnesses, including law enforcement personnel who had been called away from their normal duties, and led them to express impatience and anger. Further, she was the subject of complaints presented to other judges, the county court executive officer, and the county administrative officer, and received advisements from all four. The judge's cited acts and omissions included her habitual tardiness in commencing court sessions, despite complaints and advisements, in violation of Cal. Code Jud. Conduct, canon 3B(8), which counsels judges to dispose of all judicial matters fairly, promptly, and efficiently, and advises them in its commentary to be punctual in attending court.

[Removal or discipline of state judge for neglect of, or failure to perform, judicial duties, note, 87 **A.L.R.4th** 727.]

(15) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Conduct Prejudicial to Administration of Justice—Offering to Provide Legal Services for Convicted Felon.**—The Commission on Judicial Performance properly concluded, on the basis of clear and convincing evidence, that a judge engaged in conduct prejudicial to the administration of justice within the meaning of Cal. Const., art. VI, § 18, former subd. (c), by offering to provide legal services for her friend's husband, who had been convicted of, and imprisoned for, federal felony narcotics trafficking offenses, after the judge had borrowed substantial sums of money from the friend. The judge's cited acts and omissions included her offer to conduct legal research for her friend's husband. At the evidentiary hearing before special masters, the judge's testimony was favorable to her position, but that of the friend and another mutual friend was not, and, as against the commission and the special masters, there was no reason to generally believe the judge and disbelieve the others. Further, it was not necessary to a finding that her conduct was prejudicial to the administration of justice that "actual observers" viewed it as such.

(16) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Willful Misconduct—Refusal to Cooperate With Investigation of Commission on Judicial Performance.**—A judge was proved by clear and convincing evidence to have engaged in willful misconduct within the meaning of Cal. Const., art. VI, § 18, former subd. (c), by requesting two friends, during the course of a preliminary investigation of the judge by the Commission on Judicial Performance, not to give their cooperation to its agents. Specifically, the judge asked the friends not to discuss loans she had obtained from them with the agents. This constituted willful misconduct, and was not merely conduct prejudicial to the administration of justice. The judge's cited acts and omissions included a refusal to cooperate with, or give reasonable assistance and information to, the commission's agents in the course of the preliminary investigation, in violation of Gov. Code, § 68725. At the evidentiary hearing before special masters, the judge's testimony was favorable to her position, but that of the two friends was not, and, as against the commission and the special masters, there was no reason to generally believe the judge and disbelieve the others.

(17) **Judges § 6—Removal, Censure, and Other Discipline—Willful Misconduct, Conduct Prejudicial to Administration of Justice, and Persistent Nonperformance of Duties—Removal From Office as Necessary to Protect Public and Judicial System.**—In judicial disciplinary proceedings before the Supreme Court under Cal. Const., art.

VI, § 18, removal of a judge from office for willful misconduct, conduct prejudicial to the administration of justice, and persistent nonperformance of duties, was warranted, since it was the only sanction that would guarantee protection of the public and the judicial system. The Supreme Court's findings of fact and conclusions of law established beyond peradventure that the judge did not possess the integrity and impartiality necessary to carry out the obligations of office, and that she displayed moral turpitude, dishonesty, and corruption. Although she was reelected to office after the conduct in question, the voters apparently had only limited knowledge of her improprieties, and, in any event, it was the court's determination that was dispositive. Further, she did not show herself to be ready, willing, and able to reform under a less severe sanction. Despite two public reprovals and one private admonishment on prior occasions for conduct similar to that which was the subject of the current charges, she continued to engage in the prohibited conduct.

## COUNSEL

Kenneth B. Brock for Petitioner.

Daniel E. Lungren, Attorney General, J. Robert Jibson and Raymond L. Brosterhous II, Deputy Attorneys General, Behrens, Snyder & Romaine and William A. Romaine for Respondents.

## OPINION

**THE COURT.**—These are formal judicial disciplinary proceedings under section 18 of article VI of the California Constitution. Under former subdivision (c) thereof, the Commission on Judicial Performance (hereafter sometimes the Commission) has recommended that we remove from office Glenda Kraft Doan, a judge of the municipal court, for certain misconduct that "occurr[ed] not more than 6 years prior to the commencement of [her] current term"—specifically, "wilful misconduct in office," "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," and "persistent failure or inability to perform [her] duties."[1] Under rule 919(b) of the California Rules of Court, Doan has filed what we

[1]Under present subdivision (d) of section 18 of article VI of the California Constitution, as a general matter the Commission may now itself remove a judge from office and not merely recommend that we do so.

have deemed a petition for a writ of review, asking us to reject or modify the Commission's recommendation.[2]

## I. BACKGROUND

On January 27, 1994, after a preliminary investigation, the Commission filed a notice of formal proceedings against Doan. The notice recited that, between January 3, 1983, and June 29, 1992, Doan had been a judge of the Justice Court for the Corcoran Judicial District of Kings County, and that since June 29, 1992, she had been a judge of the Municipal Court for the Kings Judicial District of Kings County, Corcoran Division, into which the justice court had been consolidated. It went on to charge her in five counts with wilful misconduct, conduct prejudicial to the administration of justice, and persistent nonperformance of duties, as specified below.

*Count one* contained allegations to the following effect: in 1993, Doan and her husband, James Doan, owed about $400 to Miguel Meneses, their former gardener, for his services; in a felony action instituted against Meneses relating to conspiracy to possess cocaine for sale, Doan improperly engaged in ex parte contacts, including providing Meneses with legal advice; she failed to disclose her pertinent relationships and activities to the prosecution; she intentionally made a material misstatement of fact designed to mislead the prosecution as to the appropriateness of Meneses' release on his own recognizance; and, by failing to timely disqualify herself from, or at least disclose her pertinent relationships and activities at, a contested bail review hearing that resulted in her release of Meneses on his own recognizance, she failed to act with the impartiality expected of judicial office.

*Count two* contained allegations to the following effect: Doan engaged in a continuing pattern of failure to report income or loans in the statement of economic interests that she was required to file annually with the Fair Political Practices Commission pursuant to Government Code section 87200 et seq.; in 1989, she had been publicly reproved by the Commission for failing to report income in excess of $75,000; in 1990, she had been privately admonished by the Commission for failing to report loans obtained from Helen Cabell, a member of the court staff; in spite of the foregoing discipline, in 1991, she borrowed $3,000 from Russell Williams, a lieutenant in the Corcoran Police Department and its liaison with her court, insisted that there be no written evidence of the transaction, failed to report the loan,

[2]See *Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275, footnote 5 [110 Cal.Rptr. 201, 515 P.2d 1]: "[W]hen we receive a petition challenging the recommendation of the Commission, we deem it proper to treat it as a petition for a writ of review."

and had not yet made repayment; also in 1991, she borrowed about $10,410 from Hugh Osburn, who frequently appeared in her court for himself and for his business, Western Counties Insurance Brokers, failed to report the loan, and had not yet made repayment.

*Count three* contained allegations to the following effect: Doan improperly exploited her office by engaging in financial dealings with members of the court staff, including obtaining a loan of $740 from Cabell in 1993, purportedly for the benefit of one of her daughters; in addition, she involved herself in continuing business relationships with persons who appeared in her court: she obtained unpaid services, as evidenced by the debt of about $400 to Meneses; she also obtained loans—in 1991, she borrowed $3,000 from Lieutenant Williams and about $10,410 from Osburn; sometime before 1992, she borrowed about $10,000 from Morris Proctor; subsequently, she presided over a sentencing hearing involving Proctor's son; she did not disqualify herself or at least disclose her pertinent relationships and activities; she had not yet made repayment of the loan.

*Count four* contained allegations to the following effect: Doan failed to act in a manner that promotes confidence in the integrity of the judiciary; on June 29, 1993, she and her husband filed a voluntary petition of bankruptcy; they were required to list all creditors; in supporting declarations executed under penalty of perjury, she stated in substance that they had done so; her statement, however, was deliberately false, in that they had omitted, inter alios, Lieutenant Williams, Osburn, Proctor, and Fabrie Jewelers.

*Count five* contained allegations to the following effect: because she was habitually tardy in commencing court sessions, Doan persistently failed to perform her duties in a diligent fashion; her habitual tardiness adversely affected those who came into the courtroom and those who served on the court staff; and it continued despite repeated expressions of concern by the county administrative officer, the county court executive officer, another municipal court judge, and representatives of law enforcement agencies.

On March 8, 1994, Doan filed an answer. She denied the charges of wilful misconduct, conduct prejudicial to the administration of justice, and persistent nonperformance of duties.

On July 6, 1994, the Commission filed an amended notice of formal proceedings against Doan. The amended notice recited her judicial tenure as the original had done. It went on to charge her in seven counts with wilful misconduct, conduct prejudicial to the administration of justice, and persistent nonperformance of duties, as specified below.

*Count one* realleged Doan's acts and omissions, as stated in the same-numbered count of the original notice of formal proceedings, with regard to the Meneses matter. It also contained new allegations to the following effect: in 1992, she borrowed $4,500 for a term of one year without interest from Darlene Jones, who owned a restaurant in Corcoran, and had yet to make repayment except for about $750; subsequently, three events occurred, one involving Darren Powell, a nephew of Darlene, another involving Kenneth Jones, also a nephew, and yet another involving Darlene herself; *first*, Doan was assigned to preside over a misdemeanor action against Powell relating to resisting arrest and possessing an open container of an alcoholic beverage in a motor vehicle; she learned that Powell was Darlene's nephew; she commented to Darlene that she would "take care of the matter"; at a pretrial conference, she did not disqualify herself or advise any party of her comment to Darlene or her relationship with her as a friend and debtor; she was approached by the prosecutor and defense counsel with a proposal for a negotiated disposition, under which Powell would plead guilty to the resisting-arrest charge, with no jail time, and the People would move to dismiss the open-container charge; she rejected the proposal essentially as unfavorable to Powell; she continued the matter; later Judge Ronald J. Maciel, the judge of the Municipal Court for the Kings Judicial District of Kings County, Lemoore Division, accepted substantially the same proposal; *second*, she and Darlene were present at Darlene's restaurant one day when they saw Kenneth and a companion, Victoria Gamez, arrested for the misdemeanor of possession of an alcoholic beverage by a minor; Darlene expressed concern about the pair "getting into trouble" with the law; Doan assured her that she would "take care of the matter" and see to it that they would receive at most a sentence of community service, possibly involving an educational program at the California State Prison at Corcoran; she then presided over proceedings in misdemeanor actions against the pair; she subsequently dismissed the action against Gamez, and accepted a guilty plea from Kenneth and admitted him to probation on condition that he complete an educational program at the California State Prison at Corcoran; at no time did she advise the parties of her witnessing of the underlying incident, her relationship with Darlene, or her discussion with Darlene about the matter; *third*, she learned that a misdemeanor action had been brought against Darlene for obstructing an officer; she discussed the charge with Darlene; she advised her against retaining counsel because she had already spoken with Judge Maciel, who was assigned to the proceedings, and "the matter would be taken care of"; she did in fact speak with Judge Maciel about the case.

*Count two* realleged Doan's acts and omissions, as stated in the same-numbered count of the original notice of formal proceedings, with regard to

her continuing pattern of failure to report income or loans in her annual statement of economic interests, specifically the $3,000 loan from Lieutenant Williams and the $10,410 loan from Osburn, both obtained in 1991 and not yet repaid. It also contained new allegations to the following effect: beginning in 1991, she repeatedly borrowed money from Koma Howard, a resident of Corcoran, and routinely and periodically billed, for the education of the older of her two daughters, a line of credit that Howard had established for herself; by arrangement, she was required to repay Howard in the amount of $200 each month, and in the spring of 1994, had an outstanding balance of $4,107.64; in 1991, she borrowed $9,000 from Daisy Smith, a correctional officer assigned to the California State Prison at Corcoran, and had yet to make repayment; in 1992, she borrowed the sum of $4,500 from Darlene Jones, which she had yet to repay except for about $750, and from time to time in apparently the same period also borrowed small sums of $10 or $20 from her, which she had yet to repay.

*Count three* realleged Doan's acts and omissions, as stated in the same-numbered count of the original notice of formal proceedings, with regard to her financial dealings and business relationships with Meneses, Cabell, Lieutenant Williams, Osburn, and Proctor.

*Count four* realleged Doan's acts and omissions, as stated in the same-numbered count of the original notice of formal proceedings, with regard to her failure to list all creditors in her bankruptcy petition, omitting, inter alios, Lieutenant Williams, Osburn, Proctor, and Fabrie Jewelers. It also contained new allegations that she omitted Darlene Jones, Howard, and Smith as well.

*Count five* realleged Doan's acts and omissions, as stated in the same-numbered count of the original notice of formal proceedings, with regard to her persistent failure to perform her duties in a diligent fashion.

*Count six*, which was new to the amended notice of formal proceedings, contained allegations to the following effect: at some time after obtaining the $4,500 loan in 1992, Doan informed Darlene Jones that she could not make repayment but would instead "work off" the debt by providing her with legal assistance, specifically, by helping to prepare a petition for writ of habeas corpus on behalf of Darlene's husband, Rodney Jones, who had been convicted of federal felony narcotics trafficking offenses and was incarcerated in a federal correctional institution in Arizona; she indicated her intent not to sign the petition herself, but to have an attorney to do so, because it would be "illegal" for her to sign a pleading in such a matter; she asked for

and received legal papers and transcripts pertinent to Rodney's case; in the spring of 1993, she traveled with persons including Darlene to the federal correctional institution in Arizona, identified herself to the authorities there as a judge, and visited Rodney; she repeatedly stated that she would have Rodney "out of prison by Christmas" of 1993.

*Count seven*, which also was new to the amended notice of formal proceedings, contained allegations to the effect that, during the course of the Commission's preliminary investigation, Doan asked Darlene Jones and Howard, who were material witnesses, not to give their cooperation to its agents, specifically, not to discuss the $4,500 loan she had obtained from Darlene.

Doan did not file an answer to the amended notice of formal proceedings.

On June 14, 1994, at the Commission's request, we appointed three special masters to hear and take evidence in the matter and to report to the Commission. The evidentiary hearing was bifurcated. By the Commission's order under rule 907.2 of the California Rules of Court, it was open to the public on the first four counts of the amended notice of formal proceedings. Pursuant to rule 902(a) of those same rules, it was confidential on the last three.[3] The Commission appeared through its examiners. Doan, who was personally present, appeared through counsel.

On October 7, 1994, the special masters issued their report. Applying the standard of proof by clear and convincing evidence with the burden resting on the examiners, they made extensive, and largely unanimous, findings of fact and conclusions of law.[4] Their findings and conclusions were generally in accord with the allegations of the amended notice of formal proceedings,

[3]Under former subdivision (f)(3) of section 18 of article VI of the California Constitution, the Commission had authority to "open hearings to the public," "in the pursuit of public confidence and the interests of justice, . . . in the event charges involve moral turpitude, dishonesty, or corruption . . . ." On its view that former subdivision (f)(3) might authorize it to open a hearing only as to such charges, the Commission decided to bifurcate the evidentiary hearing in this matter. It determined that the first four counts of the amended notice of formal proceedings involved moral turpitude, dishonesty, or corruption, and hence might be heard in public. It determined that the last three counts either did not or might not, and hence should be heard in confidence. Subsequently, in *Adams* v. *Commission on Judicial Performance* (1994) 8 Cal.4th 630, 657-658 [34 Cal.Rptr.2d 641, 882 P.2d 358], we concluded that former subdivision (f)(3) authorized the Commission to open a hearing as to all charges if any one involved moral turpitude, dishonesty, or corruption. Under new subdivision (j) of section 18 of article VI, all hearings "shall be open to the public for all formal proceedings instituted after February 28, 1995."

[4]In this context, as generally, "findings of fact" include the resolution of both pure questions of fact and predominantly factual mixed questions of law and fact, and "conclusions

and as such were unfavorable to Doan. They included determinations that she engaged in conduct prejudicial to the administration of justice and persistently failed to perform her duties. One of the special masters would have determined that she committed wilful misconduct in the matters relating to Meneses and Darlene's nephew Darren Powell.[5]

On December 1, 1994, after the examiners and Doan had each filed a statement of objections to the special masters' report, the Commission conducted a hearing, which, like the evidentiary hearing, was open to the public as to the first four counts of the amended notice of formal proceedings and confidential as to the last three.[6] Pursuant to former subdivision (a) of section 8 of article VI of the California Constitution, the Commission then comprised nine members, a majority of whom were judges.[7] The examiners argued and responded to questions. Doan, who was personally present, appeared through counsel, who argued and responded to questions on her behalf.

On December 12, 1994, the Commission issued its decision. Applying the standard of proof by clear and convincing evidence as did the special masters, it made extensive, and largely unanimous, findings of fact and conclusions of law. As a general matter, its findings and conclusions, although more detailed, were substantially similar to the special masters'—except that they were even more in accord with the allegations of the amended notice of formal proceedings, and as such were even more unfavorable to Doan. They included determinations that she engaged in conduct prejudicial to the administration of justice and persistently failed to perform her duties. They also included determinations, like those of the dissenting special master, that she committed wilful misconduct in the matters relating to Meneses and Darlene's nephew Darren Powell.[8] The Commission dismissed the charges in Count Two as to the Osburn debt and the Smith loan, and in Count Three as to the Osburn debt, the Proctor loan, and the Meneses debt, having determined, apparently unanimously, that the underlying allegations had not been proved by clear and convincing evidence. On review of the entire record, it unanimously recommended that we remove Doan from

of law" include the resolution of both pure questions of law and predominantly legal mixed questions of law and fact.

[5]The special masters' findings of fact and conclusions of law are identified more fully in the course of the analysis that follows. (See, *post*, at pp. 311-338.)

[6]See footnote 3, *ante*.

[7]Pursuant to present subdivision (a) of section 8 of article VI of the California Constitution, the Commission now comprises 11 members, a majority of whom are not judges.

[8]The Commission's findings of fact and conclusions of law are set out in material part and with minor modifications in the course of the analysis that follows. (See, *post*, at pp. 311-338.)

office. Under former subdivision (a) of section 18 of article VI of the California Constitution, she became disqualified from acting as a judge, but without loss of salary, by reason of this recommendation, and has remained so during its pendency.[9]

On January 12, 1995, Doan filed the petition with which we are here concerned.

## II. THE LAW

Under former subdivision (c) of section 18 of article VI of the California Constitution, we may remove a judge from office only for certain specified kinds of misconduct: (1) "wilful misconduct in office"; (2) "conduct prejudicial to the administration of justice that brings the judicial office into disrepute"; (3) "persistent failure or inability to perform the judge's duties"; and (4) "habitual intemperance in the use of intoxicants or drugs."

Pertinent here are three of the four specified kinds of misconduct, to wit, wilful misconduct, conduct prejudicial to the administration of justice, and persistent nonperformance of duties.

(**1a**) Wilful misconduct was originally defined (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 795 [119 Cal.Rptr. 841, 532 P.2d 1209]) as "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith" (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 284). It was subsequently elaborated through a gloss given to one of its phrases: "Bad faith" on the part of a judge entails *either* an intent, motivated by "actual malice," to commit an act that he knows or should know is beyond his lawful power *or* an intent to commit an act, even within his lawful power, "for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties." (*Spruance* v. *Commission on Judicial Qualifications*, *supra*, 13 Cal.3d at pp. 795-796; accord, *Cannon* v. *Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 695 [122 Cal.Rptr. 778, 537 P.2d 898]; *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 365 [188 Cal.Rptr. 880, 657 P.2d 372]; *Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 45-46 [207 Cal.Rptr. 171, 688 P.2d 551]; see *Gubler* v. *Commission on Judicial Performance*, *supra*, 37 Cal.3d at p. 46, fn. 7 [noting in substance that "bad faith" as an intent by a judge to commit an act that he knows or

[9]Under present subdivision (a) of section 18 of article VI of the California Constitution, a judge removed from office by the Commission (see fn. 1, *ante*) becomes disqualified from acting as such, but without loss of salary, by reason of a petition to review the Commission's determination.

should know is beyond his lawful power must be motivated by "actual malice"]; *Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1304-1305 [240 Cal.Rptr. 859, 743 P.2d 919] [to similar effect].)

**(2a)** Conduct prejudicial to the administration of justice has been defined as *either* "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 284) *or* "wilful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity" (*id.* at p. 284, fn. 11).

**(3)** Persistent nonperformance of duties entails a pattern of legal or administrative omissions or inadequacies in the performance of a judge's duties. (See *McCullough* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191 [260 Cal.Rptr. 557, 776 P.2d 259].) It does *not* entail any intentional disregard of such duties. (See *Mardikian* v. *Commission on Judicial Performance* (1985) 40 Cal.3d 473, 482 [220 Cal.Rptr. 833, 709 P.2d 852].)

**(4)** The question of misconduct obviously implicates the standard of conduct to which judges are held. That standard is manifested, in part, in the California Code of Judicial Conduct and its canons. (*Adams* v. *Commission on Judicial Performance*, *supra*, 8 Cal.4th at p. 661.) Adopted by California judges themselves,[10] the code does "not have the force of law or regulation . . . ." (*Adams* v. *Commission on Judicial Performance*, *supra*, 8 Cal.4th at p. 661.) Nevertheless, its canons "reflect a judicial consensus regarding appropriate behavior, and are helpful in giving content to" former subdivision (c) of section 18 of article VI of the California Constitution. (*Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 838, fn. 6 [264 Cal.Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235] accord, *Adams* v. *Commission on Judicial Performance*, *supra*, 8 Cal.4th at pp. 661-662.)

**(5a)** In determining the ultimate issue whether to remove a judge from office for misconduct under former subdivision (c) of section 18 of article VI of the California Constitution, we proceed independently. (See *Spruance* v. *Commission on Judicial Qualifications*, *supra*, 13 Cal.3d at p. 799, fn. 18.) It

[10]"The California Code of Judicial Conduct, adapted from the American Bar Association Code of Judicial Conduct of 1972, was adopted by the . . . Conference of [California] Judges (later renamed the California Judges Association) on September 10, 1974, effective January [1], 1975. [On October 5, 1992,] the California Judges Association adopted a revised California Code of Judicial Conduct." (*Adams* v. *Commission on Judicial Performance*, *supra*, 8 Cal.4th at p. 637, fn. 2.)

is true that the Commission has the power to make a recommendation of removal. (Cal. Const., art. VI, § 18, former subd. (c), as amended by initiative Gen. Elec. (Nov. 8, 1988) see, e.g., *Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 275.) It is also true that its making of such a recommendation is a prerequisite to a subsequent order to that effect on our part. (E.g., *Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 276; see Cal. Const., art. VI, § 18, former subd. (c), as amended by initiative, Gen. Elec. (Nov. 8, 1988).) But it is we who remove, not the Commission. (Cal. Const., art. VI, § 18, former subd. (c), as amended by initiative, Gen. Elec. (Nov. 8, 1988); see, e.g., *Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 276.) This does not mean that we ignore its views. We do not. Rather, in recognition of its "expertise . . . in matters involving judicial conduct," we give "special weight" to its recommendation. (*Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 832.)

In determining the issues that underlie the removal of a judge from office under former subdivision (c) of section 18 of article VI of the California Constitution, we also proceed independently. (See *Spruance* v. *Commission on Judicial Qualifications*, *supra*, 13 Cal.3d at p. 799, fn. 18.) As stated, we may remove a judge only for certain specified kinds of misconduct. We may find such misconduct only if it is proved by clear and convincing evidence, with the burden resting on the examiners for the Commission. (E.g., *Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 275; see, e.g., *Spruance* v. *Commission on Judicial Qualifications*, *supra*, 13 Cal.3d at pp. 784-785.)[11] In this regard, we ourselves make findings of fact and conclusions of law. (E.g., *Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 276; *Cannon* v. *Commission on Judicial Qualifications*, *supra*, 14 Cal.3d at p. 685.) But we do not do so, as it were, in a vacuum. Applying the indicated standard of proof (see *Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at pp. 276-277), special masters initially make findings and conclusions (see *id.* at p. 275). Applying the same standard (*ibid.*), the Commission, in turn, makes findings and conclusions of its own, unaffected by those of the special masters (*ibid.*). Generally, we give "weight" to both the findings and conclusions of both the special masters and the Commission. (E.g., *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 622 [175 Cal.Rptr. 420, 630 P.2d 954].) When they vary, we favor the conclusions of the Commission over

[11]The misconduct in question, of course, must first be charged. (See *Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 315 [267 Cal.Rptr. 293, 787 P.2d 591]; see also *Gonzalez* v. *Commission on Judicial Performance*, *supra*, 33 Cal.3d at p. 365 [holding that it is "the allegations" that must be proved by clear and convincing evidence]; *Roberts* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 739, 746 [190 Cal.Rptr. 910, 661 P.2d 1064] [to similar effect].)

those of the special masters "because of its expertise in matters of judicial conduct" (*McCullough* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 191; accord, e.g., *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 880 [42 Cal.Rptr.2d 606, 897 P.2d 544]; *Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 832), whereas we favor the findings of the special masters over those of the Commission "because of [their] ability to evaluate the credibility of . . . witnesses" (*McCullough* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 191; see, e.g., *Adams* v. *Commission on Judicial Performance*, *supra*, 10 Cal.4th at p. 880; *Furey* v. *Commission on Judicial Performance*, *supra*, 43 Cal.3d at p. 1304).[12]

Finally, in deciding whether to impose discipline under former subdivision (c) of section 18 of article VI of the California Constitution and, if so, what form such discipline should take, we seek as our "ultimate objective . . . to protect the judicial system and the public which it serves from judges who are unfit to hold office." (*McComb* v. *Commission on Judicial Performance* (1977) 19 Cal.3d Spec. Trib. Supp. 1, 9 [138 Cal.Rptr. 459, 564 P.2d 1]; accord, *Wenger* v. *Commission on Judicial Performance*, *supra*, 29 Cal.3d at p. 654; *Furey* v. *Commission on Judicial Performance*, *supra*, 43 Cal.3d at p. 1320; see *Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at pp. 864-865 [stating that the "purpose of Commission proceedings is . . . protection of the public, ensuring evenhanded and efficient administration of justice, and the maintenance of public confidence in the integrity of the judicial system"]; *Adams* v. *Commission on Judicial Performance*, *supra*, 10 Cal.4th at p. 912 [to similar effect].) The answer depends on what sanction, if any, is necessary to achieve this goal. (*Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 865.)

## III. ANALYSIS

The issue that we must resolve is, of course, whether Doan has in fact subjected herself to discipline by her conduct and, if so, what discipline she requires.

[12]Although we proceed independently in determining the underlying issues bearing on the removal of a judge from office under former subdivision (c) of section 18 of article VI of the California Constitution, we are limited in the following regard: we may not find misconduct as to a charge that the Commission has dismissed either because the facts alleged were not proved by clear and convincing evidence or because the facts alleged, even if so proved, did not amount to misconduct under the law. (*Spruance* v. *Commission on Judicial Qualifications*, *supra*, 13 Cal.3d at pp. 784-785, fn. 5; see, e.g., *Wenger* v. *Commission on Judicial Performance*, *supra*, 29 Cal.3d at p. 622.)

A. *Prior Discipline*

The following three matters were established before the special masters and accepted by the Commission.

In 1989, the Commission publicly reproved Doan for conduct prejudicial to the administration of justice. It stated to the effect that, since January 3, 1983, she had served as a judge of the Justice Court for the Corcoran Judicial District of Kings County; as she was then permitted, she continued to practice law; through 1986, she received from a client payments totaling more than $75,000, which were not given for legal services; she variously described the payments as gifts, loans, and income; before receiving the payments, she did not comply with former rule 5-101 of the Rules of Professional Conduct of the State Bar of California, relating to the avoidance of interests adverse to a client; she did not inform her law firm about the payments; she failed to disclose the payments, as required, in her annual statement of economic interests; because she engaged in the conduct in question off the bench, did not compromise her performance as a judge so far as the evidence disclosed, expressed great remorse, and had a long record of civic service, she was sanctioned only with public reproval.

In 1990, the Commission privately admonished Doan for "improper action[s]" within the meaning of former subdivision (c) of section 18 of article VI of the California Constitution. It stated to the effect that, on at least two occasions, she prevailed on a member of the court staff—stipulated at the evidentiary hearing to be Helen Cabell—to lend her several thousand dollars; although she eventually repaid the loans, she violated former canon 5C(1) of the California Code of Judicial Conduct, which counseled judges, inter alia, to refrain from financial and business dealings that exploit their judicial position; further, she failed to disclose the loans, as required, in her annual statement of economic interests, but appeared to have done so out of negligence and not wilfully.

Also in 1990, the Commission publicly reproved Doan apparently for conduct prejudicial to the administration of justice. It stated to the effect that, in 1988, she was approached in private by an acquaintance and was asked to help obtain the release of a relative who had just been arrested for serious crimes of violence and who was within the exclusive jurisdiction of the superior court because he was under the age of 18; she then telephoned a superior court judge at home, told him she knew the youth's family and considered them "good people," and asked him to release the youth under supervision but without bail; he declined, stating that the request was

improper; at a hearing the next day, he disclosed the telephone conversation; she also telephoned a deputy probation officer and requested him to recommend the youth's release pending the hearing; he refused; a day or two later, she encountered him in court and repeated her request; he again refused; in acting as she did, she violated former canon 2B of the California Code of Judicial Conduct, which counseled judges, inter alia, not to lend the prestige of their office to advance the private interest of others; subsequently, in response to a request by the Commission for comment on the matter, she falsely stated that she had not attempted to help gain release for the youth; because she ultimately recognized that she had acted inappropriately and promised that she would not do so again, she was sanctioned only with public reproval.

B. *The Present Charges*

The question before us here is whether any of the charges against Doan for wilful misconduct, conduct prejudicial to the administration of justice, and persistent nonperformance of duties that were set up in the amended notice of formal proceedings and that survived dismissal by the Commission have been proved by clear and convincing evidence. In giving our answer, we shall proceed count by count.

1. *Count One*

Count one has four parts, concerning the matters in which Doan involved herself relating to Miguel Meneses, Darlene Jones's nephew Darren Powell, Darlene's nephew Kenneth Jones, and Darlene herself.

a. *The Meneses Matter*

**(6a)** The Commission's findings of fact and conclusions of law are set out in material part and with minor modifications below. They are unanimous and, although more detailed, substantially similar to those of the special masters, except as noted.

On March 6, 1993, the Commission's findings begin, Miguel Meneses conducted Miguel's Gardening Service together with his wife, Lydia Meneses. Doan and her husband, James Doan, had been customers. Meneses had dealt primarily with James. Meneses had terminated service to the Doans in 1988. At that time, he was owed $400. He did not take any legal action to collect. On the date in question, he was arrested, in a "reverse sting operation," as a suspected member of a conspiracy to possess cocaine for sale, and was booked into the Corcoran Police Department jail. Sergeant David Frost

of the Corcoran Police Department, who was in charge of the narcotics unit, was the supervising officer. Ray Garcia of the same department was the investigating officer. At 7:15 that evening, Doan signed a document entitled "Probable Cause for Warrantless Arrest" as to Meneses for participation in the conspiracy, setting bail according to a schedule.

On the morning of March 7, 1993, which was a Sunday, the Commission's findings continue, Lydia Meneses went to Doan's home, bringing her children. She had received a telephone call from Meneses, who said he was in jail and did not know why; she became distraught. Having little knowledge of legal matters, she went to seek advice and a referral to an attorney. Lydia and Doan were mere acquaintances, not friends. Lydia did not ask Doan to help get Meneses out of jail, and did not ask her about bail proceedings. Doan became concerned about Lydia and her situation. She attempted to reach Officer Garcia at the Corcoran Police Department, but was unsuccessful because he was off duty, and left a request that he call her at home. Receiving the request from the department at 9 a.m., he did so. In the ensuing conversation, she said that Meneses was her gardener, had been around her home, and had earned her trust, and that Lydia was one of her friends; using Meneses' given name, she asked why "Miguel" had been arrested and whether he was surely involved in the underlying transaction; he responded, adding that, on his arrest, Meneses was found in possession of a marked $100 bill that had earlier been used by an undercover agent in making a purchase; three times, she asked his opinion about a release for Meneses on his own recognizance; each time, it appears, he responded that, since the decision belonged to the court, he would take no position, either in support of or in opposition to such a release; he did not say that he gave his consent. She had asked his opinion on criminal matters in the past, although never before had she contacted him when he was off duty. He had expressed his opinion to her in the past, including his objection to a release, and was not afraid to do so. Through Sergeant Manuel Gonzales, she made arrangements for a visit with Meneses in jail—an act that had been uncommon for her in the past. She asked Gonzales whether he thought Meneses was guilty, and told him that she would subsequently disqualify herself from the case. At the jail, Lydia and Meneses met for about 15 minutes in the presence of Gonzales alone. Near the end of the time, Doan came by and informed Lydia she intended to leave. Lydia spoke both English and Spanish, Meneses only Spanish, and Doan only English. Doan told Lydia to advise Meneses that he needed the services of an attorney and that he should not make any statement until he had obtained such services.

On the morning of March 8, 1993, the Commission's findings go on, Sergeant Frost went to Doan's chambers, having heard from Officer Garcia

that she might release Meneses on his own recognizance. He stated that he was opposed to such a release. He explained: Meneses was involved with large quantities of cocaine, in the range of one to three kilograms; he had recently made hand-to-hand sales; on his arrest, he was found in possession of the marked $100 bill that had earlier been used by an undercover agent in making a purchase; he was reportedly conducting transactions with youngsters and young adults in the Corcoran area; and his residence had been subject to a search warrant based on his sales activity. Frost also stated that he knew of the business relationship between Meneses and the Doans, and believed that it "would be a problem." She said she had not had any indication that Meneses was involved in such matters.

On March 9, 1993, the Commission's findings continue, Meneses was arraigned, and counsel appointed, in the Municipal Court for the Kings Judicial District of Kings County, Hanford Division, by Judge John G. O'Rourke. Bail was set at $100,000. A bail review hearing was set for March 11 in the same court.

On March 11, 1993, the Commission's findings go on, Doan presided over Meneses' bail review hearing. By this time, she had developed a strong personal interest in Meneses' case, largely because she wanted to help Lydia. At the hearing, she made no disclosure. Moreover, she represented that Officer Garcia did not oppose an own-recognizance release for Meneses—an intentional omission of material fact, inasmuch as Garcia also did not support such a release. Deputy District Attorney Michael Casaus requested a bench conference because he believed that Meneses must have been a confidential informant. At the bench, Doan further represented that Garcia was closer to supporting an own-recognizance release than merely not opposing such a release—an intentional misstatement of material fact. She did not mention Sergeant Frost's opposition—another intentional omission of material fact. She proceeded to release Meneses on his own recognizance subject to certain terms and conditions. Casaus considered her representations at the hearing so unusual that he later inquired of his supervisor whether Meneses was in fact a confidential informant. Within a day, Meneses was returned to custody on an unrelated Tulare County arrest warrant.

In acting and failing to act as she did, concluded the Commission unanimously and one of the special masters, Doan committed wilful misconduct. Her cited acts and omissions included: ex parte contacts with Lydia, Meneses, Officer Garcia, and Sergeant Frost; personal involvement in the case as an advocate for Meneses in violation of former canon 2B of the California

Code of Judicial Conduct, which counseled judges, inter alia, not to allow their family, social, or other relationships to influence their judicial conduct or judgment; initiation of an "investigation" as to the propriety of an own-recognizance release for Meneses by contacting Officer Garcia; questioning Officer Garcia and Sergeant Gonzales as to whether they believed Meneses was guilty; failure to disqualify herself or at least to disclose her pertinent relationships and activities, in spite of her implicit recognition that such action was necessary; and manipulation of the bail review hearing through intentional misstatements and omissions of material fact in order to achieve her desired result, which was an own-recognizance release for Meneses. According to the conclusion of two of the special masters, however, she engaged only in conduct prejudicial to the administration of justice.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. In effect, Doan does not challenge the facts themselves. Rather, she attempts to dispute the inferences that the facts support. She would have us view her acts and omissions as praiseworthy or at least not such as would subject her to discipline. The record prohibits us from doing so.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. Doan argues that, at most, she engaged in conduct prejudicial to the administration of justice, as two of the special masters had concluded, and did not commit wilful misconduct. **(1b), (6b)** Her argument, like the two special masters' conclusion, rests on the premise that the "bad faith" (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 284) required for wilful misconduct does not encompass an intent by a judge to commit an act "for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties" (*Spruance* v. *Commission on Judicial Qualifications*, *supra*, 13 Cal.3d at p. 796), *if such act is within his lawful power.* We recognize that some language in some opinions might perhaps be read to support that premise. (See *Wenger* v. *Commission on Judicial Performance*, 29 Cal.3d at p. 622, fn. 4; *Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 531 [247 Cal.Rptr. 378, 754 P.2d 724, 76 A.L.R.4th 951]; *McCullough* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 191; *Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 832; *Kennick* v. *Commission on Judicial Performance*, *supra*, 50 Cal.3d at pp. 313-314; *Adams* v. *Commission on Judicial Performance*, *supra*, 10 Cal.4th at pp. 877-878.) **(1c)** A reading of this sort, however, should not be indulged. For it would yield untenable results, such as a conclusion that "bad faith"

could not characterize the mental state of a judge who rendered judgment in exchange for a bribe on the ground that the rendering of judgment was within his lawful power.

**(6c)** Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed wilful misconduct in the Meneses matter.

b. *The Powell Matter*

**(7)** The Commission's findings of fact and conclusions of law are set out in material part and with minor modifications below. Except as noted, they are unanimous and, although more detailed, substantially similar to those of the special masters.

Doan and her husband James, the Commission's findings begin by way of introduction, had a trucking business. In 1989, it began to fail. In the summer of 1992, creditors started to attach the couple's business and personal bank accounts. The Doans' efforts to turn the business around would fail, and they would file a voluntary petition of bankruptcy on June 29, 1993. To return to the summer of 1992: Doan's best friend was Koma Howard and one of her closest friends was Darlene Jones. The three women frequently walked and talked together in the evenings. They saw each other daily. Darlene was a frequent guest in Doan's chambers. Darlene owned and operated a restaurant in Corcoran called Roy's Drive-In. Her husband, Rodney Jones, had been convicted of federal felony narcotics trafficking offenses and was imprisoned at the Federal Correctional Institute in Phoenix, Arizona. On August 11, 1992, Darlene lent Doan $4,500, interest free, at her urgent request, on an oral agreement that she would repay the loan within a year. Doan asked for cash, stating that her bank account had been attached and that she would lose her office if outstanding checks were returned unpaid. Darlene complied, purchasing a cashier's check in the amount indicated. She made the loan to Doan personally and not to the trucking business. Darlene explained that she had set aside the money for Rodney's legal fees. Through the fall of 1993, Doan frequently told Darlene, Howard, and Kathy Jones, who was Darlene's sister-in-law, that she was working on Rodney's case. She said that she was conducting legal research, which included reviewing trial transcripts and briefs. She also said that Rodney would be home by Christmas of 1993. As a consequence, Darlene lent her additional money, provided free meals to her and to her family and friends, allowed her to take food from the restaurant when she was not present, and drove her to and from court. Doan asked whether she would have to repay

the loan if she got Rodney home by December of 1993; Darlene said she would not. In the spring of 1993, Doan went with Darlene and Rodney's brother, Jimmy Jones, to visit Rodney in prison. She told Darlene that she would give the results of her legal research to an attorney who would represent Rodney, and that she would thereby reduce the amount of attorney fees she would have to pay. She recommended, among other attorneys, William Logan, who had appeared in her courtroom several times over the years. She then accompanied Darlene to Logan's office. There, Darlene retained Logan to represent Rodney. Afterward, Logan spoke with Doan several times on the telephone about the matter. At appearances in her courtroom, he received documents concerning the case, which Doan had been given by Darlene. At two meetings in Logan's office, Doan explained to Darlene in lay terms some of the legal matters under discussion. On other occasions, she told Darlene and Howard that she could no longer hold judicial office and practice law at the same time, and stated that she would not sign any pleading or other document. As it turned out, Rodney was not released by Christmas of 1993. At the time of the evidentiary hearing in mid-1994, Doan had repaid only a portion of the loan she had obtained from Darlene. It was not proved by clear and convincing evidence that she did not conduct the legal research in question. (It *was* so proved, according to the special masters.)

On July 11, 1992, the Commission's findings continue, Darren Powell was arrested by officers of the Corcoran Police Department for resisting arrest and possessing an open container of an alcoholic beverage in a motor vehicle. Powell was Darlene's nephew. Doan knew that he was. After review, Deputy District Attorney Gayle Helart charged Powell with resisting arrest and possessing the open container. Doan spoke to Darlene in Howard's presence about the case on several occasions during its pendency. Each time, she made substantially the same statement: she would take care of the matter and Darlene should not worry. Before a pretrial conference set for October 5, 1992, Helart and Marianne Brock, who was Powell's attorney, reached an agreement on a negotiated disposition with Powell's concurrence: Powell would plead guilty to the resisting-arrest charge, and the People would move to dismiss the open-container charge and would recommend a fine and no jail time. Doan presided at the conference. Brock sought to determine whether Doan was inclined to impose any jail time, which might disrupt the agreement. Doan then stated, inter alia, that she did not believe that Powell should plead guilty to the resisting-arrest charge at all because, she asserted, he would then have that conviction on his record permanently; Brock had a good chance of obtaining a not guilty verdict from a jury because one of the arresting officers was not well liked in the community

and because there might be a viable defense of voluntary intoxication; Brock should notice a motion to suppress; and Helart was an inexperienced prosecutor and had apparently overcharged. She spoke directly to Powell: he would be making a mistake by pleading guilty to the resisting-arrest charge, and should consider pleading not guilty; Helart would further review the matter and might reduce the charge to disturbing the peace. Helart protested that Doan should not have made the latter statement because it was not true. Brock said that Powell wished to plead guilty to the resisting-arrest charge that day. Thereupon, Doan called Helart and Brock into chambers. She continued to attempt to persuade Helart to reduce the charge to disturbing the peace. Helart stood firm. Then, at Brock's request, she continued the matter. At no time did she disclose her relationship to Darlene or her discussions with her about the case. Brock subsequently noticed a suppression motion but then, finding no merit, declined to proceed. At Helart's request, Doan eventually disqualified herself. On April 27, 1993, Judge Ronald J. Maciel of the Municipal Court for the Kings Judicial District of Kings County, Lemoore Division, to whom the matter had been reassigned, accepted substantially the same plea agreement that Helart and Brock had originally reached with Powell's concurrence.

In acting and failing to act as she did, concluded eight members of the Commission and one of the special masters, Doan committed wilful misconduct. Her cited acts and omissions included: failure to disqualify herself or to disclose her relationship to Darlene or her discussions with her about the case; and use of the authority of her judicial office to attempt to influence the outcome of Powell's pretrial conference by exerting pressure on Deputy District Attorney Helart to reduce the charge of resisting arrest to disturbing the peace, for the corrupt purpose of further ingratiating herself with Darlene in order to advance their relationship. According to the conclusion of one member of the Commission and two of the special masters, however, she engaged only in conduct prejudicial to the administration of justice.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. Doan challenges the facts. At the evidentiary hearing, the witnesses included Darlene, Howard, Deputy District Attorney Helart, Attorney Brock, Judge Maciel, and Doan herself. The testimony of Doan was favorable to her position. That of the others, especially Darlene, Howard, and Helart, was not. Calling herself "blameless," and suggesting that Darlene, Howard, and Helart are not, Doan asks us to generally accept her testimony and reject theirs on credibility grounds. The special masters, who saw the witnesses and heard their words, believed Darlene, Howard,

and Helart and disbelieved Doan. After reviewing the record, the Commission did so as well. So now do we.

We also believe that the Commission's conclusions as stated above are substantially sound, and adopt them as our own. Doan argues, as noted, that she was "blameless." Under the facts found, she was not. She asserts that the appropriate charge in the Powell matter was, in fact, disturbing the peace and not resisting arrest. In support, she relies on testimony by Judge Maciel to the same effect. What is dispositive, however, is not the correctness of her legal opinion but the impropriety of her surrounding behavior. We recognize that one of the members of the Commission and two of the special masters concluded that she engaged only in conduct prejudicial to the administration of justice and did not commit wilful misconduct. Their conclusion—evidently for the special masters and apparently for the Commission member—rests on the erroneous premise that the "bad faith" (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 284) required for wilful misconduct does not encompass an intent by a judge to commit an act "for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties" (*Spruance* v. *Commission on Judicial Qualifications*, *supra*, 13 Cal.3d at p. 796), if such act is within his lawful power.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed wilful misconduct in the Powell matter.

c. *The Kenneth Jones Matter*

(**8a**) Set out below in material part and with minor modifications are the Commission's findings of fact and conclusions of law, which are unanimous and, although more detailed, substantially similar to those of the special masters.

On August 22, 1992, according to the Commission's findings, Kenneth Jones, then 20 years old, and a companion, Victoria Gamez, then 18 years old, were detained across the street from Darlene Jones's restaurant and cited by Kings County deputy sheriffs as minors in possession of alcohol. Although not a witness to the incident, Doan was present at the restaurant with Darlene and Howard at the time it transpired. Kenneth was Darlene's nephew. Doan knew that he was. Howard went to ask the couple what had happened and came back to tell Doan and Darlene. In response to concerns expressed by Darlene, Doan said, "It isn't anything serious, do not worry about it. I will put him through a program that will keep it off his record." By these words, she was referring to the "Rock Program," which she had

helped develop to provide youthful offenders with a "shock experience" at the California State Prison at Corcoran. She customarily gave minors charged with possession of alcohol the opportunity to attend this program. On September 28, 1992, she presided at a pretrial conference for Kenneth: she offered him an opportunity to attend the program, and he accepted. At no time did she disclose her relationship to Darlene or her discussions with her about the case. It does not appear, however, that the relationship or the discussions affected the disposition. Her words quoted above could be viewed as a statement of fact about her standard and indeed invariable practice in such cases. That same day, she also presided at a pretrial conference for Gamez: she dismissed the action.

In acting and failing to act as she did, concluded the Commission, Doan committed conduct prejudicial to the administration of justice. Her cited acts and omissions included the failure to disqualify herself or at least to disclose her relationship to Darlene or her discussions with her about the case—an omission that gave rise to the appearance of impropriety.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. Doan does not challenge the facts. If she had, she would not have been successful. The record would defeat any such attempt.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. Doan denies impropriety. She refers to one of the requirements of conduct prejudicial to the administration of justice, viz., that an "objective observer" must view the conduct in question to be such. (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 284.) She then argues that an "objective observer," if he had knowledge of the community of Corcoran and its residents, would not view her acts and omissions thus. Let us assume for argument's sake that an "objective observer" must be deemed knowledgeable about Corcoran. The result is not favorable to Doan. Because the community of Corcoran is small and its residents few, an "objective observer" might not view as prejudicial to the administration of justice the fact that Doan had a relationship with Darlene or even engaged in discussions with her about the case. But he would see matters differently as to her failure to at least disclose the relationship and the discussions. She appears to claim that, in light of the fact that she was reelected to office in June of 1994, "actual observers" among the voters did not view her acts and omissions as prejudicial to the administration of justice. We are concerned with an "objective observer" and not with the "actual observers." Furthermore,

"actual observers" among the voters apparently had only limited knowledge of her improprieties; certainly, the formal proceedings against her remained confidential until after the election. **(2b), (8b)** To be sure, it is *sufficient* that the "actual observers" view the conduct in question to be such. (See *McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 534 [116 Cal.Rptr. 260, 526 P.2d 268].) But, contrary to her assertion, it is not *necessary*. **(2c)** We recognize that in *Wenger* v. *Commission on Judicial Performance*, *supra*, 29 Cal.3d 615, it is stated: "Prejudicial conduct must be 'conduct prejudicial to the administration of justice *that brings the judicial office into disrepute.*' ([Cal.] Const., art. VI, § 18, [former] subd. (c); italics added.) The italicized words do not require notoriety, but only that the conduct be 'damaging to the esteem for the judiciary held by members of the public who observed such conduct.' (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 534 [116 Cal.Rptr. 260, 526 P.2d 268].)" (*Wenger* v. *Commission on Judicial Performance*, *supra*, 29 Cal.3d at pp. 622-623, fn. 4; accord, *Kennick* v. *Commission on Judicial Performance*, *supra*, 50 Cal.3d at p. 314; *Gubler* v. *Commission on Judicial Performance*, *supra*, 37 Cal.3d at p. 46; *Roberts* v. *Commission on Judicial Performance*, *supra*, 33 Cal.3d at p. 748.) To the extent that the quoted language suggests that it is necessary that the "actual observers" view the conduct in question to be prejudicial to the administration of justice, it is mere dictum, finds no support in the quoted decision, is unsound, and is hereby disapproved.

**(8c)** Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed conduct prejudicial to the administration of justice in the Kenneth Jones matter.

d. *The Darlene Jones Matter*

**(9)** The Commission's findings of fact and conclusions of law are set out in material part and with minor modifications below. Although more detailed, they are substantially similar to those of the special masters and, except as noted, are also unanimous.

On May 6, 1993, according to the Commission's findings, Darlene Jones was cited for obstructing a public officer in the performance of his duties as he was executing a creditor's "till tap" at her restaurant. She was subsequently charged with the underlying offense. On June 9, 1993, at the time set for arraignment, Doan disqualified herself. Judge Maciel was assigned to the matter. More than once while the charges were pending, in the presence of Koma Howard and Kathy Jones, Doan made statements to Darlene such as the following: "Do not worry, I will take care of it." "Everything will be

okay." "You do not need an attorney, do not waste your money on it." "I will talk to Judge Maciel about it." "I have talked to Judge Maciel about it and everything has been taken care of. Nothing is going to happen." "We do it all the time. I can do him a favor and he can do me a favor, judges do that." Doan did in fact speak with Judge Maciel: she told him that she had disqualified herself and, on his inquiry, that the case involved obstructing a public officer as he was executing a creditor's "till tap" and had arisen out of a "mess up" by attorneys in an underlying civil action. She did not, however, request any favors or preferential treatment for Darlene. Darlene eventually retained counsel. On August 23, 1993, at a pretrial conference presided over by Judge Maciel, she entered a plea of guilty to a reduced charge of disturbing the peace, and was ordered booked and released, placed on probation for one year, and fined $145. At all times pertinent here, Darlene was providing small loans and meals to Doan and her family. Doan wanted to continue to obtain money and food from Darlene—hence, her efforts to give the impression that she was assisting in the case.

In acting and failing to act as she did, concluded eight members of the Commission and all three of the special masters, Doan engaged in conduct prejudicial to the administration of justice. Her cited acts and omissions included: the giving of assurances to Darlene as to the outcome of the prosecution against her, with an implication of inside information and influence; and an apparent intent to mislead Darlene in order to continue to obtain money and food. According to the conclusion of one member of the Commission, however, she committed wilful misconduct.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. Doan challenges the facts. As noted, at the evidentiary hearing, the witnesses included Darlene, Howard, Kathy Jones, and Doan herself. The testimony of Doan was favorable to her position; that of Darlene, Howard, and Kathy Jones was not. Against the Commission and, more notably, the special masters, Doan asks us to generally believe her and disbelieve the others. We will not.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. As a major premise, Doan argues that conduct prejudicial to the administration of justice requires that the "actual observers" must view the conduct in question to be such. As a minor premise, she asserts that Darlene, the primary "actual observer," could not have so viewed her acts and omissions because of what she deems to be Darlene's bad character. We need not detain ourselves with the minor

premise. We must simply reject the major premise out of hand. As explained, the "requirement" that she claims to discern is nonexistent. She states that any assurances she may have given to Darlene as to the outcome of the prosecution against her proved ineffective in view of the fact that she eventually paid no heed to her words but chose to retain counsel. She fails to show, and we fail to see, the relevance of her assertion.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed conduct prejudicial to the administration of justice in the Darlene Jones matter.

2. *Count Two*

**(10)** As pertinent here, count two has three parts, concerning Doan's failure to report in her annual statement of economic interests loans she had obtained from Lieutenant Russell Williams, Koma Howard, and Darlene Jones.

a. *The Williams Loan*

The Commission's findings of fact and conclusions of law are set out in material part and with minor modifications below. Although more detailed, they are substantially similar to those of the special masters and, except as noted, are also unanimous.

Like other public officials—the Commission's findings begin by way of introduction—Doan was required to file a statement of economic interests annually with the Fair Political Practices Commission pursuant to Government Code section 87200 et seq. She was under an obligation to disclose, among other things, all loans of $250 or more made to her or her husband and all loans of $10,000 or more made to any business in which she had an interest of at least 10 percent. She was not under an obligation to disclose, among other things, loans from certain close family members or retail installment or credit card transactions under $10,000 if the account was maintained in the creditor's regular course of business.

On April 23, 1991, the Commission's findings continue, Russell Williams lent Doan $3,000, interest free, to be repaid within six months. The two had known each other for many years, and lived only four houses from each other. He was a lieutenant in the Corcoran Police Department. At that time, he served as the department's court liaison officer. In such capacity, he routinely presented Doan with complaints and warrant applications; she did not supervise him and he had no particular stake in her decisions. On the

date in question, she went to his office. She requested a loan with no written evidence of the transaction. She was distraught, explaining that the trucking business was causing severe financial problems. He complied with her request. He made the loan to her personally, and not to the trucking business; he did so out of friendship, and not because of her position. He retired later that year. She did not make repayment within six months. On June 6, 1994, she gave him a check drawn by her husband in the amount of $1,500. The evidence does not disclose whether this instrument was drawn on a personal or business account. She did not disclose the loan in her statement of economic interests for 1991 or 1992, but did so for 1993. At the evidentiary hearing, she testified that she failed to make the disclosure because she had forgotten to do so. She also testified that she resented the requirement of filing such a statement and considered it an invasion of privacy.

In acting and failing to act as she did, concluded six members of the Commission and all three of the special masters, Doan engaged in conduct prejudicial to the administration of justice. Her cited acts and omissions included the violation of an obligation imposed on her as a public official by statute, which must be viewed as flagrant and deliberate in light of the fact that she had been publicly reproved for similar acts and omissions in 1989. According to the conclusion of three members of the Commission, however, she committed wilful misconduct.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. Doan does not, and cannot, challenge the facts.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. Doan denies impropriety. As a major premise, she argues that conduct prejudicial to the administration of justice requires that the "actual observers" must view the conduct in question to be such. As a minor premise, she asserts that "actual observers" among the voters did not so view her acts and omissions because she was reelected to office in June of 1994. But, as explained, the "requirement" that she claims to discern is nonexistent. Furthermore, the "actual observers" among the voters apparently had only limited knowledge of her improprieties.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed conduct prejudicial to the administration of justice in the matter of the Williams loan.

b. *The Howard Loans*

Set out in material part and with minor modifications below are the Commission's findings of fact and conclusions of law, which are unanimous

and, although more detailed, substantially similar to those of the special masters.

Beginning in May of 1991, according to the Commission's findings, Doan and Koma Howard engaged in a series of transactions wherein Howard drew checks on a line of credit payable to Doan or to another on her behalf. The transactions involved an amount of at least $1,400 to make good checks Doan had drawn on her personal bank account, which had become depleted because of levies related to the failure of the trucking business. Doan had two daughters: Jayme was the older and Megan the younger. Later in 1991 and also in 1992 and 1993, Howard drew checks in the amount of $6,716 on her line of credit payable to the California State Polytechnic University for Jayme. On June 21, 1993, she drew a check in the amount of $400 on her line of credit payable to Jayme herself; Doan cashed the check at a market, applied $150 to her account there, and received the rest in cash. On one occasion, Doan charged an undisclosed amount to an account Howard had with a retail store, with the latter's permission, to buy Jayme and Megan a television set and videocassette recorder for Easter. She made payments to Howard's line of credit and to Howard's account with the retail store, and was current at the time of the evidentiary hearing in mid-1994. She did not disclose these loans in her statement of economic interests for 1991, 1992, or 1993. Her failure to do so was intentional. Inapplicable was the exception for retail installment or credit card transactions under $10,000 on an account maintained in the creditor's regular course of business: her debt was not to the holder of such an account, but to Howard. Also inapplicable was the exception for loans from certain close family members: although Doan testified at the evidentiary hearing that Howard was "like a sister," she was not a member of her family.

In acting and failing to act as she did, concluded the Commission, Doan engaged in conduct prejudicial to the administration of justice. Her cited acts and omissions included the violation of an obligation imposed on her as a public official by statute, which (it appears) must be viewed as flagrant and deliberate in light of the fact that she had been publicly reproved for similar acts and omissions in 1989.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. Doan does not, and cannot, challenge the facts.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. With the same argument

about the views of "actual observers" that she used as to the Williams loan, Doan denies impropriety. That argument was unpersuasive there. It is unpersuasive here as well.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed conduct prejudicial to the administration of justice in the matter of the Howard loans.

c. *The Darlene Jones Loan*

Set out in material part and with minor modifications below are the Commission's findings of fact and conclusions of law, which are unanimous and, although more detailed, substantially similar to those of the special masters.

On August 11, 1992, it will be recalled, Darlene Jones lent Doan $4,500, interest free, to be repaid within a year. The transaction and its circumstances are described above (see, *ante*, at pp. 320-321), and need not be repeated here. Doan did not disclose the loan in her statement of economic interests for 1992 or 1993. Her failure to do so was intentional. There was insufficient evidence to establish with certainty the dates or amounts of the various small loans that were alleged in the amended notice of formal proceedings.

In acting and failing to act as she did, concluded the Commission, Doan engaged in conduct prejudicial to the administration of justice. Her cited acts and omissions included the violation of an obligation imposed on her as a public official by statute, which (it appears) must be viewed as flagrant and deliberate in light of the fact that she had been publicly reproved for similar acts and omissions in 1989.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. Doan does not, and cannot, challenge the facts.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. With the same argument about the views of "actual observers" that she used as to the Williams and Howard loans, Doan denies impropriety. That argument was unpersuasive there. It is unpersuasive here as well.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed conduct prejudicial to the administration of justice in the matter of the Darlene Jones loan.

3. *Count Three*

As pertinent here, count three has two parts, concerning Doan's financial dealings and business relationships with Helen Cabell and Lieutenant Russell Williams, in the form of loans she had obtained.

a. *The Cabell Loan*

**(11)** Set out in material part and with minor modifications below are the Commission's findings of fact and conclusions of law, which are unanimous and, although more detailed, substantially similar to those of the special masters.

In 1993, according to the Commission's findings, Helen Cabell was a clerk assigned to the Municipal Court for the Kings Judicial District of Kings County, Corcoran Division, and served Doan from time to time in the courtroom. She had held the same position in the Justice Court for the Corcoran Judicial District of Kings County for several years prior to the 1992 consolidation, and served Doan regularly in the courtroom. Before consolidation, she had come under Doan's administrative supervision. Afterwards, she did not; she nevertheless continued under her practical supervision. The two women frequently deposited their checks in the bank at the same time, with one of them doing the transactions for both. On August 10, 1993—even though she had known for several months that she was the subject of a preliminary investigation by the Commission—Doan asked Cabell for a loan for one or two days to cover her daughter Jayme's college expenses. The two women "exchanged" checks: Cabell drew a currently dated check for $740 payable to Jayme and Doan drew a postdated check in the same amount payable to Cabell; a day or two later, Cabell cashed Doan's check. The two women were lifelong friends, who, at the time of the evidentiary hearing in mid-1994, continued to do banking for each other. Moreover, the loan here was, so to speak, "secured," of small amount, and with a short term. Nevertheless, Doan was on notice that she could not properly borrow money from Cabell: she had been privately admonished for doing so in 1990. Furthermore, despite the change in administrative supervision, Cabell remained under Doan's practical supervision.

In acting and failing to act as she did, concluded the Commission, Doan engaged in conduct prejudicial to the administration of justice. Her cited acts and omissions included obtaining a loan from Cabell, a member of the court staff, in violation of canon 4D(1)(a) of the California Code of Judicial Conduct, which counsels judges not to engage in financial and business dealings that may reasonably be perceived as exploiting their judicial position.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. Doan does not, and cannot, challenge the facts.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. Doan denies impropriety. As a major premise, she argues that conduct prejudicial to the administration of justice requires that the "actual observers" must view the conduct in question to be such. As a minor premise, she asserts that the sole "actual observer," Cabell, did not so view her acts and omissions. Whether the latter is supported as a matter of fact is of no consequence. That is because the former, as explained, is unsound as a matter of law.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed conduct prejudicial to the administration of justice in the matter of the Cabell loan.

b. *The Williams Loan*

**(12)** Set out in material part and with minor modifications below are the Commission's findings of fact and conclusions of law, which are unanimous and, although more detailed, substantially similar to those of the special masters.

On April 23, 1991, it will be recalled, Lieutenant Russell Williams lent Doan $3,000, interest free, to be repaid within six months. The transaction and its circumstances are described above (see, *ante*, at pp. 327-328), and need not be repeated here.

In acting and failing to act as she did, concluded the Commission, Doan engaged in conduct prejudicial to the administration of justice. Her cited acts and omissions included obtaining a loan from Lieutenant Williams, who routinely presented her with complaints and warrant applications, in violation of canon 4D(1)(b) of the California Code of Judicial Conduct, which counsels judges not to engage in financial and business dealings that involve them in frequent transactions or continuing business relationships with persons likely to come before their court.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. Doan challenges the facts. She asserts in substance that Lieutenant Williams made the loan to the trucking business and not to her personally. At the evidentiary hearing, the witnesses included Williams

and Doan herself. The testimony of Doan was favorable to her position. That of Williams was not. The special masters, who saw the witnesses and heard their words, believed Williams and disbelieved Doan. After reviewing the record, the Commission did so as well. So now do we.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. With the same argument about the views of the sole "actual observer" that she used as to the Cabell loan, Doan denies impropriety. That argument was unpersuasive there. It is unpersuasive here as well.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed conduct prejudicial to the administration of justice in the matter of the Williams loan.

4. *Count Four*

**(13)** Count four concerns Doan's failure to list all creditors in her bankruptcy petition.

The Commission's findings of fact are set out in material part and with minor modifications below. They are unanimous and, although more detailed, substantially similar to those of the special masters.

On June 29, 1993, according to the Commission's findings, Doan and her husband filed a voluntary petition of bankruptcy. They were required to list all creditors. In supporting declarations executed under penalty of perjury, she stated in substance that they had done so. Nevertheless, and with knowledge and intent, she omitted as creditors Fabrie Jewelers, Lieutenant Russell Williams, Hugh Osburn, Morris Proctor, Darlene Jones, Koma Howard, and Daisy Smith. Prior to filing the petition, she and her husband had retained Franklin Samples, an attorney who held himself out as an expert in bankruptcy and had practiced in that area since 1957. He advised her that she was not required to list all creditors, such as those to whom she owed small amounts of money for household goods and services. She informed him of her debt to Williams, but not of any of the others. She told Fabrie Jewelers, Williams, and Darlene that she would omit, or had omitted, them because she wanted to make repayment in full.

The Commission's conclusions of law are set out in material part and with minor modifications below. They are unanimous. But unlike their findings of fact, they differ from those of the special masters, as noted.

In acting and failing to act as she did, concluded the Commission, Doan engaged in conduct prejudicial to the administration of justice. Her cited acts

and omissions included the filing of her bankruptcy petition with its incomplete list of creditors. She could not reasonably have relied on the advice of Attorney Samples that she was not required to list all creditors because (it appears) she did not inform him of any of the debts in question other than that to Lieutenant Williams. Those other debts were not for small amounts of money for household goods and services, but for relatively large sums and/or for business expenses. By contrast, according to the conclusion of the special masters, she did not subject herself to discipline: she relied on Samples's advice, which although of questionable soundness was nevertheless given by a purported expert.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. In substance, Doan challenges what she takes to be the characterization of her intent as fraudulent. No such label, however, is attached. But we do note that, in the declarations supporting her bankruptcy petition, which were executed under penalty of perjury, she stated in substance that she and her husband had listed all creditors—when, with knowledge and intent, she had omitted those identified above.

We also believe that the Commission's conclusions as stated above are substantially sound, and we would adopt them as our own. Doan denies impropriety. But her major premise—that conduct prejudicial to the administration of justice requires that the "actual observers" must view the conduct in question to be such—is unsound as a matter of law. We decline Doan's request to "find that her conduct . . . *enhances* the esteem for the judicial office . . . ." (Italics added.) She implies that the only way for her to "tak[e] responsibility" for the debts in question was to fail to list creditors in her bankruptcy petition. That is not the case. She need only have reaffirmed.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed conduct prejudicial to the administration of justice by failing to list all creditors in her bankruptcy petition.

5. *Count Five*

**(14)** Count five concerns Doan's habitual tardiness in commencing court sessions.

Set out in material part and with minor modifications below are the Commission's findings of fact and conclusions of law, which are unanimous

and, although more detailed, substantially similar to those of the special masters.

On July 1, 1992—the Commission's findings begin by way of introduction—the Justice Court for the Corcoran Judicial District of Kings County was consolidated into the Municipal Court for the Kings Judicial District of Kings County as the Corcoran Division. That court had three judges: Judge John G. O'Rourke in the Hanford Division, Judge Ronald J. Maciel in the Lemoore Division, and Doan in the Corcoran Division. Judge Maciel had been the presiding judge since consolidation. The Hanford Division had two departments: Judge O'Rourke sat in one; Judge Maciel and Doan sat alternately in the other, as well as in their own divisions.

In 1992 and 1993, the Commission's findings continue, Doan was habitually tardy in commencing court sessions by an hour to an hour and a half. On some occasions, she arrived at the courthouse late. On others, she arrived on time but attended to separate matters. On yet others, because she preferred to take the bench only once each session, she simply declined to do so until all parties in all actions were ready to proceed. She inconvenienced attorneys. She did the same to parties and witnesses, including law enforcement personnel who had been called away from their normal duties, and led them to express impatience and anger. She was the subject of complaints presented to Judge Maciel, Judge O'Rourke, the county court executive officer, and the county administrative officer, and received advisements from all four. She almost always completed her calendar before the close of day. But by making a late start, she caused court staff to make mistakes in their attempt to keep pace as she rapidly disposed of the matters at hand. Beginning in mid-1993, she became less tardy, but only somewhat.

In acting and failing to act as she did, concluded the Commission, Doan persistently failed to perform her duties in a diligent fashion. Her cited acts and omissions included her habitual tardiness in commencing court sessions, despite complaints and advisements, in violation of canon 3B(8) of the California Code of Judicial Conduct, which counsels judges to dispose of all judicial matters fairly, promptly, and efficiently, and advises them in its commentary to be punctual in attending court.

Having independently reviewed the record in its entirety, we believe that, with one exception, the Commission's findings as stated above are essentially correct, and we adopt them as our own. The exception is this: it has not been proved by clear and convincing evidence that, by making a late start,

Doan caused court staff to make mistakes. But for this point, Doan does not, and cannot, challenge the facts.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. Doan denies impropriety. Her argument, however, misses its mark. It is not directed against persistent nonperformance of duties, with which we are here concerned. Instead, it focuses on conduct prejudicial to the administration of justice, with which we are not. In any event, it falls of its own weight. Its major premise—that conduct prejudicial to the administration of justice requires that the "actual observers" must view the conduct in question to be such—is unsound as a matter of law. Its minor premise—that "actual observers" among the voters did not so view her acts and omissions because she was reelected to office in June of 1994—is dubious. "Actual observers" among the voters apparently had only limited knowledge of her improprieties. By contrast, "actual observers" among the parties, witnesses, and attorneys who came into the courtroom had fuller knowledge. And, to judge from their complaints, less favorable views.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have persistently failed to perform her duties in a diligent fashion by her habitual tardiness in commencing court sessions.

6. *Count Six*

**(15)** Count six concerns Doan's offer to provide legal services on behalf of Darlene Jones's husband Rodney, who had been convicted of, and imprisoned for, federal felony narcotics trafficking offenses.

Set out in material part and with minor modifications below are the Commission's findings of fact and conclusions of law, which are unanimous and, although more detailed, substantially similar to those of the special masters, except as noted.

On August 11, 1992, it will be recalled, Darlene Jones lent Doan $4,500, interest free, to be repaid within a year. The transaction and its circumstances are described above (see, *ante*, at pp. 320-321), and need not be repeated here. Suffice it to say that Doan offered to conduct legal research for Darlene's husband. The Commission determined that it was not proved by clear and convincing evidence that she did not follow through. The special masters determined that it was.

In acting and failing to act as she did, concluded the Commission, Doan engaged in conduct prejudicial to the administration of justice. Her cited acts

and omissions included her offer to conduct legal research for Darlene's husband.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and we adopt them as our own. Doan makes the same challenge to the facts that she made previously. At the evidentiary hearing, the witnesses included Darlene, Koma Howard, and Doan herself. The testimony of Doan was favorable to her position. That of Darlene and Howard was not. Against the Commission and, more notably, the special masters, Doan asks us to generally believe her and disbelieve the others. We will not.

We also believe that the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. Doan's argument to the contrary is similar to others she has used. Its major premise—that conduct prejudicial to the administration of justice requires that the "actual observers" must view the conduct in question to be such—is unsound as a matter of law. Its minor premise—that Darlene and Howard, the primary "actual observers," could not have so viewed her acts and omissions because of what she deems to be their bad character—need not be considered.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed conduct prejudicial to the administration of justice by offering to provide legal services on behalf of Darlene's husband.

7. *Count Seven*

**(16)** Count seven concerns Doan's request to Darlene Jones and Koma Howard, during the course of the Commission's preliminary investigation, not to give their cooperation to its agents.

Set out in material part and with minor modifications below are the Commission's findings of fact and conclusions of law, which are unanimous and substantially similar to those of the special masters.

During the course of the Commission's preliminary investigation, according to the Commission's findings, Doan told Darlene and Howard she did not want them to discuss the loans she had obtained from them with the Commission's agents.

In acting and failing to act as she did, concluded the Commission, Doan engaged in conduct prejudicial to the administration of justice. Her cited acts

and omissions included a refusal to cooperate with, or give reasonable assistance and information to, the Commission's agents in the course of the preliminary investigation, in violation of Government Code section 68725, which provides that a judge, among others, must do so.

Having independently reviewed the record in its entirety, we believe that the Commission's findings as stated above are essentially correct, and adopt them as our own. Doan again makes the same challenge to the facts that she made previously. At the evidentiary hearing, the witnesses included Darlene, Howard, and Doan herself. The testimony of Doan was favorable to her position. That of Darlene and Howard was not. Against the Commission and, more notably, the special masters, Doan asks us to generally believe her and disbelieve the others. We will not.

We also believe that, with one exception, the Commission's conclusions as stated above are substantially sound, and we adopt them as our own. The exception is this: by telling Darlene and Howard she did not want them to discuss the loans she had obtained from them with the Commission's agents, Doan committed wilful misconduct and did not merely engage in conduct prejudicial to the administration of justice. (Cf. *Adams* v. *Commission on Judicial Performance*, *supra*, 10 Cal.4th at pp. 908-911 [concluding that, by making material misrepresentations and omissions during the course of a preliminary investigation by the Commission, a judge committed wilful misconduct].) Doan denies impropriety. Her argument, however, misses its mark. It is not directed against wilful misconduct, with which we are here concerned. Instead, it focuses on conduct prejudicial to the administration of justice, with which we are not. In any event, it falls of its own weight. We simply modify words spoken above. The major premise—that conduct prejudicial to the administration of justice requires that the "actual observers" must view the conduct in question to be such—is unsound as a matter of law. The minor premise—that Darlene and Howard, the primary "actual observers," could not have so viewed her acts and omissions, apparently because they were or became "undercover" agents for the Commission—need not be considered.

Accordingly, we are of the opinion that Doan has been proved by clear and convincing evidence to have committed wilful misconduct by requesting Darlene and Howard, during the course of the Commission's preliminary investigation, not to give their cooperation to its agents.

C. *Discipline*

**(5b)** In deciding whether to impose discipline under former subdivision (c) of section 18 of article VI of the California Constitution and, if so, what

form such discipline should take, we seek as our ultimate objective to protect the public and the judicial system itself from judges who are unfit to hold office, determining what sanction, if any, is necessary to achieve this goal.

(17) After independent consideration, we are of the opinion that, in accordance with the Commission's recommendation, we should indeed remove Doan from office for wilful misconduct, conduct prejudicial to the administration of justice, and persistent nonperformance of duties. We believe that only that sanction will guarantee protection of the public and the judicial system.

In order to carry out the obligations of office, a judge must possess integrity and impartiality and conduct himself accordingly. Doan did not. She displayed moral turpitude, dishonesty, and corruption. Our findings of fact and conclusions of law establish the point beyond peradventure. They are set out at length above, and need not be repeated here. Merely recall Doan's involvement in the matters relating to Miguel Meneses, Darlene Jones's nephews Darren Powell and Kenneth Jones, and Darlene herself. Recall as well Doan's offer to provide legal services on behalf of Darlene's husband Rodney. These incidents reveal that, as a judge, Doan looked to, and pursued, her own personal interests. Indeed, in the Powell affair, she went so far as to put a thumb on the scales of justice, and did so that she might profit from its verge.

Doan again asserts challenges to our findings and again raises arguments against our conclusions. In the course of our discussion, we found these very challenges unsuccessful and these very arguments unpersuasive. We do so here as well. She invokes her reelection to office in June of 1994. The voters, however, apparently had only limited knowledge of her improprieties. Certainly, the formal proceedings against her remained confidential until after the election. In any event, it is our determination that is dispositive. And our determination is removal.

Of course, we would hesitate to remove a judge who showed himself ready, willing, and able to reform under a less severe sanction.

Doan, however, is not such a judge. Quite the opposite is true. To use the words of one of the examiners, she is apparently the "most disciplined judge in the State of California"—meaning, obviously, the most sanctioned.

Doan did not learn from her public reproval in 1989 for, inter alia, failure to make full disclosure in her annual statement of economic interests. She again failed to make full disclosure in 1991, 1992, and 1993, with regard to

one or more of the loans she had obtained from Lieutenant Russell Williams, Koma Howard, and Darlene Jones.

Neither did Doan learn from her private admonishment in 1990 for, inter alia, engaging in financial dealings that exploited her judicial position—specifically, by borrowing money from Helen Cabell, who served her regularly as a courtroom clerk. She again engaged in financial dealings that exploited her judicial position—again, specifically, by borrowing money from Cabell, who continued to serve her from time to time as a courtroom clerk—in 1993. She did so even though she had known for several months that she was the subject of a preliminary investigation by the Commission.

Lastly, Doan did not learn from her public reproval in 1990 for lending the prestige of her office to advance the private interest of others. She again lent the prestige of her office to advance the private interest of others, even though she had promised not to do so in connection with the 1990 public reproval, in the matters relating to Darlene's nephew Darren Powell in 1992, Meneses in 1993, and Darlene herself in 1993.

In sum, Doan has had three opportunities for reformation. She will have no more.

## IV. DISPOSITION

For the reasons stated above, we conclude that Judge Glenda Kraft Doan, a judge of the municipal court, should be removed from office.

It is so ordered.

Under former subdivision (d) of section 18 of article VI of the California Constitution, a judge whom we remove from office is suspended from the practice of law unless and until we order otherwise.

Doan moves for permission to resume the practice of law. We deny her request. She relies on *Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d 270, and *Gonzalez* v. *Commission on Judicial Performance*, *supra*, 33 Cal.3d 359. There, we permitted a removed judge to resume practice. (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 287; *Gonzalez* v. *Commission on Judicial Performance*, *supra*, 33 Cal.3d at p. 378.) But we did so, at least in part, because we did not find moral turpitude, dishonesty, or corruption. (*Gonzalez* v. *Commission on Judicial Performance*, *supra*, 33 Cal.3d at p. 378; see *Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at p. 287.) Here, by contrast, we do so find. It is true

that, in *Adams* v. *Commission on Judicial Performance*, *supra*, 10 Cal.4th 866, we permitted a removed judge to resume practice in spite of an at least implied finding of moral turpitude, dishonesty, or corruption. But, to our mind, the acts and omissions that underlay removal there were less significant than those here.

We hasten to add that our denial of Doan's motion is without prejudice to the making of a new motion with proof of her rehabilitation, present fitness to practice, and present learning and ability in the general law. (Cf. Rules Proc. of State Bar, div. V, Standards for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii) [dealing with actual suspension from the practice of law for a period of two years or more].)

On November 6, 1995, the opinion was modified to read as printed above.

[No. S058378. Dec. 31, 1998.]

THOMAS B. FLETCHER, a Judge of the Superior Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

## SUMMARY

The Commission on Judicial Performance recommended that the Supreme Court remove a judge from office for willful misconduct and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, former subd. (c); now Cal. Const., art. art. VI, § 18, subd. (d)).

The Supreme Court ordered that the judge be removed from office. The court held that removal from office was warranted. The judge committed multiple acts of willful and prejudicial misconduct, including ex parte communications with parties or witnesses in several criminal cases, multiple undignified reactions to parties' disqualification motions, and mishandling of criminal cases. Together, these incidents reflected a continuing, pervasive pattern of misconduct, and the judge's lack of judicial temperament was manifest. Also, the incidents of misconduct occurred during virtually the judge's entire term in office, and his previous legal experience should have acquainted him with proper procedures. Moreover, rather than expressing contrition, the judge instead alleged there was a conspiracy against him. This belied any claim that he had learned from past experience and had modified his courtroom behavior. It demonstrated instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in every case. Thus, censure was not sufficient. (Opinion by The Court. Dissenting opinion by Kennard, J., with Mosk, J., concurring.)

## HEADNOTES

Classified to California Digest of Official Reports

(1) **Judges § 6.2—Discipline—Removal From Office—Grounds—Willful Misconduct in Office—Standard.**—Under Cal. Const., art. VI, § 18, former subd. (c) (now Cal. Const., art. VI, § 18, subd. (d)), which

authorizes removal of a judge from office for "willful misconduct in office," "willful misconduct" is unjudicial conduct committed in bad faith by a judge acting in his judicial capacity. To support a finding of bad faith, the evidence must establish that the judge performed a judicial act (1) for a corrupt purpose, which is any purpose other than the faithful discharge of judicial duties, or (2) with knowledge that the act was beyond the judge's lawful judicial power, or (3) that exceeded the judge's lawful power with a conscious disregard for the limits of the judge's authority. Cal. Const., art. VI, § 18, former subd. (c), also authorized removal of a judge from office for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Prejudicial misconduct includes acts that a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. It also includes willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem.

[See 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, § 74 et seq.]

(2) **Judges § 6.4—Discipline—Removal From Office—Recommendation by Commission on Judicial Performance—Review by Supreme Court.**—In reviewing the recommendation of the Commission on Judicial Performance to remove a judge for willful or prejudicial misconduct under Cal. Const., art. VI, § 18, former subd. (c) (now Cal. Const., art. VI, § 18, subd. (d)), the Supreme Court may consider only those misconduct charges that the commission has sustained. The court independently reviews the evidentiary record and will sustain the charges of misconduct only if clear and convincing evidence proves them to a reasonable certainty. The court gives special weight to the special masters' factual determinations, because the special masters had the advantage of observing the demeanor of the various witnesses. In addition, in recognition of the commission's expertise, the court accords great weight to the commission's conclusions of law. Based on its factual findings and legal conclusions, the court then determines independently what, if any, discipline is appropriate.

(3) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Improperly Taking and Using Photograph of Court Personnel for Campaign Purposes.**—A judge

committed prejudicial misconduct under Cal. Const., art. VI, § 18, former subd. (c) (now Cal. Const., art. VI, § 18, subd. (d)), by improperly taking and using a photograph of court personnel for campaign purposes. The judge himself admitted that at least part of his purpose in having the picture taken was to assist his campaign. By insisting, over the objections of several court personnel, that everyone participate in the photograph, by securing cooperation by stating that the picture was simply a personal memento, and by failing to disclose his intent to use the picture in his campaign, the judge committed prejudicial misconduct both in taking and using the picture for campaign purposes.

(4) **Judges § 6—Discipline—Judicial Canons—Binding Effect.**—Although the canons of judicial conduct do not have the force of law or regulation, they reflect a judicial consensus regarding appropriate behavior, and are helpful in giving content to the constitutional standards under which disciplinary proceedings are charged. The California Supreme Court therefore expects that all judges will comply with the canons, and the failure to do so suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.

(5) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Handling of Criminal Defendant's Request for Drug Diversion.**—Substantial evidence supported the conclusion of the Commission on Judicial Performance that a judge had committed prejudicial misconduct in his handling of a criminal defendant's request for drug diversion. The judge had engaged in ex parte communications with the defendant's uncle (whom the judge knew) and the defendant's parents, and the judge determined that there existed a conflict of interest that disqualified him from ruling on the issue of diversion. When defense counsel requested that the judge consider diversion despite a probation officer's recommendation to deny diversion, the judge deferred to the district attorney, who recommended diversion. The judge committed prejudicial misconduct by failing to disqualify himself after the ex parte communications. The judge was disqualified under Code Civ. Proc., § 170.1, subd. (a)(6) (grounds for disqualification of judge). He had personal feelings about the propriety of granting diversion and participating in the decision, based on his ex parte communications and the defendant's comment to his attorney that diversion was "a done deal." This disqualification could not be waived (Code Civ. Proc., § 170.3, subd. (b)(2)(A)). Further, since the decision whether to allow diversion was the judge's, he should have set the matter for a different judge rather than defer to the

district attorney. His decision to delegate his judicial power to the district attorney constituted prejudicial misconduct.

(6) **Judges § 6.2—Discipline—Removal From Office—Grounds—Willful Misconduct in Office—Handling of Criminal Defendant's Request for Drug Diversion—Alteration of Minute Order.**—Substantial evidence supported the conclusion of the Commission on Judicial Performance that a judge had committed willful misconduct by altering a minute order directing a criminal defendant to drug diversion. The judge had engaged in ex parte communications with the defendant's relatives, determined that there existed a conflict, and deferred to the district attorney's recommendation of diversion. The judge directed the court clerk to alter a minute order and, contrary to court policy, not to indicate that she had changed the order. The evidence strongly suggested he took this action after receiving the commission's inquiry about his ex parte communications in the case. This was prejudicial misconduct, regardless of the nature of the alterations. By forwarding only the altered order, the judge presented the commission with a grossly incomplete and misleading response. Second, the altered information reflected the judge's disqualification on future diversion violation hearings, but did not indicate that diversion was granted in accordance with the district attorney's recommendation. Third, the record did not support the judge's claim that the entry on the order was completed "completely contemporaneously with" the diversion hearing. Fourth, a conflict existed between the order and the reporter's transcript of the hearing, and given the circumstances of this matter, the transcript was entitled to more credence. Finally, the record indicated that, in light of the judge's conflicting explanations concerning the nature of the documents sent to the commission, it was necessary to have marked the altered order "corrected."

(7) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Ex Parte Contacts With Criminal Defendant Concerning Defendant's Compliance With Plea Bargain.**—A judge committed prejudicial misconduct by engaging in improper ex parte contacts with a criminal defendant. Under a plea agreement, the defendant pleaded guilty to violating court orders, violating a protective order, and allowing or causing a child to suffer, and sentencing was continued with dismissal to follow after a year if he committed no further violations and obeyed court orders. The case remained pending before the judge, and the defendant often appeared before the judge for compliance review. When the defendant talked about committing suicide and other violent acts, the judge recommended that the defendant seek counseling or attend a men's fellowship group that the judge led. At the fellowship meetings the defendant

discussed the problems that led to the criminal charges pending before the judge, and by his own admission, the judge viewed himself as the defendant's probation officer. Thus, the judge would have had to disqualify himself from hearing any allegations that the defendant violated his plea bargain. Further, even though the fellowship group members looked to the Bible for guidance, labeling the judge's conduct as prejudicial misconduct did not violate the judge's right to practice his religion. A judge may not participate in an ongoing support group where defendants with cases pending before him or her discuss their attempts to comply with the terms of their plea bargains.

(8) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Ex Parte Contacts With Criminal Defendant—Effect on Sentencing.**—A judge committed prejudicial misconduct by engaging in improper ex parte contacts with a criminal defendant and by taking an active part in the subsequent sentencing of the defendant. The defendant attended the same church as the judge, had worked on the judge's campaign, and participated in a men's fellowship group that the judge led. When the defendant pleaded guilty to a second offense of driving with excessive blood-alcohol content, the judge felt uncomfortable sentencing the defendant and decided to allow counsel to agree to the punishment. However, at the time of sentencing, the judge proposed that, in lieu of a fine and a jail sentence, the defendant would be required to perform community service by working on the construction of an addition to the courthouse. Subsequently, after the addition was not approved, the judge gave the defendant a list of possible community service projects from which to choose. This was prejudicial misconduct. The judge recognized that his ex parte contacts created a conflict, and his initial solution was simply to cede the sentencing decision to counsel. He did not disclose his ex parte contacts to the district attorney or to defense counsel. Moreover, despite his ex parte contacts and his decision not to participate in sentencing, the judge took control of sentencing and imposed an unusually lenient sentence that included no actual jail time.

(9) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Ex Parte Contacts With Criminal Defendant—Traffic Offender.**—A judge committed prejudicial misconduct in handling the case of a traffic offender. The judge knew the offender, informally discussed the offender's situation at a restaurant, and agreed to give the offender an extension of time in order to perform community service in lieu of a fine. The judge then altered the official court file to reflect his informal handling of the matter. This ex

parte handling of the matter confused the offender and required the judge to give the offender still another chance after a warrant was issued when the offender failed either to pay a fine or to perform community service.

(10) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Ex Parte Contacts With Criminal Defendant—Continuation of Matter Involving Defendant Known to Judge.**—A judge committed prejudicial misconduct in continuing to preside over a zoning violations case despite his personal knowledge of the relevant circumstances and his ongoing personal relationship with the defendant. The defendant had been on probation for brandishing a firearm and subsequently participated in a men's fellowship group that the judge led. At the group's meetings, the judge counseled the defendant about the defendant's personality and marital problems. Also, the judge was aware of the zoning violations and had advised the defendant to resolve them. Because of the conflict that these contacts created, the judge exercised no substantive judgment in considering the district attorney's continuance requests. By his own admission, the judge thought the district attorney was giving the defendant too much time to clean up his property, creating a potential for another confrontation with his neighbor. But for his decision not to make substantive rulings in the case, the judge might not have acceded to all of the continuance requests. Rather than participating in the case under these circumstances, he should have recused himself. In failing to do so, the judge committed prejudicial misconduct.

(11) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Ex Parte Contact With Witness.**—A judge committed prejudicial misconduct by having an ex parte contact with a witness in a criminal prosecution for assault with a deadly weapon, a BB rifle. The district attorney proposed that the defendant plead guilty to simple battery and receive a sentence of eight days of community service and a fine, since the victim had no objection, and since the Army might not accept the defendant if he served a jail term. At the court hearing, the judge telephoned the park ranger who had arrested the defendant and conducted a conversation without putting the telephone on a speaker so the defendant and counsel could only hear the judge's side of the conversation. During the conversation, the judge referred to the defendant as a "punk" and made comments such as "That's what I thought. Bad attitude." After, the call, the judge stated that the ranger affirmed that the defendant had a bad attitude, and the judge stated that he would not accept the prosecutor's proposed

plea bargain. This constituted prejudicial misconduct. Even if the judge was concerned about embarrassing the ranger, this did not excuse the judge's decision to exclude counsel and the defendant from a conversation in which he obtained information that influenced his handling of the case. Furthermore, there was nothing to show that the parties stipulated that the judge could make these calls or exclude them from his conversation.

(12) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Ex Parte Contacts Concerning Bench Warrants.**—A judge committed prejudicial misconduct in making ex parte contacts with defendants who were subject to bench warrants. On multiple occasions, the judge telephoned defendants, including defendants he knew, for whom bench warrants had been issued to advise them to come to court. The judge should not have conducted court business through informal, ex parte contacts over the telephone. Even if the judge believed that this was the most efficient way to handle these warrants or that some of the arrest warrants might have been improper, he was not entitled to address this problem through ex parte telephone contacts.

(13) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Prejudgment of Evidence.**—A judge committed prejudicial misconduct during a criminal prosecution for driving under the influence by expressing his prejudgment of a defense witness's credibility. During the preliminary hearing, defense counsel requested a continuance to subpoena a witness who would testify that he, rather than the defendant, was driving during the incident at issue. The judge stated that he had dealt with the witness in the past and that "his credibility is not too high." He further stated that the witness and a prosecution witness were both recovering alcoholics who could not be believed. The judge was not simply fulfilling his duty as a judge to disclose his personal knowledge and opinion of a defense witness. He failed to disclose his opinion of the witness at the start of the preliminary hearing despite his knowledge that the witness was the defendant's primary witness; the judge waited until after hearing the arresting officers' testimony before informing defense counsel. More important, the judge made his remarks to persuade defense counsel not to call the witness and to agree to end the preliminary hearing. This attempt to influence counsel's handling of the case by disclosing his bias against the defendant's primary witness and his prejudgment of that witness's credibility constituted prejudicial misconduct.

(14) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Reaction to Party's Attempt to**

**Disqualify Judge—Refusal to Appoint Defense Counsel.**—A judge committed prejudicial misconduct during a criminal prosecution by refusing to appoint a public defender who had stated her intention to disqualify the judge. The defendant was not represented at the preliminary hearing, and he asked the public defender, who had been in the courtroom, to accompany him while he considered a plea offer. When they returned to the courtroom, the public defender stated that the defendant was qualified for representation and asked to be appointed. She then began negotiating on the defendant's behalf, believing she was representing the defendant, since the judge's previous practice was to accept her representation without a formal statement of appointment. When the public defender believed that the judge's comments indicated that he would not be fair and impartial, she stated that she would seek to disqualify him. The judge then asked for a qualification form and eventually appointed a different public defender. In so retaliating against the public defender, the judge committed prejudicial misconduct. The judge raised a question regarding the public defender's representation only after she indicated her intent to disqualify him. Also, his request for a qualification form for defendant was contrary to his prior practice, and he appointed a substitute public defender without inquiring or commenting further about the defendant's eligibility. These facts indicated that the judge's purported concern about the public defender's alleged failure to qualify the defendant was merely a pretext for his decision to exclude the public defender because of her expressed intent to disqualify him.

**(15a, 15b) Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Reaction to Party's Attempt to Disqualify Judge—Anger at Defense Counsel.**—A judge committed prejudicial misconduct in a criminal case by his angry reaction to defense counsel's motion to disqualify the judge. The defendant was accused of shoplifting four rolls of developed film. The judge approved of defense counsel's suggestion of informal diversion, but when the prosecutor suggested a $150 fine, defense counsel stated that the defendant could not afford it. When the judge asked how the defendant could claim she could pay for the items but not the fine, defense counsel detected animosity on his part and moved to disqualify him. At the time of this matter, the pertinent canon of judicial conduct required that a judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. In this case, the judge responded angrily the very first time defense counsel, understandably concerned that the judge had become impatient with the defendant, mentioned disqualification. He immediately began yelling at defense counsel about her use

of the disqualification procedure. After expressing his view that the defendant's explanation was not credible, the judge returned to the disqualification issue, again yelling at defense counsel that he was "sick and tired" of her disqualification threats and was "not going to have it anymore." Even though defense counsel's conduct may have contributed to the undignified atmosphere, in light of the entire incident, the judge's behavior in response to the disqualification attempt constituted prejudicial misconduct.

(16) **Judges § 8—Powers and Duties—Control of Attorney's Behavior.**—Cal. Code Jud. Ethics, canon 3B(4), directs a judge to "require" lawyers to be "patient, dignified, and courteous" in their courtroom behavior. In performing this duty, trial judges confronted with disruptive, contumacious, stubbornly defiant attorneys must be given sufficient discretion to meet the circumstances of each case.

(17a, 17b) **Judges § 6.2—Discipline—Removal From Office—Grounds—Willful Misconduct in Office—Refusal to Dismiss Criminal Complaint.**—A judge committed willful misconduct by refusing to dismiss a criminal complaint and by reviewing the file and subpoenaing witnesses. The defendant had been charged with driving under the influence of alcohol with a prior conviction for driving with excessive blood-alcohol content. As part of a plea bargain in a separate matter, the district attorney moved to dismiss the charges, and the judge refused and ordered the district attorney to file an amended complaint adding another prior conviction allegation. The district attorney again moved to dismiss, and the judge denied the motion on the ground that there should be a trial for a recidivist drunk driver. The district attorney stated that it was improper for the judge to consider the defendant a drunk driver without personal knowledge of the facts and asked the judge to disqualify himself. The judge committed prejudicial misconduct. He attempted to intrude on the district attorney's authority, but not by simply suggesting a course of action; the judge, by having his clerk review the file and subpoena all prosecution witnesses, took it upon himself to do the district attorney's job. He thus deprived the defendant of an impartial judge. Moreover, the judge took his actions because of a personal conflict with the district attorney, who was a political rival.

(18) **Judges § 8—Powers and Duties—Impartiality.**—There is a compelling public interest in maintaining a judicial system that is, both in fact and as publicly perceived, fair, impartial, and efficient. Thus, judges cannot be advocates for the interests of any parties; they must be, and

be perceived to be, neutral arbiters of both fact and law who apply the law uniformly and consistently.

(19a-19c) **Judges § 6.2—Discipline—Removal From Office—Grounds—Willful Misconduct in Office—Involvement in Investigation of Church Pastor.**—The evidence was insufficient to support a finding that a judge committed willful or prejudicial misconduct by asking a police officer, who was investigating a child molestation case, to investigate whether the suspect's church pastor was a licensed counselor. Although the judge had been a member of the same church and had had a dispute with the pastor, he was not acting in a judicial capacity. First, he was not performing one of the functions generally associated with his position as a judge. Second, although the judge was in his chambers when he met with the officer, that location was simply a convenient meeting place that the officer selected. The meeting had nothing to do with the judge's work as a judge, but rather his status as someone who knew individuals involved in the matter that the officer was investigating. Third, there was no evidence that the judge attempted to curry favor with the officer on account of his judicial status. Nor did the pastor's deposition testimony that the officer "felt obligated to perform the investigation" constitute clear and convincing evidence that the judge used, or attempted to use, his authority as a judge for improper ends. Further, the record did not indicate that the judge attempted to pressure the officer into investigating the pastor, and as a church elder, the judge was legitimately concerned about the pastor's conduct and his qualifications. Finally, the only evidence that the judge asked the officer to investigate the pastor was hearsay that did not amount to clear and convincing evidence.

(20) **Evidence § 33—Hearsay—Weight Accorded.**—Even unchallenged hearsay statements should be evaluated for what they are worth. The statements should be weighed by the trier of fact the same as other evidence and may be disregarded where shown to be unconvincing or insubstantial.

(21) **Judges § 6.4—Discipline—Recommendation by Commission on Judicial Performance—Review by Supreme Court—Factual Findings.**—On review of a recommendation by the Commission on Judicial Performance of discipline of a judge, the California Supreme Court accords special weight to the factual findings of the special masters, not to those of the commission.

(22a, 22b) **Judges § 6.2—Discipline—Removal From Office—Grounds—Prejudicial Misconduct in Office—Continuing to Preside Over**

**Criminal Case After Disqualification Motion.**—A judge committed prejudicial misconduct arising from his continuing to preside over a criminal case after a motion for disqualification had been lodged. He did not commit misconduct by refusing to transfer the matter after the disqualification motion and deciding to consider whether the defendant's right to a speedy trial had been violated. At most this constituted legal error that was not subject to discipline. Nor did he commit prejudicial misconduct in resuming the hearing despite the issuance of a writ ordering him to accept the peremptory challenge to qualification or in suggesting that the defendant's remedy was to petition for a writ. However, the judge did commit prejudicial misconduct in responding to his peremptory disqualification by publicly criticizing the prosecutors and the county court on the record. The judge expressed "shock" and "embarrassment" about the conduct of the "officers of the court" and accused them of "playing games" notwithstanding their pledge to uphold the law, support the Constitution, and protect "the people's rights." He also proclaimed that he did not "want anything to do with this court again."

(23) **Judges § 6—Discipline—Legal Errors.**—A judge should not be disciplined for mere erroneous determination of legal issues that are subject to reasonable differences of opinion, including questions concerning the limitations on the judicial power.

(24) **Judges § 6—Discipline—Commission on Judicial Performance—Purpose of Proceedings.**—In making its independent determination of the appropriate disciplinary sanction, the California Supreme Court considers the purpose of a Commission on Judicial Performance disciplinary proceeding, which is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. The court's task is to determine the nature of the discipline, if any, that is necessary to achieve these goals.

(25) **Judges § 6.2—Discipline—Removal From Office—Grounds—Multiple Acts of Willful and Prejudicial Misconduct in Office.**—Removal from office was warranted for a judge who committed multiple acts of willful and prejudicial misconduct, including ex parte communications with parties or witnesses in several criminal cases, multiple undignified reactions to parties' disqualification motions, and mishandling criminal cases. In disciplinary proceedings, the number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing a lack of temperament and an inability to perform judicial functions

in an evenhanded manner. In this case, the judge twice committed willful misconduct, and he committed prejudicial misconduct on multiple occasions. Together, these incidents reflected a continuing, pervasive pattern of misconduct, and his lack of judicial temperament was manifest. Also, the incidents of misconduct occurred during virtually the judge's entire term in office, and his previous legal experience should have acquainted him with proper procedures. In any event, lack of experience cannot mitigate willful misconduct. Moreover, rather than expressing contrition, the judge instead alleged there was a conspiracy against him. This belied any claim that he had learned from past experience and had modified his courtroom behavior. It demonstrated instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in every case. Thus, censure was not sufficient.

## COUNSEL

Dennis A. Fischer and John L. Ryan for Petitioner.

Jack Coyle for Respondent.

## OPINION

**THE COURT.**—Judge Thomas B. Fletcher of the Madera Superior Court has petitioned for review of the recommendation of the Commission on Judicial Performance (Commission) that we remove him from office for willful misconduct and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (prejudicial misconduct). (Cal. Const., art. VI, § 18, former subd. (c) (former subdivision (c)), see now art. VI, § 18, subd. (d).)[1] Judge Fletcher (petitioner) concedes that he committed some of the misconduct underlying the recommendation and that "his actions call for severe censure." However, he contests many of the Commission's misconduct findings and argues that removal "is inappropriately harsh under the facts" of this case. Having independently reviewed the record, we find clear and convincing evidence to sustain all but one of the Commission's misconduct findings. Moreover, although some of the incidents of

[1]In 1994, by approving Proposition 190, the voters significantly changed the procedure for disciplining judges under article VI, section 18 of the California Constitution. Because the conduct at issue here occurred before the constitutional amendments took effect on March 1, 1995, we apply the former version of article VI, section 18. (*Dodds* v. *Commission on Judicial Performance* (1995) 12 Cal.4th 163, 168, fn. 1 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*).)

misconduct may seem relatively minor, many unquestionably are not, and the record as a whole establishes a persistent pattern of misconduct that reflects a lack of judicial temperament. Accordingly, we adopt the Commission's removal recommendation.

## I. PROCEDURAL BACKGROUND

In 1988, petitioner was elected, and then appointed, as Judge of the Sierra Justice Court in Madera County. He was later reelected to that office for a term beginning in January 1995. However, at that time, he became a municipal court judge of the Sierra Judicial District by operation of Proposition 191. By virtue of court consolidation on July 1, 1998, while this matter was pending, petitioner became a judge of the Madera Superior Court.

In February 1995, the Commission voted to initiate formal proceedings against petitioner. It later prepared a notice of formal proceedings alleging numerous counts of either willful or prejudicial misconduct, and two amended notices of formal proceedings. On February 20, 1996, before three special masters this court appointed, an eight-day hearing began on the charges in the Commission's second amended notice of formal proceedings, which alleged nineteen counts (many with subcounts) of either willful or prejudicial misconduct. The special masters filed their final report with the Commission on June 4, 1996, finding that petitioner had committed either willful or prejudicial misconduct in a number of the instances alleged.

After hearing oral argument as scheduled on August 22, 1996, the Commission ordered the case submitted. Petitioner, who failed to appear on August 22, moved to vacate submission, explaining that he had received a letter containing the notice of the August 22 argument but never opened it. The Commission granted the motion and held argument on October 23, 1996. It issued its decision and recommendation on January 10, 1997. Seven members of the Commission voted to recommend petitioner's removal from office; the remaining three members voted for severe public censure. Petitioner filed his petition with this court in July 1997.[2]

## II. APPLICABLE LEGAL STANDARDS

**(1)** As relevant in this case, former subdivision (c) authorized removal of a judge from office for "willful misconduct in office." Willful misconduct is "unjudicial conduct committed in bad faith by a judge acting in his

[2]Resolution of this case has been delayed significantly by repeated filing extensions that petitioner requested so that he could address the numerous misconduct counts underlying the Commission's removal recommendation.

judicial capacity." (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 795 [119 Cal.Rptr. 841, 532 P.2d 1209] (*Spruance*).) As we recently explained in *Broadman* v. *Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1092 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*), to support a finding of bad faith, the evidence must establish that the judge performed a judicial act (1) "for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties)," or (2) "with knowledge that the act is beyond the judge's lawful judicial power," or (3) "that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority."

Former subdivision (c) also authorized removal of a judge from office for prejudicial misconduct, i.e., "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Prejudicial misconduct includes acts that a judge "undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284 [110 Cal.Rptr. 201, 515 P.2d 1], fn. omitted.) It also includes "wilful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity." (*Id.* at p. 284, fn. 11.) "In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring 'the judicial office into disrepute,' that is, the conduct would appear to an objective observer to be prejudicial to ' "public esteem for the judicial office." ' [Citation.]" (*Broadman*, *supra*, 18 Cal.4th at p. 1093.)

**(2)** In reviewing the Commission's removal recommendation under former subdivision (c), we may consider only those misconduct charges that the Commission has sustained. (*Broadman*, *supra*, 18 Cal.4th at p. 1089.) We independently review the evidentiary record and will sustain the charges of misconduct only if clear and convincing evidence proves them to a reasonable certainty. (*Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314 [267 Cal.Rptr. 293, 787 P.2d 591, 87 A.L.R.4th 679] (*Kennick*).) We give " 'special weight' " to the special masters' factual determinations, because they "had the advantage of observing the demeanor of the various witnesses. [Citations.] In addition, in recognition of the Commission's expertise, we accord 'great weight' to the Commission's conclusions of law. [Citations.]" (*Dodds*, *supra*, 12 Cal.4th at p. 168.) Based on our factual findings and legal conclusions, we then determine independently what, if any, discipline is appropriate. (*Id.* at pp. 168-169.)

## III. SPECIFIC CHARGES

As we have noted, petitioner concedes he committed prejudicial misconduct in some instances. However, he challenges many of the Commission's findings of prejudicial misconduct and all of its findings of willful misconduct. Because they are relevant to the proper level of discipline, we first briefly summarize the uncontested charges. We then consider the contested charges.

### A. *Conceded Prejudicial Misconduct*

#### 1. *Count Four: Improper Entry of Judgment Against Nonparty*

On November 30, 1992, in a small claims matter involving construction work done on property, judgment was entered for Thorn Hertwig against Tyrone Henderson as agent for Rickey Henderson. In January 1993, Hertwig amended his claim to add Rickey Henderson as a defendant. On May 24, 1993, the parties appeared for trial, and petitioner conducted a settlement conference. Also present was Ben Savage, the realtor who had sold the property to Rickey Henderson, who came to court as a witness for Hertwig. The parties agreed to a settlement, and a judgment was entered on May 24, 1993, directing Rickey Henderson to pay Hertwig $1,357.93. According to petitioner, the judgment did not mention Savage because Savage, although agreeing to pay damages, did not want a judgment entered against him. Savage disputed petitioner's recollection, testifying that he did not agree or respond when petitioner stated at the settlement conference that Savage should pay half of the damages. Savage later failed to pay Hertwig. In February 1994, although Savage had never been named or served in the action, petitioner directed entry of a "corrected" judgment that identified him as a defendant and directed him to pay damages. Savage appealed to the superior court, which reversed the judgment.

On these facts, the Commission unanimously concluded that petitioner committed prejudicial misconduct because he "made no effort to comply with or follow the law when he entered judgment" without providing Savage, who was never named as a party, notice and an opportunity to be heard. The Commission reasoned that petitioner "acted solely upon his belief that Savage ought to pay, and his pique that [Savage] did not." Petitioner does not contest the Commission's findings and conclusion. (See *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 374 [188 Cal.Rptr. 880, 657 P.2d 372] (*Gonzalez*) [basing discipline on "disregard for even the minimal requirements of fairness and due process"].)

#### 2. *Count Ten: Improper Comments About Counsel*

Attorney Nancy Staggs, who was representing a criminal defendant before petitioner, did not appear at a scheduled hearing. After an unrecorded

telephone conference with Staggs's office, petitioner stated in open court: "She shouldn't be handling criminal cases. [¶] Here's another example of a civil attorney who shouldn't be handling criminal cases." Petitioner then commented that Staggs "probably had something more important to do today, like go to a PTA meeting." He continued: "She has a whole bunch of kids. She's been having kids ever since I've known her." Before the special masters, petitioner denied making these comments, suggested that the court reporter "made [them] up" to assist petitioner's political opponents, and stated that he had instead made complimentary remarks about Staggs. However, he also admitted sending Staggs a letter of apology. In his petition to this court, petitioner "accepts the [Commission's unanimous] finding that his statements concerning Ms. Staggs were inappropriate and could be deemed" prejudicial misconduct. (See *Kennick*, *supra*, 50 Cal.3d at p. 325 [basing finding of prejudicial misconduct on "unprofessional, demeaning and sexist" remarks].)

3. *Count Fourteen: Improper Use of Court Staff for Campaign Purposes*

During the first half of 1994, petitioner was running for reelection; the primary was scheduled for June 7, 1994. At the end of a court session in late April 1994, petitioner had a group photograph taken of court staff and others who appeared before him. Petitioner's clerk and the public defender initially declined petitioner's request that they pose for the picture. The public defender was busy with clients when petitioner came to her office and made the request. However, after petitioner "insisted" that they participate, both reluctantly agreed. Petitioner's clerk felt that petitioner had "ordered" her to participate and that she had no choice.

Based on petitioner's representations, almost all of those photographed believed the picture was simply a personal memento; none understood that petitioner would use it in his reelection campaign.[3] Indeed, both the public defender and the clerk had informed petitioner they did not want to be involved in the campaign. Despite this knowledge and contrary to his representations, in May 1994, petitioner asked a local newspaper to print the photograph. The newspaper responded that, because of the imminent election, it would not do so without charge, and that it would publish the photograph only as a paid advertisement. Petitioner agreed to pay to have

[3]In light of the testimony of those photographed, the special masters expressly found that petitioner's testimony about the incident was not credible.

the picture published. On May 26, one week before the election, the picture appeared in the paper with the caption, "PAID POLITICAL ADVERTISEMENT."[4]

On this record, the special masters concluded that "part of [petitioner's] motivation in placing the advertisement was to assist his re-election campaign," and that by failing to get consent from those photographed, his "conduct surrounding the taking and use of the photograph . . . constitute[d]" prejudicial misconduct. The Commission unanimously agreed.

In this court, petitioner "concedes the sufficiency of the evidence to sustain" the conclusion that he committed prejudicial misconduct in *using* the photograph for political purposes without getting consent from all participants. However, he contests the conclusion that his conduct surrounding the *taking* of the photograph constituted prejudicial misconduct.

**(3)** In light of the circumstances here, we reject petitioner's contention. Petitioner himself testified that at least part of his purpose in having the picture taken was to assist his campaign. By insisting (over objections) that everyone participate, securing cooperation by stating that the picture was simply a personal memento, and failing to disclose his intent to use the picture in his campaign, petitioner committed prejudicial misconduct both in taking and using the picture for campaign purposes. (See *Gonzalez, supra,* 33 Cal.3d 359 at p. 374 ["exploitation of judicial office for political ends seriously and impermissibly undermines public esteem for the impartiality and integrity of the judiciary"].)

4. *Count Seventeen: Telling Clerk She Was in Contempt*

On August 12, 1992, petitioner met in his chambers with a court clerk to discuss her "pending termination from employment." After petitioner informed the clerk of the meeting's purpose and that he was tape-recording their conversation, the clerk replied that she did not want to discuss the issue unless her union representative was present, and she started to leave. Petitioner then stated: "Sit down . . . . I am ordering you to sit down here and talk to me." The clerk left petitioner's chambers. Petitioner followed her and "ordered her back into the office," but "she refused to come" and made a telephone call. As she made the call, petitioner, who was "upset," said "loudly": "[Y]ou are in contempt." Petitioner "does not dispute" the Commission's unanimous finding that he committed prejudicial misconduct in making this statement.

[4]In his answer, petitioner stated that the newspaper "may have told [him] that [the picture] would be labeled, 'PAID POLITICAL ADVERTISEMENT.' "

5. *Count One A: Ex Parte Communications Regarding Richard Henderson*

After his arrest on June 26, 1994, Richard Henderson was charged with possession of cocaine and marijuana. Petitioner later spoke with Henderson's uncle, who asked petitioner whether Henderson's mother could talk to him about Henderson's case and about helping Henderson with his drug problem. Petitioner replied that she could call him, but advised that she should not discuss the case with him. Henderson's uncle, who is a clergyman, expressed an interest in counseling Henderson.

Henderson's mother telephoned petitioner at his home a few days later to discuss her son's case and to make an appointment to see petitioner. She related Henderson's version of the arrest to petitioner. She also told petitioner that her son had a drug problem and smoked marijuana with his father. She requested that her son receive a heavy sentence that included Christian counseling. Petitioner, who knew the case would be before him, told her the district attorney would decide whether Henderson received drug counseling as part of any disposition. Petitioner did not believe the contact was improper because he viewed it as "a confidential mother asking for help for her son" and he "believed that [Henderson] would not even know of the conversation." Petitioner did not believe Henderson was entitled to know petitioner was communicating with Henderson's family members regarding his drug use. During the conversation, petitioner set up a meeting with Henderson's parents for sometime during the next two weeks.

On August 2, at the beginning of a hearing on Henderson's case, petitioner met with counsel in his chambers and disclosed his discussion with Henderson's parents and uncle about counseling, and the uncle's desire to be involved in the counseling. He also informed counsel that, because of these contacts, he was "out of this case," and the probation department should consider whether Henderson qualified for diversion and counseling.

After the probation department prepared the diversion report, but before a scheduled September 6 diversion hearing, petitioner met with Henderson's parents in his chambers. He gave them a copy of the diversion report and the police report "so they could see the situation there and the problems that they ha[d] with their son." He also advised them about how to deal with Henderson. Henderson's parents again requested that their son receive a heavy sentence that included Christian counseling. Petitioner replied that he could not order someone to receive Christian counseling.

Sometime after Henderson received diversion, his father left a telephone message for petitioner. When petitioner returned the call, Henderson's father

stated that Henderson was not complying with diversion requirements. Petitioner then determined that the probation department had not received notice Henderson was on diversion because the minute order did not reflect this disposition.

The Commission unanimously found that petitioner's ex parte contacts with members of Henderson's family constituted prejudicial misconduct. Petitioner concedes that these contacts "gave 'rise to an appearance of impropriety,'" "could reasonably be considered prejudicial to public esteem for the judicial office," and "constituted prejudicial conduct." **(4)**(See fn. 5.) (See former Cal. Code Jud. Conduct, now Cal. Code Jud. Ethics, canon 3B(7), adopted eff. Oct. 5, 1992 [prohibiting ex parte communications].)[5]

B. *Contested Charges*

1. *Counts One A and Three: Handling of the Henderson Matter*

In connection with the Richard Henderson matter, the Commission also unanimously concluded that petitioner committed prejudicial misconduct in failing to disqualify himself and willful misconduct in directing alteration of court records to mislead the Commission.

(a) *Count One A: Failure to Disqualify*

At the August 2 hearing on Henderson's case, defense counsel stated that Henderson had said petitioner was a friend of Henderson's uncle and that diversion was "a done deal." According to petitioner, on hearing this information, he concluded that Henderson did not deserve diversion because he was using his parents and uncle to manipulate the court. At that point, petitioner determined that his ex parte contacts and his feelings about Henderson had created a conflict and he decided to disqualify himself from making the diversion decision. Petitioner informed counsel of his decision, referred the matter to the probation department for preparation of a diversion report, and scheduled a diversion hearing for September 6. The probation department's report recommended against diversion, finding Henderson statutorily ineligible because of a prior conviction.

[5]Although the canons of judicial conduct "do not have the force of law or regulation, they reflect a judicial consensus regarding appropriate behavior, and are helpful in giving content to the constitutional standards under which disciplinary proceedings are charged. [Citations.] [¶] We therefore expect that all judges will comply with the canons. Failure to do so suggests performance below the minimum level necessary to maintain public confidence in the administration of justice." (*Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 838, fn. 6 [264 Cal.Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235] (*Kloepfer*).) We cite the canons that were effective on the date of the misconduct that petitioner committed.

At the September 6 hearing, the district attorney expressed willingness to consider diversion despite the recommendation. After Henderson's counsel asked the court to consider diversion, petitioner replied: "Well, I don't want to consider it. Number one is because . . . I know his uncle. I've talked to his uncle about getting him diversion and getting him treatment. And because of that, I don't think I should make the decision." Defense counsel then asked: "Should we send it down to Madera Justice Court?" Petitioner replied: "No. I—if you two can work it out, that's fine with me. I'll go along with anything. [¶] I just want to put it on the record that I've talked to his uncle about helping him on a diversion, if he gets diversion. [¶] And I think if I got involved in overruling the Probation Department at this point, I think it would be a conflict."

Contrary to his stated intent, petitioner then discussed with counsel Henderson's prior conviction, the reported level of his drug use, and his family situation, remarking on comments Henderson's uncle had made to petitioner about this subject. When defense counsel suggested getting a second probation report, petitioner replied: "I don't think they're going to change their mind." Counsel then asked: "You don't want to have another report?" Petitioner responded: "No. That would just tick them off." Defense counsel then expressed doubt about the probation department's conclusion regarding statutory eligibility. Petitioner then interjected: "Yeah, well, the problem is, too, it says here, a 'daily use of cocaine.' [¶] And diversion . . . was originated for people who are in danger or might become endangered. When you have a regular user, C.R.C. is the place for them." Petitioner also expressed doubt about the relevance of the fact that Henderson had not been caught using drugs for some time. Finally, petitioner asked: "What do the People want to do?" The district attorney then suggested getting a "rap sheet" and noted "numerous instances" where the court, on the prosecution's recommendation, had overridden the probation department's recommendation. Petitioner replied: "Absolutely. No problem with that. [¶] But I told you I have a conflict with that." At counsel's suggestion, petitioner then continued the diversion hearing to September 20 and set it before himself.

At the hearing on September 20, the district attorney recommended diversion. Petitioner responded: "All right. [¶] I told you that I wasn't going to make the decision in this. It's up to you." Henderson's counsel "ask[ed] for the court's order for diversion even though the [probation] report [did] not seem to be too favorable." Petitioner replied: "All right. [¶] Then . . . under the People's recommendation, I'll grant you diversion." He also directed Henderson to appear on March 21, 1995, for review of his compliance with the terms of diversion. Petitioner later explained to the Commission: "I should have denied the [diversion] request and set the case for

another hearing with another Judge, but knowing that the Court usually goes along with the D.A. recommendation in these type [*sic*] of cases, and the problem of getting a visiting Judge on a Tuesday for one case, I went along with the D.A. and granted diversion."

On this record, the Commission unanimously adopted the special masters' conclusion that petitioner committed prejudicial misconduct by "fail[ing] to disqualify himself after the ex parte communications" and improperly "delegat[ing] his [judicial] power [to order diversion] away to the District Attorney to avoid a conflict." Petitioner challenges these conclusions, noting that he "fully disclosed his [ex parte] contact," he indicated he did not want to decide the diversion question because of a conflict, the parties did not seek his recusal, and he had no independent duty to disqualify himself. He also challenges the conclusion that he improperly delegated his judicial authority, arguing that diversion was a "foregone conclusion" in this case.

**(5)** We find clear and convincing evidence to support the Commission's conclusions. By statute, a judge "shall be disqualified" if "[f]or any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code Civ. Proc., § 170.1, subd. (a)(6).) Petitioner was disqualified under this provision; he himself testified before the special masters that he had personal feelings about the propriety of granting diversion and that he should therefore not participate in the decision, based on his ex parte communications and Henderson's comment to his attorney that diversion was "a done deal." As petitioner later explained to the Commission: "I wasn't going to make the [diversion] decision, because I felt if I denied diversion it would look like I was mad at them, which I was. [¶] I was very angry at Mr. Henderson for playing games with his family . . . . And I felt that I needed to get out of the case." Disqualification based on the judge's "personal bias or prejudice concerning a party" may not be waived. (Code Civ. Proc., § 170.3, subd. (b)(2)(A).) Moreover, even as to waivable disqualifications, a waiver must be written, "signed by all parties and their attorneys and filed in the record." (Code Civ. Proc., § 170.3, subd. (b)(1); see *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 906 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams*).) Thus, petitioner's suggestion that the parties waived the disqualification is unconvincing.

We also agree that petitioner improperly delegated his judicial authority regarding diversion to the district attorney. Petitioner incorrectly contends that, because diversion was a "foregone conclusion" in this case, delegating

this decision did not constitute prejudicial misconduct. Regardless of the likelihood that Henderson would receive diversion, as petitioner conceded during the Commission proceedings, "legally it was [petitioner's] decision," and he "should have . . . set the case for another hearing with another Judge" rather than address his conflict by ceding his power to the district attorney. Petitioner's decision to follow the latter course constituted prejudicial misconduct. (See *McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 532 [116 Cal.Rptr. 260, 526 P.2d 268] (*McCartney*) [judge improperly delegated judicial power and committed misconduct by imposing sentences bailiff suggested]; cf. *Fewel* v. *Fewel* (1943) 23 Cal.2d 431, 436 [144 P.2d 592] [judicial decisionmaking " 'may not be delegated to investigators or other subordinate officials or attachés of the court, or anyone else' "].)

(b) *Count Three: Alteration of Court Records*

The record contains three documents entitled "Notice, Sentence, Commitment Form" that purport to memorialize Henderson's September 20 diversion hearing. As to disposition, the first, exhibit No. 17, is blank. The second, exhibit No. 18, appears to be a copy of the first with addition of the following handwritten entry for Henderson's sentence: "Formal Diversion granted. Father to find counselling program."[6] The third, exhibit No. 19, appears to be a copy of the second with a handwritten addition indicating, "per Dan Pursell," who was the district attorney on the case. Toward the bottom of the form, the following phrase was added to exhibit No. 19: "Judge Fletcher Disqualifies himself for any violation of Diversion Hearings." Finally, a handwritten "Post-it" note attached to exhibit No. 19 stated: "Judge Fletcher—disq. himself."

On October 26, one of the court clerks, Fran Saunders, faxed exhibit No. 18 to the probation department to inform it of the diversion disposition. On October 25, the Commission sent petitioner a letter of inquiry regarding the ex parte contacts and the grant of diversion in the Henderson matter. Petitioner's December 30 response to the Commission letter attached a copy of exhibit No. 19, but did not inform the Commission that the exhibit contained entries that did not appear on exhibit No. 18. On November 2, the Commission obtained a copy of exhibit No. 18 from the probation department as part of the investigation of petitioner. In January 1995, the Commission asked petitioner to comment on allegations that, between October 26, 1994, and his December 30 response to the Commission, during the Commission's investigation, he directed alteration of the original minute order.

[6]The second document also indicates an additional address for Henderson.

Saunders testified as follows regarding preparation of these documents: On September 20, 1994, or sometime after that date but before October 26, she prepared a minute order in the form of exhibit No. 18.[7] She received a telephone call from the probation department regarding the status of the case. In response to the inquiry, on October 26, she faxed the probation department a copy of the then existing minute order, which was in the form of exhibit No. 18.[8] A few days later, petitioner approached Saunders and directed her to change the minute order to reflect that he had disqualified himself from future hearings in the case and that diversion was granted "per Dan Pursell." She asked petitioner whether he wanted her to prepare an amended minute order, because the court's policy was to prepare amended orders when existing orders were changed. Petitioner "said no, he didn't, just to change it." Saunders did not recall petitioner's stating in court on September 20 that he was disqualifying himself from hearings on diversion violations. She testified that the minute order she originally prepared would have reflected that disqualification had she heard petitioner make that statement.

**(6)** On this record, we agree with the Commission's unanimous conclusion that petitioner committed willful misconduct in his handling of the minute orders. Petitioner directed the clerk to alter a minute order and, contrary to court policy, not to indicate she had changed the order. The evidence strongly suggests he took this action after receiving the Commission's inquiry about his ex parte communications in the case. Petitioner told the Commission he received the inquiry within 48 hours of an October 26 telephone conversation with Henderson's father, and Saunders testified that petitioner directed her to alter the minute order within a few days of that date. In any event, petitioner submitted a copy of exhibit No. 19 to the Commission with his December 30 response without disclosing that he had directed alteration of the minute order to support his explanation of the events in the Henderson case. Petitioner's actions in this regard constituted willful misconduct. (See *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 643-645 [175 Cal.Rptr. 420, 630 P.2d 954] (*Wenger*) [backdating affidavit was willful misconduct].)

In defense of his actions, petitioner argues that he did not commit willful misconduct because the alterations simply conformed the minute orders to

[7]The testimony was uncertain regarding the origin of exhibit No. 17, the blank minute order that Henderson signed. The official court file did not contain a copy of an order in this form. Both Saunders and the court's supervising clerk speculated that exhibit No. 17 was a copy of a minute order that was prematurely distributed to the parties at the September 20 hearing before the proceedings were completed and the appropriate entries were made.

[8]Saunders did not recall petitioner's telling her that the minute order was incorrect and incomplete or asking her to send a copy of a corrected order to the probation department.

the docket entry for the September 20 hearing, which petitioner asserts "was completed contemporaneously with the court session" and constituted the court's "official minutes." This docket entry, petitioner maintains, "was the source of all of the material added to Exhibit 17, to make Exhibits 18 and 19 in order to accurately reflect what had occurred." "This being so," petitioner continues, "Exhibits 17, 18 and 19 are merely draft documents that cannot be 'altered' and would not mislead experienced readers." According to petitioner, "[t]he editing of a draft document cannot be an impermissible alteration if the draft document is, as yet, incomplete."

For several reasons, petitioner's response is unpersuasive. First, regardless of the docket entry, the fact remains that, during the Commission's investigation of the Henderson matter, including petitioner's role in granting diversion, petitioner directed alteration of the order, directed that the order not indicate that it had been altered, and sent the Commission a copy of the altered order without detailing the circumstances. By forwarding only the altered order, petitioner presented the Commission with a grossly incomplete and misleading response. (See *Adams*, *supra*, 10 Cal.4th at pp. 910-911 [judge's inaccurate and incomplete responses to the Commission constituted willful misconduct].)

Second, the record contradicts petitioner's contention that the docket entry reflects *all* of the information added to the orders. The entry states: "Diversion granted; Judge Fletcher disq. himself for any violation of Diversion hrgs." Although this entry reflects petitioner's disqualification on *future* diversion violation hearings, it does *not* indicate that diversion was granted "per Dan Pursell." This alteration of the order was important to support petitioner's claim that, because he had disqualified himself, he let the prosecutor make the initial diversion decision.

Third, the record also does not support petitioner's claim that the docket entry was "completed contemporaneously with" the September 20 hearing. The initials of the supervising clerk, Velma Dee Buchanan, appear beside the docket entry, indicating that she made it. However, Buchanan was not the clerk for the September 20 hearing; Saunders was. Moreover, Buchanan learned about petitioner's alleged disqualification sometime after September 20, when petitioner discovered that the case file did not reflect disqualification and informed Buchanan of the situation. The record thus suggests that Buchanan made the docket entry sometime after, and not contemporaneously with, the September 20 hearing.

Fourth, a conflict exists between the docket entry and the reporter's transcript of the September 20 hearing. Unlike the docket entry, but consistent with Saunders's recollection, the hearing transcript does not reflect that

petitioner disqualified himself from *future* diversion violation hearings. On the contrary, it shows that petitioner ordered the parties to appear before him again on March 21, 1995, for a compliance review hearing. Consistent with the transcript, on March 21, 1995, Henderson appeared before petitioner for a diversion review hearing.[9] Given all of the circumstances we have detailed, and the court reporter's certification that the transcript "comprise[d] a full, true, and correct transcript" of the September 20 hearing, we afford the reporter's transcript more credence than the docket entry. (See *People* v. *Smith* (1983) 33 Cal.3d 596, 599 [189 Cal.Rptr. 862, 659 P.2d 1152].)

Finally, petitioner's current contention that it was unnecessary to mark the altered orders as "corrected" stands in stark contrast to his position *and* the uncontradicted testimony before the special masters. In addition to Saunders's testimony regarding court policy, which we have already discussed, petitioner testified that Saunders should have followed court procedures for preparing an amended minute order in complying with his order to make the alterations. While cross-examining Saunders, he reiterated that court policy required her to indicate on the altered order that it was "corrected or amended," and he challenged her testimony that he "told [her] to break that policy and violate the law." And, in closing argument to the Commission, petitioner again stressed that, "if [clerks] add anything to a minute order after the defendant signed, they are supposed to mark it amended and supposed [to] get the defendant to agree to it." Buchanan, the court's supervising clerk, confirmed petitioner's position, testifying that court policy prohibits clerks from altering signed minute orders like exhibit No. 18 without indicating across the top that they are corrected orders and distributing copies to all parties. She also testified that petitioner's policy was to ask for preparation of a corrected minute order if he discovered that a minute order did not reflect his verbal order. Thus, petitioner's current position is directly contrary to the uncontradicted evidence in the record.

Indeed, petitioner's newly minted explanation is just another example of his vague and contradictory representations throughout these disciplinary proceedings regarding these documents. Petitioner maintains that Saunders faxed exhibit No. 18 to the probation department at his request after he learned from Henderson's father on October 26 that Henderson was not complying with diversion requirements. In his February 1995 response to the Commission's January 1995 inquiry about the matter, petitioner stated: "I don't recall looking at the minute order or the file on 10-26-94." Regarding the differences between exhibit Nos. 18 and 19, he stated: "The only explanation I can offer is that Ms. Saunders sent a FAX copy to the probation department and then added the rest at some later time." In his answer to the

[9]The minute order for that hearing indicates: "Need visiting Judge."

Commission's notice of formal proceedings, petitioner gave a different account. He there maintained that, after receiving the call from Henderson's father on October 26, he "pulled the file," discovered that the minute order did not correctly reflect that Henderson had been granted diversion pursuant to the district attorney's "decision" and that petitioner had disqualified himself, and "ordered" Saunders to make the necessary corrections and send it to the probation department. Petitioner's testimony before the special masters was initially consistent with this latter account, although he additionally noted that the minute order he found in the file on October 26 was in the form of exhibit No. 18.[10] However, after being confronted with his previous position in his February response, petitioner began to waver as to whether he looked at the file after the October 26 phone call. Later, in arguing his case to the Commission, petitioner changed his account once again. He told the Commission that his "only order to Ms. Saunders was to fax" the minute order to the probation department. Contrary to his testimony before the special masters, petitioner told the Commission that he had not ordered Saunders to amend the minute order. When asked whether he "direct[ed] her to change it in any way," petitioner replied, "No, I did not," and he suggested that Saunders made the changes on her own initiative.[11] Of course, as we have explained, petitioner has shifted his position yet again in this court, conceding that he directed Saunders to prepare a corrected minute order, but arguing that this action did not constitute misconduct because the altered documents were merely incomplete draft orders.

Petitioner's representations regarding his disclosures to the Commission on this topic are similarly confused and inconsistent. Petitioner initially testified that, with his December 30 response to the Commission's inquiry about ex parte communications, he sent copies of both exhibit Nos. 18 and 19 to show that the order had been altered. He then explained that he obtained a copy of exhibit No. 18 on October 26 when he reviewed the file after talking with Henderson's father. Later, however, he testified that he copied exhibit Nos. 18 and 19 when he received the Commission's inquiry about the matter. He also later testified that he sent the exhibits, not with his December 30 response, but with his February 1995 response to the Commission's January 1995 inquiry about the altered minute orders. Regarding his submission of minute orders to the Commission, he then testified: "I'm sorry. I don't recall now. . . . I remember sending two minute orders, but I don't remember which they were and when I looked at them . . . ." Later, petitioner again testified that he sent the two minute orders in response to the

[10]This testimony supports Saunders's testimony that she prepared a minute order in the form of exhibit No. 18 before October 26.

[11]During his testimony before the special masters, petitioner suggested that Saunders had made changes "to make it look like [he] was falsifying documents."

Commission's January 1995 inquiry, but he could not recall how he got a copy of the order in the form of exhibit No. 18. Before the Commission, however, petitioner appeared to state that he first received a copy of the minute order in the form of exhibit No. 18 from the Commission as part of its January 1995 inquiry. This last statement was consistent with the Commission's position that petitioner never submitted a copy of a minute order in the form of exhibit No. 18 and that he had only submitted a copy of exhibit No. 19. Petitioner's continually shifting explanations regarding these exhibits are further evidence of his willful misconduct in attempting to deceive the Commission. (See *Adams, supra,* 10 Cal.4th at pp. 910-911 [judge's inaccurate and incomplete responses to the Commission constituted willful misconduct].)

2. *Count One B: Ex Parte Contacts With Peter Vanderputten*

In connection with the dissolution of his marriage, Peter Vanderputten was criminally charged with violating court orders, violating a protective order, and allowing or causing a child to suffer. Under an agreement with the district attorney, Vanderputten pleaded guilty to the charges, and sentencing was continued, with dismissal to follow after a year if he committed no further violations and obeyed court orders. The case remained pending before petitioner until he dismissed the charges in accordance with the plea agreement. During that time, Vanderputten often appeared before petitioner for compliance review. At some point, Vanderputten talked about committing suicide and other violent acts. In response, and to protect Vanderputten and his family, petitioner recommended that Vanderputten seek counseling. As an alternative, petitioner advised Vanderputten that he was welcome to attend a Saturday morning men's fellowship group that petitioner led. Vanderputten attended petitioner's fellowship group a few times. The men at the group were "supporting him and trying to get him to leave his wife alone, and . . . obey all laws, to act like a reasonable person."

**(7)** On this record, we agree with the Commission's unanimous conclusion that petitioner committed prejudicial misconduct by engaging in improper ex parte contacts with Vanderputten. (See former Cal. Code Jud. Conduct, canon 3A(4), as adopted eff. Jan. 1, 1975, see now Cal. Code Jud. Ethics, canon 3B(7).) The evidence clearly shows that at petitioner's fellowship meetings Vanderputten discussed the very problems that led to the criminal charges pending before petitioner and his difficulties in accepting the situation. By his own admission, petitioner viewed himself as Vanderputten's probation officer. In one of his responses to the Commission, petitioner conceded that, because of these ex parte contacts, he "would have had to disqualify [him]self" from hearing allegations that Vanderputten

violated his plea bargain. We agree with petitioner's concession and conclude that he committed prejudicial misconduct with regard to Vanderputten. (See Code Civ. Proc., § 170.1, subd. (a)(6).)

We reject petitioner's claim that this conclusion violates his constitutional right to practice his religion. While presiding over a pending criminal case and after recommending that a defendant obtain counseling, petitioner invited that defendant to petitioner's fellowship group specifically to discuss and address the problems underlying the criminal charges. That, as part of addressing those problems, the group members would look to the Bible for guidance does not make our inquiry regarding petitioner's conduct an issue of religious freedom. As a judge, petitioner may not participate in an ongoing support group where defendants with cases pending before him discuss their attempts to comply with the terms of their plea bargains.[12]

3. *Count One C: Ex Parte Contacts With Dennis Jonathan*

In January 1991, Dennis Jonathan was charged with driving with an illegal blood-alcohol concentration and having a prior drunk driving conviction. On March 25, he appeared with counsel before petitioner, pleaded guilty to the charge, and admitted the prior conviction. Petitioner accepted the plea and then offered to postpone sentencing "for a couple months and see how [Jonathan was] doing on [his] programs," i.e., so Jonathan could "prove to the court that [he] ha[d] control over [his] drinking." After Jonathan accepted petitioner's offer, petitioner stated: "I do have personal knowledge of Mr. Jonathan and his programs, by the way." Jonathan's counsel replied that she was aware of this fact. No one was at the hearing for the prosecution.

Petitioner's acquaintance with Jonathan began when he offered to help petitioner get elected. Petitioner next saw Jonathan in late 1988, when he appeared before petitioner on a hit-and-run charge. According to petitioner, he disclosed to counsel during that proceeding that he knew Jonathan from the campaign, that he "felt uncomfortable in sentencing Mr. Jonathan, [and] that the only way [he] would hear the case . . . was that the sentence would be agreed between [counsel] . . . ." Petitioner was concerned "that Mr. Jonathan might think he got a special favor . . . ." Petitioner next saw Jonathan at the church that petitioner and Jonathan's parents attended. Later, in 1989, Jonathan appeared before petitioner on his first drunk driving

[12]We also reject petitioner's suggestion that he received inadequate notice of this charge. In its second amended notice of formal proceedings, the Commission cited Vanderputten's attendance at the "men's prayer breakfast group on Saturday mornings" as an example of petitioner's "engag[ing] in improper ex parte communications," "fail[ing] to disqualify [him]self" despite ex parte communications, and "tak[ing] action which appeared unusually lenient toward defendants after engaging in ex parte communications." These allegations afforded petitioner ample notice regarding the Vanderputten case.

charge. After taking Jonathan's guilty plea, petitioner sentenced him to the "usual" sentence for first-time offenders.

After his first drunk driving conviction, Jonathan began attending petitioner's Saturday morning men's fellowship group. Before his 1991 arrest, Jonathan attended group meetings approximately once a month for six to eight months. At group meetings, Jonathan disclosed that he was an alcoholic and that he needed help. After his 1991 arrest, but before sentencing, Jonathan attended two or three more group meetings. At a meeting before his first court appearance, he informed petitioner that he had " 'made a terrible mistake, . . . slipped on [his] sobriety and . . . received a ticket for driving under the influence.' "[13] According to Jonathan, petitioner "was sympathetic."

Petitioner testified that he decided to leave Jonathan's sentence to the agreement of counsel because of these contacts. Petitioner was concerned that, if he sentenced Jonathan, "the appearance might be that [petitioner] . . . was lenient, no matter what [he] did." Petitioner "didn't want anyone to say that [he] was lenient . . . because [Jonathan] got people to vote for [petitioner] and his parents went to the [church petitioner] attended." According to petitioner, he advised the district attorney that he knew Jonathan, that he would preside in the case if counsel did not object, but that he would leave it to counsel to agree on the sentence because of his concern about claims of leniency. The district attorney, however, did not recall that petitioner made any of these disclosures.

Because Jonathan needed to get to work, he appeared for sentencing on July 30 before court was in session. Sentencing occurred in petitioner's chambers. The district attorney was present, but defense counsel was not. Petitioner had contacted defense counsel about the matter, and she had replied that her attendance was unnecessary because she knew what the sentence would be. She and the district attorney had agreed to recommend a sentence of a fine and jail time. According to petitioner, Jonathan waived his right to have counsel appear for sentencing; there is no record of the proceedings to verify petitioner's claim. Notwithstanding his purported decision to leave Jonathan's sentence to counsel, petitioner proposed that, in lieu of the fine and jail sentence, Jonathan be required to perform community service in the form of construction work on a proposed addition to the courthouse. Petitioner eventually imposed this sentence. The district attorney characterized this sentence as "unusual," noting that in 99 percent of the cases of second-time offenders, service of a minimum 10-day jail sentence is required.

[13]Petitioner is thus incorrect in asserting that "no discussion of the case took place" at the fellowship meetings.

Over a year later, petitioner saw Jonathan in the court clerk's office. With no attorneys present, he informed Jonathan that the addition to the courthouse had not been approved and that he would have to perform his community service in another way. Petitioner asked Jonathan how he wanted to fulfill his sentence. According to Jonathan, petitioner gave him a list of options from which to choose. Petitioner then modified Jonathan's sentence in accordance with Jonathan's preference.

**(8)** On this record, we agree with the Commission's unanimous conclusion that petitioner committed prejudicial misconduct in handling the Jonathan matter. As in the Henderson matter, petitioner recognized that his ex parte contacts with Jonathan created a conflict, and his initial solution was simply to cede the sentencing decision to counsel. He did not disclose his ex parte contacts to the district attorney, and there is no evidence that he disclosed even to defense counsel that he had discussed the offense with Jonathan at a fellowship meeting. Moreover, despite his ex parte contacts and his decision not to participate in sentencing, petitioner took control of sentencing and imposed an unusually lenient sentence that included no actual jail time. Petitioner himself admitted that suspension of the jail sentence and fine was not part of "the normal sentence" for a second drunk driving offense. Over a year later, petitioner modified the sentence through additional ex parte contacts with Jonathan, without involvement of either defense counsel or the district attorney. The record thus contains clear and convincing evidence that petitioner committed prejudicial misconduct in his handling of the Jonathan matter. (See former Cal. Code Jud. Conduct, canon 3A(4), as adopted eff. Jan. 1, 1975, see now Cal. Code Jud. Ethics, canon 3B(7); Code Civ. Proc., § 170.1, subd. (a)(6).)

We reject petitioner's claim that Jonathan's sentence was "within customary local guidelines for the rare, or exceptional case." The record shows that service of jail time was not required only where a single parent could not care for her small children during incarceration or the defendant had a physical problem or was elderly. Petitioner has identified no circumstance that justified treating the Jonathan matter as an exceptional case.

4. *Count One D: Ex Parte Contacts With Robert Reagan, Jr.*

Robert Reagan, Jr., approached petitioner "at [a] restaurant and complained about a speeding violation and told [petitioner] he did not have the money to pay for it." Petitioner "knew" Reagan "by his many appearance[s] in court." Petitioner and Reagan also had attended the same school functions because their children had attended the same school for at least 10 years. Petitioner replied that Reagan "could do community service for the fine. Mr.

Reagan agreed and [petitioner] gave him a couple of month[s] to complete and show proof." Petitioner also told Reagan that he had to attend traffic school. Petitioner then "went back to court," "pulled the file," and indicated that he had given Reagan "an extension" to perform his community service. A few months later, a warrant issued because Reagan had not paid his fine. In court, Reagan stated that "he did not understand what had happen[ed] and asked for another chance to do the service and attend traffic school . . . ." In his response to the Commission charges, petitioner stated: "Because I had handled it, and I did not have a clerk do it, I felt that I should give him one more chance, and if he failed this time, it would be properly documented by a clerk. Then he would be charged with failure to pay."

**(9)** We agree with the Commission's unanimous finding that petitioner committed prejudicial misconduct in handling the Reagan matter. (See former Cal. Code Jud. Conduct, canon 3A(4), as adopted eff. Jan. 1, 1975, see now Cal. Code Jud. Ethics, canon 3B(7); Code Civ. Proc., § 170.1, subd. (a)(6).) Petitioner informally discussed Reagan's situation at the restaurant and agreed to give him an extension of time in order to perform community service in lieu of a fine. Petitioner then altered the official court file to reflect his informal handling of the matter. According to petitioner's own response, his ex parte handling of this matter confused Reagan and required him to give Reagan still another chance after a warrant was issued when he failed either to pay or to perform community service.

5. *Count One E: Ex Parte Contacts With Steven Pearson*

In July 1990, petitioner placed Steven Pearson on probation after he pleaded guilty to brandishing a firearm. Sometime after sentencing, Pearson began attending petitioner's Saturday morning fellowship meetings. According to petitioner, Pearson had "serious spousal abuse problems," was a "very sick man," and had a "very violent temper." Pearson discussed, and petitioner counseled him about, these problems during the fellowship meetings. Pearson became "a real problem" for petitioner and his wife, and they had "to discourage him from seeking [them] out."

While Pearson was on probation, he and his wife were charged with violating zoning laws by keeping piles of junk in their yard. Petitioner was personally aware of the circumstances underlying the charge; he had stopped by Pearson's property, seen the junk in the yard, and advised Pearson to dispose of it. Petitioner believed that Pearson, and not his wife, was responsible for the violation, and petitioner told the district attorney of his belief. According to petitioner, he also told the district attorney he was disqualifying himself from hearing the case. The district attorney, however, did not

recall petitioner's saying anything about the Pearsons or whether he had a problem with them.

Consistent with his practice in similar cases, the district attorney asked that the matter be continued until, and dismissed when, the Pearsons cleaned up their property. At the district attorney's request, petitioner continued the matter two or three times. Petitioner did not believe that the conflict created by his ex parte contacts and his knowledge of the zoning violation prevented him from ordering a continuance. However, petitioner also believed that the district attorney gave Pearson too much time to clean up the property and should have forced Pearson to act more quickly. Petitioner remembered that Pearson's earlier brandishing offense involved a neighbor who was angry about junk in Pearson's yard.

**(10)** On this record, we agree with the Commission's unanimous finding that petitioner committed prejudicial misconduct in continuing to preside over the zoning case despite his personal knowledge of the relevant circumstances and his ongoing personal relationship with Pearson through the fellowship meetings. Because of the conflict that these contacts created, petitioner exercised no substantive judgment in considering the district attorney's continuance requests. By his own admission, petitioner thought the district attorney was giving Pearson too much time to clean up his property, creating a potential for another confrontation with his neighbor. But for his decision not to make substantive rulings in this case, petitioner might not have acceded to all of the continuance requests. Rather than participating in the case under these circumstances, he should have recused himself. (See former Cal. Code Jud. Conduct, canon 3A(4), as adopted eff. Jan. 1, 1975, see now Cal. Code Jud. Ethics, canon 3B(7); Code Civ. Proc., § 170.1, subd. (a)(6).) In failing to do so, he committed prejudicial misconduct.

6. *Count One F: Ex Parte Contacts With Witnesses*

On July 27, 1993, Eddie Riegle appeared without counsel before petitioner for arraignment on a misdemeanor charge of assault with a deadly weapon (a BB rifle). The district attorney requested a brief continuance for plea negotiations, indicating his belief that the shooting was accidental. He wanted to discuss the incident with the victim. He also wanted to investigate how various sentence requirements would affect Riegle's Army service, which was to begin the next month.

On August 3, Riegle again appeared before petitioner without counsel. Under a plea bargain, the district attorney proposed that Riegle plead guilty

to simple battery and receive a sentence of eight days of community service and a fine. The district attorney explained that he had discussed the sentence with the victim, who had no objection. Petitioner then suggested that Riegle serve eight days in jail in lieu of the community service. Gary Whitley, a friend of Riegle's who was an inactive attorney and who was appearing as a character witness, responded that the Army would not accept Riegle under that sentence. Petitioner replied that the charge was too serious for a sentence of only eight days of community service. Petitioner then granted Riegle's request for time to consider the matter, and Riegle left the courtroom.

When Riegle returned and his case was called again, Kimberly Fletcher, the public defender, accompanied him and attempted to negotiate with petitioner for the sentence the district attorney had proposed. During this period, and while on the bench, petitioner telephoned both the victim and the park ranger who arrested Riegle. Because both were unavailable, petitioner left messages for them.

While court was still in session, the ranger returned petitioner's call. Petitioner took the call at the bench, but did not put it on the speaker phone, so Riegle and counsel could hear only petitioner's side of the conversation. According to petitioner, he intended to put the call on the speaker phone, but decided not to because the ranger became irate upon learning of the proposed plea bargain. Petitioner repeated in open court parts of his conversation with the ranger as it occurred and related more of it after the call ended. The evidence consistently showed that, during the call, petitioner referred to Riegle as a "punk" and made comments like, "That's what I thought. Bad attitude." After the call, petitioner again stated: "Just what I thought. This ranger has affirmed that he had a bad attitude. He's a punk kid." Petitioner also expressed the opinion that Riegle should be tried and that he would be convicted. Petitioner also stated that he would not accept the negotiated plea bargain.

**(11)** On this record, we agree with the Commission's unanimous conclusion that petitioner committed prejudicial misconduct by making ex parte contacts with the ranger during the Riegle matter.[14] (See former Cal. Code Jud. Conduct, canon 3B(7), as adopted eff. Oct. 5, 1992, now Cal. Code Jud. Ethics, canon 3B(7); Code Civ. Proc., § 170.1, subd. (a)(6).) Petitioner's

[14]The Commission charged that petitioner "frequently telephoned victim witnesses and/or law enforcement personnel from court during pretrial proceedings to obtain their views and information concerning matters before [him]." However, the record contains only scant evidence of contacts other than in the Riegle matter. A court reporter testified generally that petitioner had made such calls six to twelve times, but could not recall a specific incident other than the Riegle matter. Similarly, an attorney who appeared before petitioner testified

asserted concern about embarrassing the ranger does not excuse his decision to exclude counsel and the defendant from a conversation in which he obtained information that influenced his handling of the case.

Contrary to petitioner's assertion, the evidence in the record does not show the parties stipulated that petitioner could make these calls or exclude them from his conversation with the ranger. According to Whitley, petitioner made the calls "[w]ithout telling anyone what he was going to do." Kimberly Fletcher similarly testified that no one suggested petitioner make these calls; he acted "spontaneously," and "on [his] own." Consistent with this evidence, the hearing transcript does not reflect that petitioner either requested or received stipulations to his ex parte contact with the ranger.[15]

7. *Count One G: Ex Parte Contacts Regarding Bench Warrants*

The Commission alleged that, on numerous occasions, petitioner "telephoned defendants, including defendants [he] knew, for whom bench warrants had been issued to advise them to come to court." In his answer and testimony, petitioner admitted that he made these calls approximately 25 to 30 times. Petitioner explained that he informed these individuals the court was processing a warrant on them and that the warrant would not issue if they appeared in court. Before placing the calls, petitioner did not inform the district attorney or determine whether the individuals had counsel. Nor did he ask about this latter fact during the calls. In petitioner's view, this practice saved time for the understaffed clerk's office, by eliminating the need to process warrants for those who responded to petitioner's calls. Petitioner discontinued this practice when another judge informed him that it might violate the separation of powers doctrine and create conflicts.

**(12)** We agree with the Commission's unanimous finding that petitioner committed prejudicial misconduct in making these ex parte contacts. Petitioner should not have conducted court business through informal, ex parte contacts over the telephone. (See former Cal. Code Jud. Conduct, canon 3A(4), as adopted eff. Jan. 1, 1975, see now Cal. Code Jud. Ethics, canon 3B(7).) In his petition, petitioner insists that his primary motivation was to clear up improper arrest warrants for persons who were not lawfully subject to arrest. The evidence does not support this contention, but shows instead

that petitioner made such calls from the bench over counsel's objection, but she could not identify specific incidents.

[15]In arguing to the contrary, petitioner cites the district attorney's testimony that, "on a number of occasions," petitioner made telephone calls when he wanted to verify information relating to a proposed settlement, and that "counsel" stipulated to these contacts. However, this testimony described only petitioner's general practice and did not specifically address the Riegle incident.

that petitioner simply believed that his informal handling of these warrants was the most efficient way to conduct the court's business. In any event, petitioner's speculation "that maybe some of [the arrest warrants] were improper" does not excuse his decision to address this problem through ex parte telephone contacts.

8. *Count Eight: Prejudgment of Evidence in the Wickham Matter*

On November 1, 1994, petitioner presided over a preliminary hearing on a felony drunk driving charge against Aaron Wickham. At the outset of the hearing, defense counsel explained that Jon Fry was the driver of the car and could "completely exculpate" Wickham, and that a continuance was necessary to subpoena Fry. After petitioner heard testimony from the arresting officers and Wickham, defense counsel again requested a continuance because of Fry's absence. Petitioner proposed a week's continuance, and defense counsel objected, arguing that Wickham should not have to remain in custody that long "when he's got a guy to come in to say that he wasn't driving." Petitioner then explained that credibility determinations would be made by the jury during trial, not by the court during the preliminary hearing.

Defense counsel then asked whether petitioner was saying "that [he] wouldn't believe [Fry]." Petitioner replied: "This court has dealt with Jon [Fry] many, many times, and his credibility is not too high." Counsel objected that petitioner was "prejudging [Fry's] testimony." Petitioner replied: "No. I'm just warning counsel that he has come into this Court and he's been before this court many times. And he's broken many promises to this court and has many failures to appear in court. And I hope you don't expect the court to regard his testimony like any other citizen in the community." Petitioner suggested that he might dismiss the case if Wickham got the prosecution's sole eyewitness to admit she had lied to the police, and then explained: "But when you want me to waive [*sic*] who believes who and who witnesses things, that's the jury's job; that's not the court's job." Petitioner then stated that he did not "believe [the prosecution witness] would have much more credibility in this court than Jon [Fry]. They're both recovering alcoholics that are working hard to try to stay out of trouble." Defense counsel then interjected, "So you can't believe one or the other really." Petitioner replied: "Right. It's a tie." After defense counsel started to express hope that petitioner "might be convinced by—," petitioner interrupted and said, "I'm willing to listen." Petitioner also expressed skepticism about Fry's testimony, noting that he had failed to say anything when he was in court during Wickham's arraignment. Petitioner explained: "What I'm trying to say, Counsel, is why didn't [Fry] volunteer that information to the court if he knew his friend was being charged with him driving the car?"

According to petitioner, he believed that defense counsel would withdraw the continuance request after hearing petitioner's remarks about Fry. In his testimony before the special masters, petitioner explained: "I was trying to convince [defense counsel] that we should end th[e] preliminary hearing; that the Court ha[d] heard enough to hold the defendant to answer . . . ." Knowing that defense counsel was unfamiliar with Fry's background, petitioner made his remarks "with anticipation that [defense counsel] would see the futility of prolonging the hearing and wasting court time." Petitioner also stated that, based in part on his view of Fry's "credibility," petitioner "wouldn't have changed [his] mind" even if Fry had testified at the preliminary hearing that he had been the driver.

**(13)** On this record, we agree with the Commission's unanimous conclusion that petitioner committed prejudicial misconduct during the Wickham case by expressing prejudgment of Fry's credibility. The record does not support petitioner's contention, raised for the first time in this court, that he was simply fulfilling his duty as a judge to disclose his personal knowledge and opinion of a defense witness. Petitioner's contention is inconsistent with his failure to disclose his opinion of Fry at the start of the preliminary hearing despite his knowledge that Fry was Wickham's primary witness; petitioner waited until after hearing the arresting officers' testimony before informing defense counsel. More importantly, by his own admission, petitioner made his remarks to persuade defense counsel not to call Fry and to agree to end the preliminary hearing. Indeed, contrary to his current position that he made his remarks simply to fulfill some ethical or judicial duty, petitioner acknowledged in his answer to the Commission's allegations "that there is no excuses [*sic*] for putting on the record, the past performances and opinions of the witnesses." We agree with petitioner's earlier assessment of his conduct. His attempt to influence counsel's handling of the case by disclosing his bias against Wickham's primary witness and his prejudgment of that witness's credibility constituted prejudicial misconduct. (See *Dodds*, *supra*, 12 Cal.4th at p. 176 [judge's "prejudgment in the handling of cases . . . constituted prejudicial conduct"]; *Roberts* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 739, 744-745, 748 [190 Cal.Rptr. 910, 661 P.2d 1064]; *McCartney*, *supra*, 12 Cal.3d at p. 533 [in examining witness, judge "may *not* . . . become an advocate for either party or cast aspersions or ridicule upon a witness"].)

9. *Counts Eleven A, Eleven C: Inappropriate Reactions to Disqualification Attempts*

(a) *Count Eleven A: Riegle Matter*

As we have previously set forth, on August 3, 1993, defendant Eddie Riegle appeared before petitioner without counsel, accompanied only by

Gary Whitley, an inactive attorney who was present as a character witness. After refusing to accept the negotiated plea bargain and insisting that Riegle serve time in jail, petitioner granted Riegle's request for time to consider the matter, and Riegle left the courtroom. Kimberly Fletcher, the public defender, was present in court at the time and observed these proceedings.

As Riegle and Whitley left the courtroom, they asked Fletcher to accompany them. After determining that Riegle qualified for representation by the public defender, Fletcher returned to the courtroom with Riegle, informed petitioner that Riegle qualified for representation and had asked her to represent him, and asked to be heard on the matter. According to Fletcher, she "started to negotiate on" Riegle's behalf, and petitioner "talked to [her] as though [she] was the attorney of record." At this point, Fletcher believed she was representing Riegle, because petitioner's previous practice in similar circumstances had been to accept her representation without formally stating that he was appointing the public defender. Fletcher repeatedly asked petitioner to "go on the record," but petitioner refused.

As we have also previously explained, during the court proceedings, petitioner discussed the matter by telephone with the park ranger who had arrested Riegle. Given petitioner's comments about Riegle after the call, Fletcher concluded that petitioner could not be fair and impartial, and she indicated that she would attempt to disqualify him. Although Fletcher had been discussing the case with petitioner for at least 10 minutes at this point, petitioner replied that Fletcher was interfering in a case in which she had not been appointed. Fletcher reminded petitioner that in the outer hall she had qualified Riegle for representation and that petitioner had been dealing with her as Riegle's attorney. Petitioner then suggested that Riegle did not qualify for representation, and he asked for a qualification form. He had not previously made a similar request of Fletcher during her almost four years as public defender, and he had not mentioned a concern about Riegle's eligibility for public representation before Fletcher's remark about disqualification. Fletcher cited these facts as further evidence of petitioner's bias in the case. Petitioner replied: "Fine. You're emotionally involved in this case. You're way out of line, and I'm going to remove you and appoint conflict counsel." Petitioner did not, at this point, refer to Riegle's qualification for public representation.

When petitioner finally called the case, he indicated that Riegle was requesting a public defender and that he was appointing Linda Thompson instead of Fletcher. Fletcher objected, explaining that no conflict existed and that petitioner had refused to call the case, had asked for a public defender application, and had stated unsupported conclusions about Riegle's eligibility for representation. Petitioner then stated: "The record should also reflect

that Ms. Fletcher has interceded in this case without being requested or without appointment. [¶] And I think she's become personally and emotionally involved in this case, so I'm disqualifying her to represent this defendant." Fletcher again objected, reiterating that petitioner had no grounds for removing her and stating that "the Court's behavior has been inappropriate in this matter." Petitioner then stated: "Ms. Fletcher, you're getting close to contempt. And I would suggest that you sit down and be quiet." According to Fletcher, petitioner "was angry when this was going on, once [she indicated her intent to disqualify] him."

**(14)** On this record, we agree with the Commission's unanimous finding that petitioner committed prejudicial misconduct in refusing to appoint Kimberly Fletcher while immediately appointing another public defender to represent Riegle. Petitioner raised a question regarding Fletcher's representation of Riegle only after she indicated her intent to disqualify him. His request for a qualification form for Riegle was contrary to his prior practice. He appointed a substitute public defender without inquiring or commenting further about Riegle's eligibility. These facts indicate that petitioner's purported concern about Fletcher's alleged failure to qualify Riegle for representation was merely a pretext for his decision to exclude Fletcher from the case because of her expressed intent to disqualify him. In so retaliating against Fletcher, petitioner committed prejudicial misconduct.[16] (See *In re Rasmussen* (1987) 43 Cal.3d 536, 538 [236 Cal.Rptr. 152, 734 P.2d 988] [judge committed misconduct in "displaying a lack of impartiality to, and petty harassment of attorneys who filed affidavits of prejudice against him," and in "discouraging the exercise of peremptory disqualification rights by inappropriate means"].)

(b) *Count Eleven C: Tippets Matter*

On September 14, 1993, Deborah Tippets appeared before petitioner on a charge of shoplifting four packages of developed film. Her attorney, Kimberly Fletcher, suggested a disposition of informal diversion. After some discussion of the facts of the case and Tippets's explanation, petitioner suggested "a one-year dispo and have her do some things." Fletcher indicated that the proposal was "acceptable." The district attorney then suggested payment of $150 in court costs as well. Tippets indicated she could not afford that amount. Petitioner responded: "Well, one minute you tell us you're wealthy and can pay for stuff, and the next minute, you say . . . you can't pay $150.00 fine." After Tippets explained that she had just moved, petitioner abruptly declared: "All right. Let's set it for trial, then." Tippets

[16]Because neither the special masters nor the Commission found that petitioner's comment about contempt constituted prejudicial misconduct, we do not consider the question.

and Fletcher then attempted to explain Tippets's financial situation. Petitioner seemed to ignore these comments, responding by simply asking: "When do you want to try it?"

After petitioner immediately repeated this question, Fletcher stated: "I'm going to have to [disqualify] you, your Honor. I think there's some animosity here." Fletcher later explained to the Commission that she based her action on her perception that petitioner "had gotten angered by [Tippets's] comments . . . that she couldn't even afford $150, and lost patience. [Fletcher] was concerned it would be difficult at this time for [petitioner] to be impartial, given the long conversation with [Tippets] at that point." Fletcher was also acting on "what [she] perceived [were petitioner's] feelings about single women with kids out of wedlock [and] interracial [children]."

Petitioner replied: "There's no animosity. I'm trying to settle the case." Fletcher started to reply, when petitioner interjected: "[I]f you don't want me to get involved in settling cases, then I won't. But you get me involved. And then as soon as I get involved in it, then you say, 'Oh, we're going to have to [disqualify] you' because I'm trying to encourage settlement." According to the court reporter's notation in the hearing transcript, petitioner was yelling at this point. The reporter testified before the special masters that her practice was to indicate in the transcript the demeanor of the person speaking—here that petitioner was yelling—"[w]hen it was so out of the ordinary." In his testimony, petitioner confirmed that he "probably" was yelling when he made this statement. Petitioner also testified that, in his view, he had been trying to help Fletcher persuade Tippets to take the plea offer, and that he was "shocked" that Fletcher "suddenly turned against" him by mentioning disqualification.

After petitioner and Fletcher discussed Tippets's comments regarding her ability to pay for the allegedly stolen film and her inability to pay the suggested fine, petitioner asked whether Tippets had made a statement to the store security guard. The district attorney replied she had told the security guard she put the film "under [a] blanket because [her] baby's bottle was leaking, and she didn't want the liquid on the photographs." As Tippets attempted to speak, petitioner interrupted and exclaimed: "Inconsistent. Inconsistent." Contrary to petitioner's exclamation, Tippets's statement to the security guard was consistent with the explanation she gave petitioner earlier in the hearing.[17] Fletcher apparently tried to explain this fact, and to suggest that petitioner's comment supported her concern that petitioner felt animosity toward Tippets.

[17]Tippets explained at the hearing that two of her children were "grabbing at the film and going through it," so she put it "next to the baby in between the infant carrier. . . And the

Nevertheless, petitioner continued: "I've been in this job for 35 years. I can tell when people have a little bit of shaky background as far as their position. And if . . . they're changing statements and changing reasons why they did something, then it gives you an indication that maybe there was an intent there." According to petitioner, he was expressing his view that neither he nor a jury would believe Tippets's explanation and that she would be convicted.

As Fletcher attempted to respond, petitioner continued: "But if you don't want me to get involved in trial settlements anymore, then I won't. [¶] But I try to settle cases to save taxpayers' money and to save her a possibility of going to jail and being convicted of a serious crime. [¶] But if you don't want me to do that, I won't do that anymore. [¶] I won't give you an indicated sentence. [¶] And you can just do your thing."

The transcript then shows the following exchange as petitioner and Fletcher argued with each other:

"MS. FLETCHER: Well, I—

"THE COURT: (Yelling) but I'm getting sick and tired of you . . . threatening me with [disqualification]. [¶] And I'm not going to have it anymore.

"MS. FLETCHER: Then, Your Honor, a simple solution would be not to make these prejudicial statements and—

"THE COURT: (Yelling) then don't get me involved in trial settlements.

"MS. FLETCHER: —misstating her statements.

"THE COURT: (Yelling even louder) but if you ever threaten a judge in Fresno on a [disqualification], you'll be held in contempt. I guarantee you.

"MS. FLETCHER: And I can guarantee you that threatening counsel because you have been [disqualified] will get you in trouble with Judicial Council. And that is not contempt.

"THE COURT: I haven't been—I haven't been [disqualified].

"MS. FLETCHER: Well, all we have to do is read this record back. [¶] I just moved to do it.

liquid was leaking out of the [baby's] bottle onto the film. [¶] So [she] took the baby blanket and covered the film, but [she] didn't completely cover it."

"THE COURT: Fine. [¶] Oh, you just moved to disqualify me?

"MS. FLETCHER: Yes.

"THE COURT: Oh, okay.

"MS. FLETCHER: Let's set it for trial. And I'm moving—

"THE COURT: I can't set it for trial." Petitioner then set the case for trial before a different judge.

Petitioner denied that he was yelling during this exchange. However, the court reporter testified that he was speaking in a "[l]oud voice," was "rising up" or "raising forward," and was "very angry."

In his answer to the Commission charges, petitioner explained: "[I] admit[], in retrospect, that [I] was a little too pushy, probably because of [my] lack of confidence in Ms. Fletcher, in convicting [*sic*] her client that the offer was in her best interest. At the time there was not sufficient funds in the county there was a hiring freeze [*sic*], the court was short two clerks out of five authorized, and the need to save money was paramount at the time. With the trial date that week, it was imperative that we reach a settlement on the day in question."

**(15a)** On this record, we agree with the Commission's conclusion (by a vote of nine to one) that petitioner committed prejudicial misconduct in his handling of the Tippets case. At the time of the Tippets matter, former California Code of Judicial Conduct, canon 3B(4), effective October 5, 1992, provided that "[a] judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . ." (See now Cal. Code Jud. Ethics, canon 3B(4), as adopted eff. Apr. 15, 1996 [currently imposing same duty].) Petitioner's conduct during the Tippets hearing fell far short of this standard, bringing the judicial office into disrepute. (See *Kloepfer*, *supra*, 49 Cal.3d at pp. 857-858; *In re Rasmussen*, *supra*, 43 Cal.3d at p. 538; *McCartney*, *supra*, 12 Cal.3d at pp. 531-532.)

In reaching this conclusion, we are not unmindful of Attorney Kimberly Fletcher's conduct. We also recognize that "[a] court has authority to control courtroom conduct of an attorney that is in flagrant disregard of elementary standards of proper conduct and to temper [counsel's] speech in order 'to insure that courts of law accomplish that for which they were created—dispensing justice in a reasonable, efficient and fair manner.' [Citation.]"

(*Hawk* v. *Superior Court* (1974) 42 Cal.App.3d 108, 123 [116 Cal.Rptr. 713].) Indeed, in 1993, during the Tippets matter, former California Code of Judicial Conduct, canon 3B(4), effective October 5, 1992, also directed a judge to "require" *lawyers* to be "patient, dignified, and courteous" in their courtroom behavior. (See now Cal. Code Jud. Ethics, canon 3B(4), as adopted eff. Apr. 15, 1996 [currently imposing same duty].) **(16)** In performing this duty, " 'trial judges confronted with disruptive, contumacious, stubbornly defiant [attorneys] must be given sufficient discretion to meet the circumstances of each case.' " (*In re Buckley* (1973) 10 Cal.3d 237, 253-254, fn. 21 [110 Cal.Rptr. 121, 514 P.2d 1201, 68 A.L.R.2d 248].)

**(15b)** However, the record here shows that petitioner responded angrily the very first time Fletcher, understandably concerned that petitioner had become impatient with Tippets, mentioned disqualification. He *immediately* began yelling at Fletcher about her use of the disqualification procedure. After expressing his view that Tippets's explanation was not credible, petitioner returned to the disqualification issue, again yelling at Fletcher that he was "sick and tired" of her disqualification threats and was "not going to have it anymore."[18] The situation then escalated, with Fletcher asserting that petitioner could avoid being disqualified by refraining from making prejudicial and inaccurate statements, petitioner yelling in reply that Fletcher should not get him involved in settlements and that another court would treat her disqualification threat as contempt, and Fletcher answering that threatening counsel in response to a disqualification motion would "get [petitioner] in trouble with Judicial Council." Although we do not condone Fletcher's conduct, viewing the incident in its entirety, we conclude that petitioner's behavior in response to the disqualification attempt constituted prejudicial misconduct. (See *Dodds*, *supra*, 12 Cal.4th at p. 176 [judge committed prejudicial misconduct by "interrupting and yelling loudly and angrily at counsel and a litigant"]; *Wenger*, *supra*, 29 Cal.3d at p. 629 [judge entitled to take remedial steps in response to counsel's intemperate language committed willful misconduct by misusing contempt power]; *Cannon* v. *Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 706 [122 Cal.Rptr. 778, 537 P.2d 898] [judge improperly used punitive action as first, rather than last, "means of controlling proceedings"].)

[18]The record does not support petitioner's perception that Fletcher often sought to disqualify him. According to Fletcher, the Tippets matter was only the second case in which she had sought to disqualify petitioner. The first case was the Riegle matter, which had occurred the previous month. The only other case was during late July or early August 1994, well after the Tippets matter. Thus, between 1990, when she became a public defender, and August 1994, when she left the position, she sought to disqualify petitioner only three times. The district attorney confirmed that Fletcher did not frequently seek to disqualify petitioner.

10. *Count Twelve: Inappropriate Handling of the Toschi Matter*

In January 1989, the Madera County District Attorney charged Michael Toschi with the misdemeanors of driving under the influence of alcohol and driving with an excessive blood-alcohol concentration and alleged that he had suffered one prior conviction for the former offense. On May 10, as part of a plea bargain involving a separate felony charge of assault with a deadly weapon, the district attorney moved to dismiss the drunk driving case. The original plea bargain did not expressly encompass the drunk driving charges because counsel were unaware of them when they reached the bargain. The district attorney sought dismissal after concluding that the plea bargain would have included these charges had counsel known of them.

Petitioner, who was then assigned to the Madera Justice Court, denied the motion, stating "that the state Department of Motor Vehicles desired certain actions be taken against" Toschi. Toschi's counsel interpreted petitioner's comments as a statement of his own desires and an indication that he had already concluded Toschi was guilty. After denying the motion, petitioner ordered the district attorney to file an amended complaint adding a second alleged prior drunk driving conviction. The district attorney complied with petitioner's order on May 16, 1989.

During pretrial proceedings on May 17, the district attorney informed petitioner that he was "going to move the Court to strike the amended complaint and make a motion to dismiss." Without waiting for the motion to be made and without argument, petitioner immediately responded: "Motion denied." The district attorney then asked whether petitioner had "any knowledge of the facts in this case." Petitioner replied that he did not, but that he knew from "the printout" that Toschi had two prior convictions. Petitioner then explained that, despite his lack of knowledge about the facts of the case, he was denying the dismissal motion because he thought "in the interest of justice, a man with a drunk driving and two priors should go to trial." The district attorney responded that petitioner could not know Toschi "was a drunk driver unless [petitioner] ha[d] knowledge of the facts of the case," and that petitioner was not required to assume the truth of the complaint without such knowledge. Regarding the latter statement, petitioner replied: "All right. Well, the Court does."

Petitioner and the district attorney continued to argue about whether it was proper for petitioner to deny the dismissal motion without knowledge of the facts of the case. Petitioner then explained his understanding that the district attorney's motion was "[b]ased on a plea bargain, not based on the evidence," and that the plea bargain was an inadequate basis for dismissing the case, given the danger that a recidivist drunk driver posed to the community.

Unsatisfied with petitioner's explanation, the district attorney "demand[ed] immediate trial" and "ask[ed] [petitioner] to disqualify [him]self on the grounds that [he] ha[d] . . . apparent knowledge of the facts in this case." The district attorney asserted that, given petitioner's "apparent knowledge of the facts in this case, [he] would be prejudiced." Petitioner denied the motion and set the case for trial before him.

After the hearing, and without the request or knowledge of either party, petitioner ordered the court clerk to review the police reports in the case file and issue subpoenas to all witnesses. According to petitioner, he took this action because the district attorney had said he would not subpoena the witnesses. At the time, petitioner believed he "had authority to order witnesses where the District Attorney was going to not act in his official capacity to do that."

At petitioner's direction, the clerk later spoke by telephone directly with a subpoenaed witness from the police department and determined that the witness was not available for the scheduled trial date. Petitioner then contacted defense counsel, informed her of this problem, and asked her to agree to a continuance. Counsel refused and later corrected petitioner when he indicated that she had agreed to the continuance.

Based on these contacts "and some information that [petitioner] ha[d] also talked to some other potential witnesses in the case," counsel concluded that petitioner "himself [was] desirous of trying the case . . . ." Counsel felt that petitioner "had overstepped [his] bounds" and "become a prosecutor instead of an impartial magistrate, and that [Toschi] wasn't going to get a fair trial." On May 31, counsel therefore made a formal motion to disqualify petitioner, asserting that his actions and his statements during the prior hearing showed that he had prejudged the case. Over petitioner's opposition, the motion was granted.

Throughout the Commission's disciplinary proceedings, petitioner maintained that his actions in the Toschi matter resulted from his personal concerns about the district attorney, Paul Avent. Avent had unsuccessfully run against petitioner in a 1988 judicial election and, according to petitioner, was "very bitter" about the election, had "accused [petitioner] of stealing his votes and cheating to get his judges [*sic*] job," and had "expressed that he would never forgive [petitioner] for stealing his job." Petitioner believed that Avent had tried to "pull[] things" in the courts of other judges he had unsuccessfully opposed and "then reported them in the paper."

According to petitioner, he "was warned . . . by [his] bailiff [that Avent was] going to try to pull something on [petitioner], to get [petitioner] in

trouble . . . ." When Avent appeared in the Toschi matter, petitioner "realized for the first time that this was the case that Mr. Avent was going to pull something." Petitioner explained: "I thought that I outwitted [Avent] by telling him that the motion was decided and not in the interest of justice and . . . Mothers Against Drunk Drivers [*sic*] was pretty heavy. All the publicity going on. I could see my name in the paper, 'Judge Fletcher dismisses drunk driving with two priors without cause.' [¶] So I denied the motion, and Mr. Avent challenged me in court that he could go ahead and set the jury trial. He wasn't going to call any witnesses. I had two options. I had an option to recuse him and appoint the attorney general to . . . prosecute Mr. Toschi, which would [have] disqualified me from sitting in Madera from then on, because the Madera D.A.'s office do [*sic*] not take those things lightly and have blanketed other judges that stand up to him. [¶] And I felt the only option I had was to bluff him into thinking that the court was going to subpoena witnesses."

Before the special masters, petitioner conceded that, having ordered the district attorney to allege additional charges and the clerk to subpoena witnesses, he "probably should have" disqualified himself. Similarly, in his answer to the Commission, petitioner stated: "In hind sight [*sic*] and now with six years of experience, I only had 5 month [*sic*] at the time, I would have disqualified myself for the Jury trial. Even though I was not prejudiced or bias [*sic*], or knew anything about the case, it might have had the appearance that I was in some was [*sic*] bias [*sic*]. It is easy to see that now, back then I was bound and determine [*sic*] to prove that I was not bias [*sic*] . . . ."

**(17a)** On this record, we agree with the Commission's unanimous conclusion that petitioner committed willful misconduct in handling the Toschi matter. We reached a similar conclusion on analogous facts in *Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518 [247 Cal.Rptr. 378, 754 P.2d 724, 76 A.L.R.4th 951]. There, after learning that the district attorney intended to prosecute a sodomy charge as a misdemeanor, the judge contacted the district attorney ex parte and urged him to pursue the matter as a felony. (*Id.* at p. 535.) Although the judge's action did not prejudice the defendant (because the district attorney did not follow the suggestion), we nevertheless found that the judge committed willful misconduct. We explained: "Judge Ryan attempted to intrude into the charging authority of the administrative branch of government. Moreover, he deprived the defendant of an impartial magistrate by advocating a harsher charge." (*Ibid.*) Here, petitioner also attempted to intrude on the district attorney's authority, but not by simply suggesting a course of action; petitioner, by having his clerk review the file and subpoena all prosecution witnesses, took it upon himself

to do the district attorney's job. He thus deprived Toschi of an impartial judge.

Indeed, as petitioner conceded during the special masters' hearing, he "probably should have" disqualified himself as a result of his actions. Petitioner's order that the witnesses be subpoenaed was "particularly destructive of the image of the court as an impartial forum for the determination of truth." (*McCartney*, *supra*, 12 Cal.3d at p. 533.) **(18)** As we recently explained in *Broadman*, "there is a compelling public interest in maintaining a judicial system that both is in fact and is publicly perceived as being fair, impartial, and efficient." (*Broadman*, *supra*, 18 Cal.4th at p. 1103.) Thus, "[j]udges . . . cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law [citation] who apply the law uniformly and consistently." (*Id.* at p. 1100.) **(17b)** Petitioner's action in directing the clerk to subpoena witnesses "create[d] the public impression that [he] ha[d] abandoned the judicial role to become an advocate for [his] own ruling" in denying the prosecution's motion to dismiss the charges against Toschi. (*Id.* at p. 1101; see also *Wenger*, *supra*, 29 Cal.3d at p. 632 [judge who "inject[ed] himself into a proceeding" by undertaking a collateral investigation without consulting the parties committed prejudicial misconduct].)

Moreover, petitioner took this action because of a personal conflict with a political rival. According to petitioner, he considered "two options" to address his concern that Avent was trying to damage him politically: "recuse [Avent] and appoint the attorney general to . . . prosecute Mr. Toschi," or "bluff [Avent] into thinking that the court was going to subpoena witnesses." Petitioner chose the latter option because of his concern that the former would result in his own disqualification in all future proceedings involving the Madera District Attorney. In choosing the latter option for personal reasons and, as the Commission found, to "[b]luff[] and battl[e] with political opponents," petitioner committed a judicial act for a purpose other than the faithful discharge of his judicial duties. (See *In re Rasmussen*, *supra*, 43 Cal.3d at p. 538 [misconduct to initiate probation revocation proceedings for "personal reasons other than the faithful discharge of [judicial] duties"]; *Wenger*, *supra*, 29 Cal.3d at p. 652 [judge committed willful misconduct in taking judicial action motivated by personal animosity].) He thus committed willful misconduct.[19]

11. *Count Thirteen B: Investigation of Larry Bjorklund*

In 1989, petitioner joined a church at which Larry Bjorklund was pastor. Between that time and May 1992, when he became inactive in the church,

[19]Given our conclusion, we need not consider the parties' arguments as to whether petitioner had statutory authority to order the clerk to subpoena the witnesses.

petitioner, who was a church elder, and Pastor Bjorklund had a number of disputes. According to Pastor Bjorklund, petitioner was very critical of his preaching, his doctrinal approach, and his general performance as a pastor. Based on petitioner's perception of the pastor's personal problems, petitioner doubted Pastor Bjorklund's pastoral abilities. At a church meeting in early 1992, petitioner accused Pastor Bjorklund of giving a heretical and blasphemous sermon and impliedly accused him of having an extramarital affair. Petitioner became inactive at the church a short time later.

According to petitioner, at some point during this period, Detective Sergeant Milt Gauthier of the Madera Sheriff's Office came to petitioner's chambers to discuss a child molestation investigation involving a member of petitioner's church. Gauthier wanted to learn what petitioner knew about the alleged victim's father. During the conversation, Gauthier stated that the pastor had counseled and interviewed the alleged victim for 15 to 20 hours, trying to get her to admit that her father had molested her. In response, petitioner told Gauthier that he "had some real concerns about [the pastor's] methods in trying to . . . prove a case against [the alleged victim's father], because [the pastor] was upset at" the alleged victim's father.

Petitioner, who was a church elder at the time, also voiced concern about the church's potential civil liability for permitting the pastor to provide counseling if he were not licensed. According to petitioner, Gauthier also expressed interest in determining the pastor's licensing status, suggesting that counseling without a license might be a misdemeanor under a county ordinance. Petitioner then stated: "Well, you know, don't do it for me. If you run across any information whether he's licensed or not, I'd like to know. I want to advise the church Board if we have a risk going on." When Gauthier replied that he intended to call the "State Board of Licensing," petitioner replied: "That's up to you. . . . I'd appreciate knowing what you find out." A short time later, Gauthier delivered a written summary of his investigation to petitioner, which indicated that the pastor was not licensed, that he had not had a license revoked, and that he probably did not need to be licensed.

Other than petitioner's testimony, the only evidence before the Commission regarding this incident came from a deposition the pastor gave pursuant to a stipulation and order of the presiding special master. The deposition was ordered in anticipation of the pastor's unavailability for trial. On direct examination, and without objection by petitioner, the pastor testified that he received a call after petitioner had left the church from someone named Gene, who informed him that petitioner "had ordered an investigation into [the pastor's] credentials as a pastoral counselor." After the pastor called the sheriff's office to investigate the information, he received a visit from

Gauthier, who "told [him] that [petitioner] had . . . asked [Gauthier] to do an investigation to find out about [the pastor's] qualifications as being a pastoral counselor," and that petitioner "had some concern about the church maybe being legally . . . liable." Prompted by petitioner's questions on cross-examination, the pastor testified that Gene Zimmerman, who was with the Madera Employees Union, had first contacted him about the "alleged investigation." The pastor also reiterated on cross-examination, again without objection, that Gauthier had "explain[ed] the circumstances under which he felt obligated to perform th[e] investigation, but he had been directed by [petitioner]." Petitioner then asked, "Is that what he told you?" The pastor replied: "That's the word. That's what he told me."

On this record, the special masters found that, by asking Gauthier "to share information gathered during the course of his investigation, [petitioner] was using the prestige of his office for a personal purpose." They concluded: "Although, this incident does not constitute the 'instigation' of any criminal investigation for a personal purpose, it nevertheless constitutes willful misconduct." The Commission found that petitioner had "prevailed upon Sergeant Gauthier to inquire and advise [him] regarding the license status of Pastor Bjorklund for reasons that were entirely personal and unrelated to Sergeant Gauthier's investigation" of the molestation case. Finding that Gauthier had acted "because [petitioner] invoked his authority as a judge to request the report," and not "out of friendship" or "as a favor," the Commission unanimously concluded that petitioner "abused the judicial power and committed willful misconduct in office" by "ask[ing] Sgt. Gauthier to conduct an investigation of his rival for a personal purpose."

Petitioner contends that there is no *competent* evidence to support the finding that he asked Gauthier to investigate the pastor. He argues that the pastor lacked personal knowledge regarding petitioner's role in the inquiry, that the pastor's deposition testimony on this subject is inadmissible hearsay, and that we should not consider it despite his failure to object during the Commission proceedings.

**(19a)** We do not reach the merits of petitioner's evidentiary objection because, even crediting the pastor's testimony, we find the evidence insufficient to support the Commission's willful misconduct conclusion. Even if we assume that petitioner asked Gauthier to investigate the pastor, we find that petitioner was not acting in a judicial capacity when he did so. "First, petitioner was not performing one of the functions generally associated with his position as a judge. [Citations.]" (*Dodds*, *supra*, 12 Cal.4th at p. 175.) "Second, though petitioner was [in his chambers] when he met with [Gauthier], that location was simply a convenient meeting place that

[Gauthier] selected. The meeting had nothing to do with petitioner's work as a judge, but rather his status as [someone who knew individuals involved in the matter] that [Gauthier] was investigating. [Citation.]" (*Ibid.*) Finally, there is no evidence that petitioner "attempt[ed] to curry favor with [Gauthier] . . . on account of his judicial status. [Citation.]" (*Id.* at p. 176.)

Nor does the pastor's deposition testimony that Gauthier "felt obligated to perform th[e] investigation" constitute clear and convincing evidence that petitioner "use[d], or attempt[ed] to use, his authority as a judge for improper ends . . . ." (*Dodds*, *supra*, 12 Cal.4th at p. 172.) "To hold that petitioner acted in a judicial capacity simply because his [request] carried with it a degree of authority due to his status as a judge . . . would mean that a judge is always acting in a judicial capacity when he [or she] talks to [law enforcement personnel]. We decline to interpret 'judicial capacity' so broadly." (*Id.* at p. 175.)

Nor, on the totality of the circumstances in this case, do we find clear and convincing evidence that petitioner committed prejudicial misconduct. The record does not indicate that petitioner attempted to pressure Gauthier into investigating the pastor. In the context of a conversation that Gauthier initiated by coming to petitioner's chambers and seeking his help in the molestation investigation, and given Gauthier's expressed concern about the pastor's counseling of the alleged victim, petitioner's request (assuming he made it) that Gauthier determine the pastor's licensing status does not constitute prejudicial misconduct. As a church elder, petitioner was legitimately concerned about the pastor's conduct and his qualifications. Although judges must be careful not to take advantage of their position, petitioner's position as a judge did not disable him from making a request of the sheriff's office that any other member of the community with similar concerns could make.

Moreover, having independently reviewed the evidentiary record, and even considering the pastor's testimony, we do not find clear and convincing evidence to support the Commission's conclusion that petitioner "asked Sgt. Gauthier to conduct an investigation of" the pastor. **(20)** Even unchallenged hearsay statements "should be evaluated . . . for what they are worth." (*San Bernardino Valley Water Dev. Co.* v. *San Bernardino Valley Mun. Water Dist.* (1965) 236 Cal.App.2d 238, 266 [45 Cal.Rptr. 793].) They should " 'be weighed by the trier of facts the same as other evidence and may be disregarded where shown to be unconvincing or insubstantial. [Citation.]' " (*Estate of Moore* (1956) 143 Cal.App.2d 64, 74 [300 P.2d 110].) **(19b)** Here, there are good reasons to question the pastor's hearsay testimony. The record shows that both the pastor and Gauthier could be considered petitioner's opponents. The Commission's findings support this

conclusion, describing petitioner's relationship with the pastor and with Gauthier as, respectively, "hostile and strained" and "not one of mutual friendship and trust." Notably, unlike the Commission, the special masters did *not* find that petitioner *initiated* the investigation, but found only that he "asked Sgt. Gauthier to advise him if he discovered during the course of his investigation that [the pastor] was not a licensed counselor" and "to share information gathered during the course of his investigation." **(21)** On review, we accord special weight to the factual findings of the special masters, not of the Commission. **(19c)** Given the special masters' finding and petitioner's direct testimony on the matter, even considering the pastor's testimony, we do not find clear and convincing evidence that petitioner directed Gauthier to investigate the pastor or committed prejudicial misconduct in asking Gauthier to share the results of his inquiry.[20]

Because we find insufficient evidence of willful or prejudicial misconduct, we dismiss the charge contained in count thirteen B of the second amended notice of formal proceedings.[21]

12. *Count Sixteen: Improper Conduct in the Rivas Matter*

Petitioner, sitting as a visiting judge in the Madera Justice Court of Madera County, was assigned to preside in a criminal case against Lisa Rivas. On April 3, 1990, the district attorney filed a peremptory challenge against petitioner under Code of Civil Procedure section 170.6. Petitioner called the Rivas case the next day, noting that the hearing was "just a motion to disqualify." When petitioner asked about the March 30 preliminary hearing, the district attorney started to respond, and then stated: "No offense—People filed a [Code of Civil Procedure section] 170.6 motion, so I

[20]Petitioner's conduct was significantly different from the conduct we found improper in *Broadman*. There, motivated by personal animosity, Judge Broadman made a concerted effort "to affect the outcome in [a] legal malpractice case" against Attorney Arthur Kralowec. (*Broadman, supra*, 18 Cal.4th at p. 1106.) Judge Broadman *twice* summoned to his chambers plaintiff's attorney in the malpractice case and offered assistance in strengthening plaintiff's case; initiated (without request) discovery efforts on plaintiff's behalf; and appeared in the courtroom during trial of the malpractice case " 'just [to be] an asshole.' " (*Ibid.*) Here, by contrast, Gauthier sought out petitioner and solicited his knowledge of the parties involved in the ongoing criminal investigation, including the pastor. Moreover, Gauthier prompted petitioner's comments about the pastor's licensing status by remarking that the pastor had spent 15 to 20 hours trying to get the alleged victim to admit that her father had molested her. Petitioner simply did not engage in the kind of intentional interference that we found to be prejudicial misconduct in *Broadman*.

[21]Given our conclusion, we deny petitioner's request that we consider and take judicial notice of additional documentary evidence attached to his petition. The additional evidence purports to be an interview transcript in which Gauthier gave an account of the incident that differs substantially from petitioner's. We deny the request for the additional reason that, as petitioner explains, the transcript was "supplied by the Commission counsel during discovery." Petitioner offers no explanation for his failure to introduce the evidence during the Commission proceedings.

don't think the Court should inquire into what happened on the 30th. [¶] People are prepared to let this Court set some new dates closer to today's date to help [defense counsel] and his client and for that limited purpose only." When petitioner again asked about the prior hearing, the district attorney stated that the inquiry was "inappropriate," given the disqualification motion. Petitioner then stated, without any input from defense counsel: "Well, first we have got to find out whether the defendant's constitutional rights and statutory rights were violated with respect to a speedy preliminary hearing before you can get to any issues." In response to the district attorney's continued objection, petitioner stated, "I don't think you can use [Code of Civil Procedure section] 170.6 to violate constitutional rights," and "I want to make that determination before I proceed."

Over the district attorney's objection, petitioner then considered the speedy hearing question. Defense counsel asserted that Rivas had not waived her right to a speedy preliminary hearing. The district attorney, while continuing to object, asserted that Rivas had waived time so that the court could hear certain defense motions. When the district attorney asserted that petitioner lacked jurisdiction to determine whether Rivas had waived time, petitioner replied, "You're wrong," and explained, "You cannot file a [Code of Civil Procedure section] 170.6 [motion] and violate somebody's constitutional rights or statutory rights." Petitioner then directed the court reporter to get her notes from the preliminary hearing. Because the reporter's notes were not readily accessible, petitioner continued the hearing to April 6. He explained that "[t]he only issue" he would consider at the continued hearing was whether Rivas had waived time, explaining, "I can't hear [the case] for any other purposes."

On April 6, the district attorney sought and obtained an alternative writ of mandate and prohibition ordering petitioner to accept the peremptory challenge in the Rivas matter or to show cause for not doing so, and prohibiting him "from presiding in [the] case until further order of [the issuing] court." The district attorney served the writ on petitioner. At defense counsel's request, petitioner called the Rivas matter later that day. At the start of the hearing, petitioner acknowledged that he was "in possession of" the writ.[22] Responding to a question about his intent in light of the writ, petitioner explained: "I cannot hear this case for any other purpose than to determine whether [Rivas's] ten-day in custody right to a prelim[inary hearing] had been violated, and take judicial notice if that has been violated . . . [¶] . . .

[22]The district attorney testified that he personally served petitioner with the signed writ in chambers before the April 6 hearing in the Rivas case. Given this testimony, and the transcript of the April 6 hearing, during which petitioner acknowledged that he was "in possession of" the writ, we reject petitioner's challenge to the adequacy of the evidence that he received the writ before the April 6 hearing.

based on the record, the court records. I can't hear any contested issue of fact or law."

The district attorney disagreed with petitioner, insisting that he could take no action in the case of any kind, including considering the speedy hearing question. In response, defense counsel urged petitioner to determine the speedy hearing issue, arguing that it did not involve the merits of the case and that the constitutional right to be free from illegal detention outweighed the prosecution's statutory right to disqualify. Petitioner replied to defense counsel: "I think the defense ought to file a writ with the superior court that granted this writ, advising that court that your client's constitutional rights or statutory rights at least are being violated by keeping her in custody past her ten-day limit without her waiver, and without finding a good cause by the magistrate that continued the case. I think that's your remedy."

After a comment from defense counsel, petitioner continued: "It just shocks me that this can happen, that people that are supposed to be protectors of the peoples' rights, protecting of property, protecting of everything that we stand for, are playing games this way. It's just shocking to me." Petitioner continued: "I feel very strongly I don't want anything to do with this court again in Madera, and I'm going to take action to try to keep myself from even coming down here anymore. That's how strongly I feel about it. It's shocking to be associated with officers of the court, people who have pledged to uphold the law and support the Constitution, take this kind of action. It just shocks me beyond belief. Makes me embarrassed to even be associated with such people. [¶] Anyway, that's your remedy, I think . . . ." Finally, after defense counsel insisted that Rivas was being remanded to custody "without any redress of her grievances," petitioner commented, "Seems to me she has some legal remedies." Petitioner took no further action in the case.

**(22a)** On this record, we agree with the Commission's unanimous conclusion that petitioner committed prejudicial misconduct in his handling of the Rivas matter, but not for all of the reasons that the Commission cited.

The Commission concluded that petitioner committed prejudicial misconduct by "fail[ing] to transfer the *Rivas* case after the filing of the [peremptory challenge] and [deciding] to continue the case to his own calendar." However, we agree with the special masters that petitioner's initial decision to consider the speedy hearing question despite the peremptory challenge at most constituted a legal error. Although Code of Civil Procedure section 170.6 prohibits a properly challenged judge from "hear[ing] any matter . . . which involves a contested issue of law or fact," as the Commission notes, under Code of Civil Procedure section 170.4, subdivision (a)(1), a disqualified judge may "[t]ake any action or issue any order necessary to maintain

the jurisdiction of the court pending the assignment of a judge not disqualified." Under Penal Code section 859b, "[w]henever [a] [criminal] defendant is in custody," and absent a waiver or good cause, the court "shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment, . . . and the defendant has remained in custody for 10 or more court days solely on that complaint . . . ." Petitioner's belief that, notwithstanding the peremptory challenge, he could determine the speedy hearing question to preserve the court's jurisdiction "had at least enough merit to prevent the holding of it from constituting misconduct." (*Wenger*, *supra*, 29 Cal.3d at p. 647, fn. 13.) **(23)** "[A] judge should not be disciplined for mere erroneous determination of legal issues, including questions of limitations on the judicial power, that are subject to reasonable differences of opinion. [Citation.]" (*Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 47-48 [207 Cal.Rptr. 171, 688 P.2d 551].)

**(22b)** Nor on this record do we find that petitioner committed prejudicial misconduct in resuming the hearing on April 6 despite issuance of the writ or in suggesting that Rivas's remedy was to petition for a writ. On April 4, petitioner had continued the case to April 6, and called the case on that date only at the request of defense counsel. Defense counsel and the prosecutor then argued about whether petitioner could consider the speedy hearing issue despite issuance of the writ. Defense counsel insisted that petitioner could proceed because Rivas's constitutional rights outweighed the prosecution's statutory right of disqualification and the illegal detention issue did not present a factual issue or touch on the merits of the case. Only then did petitioner, concluding that he could not proceed, suggest that Rivas file a writ, stating: "I think that's your remedy." We conclude that these actions did not constitute prejudicial misconduct.[23]

Nevertheless, we agree with the Commission that petitioner's comments at the end of the April 6 hearing constituted prejudicial misconduct. As we have noted, petitioner expressed "shock[]" and "embarrass[ment]" about the conduct of the "officers of the court," and accused them of "playing games" notwithstanding their pledge to uphold the law, support the Constitution, and protect "the peoples' rights." Petitioner also proclaimed that he did not "want anything to do with this court again in Madera." We agree with the Commission that petitioner committed prejudicial misconduct in responding to his peremptory disqualification by publicly criticizing the prosecutors and the Madera court on the record. (See *Kloepfer*, *supra*, 49 Cal.3d at p. 842 [inappropriate remarks about counsel]; *In re Rasmussen*, *supra*, 43 Cal.3d at

[23]Given our conclusion, we need not address petitioner's arguments regarding the adequacy of the writ.

p. 538 [basing misconduct finding on "intemperate, open-court criticism of a fellow judge"]; *Gonzalez, supra*, 33 Cal.3d at p. 371 [judge committed misconduct by making "insulting and derogatory comments from the bench and in his chambers impugning the character and competence of his judicial colleagues"].)

## IV. DISCIPLINE

**(24)** "In making our independent determination of the appropriate disciplinary sanction, we consider the purpose of a Commission disciplinary proceeding—which is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. [Citations.]" (*Adams, supra*, 10 Cal.4th at p. 912.) Our task "is to determine the nature of the discipline, if any, that is necessary to achieve these goals." (*Kloepfer, supra*, 49 Cal.3d at p. 865.)

Seven members of the Commission recommended petitioner's removal from office. The three remaining members voted against removal, and for severe public censure. As we have explained, petitioner concedes that he committed numerous acts of prejudicial misconduct. He also concedes that "his actions call for severe censure . . . ." However, like the minority of the Commission members, he urges that public censure is the appropriate sanction.

**(25)** After independent consideration, we agree with the majority of the Commission members that petitioner's removal from office is necessary to protect the public and the judicial system. "The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing 'lack of temperament and ability to perform judicial functions in an even-handed manner.' [Citation.]" (*Wenger, supra,* 29 Cal.3d at p. 653.) We have determined that petitioner twice committed willful misconduct and committed prejudicial misconduct on multiple occasions. "Together these incidents reflect a continuing, pervasive pattern of" misconduct. (*Kloepfer, supra*, 49 Cal.3d at p. 849.) "Petitioner's lack of judicial temperament is manifest."[24] (*Kloepfer, supra*, at p. 866.)

[24]In concluding that removal is unwarranted in this case, the dissent asserts that petitioner's conduct is less egregious and offensive than that before us in *Broadman*, where we imposed public censure. (Dis. opn. of Kennard, J., *post*, at p. 923.) However, *Broadman* involved only three isolated acts of misconduct. (*Broadman, supra*, 18 Cal.4th at p. 1112.) By contrast, this case involves a continuing and pervasive pattern of misconduct. Where the record shows such a pattern of misconduct, "comparison of the discipline imposed in other cases . . . is not fruitful." (*Kloepfer, supra*, 49 Cal.3d at p. 867; see also *Broadman, supra*, 18 Cal.4th at p. 1112 ["Proportionality review based on discipline imposed in other cases . . . is neither

Petitioner blames much of his misconduct on inexperience and asserts that he has learned from his mistakes. He argues that "[t]he lack of available judicial education courses for justice court judges from 1988 to 1991, and the massive caseload facing a lone rural municipal court judge from 1988 through 1994, left [him] with limited access to judicial education and training material." He further asserts that "virtually all" of the instances of misconduct "were directly related" to this alleged "lack of available training" and "massive workload."

We find petitioner's arguments unpersuasive. The incidents of misconduct occurred between 1989 and 1994, during virtually petitioner's entire term in office before the Commission filed formal charges in early 1995. (See *Kloepfer, supra,* 49 Cal.3d at p. 866 [noting that misconduct incidents "occurred over the full span of petitioner's judicial career"].) Moreover, petitioner's 11 years as a deputy district attorney before he became a judge "should have acquainted him with criminal procedures. . . . His abuses in the civil matters . . . [are] too serious to be explainable by inexperience." (*Wenger, supra,* 29 Cal.3d at p. 654.) "In any event, lack of prior experience simply cannot mitigate wilful misconduct: if petitioner did not have the legal background and temperament to avoid committing malfeasance in office, he should not have sought election to the court." (*Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1320 [240 Cal.Rptr. 859, 743 P.2d 919].)

Moreover, contrary to the contrite tone he sounds in this court, petitioner's primary response to the misconduct allegations during the Commission proceedings was to allege a conspiracy against him. During closing argument before the Commission, petitioner stated: "I just want to point out to the Commission that just about most of the witnesses that gave damaging testimony against me were all bias [*sic*]. They were all in concert together.

required nor determinative."].) The dissent also maintains that the record reflects nothing more than a judge in a small community who sometimes has had difficulty separating his judicial role from his role in the community. (Dis. opn. of Kennard, J., *post,* at p. 922.) Although petitioner's membership in a relatively small community arguably relates to his apparent inability to refrain from ex parte contacts, it should not excuse this misconduct. Nor does it have any bearing on petitioner's willful misconduct in altering minute orders to mislead the Commission and becoming an advocate against a criminal defendant because of his political rivalry with the prosecutor, or on his prejudicial misconduct in making improper comments about counsel, using court staff for campaign purposes, abusing his contempt powers, reacting inappropriately to disqualification attempts, prejudging cases, and publicly criticizing public officers. Finally, the dissent's view that the record lacks any hint that petitioner is corrupt, venal, or biased (dis. opn. of Kennard, J., *post,* at p. 922) does not require a different result. "Honesty" is one of the "minimum qualifications which are expected of every judge." (*Kloepfer, supra,* 49 Cal.3d at p. 865; see also *Wenger, supra,* 29 Cal.3d at p. 653 [ordering removal despite lack of evidence that judge used his office for illicit gain or neglected his work].)

They had meetings. They associate with each other. They had all one intent and purpose, to get me removed from the bench." After attacking the credibility and motives of specific witnesses (referring to one as "the main instigator behind a lot of these things"), petitioner commented: "I think there was a lot of shocking—to me, the bias, the false testimony that I observed in that hearing, it devastated me, put me back into the care of my doctor under stress and tension and depression." Petitioner closed by attacking his head clerk, asserting: "She was a heavy supporter of a person that opposed me in the election and she was very vindictive . . . . She gave information out to everyone that we discussed in confidence. She told other clerks or people down the hall, and I started out thinking that I was going to be accepted as a judge in that community, but I didn't realize the power of the people that resented me to be there and really did not want to cooperate with me."

Petitioner made similar comments during opening argument before the special masters, asserting that the Commission's evidence came from "biased witnesses" and that its witness list "is mainly people who have decided that they had some ax to grind against me . . . ." He insisted that "a lot of this is generated out of retaliation for [his] firing a clerk . . . ." He further asserted: "So we have a lot of biased people that have their own agenda why they want to get me or hurt me or in some way attack me . . . ." Petitioner repeated this theme in his testimony before the special masters. For example, regarding alteration of the minute orders in the Henderson matter, petitioner suggested that his clerk was "involved with a group of people that were sending everything they could find on [him] to the Commission" and that she had altered one of the orders "to make it look [to the Commission] like [he] was falsifying documents."

We agree with the Commission that petitioner's conspiracy claims are reminiscent of those we considered in *Gonzalez*. There, in imposing a removal sanction, we commented: "In the final analysis Judge Gonzalez utterly fails to grasp either the substance or seriousness of the numerous charges levelled against him by the Commission. Despite multiple admonitions and the normal evidentiary limitations of the hearing process, Judge Gonzalez has treated this investigation as an attack on his character. . . . He persists in his theory that his adversaries conspired to record his every misdeed and regards virtually every allegation as personally motivated. Rather than respond affirmatively and convincingly to the specific charges, he expend[ed] most of his defense effort in attacking the character and credibility of the adverse witnesses. While he concedes there may be certain minor irregularities in his judicial manner and procedures, he denies he has ever deliberately abused his judicial office and generally refuses to admit he has done anything improper." (*Gonzalez, supra*, 33 Cal.3d at p. 377.)

In summary, the record "belies petitioner's claim that he has learned from past experience and has modified his courtroom behavior. It demonstrates

instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in *every* case." (*Kloepfer*, *supra*, 49 Cal.3d at p. 866, fn. omitted, original italics.) It "does not suggest that petitioner has, or will be able to, overcome [his demonstrated lack of judicial temperament] and that similar incidents will not recur." (*Ibid.*) "Mere censure of petitioner would woefully fail to convey our utter reproval of any judge who allows malice or other improper personal motivations to infect the administration of justice." (*Spruance*, *supra*, 13 Cal.3d at p. 802.) Thus, like the Commission, we conclude that petitioner's removal from office is necessary to protect the public and the judiciary's reputation.[25]

## V. DISPOSITION

We order that Judge Thomas B. Fletcher, judge of the Madera Superior Court, be removed from office. He shall, however, if otherwise qualified, be permitted to resume the practice of law (Cal. Const., art. VI, § 18, subd. (d)) on condition that he pass the Professional Responsibility Examination. This order is effective upon the finality of this decision in this court.

**KENNARD, J.,** Dissenting.—The majority finds that petitioner, Judge Thomas B. Fletcher, committed two instances of willful misconduct and a number of instances of conduct prejudicial to the administration of justice. It concludes that he should be removed from office. I disagree with the majority's conclusion that removal is the proper sanction for Judge Fletcher's misconduct, as well as with one of its findings of willful misconduct. None of Judge Fletcher's acts of misconduct involved corruption or moral turpitude, and he has sought to reform his conduct. Removal is not necessary to protect the public and the judiciary. Instead, in my view, public censure is the appropriate sanction in this case.

## I

As we recently explained, willful misconduct requires a finding by clear and convincing evidence that the judge acted in bad faith. "A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the

[25]The dissent asserts that removal is inappropriate in part because petitioner has expressed remorse and resolved to do better. (Dis. opn. of Kennard, J., *post*, at p. 923.) However, as our discussion demonstrates, "[t]he difficulty with [petitioner's] professed enlightenment is its delayed arrival." (*Wenger*, *supra*, 29 Cal.3d at p. 654.) "Mitigation of wrongdoing requires more than an unfulfilled intent to reform." (*Ibid.*)

judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman* v. *Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1092 [77 Cal.Rptr.2d 408, 959 P.2d 715].)

In the matter of Michael Toschi (count twelve), Judge Fletcher refused the prosecutor's request, as part of a plea bargain, to dismiss drunk driving charges against Toschi and instead took steps to subpoena witnesses for trial. I agree that this was misconduct. But the record lacks clear and convincing evidence of the bad faith required for willful misconduct. There is no evidence that Judge Fletcher knew he was acting beyond his judicial powers or that he acted with conscious disregard of whether he was acting beyond his powers. Nor is Judge Fletcher's suspicion that the prosecutor was trying to trick him into an erroneous dismissal that would portray him in a bad light clear and convincing evidence that he was acting for a corrupt purpose other than the faithful discharge of his judicial duties. Rather, he seems to have honestly believed that dismissal was an inappropriate resolution of the drunk driving charges against Toschi. Thus, I disagree with the majority that there is clear and convincing evidence that Judge Fletcher acted with the bad faith required for willful misconduct. Instead, I would find his conduct in this instance to be prejudicial conduct.

II

As our system of judicial discipline with its range of sanctions recognizes, not every instance of judicial shortcoming deserves the ultimate sanction of removal. We remove judges from office only when necessary for "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].) That standard is not met here.

It is important to note what is absent in this case. There is no hint that Judge Fletcher is corrupt or venal. There is no suggestion that the judge's decisions have been colored by bias or favoritism. There is no suggestion of the judge's incompetence or dereliction of duty.

What the record reveals instead is a judge who has discharged his duties diligently and in good faith but who sometimes has had difficulty in separating his judicial role from his role in the community. Especially in small communities like Judge Fletcher's town of Bass Lake in Madera County, the lawyers who become judges are often active and prominent figures deeply involved in the life of the community. Becoming a judge requires the lawyer to disengage from those connections and assume a more detached role. Most

of the instances of misconduct by Judge Fletcher have arisen from his failure at times to maintain the detachment inhering in the office of judge, especially by engaging in ex parte contacts with parties and witnesses. On occasion, he has also displayed a quick temper in court.

Although Judge Fletcher's conduct deserves sanction, the judicial system and the public will be adequately protected by public censure; removal is not necessary. As this court said in *Doan* v. *Commission on Judicial Performance* (1995) 11 Cal.4th 294, 339 [45 Cal.Rptr.2d 254, 902 P.2d 272], "we would hesitate to remove a judge who showed himself ready, willing, and able to reform under a less severe sanction." On the record here, Judge Fletcher is such a judge, and he should not be removed from office. He has expressed remorse and resolved to do better. He does not "generally refuse[] to admit he has done anything improper." (*Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 377 [188 Cal.Rptr. 880, 657 P.2d 372].) The most recent of the acts of misconduct in this case occurred in 1994. It does not appear that since then the Commission on Judicial Performance has brought any new formal charges against Judge Fletcher. On the facts of this case, public censure is a more appropriate sanction than, as the majority concludes, removal from office.

A review of our recent judicial discipline cases confirms my view that public censure is the appropriate sanction here. In *Broadman* v. *Commission on Judicial Performance, supra,* 18 Cal.4th 1079, the disciplined judge committed willful misconduct by intentionally misleading a criminal defendant and his counsel in the course of a hearing. Abusing the judicial process, the judge "tricked" an HIV-positive criminal defendant and his defense counsel into agreeing to a continuance of the sentencing hearing so the judge could attempt to craft a sentence that would deny medical treatment to the defendant in prison. The judge also committed prejudicial conduct in two instances: (1) He attempted to influence the outcome of a civil action against an attorney with whom he had a longstanding personal dispute; and (2) he improperly commented to the press about two pending cases in which he was the judge, and continued to do so even after the Commission on Judicial Performance sent him two letters telling him to desist.

In my view, these instances of willful misconduct and prejudicial conduct, and the state of mind in which they were committed, are more egregious and offensive and do more to bring the judiciary into disrepute than does the misconduct that Judge Fletcher has committed. The discipline imposed in *Broadman* v. *Commission on Judicial Performance, supra,* 18 Cal.4th 1079, however, was only public censure; the discipline imposed by the majority here is removal from office.

The most recent cases in which we removed a judge from office involved misconduct far more egregious than Judge Fletcher's. In *Doan* v. *Commission on Judicial Performance, supra,* 11 Cal.4th 294, 339, we removed from

office a judge who had displayed "moral turpitude, dishonesty, and corruption." The judge's willful misconduct included intervening on behalf of a defendant, her gardener, in a pending criminal case while at the same time presiding over his case; corruptly attempting to influence the outcome of a criminal case she was presiding over to ingratiate herself with the defendant's aunt, a friend of the judge's who had lent the judge money; and instructing witnesses not to cooperate with the Commission on Judicial Performance. The judge's prejudicial conduct included failing to disclose, in a criminal case against another nephew of the same friend who had lent the judge money, her relationship with the defendant and failing to disclose that she had discussed the case with her friend; intervening in a criminal case in which the defendant was the friend who had lent her money; failing to report in her financial disclosure forms various loans she had received; borrowing money from a court subordinate and from a police officer who regularly presented warrant applications to her; failing to list in her bankruptcy petition all her creditors; habitual tardiness in commencing court sessions; and offering to provide legal services to a convict whose wife had loaned the judge money. Nothing in this case comes close to that level of misconduct.

In *Adams* v. *Commission on Judicial Performance, supra*, 10 Cal.4th 866, we removed a judge who committed willful misconduct by deliberately providing false information to the Commission on Judicial Performance and who committed prejudicial conduct by accepting gifts and favors from attorneys and a litigant appearing before him and assisting those attorneys in cases pending before the court of which he was a member and before another court. No form of misconduct is more destructive of public confidence in the judiciary than is bribery. And even without a quid pro quo, the image of a judge accepting gifts from lawyers and litigants corrodes the public trust in the judiciary. Accordingly, even though we concluded in *Adams* that the gifts and favors the judge had received had not corruptly influenced his decisions, removal was nonetheless warranted. Again, nothing in this case approaches the level of the misconduct in *Adams*.

For the reasons stated above, I would censure Judge Fletcher rather than remove him from office, the same conclusion reached by the three of the members of the Commission on Judicial Performance.

Mosk, J., concurred.

Petitioner's application for review by the Supreme Court was denied March 17, 1999. Kennard, J., was of the opinion that the petition should be granted.

FILED

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Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING A JUDGE<br><br>NO. 138 (Judge D. Ronald Hyde) | DECISION AND ORDER OF PUBLIC CENSURE |

This is a disciplinary matter concerning D. Ronald Hyde, Judge of the Alameda County Municipal Court, Livermore-Pleasanton-Dublin Judicial District. The Notice of Formal Proceedings alleges seven counts of misconduct, all generally concerning misuse of the judicial office.

Prior to filing an answer to the Notice, Judge Hyde submitted a proposed disposition of the matter to trial counsel. The proposed disposition, along with a stipulated statement of facts, was submitted to the Commission on May 8, 1996.

Having reviewed the facts as stipulated by the parties and pursuant to the stipulated disposition, the Commission now makes the following findings of fact and conclusions of law.

Statement of Facts

The Commission accepts as true the following statement of stipulated facts:

1. Judge D. Ronald Hyde has been a judge of the Alameda County Municipal Court, Livermore-Pleasanton-Dublin Judicial District, from December 19, 1982, to the present.

2. In the fall of 1990, Judge Hyde asked certain court employees to access DMV records for the purpose of obtaining the addresses of former classmates in connection with a class reunion. After compiling the list, one of the employees, at the direction of Judge Hyde, sent the list to a third party involved in organizing the reunion. In 1991, when the Clerk/Administrator

sent a memorandum to all court employees asking such employees to acknowledge the restrictions on use of DMV records, Judge Hyde, believing himself to not be a "court employee," declined to sign the acknowledgment.

3. Between 1991 and 1995, Judge Hyde asked various court employees to access DMV records for the purpose of obtaining information regarding motorists that was not related to court business.

4. In 1991, 1993, and 1994, a court secretary performed typing, photocopying, and other services in connection with a paralegal class which Judge Hyde taught at a local College. This included typing a lengthy lesson plan, typing mid-term and final examinations, photocopying class materials, mailing out graded final examinations using court envelopes and postage, and typing correspondence. All of this work translated into the equivalent of approximately ten working days over the entire period. On May 9, 1994, the Clerk/Administrator advised Judge Hyde that he considered the use of court resources in this regard to be excessive. Although Judge Hyde generally ceased this practice, he did, on May 13, 1994, cause a court secretary to send a personal letter and make copies of the final examination.

5. Between 1992 and 1995, Judge Hyde used a county facsimile machine to send approximately 57 personal facsimile transmissions to Idaho.

6. Between 1990 and 1994, Judge Hyde requested that a court secretary send approximately 48 personal letters, approximately 43 of which were sent on official court stationery. These letters were composed during the work day by utilizing county computers.

7. On January 14, 1991, Judge Hyde requested that the court secretary type an "affidavit in lieu of appearance" that he submitted in connection with a complaint regarding a neighbor's dog, which he filed in his personal capacity.

8. In 1992, Judge Hyde requested that the court secretary type up his application for a federal judgeship. Judge Hyde then had a discussion with the Clerk/Administrator regarding the best way to get the application to San Francisco on short notice, and the application was ultimately driven to San Francisco by a court attendant utilizing a county vehicle.

9. On or about October 23, 1995, Judge Hyde and a court employee had a conversation regarding the employee's occasional trips to Oakland to deliver evidence. This conversation related to Judge Hyde's need to pick up forms relating to his candidacy for re-election, and the court employee interpreted Judge Hyde's questions regarding these trips to be a request that the court employee spend personal time picking up the needed forms. Ultimately, a division chief produced evidence to be delivered to Oakland by the court employee, although there was not a particular necessity that the evidence be delivered at that time, and while delivering the evidence the court employee also obtained the re-election forms which were needed by Judge Hyde.

10. In 1993 and 1994 there were occasions when Judge Hyde brought his elementary school-aged daughter to work and the court secretary and other court employees assisted in watching her activities. On one occasion in 1993, during her break, a court employee picked up Judge Hyde's daughter from a dental appointment during what would be considered work hours. Judge Hyde was unable to accomplish this task because he was unable to leave court.

11. Between 1990 and 1995, the court secretary performed work for Judge Hyde that benefited a particular Club, an organization of which Judge Hyde was a member and past President. In 1990 and 1991, the equivalent of approximately 40 work hours were spent doing work that included preparing a 73-page guest list, a 7-page ticket number list, and a 7-page alphabetical list and correspondence for the Club's Cabaret Night; inserting approximately 1,000 pre-printed invitations into envelopes, as well as addressing the envelopes; and typing the by-laws, constitution, membership committee forms, an information pamphlet, an affidavit and an article for the newsletter of the Club. She also typed approximately 61 pieces of Club-related correspondence, approximately 32 of which were printed on official court stationery, and 20 of which were sent on the courthouse facsimile machine or by using county postage.

12. During 1991 and 1992, Judge Hyde requested that the court secretary create a 94-page mailing list for a particular Charity; whereupon she also generated copies of a fund-raising letter addressed to those on the mailing list. Additionally, she typed labels, envelopes, by-laws, and personnel policies relating to the Charity. The court secretary spent the equivalent of approximately 24 work days on such tasks.

13. In November, 1991, Judge Hyde and a clerk/administrator had a conversation regarding utilization of the court secretary's time, during which the clerk/administrator formed the impression that Judge Hyde was attempting to intimidate him regarding his job security.

14. Between 1990 and 1994, Judge Hyde failed to report on his annual verified Statement of Economic Interests form the following items: a) income received from a local College during 1993 and 1994; b) a $28,000 personal loan in 1993; and c) a trip to Hong Kong received as a raffle prize in 1993. Judge Hyde represents (and the Commission accepts as true) that this failure was inadvertent and amended statements will be filed.

15. Between 1990 and 1995, Judge Hyde used official court stationery to send letters to the following business entities or public officials under circumstances in which the use of court stationery could have been interpreted to lend the prestige of judicial office to personal or private interests: a) a letter to an Insurance Company forwarding a Claim of Loss form regarding a burglary at Judge Hyde's home; b) a letter to the Presidents of two airlines complaining of flight delays experienced during a trip; c) a letter, written in Judge Hyde's capacity as President of the Board of Directors of a Charity, to a mayor and the members of a City Council on behalf of a business' "request for modification of their PUD;" d) a letter to a life insurance company regarding changes to Judge Hyde's insurance policy; e) a letter to a book publisher regarding a billing dispute; and f) a letter to the President of a Bank reconfirming Judge Hyde's interest in serving as a member of the Board of Directors of a Fair.

16. Between 1991 and 1995, Judge Hyde made sexually-related comments toward female court employees which were deemed to be offensive by some court employees who overheard the statements. For example, during the week of October 23, 1995, Presiding Judge Hugh Walker and two division chiefs were having a conversation regarding court policies and procedures when Judge Hyde commented to a female division chief, "Are we having a PMS day?"

17. Between 1993 and 1995, Judge Hyde was absent from the courthouse for six and three-quarters days without reporting them as vacation time. Additionally, there were other days when Judge Hyde absented himself from the courthouse without reporting the time as vacation time and regularly left the courthouse when the Friday calendar was completed, sometimes as early as noon. On some days when Judge Hyde was absent, as well as on some days when he was present, the county incurred the expense of utilizing a commissioner to hear civil trials, small claims matters, or traffic matters.

18. None of the acts related above concern the manner in which Judge Hyde conducted his courtroom proceedings or deported himself while on the bench. It was Judge Hyde's impression that utilizing the work time of court personnel did not result in the impairment or nonproduction of necessary court business. Judge Hyde represents (and the Commission accepts as true) that he has taken measures to ensure that neither court personnel nor county equipment is utilized in any manner or in any activity that is not strictly court-related.

Basis for Accepting a Stipulated Disposition

The stipulated facts admit substantially all of the allegations set forth in the Notice of Formal Proceedings. As noted above, the Commission also accepts Judge Hyde's representations of fact as being true.

In a separate signed statement, Judge Hyde also represented that he:

> ". . . is aware of the inappropriateness of the actions reflected by the Agreed Statement of Facts and assures the Commission that these actions will not be repeated in the future.

The Commission has concluded, in view of Judge Hyde's response to the Notice and his assurances that the challenged conduct has ceased and will not resume, that discipline less than removal from office would be appropriate. The Commission therefore accepts the proposed disposition and agrees that it will not order that Judge Hyde be removed from office. In proposing this disposition, Judge Hyde waived the right to a hearing and to petition the Supreme Court for review.

## Discipline

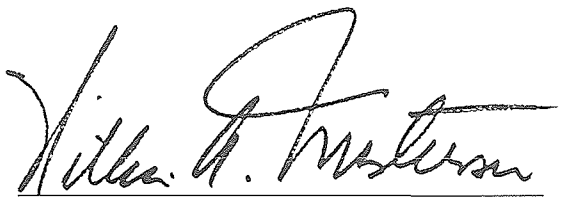
The Commission has carefully reviewed the record. The stipulated facts establish repeated instances of conduct prejudicial to the administration of justice.* As noted, the Commission's principal concern in this matter is whether Judge Hyde should be removed from office. Short of removal, the next most serious level of discipline available to the Commission is public censure.

The Commission concludes that the appropriate discipline is a severe public censure. The Commission vote was 8 to zero.

## Order

For the reasons set forth herein, the Commission orders that Judge D. Ronald Hyde be, and he hereby is, issued a severe public censure.

Dated: May 10, 1996



William A. Masterson
Chairperson

* The use of DMV records for personal purposes comes very close to willful misconduct in office. The stipulated facts do not afford, however, clear and convincing evidence that Judge Hyde's actions were performed in a judicial capacity. Dodds v. Commission on Judicial Performance (1995) 12 Cal.4th 163.

FILED

APR 16 1997

Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| INQUIRY CONCERNING A JUDGE<br><br>NO. 139 | DECISION AND ORDER IMPOSING PUBLIC CENSURE |

This is a disciplinary matter concerning Jose Angel Velasquez, Judge of the Monterey County Municipal Court, Salinas Division. Formal Proceedings having been instituted, this matter is now before the Commission on Judicial Performance pursuant to Rule 127 of the Commission's Rules of Practice (discipline by consent).

The Commission has determined that public censure is appropriate.

## APPEARANCES

Trial counsel for the Commission on Judicial Performance are Jack Coyle, Dennis Coupe, and Valerie Marchant (San Francisco). Counsel for Judge Velasquez are James Friedhofer, Douglas R. Reynolds, Lisa K. Roberts and Lewis, D'Amato, Brisbois & Bisgaard (San Diego).

## PROCEDURAL HISTORY

Formal proceedings were instituted in this matter by the Commission's Notice of Formal Proceedings dated August 30, 1996, which was later amended on October 29, 1996.[1] The Notice sets forth four counts of misconduct and concludes by alleging that Judge Velasquez committed willful misconduct in office, conduct prejudicial to the administration of justice, or improper action -- three categories of misconduct specified as being grounds for judicial discipline in article VI, section 18 of the California Constitution.

[1] All references to the Notice of Formal Proceedings herein are to the First Amended Notice of Formal Proceedings.

Served: 4-16-97
BW CJP (CCP §1019.5(b))

Judge Velasquez filed a verified Answer to the Notice on November 20, 1996. The Answer admitted many of the factual allegations of the Notice but disputed the inferences and conclusions alleged, and specifically denied willful misconduct in office or conduct prejudicial to the administration of justice. The Answer did not deny that Judge Velasquez' actions constituted improper action.

Judge Velasquez' Answer also asserted thirteen affirmative defenses to the Notice, including lack of subject matter jurisdiction and constitutional privileges for freedom of speech, freedom of religion, and freedom of expression.

Upon receipt of Judge Velasquez' Answer, the Commission requested that the California Supreme Court appoint special masters, pursuant to Rule 121. The Honorable Joanne C. Parrilli of the First District Court of Appeal, the Honorable Stanley Weisberg of the Los Angeles County Superior Court and the Honorable Cerena Wong of the Sonoma County Municipal Court were appointed and are presently serving as special masters in this proceeding.

Pretrial hearings and motions were heard by the masters, and a formal hearing to hear argument and take evidence was commenced before the special masters in San Jose, California on April 7, 1997. Shortly after the hearing commenced, and stimulated by an inquiry from the masters about possible resolution of this matter, counsel for the parties requested a brief adjournment to discuss disposition by consent. A stipulation was tentatively proposed to the Commission, through Commission Counsel, and it appearing that a disposition could be obtained, further hearings were suspended so that a stipulated resolution of this matter could be presented to the Commission.

The matter is now before the Commission, pursuant to Rule 127, upon stipulated facts and an agreement that -- if discipline by consent is accepted by the Commission in lieu of a full hearing -- discipline no more severe than a public censure would be imposed.

## FINDINGS OF FACT

In a verified statement, submitted in conjunction with the stipulation proposing resolution of this matter, Judge Velasquez admits the truth of the charges set forth in the Notice, waives review by the Supreme Court, states that he is not acting under duress, and consents to a sanction of public censure.

In the accompanying stipulation, signed by Judge Velasquez and all counsel, the parties stipulate as follows:

COUNT ONE

Judge Velasquez displayed a crucifix (approximately 9" by 6" in size) on the wall behind the bench during an arraignment calendar in December 1995. The crucifix was visible to the public. A deputy district attorney and deputy public

defender expressed concern about the display to Judge Velasquez. Judge Velasquez acknowledged their concerns and removed the crucifix later that day. He displayed the crucifix as an expression of his personal religious belief. He did not intend to offend anyone.

Judge Velasquez' actions in Count One constituted conduct prejudicial to the administration of justice.

COUNT TWO

In December 1995, Judge Velasquez received a form letter from a group called the Reproductive Rights Coalition, soliciting names to be listed in an upcoming newspaper advertisement in the *Monterey Herald* celebrating the 23rd anniversary of *Roe v. Wade*. Judge Velasquez returned a form attached to the solicitation authorizing the use of his name as "Judge Jose Angel Velasquez." The advertisement appeared in the *Monterey Herald* on January 22, 1996, with the judge's name and title. The form that Judge Velasquez filled out and the information he received did not state that a solicitation of funds would be part of the advertisement.

Judge Velasquez' actions in Count Two constituted conduct prejudicial to the administration of justice.

COUNT THREE

Upon his initial assignment to a municipal court misdemeanor trial calendar, in January 1996, Judge Velasquez made it known publicly that, effective February 8, he would impose 31 to 45 days in jail plus 30 AA meetings for first time DUI offenders, 75 to 90 days in jail plus 45 to 60 AA meetings for second DUI offenders, and 180 days in jail plus 90 AA meetings for third time DUI offenders. Those sentences would have been lawful under the California Vehicle Code. However, the DUI policy, as announced, appeared to not allow for exceptions, and therefore created the appearance of prejudgment of DUI cases.

Judge Velasquez' actions in Count Three constituted conduct prejudicial to the administration of justice.

COUNT FOUR

Between February 23, 1996, and April 5, 1996, Judge Velasquez made public statements disparaging fellow Monterey County judges and certain Monterey County attorneys. The statements were made both on and off the bench, in open court, in documents Judge Velasquez filed in court, in newspapers and on television broadcasts. The facts set forth in Count Four (a - m) of the Amended Notice of Formal Proceedings are incorporated herein by reference.

Judge Velasquez' actions in Count Four constituted willful misconduct.

MITIGATION

In mitigation, the actions described above took place within 10 months of Judge Velasquez assuming the bench and within 4 months of his initial assignment to a misdemeanor trial division; the public disparagement ceased in April 1996 and has not been repeated.

Judge Velasquez has requested that the Commission note his cooperation during its investigation.

DISCIPLINE

The parties agree that based upon the foregoing, Judge Velasquez shall be publicly censured.

The allegations of Count Four, which are incorporated by reference in the stipulation above, are that:

Between February 1, 1996, and April 30, 1996, you made public statements disparaging your fellow Monterey County judges on the municipal court bench and superior court bench, as well as certain attorneys who appeared before you. You made disparaging statements about your fellow judges both on and off the bench, in open court, in documents you filed in superior court, to newspaper reporters and on television broadcasts. Your statements impugned the integrity and impartiality of the judiciary. Your comments about attorneys occurred in March 1996, while you were on the bench and court was in session.

You made the following disparaging statements:

a. On the morning of February 23, 1996, in the DUI cases of defendant Pinney, you made disparaging statements in open court that include but are not limited to the following:

> "... and the reason why I am going on the record is that Jose Angel Velasquez in Department 4, who was elected by the people, has been treated unfairly and unjustly by Presiding Judge Stephen Sillman, in making special treatments and calendaring assignments for various cases. I don't critique or criticize this particular case, but just the activities of a presiding judge with respect to 170.6s."

In the afternoon of February 23, 1996, in the same cases, you made disparaging statements in open court that include but are not limited to the following:

> "In this case Judge, Presiding Judge Stephen Sillman called me to his chambers and we had a rather heated discussion in terms of filing the 170.6s, and a discussion about special treatment or not treatment. For the

record ... the Presiding Judge had changed the orders on several occasions... The procedure for the filing of 170.6s he says it's a special, it's not special arrangements, I say that as against me, it's being racially discriminatory, that's a factual finding, and that he's been meaning to maneuver my calendar for whatever purposes he may have ... and I told him to his face that he is racially discriminatory as against me ... and that it has been his doing to give me every individual clerk to work with my calendar not allowing me to have a continuity ... and there's been changes of policy on a daily basis and on a case per case basis and there have been special arrangements made in this particular court today, on a special case which is unique at his doing. He claims not to, but that is what I am stating on the record and he can challenge me on it."

b. On March 7, 1996, defense attorney Lawrence Biegel appeared before you regarding defendants Pinney and Zaouk. Mr. Biegel wished to disqualify you pursuant to Code of Civil Procedure section 170.1 because he represented Court Administrator Kay McCormick regarding matters that directly involved you. You made disparaging statements in open court about your fellow judges and about attorney Biegel, including but not limited to the following:

"I have made allegations on the record that there is racial discrimination being aimed and targeted by or towards me, there is an actual conspiracy between several members of the municipal court bench and superior court bench and I know that it's extended to members of the California Bar ... My question for the record is, in the commission of legal malpractice, has this client been advised, that is Mr. Morgan Patrick Pinney, for this commission of legal malpractice by your law firm, and if it hasn't, why hasn't that happened? Now I am making blatant and open accusations that the presiding judge of the Municipal Court, Stephen A. Sillman, is part of a conspiracy with members of the Superior Court bench ... also with administrators from this court and heads of other departments in their manipulations and maneuvering of my court calendar to make me look bad because of politics. ... for me to disqualify myself ... would be to engage in the perpetration of what I see a conspiracy by various members. ... my reason for making this record clear is that I detect and I suspect, and this is on the record, that there is collusion with respect to the maneuvering between Sillman, McCormick and your law office to circumvent to the idea of 170.6 and to legally get this case out of my court ..."

c. On March 18, 1996, you filed in municipal court an "Answer To Motion To Recuse" in the DUI cases of defendant Pinney and the case of defendant Zaouk. In each answer, you made disparaging statements about your fellow judges and about the Cominos and Biegel law firm, including but not limited to the following:

"So, having committed legal mal-practice, as publicly advised by a locally well-known certified criminal law attorney ... one of the only legal ways to circumvent this problem is to represent a trumped-up client against me ... I have publicly called upon a thorough investigation into a clandestine conspiracy formed by several judicial members of the Municipal and Superior Courts of Monterey County to publicly make me look bad. It is public knowledge that both presiding judges for the Municipal and Superior Court are publicly working against me because of their personal discontent with my election. ... I feel that for me to acquiesce to this disqualification which in effect is a pretext and cover-up to the commission of legal mal-practice by the Cominos and Biegel Law Office ... would be tantamount to my own perpetration of an unethical and illegal furtherance of a crime and conspiracy ... the entire Monterey County judiciary is presently involved in a major internal dispute ... it is my position that several judicial branch members, elected officials and court administrators have 'huddled' and decided to engage [defense attorney Biegel's] services, so as to give him the legal way out of having failed to timely file his 170.6s."

d. On March 21, 1996, in open court, in the DUI case of defendant Wyatt, you made statements criticizing the DUI sentences imposed by your fellow judges, and also made statements that implied that the District Attorney's Office did not want defendants who were guilty of DUI charges to be appropriately punished. Your statements include but are not limited to the following:

"... let me explain to you. I've been a lawyer before, now I'm a judge. I'm a tough judge. One state, the toughest in the State of California. So my colleagues here are complaining that I'm being too tough. The DAs are complaining that I'm too tough.... All the lawyers in the State of California are complaining that I'm too tough on people that are convicted for drunk driving. So, even though the public wants to be protected from drunk drivers and you're innocent until proven guilty, I am giving you - I'm fully disclosing to you that if you go next door, you will be given five days by another judge."

e. On March 21, 1996, in the DUI case of defendant Tavares, you made statements in open court criticizing the DUI sentences imposed by your fellow judges, including:

"Mr. Daniel Tavares, they're going to be filing a paper to disqualify me so that you can be taken to another judge in this county and be given a slap on the wrist - five days. You don't have to go to jail at all. That's how Monterey County are going to be protected by - from drunk drivers."

f. On March 21, 1996, in the case of defendant Russell, you made disparaging statements in open court about the judge who previously had the case, including stating that the judge may have committed "legal malpractice" in handling the case.

You also made disparaging statements about the deputy district attorney who had previously handled the case, including stating that the deputy district attorney may have committed "legal malpractice." The deputy district attorney you referred to was not present when you made those statements.

g. On March 29, 1996, in the case of defendant Picazo, you made statements in open court disparaging Deputy Public Defender Ruth McVeigh. These statements were made in Ms. McVeigh's absence. These statements include but are not limited to the following:

> "... it's been a problem, with her comportment, with her demeanor and with her lack of respect for any in-chambers conversations. Not only with me the individual or as a judge, but also with her continuous disrespect for the Deputy DA.... Ms. McVeigh has contemptuously, intentionally and we'll find out, she is next door. If she is next door she has a right to be there and I will wait, but I believe Ms. McVeigh has a personal problem with - and I will have my secretary (unintelligible) call Ms. McVeigh's boss and ask whether she is in her office and she has problems with this court. Maybe she should be reassigned."

h. On March 29, 1996, after a deputy public defender filed a peremptory challenge or disqualification in the cases of defendants Picazo, White and Rosas, you made statements in open court disparaging the deputy public defenders to their clients. No deputy public defender was present when you made these statements, which include but are not limited to the following:

> "... your attorneys have failed to look into the files and see what is in them and their fault and their demeanor in here and failure to (unintelligible) of the court.... I think, in this case you may have a case against them for their abandoning you in court ... you may want to hire a lawyer to sue the public defender's office for their reckless disregard of your due process rights.... I'll say that to Mr. Lawrence [the Public Defender] himself. ... I think individual people within the public defender's office are having their personal problems brought in here and they're attacking various members, including the deputy public - district attorney in cases, simply because they are not getting their way. And today I am telling you that I feel sorry for you as ... a judge, because your rights are being trampled upon by your own lawyers. They are failing to represent you.... I'll tell you one thing,

this tape recording you can pay $10 and ... go get yourself a lawyer and copy it. Okay? And if they want to talk to me they have a pager they can call my family and I will come back from wherever I am. You may hire yourself a real lawyer that's going to represent your rights. The public defenders are real lawyers but in this county several of them are just disrespecting you as a human being. And I think that's offensive and that's a crime and that's a legal malpractice.... Three of the lawyers have come in here and abandoned you without even bothering to tell you what they have done or explained to you what the procedure is ... But I am just trying to explain to people here that your lawyers are not doing their jobs for you. And I say that about Mr. Kleinkopf who was in here, I say that about Ms. McVeigh ... All three of you can have a copy of this tape for free at the court's expense and ... and you should actually file a Morrissey [sic] hearing because you can say these lawyers are not representing your rights, they are just abandoning. I am making all these legal - factual findings because I am here talking to you. You may want to talk to the next judge and then ask for help because right now you have been abandoned, you've been left naked.... Because your lawyers chose to disrespect and disregard your files and they want to make me to be the bad guy and I'm not the bad guy.... They chose to leave you in a courtroom with a judge and with a deputy DA without even telling you what was going on. That's the worst of representation that any lawyer can give in the State of California."

In addition to disparaging the deputy public defenders, these statements improperly interfered with the attorney-client relationship.

i. In an interview with KCCN television, you made disparaging statements about Judges Sillman, Duffy, Curtis and Scott that were broadcast on the evening news on April 1, 1996, including but not limited to the following:

"And even though I say that Judge Sillman is racist, and Wendy Duffy is racist, and Richard Curtis is racist and Russell Scott is racist, I have told them that it will be my intent to make friends of them. ... They're wanting to use statistics against me; that I am not carrying my own weight, that is caseload. But the reason for that is the defense attorneys are disqualifying me because I will give convicted drunk drivers a serious sentence and not a slap on the wrist."

j. In an interview with KCBA Fox 35 television, you made disparaging statements that were broadcast on the evening news on April 3, 1996, including but not limited to the following:

"My colleagues have resisted to accept the results of a valid district election that was as a result of the democratic process. ... Now I am the beneficiary of much of the hatred and distaste of many of my colleagues on the bench. ... My colleagues on the municipal court bench have chosen to make my life miserable and at the present time are wanting to coerce me by yanking me out of the department that I have been handling effectively, efficiently and competently because of my ... strong stance on DUI."

k. In an interview with KCCN television, you made disparaging statements about your fellow judges that were broadcast on the evening news on April 3, 1996, including but not limited to the following:

"They are racist and they distaste me and have publicly tried to humiliate me with the intent to assassinate my character and to disparage my reputation."

l. You made disparaging statements which appeared in an April 4, 1996, article in the *Coast Weekly* entitled "Legal Briefings," including but not limited to the following:

"There's a conspiracy amongst local judges ... They dislike me and will do anything they can to assassinate my character and disparage my reputation.... There's tampering going on with my computer ... and things being moved around my office. My fear is that these guys and ladies will come in here and plant something. In their quest to assassinate my character, they will do anything.... We all make mistakes ... but all these guys make it seem like I'm a total animal out of control."

m. You made disparaging statements which appeared in an April 5, 1996, article in *The Californian*. You compared your colleagues' treatment of you to a recently videotaped beating of illegal immigrants in Southern California, and stated: "[b]ut the battering these people have performed on me has been emotional."

The Commission acknowledges Judge Velasquez' admission that the forgoing facts are true, and it therefore adopts the forgoing as setting forth its findings of fact.

## CONCLUSIONS OF LAW

Judge Velasquez' actions with respect to the crucifix, his endorsement of one side in the ongoing debate about abortion, and his DUI policy manifest prejudgment with respect to certain religious or moral principles, and by inference, a bias against those having different religious or moral principles. The bench is not a pulpit nor soapbox for self-expression. A litigant is entitled to assume that a judge's attention will be focused entirely upon the relevant facts of his or her

case, and that his or her cause will be judged dispassionately -- without consideration of anyone's religion, or history of abortion, or the judge's political considerations (such as the "get tough policy" for DUI violations adopted and announced in a dispute with other judges).

Such conduct by a judge is prejudicial to the administration of justice and brings the judicial office into disrepute.

Most troubling is the fourth count. Judge Velasquez affirmatively used the judicial office, and his position as judge, to accuse others who were neither parties nor witnesses before his court -- and in fact who were not even present in his court -- of bias and misconduct. Especially troubling are those instances where Judge Velasquez, speaking from the bench and to the news media, publicly accused fellow judges of racial bias, thereby calling into question the integrity and impartiality of Monterey County judges and the judicial system itself. The appropriate forum for allegations of misconduct by judges is the Commission on Judicial Performance, and for lawyers, the appropriate forum is the State Bar. Neither the Monterey Municipal Court nor the news media were an appropriate forum for Judge Velasquez' comments.

The Commission therefore concludes that Judge Velasquez committed conduct prejudicial to the administration of justice in Counts One, Two, and Three, and that he committed willful misconduct in office as alleged in Count Four.

## DISCIPLINE

As stated, this matter is before the Commission for disposition under Rule 127. The stipulated findings include one count of willful misconduct, based upon thirteen instances of improper action, and three counts of conduct prejudicial to the administration of justice. As in any case in which willful misconduct has been proved, the initial focus of the Commission's consideration must be whether the public interest can be protected by any form of discipline short of removal from office. Removal is ordinarily reserved for the most serious cases, and this is a serious case.

In submitting this matter pursuant to Rule 127, the parties have agreed that, if approved, the Commission will impose discipline no more serious that public censure.[2] If the Commission is not satisfied that public censure would be sufficient, it may return this matter to the special masters for further hearings and findings of fact. Once the special masters have made their report, the matter would return to the Commission for further deliberations. At that time, the Commission would be free to impose any sanction that it concluded was appropriate, including removal from office.

[2] Other than removal, the levels of discipline available to the Commission include dismissal with an advisory letter, issuance of a private admonishment, issuance of a public admonishment, or issuance of a public censure. Of those options, public censure is the strongest sanction available.

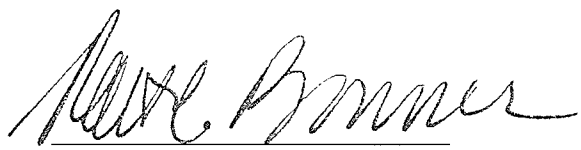
Two facts -- particularly when coupled with the Commission's enhanced authority under Proposition 190 -- persuade the Commission that removal from office is not warranted on the facts of this case. One, Judge Velasquez acted with integrity and good faith in admitting forthrightly the facts that constitute the misconduct alleged; and two, prior to the time that formal proceedings were instituted by the Commission, and throughout the past year, Judge Velasquez has refrained from further misconduct. Further evidence and hearings would not change these facts.

While there may be a risk to the public interest that Judge Velasquez will resume his conduct at some later date, the Commission now has the authority, granted by Proposition 190, to suspend Judge Velasquez from office if he should do so. (See Rule 120.) In these circumstances, the majority of the Commission concludes that removal is not required, but that no lesser discipline than public censure would be adequate.

The Commission therefore concludes that public censure is the appropriate disposition for this case. The Commission's vote was 8 to 2, with one Commissioner abstaining.

This decision and order shall constitute the order of public censure.

Dated: April 16, 1997



Chairperson

Commission members Robert C. Bonner, Esq., Hon. Lois Haight, Hon. Daniel M. Hanlon, Ms. Eleanor Johns, Patrick M. Kelly, Esq., Hon. Vincent J. McGraw, and Ms. Pearl West voted for the public censure. Commission members Mr. David L. Malcolm and Ms. Harriet Salarno voted against public censure. Commission member Ms. Ophelia Basgal was recused and Commission member Donald E. Vinson, Ph.D., did not participate in the decision.

FILED

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Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING A JUDGE<br><br>NO. 139 | MODIFICATION OF DECISION AND ORDER IMPOSING PUBLIC CENSURE |

On April 16, 1997, the Commission entered its Decision and Order Imposing Public Censure in this matter. That order is modified in this respect:

The second sentence of the third paragraph on page 11 is modified to say: "The Commission's vote was 7 to 2, with one Commissioner recused."

This modification is to correct typographical errors and has no other affect upon the Commission's decision and order.

Dated: May 28, 1997

Robert C. Bonner
Chairperson

Served: 5/29/97

BW CJP (CCP §1019.5(b))

[No. 141. Apr. 27, 1998.]

# INQUIRY CONCERNING JUDGE JAMES RANDAL ROSS

## SUMMARY

A disciplinary matter was brought concerning a retired superior court judge.

The Commission on Judicial Performance censured the judge and barred him from receiving assignments, appointments, or references of work from any California state court. The commission concluded that the judge committed eight instances of willful misconduct, plus five instances of conduct prejudicial to the administration of justice. The judge committed conduct prejudicial to the administration of justice when he became angry with an insurance company and its counsel, lost his ability to be objective, and ordered the insurance company's president to appear in court. The judge had no proper justification for threatening the insurance company's counsel with contempt for bringing a motion to stay, and he inappropriately used his contempt powers to embarrass the insurance company's counsel because he was angry with him. This constituted willful misconduct. The judge committed prejudicial conduct by throwing an object in court because an attorney purportedly violated the judge's in limine ruling. The judge violated Cal. Code Jud. Ethics, canon 2B(2), by lending the prestige of the judicial office to promote and sell a book, which constituted prejudicial conduct. The judge committed prejudicial conduct by telling an inappropriate, undignified, and offensive joke during the trial of a civil action involving alleged sexual molestation. The judge committed misconduct by becoming embroiled and abusing judicial authority to advance his own personal interests. He obtained waivers of future complaints against him to the commission as well as waivers to the filing of any civil suits against him. He also threatened retaliation if complaints were made to the commission or if civil suits were filed against him. These acts constituted willful misconduct. With regard to the appropriate sanction, the commission noted that the judge remained steadfast that he had done no wrong. There was no basis for the commission to assume or conclude that the judge was ready, willing, and able to reform—under any sanction. The judge, having resigned from office, was not subject to removal. The next available option was an order of public censure plus an order barring the judge from sitting on assignment. A lesser sanction, such as a public admonishment, would have allowed him to sit again as a superior court judge on assignment. (Opinion by Robert C. Bonner, Chairperson.)

HEADNOTES

(1) **Judges § 6—Discipline—Prejudicial Misconduct—Demeanor.**—The judge engaged in prejudicial misconduct when he ordered an insurance company to settle the case for the purpose of punishing the insurance company and its attorney and treated the attorney in an angry, discourteous and impatient manner. The judge told the attorney that the Court of Appeal would laugh at his argument.

(2) **Judges § 6—Discipline—Willful Misconduct—Abuse of Contempt Power.**—The judge committed willful misconduct when he threatened the insurance company's counsel with contempt without justification for bringing a motion to stay. The judge ordered the attorney to leave his courtroom, and threatened to hold the attorney in contempt if he said "one more word." The judge inappropriately used his contempt powers to embarrass the insurance company's counsel because he was angry with him.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 56, 73.]

(3) **Judges § 6—Discipline—Willful Misconduct—Abuse of Contempt Power—Denial of Due Process.**—The judge engaged in prejudicial misconduct when he called witnesses to the stand for an improper purpose and without providing notice to the witnesses or the litigant, and by threatening an attorney with contempt for objecting to this proceeding.

(4) **Judges § 6—Discipline—Prejudicial Misconduct—Embroilment.**—The judge engaged in prejudicial misconduct when he threatened to order the appearance of an attorney whose appearance was not necessary. The judge was embroiled and his threat was punitive.

(5) **Judges § 6—Discipline—Prejudicial Misconduct—Slamming Tablet on Bench.**—The judge engaged in prejudicial misconduct when he dramatically slammed a tablet down on the bench, causing pencils to go flying, for the purpose of embarrassing an attorney.

(6) **Judges § 6—Discipline—Prejudicial Misconduct—Misuse of Public Resources—Selling Books from Chambers.**—The judge engaged in prejudicial misconduct and misused public resources by selling a book he authored from his chambers and through his bailiff to jurors and attorneys.

(7) **Judges § 6—Discipline—Prejudicial Misconduct—Inappropriate and Offensive Joke.**—The judge engaged in prejudicial misconduct by making an inappropriate and offensive joke of a sexual nature from the bench.

(8) **Judges § 6—Discipline—Willful Misconduct—Coercing Waiver of Right to File Complaint with the Commission.**—The judge engaged in willful misconduct by coercing litigants and their counsel under threat of contempt to waive their legal rights, including their right to file a complaint with the Commission on Judicial Performance, and by compelling indemnification if a party filed such a complaint.

(9) **Judges § 6—Discipline—Multiple Incidents of Misconduct—Same Proceeding or Occurrence.**—To the extent that multiple incidents of misconduct arise out of the same proceeding or occurrence, the Commission on Judicial Performance has considered this in assessing discipline. The commission's action is based upon the nature of this misconduct and its effect on the public and the judicial system, rather than on a mere tally of the number of instances of misconduct.

(10) **Judges § 6—Discipline—Removal from Office—Willful Misconduct—Lesser Sanction.**—Willful misconduct does not compel removal from office. Indeed, a lesser sanction may be appropriate for a judge who shows himself or herself ready, willing, and able to reform under a less severe sanction.

(11) **Judges § 6—Disciplinary Proceeding—Purpose.**—The purpose of a disciplinary proceeding before the Commission on Judicial Performance is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

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## OPINION

**BONNER, Chairperson.**—This disciplinary matter concerns Judge James Randal Ross (retired), formerly a judge of the Orange County Superior Court. The Commission on Judicial Performance (Commission) concludes that Judge Ross committed willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission censures Judge Ross and bars him from receiving assignments, appointments, or references of work from any California state court.

### PROCEDURAL HISTORY

Judge Ross served as a judge of the Orange County Superior Court from 1983 to 1995. The events which are the subject of this matter took place

during the 1992 to 1995 time period, while Judge Ross was serving as a full-time superior court judge. Judge Ross retired on July 7, 1995.

This matter was commenced on December 11, 1996, with the issuance of a notice of formal proceedings. The notice was amended on June 2, 1997. Judge Ross filed answers to both notices and denied any misconduct.

At the Commission's request, the Supreme Court appointed three special masters to conduct an evidentiary proceeding and to prepare a written report.[1] Eighty witnesses testified during the hearing that commenced on July 29, 1997, and concluded on August 8, 1997. Thereafter the masters prepared findings of fact and conclusions of law which were filed with the Commission on November 21, 1997.

On January 2, 1998, Judge Ross filed objections to the masters' report, and after further briefing, the matter was set for oral argument before the Commission on March 12, 1998. Nine members of the Commission participated.[2]

## FINDINGS AND CONCLUSIONS

The first amended notice of formal proceedings sets forth five counts of alleged misconduct. Counts one, four and five allege unjudicial conduct on the bench. Count two alleges use of the judicial office for personal gain, specifically promotion and sale of a book written by Judge Ross. Count three alleges sleeping during certain specified jury trials.[3]

The Commission has reviewed the record of proceedings before the special masters, and the arguments raised by the parties in their briefs before the Commission. The evidence of misconduct found by the masters is clear and convincing. For the reasons set forth hereafter, the Commission adopts the findings of fact contained in the special masters' report as its own. Based on the masters' findings, the Commission dismisses count three, and concludes that respondent engaged in willful misconduct or conduct prejudicial as to counts one, two, four and five.

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[1] The special masters were Justice Patti S. Kitching of the Court of Appeal, Second Appellate District, Division Three, Judge John E. Dearman of the San Francisco County Superior Court, and Judge Michael T. Garcia of the Sacramento County Superior Court.

[2] The Commission normally consists of 11 members. There were two vacancies on the Commission at the time of oral argument.

[3] The masters found a failure of proof as to the third count, and trial counsel have not filed objections. That count is therefore dismissed.

While the Commission adopts the masters' detailed findings which are incorporated in this decision as an appendix, the facts are summarized here only as background for the Commission's ruling on discipline.[4]

*Count One (A)*—Zapone v. Jaridly

Count one arises out of the conduct of a civil action entitled *Zapone v. Jaridly*, an automobile accident case in which State Farm had undertaken the defense of its insured. As trial preparation proceeded, State Farm became aware of facts creating a coverage issue. It withdrew its previous settlement offers. On December 1, 1993, State Farm, through its attorney Sherman Spitz, filed a declaratory judgment action in federal court.

The allegations of misconduct arise from four incidents.

*The December 16, 1993 Incident—Conduct Prejudicial*

On December 16, 1993, the parties in the underlying civil action appeared before Judge Ross for a mandatory settlement conference. Attorney Sherman Spitz, who represented State Farm in the declaratory judgment action, attended along with two claims people from State Farm.

Following the familiar settlement conference procedure of meeting with the parties (and their insurers) separately, Judge Ross met with defense counsel in chambers. Also included in this meeting were the State Farm representatives. Judge Ross was told of the coverage dispute, the declaratory judgment action, and advised that in view of the absence of coverage (based upon alleged fraud by the insured Jaridly), State Farm would make no settlement offer.

Judge Ross said he did not want to hear that an insurance company would not pay any money at a settlement conference, and that he was going to try all issues, including the declaratory relief issue, in his courtroom.

According to Spitz, Judge Ross said he was finding that Spitz and State Farm had acted in bad faith in connection with the settlement conference and he was going to order sanctions. He asked the State Farm representatives in chambers, "How much are you going to pay?" Spitz told them not to respond. Spitz explained that he did this because Judge Ross had already said he would award sanctions, there was no court reporter present in chambers, and his instruction was for the purpose of protecting his clients.

[4] In the event of a discrepancy between the masters' findings and those made herein by the Commission, the Commission intends that these findings shall prevail.

Judge Ross testified that he turned to the State Farm representatives and said, "Well, how much money do we have today?" According to Judge Ross: "Out of the clear blue, over to the right rose this figure of Mr. Spitz and said 'Nobody in this room will say one word on behalf of—because I am representing State Farm. I have it from the highest authority. This case is not worth a plugged nickel. We're not paying a plugged nickel. Mandatory settlement conference over.' "

Any difference between Judge Ross's version and the version recounted by Attorney Spitz is immaterial. Both accounts conclude that the conference was ended and the matter was taken up in open court, on the record. Either version sets the stage for what happened next. As set forth in the masters' report:

"[Judge Ross] testified he told the parties he needed time to go to the bathroom and put his robe on. However, he did not go to the bathroom. Rather, he put on his robe and stepped into the hallway where he observed Spitz telling Ellis and Syverson that they better back Spitz up or else they wouldn't be in State Farm any longer. Respondent testified he told Spitz that was improper and Spitz replied that respondent was a liar. Respondent testified Spitz further said: 'Further, Judge Ross, you little bastard, if you fuck with me, I'll see to it that you're no longer a judge. And I've got State Farm's billions behind me.' "

"Spitz denied he told the adjusters on the way to the courtroom to back him up if they still wanted to be with State Farm. He also denied that he and respondent had such a conversation in the hallway. Ellis testified there was no such discussion between herself and Spitz in the hallway after they all left chambers on December 16."

"We are unpersuaded by respondent's testimony of his perception of the hallway events. We find the statements attributed to Spitz in the hallway did not occur."

Once in court and on the record, Judge Ross—with no motion or urging of any party—ordered that State Farm have Ed Rust, the president of State Farm, appear for a sanctions hearing. Rust was in the corporate office in Bloomington, Illinois. The masters found that Judge Ross was "extremely irate, caustic. . . . Yelling at Sherman Spitz, pointing his finger at him."

The transcript of the hearing indicates that Spitz asked if he could be heard before the court made a ruling, but he was not allowed to do so. When Spitz asked Judge Ross what authority he relied on to order Rust into court, Judge Ross—who was upset and red in the face—replied, "Stick around counsel" in a sarcastic tone.

According to the masters:

"Respondent admitted he was 'furious' and 'angry' and he tried to compose himself. We are not persuaded by respondent's testimony that he wanted to call Ed Rust in to settle the case and to explain it to Rust in spite of the personal problems that would cause respondent."

"We find that Spitz explained to respondent why he felt there was a question of coverage and that issue would be decided in the declaratory relief action. After he told respondent State Farm would not pay a 'plugged nickel,' respondent loudly asked the State Farm representatives how much they were going to pay, and Spitz told the State Farm representatives not to respond. Respondent was very angry; he told Cullins, Spitz and the State Farm representatives they could have personal exposure, they could be tried for conspiracy, Spitz and State Farm had acted in bad faith in connection with the settlement conference, he was going to order sanctions, and he would hold a sanctions hearing right then. Respondent also said he was going to try all issues, including the declaratory relief issue in his courtroom.

"In some circumstances it may be appropriate to order in the head of an organization to settle a case, but here the order was only made for the improper purpose of punishing State Farm and Spitz. State Farm did not make a frivolous argument regarding coverage, and it was inappropriate for respondent to tell the parties they could have personal exposure, that they could be tried for conspiracy, to tell them he was going to award sanctions and to tell them he was going to hold a contempt hearing. Respondent had no authority to try the declaratory relief action which had been filed in federal court. Respondent was angry, discourteous and impatient with the State Farm attorneys and witnesses. It was also discourteous to tell Spitz he could make his argument to the Court of Appeal and they would laugh at him."

(1) The masters concluded regarding the first incident alleged in count one (A): "We find that respondent committed conduct prejudicial to the administration of justice when he became angry with Spitz and State Farm, lost his ability to be objective and ordered Ed Rust to appear on December 16, 1993." We agree with the masters' findings and conclude that Judge Ross engaged in conduct prejudicial to the administration of justice.

*The December 29, 1993 Incident—Willful Misconduct*

On or about December 9, 1993, Spitz filed a motion to stay the *Zapone v. Jaridly* matter pending the outcome of the declaratory relief action in federal court. Judge Ross heard the motion on December 29, 1993. The entire incident is set forth on two pages of transcript and, except for the statement of appearances by counsel, is set forth here in its entirety:

"Judge Ross: Mr. Spitz, what right do you have to come into this court and make a special appearance for State Farm making a motion on behalf of State Farm when State Farm is not a party to the action?

"Spitz: Well, your honor, we believe that we're a stakeholder in the action from the standpoint that my client—

"Judge Ross: Can you give me a case where when you're a stakeholder you can come in and take over a courtroom?

"Spitz: May I explain, your honor?

"Judge Ross: No, you cannot, sir.

"Spitz: I don't believe that I am trying to take over.

"Judge Ross: Deputy Martini.

"Bailiff: Counsel.

"Judge Ross: You will follow my directions that I am now going to give.

"Bailiff: Yes, your honor.

"Judge Ross: And that is Mr. Spitz has no right in this courtroom. He is not a party, he is not representing any party, and in addition thereto I am not here for—quoting him—for him to have fun, unquote. Therefore, if he says one more word even under his breath in this courtroom I will hold him in contempt of court and you will take him to the Orange County jail.

"Bailiff: Understood.

"Judge Ross: Understood, Mr. Martini?

"Bailiff: Understood.

"Judge Ross: All right. Let us proceed. Mr. Spitz, you will either leave or get out of the way.

"Bailiff: Sir, please wait in the hallway.

"Judge Ross: Unless you want to say one more word. Since this motion was made by a person or organization who is not a party to the action it has no validity and will not be heard by this court. That's the end of it.

Gentlemen, I'm sorry that you had to come. I'm sorry that someone brought a motion when they had no right to bring a motion but I have no control over people filing papers unfortunately."

The testimony before the masters was undisputed that when Judge Ross was making the above quoted remarks, he was yelling and upset. He was highly agitated. After Judge Ross had threatened Spitz with contempt if he said "one more word," Spitz walked to the back of the courtroom and found a seat. Spitz felt his client had not been given a fair opportunity to be heard and he felt embarrassed for the system and for himself.

The courtroom was full because December 29th was law and motion day. The masters concluded: "We find by clear and convincing evidence that respondent abused his contempt authority. He had no proper justification for threatening Spitz with contempt for bringing a motion to stay. Respondent inappropriately used this hearing and his contempt powers to embarrass Spitz because he was angry with him."

**(2)** The masters found this constituted willful misconduct and conduct prejudicial. We agree with the masters' findings and determine that Judge Ross committed willful misconduct.

*The January 3, 1994 Incident—Willful Misconduct*

On Monday, January 3, 1994, Judge Ross called the trial calendar and again took up *Zapone v. Jaridly*. This was the date that Judge Ross had set for Ed Rust, the president of State Farm, to appear regarding the issue of settlement.

Prior to the hearing, Spitz filed papers stating that Rust would not be appearing as ordered and setting forth the reasons for Rust's nonappearance.

After taking appearances, and noting that now four lawyers were present on behalf of State Farm, Judge Ross purported to characterize what had happened in chambers on December 16th. He asked Spitz to "confirm" Judge Ross's version and the following colloquy and events occurred:

"Spitz: No, not for those reasons. May I explain?

"Judge Ross: No, you can't because you're a liar because that's what you told them and I'll go up against you any time and my reputation against yours because you told them—

"Spitz: That's not what happened, your honor."

Judge Ross then, with no further discussion or notice, called State Farm representative Lynn Ellis to come forward, had her sworn by the clerk, and began to ask her questions. Spitz objected and Judge Ross responded, "You made your record, counsel. Miss Ellis, please take the stand. We're going to straighten this out once and for all." Judge Ross proceeded to examine the State Farm representative about the events in chambers on December 16th and about an alleged incident in the hallway between Judge Ross's chambers and the courtroom.

Spitz objected on the ground that Judge Ross was being argumentative with and harassing the witness, and on the additional ground: "We have not been given notice of this particular hearing. I object to this whole proceeding going forward, your honor, with all due respect." Judge Ross replied: "Take your writ. Right now I am talking and the next time I start talking you're in contempt of court when you interrupt this court. You can do anything else you want, but you're not going to interrupt this proceeding." Spitz testified he thought he would go to jail if he persisted. Spitz testified that Judge Ross was very accusatory, bellicose and sarcastic.

Judge Ross next called a second State Farm representative to the stand, had him sworn, and questioned him about the events in chambers on December 16th. He then dismissed the witness.

At one point Spitz asked to be heard and to make a record. Judge Ross said: "No, you can't counsel. We already determined that that's the decision of the court. . . . No. There will be no record by you, Mr. Spitz."

Judge Ross then asked the third State Farm representative to come forward. Judge Ross asked her, "What is your authority from State Farm, your limits?" She replied she had policy limits authority (of up to $100,000). Judge Ross said that the ramifications of the case made it a multimillion dollar case, and that it would even rival a $60 million judgment against Farmers.[5] Spitz again asked if he could make a record and Judge Ross stated: "No, you can't, counsel. All you do is talk and talk and talk and backwards and forwards. I'm going to make the orders. If you don't like it, fine. You're not to go any further. You've defrauded this court continually, lied to it, and I'm not going to take any more."

[5] Plaintiff was not asking for $60 million or any seven-number figure. As events later developed, despite the rulings by Judge Ross against State Farm, the case settled for $85,000. The case settled because Judge Ross said he was going to strike the answer and enter default, Judge Ross said the case had a value of seven figures, and Judge Ross had imposed monetary sanctions. Given these things and respondent's demeanor, State Farm's trial attorney felt Judge Ross was prejudiced and would not provide a fair trial.

Judge Ross thereupon found willful disobeyance of the court order requiring Rust to appear. He sanctioned Spitz and his firm $5,000, defense counsel (hired by State Farm) and his firm $5,000, and State Farm $5,000. State Farm's defense counsel asked to be heard, but Judge Ross would not allow him to speak.

Judge Ross again ordered Rust to be present on January 12, 1994.

Spitz again asked for an opportunity to make a record and Judge Ross again denied that request. Neither Spitz nor State Farm were afforded an opportunity to respond to Judge Ross's assertions of fact, or any sort of hearing, before sanctions were imposed.

**(3)** Regarding this incident, the masters concluded: "We find by clear and convincing evidence that respondent had an improper purpose in calling Ellis and Syverson to the witness stand. Respondent was primarily interested in proving that he was right and Spitz was wrong regarding Spitz's order to the State Farm representatives not to speak. Respondent violated the due process rights of the witnesses and State Farm because he gave no notice he would examine these witnesses, he did not allow cross-examination of the witnesses and he did not allow State Farm to put on contrary evidence. Again, he misused his contempt powers when he threatened to hold Spitz in contempt for objecting to this 'star chamber' proceeding."

The masters found this conduct to constitute both willful misconduct and conduct prejudicial. We agree and conclude that Judge Ross's conduct constituted willful misconduct and conduct prejudicial.

*The January 26, 1994 Incident—Conduct Prejudicial*

Following the events of January 3, State Farm agreed to a settlement. When questions about the settlement arose, another hearing was held on January 26, 1994.

Judge Ross stated his understanding that the settlement would be for $100,000, and not $85,000. Judge Ross said: "If that's untrue let's get Mr. Rust out here. . . . Since he's in town let's get him here tomorrow or Friday. . . . Maybe my information is incorrect. If he's not here and he is still in Bloomington he can come out and make a big show and I'm [*sic*] put it over until Friday. Which do you want, counsel, unless this matter is resolved or do you want to come back and make him come back from Bloomington next week? I don't really care."

The attorneys eventually confirmed the amount was $85,000 total, with $60,000 from State Farm. After hearing this report, Judge Ross stated: "Well, then fine. I'm wrong and they are right. Okay. Fine. Then a $60,000 settlement."

The masters stated: "We find that respondent again had an improper purpose. There was a dispute over $15,000 which was easily resolved by communicating with lawyers who had negotiated the settlement. Respondent knew or should have known that it was not necessary to have Rust appear to settle the dispute. Respondent knew local adjusters had authority up to $100,000 to settle a case. Respondent was threatening to order Rust to appear merely because of his anger with State Farm. [¶] . . . [¶]

**(4)** "We conclude this was prejudicial conduct because it was 'prejudicial to public esteem for the judicial office.' (Geiler v. Commission on Judicial Qualifications (1973) 10 Cal.3d 270, 284 [110 Cal.Rptr. 201, 515 P.2d 1].)" The Commission agrees. Judge Ross was embroiled in the cases and his threat as to State Farm was punitive.

*Count One (B)*—Harris v. Chevron

Judge Ross was charged with unjudicial conduct for throwing an object in court and yelling at an attorney in the case of *Harris v. Chevron*.

There is no factual dispute that Judge Ross slammed a tablet down on the bench and excused the jury. The gesture was dramatic and caused pencils to go flying. The purported justification, according to Judge Ross, was that Attorney DeGomez had repeatedly violated one of his in limine rulings.

Judge Ross stated that he tells attorneys that his practice as regards in limine rulings is that "if you violate my rule in limine the first time, I'll be nice. The second time I will not be nice. And the third time I'll do everything that I can to embarrass you."

The masters summarized the evidence:

**(5)** "We find by clear and convincing evidence that, in the presence of the jury, respondent became angry at Mr. DeGomez during cross examination when Mr. DeGomez was questioning in areas in violation of in limine rulings. Respondent slammed a legal pad onto the bench, causing pencils to go flying. Respondent then dismissed the jury and yelled at Mr. DeGomez for several minutes loudly enough to be heard in the hallway through a closed door.

"Even if Mr. DeGomez violated an in limine motion, respondent's response was unjudicial and constitutes prejudicial conduct. (See *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 538 [116 Cal.Rptr. 260, 526 P.2d 268].) Respondent's stated purpose of embarrassing the attorney was improper. Additionally, respondent was not patient, dignified and courteous, in violation of Canon 3B(4). We find this constitutes prejudicial conduct." The Commission agrees.

*Count Two*

Judge Ross was charged with violating California Code of Judicial Ethics canon 2B(2) by lending the prestige of the judicial office to promote and sell a book.

Judge Ross is the author of a book entitled I, Jesse James. From approximately 1989 through his retirement in 1995, he kept the book available for sale in the courthouse. In one case, a juror testified that a copy of Judge Ross's book was provided by the bailiff and passed among the jurors either in the jury box or the hallway.

Transcripts in one trial show that Judge Ross discussed the book with jurors in open court and told them it was for sale in chambers, and that he would autograph it. Other jurors testified that Judge Ross discussed the book from the bench. Some bought copies in chambers after the trial.

During the *Walker* trial in 1995, Judge Ross sold books to the attorneys participating in the trial. One juror—who also bought a book—testified that he was aware that one of the attorneys had purchased a book and believed that the attorney had done it to "suck up" to the judge.

The masters found:

**(6)** "The evidence is clear and convincing that respondent sold copies of his book from his chambers and through his bailiff to jurors and attorneys. Most sales occurred after trials were over and took place in his chambers where respondent was available to autograph the book. Respondent did not explicitly advertise the book but did mention it in court in response to inquiries about it. Respondent established a procedure whereby copies of the book could be purchased through the bailiff who took the order and recorded it on order forms found at the bailiff's desk in court. The book had received widespread national and local media attention. [¶] . . . [¶]

"Respondent has committed conduct prejudicial to the public's esteem for the judiciary by selling the books from his chambers. There is no evidence of

pressure being exerted by respondent to buy his book. However, by informing attorneys and jurors from the bench or through his bailiff that the book was for sale after the trial in his chambers or from his bailiff and that he was available to autograph it, respondent was lending the prestige of his judicial office for personal pecuniary gain. Granted, the profits were minimal since it appears that less than 100 books were sold at $2.95 profit per book. However, it still constitutes prejudicial conduct in violation of the judicial integrity provisions of Canons 1 and 2A and the prohibition against using the judicial office to advance personal interests in Canon 2B.

"Also, the procedure established by respondent to sell his books from the courthouse was an inappropriate use of public judicial resources. Using bailiffs to assist in the sales was also a misuse of public resources.

" 'A judge may not misuse the administrative resources available to the judge. To accomplish a judge's varied administrative responsibilities . . . a judge has individuals, equipment, and facilities at his or her command. . . . A judge may not use these resources for personal financial gain. . . .' (Shaman, Lubet and Alfmi, Judicial Conduct and Ethics (2d ed. 1995) § 6.13.)

"We find these separate violations of the Canons constitute one incident of prejudicial conduct." The Commission concurs.

*Count Four*

Judge Ross was charged with unjudicial conduct for telling an inappropriate, undignified and offensive joke during the trial of *Wellema v. Wall* in 1994.

The *Wall* case was a civil action involving alleged sexual molestation. Plaintiffs' attorney described the nature of the case: "The allegations involved my client from the time she was 12 years old, for several years being sexually abused by the defendant, including sodomy, use of alcohol, use of vodka enemas, use of pins penetrating her nipples and other foreign objects, involved the use of rubber clothing. To summarize, disgusting conduct over at least six years of time, as I recall."

During the course of the trial, with the parties present, the jury absent, and with a medical witness on the stand, Judge Ross told the following joke: "Did you hear about the psychologist that had this man in for testing for the Rorschach—if I'm saying it right—test and he said what's this one, and the man looks at him and says that's a man and a woman having intercourse. So, he showed him the next one. He says that's two women making love. He turned over the third one. What's this? Oh, that's a gang intercourse. And he

turned over another one. Oh, they are having sodomy, a man and a woman. About that time the doctor said man, I think you're a pervert, and the man looked at him and said don't talk about me, doctor, they are your pictures." Up to 30 people were present in the courtroom, including the plaintiff, who testified that she was "stunned."

(7) The Masters found: "Respondent committed prejudicial conduct by telling an inappropriate and offensive joke while on the bench in violation of the judicial integrity provision of Canons 1 and 2A and the provisions of dignity and courtesy of Canon 3B(4). This is especially the case in light of the sensitive subject matter of the case. Respondent was clearly demeaning to the public esteem for the judiciary by his thoughtlessness. (See Ryan v. Commission on Judicial Performance (1988) 45 Cal.3d 518, 544–545 [247 Cal.Rptr. 378, 754 P.2d 724].)" We agree.

*Count Five*

Judge Ross is charged in count five with misconduct by becoming embroiled and abusing judicial authority to advance his own personal interests, specifically that:

1. He obtained waivers of future complaints against respondent to the Commission and of the filing of potential civil suits.

2. He threatened retaliation if complaints were made to the Commission or if civil suits were filed against respondent.

3. He obtained an agreement to indemnify himself for costs incurred in Commission proceedings.

4. He made contempt proceedings conditional upon the agreement to waivers and indemnification.

*David and Janie Walker v. Daniel Craig, Hi-Standard Automotive* was an action for personal injury arising out of an automobile accident. Plaintiff was Janie Walker, a reserve Costa Mesa police officer, whose police car was rear-ended by an allegedly drunk driver. Her husband, David Walker, was a sergeant in the Costa Mesa Police Department. There were two defendants, one the driver of the car that rear-ended Officer Walker and the other a products liability defendant.

The trial was protracted, and while Judge Ross's arguments all focus upon the alleged misconduct of counsel trying the case, our focus is upon Judge Ross's conduct, and whether he stayed within the bounds of judicial ethics.

As explained below, Judge Ross committed serious misconduct by coercing litigants and their counsel under threat of contempt to waive their legal rights, including their right to file a complaint with the Commission, and by compelling indemnification if a party filed such a complaint.

On June 12, 1995, after weeks of trial had already passed, Sergeant Walker was on the stand being examined by one of the counsel for the two defendants. Plaintiff's counsel (Eisenberg) whispered words to defense counsel (Erickson) to which she took offense. According to the transcript, she said, "I don't need that kind of language directed at me."

Judge Ross admonished counsel that there would be no further conversation between counsel, or he would commence a contempt proceeding. He did not ask what had been said, but he made clear that he would not tolerate further interruptions due to exchanges between counsel. (That action is not challenged, and based upon a review of the transcript, it appears to be appropriate.)

The trial resumed. Sergeant Walker remained on the stand.

At the end of the day, Sergeant Walker complained to plaintiff's counsel (Eisenberg) that Attorney Himes had extended his middle finger to him. This incident did not take place in Judge Ross's presence, and he did not learn about it until the next day.

The next morning, which was June 13th, Judge Ross began with an apparent reference to the then ongoing investigation by the Commission. He indicated that he wanted to record what had transpired the preceding afternoon. He then ordered defense counsel (Erickson) "to tell me the exact words as best she can remember yesterday afternoon approximately 4:10 what Mr. Eisenberg whispered to you." Erickson complied: "He's an abrasive mother-fucker and I'm going to make the client pay." The apparent reference was to defense counsel Himes—whom Eisenberg thought was being abrasive during his examination of Sergeant Walker.

Judge Ross found such language extremely offensive and thereupon entered the following order:

"I'll tell you what I'm going to do. At this time I'm going to do the following. It will not affect the case and that's why I've asked Mrs. Walker and Sergeant Walker to come up to the counsel table.

"However, if one word of the incident yesterday or this morning is ever reported back to me and it gets back I will release the transcript of yesterday

afternoon and this morning to the following: the Orange County Register, the Los Angeles Times, the Orange County Bar Association, the Orange County Trial Lawyers Association, the California Trial Lawyers Association, whatever their new name is, the State Bar of the State of California so that they may act accordingly." After concluding his comments about the inappropriateness of such comments, including a reference to his concern that "I get reported to somebody like the Judicial Performance Commission," Judge Ross called for the jury to be brought in.

At that time, prior to the jury returning, Attorney Eisenberg addressed the court and related the story of how Himes had given the finger to Sergeant Walker the afternoon before. Himes denied it; Sergeant Walker claimed it happened. Judge Ross directed that "there will be no more of that," and the jury was eventually brought in.

The examination of Sergeant Walker resumed.

The remainder of the morning session continued without notable incident. Sergeant Walker's examination was concluded. The defense rested. Plaintiff began rebuttal.

At the beginning of the afternoon session, however, Attorney Himes advised the court of a new incident. According to Himes, the bailiff had told him (Himes) that he (the bailiff) had overheard Sergeant Walker say that Walker hopes that Himes "lives in a metal house." According to Himes, the bailiff "confronted" Walker about that statement. According to Himes, Walker responded, "After this is over that he's done some investigation and has determined that I'm doing something illegal and he's going to report me to the State Bar."

The transcript does not contain any elaboration on the "metal house" reference, nor indicate whether Sergeant Walker was speaking quietly with an expectation of privacy, or even an indication as to whom the comment was addressed.

When Judge Ross inquired, the bailiff confirmed that Himes had correctly stated what the bailiff had overheard. Judge Ross characterized the alleged statement as being "atrocious" and "absolutely fantastic."—"Police officers making such absolutely ridiculous statements in court where they can be overheard."

Sergeant Walker, having been excused, was not in court.

Judge Ross then said, "If you want him brought in here we'll have a contempt proceeding for contempt of court and I'll put him in jail right now."

"THE COURT: If you want Mr. Walker brought back I'll go get him. I mean I'll send the marshal out to get him. If it needs to be in handcuffs I'll do it.

"He was told—he was sitting here—on this kind of attitude.

"Do you want him brought back?

"MR. HIMES: Your honor, I would like to have honestly some admonition made if in fact—

"THE COURT: All right. When can Sergeant Walker be here?" He ordered plaintiff, Janie Walker, to telephone her husband and "get him here." The trial resumed.

When Sergeant Walker arrived, Judge Ross called him forward and recited the allegation made by Himes,[6] which Judge Ross unequivocally characterized as contempt of court: "That is in my opinion contempt of court and you have the right to remain silent and have a full and complete hearing on it." He told Sergeant Walker that a finding of contempt would result in financial sanctions and incarceration.

Himes restated that he was only seeking an admonition. Erickson suggested that perhaps counsel could resolve the matter by stipulation.

[6] The transcript reflects a lengthy dialog in which Judge Ross attempts to conduct a contempt proceeding. With respect to Sergeant Walker's alleged contempt, the transcript shows:

"THE COURT: . . . Sergeant Walker, I have a very serious charge against you. I am going to repeat it to see if the deputy, I'm saying it correct.

"That Yesterday at approximately 4:30 p.m. that is or 1630 in Marine and Army and Air Force time that you made the following statement, and would you repeat again what you said previously, the first part of the statement?

"THE BAILIFF: Sergeant Walker made a statement to me that Mr. Himes better live in a metal house at which time I confronted him said you don't make those kind of remarks in my courtroom, and he stated he didn't mean it in a threatening manner, he meant it similar to people who live in glass houses don't throw rocks.

"Then he said he had information that Mr. Himes was involved in some illegal activity and he would report him to the State Bar at the end of the trial.

"THE COURT: All right. Sergeant Walker, you have the right to remain silent. This will be a hearing on a contempt proceeding.

"MR. EISENBERG: Ah.

"THE COURT: And I will set it because there is no question in this court's mind that this is contempt of court. It is one of the most terrible things I've ever heard and you're entitled to counsel so you can remain silent or you can say you want to talk now.

"I don't care. But you have the right to remain silent. You also have the right to an attorney. If you cannot afford an attorney one will be appointed for you for the order to show cause hearing for contempt."

Judge Ross stated that a contempt-related situation had caused him personal grief and financial losses because it resulted in a complaint to the Commission. Judge Ross then directed counsel to see if a stipulation could be reached to which all parties could fully agree.

Counsel presented a stipulation in which Sergeant Walker agreed not to make any complaint to the State Bar, and Himes agreed not to make any allegation of contempt against Sergeant Walker. Judge Ross rejected the stipulation unless the following language was included: "The parties and counsel also waive any claims against Judge Ross of a civil nature or before the Judicial Performance Commission." That language was handwritten by Erickson at the bottom of the stipulation. No contempt hearing was held.

Thereafter, Judge Ross required plaintiff and Sergeant Walker to state on the record that they were not coerced into the waiver. In fact, the Walkers were coerced. Each believed that Sergeant Walker would suffer incarceration unless they agreed to Judge Ross's requests.

The trial continued for another week. The final incident occurred on June 20, 1995 when Judge Ross cited Eisenberg for contempt during his closing argument. Again, all counsel worked out a stipulation to resolve the problem and reduce it to a writing. When it was submitted for approval, Judge Ross required the following language be added: "The parties and all counsel also waive any claims against Judge James Ross of a civil nature or before the Judicial Performance Commission."

With respect to complaints that the court's conduct was prejudicial to Walker and retaliatory, Judge Ross replied that if Eisenberg or his client were going to sue or report respondent to the Commission, he would proceed with a contempt hearing.[7]

Plaintiff was not in the courtroom. Judge Ross called Sergeant Walker forward and asked him to waive his and his wife's right to file an action against Judge Ross.

Judge Ross stated there would be a contempt hearing if there was no waiver and, in response to Sergeant Walker's request to consult with counsel, Judge Ross asked Eisenberg to speak with Mr. Walker. Eisenberg reminded the court that he did not represent Sergeant Walker. Judge Ross again stated there would be a contempt hearing without the waiver.

Sergeant Walker then gave his personal waiver to respondent. The masters found that this waiver was made under duress, and we concur.

[7] Judge Ross also said, "I assume—and if you sue me Mr. Eisenberg, I'll get your ass for the rest of your life."

Judge Ross then demanded that Sergeant Walker make the same waiver on behalf of his wife. Walker gave the requested waiver on her behalf.

Judge Ross then required, in addition, a promise of indemnification: "Will you further indemnify James R. Ross for any action that she brings or anything to the Judicial Performance Commission which could cost me many thousands and thousands and thousands and thousands of dollars?" Sergeant Walker replied, "Yes, sir." Walker did so because he believed that Judge Ross would send Eisenberg to jail and impose sanctions of $500,000. "I felt that the only way we were going to proceed with my case—my wife's case, was to appease the judge again."

The masters made the following findings and conclusions regarding count five:

Waivers

"Respondent requested and received waivers of any complaints to the Commission on Judicial Performance as well as waivers to the filing of any civil suits against respondent on June 13, 1995 and June 20, 1995. Each of these acts was unjudicial conduct. Canon 1 requires a judge to uphold the integrity and independence of the judiciary. Canon 2A requires that a judge shall act at all times in a manner that promotes public confidence. Respondent's request and receipt of immunity from civil suit and disciplinary scrutiny for his conduct during the trial impugns the very foundation of judicial integrity. A judge must accept constant public examination freely and willingly. Respondent's attempt to circumvent the public's ability to have his conduct reviewed by the constitutional process which purpose is to provide the public with safeguards against judicial abuse undermines public confidence.

"Respondent's request for the waivers was intentional. Respondent made the request and received waivers on two separate occasions. These acts were beyond the lawful power of a judge. Even if the requests for waivers of public scrutiny were lawful, they were specifically for a purpose other than the faithful discharge of judicial duties. Respondent on the record placed the value to him of such waivers at $50,000. Respondent requested and received the waivers for his own personal financial benefit.

"Respondent was on the bench conducting a jury trial when he made the request for and received the waivers. Further, the request and receipt of waivers required respondent to use his judicial powers for an improper purpose. Respondent was acting in his judicial capacity.

"We find respondent committed two separate acts of willful misconduct, one on June 13, 1995, and one on June 20, 1995." The Commission agrees.

Conditional Contempt

"Canon 1 requires a judge to uphold the integrity and independence of the judiciary. Canon 2A requires that a judge shall act at all times in a manner that promotes public confidence. Canon 3B(2) requires that a judge be faithful to the law regardless of fear of criticism. Respondent stated on each occasion that if he did not receive the waivers he requested, he would proceed with contempt hearings. Respondent took a recess for the purpose of research to make certain he conducted the contempt hearing against Dave Walker without committing error. Once respondent received the waivers, he did not conduct the contempt hearings even though respondent believed such hearings were appropriate. Respondent failed to address the acts he identified as contempt in a lawful manner. This breach of duty erodes public confidence in the judiciary as noted by several of respondent's witnesses who were jurors during the trial; it questions the integrity of the judiciary; and, it certainly is not a faithful adherence to the law. Failure to proceed in a lawful contempt action in trade for a waiver of scrutiny of respondent's ethical behavior is a violation of the most serious nature.

"Respondent's request was intentional. The record is clear that if counsel and the Walkers did not agree to the requested waivers, a contempt hearing would be held. Respondent's decision to conduct a contempt hearing as provided for by law under the facts known to respondent in each situation was well within his lawful power as a judge. However, respondent requested and received the waivers for his own personal financial benefit. This purpose was not for the faithful discharge of judicial duties and constitutes bad faith.

"Respondent was on the bench conducting a jury trial when he requested and received the waivers. Further, the request and receipt of waivers required respondent to use his judicial powers for an improper purpose. Respondent was acting in his judicial capacity.

"We find the respondent committed two separate acts of willful misconduct, one on June 13, 1995, and one on June 20, 1995." The Commission agrees.

Indemnification

"On June 20, 1995, after respondent received the waivers he requested from counsel and Dave Walker, he further requested Dave Walker to indemnify respondent for any civil or judicial performance action Janie Walker

might bring against respondent. Dave Walker complied under duress. This request shakes the core of a fair and accessible court system. This is a classic chilling factor that impedes lawful inquiry into judicial performance. A judge making and receiving such indemnification violates Canon 1 requiring a judge to uphold the integrity and independence of the judiciary and Canon 2A which requires that a judge shall act at all times in a manner that promotes public confidence.

"The request for indemnification was directly made on respondent's own initiative. It was intentional and beyond any possible lawful purpose.[8] Additionally, it was done for the purpose of respondent's own personal financial benefit. This constitutes bad faith.

"Respondent was on the bench conducting a jury trial when he requested and received the waivers. Further, the request and receipt of waivers required respondent to use his judicial powers for an improper purpose. Respondent was acting in his judicial capacity.

"We find this constitutes a single act of willful misconduct." The Commission agrees.

Dissuading the Filing of Complaints by Threats of Retaliation

"Canon 1 requires a judge to uphold the integrity and independence of the judiciary. Canon 2A requires that a judge shall act at all times in a manner that promotes public confidence. Canon 3B(2) requires that a judge be faithful to the law regardless of fear of criticism. Canon 3D requires a judge to take appropriate action when a lawyer exhibits unprofessional conduct in the presence of the judge.

**(8)** "Respondent's threat to send the transcript to various media and professional organizations violates multiple Canons. First, this is an unacceptable way to deal with perceived misconduct. Direct communication to the lawyer to correct the behavior or a referral to the appropriate disciplinary body is the proper course. Second, this approach demeans the integrity of the judiciary. Lastly, the public expects and deserves the judiciary to immediately address and correct the problem with the proper tools. This can only be viewed as respondent employing an inappropriate method of threatening counsel with public censure without due process of a disciplinary proceeding.

[8] Additionally, article VI, section 18, subdivision (h) of the Constitution provides: "No civil action may be maintained against a person, or adverse employment action taken against a person, by an employer, public or private, based on statements presented by the person to the commission."

"Respondent's extraction of a waiver regarding the reporting of respondent's activities to the Commission on Judicial Performance is inexcusable and impugns the very foundation of judicial integrity. Failure to proceed in a lawful contempt action in trade for a waiver of scrutiny of the respondent's ethical behavior is willful misconduct.

"Respondent's act was intentionally done after an evening had passed which afforded ample time for reflection regarding the appropriate course of action. Respondent's announcement of his plan to contact the media and professional organizations in a retaliatory fashion was not a lawful approach to the problem of an attorney's unprofessional conduct in a courtroom. Finally, even if lawful, this underlying purpose was not for a faithful discharge of judicial duties. The primary overriding purpose was for respondent's own personal financial benefit. Respondent did not want to have this trial or his conduct reviewed by the Commission on Judicial Performance and was willing to discourage the filing of complaints by the use of a threat.

"Respondent was on the bench conducting a jury trial when he requested and received the waivers. Further, the request and receipt of waivers required respondent to use his judicial powers for an improper purpose. Respondent was acting in his judicial capacity.

"We find this constitutes a single act of willful misconduct." Again, the Commission agrees.

## JUDGE ROSS'S ARGUMENTS AND OBJECTIONS SUBMITTED FOR COMMISSION REVIEW

Judge Ross submitted written objections to the masters' report. He argues that he did nothing wrong, and that if any discipline is imposed, it should be no more severe than a public admonishment.

Judge Ross's factual objections do not identify any particular finding as being in error.[9] His briefs contain numerous statements of facts which either have no citation to the record, or, if cited, no support in the record. The Commission values the masters' report and gives their findings great weight, especially respecting credibility determinations. Having carefully reviewed the record, the Commission concludes that the masters' findings are fully supported by the evidentiary record.

It follows that the Commission finds no merit to Judge Ross's assertions that do not square with the masters' findings. In arguing that Judge Ross did

[9] The Commission's rules specify that: "Objections to the masters' report and all factual statements shall be specific and shall be supported by reference to the book and page number of the record." (Rules of Com. on Jud. Performance, rule 130(a).)

nothing wrong in the *Walker* case, for example, Judge Ross's written objections assert: "There was no coercion; all parties testified on the record that they were signing the waivers of their own free will."[10] Reference to the cited pages shows that each witness testified that in order to avoid jail or other threats from Judge Ross, they had signed waivers in order to keep Judge Ross from putting Sergeant Walker in jail.

The unqualified statement in Judge Ross's brief that the parties testified they exercised their own free will is not accurate. We specifically find, as the masters did, that Janie Walker and her husband were coerced into signing the waivers, and that each believed that Sergeant Walker would suffer incarceration if they did not do so.

In another instance, Judge Ross's brief asserts, without citation: ". . . Judge Ross's intention was not to embarrass Spitz, but to keep order in his courtroom. Judge Ross had ruled that Spitz was not a party to the motion, and that he should stop addressing the court out of turn; when Spitz refused to follow the ruling the court had made, and continued to speak out of turn, Judge Ross told him he would hold him in contempt. This was not done to embarrass him, but to keep order in the courtroom. The calendar was full that day and court proceedings needed to continue in a timely fashion." (Underscoring added.) The underlined portion is not a fair characterization of the record, which is quoted in the findings above. There was no evidence that Spitz refused to follow a court ruling, nor that he "continued to speak out of turn." With respect to Judge Ross's treatment of Spitz, the masters found—with no contradiction in the evidence from Judge Ross or from any other witness—that it was Judge Ross who was upset and yelling, not Spitz.

In short, the Commission finds no merit to Judge Ross's assertions of error by the masters.

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[10] At oral argument, Judge Ross's counsel continued to assert that the extortion of waivers was not through the exercise of judicial authority:

"CHAIRMAN BONNER: Is it your position that the waivers that were given by the attorneys and the parties were freely and voluntarily given?

"MS. SUWCZINSKY: Absolutely.

"CHAIRMAN BONNER: You're telling us that Judge Ross did not use his position of authority in any way to induce the parties and litigants to enter into these waivers?

"MS. SUWCZINSKY: No, he did not. He gave the litigants a choice: Either fill out the waiver, or let's go forward with contempt proceedings and declare a mistrial.

"CHAIRMAN BONNER: But if you say, you know, 'Either sign the waiver or we're going to have contempt proceedings,' as to you, counsel, isn't that coercive?

"MS. SUWCZINSKY: No. Not if stated as—as the way Judge Ross stated, it was 'We are going to have contempt proceedings. We are going to have this trial stopped. We are going to have a mistrial.'

"The only way that's not going to happen is if everybody here agrees to just forget what's been happening so far and start from a clean slate and waive everyone's complaints against everyone else since everybody's been doing so many egregious things in the courtroom."

With respect to Judge Ross's legal arguments, they all share the same defect: they are not based upon the record. In each instance, Judge Ross starts with the premise that he did not do anything wrong, and concludes, therefore, that he was not acting in bad faith, and that he did not commit misconduct. Judge Ross's arguments simply do not address the facts as found by the masters, and the Commission.

The record does reflect that Judge Ross may have encountered some difficult situations, and as the masters noted, Judge Ross "exercised great patience numerous times during the trial of *Walker* v. *Craig*." All judges encounter difficult cases and difficult attorneys. No matter what the situation, however, there can be no justification for demands of waiver, conditioning contempt upon signing stipulations, or extorting promises purporting to preclude complaints to the Commission.

## DISCIPLINE

Judge Ross served for 12 years as a judge of the Orange County court. He has no record of prior discipline. The masters—who observed Judge Ross and evaluated his credibility—found a lack of credibility. With respect to the incident involving Spitz in the hallway, for example, the masters found that the statements attributed to Spitz "did not occur." Our own review of the record persuades us that Judge Ross's description of certain events is not reliable.

On the other hand, Judge Ross called a large number of witnesses to testify that he has a good reputation as a judge. He practiced law for 29 years, and according to some witnesses, he was hard working and had other characteristics that one would expect a judge to have.

As the masters concluded, however, after recitation of the evidence in mitigation: "Respondent's evidence of his honesty, legal knowledge, reputation for appropriate courtroom control and the difficult circumstances of various trials cannot mitigate the serious nature of the multiple acts of willful misconduct and prejudicial conduct he committed." We agree. (See also *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239].)

**(9)** By adopting the masters' findings, the Commission has found eight instances of willful misconduct, plus five of conduct prejudicial. To the extent that multiple incidents of misconduct arose out of the same proceeding or occurrence, the Commission has considered this in assessing discipline. The Commission's action is based upon the nature of this misconduct and its effect on the public and the judicial system, rather than a mere tally of the

number of instances of misconduct. (See *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1313, 1315 [240 Cal.Rptr. 859, 743 P.2d 919] [overlapping charges not counted separately for discipline].)

As noted, Judge Ross's briefs and arguments continue to assert that his conduct was blameless. It is evident that Judge Ross has no basis for appraising his future conduct—and that events such as those described above could happen again if he were to sit as a judge.

**(10)** We recognize that willful misconduct does not compel removal from office. Indeed, the Commission recognizes that a lesser sanction may be appropriate for a judge "who showed himself ready, willing, and able to reform under a less severe sanction." (See *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 339 [45 Cal.Rptr.2d 254, 902 P.2d 272].) In this case, however, Judge Ross does not acknowledge any wrongdoing, nor is there any suggestion in the evidence or in the briefs that he would change his behavior if he were to resume judicial duties. In his brief filed January 15, 1998, Judge Ross continues to assert: "Respondent never committed any act of wilful misconduct, or prejudicial misconduct so sanctions should not be given."

At oral argument, Judge Ross remained steadfast that he had done no wrong. With respect to extracting waivers from the parties of their constitutional rights to complain to the Commission, Judge Ross's response remained that, "I made the best decision, I thought, for everybody."

Thus, from what appears in the record, and what appeared at oral argument, there is no basis for the Commission to assume or conclude that Judge Ross is ready, willing and able to reform—under any sanction. (See *Doan v. Commission on Judicial Performance, supra*, 11 Cal.4th 294.)

As was the case in *Kloepfer v. Commission on Judicial Performance*: "The record does not suggest that petitioner has, or will be able to, overcome this trait and that similar incidents will not recur. For this reason comparison of the discipline imposed in other cases, as petitioner suggests, is not fruitful. Our role is to determine, in the individual case, the action necessary to protect the public and the reputation of the judiciary. The evidence fully supports the conclusion of the Commission that this purpose requires that petitioner be removed from the bench." (*Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d at pp. 866–867.)

**(11)** As the Supreme Court said in *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544]: "In making our independent determination of the appropriate disciplinary

sanction, we consider the purpose of a Commission disciplinary proceeding—which is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. [Citations.]"

Judge Ross, having resigned from office, is not subject to removal. The next available option is an order of public censure *plus* an order barring Judge Ross from sitting on assignment. The Commission was granted such authority by Proposition 190.[11] Lesser sanctions, such as a public admonishment, would allow Judge Ross to sit again as a superior court judge on assignment.

Given the egregious misconduct presented in this case, the Commission orders that Judge Ross be publicly censured, and that he be barred from receiving any assignment, appointment, or reference of work from any California state court.

This decision shall constitute the order of public censure and bar.

Commission members Robert C. Bonner, Esq., Ms. Ophelia Basgal, Mr. Mike Farrell, Hon. Lois Haight, Hon. Daniel M. Hanlon, Patrick M. Kelly, Esq., Hon. Vincent J. McGraw, Ms. Harriet Salarno, and Donald E. Vinson, Ph.D., voted for the public censure and bar. There were two vacant positions on the Commission.

[11] "The commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court." (Cal. Const., art. VI, § 18, subd. (d).)

[No. 146. Jan. 5, 1999.]

# INQUIRY CONCERNING JUDGE GEORGE W. TRAMMELL III

## SUMMARY

A disciplinary matter was brought concerning a retired superior court judge.

The Commission on Judicial Performance censured the judge and barred him from receiving assignments, appointments or reference of work from any California state court. The commission concluded that the judge engaged in willful misconduct in carrying on, and actively concealing, a sexual relationship with a criminal defendant, while she was a probationer under his supervision and he was presiding over the criminal cases against her two codefendants, and in using his judicial office to further his relationship with the defendant. The judge acted in his judicial capacity in presiding over hearings and ruling on motions concerning all three defendants while he had an undisclosed sexual relationship with one of them. His actions were in bad faith as he acted for a corrupt purpose—to further his relationship with the defendant. The judge's misconduct compromised the integrity and independence of the bench and could not be tolerated. His misconduct warranted removal from office—a sanction not available to the commission because of his retirement. However, because of the passage of Proposition 190, the judge could not avoid all discipline by retiring from the bench. Accordingly, the commission imposed the maximum discipline available to it. (Opinion by Robert C. Bonner, Chairperson.)

## HEADNOTES

(1) **Judges § 6—Willful Misconduct—Sexual Relationship with Criminal Defendant.**—The judge engaged in willful misconduct in carrying on, and actively concealing, a sexual relationship with a criminal defendant, while she was a probationer under his supervision and he was presiding over the criminal cases against her two codefendants, and in using his judicial office to further his relationship with the defendant.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 57, 58, 73.]

(2) **Judges § 6—Willful Misconduct—Elements.**—There are three elements of willful misconduct committed by a judge: (1) unjudicial conduct, (2) committed in bad faith, (3) by a judge acting in his or her judicial capacity.

(3) **Judges § 6—Discipline—Grounds—Willful Misconduct—Conduct Prejudicial—Ex Parte Communications.**—Ex parte communications that were made by the judge in his judicial capacity and were made in bad faith constituted willful misconduct. Ex parte communications that were not judicial acts, and those that were judicial acts but for which there was not clear and convincing evidence of a corrupt purpose, were prejudicial conduct.

(4) **Judges § 6—Censure of Former Judge—Assignments Barred.**—Cal. Const., art. VI, § 18, subd. (d), provides that the Commission on Judicial Performance may censure a former judge, and, where appropriate, may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court.

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**OPINION**

**BONNER, Chairperson.**—This disciplinary matter concerns Judge George W. Trammell III (retired), formerly a judge of the Los Angeles County Superior Court. The proceedings arose from allegations that Judge Trammell entered into a clandestine intimate relationship with one of three codefendants, that he continued to preside over their cases, that he allowed that relationship to influence his actions and that he engaged in numerous improper ex parte communications. The Commission on Judicial Performance (Commission) concludes that Judge Trammell committed willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission censures Judge Trammell and bars him from receiving assignments, appointments or reference of work from any California state court.

## PROCEDURAL HISTORY

Judge Trammell served on the Los Angeles County Municipal Court from May 25, 1971, until January 31, 1988, and served on the Los Angeles County Superior Court from January 31, 1988, until January 10, 1997, when he retired.

The Commission's investigation of allegations concerning Judge Trammell led to the filing on February 4, 1998, of a notice of formal proceedings. Judge Trammell declined to file a verified answer, citing the Fifth Amendment of the United States Constitution.

As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report.[1] Judge Trammell participated in the initial proceedings before the special masters, but declined to participate in the evidentiary hearing that was held on July 20 and 21, 1998. On September 22, 1998, the special masters filed their final report with the Commission.

Judge Trammell declined to file a brief on the special masters' report, as provided by rule 130 of the Rules of the Commission on Judicial Performance, and failed to respond to a letter from Commission counsel providing him with an opportunity to be heard orally before the Commission, as provided by rule 132 of the Rules of the Commission on Judicial Performance.[2] Accordingly, the matter was submitted to the Commission on December 9, 1998, without oral presentations. Nine members of the Commission participated in the consideration of the case.[3]

## FINDINGS

In the spring of 1995, Ming Jin (Jin), Pifen Lo (Lo), Jin's ex-wife with whom he lived with their three children, and Yu Chang Chu (Chu), apparently their live-in babysitter and Jin's lover, were arrested. The case was assigned to Judge Trammell. The charges included two counts of kidnapping for purposes of extortion, assault of one victim with a semiautomatic firearm, several counts of robbery, several counts of laundering money, possession of explosives, possession of silencers, possession of counterfeit computer software, and three counts of child endangerment because the explosives and guns were in the house where the three children lived. The most serious charges were lodged against Jin and Chu and carried punishments of life

[1] The special masters were Justice Robert R. Puglia of the Court of Appeal, Third Appellate District (presiding), Justice Daniel J. Kremer of the Court of Appeal, Fourth Appellate District, Division One, and Judge Francisco P. Briseño of the Orange County Superior Court.

[2] The office of trial counsel submitted a three-page opening brief and responded to Commission counsel's letter stating that they did not seek to make an oral presentation to the Commission.

[3] There is one vacancy on the Commission and one member was not present for the vote.

sentences without parole. The charges against Lo exposed her to a potential sentence of 12 years.

On January 18, 1996, Judge Trammell accepted Lo's plea of no contest to certain nonviolent felonies. On April 26, 1996, a sentencing hearing was held. Judge Trammell suspended imposition of judgment and sentence and placed Lo on probation for five years with the conditions, among others, that she pay a fine of $100,000, make restitution in the amount of $400,000 and submit to psychiatric and psychological counseling.

Several days later, Lo returned to court to pick up some papers connected with her probation. When informed by the bailiff that Lo was there, Judge Trammell invited her into his chambers and spoke to her with only her brother-in-law present.

In April 1996, Judge Trammell had also rejected motions to suppress evidence which Chu and Jin had attempted to file. Subsequently, Jin pled guilty to the nonviolent felonies and these charges were dismissed as to Chu. Judge Trammell then presided over a jury trial of Jin and Chu on the violent felony charges. In early July, both were convicted on the violent felony charges. Jin and Chu filed motions for new trial that were still pending when Judge Trammell left the bench in January 1998.

In late August and early September 1996, Judge Trammell contacted a deputy sheriff because of a number of unusual occurrences which he felt were designed to intimidate him[4] and because he had received birthday cards from Jin, Chu and Lo, and wanted to know how they knew his birth date. The deputy sheriff offered to install a surveillance camera at the judge's residence, but the judge declined stating that he and a prior live-in girlfriend had purchased a camera. The deputy sheriff testified that the prior girlfriend denied that they had purchased a camera.

On September 13, 1996, Judge Trammell asked Chu's attorney to appear before him. When she arrived, he told her in the presence of the district attorney that he was unhappy with her performance and intended to appoint an attorney to investigate whether she rendered ineffective assistance. The attorney requested to be relieved as counsel for Chu, but Judge Trammell denied the request.

[4] The deputy sheriff testified that Judge Trammell told him that someone posing as him had deactivated his daughter's residential alarm, that he had reported prowlers at his home to the local police, and that one night when he came home, "he discovered a shotgun that he had purchased was now lying in the middle of his bed with . . . a round in the chamber, and he normally did not leave it that way for safety purposes."

On September 20, 1996, Chu was brought from jail to Judge Trammell's chambers by his bailiff. Judge Trammell then met with Chu in his chambers and discussed her potential sentence and Jin. Chu allegedly indicated that she would like to have a vegetarian diet and would like to attend a pottery class.

Lo testified before the special masters that on September 18, 1996, Judge Trammell contacted her by telephone and asked her to come to his chambers. She went to the courthouse and waited outside Judge Trammell's chambers until he ushered her into his room. Lo testified that Judge Trammell asked her if she had sent the birthday cards and she admitted that she had. Lo also testified that they discussed Jin and his possible sentence. She further testified that Judge Trammell complimented her, touched her, and kissed her. The meeting ended when someone sought entry into the judge's chambers and Judge Trammell let Lo out a side door.

Lo testified that on Saturday, September 21, 1996, Judge Trammell contacted her by telephone and asked her to come to his house. On Sunday, September 22, 1996, Lo went to Judge Trammell's house. They talked for awhile, they discussed Jin, and according to Lo, engaged in sexual intercourse over her objections.

Lo testified that from then through December 1996,* she visited Judge Trammell at least once a week and that they often engaged in sexual intercourse. During this period of time, Judge Trammell and Lo spoke to each other frequently by telephone. In their conversations Judge Trammell allegedly discussed how he might be able to terminate Lo's probation after only a year and advised her on how she might seek the return of property seized by the police, including a Mercedes automobile. At some point in time, Lo obtained a pager and Judge Trammell left numerous coded messages on Lo's pager.

During this time, Judge Trammell continued to preside over matters concerning Lo, Chu and Jin. Chu informed her attorney of her September 20 meeting with Judge Trammell, and the attorney prepared a motion to disqualify Judge Trammell. Jin also filed a motion to disqualify Judge Trammell.

On October 4, 1996, Chu's attorney received a phone call from Judge Trammell's clerk instructing her to prepare a motion to reduce Chu's bail to $45,000. On October 9, 1996, the attorney filed the motion to reduce bail.

The motions to disqualify and the motion for bail were set for hearing on October 18, 1996. When Chu's attorney arrived at the courthouse she was

* Reporter's Note: The original decision incorrectly reflected the date as December 1997.

told that Chu wished to see her. The attorney consulted with Chu who insisted that she withdraw the motion to disqualify. The attorney withdrew the motion and Jin's counsel withdrew his motion to disqualify. Judge Trammell nonetheless addressed the motions, denied the allegations in the motions, and declined to recuse himself. Judge Trammell did not disclose his relationship with Lo. At one point during the hearing, Judge Trammell, while accusing Jin of having others, including Lo, do his bidding, disingenuously commented "whatever the name of your wife or ex-wife." Judge Trammell also granted Chu's motion for bail, reducing it to $25,000 purportedly to allow her to attend the pottery class, should she not be able to raise the bail.

At the end of October 1996, Judge Trammell called an indigent criminal defense appointment panel and requested that a particular attorney be appointed to represent Lo. The judge did not inform Lo's attorney of record of this request. When the attorney telephoned Judge Trammell's clerk to determine the nature of the appointment, Judge Trammell spoke directly to the attorney. Judge Trammell reportedly told the attorney that Lo had written a letter to the court requesting the return of property seized in conjunction with the criminal case and he wanted the attorney to prepare a motion for return of property for Lo. The attorney filed a motion for return of property. The letter written by Lo, however, was dated November 6, after the conversation between the attorney and the judge.

On December 5, 1996, Judge Trammell contacted Lo's probation officer, purportedly to inquire about a status report. Judge Trammell allegedly told the officer that he thought that the requirement of psychological counseling was no longer necessary and that Lo's probation need not continue for the full five years.

On December 6, 1996, Judge Trammell heard argument on the motion for return of property. Prior to the hearing, before the district attorney arrived, Judge Trammell informed Lo's appointed counsel that the district attorney intended to file amended forfeiture papers. At the hearing, the district attorney argued against the motion, Judge Trammell responded to the arguments, and then ordered the return of most of the property.

Lo's appointed attorney testified that several days later, Judge Trammell telephoned him to tell him that he had heard that the district attorney did not intend to comply with his order to return the property.[5] The attorney further

[5] The attorney further testified that his subsequent phone call to the district attorney's office revealed that the judge's allegation was not well founded.

testified that in a telephone conversation Judge Trammell told him that Jin and Chu had filed motions for a new trial based on ineffective assistance of counsel, that he thought they were well taken, and that he believed Lo's case had been "over filed" and that she had "over pled." The judge told the attorney that when Lo approached the one-year anniversary of her probation, he wanted the attorney to file a motion to terminate probation, which he would be inclined to grant.

On January 2, 1997, jail personnel intercepted correspondence from Jin to Lo which contained a "petition" alleging sexual misconduct by Judge Trammell. The document alleged, among other things, that Lo had collected pubic hair from the judge as proof of their sexual relationship. On January 6, 1997, two deputy sheriffs and their supervisor met with Judge Trammell and showed him the intercepted "petition." When asked, Judge Trammell admitted that Lo had been to his house once or twice, that he had called her four or five times and had taken her to dinner. He admitted telling her that he loved her, but denied having had sexual intercourse with her.

On January 6, 1997, without notice to counsel, Judge Trammell issued an order canceling the probation condition requiring Lo to receive counseling.

On January 9, 1997, Judge Trammell was served with a search warrant for his home and chambers. The following day he retired from judicial office.

## FINDINGS OF FACT

The special masters found clear and convincing evidence[6] supporting four findings of fact and the Commission adopts those findings of facts.

First, the Commission finds that Judge Trammell had a sexual relationship with Lo from mid-September 1996 through early January 1997. During this period, Lo was Judge Trammell's probationer and a codefendant of Chu and Jin, both of whom had been convicted of felony charges and were awaiting Judge Trammell's rulings on their motions for a new trial and sentencing. The evidence supporting the existence of the sexual relationship includes Lo's testimony, telephone billing records showing numerous calls between Judge Trammell and Lo, four telephone conversations between Judge Trammell and

[6] Citing *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 276–277 [110 Cal.Rptr. 201, 515 P.2d 1], and *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715], the special masters noted that clear and convincing evidence is "proof that rises to a 'high probability,' but not necessarily beyond a reasonable doubt."

Lo (which Lo taped), and Judge Trammell's admission to a deputy sheriff of a romantic, albeit not sexual, relationship with Lo.

Second, the Commission finds that Judge Trammell actively endeavored to keep the existence of his relationship secret. Despite presiding over a number of hearings in matters concerning Lo, Chu and Jin, Judge Trammell did not mention his relationship with Lo, and at one point, gave the impression that he did not even know her name. This finding is also supported by Lo's testimony, by Judge Trammell's use of Lo's pager to send coded messages, and the deputy sheriff's testimony that Judge Trammell declined to have a surveillance camera installed at his residence, stating incorrectly that he already had such a camera.

Third, the Commission finds that Judge Trammell misused his judicial office in an attempt to further his relationship with Lo. He counseled Lo on how to seek the return of seized property, arranged for the appointment of an attorney specifically to assist Lo in securing the return of property, and then ruled on the motion. Both the attorney and Lo's probation officer testified as to Judge Trammell's intent to reduce Lo's term of probation from five years to one. Finally, just before he resigned from the bench, Judge Trammell, on his own motion and without notice to the district attorney or counsel, ordered the condition of probation requiring Lo to submit to psychological counseling eliminated.

Fourth, the Commission adopts the special masters' findings that Judge Trammell engaged in at least 13 improper ex parte communications with Lo and Chu, defendants in criminal proceedings over which he was presiding, and with attorneys involved in those proceedings. Among the improper ex parte communications are his April 29 and September 18, 1996 meetings with Lo in his chambers, his September 20, 1996 meeting in his chambers with Chu, his September 22 meeting with Lo at his home, his numerous telephone conversations with Lo in which he discussed pending matters in Lo's and Jin's cases, his instruction to Chu's attorney to prepare a motion for bail, and his telephone conversations to the attorney he appointed to represent Lo on her motion for return of property.

## CONCLUSIONS OF LAW

**(1)** The Commission concludes, as did the special masters, that Judge Trammell engaged in willful misconduct in carrying on, and actively concealing, a sexual relationship with Lo, while she was a probationer under his supervision and he was presiding over the criminal cases against her two codefendants, and in using his judicial office to further his relationship with Lo.

**(2)** There are three elements of willful misconduct: (1) " 'unjudicial conduct,' " (2) " 'committed in bad faith,' " (3) " 'by a judge acting in his judicial capacity.' " (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260].) Here Judge Trammell acted in his judicial capacity in presiding over hearings and ruling on motions concerning Lo, Chu and Jin while he had an undisclosed sexual relationship with Lo. His actions were in bad faith as he acted for a corrupt purpose[7]—to further his relationship with Lo.

"Unjudicial conduct" is measured by reference to the California Code of Judicial Ethics and Judge Trammell's conduct violated a number of canons. He violated canon 1 of the California Code of Judicial Ethics by compromising the independence and integrity of his office by presiding over criminal proceedings while maintaining a clandestine sexual relationship with one of the defendants. He violated canon 2A by engaging in personal conduct that created doubt as to his impartiality in respect to each of the rulings in the criminal proceedings (which followed the commencement of the relationship). Judge Trammell violated canon 2B(1) by allowing his relationship with Lo to influence his judicial conduct and judgment and by conveying the impression that Lo was in a special position to influence him. He violated canon 3E by failing to disclose his relationship with Lo and failing to disqualify himself, and he violated canon 4A by participating in a clandestine relationship with Lo while she was his probationer and he was presiding over proceedings against her codefendants.

**(3)** The Commission also agrees with the special masters that all of Judge Trammell's ex parte communications were violations of California Code of Judicial Ethics canon 3B(7)'s prohibition against ex parte communications, and that most of the ex parte communications constituted willful misconduct or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Judge Trammell's ex parte communications with Lo concerning the return of Lo's property and all of his ex parte communications with Lo's attorney constitute willful misconduct as they were made in his judicial capacity, were made in bad faith (for the corrupt purpose of furthering his relationship with Lo), and violated California Code of Judicial Ethics canons 1 and 2 by compromising the integrity and independence of the judiciary and the appearance of impartiality.

Judge Trammell's other ex parte communications, with Lo, with Chu, and with Chu's attorneys, constitute prejudicial conduct. His communications

[7] A judge acts in bad faith when he or she performs a judicial act for a corrupt purpose which is a "purpose other than the faithful discharge of judicial duties." (*Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th at p. 1092.)

with Lo in which he discussed Lo's probation or the criminal proceedings as they related to Jin and Chu violated California Code of Judicial Ethics canons 1 and 2, but the special masters found that they were not judicial acts. Judge Trammell's ex parte communications with Chu and her attorney also violated canons 1 and 2 and were judicial acts, but the special masters found that there was not clear and convincing evidence that they were for a corrupt motive.

## DISCIPLINE

**(4)** As Judge Trammell has retired from office, he is not subject to removal. The California Constitution (art. VI, § 18, subd. (d)) provides, however, that the Commission may censure a former judge, and, where appropriate, "may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court."

The Commission has found that for more than three months Judge Trammell participated in a clandestine sexual relationship with a probationer, who was also a codefendant to two others whose criminal cases were pending before him. The facts reveal that Judge Trammell put himself in a position to be compromised and permitted the situation to continue by failing to disqualify himself once he established a totally inappropriate liaison with Lo. In addition, Judge Trammell not only failed to disclose the relationship, he actively used his position as a judge to further that relationship. He initiated calls to attorneys, counseled Lo and the attorneys on how to proceed, and ruled on the motions that the attorneys filed at his direction. Furthermore, there is no indication that Judge Trammell contemplated any closure to this situation. The end came only when jail officials intercepted correspondence from Jin to Lo which alleged that Judge Trammell had a sexual relationship with Lo. Even then, Judge Trammell was less than forthcoming about the relationship, and, without notice to counsel, he issued an order canceling the probation condition requiring Lo to receive counseling.

The Commission notes that Judge Trammell had served on the bench for 25 years when he first met Lo. He clearly understood not only that the relationship was improper but also that he could not ethically continue to preside over her case and those of her codefendants. Judge Trammell's misconduct compromised the integrity and independence of the bench and cannot be tolerated. His misconduct warrants removal from office—a sanction not available to the Commission because of his retirement. Since the passage of Proposition 190, a judge can no longer avoid all discipline by retiring from the bench. Accordingly, the Commission imposes the maximum discipline available to it. We publicly censure Judge Trammell and we bar him from receiving any future assignments, appointments or references.

Accordingly, the Commission orders that Judge George W. Trammell III be publicly censured, and that he be barred from receiving any assignment, appointment, or reference of work from any California state court.

This decision shall constitute the order of public censure and bar.

Commission members Robert C. Bonner, Esq., Mr. Mike Farrell, Hon. Daniel M. Hanlon, Patrick M. Kelly, Esq., Mr. Luke Leung, Ms. Ramona Ripston, Ms. Harriet Salarno, and Donald E. Vinson, Ph.D., voted for the public censure and bar. Ms. Ophelia Basgal and Hon. Lois Haight did not participate. There was one vacant position on the Commission.

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING A JUDGE<br><br>NO. 133 | DECISION AND ORDER OF PUBLIC CENSURE |

This is a disciplinary matter concerning William M. Ormsby, Judge of the Inglewood Municipal Court, Los Angeles County. The Second Amended Notice of Formal Proceedings alleges thirteen counts of misconduct, the common theme being unjudicial conduct while sitting as a municipal court judge.

A formal hearing commenced before a panel of Special Masters in October, 1995 and was continued until January, 1996. After testimony had begun, a stipulated disposition was reached between Judge Ormsby and trial counsel for the commission. The proposed disposition was submitted to and accepted by the commission on February 1, 1996, subject to the parties submitting an agreed statement of facts.

The commission having reviewed the facts as stipulated by the parties and pursuant to the stipulated disposition, it now makes the following findings of fact and conclusions of law.

Statement of Facts

The commission accepts as true the following statement of stipulated facts:

1. Judge William M. Ormsby has been a judge of the Los Angeles Municipal Court, Inglewood Judicial District, from July 17, 1981, through the present.

2. In approximately February of 1994, Judge Ormsby remanded to custody the girlfriend of a defendant charged with gun possession who had accompanied the defendant to court. Judge

Ormsby called the woman forward and immediately remanded her to custody for whispering to her boyfriend in court. Judge Ormsby did not follow proper contempt procedures. Approximately one-half hour later, Judge Ormsby had the woman returned to court. She explained that her boyfriend had said something to her, and that she had told him that they should not talk. Judge Ormsby released her at that time.

3. On approximately February 13, 1990, Judge Ormsby ordered Rhonda Coulon, 90M00035, remanded for whispering in the courtroom. Judge Ormsby did not follow proper contempt procedures. Ms. Coulon was released later that day.

4. On the morning of February 21, 1990, Judge Ormsby ordered the defendant in People v. Gerardo Villaruel, 90M00215, remanded for whispering. Judge Ormsby had told Mr. Villaruel and two other men, in English, that no talking was allowed in court. About an hour later, one of the other men whispered in Mr. Villaruel's ear. Judge Ormsby called both men forward and ordered them remanded to custody without following proper contempt procedures. When counsel objected, Judge Ormsby refused to hear argument before calling the other cases on his calendar. When counsel was allowed to speak, counsel argued that due process required notice and a hearing before incarceration, and pointed out that Mr. Villaruel spoke Spanish. Judge Ormsby told counsel to present points and authorities on the afternoon calendar. In the afternoon, Judge Ormsby recalled the matter and released Mr. Villaruel.

5. On approximately February 20 or 21, 1990, Judge Ormsby ordered Ray Anderson, 90M01263, into custody for appearing to fall asleep in court. Judge Ormsby did not follow proper contempt procedures. Mr. Anderson was released later that day.

6. On occasion, when represented defendants who have failed to appear and have had bench warrants issued for their arrest later appeared in court, Judge Ormsby has refused to let counsel speak for them, stating that because bench warrants have been issued, they no longer have counsel.

7. In People v. Timothy Duffy, 89M03491, on January 10, 1990, the defendant appeared with counsel and was placed on probation upon condition that he serve either 30 days in jail or 90 days home arrest. The matter was continued for proof of acceptance into home arrest program. On February 22, 1990, the defendant appeared without his attorney of record and told Judge Ormsby that he was not in the home arrest program because he had been sentenced by another judge in another case to one year in jail. Judge Ormsby imposed the sentence of 30 days in jail, concurrent to the one year sentence, upon the defendant in the absence of his retained attorney, although Judge Ormsby knew that the defendant had counsel.

8. In People v. Charlie H. Mepham, 90M02273, Judge Ormsby told the defendant that the services of the public defender were for trials and that if he wanted diversion he could not have a public defender. Mr. Mepham appeared before Judge Ormsby on May 16, 1990, and stated that he was in a drug rehabilitation program. He apparently had been referred to the probation department for a diversion eligibility report before entering the program. Judge Ormsby noted that the case was on calendar for diversion eligibility and asked Mr. Mepham if he

wished to be placed on diversion. Mr. Mepham replied, "Actually, I'd like to have a public defender, your honor." Judge Ormsby responded: "Public defender is for prosecution. I am going to place you on diversion. Once you are placed on diversion, you no longer have the public defender. The public defender is here in case you want to go to trial on this matter. Is that what you want to do is go to trial on the matter?" Mr. Mepham replied that he did not, and that he wished to submit a letter from the program and have the program considered as a diversion program. Judge Ormsby declined to place Mr. Mepham on diversion without a determination by the probation department that the program the defendant had entered was satisfactory, and referred the defendant to the probation department.

9. On February 9, 1993, in People v. Tonia Lynn Taylor, 93M09671, Judge Ormsby was rude and insulting to Deputy Public Defender David Marsh. In denying the defendant's motion for appointment of a handwriting expert, Judge Ormsby referred to the written materials submitted by the defense as "garbage" and "weak and insipid." In an opinion reversing Judge Ormsby's ruling, the Court of Appeal for the Second Appellate District, Division Two, noted that proper judicial discretion must be exercised in conformity with the spirit of the law and stated, "Obviously, such a spirit is lacking when the court itself engages in conduct violative of our Code of Judicial Conduct which requires that '...a judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in an official capacity....'"

10. On January 11, 1993, in People v. James Bishara, 92Ml0291, Judge Ormsby made insulting and disparaging comments to Deputy Public Defender David Marsh. Mr. Marsh requested a continuance to investigate the case further in order to determine whether to request appointment of a fingerprint expert. Judge Ormsby stated several times, in an insulting manner, that Mr. Marsh's theory of the case was nonsensical and ridiculous, or words to that effect. Approximately ten other defendants represented by Mr. Marsh were present in court and witnessed Judge Ormsby's disparagement of Mr. Marsh.

11. On December 10, 1992, in People v. Grisham, 92M05977, Judge Ormsby made insulting remarks to Deputy Public Defender David Marsh. In denying a motion to suppress under Penal Code section 1538.5 brought by Mr. Marsh, Judge Ormsby characterized Mr. Marsh's theory as "marshmallow." Judge Ormsby employed a mocking tone in his statements.

12. On December 17, 1992, in the case of People v. Morin, Judge Ormsby reacted angrily to Deputy Public Defender David Marsh when he requested that Judge Ormsby address the issue of whether or not the defendant could travel to Mexico while released from custody pending trial.

13. On June 10, 1993, in the case of People v. Fuller, case no. 92M09152, Judge Ormsby suggested that Deputy District Attorney William Thomas might have committed misconduct by asking to interview the wife of a defendant before she testified at trial. When Mr. Thomas stated that if Judge Ormsby believed he had committed misconduct it would be appropriate to refer the matter to the State Bar, Judge Ormsby replied that, "I don't think because of your inexperience or because of your ignorance that I will do that."

14. On July 28, 1994, defendant Robert Lowery appeared before Judge Ormsby unrepresented for arraignment on theft charges. Mr. Lowery told Judge Ormsby that he was unemployed and attending school. Judge Ormsby forced him into an unnecessary colloquy regarding what he was learning in school. Judge Ormsby questioned him in a manner which was demeaning, visibly embarrassing Mr. Lowery in open court.

15. On occasion, Judge Ormsby put inordinate pressure on prosecutors to offer dispositions and on defendants to enter guilty pleas. On other occasions, Judge Ormsby engaged in conduct which appeared aimed at avoiding conducting preliminary hearings in cases which involve multiple counts or multiple defendants. In such cases, Judge Ormsby pressured defendants to waive preliminary hearings and prosecutors to offer dispositions.

16. On occasion, when defendants scheduled to appear in court for pretrial conferences were late, Judge Ormsby ordered them remanded to custody upon their arrival in court; Judge Ormsby then advised that if the defendant was willing to plead guilty he would be released that day, but if the defendant wished a trial, the trial would be set within thirty days and the defendant kept in custody until trial.

17. In the summer of 1994, an in-custody defendant was offered an opportunity to plead guilty for credit for time served; when the defendant refused the offer and opted for a jury trial, Judge Ormsby stated that he would proceed with jury selection that day (a Tuesday) and then recess the trial until the following Monday, with the defendant to remain in custody.

18. On December 17, 1992, Judge Ormsby criticized Deputy Public Defender David Marsh for filing motions to suppress under Penal Code section 1538.5. Judge Ormsby stated that the question of standing was going to come up, whether or not it was raised by the People. On February 4, 1993, in the case of People v. Cervantes, case no. 92M08973, Judge Ormsby sua sponte refused to allow David Marsh to call witnesses on the issue of standing in a motion to suppress under Penal Code section 1538.5. The appellate department of the superior court found this to be reversible error.

19. In People v. Yvonne R. Cleveland, 89M09659, at a jury trial held in 1990, Judge Ormsby refused to allow a defendant charged with battery to call a police officer to testify about an inconsistent statement he heard the alleged victim make at the time of the incident.

20. Judge Ormsby refused to accept written or oral Tahl waivers in the driving under the influence case of People v. Tai, 92M04129, in which the defendant entered a guilty plea on January 4, 1994. When the prosecutor pointed out that it was necessary that waivers be in the record in order for the conviction to be used as a prior conviction in any subsequent proceedings, Judge Ormsby indicated that he did not care.

21. Judge Ormsby frequently and arbitrarily dismissed misdemeanor cases on the day set for trial if the prosecution was unable to proceed that day, without giving consideration to the

prosecution's requests to trail the cases within the 10-day grace period set forth in Penal Code section 1382. Judge Ormsby stopped dismissing cases under these circumstances in 1994.

22. On or about February 27, 1990, Judge Ormsby remanded Edgar Poz, 89M09497, for being late to court without giving him or Michael Russo, the deputy public defender representing him, an opportunity to explain his tardiness. Believing that Mr. Russo had made inconsistent statements about when he had seen Mr. Poz in court that morning, and confusing Mr. Poz with another defendant, Judge Ormsby refused to hear from Mr. Russo or Mr. Poz as to why Mr. Poz was late. Judge Ormsby rudely cut off Mr. Russo when he attempted to speak, stated that he was not concerned with what his understanding was because he had been wrong on things before, and directed him to sit down. Mr. Russo filed an affidavit pursuant to Code of Civil Procedure section 170.6. Judge Ormsby continued the case to the following day before another judge, rather than transferring it immediately to another judge. Mr. Russo was able to have the case called by another judge on February 27; and Mr. Poz was released on the original bail amount.

23. On May 9, 1989, Deputy Public Defender Fred Brennan appeared before Judge Ormsby in the case of People v. Seller, 89M01068. Mr. Brennan and the prosecution had agreed upon a proposed disposition of the matter, which was presented to Judge Ormsby. Judge Ormsby rejected the proposed settlement and, without request from the defendant, gave an indicated sentence should the defendant plead guilty. Mr. Brennan asked that the case be set for trial and orally moved to disqualify Judge Ormsby under Code of Civil Procedure section 170.6. The case was continued to July 11, 1989. On the same day, May 9, 1989, Mr. Brennan executed a written affidavit pursuant to Code of Civil Procedure section 170.6. The affidavit was accidentally dated May 5, 1989. When the case came before Judge Ormsby on July 11, 1989, Mr. Brennan reminded Judge Ormsby that he had challenged him pursuant to Code of Civil Procedure section 170.6, and stated that an affidavit had been filed on May 9, 1989. Judge Ormsby stated that the challenge was untimely because it was made after he gave an indicated sentence. Mr. Brennan requested a continuance to seek appellate review of Judge Ormsby's order. Judge Ormsby denied this request without prejudice, and continued the case to July 12, 1989. Thereafter, Judge Ormsby's clerk told Mr. Brennan that the affidavit was not in the court file. Mr. Brennan checked his files and found that the affidavit he had executed was still there; he immediately filed it with the clerk. On July 12, 1989, Judge Ormsby accused Mr. Brennan on the record of unethical conduct, stating that Mr. Brennan had engaged in "forum shopping" by attempting to disqualify him after he gave an indicated sentence. Judge Ormsby also accused Mr. Brennan of committing a fraud on the court by representing that the affidavit had been filed on May 9 when it had not been, and stated that the written affidavit had been back dated. Judge Ormsby then denied the disqualification motion, but recused himself from further proceedings in the case. Thereafter, without giving Mr. Brennan an opportunity to respond, Judge Ormsby stated his intention to refer Mr. Brennan to the State Bar and ordered Mr. Brennan "not to appear in my courtroom again, either as public or private counsel." On July 13, 1989, Mr. Brennan's supervisor, Deputy Public Defender Alvin Nierenberg, went to Judge Ormsby to attempt to clarify the situation. Mr. Nierenberg made comments in defense of Mr. Brennan. Judge Ormsby said that if Mr. Brennan was in court when he took the bench, he would warn him to leave and then have him arrested if he did not. Judge Ormsby said, ". . . if I come out and he is in my court, I will give him warning that he is not to be here; and if he does not leave, I will have my

bailiff arrest him, take him into custody and I will begin contempt proceedings against him because it will be a direct contempt." When Mr. Nierenberg asked the basis of the contempt, Judge Ormsby declined to state one. When Mr. Nierenberg attempted to discuss the matter further, Judge Ormsby stated that the record was closed, ordered everything further to be off the record, and ordered Mr. Nierenberg physically removed from the courtroom. The appellate department of the superior court granted a writ preventing enforcement of Judge Ormsby's order barring Mr. Brennan from his courtroom. The State Bar found insufficient evidence that Mr. Brennan had engaged in impropriety.

24. On February 23, 1994, Judge Ormsby unnecessarily threatened Deputy Public Defender Lois Bruton with contempt. Ms. Bruton had conferred with her in-custody clients in the court's holding cell instead of conferring with three out-of-custody clients, whose cases Judge Ormsby wished to resolve that morning. Judge Ormsby chastised Ms. Bruton for this, and then attempted to appoint alternate counsel for a defendant appearing for arraignment, although the public defender had not declared a conflict. When Ms. Bruton attempted to make a record that there was no conflict and that the public defender was prepared to represent the defendant, Judge Ormsby threatened her with contempt.

25. On December 13, 1993, the defendant in People v. Alonzo Harris, 93M09733, appeared before Judge Ormsby on time and advised that he had not been able to get to the public defender's office to be interviewed as Judge Ormsby had directed. Judge Ormsby remanded Mr. Harris to custody. The prosecutor agreed to dispose of the matter for a $300 fine and penalty assessment. Judge Ormsby refused to accept the disposition at that time and continued the matter to the following day, with the defendant to remain in custody, "to see how he's going to pay the fine." On December 14, 1993, Judge Ormsby questioned Mr. Harris about when he had last worked and why he could not find work. Judge Ormsby then refused to give Mr. Harris credit against the fine for time spent in custody on the ground that his failure to go to the public defender's office was "worth the two days in county jail." Judge Ormsby also stated that because bail was set and the defendant could not make bail, the time he served in custody would be in addition to the fine.

26. None of the acts by Judge Ormsby, described above, involved personal corruption or gain. Judge Ormsby has acknowledged his mistakes and appears to have significantly improved his judicial conduct. A medical condition may have contributed to some of the conduct described above.

## Conclusions of Law

The commission has independently reviewed the facts set forth above, and reached the following conclusion of law: Judge Ormsby's conduct constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

## Discipline

The stipulated facts warrant discipline, and could warrant removal from office. In the present case, however, the commission is persuaded that Judge Ormsby--having admitted his misconduct--is genuinely repentant and is unlikely to resume the conduct.

In reaching an agreement to terminate these proceedings and withdraw it from the Special Masters, the commission advised Judge Ormsby that it would not recommend or impose any discipline more severe than that of a severe public censure. Judge Ormsby further agreed that this order would be effective when entered; he has waived any right to further review.

The commission concludes that the appropriate discipline is a severe public censure. The commission vote was six to zero.

## ORDER

For the reasons set forth herein, the commission orders that Judge William M. Ormsby be, and he hereby is, issued a severe public censure.

Dated: March 20, 1996

_____
William A. Masterson
Chairperson

[No. 147. June 3, 1999.]

INQUIRY CONCERNING FORMER JUDGE ROBERT C. BRADLEY

## SUMMARY

A disciplinary matter was brought concerning a superior court judge, who retired during the proceedings.

The Commission on Judicial Performance ordered that the judge be publicly censured and that he be barred from receiving any assignment, appointment, or reference of work from any California state court. The bar was without prejudice to the judge's filing, no sooner than a year after the entry of the commission's order, a motion to lift the bar to assignment, appointments, and reference of work. The commission concluded that the judge had violated Cal. Code Jud. Ethics, canons 1, 2A, 2B(2), by repeatedly driving under the influence of alcohol and engaging in abusive and threatening behavior while he was intoxicated. The judge's appearance at the courthouse while under the influence of alcohol and his persistent failure to perform his duties violated Cal. Code Jud. Ethics, canon 3C(1). The commission concluded that the judge's conduct constituted, at a minimum, prejudicial misconduct, habitual intemperance, and persistent failure or inability to perform judicial duties. The judge did not dispute that his conduct warranted a public censure, and the commission noted the importance of reassuring the bench and the public that his misconduct would not be overlooked. (Opinion by Daniel M. Hanlon, Chairperson.)

## HEADNOTES

(1) **Judges § 6.2—Discipline—Prejudicial Conduct—Definition.**—Prejudicial conduct refers to conduct that would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office.

(2) **Judges § 6—Discipline—Grounds—Substance Abuse.**—The judge's appearance at the courthouse while under the influence of alcohol impaired the integrity of the court and weakened public confidence in the judiciary, as did his knowing violation of a court order.

(3) **Judges § 6—Discipline—Grounds—Violation of Condition of Probation and Court Order.**—The judge, who violated the no-alcohol condition of his probation and knowingly violated an emergency protective order, violated Cal. Code Jud. Ethics, canons 1 and 2A.

(4) **Judges § 6—Discipline—Grounds—Conduct Prejudicial to Public Esteem.**—The judge's continued alcohol abuse, violation of court orders and unlawful conduct were prejudicial to public esteem for the judicial office and violated Cal. Code Jud. Ethics, canons 1 and 2A.

(5) **Judges § 6—Discipline—Violation of Court's Zero Tolerance Policy on Alcohol.**—The judge violated Cal. Code Jud. Ethics, canon 3C(1), when his continued abuse of alcohol led him to violate the court's zero tolerance policy and to be relieved of his duties when he showed up at the courthouse intoxicated.

(6) **Judges § 6.4—Discipline—Purpose of Proceedings—Former Judges.**—The purpose of a Commission on Judicial Performance disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity of the judicial system. The ultimate objective is to protect the judicial system and the public that it serves from judges who are unfit to hold office. The ultimate standard for judicial conduct must be conduct that constantly reaffirms fitness for the high responsibilities of judicial office. The bench and the public should be reassured that unethical actions will not be overlooked if the offending judge's term expires before the commission's proceedings are completed.

(7) **Judges § 6.2—Discipline—Grounds—Fitness for Assignment.**—The former judge, who had repeatedly driven under the influence of alcohol, engaged in abusive and threatening behavior while he was intoxicated, appeared at the courthouse while under the influence of alcohol, and persistently failed to perform his duties, could not be found fit to sit on assignment. There was no guarantee of recovery, and his current sobriety had been achieved under controlled circumstances. Furthermore, the judges and lawyers who testified in support of his sitting on assignment conditioned their endorsements on his first maintaining an extended period of sobriety.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 57, 73.]

## OPINION

**HANLON, Chairperson.**—This disciplinary matter concerns Judge Robert C. Bradley, formerly a judge of the Ventura County Superior Court. The proceedings arose from a series of actions by Judge Bradley commencing with his arrest for driving under the influence of alcohol on December 6, 1997, and culminating with his arrest on May 5, 1998, for riding a bicycle under the influence of alcohol. The commission finds that the nine counts charged in the second amended notice of formal proceedings were established by clear and convincing evidence, that Judge Bradley's actions violated the California Code of Judicial Ethics and that his actions constituted at least conduct prejudicial to the administration of justice that brings the judicial office into disrepute, habitual intemperance, and persistent failure or inability to perform his judicial duties, as those terms are used in article VI, section 18, subdivision (d) of the California Constitution. The commission hereby publicly censures Judge Bradley and bars him from receiving assignments, appointments or references of work from any California state court. This bar from receiving assignments, however, is without prejudice to Judge Bradley's filing, no sooner than a year after the entry of this order, a motion to remove the bar based on a showing that he has maintained, and is maintaining, complete sobriety.

## PROCEDURAL HISTORY

Judge Bradley became a municipal court judge in 1983 and was elevated to the superior court in 1984. In 1996 and 1997, he was the presiding judge of the Ventura County Superior Court. His term of office ended on December 31, 1998, and he did not seek reelection.

Formal proceedings in this matter were commenced with the filing on March 20, 1998, of a notice of formal proceedings and a notice of intention to temporarily disqualify under rule 120(b) of the Rules of the Commission on Judicial Performance. On April 1, 1998, following receipt of Judge Bradley's response to the notice of intention, the commission issued an order of disqualification barring Judge Bradley from acting as a judge pending further order of the commission or until the completion of formal proceedings.

A first amended notice of proceedings was filed on June 22, 1998, and a second amended notice of proceedings was filed on August 24, 1998. Judge Bradley filed his response to the second amended notice of proceedings on October 13, 1998.

As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct

an evidentiary hearing and prepare a written report. The evidentiary hearing was held on December 7 and 8, 1998, before Justice William Stone, presiding, of the Court of Appeal, Fifth Appellate District, Justice Judith Haller of the Court of Appeal, Fourth Appellate District, Division One, and Judge Richard Patsey of the Contra Costa County Superior Court. On February 23, 1999, the special masters filed their report.

Judge Bradley and trial counsel filed opening, responding and reply briefs with the commission. In addition, Judge Bradley filed two motions to allow the taking of additional evidence and trial counsel filed opposition to the motions. The commission granted Judge Bradley's motions to allow the taking of additional evidence only insofar as the tendered declarations of Judge Bradley and Dr. Moglen were ordered filed.

On May 12, 1999, the matter was orally argued before the commission. All members of the commission were present. Mr. William Smith presented argument on behalf of trial counsel and Mr. Thomas Brayton of Jones, Mahoney, Brayton & Soll represented Judge Bradley. Judge Bradley also spoke on his own behalf.

## FINDINGS

Judge Bradley in his presentation to the commission as well as in his testimony before the special masters admitted that he has had problems with alcohol since his service in Vietnam in 1969. He voluntarily checked into a residential program in 1980, and in November 1991 he voluntarily participated in a residential treatment program at the Betty Ford Center for 28 days. He attended Alcoholics Anonymous meetings after his stay at the Betty Ford Center, slowly tapering off and ceasing by the end of 1992. He resumed his association with Alcoholics Anonymous sometime in 1996.

Judge Bradley admitted virtually all of the factual allegations and did not object to the special masters' findings. The special masters found that the following facts were established by clear and convincing evidence, and the commission makes the following findings.

One night in the latter half of 1997, Ventura County Sheriff's deputies stopped Judge Bradley after he had run two stop signs. Judge Bradley smelled of alcohol, admitted that he had been drinking and appeared to be impaired. The deputies did not administer a field sobriety test and did not ask him how much he had had to drink. The deputies decided to drive Judge Bradley approximately one mile to his home rather than arrest him. The deputies indicated they may have done this as a "professional courtesy,"

although they may have made the same decision had he not been a judge. On the drive home, Judge Bradley asked the deputies not to disclose the incident to anyone.

At approximately 9:00 p.m. on December 6, 1997, Judge Bradley was stopped by the California Highway Patrol in the city of Ojai in Ventura County for running a stop sign and failing to use a turn signal. The officer noted that he exhibited objective signs of alcohol intoxication, such as slurred speech and the strong odor of alcohol. Field sobriety tests were administered and Judge Bradley's performance was unsatisfactory. During the tests, Judge Bradley informed the officer that he was a Ventura County Superior Court judge and urged the officer to allow him to drive home. At one point, Judge Bradley turned from the officer and walked back to his car, saying he was going to drive straight home. The officer instructed him to stop, which he did. Judge Bradley was arrested for driving under the influence of alcohol.

After being taken to jail, a breath test was administered which revealed that Judge Bradley's blood-alcohol level was 0.23/0.21 percent, well above the legal limit of 0.08 percent. He violated Vehicle Code section 23152, subdivisions (a) and (b), driving under the influence and driving with an unlawful blood-alcohol level. Judge Bradley falsely told the officer that he had had only one glass of wine to drink and that he did not feel the effects of alcohol. On February 24, 1998, Judge Bradley pled guilty to driving with an unlawful blood-alcohol level and was sentenced to three years' probation.

At approximately 9:00 p.m. on January 3, 1998, a Santa Paula police officer stopped to assist Judge Bradley who was standing by his car in a turn lane. As the officer exited his vehicle, Judge Bradley entered his car and drove to a gas station and attempted to change a flat tire. The officer approached Judge Bradley and noticed that his car had fresh damage. Judge Bradley could not explain how the car had been damaged. He smelled strongly of alcohol and was very unsteady as he attempted to change the tire.

After a second officer arrived, Judge Bradley was given field sobriety tests, which he performed unsatisfactorily. During the tests, he asked one of the officers, "Don't you know who I am?" When told that the officer did not know, Judge Bradley asked him not to continue because an arrest would ruin his life and his career. He asked to be driven home. Judge Bradley was placed under arrest for driving under the influence of alcohol.

The officers found two pint-sized bottles of vodka, three-quarters empty, on the front passenger's seat of Judge Bradley's car and a half-empty bottle of vodka in a paper bag on the floor in front of the passenger's seat. Judge Bradley falsely stated that he had had only one beer and one drink and that he did not feel the effects of alcohol.

During the booking process, Judge Bradley was very distraught. He repeatedly stated that his life would be ruined if he was booked for driving under the influence, and again asked the officers if they knew who he was. During fingerprinting, Judge Bradley said he was not going to continue and started to walk out of the booking area. After a minor struggle with an officer, he cooperated and completed the booking process. A blood test revealed that he had been driving with a blood-alcohol level of 0.27.

On February 24, 1998, Judge Bradley pled guilty to driving with an unlawful blood-alcohol level and was sentenced to five years on probation and 30 days in jail. He completed the jail sentence on March 17, 1998, and enrolled in an inpatient alcohol rehabilitation program. Unfortunately, after he completed the program, Judge Bradley continued to abuse alcohol.

Judge Bradley's two arrests for driving under the influence of alcohol received extensive negative newspaper coverage and were widely known in the legal community as well as by the general public. On January 8, 1998, the presiding judge of the Ventura County Superior Court gave Judge Bradley a confidential memorandum stating: "Because of recent events it is essential that you not have any alcohol in your system while performing any of your duties as a judge. Therefore, under my authority as presiding judge, I am imposing a policy of 'zero tolerance' regarding you and alcohol. You are not to be alcohol positive while engaged in the performance of any of your judicial duties. Any violation of this condition will be considered a breach of your judicial responsibilities."

On the morning of January 13, 1998, Judge Bradley arrived at the Ventura County Courthouse under the influence of alcohol. Although he had no cases set for court that day, the courthouse was open to the public beginning at 8:00 a.m. The executive officer of the superior court was contacted between 8:30 and 9:00 a.m. and she and the assistant presiding judge went to Judge Bradley's chambers at approximately 10:00 a.m. Judge Bradley smelled of alcohol, exhibited an unusually relaxed demeanor and spoke nonsensically. When confronted with the fact that he appeared to be under the influence of alcohol, Judge Bradley initially denied, then admitted, that he had been drinking. The assistant presiding judge, in the absence of the presiding judge, relieved Judge Bradley of all judicial assignments, and that afternoon the executive officer drove Judge Bradley to an alcohol treatment facility.

The week before, on January 5, 1998, the presiding judge had gone to Judge Bradley's chambers to assess his condition on his first day back to work after his second arrest. Judge Bradley began discussing his wife's relationship with a deputy district attorney. Judge Bradley said something to the effect of: "Maybe I ought to blow them both away." Judge Bradley had

never met or talked to the deputy district attorney. The presiding judge did not believe that the statement constituted an actual threat, and he attributed it to Judge Bradley's depressed emotional state. Nonetheless, the presiding judge thought he should not ignore the comment and informed the district attorney of the comment. At the district attorney's request, Judge Bradley met with him to discuss the statement. When the deputy district attorney was informed of the statement, it caused him "some concern" for his safety.

On or about January 23, 1998, Judge Bradley entered a 90-day inpatient alcohol treatment program. He left before completing the program and continued to abuse alcohol. On February 18, 1998, Judge Bradley left the following message on the deputy district attorney's voice mail: "[The district attorney] said I should call you about a potential death problem—threat. I don't think this is a situation that we should even discuss on the phone—whatever. I'll call you later on. Bye-bye." The deputy district attorney did not recognize the voice and was unsure if it was a threat. When it was established that it was Judge Bradley who left the message, his concern for his safety increased.[1]

The next day, February 19, 1998, Judge Bradley telephoned the executive officer and told her that he was no longer at the inpatient program and was coming back to work on March 2. On February 20, 1998, Judge Bradley again telephoned the executive officer. He was intoxicated during the conversation, and said that he had been drinking since leaving the inpatient program. He said that he "really did it this time"; he had left an explicit voice mail message for the deputy district attorney at his office indicating that if the attorney continued a sexual relationship with his wife, he was going to kill him. In fact, Judge Bradley had not left such a message. The executive officer informed the presiding judge of what Judge Bradley had told her. When the attorney was informed of this statement by Judge Bradley, it increased his concern for his safety, but this concern was lessened when he was told the statement referred to the message that Judge Bradley had previously left on his voice mail.

On February 21, 1998, the Ventura County District Attorney's Office learned that Judge Bradley had left San Diego by train, intending to return to the Ventura area. This information was given to the presiding judge. On February 23, 1998, after discussing the matter with all supervising judges of the Ventura County courts, the presiding judge barred Judge Bradley from the courthouse. The presiding judge took this action because Judge Bradley had been relieved of his duties, had no reason to be at the courthouse, and was exhibiting very poor judgment.

[1] The masters noted that they had listened to the tape and that Judge Bradley sounded calm and nonthreatening.

Between December 8, 1997, the first workday following his arrest on December 6, 1997, and March 30, 1998, the date that the commission issued an order suspending Judge Bradley, he was available for work only six days. He was in inpatient rehabilitation programs for 63 days and incarcerated for 20 days.

At approximately 2:00 a.m. on April 25, 1998, Judge Bradley took a cab from Ventura to the family residence in Ojai. He pried open a window with a knife he found in the shed and entered the house. His estranged wife and their children were living there. Judge Bradley had not lived in the house for approximately 14 months. When the wife discovered Judge Bradley was in the house she told him to leave. He refused, noting that the house was still his. They argued verbally and engaged in a minor mutual "pushing and shoving match." In the course of the argument Judge Bradley told his wife that he would kill her, but she did not take this as a real threat. She called the police.

When the police arrived they found Judge Bradley asleep in an upstairs bedroom. He was verbally abusive to the officers and uncooperative. It was apparent that Judge Bradley had been drinking and he was placed under arrest for violating the no-alcohol condition of his probation stemming from the driving under the influence cases. The officers contacted the "on duty" judge who issued an emergency protective order prohibiting Judge Bradley from having contact with his wife and children. He was told of the order and given a copy of it.

Later that morning from jail, Judge Bradley made two brief telephone calls to his wife, unsuccessfully seeking her help with posting bail. After he was released from jail, he left three messages on his wife's answering machine. None was threatening, but in one message Judge Bradley admitted he was violating the protective order by calling.

On May 14, 1998, Judge Bradley admitted he had violated his probation in the two driving under the influence cases. On June 26, 1998, he was sentenced to 180 days in jail. Also on June 26, he pled no contest to two counts of violating the emergency protective order. The court suspended the 365-day jail sentence for violating the protective order and placed him on probation for three years on the condition he serve 30 days in jail concurrent to the sentence in the driving under the influence cases.

At approximately 10:00 p.m. on May 15, 1998, a Ventura police officer saw Judge Bradley attempting to stand up in a street near railroad tracks after apparently falling off a bicycle. He stumbled as he unsuccessfully attempted to remount the bike. As the officer approached Judge Bradley and asked for

identification, she recognized him. The officer was aware that he was on probation for driving under the influence of alcohol. Judge Bradley exhibited symptoms of being under the influence of alcohol. He admitted he had been drinking and was arrested for violating the no-alcohol condition of his probation. A breath test administered at the station revealed that Judge Bradley had a blood-alcohol level of 0.22/0.21 percent. On June 26, 1998, he pled no contest to riding a bicycle under the influence of alcohol and was fined.

## CONCLUSIONS

The special masters concluded that on each of the seven counts concerning specific actions Judge Bradley engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Count one concerned Judge Bradley's driving under the influence of alcohol on December 6, 1997. The special masters found that he intentionally broke the law by driving under the influence, unnecessarily informing the officer that he was a judge, asking to be allowed to drive himself home, and untruthfully telling the officer that he had only one glass of wine to drink. They found that Judge Bradley violated canons 1, 2A and 2B(2) of the California Code of Judicial Ethics by these actions, "which eroded the integrity of his office, undermined public confidence in the judiciary and [that he] improperly sought to use the prestige of his office to advance his personal interests."

Similarly, on count two which concerned Judge Bradley's driving under the influence of alcohol on January 3, 1998, the masters noted that he "brazenly broke the law by driving under the influence and with a blood alcohol level of .27 percent," "was not truthful about how much alcohol he had consumed," and "was prepared to tell the officers that he was a judge and asked for special treatment." In addition, his "behavior during booking when he was uncooperative, walked away from the fingerprinting process and briefly struggled with an officer" constitutes, by itself, prejudicial misconduct. The masters concluded that Judge Bradley's actions violated California Code of Judicial Ethics canons 1, 2A and 2B(2).

The masters were of the opinion that Judge Bradley's conduct as alleged in counts one and two did not constitute willful misconduct because he had not been acting in his judicial capacity when he was driving or during the arrest procedures. The masters note that in *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 318–319 [267 Cal.Rptr. 293, 787 P.2d 591], the "Supreme Court found Kennick's conduct—referring to his judicial status and the fact that the California Highway Patrol has cases before the

court and suggesting the officer lose the paperwork—did not occur while Kennick was acting in a judicial capacity, and therefore could not be willful misconduct." The masters concluded that Judge Bradley's actions were significantly less egregious than the conduct in issue in *Kennick*.

**(1)** The masters concluded that Judge Bradley's actions charged in count three concerning drinking and driving in the latter half of 1997 and being driven home by a sheriff's deputy, constituted prejudicial misconduct.[2] They note that in *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284 [110 Cal.Rptr. 201, 515 P.2d 1], the Supreme Court stated that prejudicial conduct refers to conduct that "would appear to an objective observer to be not only unjudicial . . . but . . . prejudicial to public esteem for the judicial office." The masters found, "although there is no evidence anyone other than the deputies who made the stop became aware of the incident, we conclude that to an objective observer respondent's act of drinking and driving would lessen the esteem of the judiciary." Judge Bradley's actions violated California Code of Judicial Ethics canons 1 and 2A.

**(2)** The masters concluded that the actions charged in count four concerning Judge Bradley's coming to the courthouse when intoxicated in violation of the zero-tolerance policy constituted prejudicial misconduct. Judge Bradley's appearance at the courthouse while under the influence of alcohol impaired the integrity of the court and further weakened public confidence in the judiciary, as did his knowing violation of a direct order from the presiding judge. The masters concluded that these acts violated California Code of Judicial Ethics canons 1 and 2A. They further noted that Judge Bradley "was on specific notice that such conduct would not be tolerated by the superior court, but chose to ignore the repercussion—that he would be relieved of his duties. Consequently, as a result of his own conduct, respondent was rendered unable to diligently discharge his duties and thereby violated canon 3C(1)."

The masters concluded that Judge Bradley's actions charged in count five concerning his threats and telephone calls involving the deputy district attorney constituted prejudicial misconduct. They found that the incidents, when considered as a whole, "demonstrate at the very least respondent's poor judgment and continued alcohol abuse." Judge Bradley's statements about and to the deputy district attorney were the most serious actions. "While these statements could have been construed as threats to physically harm the deputy district attorney, they appear to be more the product of respondent's emotionally depressed state than a legitimate threat to use violence." The masters nonetheless concluded that Judge Bradley's conduct constituted

[2] The masters noted that count three alleged that on two occasions Judge Bradley was driven home by law enforcement officers because he had been drinking and driving. Trial counsel conceded that they did not prove there was a second incident.

prejudicial misconduct, citing *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 685, footnote 4, and 704–705 [122 Cal.Rptr. 778, 537 P.2d 898] (prejudicial conduct where judge verbally threatened to kill her apartment manager). They further noted "whenever a judicial officer makes statements that indicate an intent to break the law and/or commit violent acts upon another, public esteem for the judiciary will undoubtedly suffer great damage. This is so whether or not the judicial officer's statements are innocuous."

**(3)** The masters found that Judge Bradley's conduct at the family residence on the night of April 25, 1998, and his subsequent phoning of his estranged wife as charged in count seven constituted prejudicial misconduct. They noted that Judge Bradley surreptitiously entered the family residence, argued with his estranged wife, engaged in minor pushing and shoving with her, and was verbally abusive and uncooperative with officers who were dispatched there. They commented that while the incident involved matters that are typically private, here Judge Bradley's "conduct caused the involvement of law enforcement officers and brought his judicial office into disrepute." Furthermore, Judge Bradley was obviously under the influence of alcohol in violation of the no-alcohol condition of his probation. Also, because of the volatility of the domestic situation, the officers sought and received an emergency protective order which Judge Bradley knowingly violated. Judge Bradley, by his actions, repeatedly violated California Code of Judicial Ethics canons 1 and 2A.

**(4)** The masters found that Judge Bradley's riding a bicycle under the influence of alcohol as charged in count eight constituted prejudicial misconduct. His continued alcohol abuse, violation of court orders and unlawful conduct were prejudicial to public esteem for the judicial office and violated California Code of Judicial Ethics canons 1 and 2A.

**(5)** In addition, the masters found that Judge Bradley demonstrated a persistent failure or inability to perform judicial duties as charged in count six. During the four-month period from December 8, 1997, to March 30, 1998, he was available for work only six days. The masters found that the responsibility for Judge Bradley's unavailability during the bulk of the period lay directly with him. They noted that while it is generally not misconduct when a judge is unavailable because he or she is voluntarily seeking treatment for alcoholism, here the treatment sought was a direct consequence of Judge Bradley's unlawful behavior, and his continued abuse of alcohol which led him to violate the zero-tolerance policy and to be relieved of his duties when he showed up at the courthouse intoxicated. The masters opined that the actions of the presiding and assisting presiding judges were prudent responses to Judge Bradley's "protracted intemperate and irresponsible behavior." His conduct violated California Code of Judicial Ethics canon 3C(1).

Finally, the masters found that Judge Bradley demonstrated habitual intemperance in the use of intoxicants or drugs as charged in count nine. They recognized that there is no published authority interpreting the state's constitutional provision for removing or censuring judges on the grounds of habitual intemperance, but concluded that Judge Bradley's "excessive abuse of alcohol as outlined in Counts One through Eight constituted habitual intemperance by any generally accepted meaning of the term, including that contemplated by our state Constitution."

The masters rejected Judge Bradley's argument that "habitual intemperance" as used in article VI, section 18, subdivision (d) of the California Constitution violated principles of due process because it was unconstitutionally vague. The masters note that in analyzing whether a statute is void for vagueness there is a strong presumption that legislative enactments be upheld unless their unconstitutionality is clear (citing *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568 [20 Cal.Rptr.2d 341, 853 P.2d 507]) and that in determining whether language is impermissibly vague, we ask whether the language provides a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [33 L.Ed.2d 222, 92 S.Ct. 2294].) The masters concluded that given its context in a provision dealing with judicial discipline, "habitual intemperance" provides adequate notice to judicial officers of what conduct is proscribed.

The commission agrees with the special masters' conclusions that Judge Bradley's actions violated the California Code of Judicial Ethics. The commission also agrees that Judge Bradley's actions as charged in counts one through five and seven and eight constituted at a minimum prejudicial misconduct. As Judge Bradley's term has expired and he agrees that he should be publicly censured, the commission need not determine whether any of his actions, such as showing up at the courthouse intoxicated and in violation of a specific zero-tolerance policy, might also constitute willful misconduct.

## MITIGATION

The masters note that a substantial portion of the testimony concerned Judge Bradley's presentation of mitigation evidence. Nine witnesses, representing a broad cross-section of Ventura County's judicial and legal community, testified as to Judge Bradley's professional conduct, including one appellate judge, two superior court judges, a court administrator, the district attorney, the public defender, and three experienced trial attorneys. Before his first arrest, Judge Bradley "was viewed as a bright, thorough, hard-working and fair-minded judge." The witnesses opined that if he were able to maintain

an extended period of sobriety, they would have no hesitation in having Judge Bradley hear and resolve their cases if permitted to sit on assignment. The masters found the witnesses' testimony "highly credible and persuasive," noting that the testimony of two of Judge Bradley's colleagues, whose court had suffered as a result of his behavior, was particularly compelling.

The masters found Judge Bradley's evidence concerning his ability to overcome his alcohol dependency less convincing. His intoxication led to six known incidents since December 6, 1997, "notwithstanding his having sought treatment in four in-patient rehabilitation programs. Although respondent has made an effort to control his sobriety, as of the time of the hearing, his efforts had not been successful."

The masters noted that in October 1998, Judge Bradley was diagnosed as suffering from posttraumatic stress syndrome (PTSS). Dr. Moglen, his psychiatrist, attributed this disorder to the 10 and one-half months respondent was in Vietnam. The masters found that Judge Bradley testified convincingly that he first abused alcohol in Vietnam as a diversion from his combat experience. Dr. Moglen expressed confidence respondent's PTSS can be treated successfully, and noted that with successful treatment there is a higher probability Judge Bradley can gain prolonged control over his sobriety. Dr. Moglen conceded, however, that success cannot be guaranteed. As Judge Bradley's new treatment plan was scheduled to commence immediately after the hearing, the masters declined to comment on the likelihood of success.

The declarations accepted by the commission suggest that Judge Bradley is in recovery. Judge Bradley states that: (1) he has not consumed alcohol since December 2, 1998; (2) in January 1999 he commenced working at a 48-hour-a-week job; (3) following an inpatient program from December 11 through December 18, 1998, he has been in an outpatient program that will continue through the middle of June; and (4) that he attends therapy sessions and Alcoholics Anonymous sessions seven days a week. Dr. Moglen states that Judge Bradley is taking Antabuse on a daily basis and is randomly tested for alcohol and that he is no longer depressed and is not experiencing the symptoms of PTSS. Dr. Moglen admits that there is no guarantee that Judge Bradley will maintain his sobriety, but opines that he will.

## DISCIPLINE

Article VI, section 18, subdivision (d) of the California Constitution provides that the commission may "censure a . . . former judge . . . for action . . . that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice

that brings the judicial office into disrepute." The subdivision further states: "The commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court."

**(6)** The Supreme Court has consistently stated that the purpose of a commission disciplinary proceeding is not punishment, " 'but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity . . . of the judicial system.' " (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112 [77 Cal.Rptr.2d 408, 959 P.2d 715], quoting *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].)

Some of the variations of this theme sounded by the Supreme Court include: " '[t]he purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield' " (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 179 [48 Cal.Rptr.2d 106, 906 P.2d 1260], quoting *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1320 [240 Cal.Rptr. 859, 743 P.2d 919], citing *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 314 [45 Cal.Rptr.2d 254, 902 P.2d 272]); the " 'ultimate objective [is] . . . to protect the judicial system and the public which it serves from judges who are unfit to hold office' " (*Doan, supra,* 11 Cal.4th at p. 314, quoting *McComb v. Commission on Judicial Performance* (1977) 19 Cal.3d Spec. Trib. Supp. 1, 9 [138 Cal.Rptr. 459, 564 P.2d 1]); and "[t]he ultimate standard for judicial conduct must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office" (*Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d at p. 281).

Judge Bradley's conduct clearly warrants a public censure. He concedes as much. More importantly, the bench and the public should be reassured that such actions by a judge are unethical and will not be overlooked if the offending judge's term expires before the commission's proceedings are completed.

**(7)** The question of whether Judge Bradley should be barred from assignment is a more complicated matter. The commission's primary trust is to the public and it cannot at this time find that Judge Bradley is fit to sit on assignment. The commission was impressed with Judge Bradley's forthrightness when he appeared before the commission and hopes that his recovery will be speedy and complete, but as Judge Bradley admitted, there is no guarantee of such a recovery. The commission is mindful of the concerns raised in trial counsel's opposition to the motion to allow the taking of

additional evidence, that Judge Bradley's alleged current sobriety has been achieved under controlled circumstances[3] and provides no assurance of his future fitness. Furthermore, as noted by the masters, the judges and lawyers who testified in support of Judge Bradley sitting on assignment conditioned their endorsements on Judge Bradley first maintaining an extended period of sobriety.

The commission was also impressed with Judge Bradley's record as a judge prior to December 6, 1997, and notes that despite his now admitted long-standing problems with alcohol there were no reported incidents prior to that date of these problems ever interfering with his performance of his judicial duties. Judge Bradley argues that, should he demonstrate over an extended period of time that he can maintain complete sobriety, it would be in the public's interest for him to be eligible to sit on assignment. The commission, without in any way committing itself to this approach, does not wish to foreclose Judge Bradley from making such an argument should he achieve its predicate—the maintenance of sobriety over an extended period of time.[4] Accordingly, the commission's bar to Judge Bradley receiving assignments is without prejudice to Judge Bradley's filing, no sooner than a year after the entry of this order, a motion to lift the bar to assignments, appointments and reference of work.

The commission orders that Judge Robert C. Bradley be publicly censured, and that he be barred from receiving any assignment, appointment or reference of work from any California state court. This bar is without prejudice to Judge Bradley's filing, no sooner than a year after the entry of this order, a motion to lift the bar to assignment, appointments and reference of work.

This decision shall constitute the order of public censure and bar.

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[3] Among the controlling circumstances are: (1) Judge Bradley is taking Antabuse; (2) he is randomly tested for alcohol; (3) he is in an intense outpatient program; (4) he resides with three other recovering alcoholics; (5) he attends programs and sessions seven days a week; and (6) he is on probation on his criminal convictions.

[4] The California Constitution's provision authorizing the commission to permanently bar a former judge from assignments, arguably includes implicitly the authority to impose a lesser penalty—for example, a bar for a limited period of time. The commission recognizes that the parties did not brief this issue, that it has not previously asserted such implicit authority, and, of course, that any lifting of a prior bar to assignments would in no wise be binding on the Chief Justice. The issues inherent in the proposition that the commission might remove a bar to assignments will have to be addressed if and when Judge Bradley makes such a motion. Thus, the commission's indication that Judge Bradley may file a motion to remove the bar should not be construed as implying that the motion would necessarily be granted even though the factual predicate for the motion is met.

Commission members Hon. Daniel M. Hanlon, Ms. Lara Bergthold, Mr. Mike Farrell, Hon. Madeleine I. Flier, Michael A. Kahn, Esq., Mrs. Crystal Lui, Hon. Risë Jones Pichon, Ms. Ramona Ripston, Ms. Julie Sommars, and Donald E. Vinson, Ph.D., voted for the public censure and bar. Commission member Patrick M. Kelly, Esq., did not participate.

FILED

OCT 1 3 1999

Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| Inquiry Concerning Judge Fred L. Heene, Jr.<br><br>No. 153 | DECISION AND ORDER IMPOSING PUBLIC CENSURE |

This is a disciplinary matter concerning Judge Fred L. Heene, Jr., of the San Bernardino County Superior Court. Formal proceedings having been instituted, this matter is before the Commission on Judicial Performance pursuant to rule 127 of the Rules of the Commission on Judicial Performance (discipline by consent).

## APPEARANCES

Trial Counsel for the Commission on Judicial Performance are Jack Coyle and William Smith. Counsel for Judge Heene is James E. Friedhofer of Lewis, D'Amato, Brisbois & Bisgaard.

## PROCEDURAL HISTORY

Formal proceedings were instituted in this matter by a Notice of Formal Proceedings dated February 26, 1999. The Notice set forth nine counts of misconduct pursuant to article VI, section 18 of the California Constitution. On April 29, 1999, Judge Heene filed a response to the Notice of Formal Proceedings. As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report.[1]

## CONSENT AGREEMENT

Following the holding of a prehearing conference by the special masters and the scheduling of an evidentiary hearing,[2] Judge Heene submitted a proposed disposition by consent. The "Proposed Disposition" recites the following factual stipulations.

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[1] The special masters are Justice Marcel Poché of the Court of Appeal, First Appellate District, Division Four (presiding), Judge Barbara A. Lane of the Superior Court of Ventura County and Judge Jerry E. Johnson of the Municipal Court of Los Angeles County.

[2] In light of the commission's disposition of the matter, the hearing scheduled to commence November 1, 1999 is cancelled.

COUNT ONE

*People* v. *Fullerton*

On the morning of July 30, 1996, Judge Heene presided over the preliminary hearing in the rape case of *People* v. *Fullerton*. The alleged victim (referred to as Ms. Doe) testified inconsistently with what she had told police. Ms. Doe testified that she had given the police information that was not true. At the conclusion of her testimony, Judge Heene ordered that she be taken into custody, stating:

> Okay, ma'am, you are not allowed to leave. The bailiff is ordered to take her into custody and I am going to set bail in the amount of $25,000 and ask that charges be filed ... She has admitted to this Court a crime.

Deputy District Attorney Friedman, who was prosecuting the preliminary hearing, asked that Judge Heene take a recess before taking the witness into custody; Judge Heene refused. When Friedman noted that there were no charges pending against Ms. Doe, the judge stated that she had admitted a crime in court and again ordered her remanded. Shortly thereafter, Deputy District Attorney Hansen, Friedman's supervisor, appeared in court and expressed concern that the witness had been taken into custody under such circumstances. The judge again stated that the witness had admitted a crime. When Hansen noted that the district attorney's office had not made a determination as to whether a crime had been committed, the judge responded that Ms. Doe had admitted on cross-examination that she had filed a false police report.

Shortly thereafter, Judge Heene released Ms. Doe from the custody of the bailiff to her attorney upon the condition that she was not free to leave the courthouse. Ms. Doe had been in the custody of the bailiff for approximately 10 minutes. The preliminary hearing was thereafter concluded. After the lunch recess, Judge Heene had Ms. Doe brought into the courtroom, and told her that he was ordering a transcript to be prepared for the district attorney's office to review to possibly file criminal charges. Judge Heene stated that he was going to order a day for Ms. Doe to return to court, then withdrew that order at Friedman's request. He then told Ms. Doe that she was free to leave.

COUNT TWO

*People* v. *Reis*

On February 10, 1997, Judge Heene presided over the court trial on a speeding ticket in the case of *People* v. *Reis*. After the police officer testified, Judge Heene asked defendant Reis, who was representing himself, to tell his side of the story. The following then occurred:

> MR. REIS: Do I get to cross-examine the officer?
>
> THE COURT: No, sir. You tell me your side of the case.

MR. REIS: Oh. I thought – I misunderstood. I thought we got to cross-examine the officer also.

THE COURT: Sir, it is early on Monday morning.

MR. REIS: I don't want to offend you.

THE COURT: Okay. All right. I asked you to tell me your side of the case.

THE COURT: Okay.

THE COURT: Now, for the third time, would you please tell me you side of the case?

Judge Heene did not allow the defendant to cross-examine the officer. The defendant then explained that he was going 55 mph, not 58 as testified to by the officer, and explained why he believed that his speed was safe for the conditions at the time. Judge Heene told the defendant that the speed limit was 45, and that he was going to impose a fine. The case was then concluded. The conviction was reversed by the Appellate Department of the Superior Court, on the basis that the defendant should have been allowed to cross-examine the officer.

COUNT THREE

*People* v. *Boykin*

On December 1, 1997, Judge Heene presided over the case of *People* v. *Boykin*. Defendant Boykin was charged with the infraction of driving a vehicle with expired registration. Boykin had entered a not guilty plea on November 13, 1997, and the matter was set for a court trial on December 15, 1997. Boykin appeared on December 1, 1997, because he had been unable to pay the $200 bail set on November 13. Boykin was representing himself.

Judge Heene stated as follows:

THE COURT. Okay. Tell you what. Get rid of the car, that will get you some money, and then we will get rid of the ticket, okay? Then you will solve my problem because you won't be driving. You will solve everybody else's problem because the car is gone and you will have some money; right?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

THE DEFENDANT: Hopefully I can get some money now that I am working.

THE COURT: Be back here December 11, okay, December 11th showing that the car is sold, okay.

THE DEFENDANT: Well, if I can't sell it by then, I mean, I can't make people buy it, sir. I don't –

...

THE COURT: Do you know how to determine the sale price of something?

THE DEFENDANT: No, sir.

THE COURT: You start at a nickel and you work up. And when you are down to the last person, then that's the sale price. All right? I guarantee you, offer that thing up for a hundred dollars, you are going to have some buyers, aren't you?

THE DEFENDANT: Not necessarily on the car, if you seen the car.

THE COURT: Then a tow company will buy it.

THE DEFENDANT: For 20 dollars or so.

THE COURT: Right. You be back here with that car gone on December 11th. Because one of the two of you is going to be gone on December 11th, all right? All right. We have been playing around with this since July. Make it happen. December 11th you are here, either you have a sale that's been registered with DMV showing the car is gone, or we will give you some vacation time to think about it.

THE DEFENDANT: What if I get it registered by then?

THE COURT: Did you hear me? Was I not clear? Make the car gone on December 11th or you will get some vacation time. Is that clear?

THE DEFENDANT: Yes, sir.

Defendant Boykin appeared before Judge Heene on December 11 and stated that he had sold his car. Judge Heene imposed court costs of $10, and the case was dismissed.

COUNT FOUR

*People* v. *Lopez*

On December 30, 1997, Judge Heene presided over the misdemeanor case of *People* v. *Lopez*. Defendant Lopez had been previously ordered by another judge to do community service in lieu of a fine, as part of a sentence for driving on a suspended license and two vehicle code infractions. Lopez had not completed the community service work before the due date of December 13, 1997, and came to the courthouse on December 30, 1997, to request an extension. Lopez had not been scheduled to appear in court on December 30. (No notification of failure to complete the hours had been filed with the court.) She was sent to Judge Heene's department.

She appeared without an attorney. Judge Heene inquired whether she had completed the community service or paid the fine, and she said that she had not. The following occurred:

> THE COURT: Have a seat right there ma'am (pointing). All right. Ms. Lopez, stand up, please. This Court has tried 16 different – well, three different ways to try to help you get it paid. It is $1,314, we divide that by 30, and that's 44 days in the county jail. You will be remanded into custody. Okay. Good luck to you.
>
> MS. LOPEZ: Your Honor, can I say something?
>
> THE COURT: Sure. What do you want to say?
>
> MS. LOPEZ: I just had a baby. And when I was pregnant, I was on bed rest from two months on and I couldn't do my community service.
>
> THE COURT: Did you come into court and tell them that?
>
> MS. LOPEZ: No, I didn't, your Honor.
>
> THE COURT: Okay. Good luck.
>
> MS. LOPEZ: I have a seven-day old baby at home.
>
> THE COURT: Ma'am, you should have thought about that a long time ago.

Judge Heene did not inform the defendant that he was conducting a violation of probation hearing, nor otherwise advise her of her rights in connection with a probation violation hearing.

## COUNT FIVE

*People* v. *Hillmann*

In January 1998, Judge Heene presided over a jury trial in the case of *People* v. *Hillmann*. The trial was completed and the jury began deliberations. On January 13, 1998, a juror was late to court. He was replaced with an alternate juror. When the late juror appeared, Judge Heene asked for his explanation for being late, then found him in contempt and remanded him. Judge Heene did not cite the juror for contempt or otherwise inform the juror that he was conducting a contempt hearing before finding him in contempt.

## COUNT SIX

*People* v. *MacLeod*

On February 19, 1998, a defendant charged with speeding and a related misdemeanor for failure to attend traffic school appeared before Judge Heene for arraignment on the misdemeanor in the case of *People* v. *MacLeod*. Defendant MacLeod appeared without an attorney. She had not entered a plea on the traffic ticket; criminal proceedings had been stayed pending the completion of traffic school. MacLeod had not entered a guilty or no contest plea (or a not guilty plea) on the misdemeanor. The following occurred:

> THE COURT: ...What seems to be the problem?
>
> THE DEFENDANT: Well, I came to court once and I got an extension to January 1st.
>
> THE COURT: Yeah, I know that. You got actually two extensions.
>
> THE DEFENDANT: And I did lose my job. I wasn't able to pay the fine in full.
>
> I do have the original money for the original fine, I just don't have the additional fine.
>
> THE COURT: Well, ma'am, it is $589 at the present time.
>
> THE DEFENDANT: Uh-huh.
>
> THE COURT: Okay. Can you pay that today?
>
> THE DEFENDANT: No, I only have $329, the original –
>
> THE COURT: Well, it will be $589 or 20 days in the county jail. Okay. You are remanded into custody. Good luck to you.

Judge Heene sentenced the defendant in the absence of a plea of guilty or no contest or conviction at trial. The defendant then paid the fine of $589 and was released.

COUNT SEVEN

*People* v. *Howell*

On March 24, 1998, Judge Heene presided over a pretrial hearing in the misdemeanor case of *People* v. *Howell*. Defendant Howell appeared without an attorney and requested that the public defender be appointed. Howell stated that he had been unemployed since February 1998 and had almost depleted his other resources. The following occurred:

> THE COURT: How do you expect to eat next week?
>
> THE DEFENDANT: I just received an income tax return of one thousand dollars.
>
> THE COURT: Okay.
>
> THE DEFENDANT: And in the meantime I expect to be looking for employment.
>
> THE COURT: Okay. Now we are getting to the real crux of the situation. When was the last time that you filled out an employment application for work?
>
> THE DEFENDANT: That would be prior to my employment with the City of Chino Hills.
>
> THE COURT: Yeah. Okay. I strongly suggest, sir, that (a) you use that tax return money to get an attorney; and (b) that you go out and find a job right away, okay?
>
> THE DEFENDANT: I intend to do that.
>
> THE COURT: The Court will not appoint the Public Defender at this point in time. You are an able-bodied person. You can get a job, okay? There is lot [sic] of jobs out there. I would suggest you go find one. All right. Now based on all of that, you want to go back and talk to the D.A. in earnest about the case?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Good. Okay.

The case was continued to April 7, when the defendant appeared without an attorney and asked for a continuance. The case was continued until April 28. On April 21, the defendant appeared on a new felony charge and stated that he had not worked for two months. Judge Heene appointed the public defender on both cases.

COUNT EIGHT

*People* v. *Anderson*

On May 6, 1998, Judge Heene presided over a probation revocation hearing in the misdemeanor case of *People* v. *Anderson*. Defendant Anderson appeared without an attorney. Without advising Anderson of his constitutional rights regarding revocation of probation (e.g., the rights to an attorney, a hearing, and to subpoena and examine witnesses), Judge Heene reinstated and modified the terms of Anderson's probation by adding 30 days to the jail sentence, and remanded him.

COUNT NINE

*People* v. *Aguilar*

On May 6, 1998, Judge Heene presided over a probation revocation hearing in the misdemeanor case of *People* v. *Aguilar*. Defendant Aguilar appeared without an attorney. Without advising Aguilar of her constitutional rights regarding revocation of probation (e.g., the rights to an attorney, a hearing, and to subpoena and examine witnesses), Judge Heene reinstated and modified the terms of Aguilar's probation by imposing community service hours in lieu of a fine.

* * *

In the "Proposed Disposition" Judge Heene and Trial Counsel also stipulated that the commission may impose discipline for any or all of the allegations in the Notice of Formal Proceedings, not to exceed a public censure.

The "Proposed Disposition" is signed by Judge Heene, his attorney and by Trial Counsel. It is accompanied by an affidavit of consent for discipline signed by Judge Heene admitting the truth of the charges as alleged in the Notice of Formal Proceedings, stating that he freely and voluntarily consents to the imposition of discipline up to and including a public censure, and waiving review by the Supreme Court.

DISCIPLINE

The commission adopts the factual stipulations set forth in the "Proposed Disposition" and finds that in these stipulations Judge Heene has admitted all of the factual allegations set forth in the Notice of Formal Proceedings.

The commission finds that Judge Heene's actions constitute misconduct under article VI, section 18(d) of the California Constitution. His actions on each count violated the Code of Judicial Ethics, canon 1 ("a judge shall uphold the integrity and independence of the judiciary") and canon 2A ("a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"). In addition, Judge Heene's actions on all the counts, other than count seven, violated several subsections of canon 3B ("a judge shall perform the duties of judicial office impartially and diligently").

The commission, in accepting the "Proposed Disposition," carefully reviewed the Notice of Formal Proceedings and determined that Judge Heene's misconduct does not rise to a level that recommends his removal from office. The commission concludes that public censure is the appropriate disposition for this case. The nine incidents in slightly less than two years are not isolated unrelated incidents of misconduct. In every instance, Judge Heene failed to respect the rights of unrepresented individuals. The "Proposed Disposition" recites no mitigating factors. The commission notes, however, that Judge Heene has not been previously disciplined and that his entry into the "Proposed Disposition" implicitly signals appreciation of his misconduct.

Commission members Justice Daniel Hanlon, Mr. Mike Farrell, Judge Madeleine Flier, Mr. Michael Kahn, Mr. Patrick Kelly, Mrs. Crystal Lui, Judge Rise Jones Pichon, and Ms. Ramona Ripston voted to impose a public censure. Commission members Ms. Lara Bergthold and Ms. Julie Sommars did not participate in this matter. There is one vacancy.

This decision and order shall constitute the order of public censure.

Dated: October 13, 1999

Honorable Daniel M. Hanlon
Chairperson

[No. 154. June 27, 2000.]

INQUIRY CONCERNING JUDGE W. JACKSON WILLOUGHBY

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance publicly censured the judge. The commission concluded that the judge engaged in a pattern of inappropriate conduct in the workplace toward female employees consisting of (1) the improper and unwanted touching of his bailiff's breasts; (2) staring at and asking to see his bailiff's breasts; (3) making a sexually suggestive comment to a deputy sheriff; and (4) making a crude and derogatory reference about a female deputy district attorney. These activities violated Cal. Code Jud. Ethics, canons 1 and 2A. The judge's touching of his bailiff's breasts as well as his staring at her breasts and asking to see them constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute. Public censure, rather than removal from office, was the appropriate sanction. The judge recognized the impropriety of his touching his bailiff's breasts and issued a public apology. Whatever his motive, the judge immediately sought additional information and training on avoiding sexual harassment. The commission could not conclude that the judge's pattern of inappropriate conduct was so continuing or pervasive as to preclude his reformation. (Opinion by Patrick M. Kelly, Commission Member.)

## HEADNOTES

(1) **Judges § 6—Discipline—Pattern of Sexually Inappropriate Conduct—Female Court Employees.**—The judge engaged in a pattern of inappropriate conduct in the workplace toward female court employees consisting of (1) the improper and unwanted touching of his bailiff's breasts; (2) staring at and asking to see his bailiff's breasts; (3) making a sexually suggestive comment to a deputy sheriff; and (4) making a crude and derogatory reference about a female deputy district attorney. These activities violated Cal. Code Jud. Ethics, canons 1 and 2A. The judge was publicly censured for his conduct.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 73.]

(2) **Judges § 6—Violations of Canons—Alcohol in Courtroom.**—The judge did not violate the canons by asking his clerk to join him in having an alcoholic drink in the courtroom during business hours when court was not in session and no members of the public were present.

(3) **Judges § 6—Prejudicial Conduct—Definition.**—Prejudicial conduct by a judge means conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.

(4) **Judges § 6—Willful Misconduct—Elements.**—To commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity.

(5) **Judges § 6—Wilful Misconduct—Prejudicial Misconduct—Judicial Capacity.**—The judge who engaged in a pattern of inappropriate sexual conduct towards female court employees engaged in prejudicial misconduct rather than willful misconduct because the judge was not acting in a judicial capacity, an element of willful misconduct.

(6) **Judges § 6—Discipline—Censure or Removal.**—Under Cal. Const., art. VI, § 18, subd. (d), the Commission on Judicial Performance has the authority to censure a judge or remove a judge for action that constitutes willful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(7) **Judges § 6—Disciplinary Proceedings—Purpose.**—The purpose of judicial disciplinary proceedings is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. In determining whether to remove a judge from office or to publicly censure a judge, the Commission on Judicial Performance must carefully consider whether the judge's misconduct requires such a severe remedy and whether any lesser discipline would meet these purposes.

(8) **Judges § 6—Disciplinary Proceeding—Precedent.**—The Commission on Judicial Performance is not bound by precedent in determining the appropriate discipline in judicial disciplinary proceeding. The factual variations are too great to permit meaningful comparison in many instances. Nonetheless, the commission's decision on what discipline to impose should be informed by some comparison with similar cases.

(9) **Judges § 6—Discipline—Number of Wrongful Acts Committed.**—The number of wrongful acts committed by a judge is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing lack of judicial temperament and inability to perform judicial functions in an evenhanded manner.

(10) **Judges § 6—Discipline—Pattern of Inappropriate Sexual Conduct—Female Court Employee.**—On the facts as found by the masters, the commission could not conclude that the judge's pattern of inappropriate conduct was so continuing or pervasive as to preclude his reformation. The commission's reluctance to remove the judge should not be construed to suggest that the commission will not in the future remove a judge from office, even for a single act of prejudicial misconduct, where warranted.

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**OPINION**

**KELLY, Commission Member.**—This disciplinary matter concerns Judge W. Jackson Willoughby, a judge of the Placer County Superior Court. Judge Willoughby (respondent) was born in 1935. Respondent was appointed to the Placer County Municipal Court in March 1993, and was elevated to the superior court in 1997.

## SUMMARY

(1) The commission finds that Judge Willoughby engaged in a pattern of inappropriate conduct in the workplace toward female employees consisting of (1) the improper and unwanted touching of his bailiff's breasts; (2) staring at and asking to see his bailiff's breasts; (3) making a sexually suggestive comment to a deputy sheriff; and (4) making a derogatory reference to a female deputy district attorney. These activities violate the California Code of Judicial Ethics, canons 1 and 2A, as alleged in the second amended notice of formal proceedings. The commission finds that the allegations concerning the judge's court clerk in 1997 and 1998 were not proved by clear and convincing evidence. For the reasons set forth in this decision, the commission publicly censures Judge Willoughby.

## PROCEDURAL HISTORY

Formal proceedings in this matter commenced with the filing on March 18, 1999, of a notice of formal proceedings. On March 31, 1999, respondent filed his verified answer. The notice was amended on June 28, 1999, and August

26, 1999, and respondent filed verified answers to the amended notices on July 12, 1999, and August 26, 1999.

As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report. The evidentiary hearing was held in three parts, commencing on September 7, 1999, and concluding on October 18, 1999, before Justice Paul Turner, presiding, of the Court of Appeal, Second Appellate District, Judge Ken M. Kawaichi of the Superior Court of Alameda County, and Judge Marguerite L. Wagner of the Superior Court of San Diego County. The special masters filed their report to the commission on January 3, 2000.

Following the receipt of objections and briefs from respondent and the office of trial counsel, the matter was orally argued before the commission on March 8, 2000, and reargued on May 2, 2000. Mr. Jack Coyle presented argument on behalf of trial counsel and Mr. Michael S. Sands presented argument on behalf of respondent.

## FINDINGS OF FACT ON SUSTAINED COUNTS

Paragraph one of count one of the second amended notice of formal proceedings alleged that, from approximately November 1997 through June 1998, respondent engaged in a pattern of inappropriate conduct in the workplace toward female court employees, in violation of the California Code of Judicial Ethics, canons 1, 2A, 3B(4) and 3B(5). The count set forth specific charges concerning five persons.

1. *Deputy M___*. The notice alleged that, in April 1998, respondent's bailiff, Deputy M___, had breast implant surgery of which respondent was aware and that, following the surgery, respondent frequently stared at her breasts and on more than one occasion asked when he would get to see her breasts. Moreover, it was alleged that on "a Monday in May 1998, in chambers, you rubbed [your bailiff's] breasts. The contact was not consensual."

The bailiff testified that she had worked in law enforcement for 13 years and became respondent's courtroom bailiff in 1995 or 1996. The bailiff explained that she decided to tell respondent about her scheduled breast implant surgery because she would be "off for a period of time" and would not be in uniform for a couple of weeks when she came back. A day or two before the surgery, the bailiff and the clerk met with Judge Willoughby in his chambers and advised him that the bailiff was going to have breast implant surgery. The bailiff testified that they showed respondent a pamphlet, that he

asked if it was a safe procedure and told the bailiff that she was sexy just the way she was. The bailiff also testified that she had been losing weight at that time and that respondent had told her how nice she looked. She did not find the remark offensive because everybody was telling her that.

The masters' report sets forth the bailiff's version of the incident as follows: "[She] testified that on either May 4 or May 1, 1998, she went into Judge Willoughby's chambers in order to tell him the parties were ready for court to be called to order. After her breast augmentation surgery, Deputy M___ experienced an infection, which required she take an antibiotic. The infection did not affect her ability to work although she was not in uniform. Judge Willoughby was walking out of the restroom and he said to Deputy M___: 'Come here. Come here.' Deputy M___ testified his tone of voice was such that it sounded as though Judge Willoughby was making an order to her. She testified the following then happened: 'He gave me a hug and told me he hoped that I was feeling better.' The hug lasted for a very brief period of time. Thereupon, according to Deputy M___, Judge Willoughby grabbed her. Judge Willoughby then began to rub both of her breasts. She testified, 'He just open-handedly grabbed both of my breasts and started rubbing.' She described that he was using both hands. She did not know how long Judge Willoughby was rubbing her breasts nor if he said anything. She then walked into the courtroom."

Respondent agreed that he had touched one of his bailiff's breasts but testified that the incident occurred differently. The bailiff developed an infection after the surgery and told respondent that she was experiencing an infection. Respondent testified that some time before the incident, while fully clothed, the bailiff lifted her breast and pointed to the area of the infection. The masters' report summarizes respondent's version of the incident as follows: "[The bailiff], wearing civilian clothing, entered the chambers being used by Judge Willoughby and made a number of complaints about her personal life. Judge Willoughby testified that he tried to comfort her and told her, 'hang in there, it will get better.' Judge Willoughby testified the following occurred: 'Well, we, I hugged her, we hugged each other actually. So I had my arms around her and I was kind of patting her on the back.' Judge Willoughby testified that he then touched one of Deputy M___'s breasts. He testified as follows: 'Well, what happened was probably the biggest mistake of my life. My hands went from holding her and it came around the side and I apparently caressed her left breast for a moment and then when I realized what I'd done, I immediately took my hand away.' He testified his right hand touched her left breast. Judge Willoughby described Deputy M___'s reaction after he withdrew his hand as follows, 'I saw someone whom I thought felt better, was less upset than she was when she came into the chambers . . . [¶] she looked up at me and said, thank you for caring about me.' Judge Willoughby said nothing back to Deputy M___ according to his testimony.

Judge Willoughby described his immediate reaction to the act of touching Deputy M___'s left breast as follows: 'Well, I was utterly humiliated and embarrassed over what I'd done. I guess I was playing ostrich and I kind of put my head in the sand and hoped that it would go away. I think, I believe that if I had been smart enough to apologize right then and there I don't think all of this would have happened. I think she would have accepted that. But I didn't.' "

The masters also note respondent's testimony that, sometime after the incident, he again hugged his bailiff when she was upset about a case involving a defendant who was convicted of driving under the influence of alcohol. He testified that she was crying and he hugged her. He described what occurred during the hug as follows: "Because when it occurred I was conscious of what happened the last time and I wasn't going to let that mistake happen again. So I was very careful when I, when we disengaged from the hug, put my hands at my side and not let them wander."

The masters found that the bailiff's version of what occurred was more credible. They found respondent's recollection of the facts not to be persuasive for a number of reasons including: (1) respondent's claim that he did not act out of a sexual impulse was not credible, and he "offered no credible alternative explanation"; (2) respondent claimed he was humiliated the instant he grabbed his bailiff's breast and that "she thanked him for caring about her after he grabbed her breast," but "[t]here is no credible evidence she was then or ever thankful for being grabbed in the breast area"; (3) there is no merit to respondent's testimony that he did not know the bailiff was on duty when he touched her and that he did not know she was a subordinate; (4) "the argumentative nature of Judge Willoughby's unwillingness to admit that he intentionally touched [the bailiff] is unpersuasive"; and (5) although respondent testified that the bailiff referred to the breast augmentation surgery as a "boob job," every other witness who was asked denied that the bailiff used that phrase.

The masters noted that the bailiff testified that, after she returned from surgery, respondent stared at her breasts and that respondent never denied that after her surgery he would stare at her breasts. Although other witnesses testified that they had not seen respondent look at women's breasts, they had not observed respondent and his bailiff in April and May 1998. The masters concluded that there was "clear and convincing evidence Judge Willoughby stared at Deputy M___'s breasts as she testified."

The masters also found that respondent asked to see the bailiff's breasts, citing her testimony, their lack of confidence in his testimony and his admitted touching of her breast.

2. *Deputy Sheriff P___*. The notice charges that in approximately April 1998, a bailiff for another judge, Deputy Sheriff P___, was changing her uniform shirt in a hallway in the courthouse when she observed respondent standing nearby staring at her. When she asked if she was in his way, he answered, "I could stand here and watch you undress all day."

The deputy sheriff testified that she was removing her uniform shirt in the hallway in the courthouse where she has a locker. Under her uniform shirt she wore a T-shirt. As she was doing so, she looked up and saw respondent watching her. She asked him if he needed to get by her as she was blocking access through the hall to a bathroom. She testified that respondent answered, "No, I could stand here and watch you all day get undressed." Respondent could not recall such an occurrence. He admitted that if he had said something to the effect of what the deputy sheriff stated it would have been done in a facetious or sarcastic fashion. The masters found that the events happened as the deputy sheriff testified.

3. *Deputy District Attorney M___*. The notice charges that on at least one occasion respondent, in the presence of his clerk and bailiff, referred to a female deputy district attorney as "Old Iron Tits."

The bailiff and the clerk testified that one day when they were walking with respondent to lunch outside the courthouse, Deputy District Attorney M___ was walking nearby and that respondent mentioned that he called the deputy district attorney "Old Iron Tits." Respondent did not recall the incident but admitted that he probably referred to the attorney in the derogatory fashion alleged. Before the masters, respondent testified that he thought the deputy district attorney did a great job in court and that the nickname did not originate with him, he had heard the phrase at a judges' meeting. When asked by a master, respondent refused to identify the one or more judges who used the phrase. The masters found that respondent made the remark and that it constituted prejudicial conduct.

4. *Courtroom Clerk Ms. S___*. The notice charges that between approximately March and September 1996, on more than one occasion in the courthouse, respondent "pressed [his] lips together and made a kissing sound directed towards" his former clerk "apparently to thank her for work she had done." It is further alleged that during the same period of time, when the clerk asked if she could work in her office because her presence in court was not necessary, respondent answered, "I just want you to sit there and look pretty."

The former clerk testified that, when she was employed as respondent's law and motion clerk, she lacked the training necessary to handle the long

hours and heavy calendar. Accordingly, she asked respondent whether she could leave the courtroom during the law and motion calendar to complete her paperwork in her office. She testified that respondent said, "I just want you to sit there and look pretty." Respondent testified that he did not require his former clerk to be in the courtroom when she was not needed. He did not recall saying anything like "just sit there and look pretty." The masters found that there was "clear and convincing evidence that Judge Willoughby made the statement concerning sitting in the courtroom and looking pretty."

The masters noted that the former clerk testified that respondent would pucker his lips and kiss from afar and that her testimony was essentially uncontradicted. They also noted that respondent's wife testified that he often engaged in the "kissing" motion and in hugging people.

The masters determined that respondent's actions concerning his bailiff, his statement to the deputy sheriff, and his derogatory reference to a deputy district attorney constituted a pattern of inappropriate conduct in the workplace towards female court employees as charged in the second amended notice of formal proceedings.[1] In making this finding, the masters had the benefit of observing the demeanor of the various witnesses, and accordingly their determination is entitled to special weight. (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 168 [48 Cal.Rptr.2d 106, 906 P.2d 1260].) The commission has reviewed the record and adopts the masters' finding that respondent engaged in a pattern of inappropriate conduct in the workplace towards female court employees.

## FINDINGS OF FACT ON DISMISSED COUNTS

**1. Count one.** This count also alleged that in November 1997, respondent pressed his "groin area into the buttocks of [his] clerk," while in chambers, and that from approximately 1997 through June 1998 "[he] frequently stared at clerk [M___'s] breasts, while you were in court and elsewhere in the courthouse."

The clerk's testimony supported the allegations and the masters found her to be a credible witness, but they concluded that the allegations were not sustained by clear and convincing evidence. They noted that over time the clerk's testimony had changed. At her deposition in her civil action she stated

[1] Respondent properly contends that the allegations concerning his former court clerk cannot be considered part of the pattern of inappropriate conduct because the pattern is alleged in the notice to have existed between November 1997 and June 1998, and the incidents concerning the former court clerk took place in 1996. Nonetheless, as the incidents were charged and fully litigated before the masters, the masters could properly consider the incidents in determining whether respondent had engaged in a subsequent pattern of inappropriate conduct.

that the incident with respondent occurred on November 26, 1997, and that she telephoned two friends after the incident. At the hearing, she was no longer sure as to when the incident occurred. Furthermore, her telephone records failed to disclose any telephone calls to her friends on November 26, 1997. The masters noted that the clerk testified that she immediately left work after the incident, but her work records for November 26, 1997, indicate that she did not leave work early.

The masters also noted that when the clerk first gave a statement to an investigator in the summer of 1998, she had forgotten many of the details of the incident. She stated, "When he went by, rather than just walking, what he did was brush up—basically going groin to fanny. And you could just say that maybe he was just scooting by." In her deposition in the civil action and before the masters, the clerk testified that she was leaning over a chair in chambers when respondent walked up behind her and pressed his groin against her backside, and stayed there for a little while. She stated that "it felt like he was becoming aroused." There was uncontradicted medical and testimonial evidence that this could not have occurred. Furthermore, the clerk's friends were unable to corroborate her details.

The masters noted that while the clerk and respondent's bailiff [Deputy M___] testified that respondent stared at his clerk's breasts, other witnesses who were queried on the subject, including two women whose testimony was otherwise adverse to respondent, denied ever having seen respondent stare at his clerk's breasts or the breasts of other women. The masters found that in light of the conflicting evidence, the examiners had failed to carry the burden of proving the allegation by clear and convincing evidence.

The commission agrees that the allegations concerning the clerk were not sustained by clear and convincing evidence and they are dismissed.[2]

**2. Count two.** The second amended notice charged that, in August 1997 when the clerk [Ms. M___] was in respondent's courtroom during normal business hours helping respondent prepare for a judicial conference, he "came into the courtroom with a bottle of alcohol and asked her if she wanted to join [him] in a drink. [The clerk] acquiesced and [he] made two alcoholic drinks, one of which [he] drank in the courtroom." The notice alleges that this conduct violated canons 1 and 2A of the California Code of Judicial Ethics.

**(2)** The masters found that the incident occurred but that there was no violation of any canon. They note that at no time did a member of the public

[2] The commission voted unanimously to dismiss the allegations concerning the clerk.

enter the courtroom while the clerk had the drink and that there was no evidence that the drink affected her in connection with her duties. They also note that there was no evidence that offering a drink to the clerk—who was clearly an adult—violated any criminal statute and that there was credible evidence that the historic courthouse had "been used for several activities where alcohol has been served and consumed by state and county dignitaries." There was no evidence of a pattern or practice of using the courthouse for drinking or that respondent ever was under the influence of alcohol while on the bench.

The commission agrees with the masters that the evidence on count two does not support a finding of any violation of the California Code of Judicial Ethics and count two is dismissed.[3]

## CONCLUSIONS OF LAW

**(3)** The masters found that respondent's conduct on all the proven factual allegations in count one constituted prejudicial misconduct. In *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314 [267 Cal.Rptr. 293, 787 P.2d 591], the California Supreme Court reiterated that prejudicial conduct "means 'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.' (*Geiler* v. *Commission on Judicial Qualifications* [(1973)] 10 Cal.3d 270, 284 [110 Cal.Rptr. 201, 515 P.2d 1] . . . .)" (See also *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1104 [77 Cal.Rptr.2d 408, 959 P.2d 715].)

**(4)** Trial counsel suggest that the commission could conclude that respondent's touching of his bailiff's breasts constituted willful misconduct. In *Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at page 1091, the Supreme Court reiterated that to commit willful misconduct in office, "a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity." Trial counsel opine that the "judicial capacity" element might be met, even though respondent was not acting as a "judge" at the time, by the fact that the touching took place in respondent's chambers. They argue that respondent's judicial work is the only reason that he and the bailiff were in his chambers at the time of the incident.

The commission declines to adopt trial counsel's approach at this time. Such a determination would not enlarge the discipline options available to the

[3] The commission voted unanimously to dismiss count two.

commission, as the Constitution allows for the removal of a judge for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" as well as for willful misconduct.[4] Furthermore, the cases cited by trial counsel do not necessarily compel their conclusion.[5]

**(5)** The commission agrees with the masters that respondent's touching of his bailiff's breasts as well as his staring at her breasts and asking to see them constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The commission also agrees with the masters that Judge Willoughby's statement to the deputy sheriff, his reference to a deputy district attorney as "Old Iron Tits," his command to his former court clerk to "sit there and look pretty," and his making the "kissing motion" toward his former court clerk,

[4] California Constitution, article VI, section 18, subdivision (d); see also *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191 [260 Cal.Rptr. 557, 776 P.2d 259] (The Supreme Court reiterated that prejudicial conduct, although "less grave" than willful misconduct, "may nevertheless, by itself, justify removal."); *Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d at page 284, footnote 11 ("It should be emphasized that our characterization of one ground for imposing discipline as more or less serious than the other does not imply that in a given case we would regard the ultimate sanction of removal as unjustified solely for 'conduct prejudicial to the administration of justice which brings the judicial office into disrepute.' ").

[5] For example, in *Dodds v. Commission on Judicial Performance, supra*, 12 Cal.4th at page 172, the Supreme Court stated that a judge is "acting in his judicial capacity," when he or she is performing a "judicial function," i.e. "one of the varied functions generally associated with his position as a judge, whether adjudicative or administrative in nature." The court stated that it gave weight to the location of a judge's conduct and that "when a judge is in chambers during normal working hours, he is generally, though not necessarily, acting in a judicial capacity . . . ." (*Ibid.*) Nonetheless, the court disagreed with the commission's finding that the judge's failure to report that a fellow judge had let the air out of the tire of a van and his interference with the investigation constituted willful misconduct. The court noted that neither the witnessing of the event nor the interference with the investigation was a function generally associated with the position of judge, and stated that although the judge was "at the courthouse when he met with the detective, that location was simply a convenient meeting place." (12 Cal.4th at p. 175.)

In *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518 [247 Cal.Rptr. 378, 754 P.2d 724], the judge was found to have told offensive jokes to female attorneys in chambers on two separate occasions. The court stated that the judge was acting in his "official capacity" when he told a joke to two female attorneys who were in his chambers on a preliminary hearing, but noted in a footnote that it was unclear why the attorneys were present in chambers on the second occasion. (45 Cal.3d at p. 545.)

In *Kennick v. Commission on Judicial Performance, supra*, 50 Cal.3d 297, the court held that the judge's attempt to have the highway patrolman misplace the paperwork on the judge's driving under the influence arrest was not willful misconduct because the improper request did not take place when the judge was on the bench or in chambers ("took place wholly outside any judicial setting" (50 Cal.3d at p. 319)). The improper request may have constituted willful misconduct if it had been made in chambers, but it does not necessarily follow that every act in chambers is a judicial act.

all constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

DISCIPLINE

**(6)** In 1994 the voters of California amended the California Constitution to give the commission the authority to "censure a judge . . . or remove a judge for action . . . that constitutes willful misconduct in office . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Art. VI, § 18, subd. (d).)

**(7)** The Supreme Court has indicated that the purpose of a commission disciplinary proceeding is not punishment, " 'but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at p. 1112, citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].) In determining whether to remove a judge from office or to publicly censure a judge, the commission must carefully consider whether his or her misconduct requires such a severe remedy and whether any lesser discipline would meet these purposes.

A. *Precedent*

**(8)** The Supreme Court has indicated that the commission is not bound by precedent in determining the appropriate discipline in a case. In *Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at page 1112, the court in adopting the commission's recommendation of public censure noted: "According to petitioner, public censure in his case is improper because his misconduct is less egregious than that of judges publicly censured in previous cases. Proportionality review based on discipline imposed in other cases, however, is neither required nor determinative. The factual variations from case to case are simply too great to permit a meaningful comparison in many instances. 'Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar.' (*Furey* v. *Commission on Judicial Performance* [(1987)] 43 Cal.3d [1297,] 1318 [240 Cal.Rptr. 859, 743 P.2d 919].)" Nonetheless, earlier Supreme Court cases suggest that the commission's decision on what discipline to impose should be informed by some comparison with similar cases. (See *Kennick v. Commission on Judicial Performance, supra*, 50 Cal.3d at pp. 339–340; *Dodds v. Commission on Judicial Performance, supra*, 12 Cal.4th at pp. 178–179.)

In most instances, as in this case, neither the Supreme Court nor the commission has had any difficulty identifying inappropriate conduct toward women. However, past cases offer less guidance on the appropriate discipline.

The only time the Supreme Court removed a judge from office for sexually offensive activity was its first removal, *Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d 270. Judge Geiler was removed for numerous inappropriate acts. The court noted: "Petitioner was found to have prodded a deputy public defender with a 'dildo' during a conference in chambers one morning, and later that day to have referred to this incident twice in open court so as to curtail the victim's cross-examination of two witnesses. Petitioner was found to have approached a court commissioner from behind in a public corridor of the hall of justice and to have grabbed this victim's testicles. Petitioner was found on two occasions to have made lustful references to his female clerk, once while in chambers in the presence of a group of professional associates. Petitioner was found to have habitually used vulgar and profane language in his conversations with this clerk, and on two occasions to have used profane terms of personal abuse in reprimanding her and another woman employed by the court. Petitioner was also found to have invited two female attorneys into his chambers wherein he discoursed on the salacious nature of the evidence adduced in criminal cases concerning homosexual acts and rape, punctuating his commentary with profane terms for bodily functions." (10 Cal.3d at p. 277.)[6]

In *In re Stevens* (1981) 28 Cal.3d 873, 874 [172 Cal.Rptr. 676, 625 P.2d 219], the Supreme Court followed the commission's recommendation and publicly censured Judge Stevens.[7] For a period of over three years the judge had, despite objections, repeatedly initiated conversations with a married couple in which he discussed his sexual experiences and fantasies and proposed that the couple engage in various kinds of sexual activity with him and with other persons, all in explicit, vulgar, and offensive language, all to gratify his own sexual desires.

In *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552 [37 Cal.Rptr.2d 581, 887 P.2d 937], the commission recommended that Judge

[6] In addition to this conduct, Judge Geiler was found to have improperly and unlawfully relieved deputy public defenders from representing defendants in eight cases. The court severely criticized Judge Geiler's treatment of the deputy public defenders. "Petitioner's bad faith was directed towards our legal system itself . . . . It is this commitment to institutional justice which petitioner's individual conduct threatens to corrupt. Risk of recurrence of such conduct cannot be tolerated." (*Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d 270, 286.) Accordingly, it is not a certainty that the court would have removed Judge Geiler if he had only been charged with sexually offensive conduct.

[7] Justice Richardson would have called for further briefing and set the matter for oral argument in order that the court might consider imposition of a more severe sanction.

Fitch be publicly censured for engaging in a pattern of misconduct involving inappropriate and offensive remarks to court staff, court attachés and attorneys, and nonconsensual touchings of women working under his supervision. The Supreme Court publicly censured Judge Fitch finding that he "made offensive remarks to female court reporters or clerks concerning their buttocks, breasts, or legs," "made offensive remarks to female court attachés or attorneys regarding their intimate relationships with their spouses," "made other offensive and crude remarks in the presence of court staff," and on a few isolated occasions, "singled out women working under his supervision for inappropriate and nonconsensual touching, or attempted touching. (E.g., he slapped or patted a court reporter and a court trainee on their buttocks.)" (9 Cal.4th at pp. 556–557.)

In *In re Gordon* (1996) 13 Cal.4th 472 [53 Cal.Rptr.2d 788, 917 P.2d 627], the commission had found that over an 18-month period of time: "Judge Gordon on several occasions made sexually suggestive remarks to and asked sexually explicit questions of female staff members; referred to a staff member using crude and demeaning names and descriptions and an ethnic slur; referred to a fellow jurist's physical attributes in a demeaning manner; and mailed a sexually suggestive postcard to a staff member addressed to her at the courthouse." (13 Cal.4th at pp. 473–474.) The Supreme Court publicly censured Judge Gordon (as recommended by the commission), noting that none of the conduct occurred while court was in session or the judge was on the bench conducting the business of the court, and that "the actions were taken in an ostensibly joking manner and there was no evidence of intent to cause embarrassment or injury, or to coerce, to vent anger, or to inflict shame . . . ." (13 Cal.4th at p. 474.)

In the last two years the commission has issued two disciplinary decisions concerning inappropriate conduct in the workplace towards female court employees. On October 26, 1998, the commission, pursuant to a unanimous vote, issued a public admonishment of Judge Harvey H. Hiber. It found that, after convincing a woman to become his courtroom clerk in the fall of 1994, Judge Hiber engaged in a pattern of insistent and unwelcome behavior. He wrote to her repeatedly while on vacation, prepared and presented the woman with a "sexual harassment waiver" (which she refused to sign), repeatedly asked her to spend time with him outside of court hours, frequently interrupted her while she was working to discuss nonwork-related matters, on one occasion called her at home, on at least one occasion brought flowers to her home when she was ill, and on one occasion, "he kissed her on the mouth after taking her to her car near the courthouse, for which he apologized." The commission noted in mitigation that Judge Hiber cooperated with the commission and had acknowledged that his actions toward his clerk were inappropriate.

Most recently on January 28, 2000, the commission issued a public admonishment of Judge John B. Gibson for engaging in a pattern of inappropriate conduct in the workplace toward female court employees. Eight separate acts of inappropriate conduct were identified. They included giving a female county employee who had just resigned an unwelcome and unconsented-to full kiss on the lips; wiggling his finger out of his judicial robes in the area of his groin and saying to Ms. Huntsman, the court clerk, "Say hello to Mr. Bobo"; sending Ms. Huntsman a memorandum that contained suggestive sexual references; commenting to Ms. Huntsman that "he really enjoyed seeing [another female employee] walk in the door with her light-colored sweater on and her 46DD bra and her nipples showing"; and commenting to a friend when Ms. Huntsman came into his chambers, "Isn't that the best looking pair of legs and ass you've ever seen?"

In mitigation the commission noted that the masters found that the judge's behavior was for the most part limited to Ms. Huntsman, that she encouraged "a less than professional relationship," and that Judge Gibson recognized that he should not have continued the relationship, as before, after he became a judge.

In deciding to publicly admonish rather than censure Judge Gibson for his "completely unacceptable conduct," the commission noted that it believed:

"[S]everal circumstances mitigate the risk of further violations by Judge Gibson of the sort proved in this matter. First, the vast majority of the incidents involved Ms. Huntsman, with whom Judge Gibson had an unusual relationship. Second, Judge Gibson has recognized his responsibility for his mistakes and has apologized for his actions. Third, the events in question all occurred over six years ago, when Judge Gibson was new to the bench; no subsequent similar conduct has been reported in the interim. Fourth, the commission has before it considerable character evidence attesting to Judge Gibson's exemplary behavior over the last six years. Furthermore, Judge Gibson has already suffered (to use his counsel's words) the 'public humiliation' of the widespread publicity of these embarrassing incidents.

"In addressing charges such as those brought against Judge Gibson by Ms. Huntsman, the commission would ordinarily be concerned that an aggrieved party might face continuing unacceptable conduct or would lack access to remedies other than those provided by the commission."

B. *Mitigating considerations*

Some of the considerations noted by the commission in its public admonishment of Judge Gibson are relevant to this case. Respondent's most serious

misconduct concerned a single employee, his bailiff. Respondent, however, did not have the type of mitigating "unusual relationship" with his bailiff that Judge Gibson had with Ms. Huntsman.

Respondent recognizes the impropriety of his touching his bailiff's breasts and has issued a public apology. Respondent voluntarily resigned as presiding judge and admitted to the touching in his first response to the commission's inquiry. The evidence also shows that respondent of his own volition immediately sought out and attended a course on avoiding sexual harassment. Although respondent did not apologize until a civil lawsuit settled, he explained that this was because he was instructed, from the time that the bailiff told her supervisor of the judge's misconduct, not to have any contact with the bailiff. Judge Willoughby's public apology not only admitted his misconduct, but also praised the bailiff's performance as a bailiff.

Respondent had been a judge for a handful of years at the time of the incidents. He was appointed to the municipal court in 1993 and was elevated to the superior court in 1997. Respondent submitted character evidence and considerable evidence of his contributions to the judicial system. Respondent was involved in the initiation and development of various innovative judicial programs including: the drug court program in Placer County; the Driving Under the Influence Victim Impact Program; the telephone conference call program; the Placer County Domestic Violence Task Force; and the Peer Court (a program designed to assist juvenile offenders).

Respondent has certainly suffered "public humiliation" from the widespread publicity generated by his misconduct. The commission is aware that the filing of a notice of formal proceedings inherently gives rise to some "public humiliation." Respondent's exposure, however, has two unusual features. First, as a result of his misconduct and the investigation generated by his misconduct, respondent has been barred from the courthouse for over twenty months. Second, in the course of these proceedings, respondent felt compelled to reveal several aspects of his private life that should not ordinarily become a matter of public knowledge. Placer County is a relatively small county in terms of population. There can be little doubt that Judge Willoughby's neighbors now know considerably more about Judge Willoughby than Judge Willoughby, and perhaps the neighbors, would like.

In this case, the bailiff availed herself of her civil remedies. She filed a sexual harassment lawsuit against respondent, the county and the State of California. The suit was settled for $165,000. Respondent paid $10,000 from

his own funds, his insurer paid $10,000, and the balance of the settlement was paid by the county and the state.[8]

Respondent's recognition of the impropriety of his actions, his public apology, his additional education on sexual harassment and the settlement of the civil lawsuit arguably suggest that there is little likelihood of the bailiff facing continuing unacceptable conduct. The other victims of respondent's prejudicial conduct also do not face continuing improper conduct. Respondent's former courtroom clerk and the former deputy district attorney are not now in Placer County, and the deputy sheriff was, and presumably remains, the bailiff for another judge.

The other cases cited as precedent weigh in favor of discipline in the form of censure or some other form of public reproval. Respondent's conduct—although completely unacceptable—is clearly different from the conduct that led to the Supreme Court's removal of Judge Geiler. Judge Fitch engaged in many more acts of misconduct than respondent did, including the touching of female subordinates, but was censured, not removed. Similarly, Judge Gordon appears to have engaged in many more incidents of misconduct than respondent and was censured, not removed. The Supreme Court noted that Judge Gordon's misdeeds were not committed while the court was in session or the judge was on the bench and that there was "no evidence of intent to cause embarrassment or injury, or to coerce, to vent anger, or to inflict shame." (*In re Gordon, supra*, 13 Cal.4th at p. 474.) Here, the masters found that respondent's improper touching of his bailiff's breasts was not done in his judicial capacity, and there is no suggestion that respondent ever intended to cause embarrassment, injury or shame.

C. *Criteria for removal*

As noted, the California Constitution provides that a judge may be removed for conduct prejudicial to the administration of justice. Furthermore, it is settled that for removal the unjudicial conduct need not "amount to moral turpitude, dishonesty or corruption" (*Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d at p. 287). However, determining whether to remove a judge from office, like choosing any other sanction is an art, not a science. (See *Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at p. 1112.)

**(9)** A review of the Supreme Court's opinions removing judges from office reveals two common considerations. First, the Supreme Court always

[8] The clerk (Ms. M___) also filed a sexual harassment suit against respondent, the county and the state. This suit was settled for $25,000. Respondent declined to participate in the settlement of the clerk's action.

noted that the judge who was being removed engaged in numerous acts of misconduct over an extended period of time. Most recently, in *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958], the Supreme Court, in agreeing with the commission's recommendation to remove Judge Fletcher, noted: " 'The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing "lack of temperament and ability to perform judicial functions in an even-handed manner." [Citation.]' (*Wenger*[ *v. Commission on Judicial Performance* (1981)] 29 Cal.3d [615,] 653 [175 Cal.Rptr. 420, 630 P.2d 954].) We have determined that petitioner twice committed willful misconduct and committed prejudicial misconduct on multiple occasions. 'Together these incidents reflect a continuing, pervasive pattern of' misconduct. (*Kloepfer*[ *v. Commission on Judicial Performance* (1989)] 49 Cal.3d [826,] 849 [264 Cal.Rptr. 100, 782 P.2d 239].) 'Petitioner's lack of judicial temperament is manifest.' [Fn. omitted.] (*Kloepfer, supra*, at p. 866.)"

"In concluding that removal is unwarranted in this case, the dissent asserts that petitioner's conduct is less egregious and offensive than that before us in *Broadman*, where we imposed public censure. (Dis. opn. of Kennard, J., *post*, at p. 923.) However, *Broadman* involved only three isolated acts of misconduct. (*Broadman, supra*, 18 Cal.4th at p. 1112.) By contrast, this case involves a continuing and pervasive pattern of misconduct. . . ." (*Fletcher v. Commission on Judicial Performance, supra*, 19 Cal.4th at p. 918, fn. 28.)

The Supreme Court has consistently commented on the numerous acts of misconduct. (See *Adams v. Commission on Judicial Performance, supra*, 10 Cal.4th 866 [Judge Adams was removed from office for engaging "in successive extrajudicial transactions that extended over a significant period of time, creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary—a consequence petitioner either deliberately ignored or was unable to appreciate." (10 Cal.4th at p. 914.)]; *Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d 826 [judge removed for a continuing, pervasive pattern of misconduct—four charges of willful misconduct and twenty-one charges of prejudicial conduct]; *McCullough v. Commission on Judicial Performance, supra*, 49 Cal.3d 186 [Judge McCullough was removed for committing four acts of willful misconduct and one act of persistent failure and because his failure to respond to a prior public censure evidenced a lack of regard for the commission, this court and his obligations as a judge.]; *Ryan v. Commission on Judicial Performance, supra*, 45 Cal.3d 518 [judge removed for having committed four acts of willful misconduct and fourteen acts of prejudicial conduct]; *Furey v. Commission on Judicial Performance, supra*, 43 Cal.3d 1297 [judge removed for eight acts of willful misconduct and ten acts of prejudicial conduct]; *Gonzalez v. Commission on Judicial Performance, supra*, 33 Cal.3d 359

[judge removed for 18 counts of willful misconduct and two counts of prejudicial conduct]; *Wenger v. Commission on Judicial Performance, supra*, 29 Cal.3d 615 [judge removed for nine counts of willful misconduct and one count of prejudicial conduct]; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678 [122 Cal.Rptr. 778, 537 P.2d 898] [judge removed for 21 acts of willful misconduct and eight acts of prejudicial conduct]; *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778 [119 Cal.Rptr. 841, 532 P.2d 1209] [judge removed for 11 counts of willful misconduct and prejudicial conduct]; and *Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d 270 [judge removed for six counts of misconduct which included 23 specified acts].)

Second, the court often comments on the judge's failure to appreciate or to admit to the impropriety of his or her acts and that he or she is unlikely to reform. In *Fletcher, supra*, 19 Cal.4th 865, 919, the Supreme Court noted that "contrary to the contrite tone he sounds in this court, petitioner's primary response to the misconduct allegations during the Commission proceedings was to allege a conspiracy against him." (*Ibid.*) The court agreed with the commission that Judge Fletcher's conspiracy claims were reminiscent of those that the court had rejected in *Gonzalez v. Commission on Judicial Performance, supra*, 33 Cal.3d 359.[9] The Supreme Court concluded as to Judge Fletcher that: "[T]he record 'belies petitioner's claim that he has learned from past experience and has modified his courtroom behavior. It demonstrates instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in *every* case.' (*Kloepfer, supra*, 49 Cal.3d at p. 866, fn. omitted, original italics.) It 'does not suggest that petitioner has, or will be able to, overcome [his demonstrated lack of judicial temperament] and that similar incidents will not recur.' (*Ibid.*)" (19 Cal.4th at pp. 920–921.)

In *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 339 [45 Cal.Rptr.2d 254, 902 P.2d 272], the Supreme Court removed a judge for willful and prejudicial conduct that displayed moral turpitude, dishonesty and corruption. The court noted, however, that it "would hesitate to remove a judge who showed himself ready, willing, and able to reform under a less severe sanction." (*Ibid.*) Judge Doan, however, did not learn from her two prior reprovals and private admonishment. The court concluded, "Doan has had three opportunities for reformation. She will have no more." (11 Cal.4th at p. 340.)

[9] The court noted "[i]n the final analysis Judge Gonzalez utterly fails to grasp either the substance or seriousness of the numerous charges levelled against him by the Commission. Despite multiple admonitions and the normal evidentiary limitations of the hearing process, Judge Gonzalez has treated this investigation as an attack on his character." (*Gonzalez v. Commission on Judicial Performance, supra*, 33 Cal.3d at p. 377.)

In *Kennick v. Commission on Judicial Performance, supra*, 50 Cal.3d 297, the Supreme Court declined to remove Judge Kennick from office because of misconduct (it did remove him for his persistent failure or inability to perform judicial duties). The court wrote: "Viewed as a whole, petitioner's misconduct does not appear so continuing or pervasive as to preclude his reform. (Cf. *Kloepfer* v. *Commission on Judicial Performance, supra*, 49 Cal.3d 826, 866.) Thus, it seems likely that our public censure of each of petitioner's misdeeds would have led him to correct and improve his judicial behavior. (See *In re Rasmussen* (1987) 43 Cal.3d 536, 538 [236 Cal.Rptr. 152, 734 P.2d 988].) Accordingly, we decline to order him removed from office for willful misconduct or prejudicial conduct." (50 Cal.3d at p. 341.)

D. *Application to respondent*

Since the advent of the commission, judges have been held to a higher standard of conduct than attorneys. (See *Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d at p. 287.) Here, Judge Willoughby's conduct, particularly his touching of his bailiff's breasts, is clearly unacceptable. As the masters noted, Judge Willoughby did not need any training on avoiding sexual harassment to know that it was wrong to touch his bailiff's breasts. His conduct seriously undermines confidence in his integrity and the integrity of the judiciary in violation of canons 1 and 2A of the California Code of Judicial Ethics. The public, court staff and other judges deserve to be reassured by the commission that conduct such as Judge Willoughby's touching of his bailiff's breasts is totally unacceptable and will result in serious discipline.

The commission, however, feels constrained by precedent, the criteria for removal used by the Supreme Court, and the mitigating factors in this case to publicly censure respondent rather than remove him from office. Judge Willoughby admits his conduct was clearly wrong. The conduct took place over a two-month period of time in 1998, following his bailiff's breast implant surgery. Indeed, all the proven incidents that constitute the pattern of inappropriate conduct in the workplace toward female court employees took place in the late spring of 1998.[10] Furthermore, whatever his motive, Judge Willoughby immediately sought additional information and training on avoiding sexual harassment. These facts will not allow the commission to conclude that Judge Willoughby will not or cannot correct and improve his behavior.

[10] The comment to the deputy sheriff was made around April 1998. Both the bailiff and the clerk testified that respondent's derogatory comment concerning the deputy district attorney was made in 1998. The portion of the second amended notice of formal proceedings concerning the derogatory comment is accordingly amended to conform to proof. (Rules of Com. on Jud. Performance, rule 128(a).)

In addition, the complaint that initiated this case was the first time that the commission was informed of any allegation of gender discrimination or inappropriate conduct concerning staff by respondent. Although the second amended notice of formal proceedings alleged a second incident of touching, respondent has consistently denied the allegation, the masters found that the allegation was not sustained, and trial counsel characterized the masters' finding as "a very thorough and rational analysis." On the facts as found by the masters, the commission cannot conclude that Judge Willoughby's pattern of inappropriate conduct is so continuing or pervasive as to preclude his reformation.

**(10)** The commission's reluctance to remove Judge Willoughby from office should not be construed to suggest that the commission will not in the future remove a judge from office, even for a single act of prejudicial conduct, where warranted. Rather, the commission in crafting the appropriate discipline for the particular facts of this case, has determined that one clearly wrongful act, coupled with a minimal number of lesser acts sufficient to constitute a pattern of inappropriate conduct in the workplace toward female court employees, constitutes a most serious violation meriting severe discipline.

Finally, the commission is mindful of the concerns over respondent's return to the bench noted by the presiding judge in his testimony before the masters. The commission must fashion its order of discipline on the basis of the materials presented to it in the formal proceedings guided by the decisions of the Supreme Court and the commission's prior decisions. The commission's decision to publicly censure respondent is not a comment on the presiding judge's past or future actions.

## CONCLUSION

The commission orders that Judge W. Jackson Willoughby be censured for engaging in a pattern of inappropriate conduct in the workplace toward female court employees, and in particular for touching his bailiff's breasts.

This decision shall constitute the order of public censure.

Commission members Judge Madeleine I. Flier, Ms. Gayle Gutierrez, Mr. Patrick M. Kelly, Mrs. Crystal Lui, Judge Rise Jones Pichon, and Ms. Ramona Ripston voted in favor of the public censure. Commission members Justice Daniel M. Hanlon, Mr. Michael A. Kahn, Ms. Lara Bergthold, and Mr. Mike Farrell favored the removal of Judge Willoughby from office. There is currently one public member vacancy.

Commission members Justice Hanlon, Michael Kahn, Lara Bergthold and Mike Farrell express the opinion that: It is only by removing judges who

behave as Judge Willoughby did that the commission can fulfill its duty to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity of California's judicial system. The commission's prior decisions might suggest to some that a judge should remain on the bench even though he makes inappropriate and offensive remarks to female court employees and touches them without their consent (*Fitch v. Commission on Judicial Performance*), or that a judge should remain on the bench even though he makes sexually suggestive remarks to female staff members and sends a sexually suggestive postcard to a staff member, addressed to her at the office (*In re Gordon*). If conduct like Judge Willoughby's can take place in a California courthouse in 1998, it is clear that forms of discipline less severe than removal will not protect the public or enforce rigorous standards of judicial conduct, or maintain public confidence in the integrity of the state's judicial system. Only removal will reassure court employees that reporting conduct like Judge Willoughby's is not a futile exercise. And only removal will reassure the public that California's judges are held to an appropriate standard of conduct and that the state's judiciary is worthy of the respect and trust that is required in a society governed by law.

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br>FORMER JUDGE ALFONSO D. HERMO,<br>NO. 160 | NOTICE OF FORMAL PROCEEDINGS<br>and<br>DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BARRING JUDGE HERMO FROM RECEIVING ASSIGNMENTS |

## I. NOTICE OF FORMAL PROCEEDINGS

To Alfonso D. Hermo (retired), a judge of the Los Angeles County Municipal Court from April 1, 1968, to March 31, 1998:

Preliminary investigation pursuant to Rules of the Commission on Judicial Performance, rules 109 and 111, having been made, the Commission on Judicial Performance has concluded that formal proceedings should be instituted to inquire into the charges specified against you herein.

By the following allegations, you are charged with willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, improper action and dereliction of duty within the meaning of article VI, section 18 of the California Constitution providing for removal, censure, or public or private admonishment of a judge or former judge, and providing that a former judge who has been censured may be barred from receiving an assignment, appointment, or reference of work from any California state court, to wit:

On January 21, 1998, you presided in Division One of the Whittier Municipal Court. On that day, defendant Frederico Felix was scheduled to appear in Division One at 9:00 a.m. for arraignment in case number 8WH00327 on a misdemeanor charge of driving on a suspended license (California Vehicle Code, section 14601.2(a)), and on alleged probation violations in four other misdemeanor cases (case numbers 95M04965, 6WH04117, 6WH05063, and 6WH01367). You called the five *Felix* cases at approximately 9:55 a.m. that day. Mr. Felix failed to appear, and, as a result, you ordered warrants for Mr. Felix's arrest issued in each of the five cases and set bail at $20,000.

At some time during the afternoon on January 21, 1998, Mr. Felix appeared before you in connection with the above-referenced cases. Mr. Felix was without counsel and he conversed with you through a Spanish language interpreter. At that time, you issued an order recalling the

arrest warrants, arraigned Mr. Felix, and scheduled a pretrial conference for February 9, 1998. You then told Mr. Felix, "I'm going to set bail in this case, so have a seat over there," pointing toward the jury box. You then ordered bail set at $25,000 and appointed the public defender's office to represent Mr. Felix.

Pursuant to your order, Los Angeles County Sheriff's Deputy, Al Garces, who had been your bailiff for 24 years, directed Mr. Felix to sit in a chair in front of the jury box and next to a door in the courtroom leading to an adjacent holding area. Shortly thereafter, you adjourned the proceedings for the afternoon recess. After the recess was called and after you had left the bench, Mr. Felix ran out of the courtroom. Deputy Garces briefly pursued Mr. Felix and ordered him to stop, but Mr. Felix ran out of the building and avoided capture. Deputy Garces returned to the courtroom and proceeded to your chambers, where he informed you that Mr. Felix had escaped. You responded by ordering that a warrant issue for Mr. Felix's arrest in each of the five pending cases and that bail be set at amounts totaling $175,000. You then wrote a note in one of the *Felix* case files, on a document labeled "Record of Proceedings in Court," stating, "def[endant] ran out of [the] courtroom."

Deputy Garces did not report Mr. Felix's escape to the sheriff's department. Instead, at approximately 9:30 a.m. the following morning, January 22, 1998, Deputy Garces falsely told his supervisor at the Whittier courthouse that you had ordered Mr. Felix released on his own recognizance. Later that morning, Deputy Garces approached you while you were on the bench and handed you the *Felix* files. Deputy Garces engaged you in a private conversation, during which the deputy advised you that he would be suspended from the sheriff's department for three weeks without pay for allowing Mr. Felix to escape.

You responded to Deputy Garces' statements during the bench conversation by ordering the recall of the warrants issued for Mr. Felix's arrest, and further ordering that Mr. Felix be released on his own recognizance. You also ordered reinstatement of the February 9, 1998, pretrial conference date. You marked a line through the handwritten notation "B35,000" (shorthand for $35,000 bail) and wrote "OR" (shorthand for own recognizance) on a "Record of Proceedings in Court" form pertaining to the pending *Felix* cases. On the same form, you also wrote "warrant recalled OR," and marked this entry with your initials, "AH." These entries, while made on January 22, 1998, appear near file date stamps reading, "Jan 21 1998." You directed your courtroom clerk to immediately notify both the district attorney's and public defender's offices that Mr. Felix's status had been changed from bail to own recognizance. Neither Mr. Felix nor his counsel was present in the courtroom during the above-described events on January 22, 1998.

You took these actions to help Deputy Garces avoid being suspended without pay for allowing Mr. Felix to escape. You understood at the time that Deputy Garces was supporting a family and had numerous debts.

On March 17, 1999, a Los Angeles County grand jury indicted you and Deputy Garces in connection with the foregoing events. The indictment charged you and Deputy Garces with one felony count of "conspiracy to obstruct justice or the due administration of the law," in violation of California Penal Code section 182(a)(5). The indictment alleged that on or about January 22,

1998, you and Deputy Garces "did willfully and unlawfully conspire together to obstruct justice, and pervert the due administration of the laws ...." The indictment further alleged that you participated in the conspiracy by means of the following overt acts: you "issued an order recalling the five arrest warrants for escapee Frederico Felix"; "wrongly issued an 'own recognizance' (OR) release for the escaped prisoner Frederico Felix on each of [his] five pending criminal cases"; "wrote 'OR' in each of the five active files for Frederico Felix and signed each entry with [your] initials, 'AH,' without legal cause"; and "failed to perform [your] duty to re-issue arrest warrants for escaped prisoner Frederico Felix."

On November 30, 1999, pursuant to plea agreements with the Los Angeles County District Attorney's Office, you and Deputy Garces each pleaded no contest to aiding and abetting a person's escape after remand to the custody of a sheriff, a violation of Penal Code, section 836.6(a), a misdemeanor. On January 19, 2000, the court suspended imposition of sentence and placed both you and Deputy Garces on two years' informal court probation. Among the terms of probation imposed on you and Deputy Garces were that each of you perform 40 hours of volunteer work and pay a $1,000 fine.

Your conduct on January 22, 1998, violated the California Code of Judicial Ethics, canons 1, 2, and 2A.

YOU ARE HEREBY GIVEN NOTICE, pursuant to Rules of the Commission on Judicial Performance, rule 118, that formal proceedings have been instituted and shall proceed in accordance with Rules of the Commission on Judicial Performance, rules 101-138.

## II. DECISION

Judge Alfonso D. Hermo, his attorney, Edward P. George, Jr., and the commission's trial counsel, Jack Coyle, have submitted to the commission a proposed disposition by consent, supported by Judge Hermo's affidavit of consent[1]. Judge Hermo waives filing an answer to the notice of formal proceedings and hearings before the commission and special masters. Judge Hermo stipulates to the truth of all the factual allegations in the notice of formal proceedings. Judge Hermo further stipulates that his actions of January 22, 1998, regarding the *Felix* cases as set forth in the notice of formal proceedings, constitute willful misconduct in office under article VI, section 18(d) of the California Constitution, and that his conduct warrants a public censure and a bar from receiving assignments.

The commission accepts the stipulation and finds that the factual allegations in the notice of formal proceedings are true. The commission further finds that Judge Hermo's actions of January 22, 1998, regarding the *Felix* cases as set forth in the notice of formal proceedings, constitute willful misconduct in office under article VI, section 18(d) of the California Constitution. Judge Hermo's conduct was in violation of the California Code of Judicial Ethics, canon 1 ("a judge shall uphold the integrity and independence of the judiciary"), canon 2 (" a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities"), and canon 2A ("a judge shall respect and comply with the law and shall act at all times in a

[1] The proposed disposition and affidavit are on file and available for public inspection.

manner that promotes public confidence in the integrity and impartiality of the judiciary"). Judge Hermo's actions were committed in bad faith: his orders recalling the bench warrants and orders for manufactured, after-the-fact own recognizance releases were without legal authority, creating a misleading record, and were done for the improper purpose of doing a personal favor for his long-time bailiff rather than for the faithful discharge of his judicial duties.

As Judge Hermo has retired from judicial office, he is not subject to removal. However, article VI, section 18(d) of the California Constitution provides that the commission may "censure a ... former judge ... for action ... that constitutes willful misconduct in office ... or conduct prejudicial to the administration of justice that brings the judicial office into disrepute ...." Section 18(d) also provides that the commission may "bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court."

The commission accepts Judge Hermo's stipulation and finds that his conduct warrants a public censure and bar from receiving any assignment, appointment or reference of work from any California state court. In California, and elsewhere, judges have been removed from office for misconduct that included intentionally altering a court record or creating an inaccurate record. See *Fletcher* v. *Commission on Judicial Performance* (1998) 19 Cal.4th 865, 886-891 (judge directed a court clerk to alter a minute order that the judge subsequently submitted to the Commission on Judicial Performance in its altered form), *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 643-645 (judge directed a clerk to backdate a document entitled "Affidavit in Support of Hearing on Contempt"), and *In re Sterlinske* (Wisc. 1985) 365 N.W.2d 876, 877-878 (judge dictated and signed, more than three months after the conclusion of a criminal trial, a certificate falsely attesting that a conference on proposed jury instructions and on a proposed verdict had been held in his chambers).

The commission orders that former Judge Alfonso D. Hermo be publicly censured, and that he be barred from receiving any assignment or reference from any California state court.

Commission members Mr. Michael A. Kahn, Ms. Lara Bergthold, Judge Madeline I. Flier, Ms. Gayle Gutierrez, Mr. Patrick M. Kelly, Mrs. Crystal Lui, Judge Rise Jones Pichon, Justice Vance W. Raye, and Ms. Ramona Ripston voted to issue the notice of formal proceedings, and to impose this public censure and bar from receiving assignments. Commission member Mr. Mike Farrell did not participate in this matter. There is currently one public member vacancy.

This decision and order shall constitute the order of public censure and bar.

Dated: February 20, 2001

Michael A. Kahn, Esq.
Chairperson

[No. 157. May 10, 2001.]

INQUIRY CONCERNING JUDGE PATRICK B. MURPHY

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance concluded that the judge's extensive absences from court from 1996 through 2000 constituted a persistent failure or inability to perform judicial duties. The judge asserted that his numerous absences were the result of illness. However, while he was on sick leave, the judge completed several courses in preparation for applying to medical school abroad and left the country without informing anyone of his whereabouts. The commission concluded that the judge was capable of performing his judicial duties and failed to do so and that the judge engaged in prejudicial misconduct by allowing his nonjudicial activities to interfere with his judicial duties. The commission also concluded that the judge engaged in prejudicial misconduct through his failure to provide documentation of his claimed illness to the presiding judge upon request. The judge engaged in willful misconduct through his malingering and fraudulent use of sick leave.

In its decision, the commission ordered the judge removed from office, but stated that if it was "determined that Judge Murphy has resigned prior to this order of removal, this decision shall be considered a public censure of former Judge Patrick B. Murphy and a bar from receiving any assignment, appointment, or reference of work from any California state court." Subsequent to the issuance of the decision, the commission was informed and confirmed that the judge resigned prior to the order of removal, and resolved, as stated in the minutes of the July 19–20, 2001 meeting, that the decision shall be considered a public censure of the former judge and a bar from receiving any assignment, appointment or reference of work from any California state court. (Opinion by Michael A. Kahn, Chairperson.)

## HEADNOTES

(1) **Judges § 6.2—Discipline—Grounds—Willful Misconduct—Elements.**—To commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith,

(3) while acting in a judicial capacity. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

(2) **Judges § 6.2—Discipline—Grounds—Prejudicial Misconduct—Definition.**—Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is either conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office, or willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity.

(3) **Judges § 6—Removal—Persistent Failure or Inability to Perform Judicial Duties.**—The judge's extensive absences from court constituted a persistent failure or inability to perform judicial duties for which a judge may be censured or removed from office under Cal. Const., art. VI, § 18, subd. (d).

(4) **Judges § 6—Prejudicial Misconduct—Failure to Give Precedence to Judicial Duties.**—The judge engaged in prejudicial misconduct by taking extensive sick leave while applying to medical school and traveling abroad. The judge allowed his nonjudicial activities to interfere with his judicial duties in violation of Cal. Code Jud. Ethics, canons 3A and 4A(3).

(5) **Judges § 6—Willful Misconduct—Failure to Cooperate with Presiding Judge—Dishonesty.**—The judge committed willful misconduct by making false representations concerning his health to the presiding judge for the purpose of obtaining sick leave.

(6) **Judges § 6—Prejudicial Misconduct—Failure to Cooperate with Presiding Judge.**—The judge's failure to provide a doctor's note for his sick leave absences as requested by the presiding judge constituted prejudicial misconduct.

(7) **Judges § 6.2—Removal—Willful Misconduct—Dishonesty.**—Because the judge did not suffer from any illness disabling him from performing his judicial duties during his extensive absences, his falsely obtaining sick leave constituted malingering. This conduct violated Cal. Code Jud. Ethics, canons 1, 2A, 3A, 3C(1) and 4A(3), and constituted willful misconduct. The judge was acting in his judicial capacity in his fraudulent use of sick leave. The judge was motivated by a bad faith intent to remain on the payroll of the State of California as a full-time, sitting judge while avoiding his judicial obligations. His removal was required.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 57, 58, 76.]

(8) **Judges § 6.2—Discipline—Purpose.**—The purpose of a judicial disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

(9) **Judges § 6.4—Discipline—Proceedings—Determining Appropriate Sanction.**—Determining whether to remove a judge from office, like choosing any other sanction, is an art, not a science. Nonetheless, the severity of the misconduct, the duration of the misconduct and evidence of contrition and willingness to reform are relevant to a determination of what discipline to impose. It should be noted, however, that removal may be appropriate even where these factors do not all weigh against the judge.

(10) **Judges § 6.2—Discipline—Grounds—Dishonesty.**—The public will not, and should not, respect a judicial officer who has been shown to have repeatedly lied for his or her own benefit. Honesty is a minimum qualification that is expected of every judge.

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## OPINION

**KAHN, Chairperson.**—This disciplinary matter concerns Judge Patrick B. Murphy, a judge of the Los Angeles County Superior Court. The Commission on Judicial Performance, based on Judge Murphy's absences from court from 1996 through 2000, charged Judge Murphy with persistent failure or inability to perform his judicial duties. Judge Murphy was also charged with failing to give his judicial duties precedence over all other activities and engaging in activities that interfered with the proper performance of his judicial duties, and with exhibiting a lack of candor to his presiding judge and failing to cooperate in the administration of court business. In addition, the commission charged Judge Murphy with malingering in that he "falsely claimed to be ill

and/or medically disabled for the purpose of continuing to collect [his] salary without performing [his] judicial duties."

A panel of three justices, sitting as special masters, found that all the charges were supported by clear and convincing evidence. For the reasons set forth in this decision, the commission unanimously adopts the masters' findings of fact and conclusions of law and removes Judge Patrick B. Murphy from the bench.

On May 4, 2001, the commission received a faxed document purporting to be a letter of resignation from Judge Murphy to Governor Davis. Trial counsel informs us that as of the afternoon of May 8, 2001, the governor's judicial appointments secretary indicated that he did not have a letter of resignation from Judge Murphy. Accordingly, the commission believes that it is still within its authority to impose the discipline Judge Murphy merits, his removal from office. If it is determined that Judge Murphy has resigned prior to this order of removal, this decision shall be considered a public censure of former Judge Patrick B. Murphy and a bar from receiving any assignment, appointment, or reference of work from any California state court.*

## PROCEDURAL HISTORY

On May 13, 1999, the commission sent Judge Murphy an investigation letter requesting that he respond to allegations of excessive absences. Judge Murphy responded with a letter first alleging that the complaint to the commission was an attempt by his political opponents to manipulate the commission. He then offered numerous medical explanations for his absences including a thyroidectomy, a congenital nonfusion of his spine, degenerative disc disease, cephalgia, sleep deprivation, stress, and "muscular pain, joint pain and abdominal pains" of increasing duration, intensity and frequency. In the course of the letter, Judge Murphy indicated that six different physicians had treated him or given him medical tests.

Judge Murphy was less than forthcoming in providing the commission with access to his medical files and his doctors. The commission was finally able to arrange for an independent medical examiner to examine Judge Murphy in the fall of 1999, resulting in a report dated November 23, 1999.

On January 14, 2000, the commission sent Judge Murphy another investigative letter requesting his response to allegations that he had failed to report for work on 157½ days in 1999.

*Reporter's Note: Subsequent to the issuance of the decision, the commission was informed and confirmed that the judge resigned prior to the order of removal, and ordered that the decision shall be considered a public censure of the former judge and a bar from receiving any assignment, appointment or reference of work from any California state court.

Judge Murphy responded by letter dated February 15, 2000, by counsel, Mr. Edward M. Moses, who complained that he had twice been denied extensions of time to respond to the investigation letter. Mr. Moses represented that he would be Judge Murphy's attorney on an application for permanent disability. He alleged that Judge Murphy had had a "syncopal episode" (a fainting spell) on September 21, 1999, at the courthouse and had been unable to return to work since then. The letter listed three physicians who were said to be of the opinion that Judge Murphy was permanently disabled. Mr. Moses never filed a disability application for Judge Murphy.

On March 3, 2000, the commission commenced formal proceedings against Judge Murphy by filing a notice of formal proceedings alleging that Judge Murphy's extensive absences from court violated the California Code of Judicial Ethics. On April 20, 2000, Judge Murphy, then represented by different counsel, filed a verified answer admitting to some significant periods of absence but otherwise denying all allegations.

The commission also continued its investigation of Judge Murphy and, on March 31, 2000, sent Judge Murphy another investigation letter alleging incidents of lack of candor with the presiding judge and of failures to cooperate with judges and other court officials in the administration of court business. Judge Murphy responded by letter dated May 5, 2000.

On July 7, 2000, the commission sent another investigative letter to Judge Murphy—this time asking him to respond to allegations of teaching evening classes on days when he took sick leave, and testifying at depositions on days that he took sick leave. The letter also alleged that from July 1999 through December 1999, Judge Murphy, while absent on sick leave, took an intense regimen of college science courses that were prerequisites to applying to medical school and applied to medical school. It was further alleged that, on January 1, 2000, Judge Murphy left Los Angeles and traveled to the island of Dominica in the West Indies in order to attend medical school on the island.

Judge Murphy, now proceeding without counsel, twice requested extensions of time in which to respond to the July 7, 2000 investigative letter and never submitted a response. On September 11, 2000, a first amended notice of formal proceedings was filed that, in addition to the allegations of persistent failure or inability to perform judicial duties (count one), set forth specific allegations of failing to give judicial duties precedence over other activities (count two), five incidents of failure to cooperate in the administration of court business (count three), and a charge of malingering by falsely claiming to be medically disabled for the purpose of continuing to collect a judicial salary without performing judicial duties (count four). On October

16, 2000, Judge Murphy filed a verified answer claiming that he suffered a medical condition that rendered him "unable to perform his judicial functions at the relevant times."

In the meantime, on April 21, 2000, in response to the commission's request, the Supreme Court appointed three special masters to hear and take evidence in this matter and to report thereon to the commission.[1] A prehearing conference was held and the evidentiary hearing was scheduled for September 18, 2000, before the masters. Judge Murphy's request for extensions of time and ultimate failure to respond to the July 7, 2000 investigation letter delayed the commission's decision to issue a first amended notice of formal proceedings, and required the cancellation of the scheduled September 18, 2000 hearing.

The commission, while sensitive to providing Judge Murphy with due process, has been concerned that it could not proceed more expeditiously in this case. Although the California Constitution[2] and the commission's rules[3] allow the commission to temporarily disqualify a judge, this requires a determination that continued service "is causing immediate, irreparable, and continuing public harm," and the disqualification would be "without loss of salary." (Rules of Com. on Jud. Performance, rule 120(b).) The commission had no choice but to marshal its evidence for presentation to a panel of special masters.

A second prehearing conference took place by telephone on Tuesday, October 3, 2000, between the masters, Mr. Jack Coyle of the office of trial counsel representing the commission, and Judge Murphy, representing himself. All agreed that the hearing could commence on January 22, 2001, and the commission issued an order noticing the hearing to be held at the Court of Appeal, Fourth Appellate District, Division Two in Riverside, California.

[1] On October 20, 2000, the Supreme Court issued an order noting that one of the initial special masters had withdrawn from the proceedings and appointed another justice to replace him. The special masters who heard the evidence and issued the report are Justice Art W. McKinster, Court of Appeal, Fourth Appellate District, Division Two (presiding special master); Justice Carol A. Corrigan, Court of Appeal, First Appellate District, Division Three; and Justice Betty Ann Richli, Court of Appeal, Fourth Appellate District, Division Two.

[2] Article VI, section 18, subdivision (b) of the California Constitution reads: "The Commission on Judicial Performance may disqualify a judge from acting as a judge, without loss of salary, upon notice of formal proceedings by the commission charging the judge with judicial misconduct or disability."

[3] Rule 120(b) of the Rules of the Commission on Judicial Performance reads, in part: "Before the commission has reached a determination regarding removal or retirement of a judge, the commission may temporarily disqualify a judge without loss of salary upon notice of formal proceedings pursuant to article VI, section 18(b) of the California Constitution if the commission determines that the continued service of the judge is causing immediate, irreparable, and continuing public harm."

The evidentiary hearing commenced on January 22, 2001, and concluded on January 25, 2001. The case in support of the charges was presented by Jack Coyle, Esq., with Valerie Marchant, Esq., and Sei Shimoguchi, Esq. Judge Murphy represented himself. The masters filed their 70-page report with the commission on April 5, 2001.

The parties were immediately sent copies of the masters' report, informed that they could file objections to the report and informed that they could request an opportunity to be heard orally before the commission. Mr. Coyle submitted a timely brief and indicated that he did not request a hearing. Judge Murphy did not tender a brief or otherwise communicate with the commission. The parties were informed on April 26, 2001, that absent objection, the matter would be taken under submission by the commission on May 9, 2001.

## FINDINGS OF FACT

Judge Murphy has been a registered nurse since 1977. He enrolled in law school in 1982, worked as a nurse throughout law school, and commenced private practice as a lawyer when he was admitted to the bar in 1984. After several years he became the administrator and corporate counsel of a medical group. He remained in this position until he was elected judge in June 1992.

From 1993 through early 2000, Judge Murphy was assigned to the Citrus Judicial District Municipal Court in West Covina. He presided over a portion of the misdemeanor trial calendar during these years until he was reassigned to a small claims/miscellaneous civil calendar in April 1999.

### A. *Absences (Count One)*

In 1996, Judge Murphy had a subtotal thyroidectomy to remove a benign tumor and began taking Levoxyl to make up for the lost thyroid function. Judge Murphy was also regularly absent during his unsuccessful campaign for superior court judge. Judge Murphy was absent from the court for 77½ days.

In 1997, Judge Murphy was the presiding judge. He missed a total of 66½ work days. Judge Murphy attributed his 29 days of sick leave to colds and flu as well as a congenital nonfusion of his spine (spina bifada occulta), which allegedly caused debilitating back pain. Judge Murphy's physician, Dr. Eshom, when called as a witness by Judge Murphy, testified that he did not think the condition "was causing [Judge Murphy] a problem."

In 1998, the court records show that Judge Murphy was absent for 96 days. Judge Murphy attributed much of his 28 days of sick leave to increasing backaches, neck aches and headaches resulting in insomnia. During the summer, Judge Murphy took over two and one-half months' accumulated vacation time. A month was used for a trip to Ireland with his mother and the rest was spent convalescing.

In 1999, Judge Murphy was absent 159½ days of which 157 days were listed on the court records as "sick" or "sick/personal" days. Judge Murphy was absent two and one-half days in January, six and one-half days in February, and all but one full day and four half days of March. He worked two and one-half days in April and did not return to the bench until July 1, 1999. The court records show no absences for Judge Murphy from then until a half day of vacation on September 16, 1999. Judge Murphy had a fainting spell at the court on September 20, 1999, and was taken to the hospital. He was absent from the court for the rest of the year.

In 2000, Judge Murphy was absent from court until April 3, 2000, when he commenced an assignment in the Los Angeles Metropolitan Court handling traffic matters, one of the least stressful assignments available to judges. Judge Murphy ceased working as of June 8, 2000, and has never returned to the court.

B. *Activities That Interfered with the Proper Performance of Judicial Duties (Count Two)*

1. From before 1996 through 1998, Judge Murphy taught or co-taught one or two classes a term on weekday evenings at Glendale University College of Law. The classes ran from 6:30 to 9:30 p.m. The masters found that on five days in 1996, on five days in 1997, and on two days in 1998 when Judge Murphy claimed he was too ill to work during the day, he taught or co-taught classes at night.

The masters also found that Judge Murphy taught a one- or two-hour session of the Baldwin Park Police Department's Citizen's Academy during the week of March 22, 1999, on a day that Judge Murphy was absent from work on sick leave.

2. In November 1998, a civil action was filed in a federal court alleging a scheme to hide approximately $1.7 million. Judge Murphy was named as a defendant in the action in April 1999. He was also named as a defendant in

a related adversary bankruptcy proceeding. Judge Murphy testified that the cases were subsequently dismissed against him.

The masters found that on five dates in 1999 when Judge Murphy was absent from work on sick leave, he attended and testified at his depositions in these lawsuits.

3. In July 1999, Judge Murphy began formal preparations for applying to Ross University School of Medicine located on the island of Dominica in the West Indies. His preparations included completing classes required for medical school.

He applied for admission to the Cleveland Chiropractic College in Los Angeles and sought and obtained permission to enroll late in Physics I. Judge Murphy completed Physics I and its corresponding lab by the end of August 1999. The class and lab were taught in two five-hour sessions, one on Saturday and one on Sunday, for a total of 10 class hours a week. Judge Murphy had perfect attendance and earned an A in the lecture and the lab while not missing a day in the courtroom.

On September 4, 1999, Judge Murphy enrolled in Physics II and Organic Chemistry I and their corresponding labs. These classes were from 8:00 a.m. to 6:30 p.m. on Saturday and Sunday, for a total of 20 hours of class a week. Although Judge Murphy had a fainting spell on Monday, September 20, 1999, for which he was hospitalized, Judge Murphy attended 20 hours of classes on Saturday, September 25, and Sunday, September 26. At the end of October, Judge Murphy completed the classes with perfect attendance. He earned a B in Physics II lab and an A in Physics II lecture, Organic Chemistry I lecture and Organic Chemistry I lab.

On October 27, 1999, Judge Murphy enrolled in General Chemistry II and Organic Chemistry II and their corresponding labs. One class was taught on Monday and Wednesday evenings in five-hour sessions (5:30–10:30 p.m.) and the other was taught in five-hour sessions on the weekends, for a total of 20 hours of class a week. Judge Murphy completed the classes in mid-December. He missed only one class and earned A's in the classes and the labs.

In November 1999, Judge Murphy completed the College Level Examination Program in biology (known as the "CLEP" test). He earned a score in the 99th percentile. The CLEP test and the science classes at Cleveland Chiropractic were all prerequisites for Judge Murphy's medical school application.

On October 2, 1999, Judge Murphy filed an online application for Ross University. On the application he indicated that he did not have any disabilities that would interfere with the practice of medicine. On November 29, 1999, while on sick leave, Judge Murphy had a one-hour application interview at the Ross University office in Glendale, California. During the interview Judge Murphy was "very upbeat, very articulate, very responsive, very coherent" and his health appeared fine. When the interviewer asked the judge how his health was, he responded by referring only to his thyroid condition, and told the interviewer he had no health problems. Judge Murphy indicated that he was still interested in and active in scuba diving and skiing and stated that he decided to apply to medical school because "medicine was his first love, his first career desire." He requested an expedited response because he "must notify Governor Gray Davis of his intent to resign his judgeship . . . ." Judge Murphy was accepted to medical school the next week for the term commencing on January 5, 2000.

On December 17, 1999, as part of his visa application, Judge Murphy obtained a letter from the Los Angeles County Sheriff's Department to the Chief of Immigration in Dominica attesting to his lack of criminal record and good character. The letter stated, "Judge Murphy will be traveling to Dominica on a vacation."

On December 21, 1999, Judge Murphy obtained a certificate of good health from Dr. Boutros as part of his visa application. He did not obtain the certificate from Dr. Eshom, his treating physician, because he knew Dr. Eshom would not certify that he was in good health. The certificate listed Judge Murphy's thyroid condition as his only medical condition and listed Synthroid as the only medication that Judge Murphy was taking.

On December 27, 1999, Judge Murphy purchased a round trip ticket to Dominica with a departure date of January 1, 2000, and a return date of April 22, 2000 (the last day of classes at Ross University for the spring semester).

On December 30, 1999, Judge Murphy faxed a disability slip signed by Dr. Eshom and dated "12/31" from his house to the court, as he had done on a number of occasions. The slip said, "Continues to be disabled. Unable to work until further evaluation." Judge Treu considered the slip unacceptable because no specific end date had been given. He was unaware that Judge Murphy was about to leave the country.

4. On January 1, 2000, Judge Murphy left for Dominica. He did not resign his judgeship and he did not inform Judge Treu, or any other judge or court employee that he was leaving the country and planned to study medicine. In

Dominica, Judge Murphy registered for classes on January 5. Classes began on January 5, and Judge Murphy picked up his picture ID card on January 9.

Judge Murphy returned home on January 14, 2000. Judge Murphy denied knowing of any adverse publicity about his attending medical school in the Caribbean prior to returning home.

C. *Incidents of Lack of Candor and Failure to Cooperate in the Administration of Court Business*

1. In January 1999, Judge Ralph Michael Treu became the presiding judge of the Citrus Judicial District Municipal Court. Due to Judge Murphy's extended absences for sick leave, Judge Treu kept a log from January 7 to April 27, 1999. Judge Murphy called in sick on January 20, and was not in on January 21. At a meeting with Judge Treu on January 22, Judge Murphy told him that "he may need to take significant time off in the future as directed by his physician." He further stated that he currently had no immune system left, that his thyroid condition of 1995 and 1996 resulted in the removal of a malignant tumor and that his current condition was serious. Judge Treu suggested that Judge Murphy take a less demanding assignment doing a civil overflow/small claims calendar, but Judge Murphy declined the proposal.

Judge Murphy denied characterizing the tumor as malignant. He suggested that he may have indicated that prior to the surgery there was concern that the growth to be removed was malignant, but he maintains he did not tell Judge Treu that the growth that was removed actually was malignant. Judge Murphy noted that he is a nurse and "quite facile with employing medical terms" and he claimed that Judge Treu "misconstrued" what he said because Judge Treu lacked medical training.

The masters concluded that Judge Murphy lied about his condition to induce Judge Treu to grant him additional sick leave, and the commission adopts the masters' finding. The masters noted that Judge Treu testified that prior to taking the bench he had 20 years in private practice focused on plaintiff's tort litigation and medical malpractice. The masters found that Judge Treu had sufficient medical knowledge to understand the difference between a preoperative tentative diagnosis of cancer and a postoperative finding of malignancy. The masters also noted that Judge Treu summarized his conversations with Judge Murphy in a log within 24 hours and that when he testified, Judge Treu was absolutely confident that Judge Murphy told him the tumor was malignant. Finally, the masters contrasted Judge Treu's "clear,

compelling, and credible testimony on this and other issues," with their finding that Judge Murphy's testimony "generally lacked credibility."

2. On March 4, 1999, four judges complained to Judge Treu that Judge Murphy's frequent absences required them to cover his misdemeanor calendar. Judge Murphy was again absent on Monday, March 8, but worked on March 9, when he attended a judge's meeting. Judge Treu described the meeting as "acrimonious." Judge Murphy acknowledged that this characterization was correct and attributed his actions to the "frazzled" emotional state he was in as a result of his medical condition. Judge Murphy did not return to work after the March 9, 1999, judges' meeting. He next returned to the court on Friday, March 26, 1999, for another judges' meeting.

On March 26, 1999, Judge Murphy told Judge Treu that he would not be at work the following week because he was undergoing medical tests. Judge Murphy claimed sick leave for the week of March 29, but did not undergo any medical tests. Instead, on Tuesday, March 30, 1999, Judge Murphy appeared and testified at his deposition in the civil action.

When first questioned by the commission about his representation to Judge Treu, Judge Murphy admitted telling Judge Treu that he was having tests and asserted that he could identify what tests occurred if he had his complete medical records. In his verified answer, however, Judge Murphy admitted that he did not undergo any medical tests the week of March 29, 1999, and labeled his conversation with Judge Treu a misunderstanding. He claimed that he told Judge Treu only that he anticipated undergoing medical tests and asserted that since he had an HMO, the tests were performed at a later date. Judge Murphy further stated in his verified answer that Judge Treu "was in the possession of a medical certificate of disability dated March 9, 1999 and signed by Dr. Eshom," and that he did not mention the deposition because he was not thinking about it.

The masters found that Judge Murphy did tell Judge Treu that he would be absent the week of March 29, 1999, for medical tests when he would actually be testifying at his deposition on March 30, 1999, and that the purpose of the lie was to falsely claim sick leave instead of taking personal leave. The commission adopts these findings of the masters. The masters cite Judge Murphy's shifting explanations and note that again Judge Murphy's testimony generally lacked credibility. They also point out that while a doctor's note dated March 9, 1999, for a two-month medical absence does exist in Dr. Eshom's file, "Judge Murphy provided no such note to Judge Treu; Judge

Treu did not have such a note, and Judge Murphy did not mention it during their conversation."

3. Judge Murphy was released from the hospital on September 22, 1999, following his fainting spell on September 20. Shortly thereafter, Judge Treu received a short note on one of Dr. Eshom's preprinted prescription pads saying, "No work x 2wks." The masters found that such disability "slips" or "certificates" or doctor's notes, "usually did not come directly from the doctor's office, but were faxed from Judge Murphy's home after normal business hours." Judge Treu received a second disability slip covering the two weeks from October 7 through October 24, a Sunday.

On Thursday, October 21, 1999, Judge Murphy left a message with the judicial secretary saying his doctor had him off for another couple of weeks. No disability slip accompanied the telephone message. The next day, Judge Treu wrote a letter to Judge Murphy acknowledging the communication and requesting a doctor's disability certificate. Although Judge Treu requested a doctor's certificate for the period of time from October 25 through November 16, 1999, in three additional letters, he never received any documentation. Judge Murphy, however, did provide disability slips from Dr. Eshom for the rest of his absences through the end of the year.

The masters note that when first questioned by the commission on this matter, Judge Murphy stated that he did not recall seeing the letters from Judge Treu and speculated that the letters may have been intercepted, destroyed or hidden because he had been living in marital discord. Judge Murphy further indicated that if he had seen the letters he may have told Dr. Eshom to send a note directly to Judge Treu. In his verified answer, Judge Murphy asserted that his phone calls were sufficient because there was no requirement that he provide any doctor's note.

The masters found that Judge Treu's request for medical documentation was justified and that Judge Murphy did not provide any documentation supporting his absences from October 25 through November 16, 1999. The commission adopts the masters' findings.

4. As noted, when Judge Murphy left the country on January 1, 2000, to attend medical school in Dominica, he did not resign his judgeship and he did not inform Judge Treu or any other judge or court employee that he was leaving the country or that he was planning to study medicine or how to contact him.

Judge Murphy contended that he was not obligated to provide the court with this information because he was on sick leave. The masters found that

Judge Murphy was obligated to keep the court informed of his whereabouts and that he failed to do so. The commission adopts these findings by the masters. The masters note that Judge Chavez testified that the policy of the Los Angeles County Superior Court was to require judges away from the court to keep the court apprised of their locations and a means to communicate with them. The commission also notes that Judge Murphy testified that he occasionally undertook some judicial functions such as signing warrants while on sick leave.

Judge Murphy also testified that when he left for Dominica he was convinced that he was permanently disabled and that he thought that once his disability application was filed he would no longer be a sitting judge. To the extent that Judge Murphy proffers this as an excuse for his failure to keep the court informed of his whereabouts, his argument is rejected. The masters found that Judge Murphy's "claim that he believed his lawyer would apply for his disability leave is not credible in light of his training and sophistication and in light of the fact that he knew he had signed no such documents." Judge Murphy could not reasonably believe that he was no longer a judge when he left the country for Dominica.

5. On January 3, 2000, the judicial secretary faxed a ballot regarding court unification to Judge Murphy's home. On January 5, 2000, the secretary telephoned Judge Murphy's home and left a message to remind Judge Murphy that he had probable cause duty on Saturday, January 8, 2000. She noted that he could perform this duty at the West Covina Police Department or from his home. On January 7, the secretary left another message asking about the ballot and reminding Judge Murphy to respond as soon as possible about probable cause duty. Judge Murphy was in the West Indies and never returned the phone calls or the ballot. Another judge was assigned to perform Judge Murphy's probable cause duties.

The masters rejected Judge Murphy's argument that he was not obliged to respond because he was sick, and the commission concurs. As noted, Judge Murphy testified that he on occasion performed judicial duties even when on sick leave.

D. *Malingering*

1. *Affirmative evidence that Judge Murphy was not ill.*

The masters found that Judge Murphy was not ill in the sense that he was unable to perform his judicial duties. They note seven factors to support their finding that Judge Murphy could have performed his duties most of the time

if not all of the days that he called in sick, especially during the long absences in 1999 and 2000.

a. When Judge Murphy did go to work there were no observable signs of illness. Judge Murphy's colleagues at the municipal court uniformly testified that Judge Murphy appeared to be healthy, energetic and positive when at work. There were no indications that he was struggling with any medical conditions. One judge did qualify his testimony by noting that there were times when Judge Murphy appeared to be suffering from normal illnesses such as a cold or the flu, but he continued that otherwise Judge Murphy "is probably the most upbeat and happy-go-lucky type of person I've ever met."

b. There were a number of instances when Judge Murphy was seen out in the community when he was absent from work on sick leave. The reports of these "Murphy sightings" consistently included that Judge Murphy appeared to be healthy.

c. In 1996 and 1997 during the evenings on ten days he was on sick leave, Judge Murphy taught three-hour law school classes. In 1998 he twice taught during the evenings of days he was on sick leave.

d. The masters note that Judge Murphy started taking pre-med classes for medical school in July 1999, after returning to work following his nearly four months of absences. They also note that he returned to work only after being informed that the commission was investigating his absences. After taking 10 hours of classes in July and August, Judge Murphy took 20 hours of classes a week from September through the middle of December, 1999, earning all A's except for one B. He had perfect attendance, except for one absence. He even attended 20 hours of classes on the weekend of September 26, 1999, following his fainting spell on Monday, September 20.

e. On five days in 1999 when he claimed he was ill, Judge Murphy testified at his depositions. The masters note that excluding lunch recesses, these depositions involved three to six and a half hours of deposition time.

f. On November 18, 1999, Judge Murphy took the CLEP test in biology and scored in the top 1 percent. The masters note that Dr. Eshom testified that Judge Murphy's score showed that "he's cognitively able to decipher information."

g. Finally, the masters found that his performance during the hearing before them clearly demonstrated his capacity to serve as a judge. The masters explained: "During the entire four days of hearing, Judge Murphy performed as an experienced and skilled courtroom attorney. He generally showed no

weakness, lack of attention, slowness, or misunderstanding. He competently objected to evidence and argued his objections. He conducted cross-examination in discrete segments aimed at making specific points. After the first morning session on the second day, Judge Murphy requested a recess until the next day because he was 'really feeling ill' and did not think that he could continue. His request was denied. Although occasionally thereafter he complained of having a headache, his competent performance and professional demeanor continued unabated."

2. *Judge Murphy's evidence that he was ill.*

The masters found that Judge Murphy's evidence was less than persuasive. Judge Murphy reported having chronic, severe headaches, neck aches and backaches (partially attributable to a congenital nonfusion of a lumbar vertebra and degenerative disc disease) that prevented him from sleeping more than a couple of hours a night. Judge Murphy represented that he also suffers from chronic fatigue syndrome (CFS) and that this and other illnesses render him physically incapable of serving on the bench. He thought that the genesis of these symptoms was the thyroidectomy. Judge Murphy also claimed that he had a phobic reaction to judicial duties that aggravated his symptoms. He testified that he became frazzled because of these symptoms resulting in his "going off" on his colleagues, such as he did in March 1999 to Judge Treu. Judge Murphy said that he could perform other activities that he perceived as less stressful, including his various extrajudicial activities.

The masters note that part of the weakness of Judge Murphy's "phobia" claim is its evidentiary failings. Only Judge Murphy and Dr. Eshom testified about Judge Murphy's physical and mental condition. Judge Murphy made repeated references to diagnoses and other statements by Dr. McCord, who apparently was his psychiatrist. Judge Murphy, however, chose not to call Dr. McCord and made no representation that he was unable to do so. Furthermore, statements attributed to Dr. McCord and other doctors' hearsay statements were admitted by the masters only for the limited purposes of showing how they affected Dr. Eshom's diagnoses or opinions and of explaining Judge Murphy's subsequent conduct and state of mind.

In his April 23, 1999 letter to Judge Treu, Dr. Eshom represented that Judge Murphy suffered from chronic cephalgia (headache), fibromyalgia (body ache) and fatigue syndrome. At the hearing, under questioning from Judge Murphy, Dr. Eshom acknowledged that there was "no real scientific test that we can order for these diagnoses" and that they were formulated based on symptoms Judge Murphy presented when he came to his office. The April 1999 letter makes no mention of any difficulties stemming from spina bifida or of any judicial phobia.

Although Dr. Eshom in his testimony indicated that he would support Dr. McCord's purported "diagnoses of phobia, panic disorders, anxiety reaction specifically to the court," he did not explain why he would support such a diagnosis. The record concerning the judicial phobia is devoid of any test results allegedly conducted by Dr. McCord or any other supporting documentation. No competent evidence was presented as to the basis for Dr. McCord's alleged conclusions or even of Dr. McCord's background, experience or competence.

Despite Dr. Eshom's belief that Judge Murphy was disabled, some of his testimony indicated that Judge Murphy was not disabled. Dr. Eshom testified that Judge Murphy had not "lost his ability to analyze anything" and that his high score on the CLEP test for biology shows that "he's cognitively able to decipher information." Dr. Eshom acknowledged that there was no difference regarding "physical ability or disability" between "sitting on the judicial bench for five hours or sitting in a classroom for five hours."

Although Judge Murphy claimed that a congenital anomaly in his back caused him pain and cost him sleep, no documentation was presented to support this contention. Dr. Eshom did not mention this condition in his April 23, 1999 letter. At the hearing, Dr. Eshom testified that he was aware of the condition because Judge Murphy had told him about it, but that he did not independently examine Judge Murphy because he didn't think that it was causing Judge Murphy a problem.

Judge Murphy and Dr. Eshom testified about Judge Murphy's elevated levels of Epstein-Barr virus. The tests purportedly showing these elevated levels were not admitted into evidence, so this is unsupported hearsay.[4] In fact, no documentary evidence of Judge Murphy's medical condition was offered or admitted, except Dr. Eshom's April 23, 1999 letter, various disability slips, and Dr. Boutros's health certificate. Accordingly, Judge Murphy's insistence that the Epstein-Barr virus was the "causative agent" of CFS remains an unsupported self-serving assertion.

At the hearing, Judge Murphy elicited from Dr. Eshom an opinion that he did not believe Judge Murphy was malingering. In support of that belief, Judge Murphy cited Dr. Eshom's board certification and experience in emergency room medicine. The masters rejected this perspective noting that "Dr. Eshom's experience with emergency room malingerers in no way

[4] The masters note that although Dr. Eshom testified that moderately high levels of Epstein-Barr virus indicated a chronic debilitating infection, he also indicated that he was not an expert in that field but had read in the literature that there's a correlation of people who have CFS also having elevated Epstein-Barr virus titers. He also recognized that no mechanism had been discovered as to how the virus caused the symptoms.

prepared him for dealing with a malingerer with Judge Murphy's degree of medical sophistication" and that there was no "testimony that the emergency room malingerers were faking fibromyalgia."

The masters further noted that Dr. Eshom's opinions were shown to be suspect because of information Judge Murphy withheld about his nonjudicial activities. Judge Murphy told Dr. Eshom that he was taking some chemistry and physics classes, but he did not say he was taking five-hour classes two nights a week and another five hours each Saturday and Sunday. When Dr. Eshom wrote a disability slip for Judge Murphy following his fainting episode on September 20, Judge Murphy did not inform him that he intended to take 20 hours of classes on the weekend. Although Dr. Eshom refused to acknowledge that this information affected the validity of his diagnoses and disability slips, he did testify that knowledge of these facts would have been "helpful." He also admitted that Judge Murphy, as a registered nurse, should have known this and that Judge Murphy's attendance of 20 hours of classes during the weekends did not sound as if he were disabled.

Dr. Eshom tried to leave open the possibility that Judge Murphy's thyroidectomy might support the existence of his symptoms. In cross-examination, however, he conceded that he monitored Judge Murphy's thyroid condition to keep it "in balance" and "close to normal."

In addition, the evidence concerning Judge Murphy's efforts to obtain a disability retirement undermine his claim of being disabled. Judge Murphy testified that he had intended to resign from the bench in the fall of 1999, but that an attorney acquaintance, Mr. Moses, convinced him that he qualified for a disability retirement. He testified that he did not investigate this matter but relied entirely on the attorney. He testified that when he left the country to go to medical school on January 1, 2000, he believed that his attorney had filed a disability application. The masters, however, found that his belief was not credible. Judge Murphy further testified that when he returned from Dominica he attempted to get the necessary papers from Dr. Eshom to complete the application, but was unsuccessful. There is no explanation as to why a doctor who first stated that Judge Murphy was disabled in April 1999, and was the only witness called by Judge Murphy in the hearing in January 2001, would not issue a report in January 2000. In any event, Judge Murphy testified that he did not actually apply for disability retirement until July 2000, that he received the commission's tentative denial of the application on November 16, 2000, and took no further action on the application.[5] Judge Murphy's initial reliance on his attorney, his failure to actually apply for disability

[5] Policy Declarations of the Commission on Judicial Performance, policy 5.4(6) provides that a tentative denial becomes final 30 days after issuance unless, within 30 days of the tentative denial, the judge files a request to present additional evidence.

retirement until July 2000 and his acceptance of a tentative denial hardly constitute a robust presentation of his claim.

3. *Judge Murphy's lack of credibility.*

The masters listed several specific reasons for finding that Judge Murphy's testimony lacked credibility.

a. The masters first point to the two false answers contained in Judge Murphy's medical certificate for Ross University. On December 21, 1999, Judge Murphy went to Dr. Boutros's office without an appointment and presented him with the health certificate from Ross University. Dr. Boutros filled it out and returned it to Judge Murphy that day. The completed certificate contained two misrepresentations: (1) the only "present medication" listed was Synthroid; and (2) only hypothyroidism was listed in response to the question "condition(s) for which you are being treated."

Judge Murphy testified that he did not go to Dr. Eshom because he knew that Dr. Eshom did not think that he was fit to go to medical school. He also did not go to Dr. McCord, who he claimed to have been seeing regularly for psychiatric treatment.

Judge Murphy had both a personal and medical relationship with Dr. Boutros. Sometime before 1996, Judge Murphy conducted Dr. Boutros's wedding in Dr. Eshom's house. Dr. Eshom and Dr. Boutros became partners, but in 1996, they ended their partnership because Dr. Eshom believed that Dr. Boutros was "very sloppy" and his character left "a lot to be desired." Dr. Eshom never shared his evaluation of Dr. Boutros with Judge Murphy, but Judge Murphy agreed that Dr. Boutros was sloppy.

Dr. Boutros was one of the physicians involved in the diagnosis and treatment of Judge Murphy's thyroid tumor in 1996. After 1996, however, Judge Murphy only saw Dr. Boutros every three or four months for such problems as upper respiratory tract infections and colds. Judge Murphy's medical appointments with Dr. Boutros were only a "minute or two" in duration and perfunctory. On these occasions Dr. Boutros did not ask, and Judge Murphy did not say, what medications he was taking.

Judge Murphy denied responsibility for the falsehoods in the certificate. He claimed he did not know what the certificate said and that Dr. Boutros completed the form. He testified that he didn't keep anything from Dr. Boutros, but Dr. Boutros didn't ask many questions. Judge Murphy also testified that he knew that Dr. Boutros had only limited knowledge of his medical conditions.

The masters found that Judge Murphy knew that if "he did not inform himself about the certificate and directly provide full information to Dr. Boutros, the certificate would inaccurately represent his medical condition and the medications he was taking." They reported that Judge Murphy very much wanted to go to medical school and that he believed that the university might not accept him if they were fully informed of his medical condition and medications. The masters note that Judge Murphy's "apparent indifference to the certificate and Dr. Boutros's answers alone justif[y] an inference of his indifference to truth when it is in his perceived interest," and they continue: "We also go further and find Judge Murphy was responsible for the falsehoods on the certificate to the same extent as if he had himself personally read the certificate and written the false answers. Judge Murphy selected Dr. Boutros precisely because Judge Murphy knew Dr. Boutros would answer the questions falsely. Since Judge Murphy obtained false answers on his certificate, we infer that Judge Murphy's testimony generally lacks credibility."

b. The masters next cite Judge Murphy's contradictory statements to Judge Treu and to Ross University. In January 1999, Judge Murphy told Judge Treu that "he has currently virtually no immune system left, that his thyroid condition of 1995 and 1996 resulted in the removal of a malignant tumor, and that his current condition is serious." The seriousness of Judge Murphy's condition (without the characterization of the tumor as malignant) was reiterated by Judge Murphy's having Dr. Eshom write a letter to Judge Treu on April 23, 1999, stating that Judge Murphy should be considered disabled because in addition to hypothyroidism, he had chronic cephalgia, syncope secondary to chronic cephalgia, chronic fibromyalgia and CFS.

In contrast, at his application interview in November 1999, Judge Murphy represented to the interviewer that he had no health problems other than that he had had thyroid surgery earlier in life and took Synthroid to stimulate his thyroid. Judge Murphy also indicated that scuba diving and skiing were "things he was interested in and was still active in."

c. Third, the masters cite a couple of particular inconsistencies in Judge Murphy's testimony. Judge Murphy claimed that despite his judicial phobia he could perform well as a law professor and as a student of demanding subjects because they were enjoyable. The masters note that Judge Murphy also testified that he loved being a judge. Judge Murphy testified that he could not return to the bench because he could not get a doctor to release him. The record shows, however, that in July 1999, after the commission began its investigation, and in April 2000, following the filing of the notice of formal proceedings, Judge Murphy returned to the bench without any doctor's "release." The masters conclude: "While Judge Murphy appeared to

have some kind of excuse for virtually every eventuality, their variety and facility ultimately undermine his credibility. His responses fail under the weight of their own inconsistency and strained ingenuity."

The commission agrees with the masters and adopts their findings that Judge Murphy was not ill in the sense that he was medically unable to perform his judicial duties.

## CONCLUSIONS OF LAW

In this section the commission considers whether Judge Murphy's actions violate sections of the California Code of Judicial Ethics and whether they constitute actions for which discipline may be imposed under article VI, section 18, subdivision (d) of the California Constitution. This section of the Constitution provides that the commission may "censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term or of the former judge's last term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . ."

**(1)** The Supreme Court in *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091 [77 Cal.Rptr.2d 408, 959 P.2d 715] reiterated that to commit willful misconduct in office, "a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity." The court went on to explain that a judge "acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (18 Cal.4th at p. 1092.)

**(2)** The Supreme Court then defined prejudicial conduct: "Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is '*either* "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" [citation] *or* "willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity" [citation].' (*Doan* v. *Commission on Judicial Performance* [(1995)] 11 Cal.4th

294,[] 312 [45 Cal.Rptr.2d 254, 902 P.2d 272], original italics.)" (*Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th at pp. 1092–1093.)

**(3)** Judge Murphy's extensive absences as charged in count one clearly constitute a persistent failure or inability to perform judicial duties, especially since the beginning of 1999. Judge Murphy concedes the extensive absences, but claims he is disabled. The masters, however, concluded, and the commission agrees, that Judge Murphy was not and is not disabled, and that he "has persistently failed to perform his duties as a judge when capable of doing so."

**(4)** As alleged in count two, Judge Murphy considered his nonjudicial activities more important than his judicial duties and allowed them to interfere with his judicial duties. In doing so Judge Murphy specifically violated California Code of Judicial Ethics canons 3A and 4A(3) as well as the more general canons 1 and 2A.[6] The violations of the California Code of Judicial Ethics constitute incidents of conduct prejudicial to the administration of justice that brings the judicial office into disrepute. They are not incidents of willful misconduct because Judge Murphy was not acting in a judicial capacity when he engaged in these activities.

**(5)** The five incidents of Judge Murphy's failure to cooperate with his presiding judge in the administration of court business alleged in count three violate California Code of Judicial Ethics canon 3C(1) and generally violate canons 1 and 2.[7] Judge Murphy's statement to the presiding judge that the benign thyroid tumor had been malignant constituted willful misconduct because lying to his presiding judge is a violation of the judicial canons, he was acting in his judicial capacity in discussing his assignments with the presiding judge, and his lie was in bad faith for the purpose of falsely obtaining sick leave. Similarly, Judge Murphy's misrepresentation that he would be absent for medical tests the week of March 29, 1999, constituted willful misconduct because he violated the judicial canons, he was acting in his judicial capacity, and his purpose was to falsely obtain sick leave.

**(6)** Judge Murphy's failure to provide a doctor's note for his sick leave absences from October 25, 1999, through November 16, 1999, constitutes

[6] Canon 1 of the California Code of Judicial Ethics states, "a judge shall uphold the integrity and independence of the judiciary" (capitalization omitted), and canon 2A states, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A states, "[a]ll of the judicial duties prescribed by law shall take precedence over all other activities of every judge." Canon 4A(3) provides that a judge shall conduct all extrajudicial activities so that they do not "interfere with the proper performance of judicial duties."

[7] Canon 3C(1) of the California Code of Judicial Ethics states, "[a] judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business."

conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The masters found, and the commission agrees, that the presiding judge's request for a doctor's note was reasonable, and that in failing to provide a doctor's note Judge Murphy violated judicial canons. Furthermore, the failure was in bad faith as it furthered his scheme—as found by the masters—to falsely obtain sick leave.

Judge Murphy's departure from the country and concomitant failure to keep the court informed of his whereabouts, and his failure to respond to the judicial secretary's inquiry concerning probable cause duty also constitute incidents of conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The masters found, and the commission agrees that Judge Murphy's leaving the country to attend medical school without informing anyone of his plans, location or means to communicate with him violated judicial canons. Judge Murphy's failure to respond to the judicial secretary's inquiries as to where he would perform his probable cause duty clearly violates California Code of Judicial Ethics canons 3A, 3C(1) and 4. Even if Judge Murphy did not know of the judicial secretary's inquiries, his inaction was in bad faith because by leaving the country and not informing anyone of his whereabouts he prevented the judicial secretary from contacting him.

**(7)** As Judge Murphy did not suffer from any illness disabling him from performing his judicial duties during his extensive absences in 1999 and 2000, his falsely obtaining sick leave constitutes malingering as alleged in count four. This conduct violates California Code of Judicial Ethics canons 1, 2A, 3A, C(1) and 4A(3) and constitutes willful misconduct. Judge Murphy was acting in his judicial capacity in his fraudulent use of sick leave. The masters concluded, and the commission agrees, that Judge Murphy was motivated by a bad faith intent of remaining on the payroll of the State of California as a full-time, sitting judge while avoiding his judicial obligations.

## DISCIPLINE

**(8)** The commission is guided by the Supreme Court's reiteration that the purpose of a judicial disciplinary proceeding is not punishment, " 'but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' "[8] The commission finds that these purposes require the removal of Judge Murphy from the bench.

[8] *Broadman v. Commission on Judicial Performance, supra,* 18 Cal.4th at page 1112, quoting *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].

**(9)** The Supreme Court has observed that determining whether to remove a judge from office, like choosing any other sanction, is an art, not a science.[9] Nonetheless, the commission finds that the court's opinions indicate that the severity of the misconduct, the duration of the misconduct and evidence of contrition and willingness to reform are relevant to a determination of what discipline to impose.[10] It should be noted, however, that removal may be appropriate even where these factors do not all weigh against the judge.[11]

**(10)** Judge Murphy, in claiming sick leave when he was not disabled and lying to his presiding judge, engaged in willful misconduct that displays moral turpitude and dishonesty. The public will not, and should not, respect a judicial officer who has been shown to have repeatedly lied for his own benefit. The Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239] noted that honesty is a minimum qualification that is expected of every judge. The severity of Judge Murphy's willful misconduct might well in itself require his removal from the bench.

Judge Murphy's misconduct also continued over several years. His cavalier attitude to sick leave manifested itself as early as 1996 when he would teach law school in the evenings on days that he purported to be too ill to sit as a judge. In the spring of 1999, he demonstrated a complete disregard for his judicial duties as well as the impact his absences had on his colleagues and the court. In the fall of 1999, he felt justified in taking intense college level science classes in preparation for medical school while on sick leave. Even after he dropped out of medical school, he did not return to the bench for three months and did not file an application for a disability retirement until July 2000. Thus, the evidence shows that over several years Judge Murphy persisted in a reprehensible course of conduct.

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[9] See *Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at page 1112.

[10] See, for example, *Doan v. Commission on Judicial Performance, supra*, 11 Cal.4th at page 339 in which the Supreme Court removed a judge for willful and prejudicial misconduct that displayed moral turpitude, dishonesty and corruption. In *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958], the Supreme Court noted that the number of wrongful acts is relevant to determining whether they were isolated occurrences or part of an improper course of conduct. In *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359 [188 Cal.Rptr. 880, 657 P.2d 372], the court noted that the record belied the judge's claim that he learned from past experience. In contrast, in *Doan*, the court indicated that it would hesitate to remove a judge who demonstrated readiness, willingness and ability to reform under a less severe sanction.

[11] In *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284, footnote 11 [110 Cal.Rptr. 201, 515 P.2d 1], the Supreme Court while explaining that " 'conduct prejudicial to the administration of justice' " was a less severe charge than "wilful misconduct," noted "[i]t should be emphasized that our characterization of one ground for imposing discipline as more or less serious than the other does not imply that in a given case we would regard the ultimate sanction of removal as unjustified solely for 'conduct prejudicial to the administration of justice which brings the judicial office into disrepute.' "

The record contains little evidence of contrition or willingness to reform. While Judge Murphy admitted that his actions were prejudicial to the administration of justice, he continued to insist on his subjective good faith based on his disabilities. Other than his insistence that he is disabled, Judge Murphy offered no evidence in mitigation. The masters, however, found that Judge Murphy was not disabled and that he had proceeded in bad faith and the commission adopts those findings. Judge Murphy has not filed any objections to the masters' report with the commission. Accordingly, there is nothing before the commission that shows contrition or willingness to reform.

Finally, it should be noted that Judge Murphy was also charged with the persistent failure or inability to perform his judicial duties. The masters found that these charges had been proved and the commission adopts those findings. Judge Murphy testified that his application for a disability retirement had been denied, and he has not indicated that he has any intention of returning to the bench or of renewing his disability application. Accordingly, even if there were not overwhelming evidence of malingering and other willful misconduct as alleged in counts three and four, and of conduct prejudicial to the administration of justice as alleged in count two, the commission would be compelled to remove Judge Murphy from the bench.

## CONCLUSION

The commission orders that Judge Patrick B. Murphy of the Los Angeles County Unified Superior Court be hereby removed from the bench* for: (1) malingering by falsely claiming to be ill as charged in count four; (2) willful misconduct and prejudicial misconduct in failing to cooperate in the administration of court business as charged in count three; (3) conduct prejudicial to the administration of justice that brings the judicial office into disrepute in giving nonjudicial activities precedence over, and allowing them to interfere with, his judicial duties as charged in count two; and (4) persistent failure to perform his judicial duties as charged in count one. The special masters found that the charges were sustained by clear and convincing evidence and the commission adopts the masters' findings of fact and conclusions of law. The commission concludes that its responsibilities to protect the public, enforce rigorous standards of judicial conduct and maintain public confidence in the integrity of the judiciary dictate that Judge Murphy be removed from office.

*Reporter's Note: Subsequent to the issuance of the decision, the commission was informed and confirmed that the judge resigned prior to the order of removal, and ordered that the decision shall be considered a public censure of the former judge and a bar from receiving any assignment, appointment or reference of work from any California state court.

This decision shall constitute the order of removal of Judge Patrick B. Murphy.

Commission members Mr. Michael A. Kahn, Judge Risë Jones Pichon, Ms. Lara Bergthold, Judge Madeline I. Flier, Mr. Marshall B. Grossman, Ms. Gayle Gutierrez, Mrs. Crystal Lui, and Justice Vance W. Raye, voted in favor of all the findings and conclusions expressed herein and in the removal of Judge Patrick B. Murphy from judicial office. Commission members Mr. Mike Farrell and Ms. Ramona Ripston did not participate in this proceeding. There is currently one public member vacancy.

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| | |
|---|---|
| Inquiry Concerning<br>Former Judge William H. Sullivan, No. 163 | DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BARRING JUDGE SULLIVAN FROM RECEIVING ASSIGNMENTS |

This is a disciplinary matter concerning Judge William H. Sullivan, a judge of the Riverside County Superior Court from November 17, 1987, to December 31, 1999. Formal proceedings having been instituted, this matter came before the Commission on Judicial Performance pursuant to rule 127 of the Rules of the Commission on Judicial Performance.

The commission concludes, based on Judge Sullivan's stipulation, that Judge Sullivan engaged in a pattern of improper financial dealings and fiduciary activities prior to his retirement. The commission hereby publicly censures Judge Sullivan and bars him from receiving an assignment, appointment or reference of work from any California state court.

## APPEARANCES

Judge Sullivan is represented by Edward P. George, Jr. Trial Counsel for the Commission on Judicial Performance is Jack Coyle.

## PROCEDURAL HISTORY

A Notice of Formal Proceedings was filed on October 29, 2001, charging Judge Sullivan with four counts of unethical conduct. Judge Sullivan filed his verified answer on November 15, 2001. Pursuant to rule 121, the commission requested the appointment of three special masters, and the Supreme Court appointed Justice Norman L. Epstein, presiding, Justice Judith Lynette Haller, and Judge Thomas Pearce Anderle as masters. The masters held a pretrial conference on January 25, 2002, in Los Angeles, and the case was scheduled for an evidentiary hearing commencing on March 25, 2002, in Pasadena.

On March 21, 2002, Judge Sullivan and Trial Counsel submitted a Stipulation for Discipline by Consent pursuant to rule 127 of the Rules of the Commission on Judicial Performance. On the same day, the commission issued an order vacating the hearing date in order that the commission might consider the Stipulation at its May 2002 meeting.

## THE STIPULATION FOR DISCIPLINE BY CONSENT

### A. Judge Sullivan's Agreement to Discipline

Judge Sullivan and Trial Counsel propose that the commission dispose of this matter by issuing a censure and bar from receiving an assignment, appointment or reference of work from any California state court. Judge Sullivan understands that if the commission accepts the proposal, the commission may articulate the reasons for its decision and he agrees to accept any such explanatory language.

The Stipulation notes that Judge Sullivan is no longer on the bench, having retired effective December 31, 1999.

Judge Sullivan has signed and submitted an affidavit consenting to the sanction of a censure and bar from any assignments, stating that his consent is freely and voluntarily given, admitting to the truth of the charges as alleged, and waiving review by the Supreme Court.

### B. The Findings of Fact

The Stipulation for Discipline sets forth the following factual stipulation, which tracks the allegations set forth in the Notice of Formal Proceedings. The commission adopts the following as its findings.

#### Count One

A. Respondent (Judge Sullivan) became the trustee for the Frances Campbell Living Trust in November 1984. Despite assuming judicial office in November 1987, he continued to act as trustee for the Campbell Trust until September 29, 1995, when he resigned as trustee. Respondent paid himself annual trustee fees throughout this period. (In 1996, after he resigned as Trustee, respondent refunded to the Trust all of his trustee fees.)

B. Between 1990 and 1994, respondent loaned himself $186,000 from the Campbell Trust account at PaineWebber, by writing checks from himself as trustee to himself as an individual. The dates and amounts were as follows:

| | |
|---|---|
| April 14, 1990 | $30,000 |
| July 21, 1990 | $11,000 |
| November 20, 1990 | $21,000 |
| January 24, 1991 | $11,000 |
| April 15, 1992 | $ 8,000 |
| July 13, 1992 | $22,000 |
| July 24, 1992 | $28,000 |
| March 8, 1994 | $25,000 |
| March 28, 1994 | $30,000 |

These loans were not authorized by Frances Campbell and were unsecured. Around November 20, 1990, he set an interest rate of 8% for the amounts loaned as of that date. Effective February 20, 1995, he increased the interest rate to 9.25%.

Respondent made sporadic and insufficient payments toward the monies owed, while continuing to loan himself more money. As of approximately mid-1995, he owed the Campbell Trust over $200,000 in principal and interest on these loans. The loans to respondent caused the Campbell Trust account at PaineWebber to incur interest charges. (During the accounting, respondent repaid these loans.)

C. Between 1986 and 1992, inclusive, respondent purchased for the Campbell Trust eight promissory notes secured by land originally purchased from the Johnson Heirs Trust. On several of these promissory notes, the Campbell Trust made payments to the Johnson Heirs Trust, on first deeds of trust assumed by the Campbell Trust.

Respondent made and held these promissory note investments for the Campbell Trust despite a conflict of interest. He had been a trustee of the Johnson Heirs Trust since its formation in 1981. In May 1986, he had also become a beneficiary of the Johnson Heirs Trust, as trustee of the T.H.S. Trust. (Respondent owned a one-third beneficial interest in the T.H.S. Trust, which was a business that invested in promissory notes secured by deeds of trust.) The main asset of the Johnson Heirs Trust was unimproved land near Anza, California, which the trust sold for development. Between approximately 1988 and 1993, inclusive, he purchased from the Johnson Heirs Trust many deeds of trust given for the purchase of trust land, either in his own name as an individual or as trustee of the C.T.S. Trust. (Respondent owned a one-third beneficial interest in the C.T.S. Trust, which was a business that invested in promissory notes secured by deeds of trust.)

D. Despite assuming judicial office in 1987, respondent continued to act as a trustee of the Johnson Heirs Trust until about 1996, when the trust was terminated.

E. One of the promissory notes that respondent purchased for the Campbell Trust was known by the payor name of Richardson. With a check written on the Campbell Trust account, he acquired the Richardson note in his own name as an individual, not as trustee of the Campbell Trust. He continued to hold this note in his own name, and not as trustee, until it was assigned to respondent's successor trustee in 1995.

Between 1989 and 1990, respondent failed to deposit into the Campbell Trust account at least three payments that were made on the Richardson note. In 1994, he failed to deposit into the Campbell Trust account at least two payments

that were made on another promissory note that he had purchased for the trust, known by the payor name of Hunt.

F. In June 1989, respondent purchased seven promissory notes from a man named Jess Watkins, who since 1982 had been involved in purchasing and reselling unimproved land originally owned by the Johnson Heirs Trust. At least six of the promissory notes he purchased from Watkins were secured by land originally owned by the Johnson Heirs Trust, including a note known by the payor name of DiNardo.

The total cost of the seven notes was $230,000. The money came from various trusts for which respondent was the trustee; he deposited the funds into his own bank account and obtained a cashier's check for Watkins. The funds included a check for $51,000 to himself from the Campbell Trust account, dated June 12, 1989. Respondent purchased each of the seven notes from Watkins in his own name as an individual, not as a trustee for any trust. He purchased each note at a discount from the face value of the note.

In November 1989, respondent sold the DiNardo note to the Campbell Trust. He had purchased the DiNardo note from Watkins at a 10% discount. He subtracted the face value of the DiNardo note from the $51,000 he had paid to himself from the Campbell Trust account, and paid the Campbell Trust the difference, with a check from his personal account dated November 1, 1989. He retained the difference between the face value of the note and the discounted value he had paid for it in June 1989, which was approximately $3,400. He did not pay the Campbell Trust interest on the trust money that he withdrew in June 1989.

Included in the check from his personal account dated November 1, 1989, was reimbursement to the Campbell Trust for four payments on the DiNardo note that he had deposited into his personal account. He did not pay the Campbell Trust interest on the four payments for the period of time that he retained the monies.

Respondent continued to hold the DiNardo note in his own name, and not as trustee, until it was transferred to his successor trustee in October 1995.

G. In November 1989, respondent sold another one of the seven promissory notes purchased from Watkins to the Follansbee Marital Trust, for which he also was the trustee. (The Follansbees were his in-laws.) This note was known by the payor name of Lollis. The Lollis note was secured by land originally purchased from the Johnson Heirs Trust. The Follansbee Marital Trust had contributed $51,000 to the transaction with Watkins in June 1989. Respondent had purchased the Lollis note at a 10% discount. He subtracted the face value of the Lollis note from the $51,000 contributed by the Follansbee Marital Trust, and paid the Follansbee Marital Trust the difference, with a check from his personal account dated November l, 1989. He retained the difference

between the face value of the note and the discounted value he had paid for it in 1989, which was approximately $3,900.

H. An accounting for the Campbell Trust was begun in approximately March 1995, at the request of Frances Campbell. In November 1995, respondent told Ms. Campbell's accountant that he would pay off about $11,000 in loans to himself from the Campbell Trust by paying off the first deed of trust on a note known by the payor name of Hein/Turner. He did so. However, this also benefited respondent and/or the C.T.S. Trust; in 1992, he had purchased the first deed of trust from the Johnson Heirs Trust, as trustee of the C.T.S. Trust.

**Count Two**

A. In March 1987, before respondent assumed judicial office, he witnessed the will of Olga Bye of Riverside, California. The Bye will contained a provision establishing a 12-year testamentary trust that benefited established charities. The will provided that John Neblett (a former Riverside County Superior Court judge) was to be the trustee, and that respondent had the power to appoint himself as the successor trustee should Neblett be unable or unwilling to act as trustee. The will also provided that respondent was to be the executor should Neblett be unable or unwilling to act as executor.

Respondent assumed judicial office in November 1987. In February 1988, Olga Bye died. In March 1988, the Bye will was admitted to probate in the Riverside County Superior Court.

In December 1988, executor Neblett filed the Bye estate's First and Final Account and Petition for its Settlement. In January 1989, executor Neblett filed the estate inventory. The Bye estate was valued at over one million dollars. Respondent had been managing Bye's financial affairs before her death; her estate included six promissory notes, three of which were secured by land originally purchased from the Johnson Heirs Trust, and one of which, known by the payor name of Teixeira, was originally owned in part by respondent.

Despite his conflict of interest, respondent presided over the Bye probate matter. On January 25, 1989, respondent signed an Order Settling First and Final Account, which approved the accounting for the Bye estate. Respondent's order established the Bye Testamentary Trust, and confirmed his own power to appoint himself as successor trustee to Neblett. On April 28, 1989, respondent signed an amended Order Settling First and Final Account, which also confirmed his power to appoint himself as successor trustee.

Respondent continued to preside over the Bye Trust matter until approximately August 27, 1991, while the Bye Trust was under the supervision of the Riverside County Superior Court and while annual accountings by the trustee were required. During that time, he continued to manage the Bye finances.

B. As described above in Count One (F), in June 1989, respondent purchased seven promissory notes from Jess Watkins, in his own name as an individual, at a discount using money from various trusts for which he acted as trustee. In November 1989, he sold to the Bye Trust two of those promissory notes, known by the payor names of Fletcher and Robinson. Each note was secured by land originally purchased from the Johnson Heirs Trust. Respondent had purchased the Fletcher note at a 15% discount and the Robinson note at a 10% discount. He sold the Fletcher and Robinson notes to the Bye Trust at face value. He retained the difference between the face value and the discounted value he paid, which was approximately $7,400. (This was done by subtracting the face value of the Fletcher and Robinson notes from the 1989 payoff of the Teixeira note owned by the Bye Trust, then depositing the remainder of the Teixeira payoff into the Bye Trust account at PaineWebber.)

In April 1990, respondent reimbursed the Bye Trust for payments made on these notes during the fourth quarter of 1989, which he had deposited in his personal account; he did not include interest. In August 1990, he reimbursed the Bye Trust for payments made on these notes during the first quarter of 1990, which he had deposited in his personal account; he did not include interest. Respondent continued to hold the Fletcher and Robinson notes in his own name, and not as trustee, until they were paid off in 1992 and 1997, respectively.

The 1989 trust accounting, filed by trustee Neblett, reflected the purchase of the Fletcher and Robinson notes and the Teixeira payoff. It did not disclose that the Fletcher and Robinson notes had been purchased from respondent, that they had been acquired by him at a discount and sold by him to the trust at face value, or that respondent continued to hold the notes in his own name as an individual. On June 13, 1990, respondent signed an Order Settling First Account, which approved the 1989 accounting.

The 1990 trust accounting, filed by trustee Neblett, reflected the 1989 and 1990 payments on the Fletcher and Robinson notes that had been paid to the Bye Trust by respondent. It did not disclose that these were reimbursements for payments that respondent had deposited into his own account. It did not disclose that respondent continued to hold the Fletcher and Robinson notes in his own name as an individual. (Nor did any subsequent accounting.) On April 1, 1991, respondent signed an Order Settling Second Account, which approved the 1990 accounting.

Respondent's acquisition of these promissory notes for the Bye Trust, as well as other promissory notes secured by land originally purchased from the Johnson Heirs Trust as described in (D) below, involved a conflict of interest, as set forth in Count One (C).

C. Respondent continued to preside over the Bye Trust matter until approximately August 27, 1991, when Neblett resigned as trustee. Despite having assumed judicial office, on that date, respondent nominated himself as trustee, and

began acting as sole trustee. He continued to act as trustee of the Bye Trust through July 30, 1999, when he resigned as trustee. Respondent paid himself annual trustee fees throughout this period. (When respondent resigned as Trustee, he refunded to the Trust all of his trustee fees.)

D. In 1992, respondent sold to the Bye Trust five promissory notes that he owned in his own name as an individual. Each involved land originally purchased from the Johnson Heirs Trust. Respondent sold these notes to the Bye Trust at face value, for a total of approximately $140,000. The price paid to respondent by the Bye Trust, and the 1992 loan of trust funds described below in (E), caused the trust to incur cash expenses to finance its purchases from him.

Respondent filed the verified Bye Trust accounting for the year 1992, as trustee for the Bye Trust. In the accounting, he described these five notes as "seasoned obligations with good payment records." However, one of the notes, known by the payor name of Delgado, had been in default since at least April 1992.

E. The 1992 Bye Trust accounting, in reference to a promissory note known by the payor name of McFall, stated that respondent "purchased a $50,000 promissory note from an individual investor." This statement was misleading. Around March 13, 1992, respondent loaned $50,000 of Bye Trust funds to McFall, for which she executed a promissory note to him for $50,000, secured by a deed of trust to land that she owned. The promissory note set an interest rate of 14% and provided that payments of $1,750 were due quarterly starting on June 15, 1992, with the balance due on June 15, 1995.

Only one $1,750 payment was made on the McFall note, on June 15, 1992. On respondent's handwritten payment ledger, he allocated this payment entirely to interest. At an unknown point, he wrote on the payment ledger, "Interest moratorium to 6/15/95." On December 27, 1993, respondent wrote a $50,000 check on the C.T.S. Trust account to the Bye Trust account to purchase the McFall note; he did not pay to the Bye Trust any of the unpaid interest that had been due to it under the terms of the promissory note from McFall.

Respondent filed the verified Bye Trust accounting for the year 1993. It reflected that the entire principal of the McFall note had been repaid. The accounting was misleading, as it did not disclose that the McFall note had been purchased by the C.T.S. Trust, or that respondent had an ownership interest in the C.T.S. Trust.

F. On April 8, 1994, respondent loaned the C.T.S. Trust $44,500 from the Bye Trust funds. He executed a promissory note that set an interest rate of 8% and provided for quarterly payments, with the balance due in five years. The loan was unsecured.

Respondent filed the verified Bye Trust accounting for the year 1994. In the accounting, he stated that this note was "maintained current and was thereafter repurchased by the CTS Trust on December 31, 1994"; the accounting also stated that he was the trustee of the C.T.S. Trust. These statements were misleading and incomplete. His interest payments on the loan were late, and the accounting did not disclose that he had an ownership interest in the C.T.S. Trust.

G. Between May and July 1994, respondent loaned himself a total of $110,000 from the Bye Trust account. He did so by writing three checks to himself: on May 9, 1994, for $48,000; on May 12, 1994, for $12,000; and on July 12, 1994, for $50,000. At least the first two of these loans were not secured at the time made.

Respondent executed a promissory note dated May 12, 1994, for $60,000 and a promissory note dated July 12, 1994, for the total loan amount of $110,000. The promissory notes set an interest rate of 8% and required quarterly payments, with the balance due in five years. The amount of these loans and the loan described above in (F) caused the trust to incur cash expenses to finance its loans to respondent and/or the C.T.S. Trust.

The $110,000 in loans was eventually secured by the assignment to the Bye Trust of a half interest in a promissory note known by the payor name of Roome. The trust accounting for the year 1994 did not disclose the fact that the Roome note was originally given to respondent by the Roomes for their purchase of a residence owned by him.

The 1994 trust accounting, filed on April 24, 1995, stated that the first two loans (totaling $60,000) were unsecured when made and that the entire obligation was currently secured, but did not state when that occurred. On the document assigning the half interest in the Roome note to the Bye Trust, the date July 12, 1994, is typed next to respondent's signature; however, the signature was notarized on April 5, 1995, and the document was recorded on April 11, 1995.

In the verified Bye Trust accounting respondent filed for the year 1995, he stated that the $110,000 loan had been "satisfied." However, he structured that transaction so as to receive additional cash from the Bye Trust. In August 1995 he increased the trust's interest in the Roome note to 75%, or approximately $163,000, which was about $51,000 greater than the amount then owed his $110,000 loan. Respondent had previously foreclosed on the Delgado deed of trust and taken title to the real property securing the Delgado note, for about $43,000, which was the total amount then due on the note. He subtracted the approximate $43,000 he owed the trust for the Delgado transaction from the approximate $51,000 difference between the increased interest in the Roome note and the amount owing on the $110,000 loan to himself; as a result he took $7,900 in cash from the Bye Trust.

H. Respondent filed the verified Bye Trust accounting for the year 1996. In the accounting, he stated that the note known by the initial payor name of Gregory had been purchased from the Bye Trust by the T.S. Trust, of which he was also trustee. This was misleading, as he did not disclose that he held a one-half beneficial interest in the T.S. Trust, which was a business that invested in promissory notes secured by deeds of trust.

**Count Three**

On April 7, 1992, while presiding over *Conservatorship of Harry Dostal*, case No. 59398, respondent signed an order authorizing the sale of the conservatee's home located at 4340 Glenwood Drive in Riverside, California. Despite respondent's conflict of interest, on approximately June 5, 1992, he entered into an agreement to purchase the property and thereafter continued to preside over the *Conservatorship of Harry Dostal* case.

On June 20, 27 and 29, 1992, a Notice of Intention to Sell Real Property at a private sale on July 3, 1992, was published. On July 9, 1992, the conservator filed a petition for court confirmation of the sale to respondent. On or about July 23, 1992, he entered an order on his own motion, which advanced the date for hearing the conservator's petition for court confirmation of the sale, from August 11, 1992, to July 27, 1992. As a result of his order advancing the confirmation hearing, the notice of the proposed sale required by law was not given, and the opportunity for third parties to appear and make competing bids to purchase the property was reduced or denied.

An order confirming the sale to respondent was signed by another judge on July 27, 1992. He continued to preside over the Dostal case. On May 10, 1993, he signed an order approving the second accounting of the conservator. This included the 1992 sale to respondent of the property located at 4340 Glenwood Drive, Riverside, California. On January 14, 1994, he signed an order approving the third accounting of the conservator. On May 27, 1994, he signed an order of final discharge of the conservator.

**Count Four**

On respondent's verified Statements of Economic interests required by California Government Code section 87203, in the applicable years, he failed to disclose the following:

A. Trustee fees he received from the Campbell Trust;

B. Trustee fees he received from the Bye Trust;

C. Loans to himself from the Campbell Trust of $186,000 in 1990-1994;

D. Loans to himself from the Bye Trust of $110,000 in 1994; and

E. Interest in the following real properties:

(1) Property conveyed by September 13, 1989, Grant Deed from Celesta Aragonez and Ernie Aragonez to William H. Sullivan, a widower, described as:

Block 12, Range 10, Map of Town of Riverside, San Bernardino County.

(This property was erroneously described in the original August 10, 1988, deed from Celesta Aragonez and Ernie Aragonez to William H. Sullivan, a widower, as Block 12, Range 10, Map of Town of San Bernardino. Book 7, page 17 of Maps, records of San Bernardino County Maps.)

(2) Property conveyed by December 1, 1989, Grant Deed from Israel J. Arriaga and Linda M. Mayer to William H. Sullivan, a widower, described as:

A Condominium consisting of Unit 166 as shown and defined on the Condominium Diagrammatic Plan recorded October 21, 1977 as Instrument 209851.

(In a subsequent deed, this property is described as Unit 166 as shown and defined on the condominium plan of Tract No. 4528, said plan being recorded October 21, 1977 as Instrument No. 109851 and amended November 15, 1977 as Instrument No. 1282-59, both of official records of Riverside County.)

(3) Property conveyed by June 28, 1993, Grant Deed from Thayne B. Grover and Amy L. Grover to Edward Vincent Talbot and Lisa Marie Talbot, husband and wife, joint tenants, as to an undivided one-half interest, and William H. Sullivan, a widower, as to an undivided one-half interest as tenants in common, described as:

Lot 225 of Brockton Heights No. 4, City of Riverside, as per Map recorded in Book 30, page 3 and 64 of Maps in the Office of the County Recorder of said county, with a street address of 4092 Manchester Avenue, Riverside, California.

(4) The following units which appear to be part of the Racquet Club of Palm Springs, located at 2743 N. Indian Canyon Drive, Palm Springs, California:

Unit 2A in Lot l, Tract 4320, as per map in Book 69, pages 68 & 69, Records of Riverside County, APN: 504-300-002-5, conveyed by January 20, 1993 Corporation Grant Deed from Racquet Club of Palm Springs, a California corporation, to William H. Sullivan, a widower;

Parcel 3, Record of Surveys, as per map in Book 33, page 18, Records of Survey of Riverside County, APN: 504-131-025-1, conveyed by May 6, 1993 Corporation Grant Deed from Racquet Club of Palm Springs, a California corporation, to William H. Sullivan, a widower; thereafter conveyed by May 24, 1993 Grant Deed from William H. Sullivan, a widower, to Racquet Club of Palm Springs, a California corporation;

Parcel 15, Record of Surveys, as per map recorded in Book 33, page 18, Records of Survey of Riverside County, conveyed by May 24, 1993 Corporation Grant Deed from Racquet Club of Palm Springs, a California corporation, to William H. Sullivan, a widower, showing that it was recorded to convey the "correct unit" to buyer;

Parcel 14, Record of Surveys, as per map in Book 33, page 18, Records of Survey in office of Riverside County Recorder, APN: 504-131-036-1, conveyed by September l, 1993 Corporation Grant Deed from Racquet Club of Palm Springs, a California corporation, to William H. Sullivan, a widower, also identified as 2743 N. Indian Canyon Drive, # 229-230.

(5) Property conveyed by April 6, 1993, Grant Deed from James R. Haley and Georgette C. Haley to William H. Sullivan, a widower, described as: Parcel 3 of Parcel Map No. 21316, as shown by map on file in Book 141, pages 56 and 57 of Parcel Maps, Records of Riverside County, California.

(6) Property in the City of Palm Springs conveyed by November 18, 1993, Grant Deed from Nancy Shane to William H. Sullivan, a widower, described as:

Parcel 29, Record of Surveys as per map recorded in Book 33, page 18 of Records of Survey in the Office of the County Recorder in Riverside County, APN: 504-131-051.

(7) Property in the City of Palm Springs conveyed by November 22, 1994, Individual Grant Deed from Roland I. Richman, Trustee of the Roland I. Richman Revocable Trust to William H. Sullivan, a widower, described as:

Parcel 28, Record of Surveys in Book 33, page 18, Records of Survey of Riverside County, APN: 504-131-050.

(8) Property in an unincorporated area of Riverside County conveyed in a September 11, 1995, Grant Deed from M. Thomas Bivins, Jr. and Treva F. Bivins to William H. Sullivan, Trustee of the T.S. Trust, described as:

Parcel 4 of Parcel Map 6626, in the County of Riverside, State of California, as per map recorded in Book 20, pages 50-54 inclusive of Parcel Maps, in the Office of the County Recorder of said county, APN: 577-420-001-4.

(9) Property known as 2743 N. Indian Canyon Drive, #105-106, Palm Springs, conveyed in a December 18, 1995, Grant Deed from Arthur L. Gordon to William H. Sullivan, described as:

Parcel 1 of Record of Surveys in the City of Palm Springs, County of Riverside, State of California, as shown by map filed in Book 33, page 18 of Record of Surveys, in the Office of the County Recorder of said county, APN: 504-131-023.

(10) Property conveyed by July 19, 1996, Trustee's Deed Upon Sale from First American Title Insurance Company, Trustee, to William H. Sullivan, described as:

Parcel 3, together with Lot C, of Parcel Map 22891, on file in Book 156, pages 76 and 77 of Parcel Maps, Records of Riverside County, APN: 580-500-050-9.

(11) Property conveyed by November 24, 1998, Trustee's Deed Upon Sale from First American Title Insurance Company, Trustee, to William H. Sullivan, Trustee, described as:

That portion of Parcel 1 and Parcel 3 of Parcel Map 19567 as shown by map on file in Book 123, pages 98 and 99 of Parcel Maps, Records of Riverside County, California [and more particularly described in said deed], APN: 577-270-052-7.

(12) Property conveyed by June 26, 1995, Trustee's Deed Upon Sale from First American Title Insurance Company, Trustee, to William H. Sullivan, thereafter conveyed by March 23, 1999, Grant Deed from William H. Sullivan, a widower, to Barbara Roxanne Coskran, described as:

Parcel 4, of Parcel Map No. 22289 on file in Book 155, pages 16 and 17 of Parcel Maps, Records of Riverside County, California, APN: 577-420-044-3.

**C. Conclusions of Law**

The Stipulation for Discipline sets forth the following conclusions concerning misconduct, and the commission adopts them as its own.

**Counts One and Two**

Respondent was disqualified from presiding over the Bye probate proceeding and the Bye Trust matter. He had managed Bye's financial affairs before her death, had witnessed her will, was serving as the backup executor and the backup trustee, and continued to manage the estate and trust financial affairs after her death.

Presiding under those circumstances constitutes willful misconduct. Respondent was acting in his judicial capacity. He violated the former Code of Judicial Conduct, effective January l, 1975, canon 1 (a judge should uphold integrity and independence of judiciary), canon 2 (a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities), and canon 3C(1) (judges should disqualify themselves in a proceeding in which their disqualification is required by law, or their impartiality might reasonably be questioned). He acted in bad faith because the purpose of his conduct was to benefit himself, and because it was beyond his lawful power to preside over a matter where he so obviously was disqualified.

Respondent's conduct also constitutes a pattern of prejudicial misconduct. He violated the canons of ethics over a significant period of time which was prejudicial to public esteem for the judiciary.

Serving as trustee for the Johnson Heirs Trust, the Campbell Trust and the Bye Trust after taking the bench violated the Code of Judicial Ethics, canon 4E(1) (a judge shall not serve as trustee except for trust of a member of the judge's family), the former Code of Judicial Conduct, effective October 5, 1992, canon 4E(1) (a judge should not serve as trustee except for trust of member of the judge's family), and the former Code of Judicial Conduct, effective January 1, 1975, canon 5D (a judge should not serve as trustee except for trust of member of the judge's family).

Respondent misused trust funds for his own benefit, and committed other serious improprieties in his position as trustee. His conduct violated the most basic fiduciary duties and fundamental ethical obligations, as reflected in present canons 1 and 2 (a judge shall uphold integrity and independence of judiciary, shall avoid impropriety and the appearance of impropriety in all of the judge's activities), and former canons 1 and 2 (a judge should uphold integrity and independence of judiciary, should avoid impropriety and the appearance of impropriety).

Respondent's conduct violated the Code of Judicial Ethics, canon 4A(1) (a judge shall conduct all of his extra judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially), the former Code of Judicial Conduct, effective October 5, 1992, canon 4A(1) (a judge should conduct his extra judicial activities so that they do not cast reasonable doubt on the judge’s capacity to act impartially), the Code of Judicial Ethics, canon 4D(1)(a) (a judge shall not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position), and the former Code of Judicial Conduct, effective October 5, 1992, canon 4D(1)(a) (a judge should not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position).

Respondent's conduct also violated the former Code of Judicial Conduct, effective January 1, 1975, canon 5C(1) (judges should refrain from financial and business dealings that tend to reflect adversely on their impartiality, interfere with the proper performance of their judicial duties, exploit their judicial position, or involve them in frequent transactions with lawyers or persons likely to come before the courts on which they serve), canon 5C(3) (judges should manage their investments and other financial interests to minimize the number of cases in which they are disqualified), and canon 5D (judges should not serve as fiduciary if it is likely that as a fiduciary they will be in engaged in proceedings that would ordinarily come before them).

**Count Three**

Presiding over this matter in connection with the property purchase and thereafter constitutes willful misconduct. Respondent was acting in his judicial capacity. He violated the former Code of Judicial Conduct, effective October 5, 1992, canons l, 2 and 3E (a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, or in a proceeding in which disqualification is required by law), and the former Code of Judicial Conduct, effective January l, 1975, canons l, 2 and 3C(1)/3C(1)(c) (a judge should disqualify himself when required by law, or when his impartiality might reasonably be questioned, including instances where the judge has a financial interest in the subject matter). He acted in bad faith by presiding in a matter where he was so clearly disqualified, and by advancing the hearing date for confirmation of a sale to himself.

Purchasing property from a conservatorship estate over which he was presiding constitutes prejudicial misconduct. It violated the former Code of Judicial Conduct, effective January 1, 1975, canons 1, 2 and 5C(1)/5C(3) (judges should refrain from financial and business dealings that tend to reflect adversely on their impartiality or exploit their judicial position, should manage their investments and other financial interests to minimize the number of cases in which they are disqualified).

**Count Four**

Respondent's failure to disclose information on his Statements of Economic Interests constitutes willful misconduct. He was required to file the statements only because he was a judge; therefore, he was acting in his judicial capacity when he completed them. (Gov. Code, § 87203; *Adams v. Commission on Judicial Performance (Adams II)* (1995) 10 Cal.4th 866, 910 [commission's inquiry was directed to respondent because he was a judge, and his reply was required as one of his judicial functions; therefore, judge was acting in judicial capacity in replying to commission inquiry]).

Statements of Economic Interests are filed under penalty of perjury; respondent's omission of information was unjudicial because it violated present

and former canons 1 and 2. He acted in bad faith because his purpose was to conceal information.

## DISCIPLINE

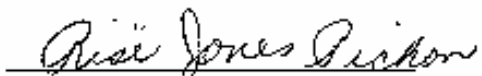
Judge Sullivan has stipulated, and the commission concludes, that Judge Sullivan engaged in a pattern of improper financial dealings and fiduciary activities from the time he became a judge in 1987 until he decided to retire in 1999, after learning of the commission's investigation. Furthermore, Judge Sullivan, on a number of occasions, used his judicial position to further his unethical schemes, all of which had the effect, if not the design, of benefiting him financially.

On the basis of these findings, the commission concludes that publicly censuring Judge Sullivan and barring him from receiving an assignment, appointment, or reference of work from any California state court – the maximum sanction it may levy against a former judge – is the minimum sanction necessary for "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system."[1] The commission would be remiss in its responsibilities if it did not root out, expose and discipline such longstanding financially motivated willful misconduct, regardless of the judge's age or health.

This decision shall constitute the public censure of Judge Sullivan and a bar from Judge Sullivan receiving an assignment, appointment, or reference of work from any California state court.

Commission members Judge Rise Jones Pichon, Justice Vance W. Raye, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Marshall B. Grossman, Mr. Michael A. Kahn, Mrs. Crystal Lui, and Ms. Barbara Schraeger voted to impose this public censure and bar from receiving assignments. Commission members Ms. Gayle Gutierrez, Ms. Ramona Ripston, and Dr. Betty L. Wyman did not participate in this proceeding.

Dated: May 17, 2002



Honorable Rise Jones Pichon
Chairperson

[1] *Broadman* v. *Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| | |
|---|---|
| Inquiry Concerning Judge James I. Aaron,<br><br>No. 164 | DECISION AND ORDER OF PUBLIC CENSURE AND STIPULATED RETIREMENT |

This is a disciplinary matter concerning Judge James I. Aaron, a judge of the Fresno County Superior Court. Formal proceedings having been instituted, this matter comes before the Commission on Judicial Performance on a Stipulation for Discipline by Consent (the Stipulation)[1] pursuant to rule 127 of the Rules of the Commission on Judicial Performance.

The commission concludes that the conduct admitted in the Stipulation – particularly Judge Aaron's promotion of and participation in a dubious investment scheme, and his avoidance of financial obligations over a lengthy period of time by writing worthless checks, making false promises, making misrepresentations and otherwise engaging in delaying tactics – constitutes, at a minimum, conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission hereby publicly censures Judge Aaron conditioned on his irrevocable retirement from judicial office within five calendar days of the issuance of this decision and order, as agreed to by Judge Aaron in the Stipulation. Should Judge Aaron fail to immediately retire from judicial office, this order may be withdrawn, formal proceedings may be resumed and Judge Aaron's failure to comply with the condition he proposed in the Stipulation will constitute additional and independent grounds for discipline.

## APPEARANCES

Judge Aaron is represented by Jerome Sapiro, Jr., and David A. Sauers of The Sapiro Law Firm in San Francisco, California, and Richard Ewaniszyk of The Hegner Law Firm in Victorville, California. Trial Counsel for the Commission on Judicial Performance is Jack Coyle.

## PROCEDURAL HISTORY

A Notice of Formal Proceedings (the Notice) was filed on December 19, 2001 charging Judge Aaron with six counts of unethical conduct. Pursuant to rule 121, the commission requested the appointment of three special masters. The Supreme Court appointed Justice

[1] With the issuance of this decision, the Stipulation is filed and is available to the public.

Gilbert Nares, presiding, of the Court of Appeal, Fourth Appellate District; Judge Dennis G. Cole of the Superior Court of San Bernardino County; and Judge Talmadge R. Jones of the Superior Court of Sacramento County as masters. Judge Aaron filed his verified answer on February 19, 2002, and the masters held a telephonic pre-hearing conference on April 9, 2002.

On June 21, 2002, the commission was alerted to the parties' Stipulation. The signed Stipulation for Discipline by Consent was submitted on June 26, 2002, pursuant to rule 127 of the Rules of the Commission on Judicial Performance.

## THE PROPOSED DISCIPLINE

In the Stipulation, the parties request that the commission resolve this matter by issuing a public censure, without a bar to assignment, on the condition that Judge Aaron immediately retire from judicial office. Judge Aaron "agrees to irrevocably retire from judicial office effective no later than five calendar days after the commission issues a conditional order of censure pursuant to this stipulation." The Stipulation further recites that Judge Aaron "stipulates that his failure to comply with the condition that he immediately retire from judicial office will result in withdrawal of the conditional order of censure and resumption of formal proceedings, and will constitute additional and independent grounds for discipline."[2]

The Stipulation represents that Judge Aaron "understands that, if the commission accepts this proposed disposition, the commission's order may articulate the reasons for its decision," and he "agrees to accept any such explanatory language that the commission deems appropriate." Judge Aaron has also signed an affidavit consenting "to a censure and retirement from judicial office" as set forth in the Stipulation, stating that his consent is freely and voluntarily given, admitting to "the truth of the alleged charges as modified by" the Stipulation, and waiving review by the Supreme Court.

## THE FACTS

The following facts are based on the Stipulation.[3]

### Count One

As alleged in the Notice and agreed to in the Stipulation, in 1998 and 1999, various persons were induced to invest substantial sums of money in an investment scheme involving Westminster Financial Associates, based on promises of safety of capital and extremely large and quick profits. Judge Aaron, despite having reason to believe that the investment scheme was too good to be true, and suspecting that it might not be legitimate, introduced investors to the

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[2] The Stipulation concludes with a section on mitigation, which sets forth some of Judge Aaron's accomplishments during 24 years of service on the bench and represents that Judge Aaron is held in high regard in Fresno County. In addition, Judge Aaron assures the commission that "he accepts full responsibility for his conduct and is sincerely remorseful," and that "he is diligently working to pay off his remaining obligations and has kept his house payments current."

[3] Unless otherwise indicated, all quotes in this section are from the Stipulation for Discipline by Consent.

scheme, vouched for the personal integrity of one of the promoters (Kenneth Roper), lent the prestige of his judicial office to the scheme, and profited financially from the scheme.

In the fall of 1998, attorney David Mugridge appeared before Judge Aaron in drug court on behalf of a client. Immediately following the hearing, Judge Aaron requested that Mugridge meet with him in his chambers. Judge Aaron engaged Mugridge in a discussion concerning Judge Aaron's marital problems and the reactions of members of their church to those problems. Judge Aaron and Mugridge prayed together.

On a subsequent occasion during the fall of 1998, Mugridge again appeared before Judge Aaron on behalf of a criminal defendant. Judge Aaron did not recuse himself or disclose his prior meeting with Mugridge. In the interim between Mugridge's appearances before Judge Aaron, Roper approached Judge Aaron about an investment opportunity that turned out to involve Westminster Financial Associates. At the conclusion of the court hearing, Judge Aaron again met with Mugridge in his chambers. The Stipulation states that:

> While wearing his judicial robe, Judge Aaron told Mugridge that he knew that it was inappropriate for him to solicit money from Mugridge. However, after noting that both he and Mugridge were Christians, Judge Aaron advised Mugridge of what Judge Aaron characterized as an investment opportunity which could help Mugridge meet his financial goals and about which Roper had recently approached Judge Aaron. Judge Aaron described the investment in general terms as he understood them, that it was supposed to be safe and that there was a promise of quick and large returns. Judge Aaron stated that he had told his son and his best friend about it and suggested that Mugridge invest.

At the time of this conversation, Mugridge was a member of the panel maintained by the Fresno County Superior Court for appointments to represent criminal defendants in capital and special circumstances cases. Judge Aaron never appointed Mugridge to a case and did not know at that time that Mugridge received appointments and compensation from the court.

Approximately two weeks later, Mugridge again appeared before Judge Aaron in connection with the same criminal case. Judge Aaron did not recuse himself or disclose his prior meetings in chambers with Mugridge.

Again following the hearing, Judge Aaron requested that Mugridge accompany him into his chambers. While wearing his robe, Judge Aaron urged Mugridge to invest in the Westminster Financial scheme. Judge Aaron told him that "it was such a good opportunity that he had told his son and best friend about it." Subsequently, during the period shortly prior to Thanksgiving 1998, Judge Aaron made telephone calls to Mugridge at his home and office inviting him to come to a meeting of prospective investors and to meet Ken Roper, whom Judge Aaron claimed was a friend and a private banker/investment advisor.

In November and December 1998, Judge Aaron acted as host at a series of meetings attended by Roper and prospective investors. Judge Aaron introduced Roper to his son,

Mugridge, and several other potential investors. Some of the meetings took place at a Fresno tobacconist shop to which Judge Aaron arranged access.

At one or more of these meetings, Judge Aaron vouched for Roper "by telling prospective investors that Roper was an investment banker whom he had known for many years through his church." The Stipulation recites that:

> Judge Aaron was present when Roper made affirmative representations of fact to induce individuals to invest in Westminster Financial. These representations included that any principal amount invested would remain safely in an attorney's trust account in a federally insured bank, and that very large returns would be realized very quickly. At the time Roper made these representations, Judge Aaron did not dispute them, despite having no reasonable ground for believing them to be true.

Judge Aaron facilitated the investment by pointing out to prospective investors at one or more of the meetings, and in other conversations that "prospective investors included David Mugridge, whom Judge Aaron identified as an attorney, Judge Aaron's son David Aaron, a friend of David Aaron whom Judge Aaron also identified as an attorney, and other persons whom Judge Aaron represented to be fellow Christians and/or long-time friends or acquaintances of his or of Roper, whom Judge Aaron referred to as his 'Christian friend.'"

Judge Aaron suggested that each person should make sure they were comfortable with the investment and should carefully consider it before investing. However, at one or more of these meetings, Judge Aaron permitted references to himself as a judge and his involvement in the plan. "An objective observer could reasonably have concluded that this encouraged the investment by indicating its soundness." Furthermore, although Judge Aaron did disclose to several of the investors "that he did not have any money to invest but expected to receive a portion of Roper's commission," he did not disclose to at least two of the investors:

1. That Judge Aaron personally was not investing in the scheme;
2. That he had entered into agreements to split commissions and/or fees with others connected with the Westminster Financial scheme, specifically Roper and Debbie Alliji; these agreements included payments to him consisting of a percentage of the dollar amounts of the investments that he procured; or
3. That he would be entitled to a percentage of any profits realized by the investors.

These persons, in deciding to invest, relied at least in part on Judge Aaron's nondisclosures. "An objective observer could reasonably have concluded that Judge Aaron's non-disclosures of these material facts facilitated the investment."

In December 1998, at one of the promotional meetings attended by Judge Aaron, it was agreed that Mugridge was the appropriate person to receive and hold the actual investment funds prior to transmitting them to a designated recipient on behalf of Westminster Financial. Accordingly, in December 1998, Mugridge executed certain documents, received investment funds from the other investors, and wire-transferred approximately $197,000 of the Fresno

investors' funds "to an account maintained in Chicago by one of the principals in the scheme, James Baczynski."

In February 1999, all of the Fresno investors had been repaid their initial investment. Mugridge sent a letter to the investors indicating that he was hopeful that their profits would be received very soon.

In approximately April 1999, Judge Aaron received a payment of $20,000 from Debbie Alliji, one of the principals in the Westminster Financial scheme. "Judge Aaron accepted this money even though he knew that the Fresno investors had not received any of the profits they had been promised on their investments." Judge Aaron has continued to retain the $20,000, "despite knowing that Alliji, Roper and Baczynski have all been convicted at trial of or pled guilty to federal criminal offenses, and have been sentenced to lengthy prison terms for their roles in Westminster Financial, described by United States District Judge Oliver Wanger who presided over the trial as a 'classic Ponzi scheme.'"

Judge Aaron's conduct violated canons 1, 2A, 2B(2), 4A(2) and 4D(1) of the Code of Judicial Ethics. Judge Aaron, by participating "in an investment scheme that he suspected might not be legitimate, and which turned out to be fraudulent, and by keeping the money he received" from the scheme, violated canons 1 (failing to observe high standards of conduct to preserve the integrity and independence of the judiciary), 2A (failing to act in a manner that promotes public confidence in the integrity of the judiciary), and 4A(2) (conducting extrajudicial activities that demean the judicial office). Judge Aaron violated canon 2B(2) by lending the prestige of his judicial office to advance his own pecuniary interests and the pecuniary interests of others. Judge Aaron violated canon 4D(1) by engaging in a deal that "may reasonably be perceived to exploit the judge's judicial position," and by involving himself in a continuing business relationship with an attorney who frequently appeared before other judges in the Fresno County Superior Court.

Judge Aaron violated canon 3E of the Code of Judicial Ethics by failing to disclose, on the record, in the case involving David Mugridge, his meetings with and relationship with Mugridge.

**Count Two**

Judge Aaron's involvement with the Westminster Financial investment scheme included telling some investors that he believed their profits would be forthcoming and otherwise discouraging them from complaining to government authorities.

When the promised profits were not forthcoming in late-December 1998 or January 1999, Judge Aaron and Mugridge telephoned Roper, Baczynski and Alliji and had at least one meeting with Roper. The Fresno investors were repaid their initial investment in February 1999. Judge Aaron and Mugridge continued their efforts to obtain the promised profits. They made numerous telephone calls to the principals, and Mugridge and Judge Aaron met on at least one occasion in Judge Aaron's chambers where they compared notes and discussed their options.

On April 28, 1999, Mugridge wrote a letter to the Fresno investors in which he indicated that Roper had not been "completely forthright" in his dealings with them, that Roper had missed a deadline to pay investors their profit, and that he did not know whether Roper and Alliji were "crooks or simply incompetent." Mugridge's letter also stated that Judge Aaron said that Alliji had paid him a portion of his finder's fee. Subsequently, Judge Aaron received a telephone call from Roper. Judge Aaron then called Mugridge. Judge Aaron told him that Roper was very displeased by statements made by Mugridge and that Roper "wanted to assault or beat up Mugridge." Judge Aaron told Mugridge that he just wanted Mugridge to know of Roper's threat. Mugridge feared for his personal safety as a result of Roper's threat.

Starting in April 1999, Mugridge had increasing difficulty communicating directly with either Roper or Alliji, and Judge Aaron became the primary contact and conduit for information concerning Westminster Financial. "Judge Aaron repeatedly told Mugridge that, based on numerous assurances he received from Roper, Baczynski and/or Alliji, he believed payment was forthcoming, and he counseled Mugridge to be patient. At the time, Judge Aaron still suspected the investment might not be legitimate."

In October 1998, Alliji was indicted for activities in connection with an investment scheme in the Sacramento area, which was similar to the Westminster Financial scheme. Judge Aaron was aware of the indictment by June 1999.

In approximately June 1999, Judge Aaron learned that the federal authorities, including the Internal Revenue Service and the United States Attorney, were conducting a criminal investigation concerning Westminster Financial. Judge Aaron initiated contact and was interviewed by representatives of those agencies. On their behalf, Judge Aaron made clandestine recordings, "by means of a wiretap on his chambers telephone, of conversations between Roper and himself."

Subsequently in late-summer 1999, when Mugridge told Judge Aaron that he was considering complaining to governmental authorities, Judge Aaron advised him that the government was already investigating the matter and urged him not to complain. "Judge Aaron stated to the effect that the 'Feds' would let the Fresno investors realize a profit on their investments if they believed that the deal was legitimate, and that any complaint to the authorities would jeopardize the profit-realization."

In spring 1999, S. invested $125,000 in a separate scheme with Roper, Baczynski and Alliji. He had been solicited to invest by someone outside of the Fresno group. At that time, Judge Aaron had no knowledge of S.'s investment. In the summer of 1999, after S. told Baczynski that he intended to complain to the authorities concerning Westminster Financial, Baczynski referred S. to Judge Aaron. From approximately July through October 1999, Judge Aaron participated in frequent telephone calls with S., including calls that Judge Aaron initiated from his chambers.

> Throughout this period, Judge Aaron urged [S.] to be patient, advised him that the authorities were already investigating the principals, advised him not to complain to the authorities and stated to the effect that if he did so, [S.] might never have a

> chance to get his money back. Judge Aaron also stated to the effect that if the investment was not legitimate he would go to the authorities with him.

The Stipulation states that Judge Aaron believed that S. might at least get his money back since the Fresno investors had received theirs. The Stipulation, however, also recites that Judge Aaron's statements to S. "might have had the effect of delaying the federal investigation: [S.] was not contacted by federal authorities until approximately September 1999."

Judge Aaron, by providing assurances to investors when he suspected the investment might not be legitimate, and otherwise discouraging them from complaining to government authorities, violated canons 1 (failing to observe high standards of conduct), 2A (failing to act in a manner that promoted public confidence in the integrity of the judiciary), 2B (2) (lending the prestige of his judicial office to advance his pecuniary interests and those of others) and 4A(2) (demeaning the judicial office) of the Code of Judicial Ethics. Judge Aaron violated canon 4D(1)(a) by dissuading Mugridge and S., who may have been influenced by the fact that Judge Aaron was a judge, from complaining to the authorities.

**Count Three**

During 1998 and 1999, Judge Aaron engaged in frequent telephone conversations at the court with Roper, Baczynski, and Alliji regarding the Westminster Financial scheme. Judge Aaron instructed court staff that all calls from these persons were to be put through to him either on the bench or in his chambers.

Judge Aaron's conduct violated canons 1, 2A and 3A of the Code of Judicial Ethics. He violated canon 1 by failing to observe high standards of conduct, and he violated canon 2A by failing to act in a manner that promoted public confidence in the integrity of the judiciary. Judge Aaron violated canon 3A by directing that calls from the principals in the Westminster Financial scheme be put through to him on the bench, thus giving personal matters precedence over his judicial duties.

**Count Four**

The Stipulation contains no findings as to Count Four, but notes that the parties request that the count be dismissed.

**Count Five**

Judge Aaron avoided his financial obligations over a substantial period of time by writing worthless checks, making false promises and misleading representations, failing to disclose material information, failing to communicate with his creditors and otherwise engaging in delaying tactics.

Judge Aaron failed to make payments required under the terms of loan contracts, secured by deeds of trust on his personal residence. "This resulted in the commencement of numerous foreclosure proceedings respecting his residence, including during June 1991, August 1991,

January 1995, February 1995, May 1995, December 1996, January 1997, April 1997, May 1997, November 1997, December 1997, March 1998, December 1999, and April 2000." The Stipulation represents that Judge Aaron cured each default.

Judge Aaron failed to pay personal property taxes when due on his personal airplane for fiscal years 1992-1993, 1993-1994, 1994-1995 and 1995-1996. He failed to pay personal property taxes when due on his personal airplane and personal boat for fiscal year 1997-1998. Judge Aaron failed to pay personal property taxes when due on his personal boat for fiscal years 1998-1999 and 1999-2000. The County of Fresno commenced legal actions against Judge Aaron in 1997 and 1999 and levied execution on judgments in order to obtain payment of delinquent taxes, penalties and costs. The Stipulation recites that Judge Aaron has paid all of his delinquent taxes, penalties and costs.

In July 1996, Judge Aaron and his then-wife borrowed $50,000 from a couple at 2% interest per month, due in 90 days, and signed a promissory note agreeing to repay in accordance with those terms.

> The note was secured by a third deed of trust on Judge Aaron's residence property. As further ostensible "security" for the loan, Judge Aaron gave a $50,000 check dated July 16, 1996, to the creditors' attorney for him to hold; however, as disclosed by Judge Aaron there were insufficient funds in Judge Aaron's bank account at the time. Judge Aaron made no payments of either principal or interest when due.

In August 1996, Judge Aaron defaulted on the loan secured by the second deed of trust on his residence and in October 1996, he defaulted on the loan secured by the first deed of trust on his residence. Notices of default were recorded in December 1996 and January 1997, and trustee's sales were noticed for April 1997. From approximately November 1996 through July 1997, Judge Aaron made a series of assurances and/or promises to the couple or their attorney that repayment was forthcoming, and he "did so for purposes that included inducing them to not take legal action on the debt."

In March 1997, Judge Aaron tendered a check for $54,000 payable to the husband of the couple "in purported satisfaction of the principal and accrued interest owing under the July 1996 note." Judge Aaron knew that there were insufficient funds in the account on which the check was drawn to cover the check. He told the couple's attorney, that the check would be good by the end of the month when a loan Judge Aaron was obtaining to refinance his home closed. A week later, Judge Aaron forwarded to the husband and his attorney a letter on a mortgage company's letterhead stating that a $370,000 loan to Judge Aaron had been delayed but was a "virtual certainty for the week of March 31." Judge Aaron added a handwritten note reassuring the husband that money was coming and offering to "add 100.00 per day to the $54,000 until I am funded." No payment was made at that time.

In July 1997, the couple sued Judge Aaron's wife for breach of contract under the 90-day note of July 1996. In approximately March 1998, Judge Aaron refinanced his residence and obtained a new first loan of $266,000, "the terms of which required the subordination of the deed

of trust" securing the couple's note. In connection with the subordination, a payment of $5,000 was made to the couple and the lawsuit was dismissed without prejudice on April 6, 1998.

During 1998, Judge Aaron attempted to renegotiate the terms of the July 1996 note. Judge Aaron proposed that the note be rewritten at 14.5% interest from July 1996 to July 1998. The Stipulation recites:

> Judge Aaron prepared a written proposal for paying off the recalculated balance either in a lump sum on July 16, 1998, or in monthly installments of $1,000 per month until his residence was refinanced at a lower rate. Judge Aaron represented that a refinancing in one year was already set up. The representation that a refinancing had been prearranged for a year in the future was misleading. Although Judge Aaron's mortgage broker had promised to process his loan papers in one year, Judge Aaron knew that such refinancing had not been prearranged.

Other than the $5,000 payment in March 1998, Judge Aaron made no payments to the couple. In October 2000, they sued Judge Aaron for breach of contract under the original note, alleging $50,000 principal and $98,000 accrued interest owed. Judge Aaron was served with the summons and complaint in approximately February 2001. He did not file any responsive pleading and a default was entered on June 14, 2001.

On April 24, 1997, Judge Aaron entered into a written agreement with a certain businessman to borrow $10,500 for 90 days at 10% interest. Two weeks later, Judge Aaron entered into a further written agreement with the businessman's company to borrow an additional $26,500 for 75 days at 10% interest. Judge Aaron added a representation to the second loan note that the loan was to be secured with a deed of trust on his personal residence. He failed to disclose to the business man that at that time "his residence was encumbered by three deeds of trust, all of which were in default, and that the holders of both the first and second deeds of trust had recorded notices of trustee's sales of the residence and thus, there was insufficient equity to secure the loan."

Judge Aaron made no payment of either principle or interest on the loans from the businessman and did not secure the second loan with a deed of trust on his residence. After efforts at collection were unavailing, the businessman in November 1998 commenced a lawsuit against Judge Aaron for breach of contract for nonpayment under the two notes, "and for constructive trust based on alleged fraud on Judge Aaron's part." Judge Aaron did not file a responsive pleading and made no appearance.

On approximately March 13, 1999, Judge Aaron and the businessman signed an agreement by which Judge Aaron stipulated to a judgment being entered in the lawsuit on March 31, 1999, for the principal, interest and court costs, unless prior thereto Judge Aaron made a $20,000 payment, "in which case the stipulated judgment would be deferred until May 15, 1999, at which time if the remaining balance had not been paid, judgment could be entered, less any payments previously made. Judge Aaron made no payments."

On or around August 12, 1999, Judge Aaron faxed a handwritten letter to the businessman proposing a meeting on August 24 and assured him that he would have a substantial payment, if not the full amount, at that time. Judge Aaron then requested a short postponement of the meeting. Judge Aaron made no payments.

On December 15, 1999, a default judgment was entered against Judge Aaron in the businessman's lawsuit in the amount of $45,677.61, together with interest at 10%. The Stipulation recites that the "judgment remains unsatisfied in the full amount."

In the middle of April 1998, Judge Aaron purchased a piano from a business for $3,620 plus tax, paying $500 down. Within 48 hours, Judge Aaron rescinded the transaction. The seller voided Judge Aaron's check, but Judge Aaron had already received the piano.

From May through December 1998, the business made repeated, unsuccessful attempts to contact Judge Aaron to arrange for the return of the piano. In December 1998, the business sent Judge Aaron a written proposal offering a 30% discount off the original purchase price, if Judge Aaron would pay the full reduced balance by the end of the year. Judge Aaron did not respond to the proposal, yet continued to retain the piano. The business reissued its offer in January 1999, stating that Judge Aaron either needed to pay or return the piano. Judge Aaron did not respond, but continued to retain the piano.

The business continued to attempt to resolve the matter on numerous occasions between February and June 1999. On July 2, 1999, Judge Aaron left a phone message with a representative of the business stating that he was buying the piano and would send a check for the full balance. On approximately July 8, 1999, Judge Aaron sent the business a check in the amount of $2,730.39 dated that day "with a handwritten note directing [the business] to negotiate the check on Judge Aaron's payday, July 31." Judge Aaron further wrote that he was going to delay his August mortgage payment to pay for the piano. When the business attempted to negotiate the check at the beginning of August, the check was returned on two successive occasions for insufficient funds. Although Judge Aaron told a representative of the business that the July 8 check bounced because he had to pay his mortgage lender, "Judge Aaron did not make a mortgage payment in either July or August."

On approximately August 23, 1999, Judge Aaron promised in a letter to the business to send a cashier's check for the full balance plus $20 as reimbursement for bank charges for the returned check. Instead, on or about September 2, 1999, Judge Aaron sent a cashier's check for $1,000 with a note that he would send the balance on Friday via overnight mail. On Friday, September 3, 1999, Judge Aaron sent a cashier's check for $100 with a note stating that this was all he could scrape together.

In October 1999, the business filed a small claims action against Judge Aaron for $1,650.39, which covered the balance owing after the 30% discount and the partial payment of $1,100. Judge Aaron initially declined service by certified mail and he was personally served in December 1999.

The Stipulation further recites:

> On approximately January 10, 2000, five days before the continued trial date, Judge Aaron telephoned a representative of [the business] and advised that any judge assigned to the case would probably be required to disqualify himself or herself once he or she realized that Judge Aaron was the defendant, and that it would require 30-60 days for an outside judge to be appointed to hear the matter. Judge Aaron then stated that he had sold some jewelry and stock, generating $1,000, and inquired whether [the business] was firm as regards the balance owing. When he was advised that the price was firm, Judge Aaron asked that a representative of [the business] meet him in his chambers on January 14, 2000 – the day before trial. At the meeting, Judge Aaron presented the [business'] representative with a cashier's check for $1,650.39. The lawsuit was dismissed on January 15, 2000.

Judge Aaron's conduct violated canons 1, 2A and 4A(2) of the Code of Judicial Ethics, and the corresponding canons of the former Code of Judicial Conduct that were in force between 1991 and 1995. Judge Aaron, by avoiding his financial obligations over a substantial period of time, writing worthless checks, making false promises and misleading representations, failing to disclose material information, failing to communicate with his creditors, and otherwise engaging in delaying tactics, failed to observe high standards of conduct (canon 1), failed to act in a manner that promotes public confidence in the integrity of the judiciary (canon 2A) and demeaned the judicial office (canon 4A(2)).

**Count Six**

The Stipulation recites that on numerous occasions in 1998-1999, Judge Aaron "ordered a defendant to approach the bench where Judge Aaron then conducted a 'smell test' of the defendant's hair, and/or examined the defendant's eyes." Often the defendant would admit to being under the influence of drugs.

> Judge Aaron would then announce, ostensibly based on such examination and/or admissions, that he knew the defendant was using drugs and would then order the defendant remanded. Pursuant to Judge Aaron's order, the bailiff would handcuff the defendant and hold the defendant in custody in the jury box. Judge Aaron would subsequently release the defendant later in the day with a warning.

Judge Aaron, by remanding defendants based on his personal examination of them, gave the appearance of abandoning his role as a detached neutral magistrate. In so doing, he violated canons 1, 2A and 3B(4) of the Code of Judicial Ethics.

## CONCLUSIONS OF LAW

The parties stipulate that Judge Aaron's promotion of and participation in the Westminster Financial scheme (Count One), his representing to investors that profits would be forthcoming and his discouraging them from complaining to government authorities (Count Two), his instructing staff to put calls from the principals in the Westminster Financial scheme

through to him either on the bench or in chambers (Count Three), and his avoidance of financial obligations over a substantial period of time using false promises, misrepresentations and other delaying tactics (Count Five) constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of article VI, section 18 of the California Constitution. In addition, the parties stipulate that Judge Aaron's use of the "smell test" to determine that defendants were using drugs and placement of defendants in custody (Count Six) constituted improper actions within the meaning of article VI, section 18 of the California Constitution.

The commission concludes that Judge Aaron's conduct as alleged and stipulated to in Counts One, Two, Three and Five constitute, at a minimum, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and that Judge Aaron's use of the "smell test" to determine defendants' use of drugs constitutes, at a minimum, improper action. This matter is before the commission pursuant to Stipulation for Discipline by Consent. Whether or not Judge Aaron's ethical violations may constitute more serious misconduct than that stipulated to has not been argued or briefed and a determination that the violations constituted more serious misconduct would not effect the commission's resolution of this matter.

## DISCIPLINE

The commission accepts the parties' request and hereby dismisses Count Four of the Notice of Formal Proceedings. The commission remains of the opinion that the allegations in Count Four – that Judge Aaron asked Mugridge for a personal loan – set forth a violation of the Code of Judicial Ethics. The commission, however, accepts the parties' representation that material facts are in dispute and are unresoluble without a hearing. In light of the more serious misconduct to which Judge Aaron has stipulated, findings of fact and conclusions of law on Count Four would not alter the commission's disposition of this matter.

The commission is of the opinion that Judge Aaron's conduct, particularly his involvement with Westminster Financial (Counts One and Two) and his duplicitous avoidance of his financial obligations (Count Five) clearly support the imposition of severe discipline. In light of the fact that Judge Aaron will retire within five days of the filing of this opinion, the commission accepts the stipulation and imposes this public censure. The commission believes that this decision and order of public censure, along with Judge Aaron's immediate retirement, will protect the public and maintain public confidence in the integrity and independence of the judicial system.[4]

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[4] The Supreme Court in *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112, quotes the following passage from *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912:

> In making our independent determination of the appropriate sanction, we consider the purpose of a Commission disciplinary proceeding – which is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

Even though Judge Aaron remains eligible for future assignments,[5] the commission trusts that those considering an assignment, appointment or reference of work will review this decision and order.

Judge Aaron is hereby publicly censured for his misconduct as set forth in this decision and order. This public censure is conditioned on Judge Aaron fulfilling his agreement to irrevocably retire from judicial office within five calendar days of the issuance of this order. Should Judge Aaron fail to comply with this condition, this decision and order may be withdrawn, the formal proceedings may be resumed, and Judge Aaron's failure to comply will constitute additional and independent grounds for discipline.

This decision shall constitute the public censure of Judge Aaron.

Commission members Judge Rise Jones Pichon, Justice Vance W. Raye, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Marshall B. Grossman, Mr. Michael A. Kahn, Mrs. Crystal Lui, Ms. Ramona Ripston, Ms. Barbara Schraeger, and Dr. Betty L. Wyman voted to impose this public censure. One public member position is vacant.

Dated: July 8, 2002

Rise Jones Pichon

Honorable Rise Jones Pichon
Chairperson

[5] See California Constitution, article VI, section 18(d).

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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|---|---|
| Inquiry Concerning<br>Former Judge Arthur S. Block, No. 167 | DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BARRING JUDGE BLOCK FROM RECEIVING ASSIGNMENTS |

This is a disciplinary matter concerning Judge Arthur S. Block, a judge of the Riverside County Municipal Court from June 29, 1982 to July 28, 2000, and a judge of the Riverside County Unified Superior Court from July 29, 2000 to December 1, 2002. Formal proceedings having been instituted, this matter came before the Commission on Judicial Performance pursuant to rule 127 of the Rules of the Commission on Judicial Performance.

The commission concludes, based on Judge Block's stipulation, that Judge Block engaged in a pattern of inappropriate sexual conduct, attempted to intimidate potential witnesses during the investigation of the alleged sexual conduct, and improperly attempted to use his office to intercede in a pending matter on behalf of an acquaintance. The commission hereby publicly censures Judge Block and bars him from receiving an assignment, appointment, or reference of work from any California state court.

## APPEARANCES

Judge Block is represented by attorneys Edward P. George, Jr., and Timothy L. O'Reilly of Long Beach, California, John E. FitzGerald III, of Fitzgerald & Mule of Palm Springs, and Rodney Lee Soda of Palm Desert, California. Trial Counsel for the Commission on Judicial Performance is Jack Coyle.

## PROCEDURAL HISTORY

A Notice of Formal Proceedings was filed on June 13, 2002, charging Judge Block with four counts of unethical conduct. Judge Block filed his answer on July 2, 2002. Pursuant to rule 121 of the Rules of the Commission on Judicial Performance, the commission requested the appointment of three special masters and the Supreme Court appointed Judge Jack Komar of the Santa Clara Superior Court (presiding), Judge Vincent J. O'Neill, Jr., of the Ventura County Superior Court, and Judge Dana M. Sabraw of the San Diego County Superior Court as masters. The masters held a prehearing conference on August 22, 2002, and the evidentiary hearing before the masters was scheduled to commence on October 21, 2002 in Pasadena, California.

On October 17, 2002, the commission received a letter from counsel for all parties stating that they had reached an agreement in principle for a stipulated disposition and requesting that

the hearing be taken off calendar so that they could reduce the terms of the settlement to writing for submission to the commission pursuant to rule 127 of the Rules of the Commission on Judicial Performance. On October 18, 2002, the commission issued an order vacating the hearing date. On December 2, 2002, Judge Block and Trial Counsel submitted a Stipulation for Discipline by Consent pursuant to rule 127.[1]

## THE STIPULATION FOR DISCIPLINE BY CONSENT

### A. Judge Block's Retirement and Agreement to Discipline

The Stipulation notes that Judge Block has irrevocably retired from judicial office, effective December 1, 2002.[2]

Judge Block and Trial Counsel propose that the commission dispose of this matter by issuing a censure and bar from receiving an assignment, appointment, or reference of work from any California state court. Judge Block understands that if the commission accepts the proposal, the commission may articulate the reasons for its decision and he agrees to accept any such explanatory language.

Judge Block has signed and submitted an affidavit consenting to the sanction of a censure and bar from any assignments, stating that his consent is freely and voluntarily given, admitting to the truth of the charges as set forth in the Stipulation, and waiving review by the Supreme Court.

### B. The Findings of Fact and Conclusions of Law

The commission adopts the following findings of fact and conclusions of law set forth in the Stipulation for Discipline by Consent.

#### COUNT ONE

> A. In approximately October 2000, Deputy County Counsel Tanya Galvan appeared before Judge Block in a contested juvenile dependency case. During Ms. Galvan's argument, Judge Block wrote "relax" on her hand with a pen. Ms. Galvan felt humiliated and sat down without finishing her argument.
>
> **…**
>
> Judge Block's conduct was in violation of the Code of Judicial Ethics, canons 1, 2A, 3B(4) and 3B(5), and constitutes prejudicial misconduct.

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[1] With the issuance of this decision accepting the Stipulation for Discipline by Consent, the Stipulation is filed and is available to the public.

[2] A redacted copy of Judge Block's November 18, 2002 letter of retirement was submitted with the Stipulation for Discipline by Consent.

B. In approximately February 2001, Judge Block was on the bench during a recess in a juvenile dependency calendar, while attorneys in the courtroom were attempting to resolve cases. Judge Block called Deputy County Counsel Tanya Galvan to sidebar. Judge Block did not ask any other attorney to sidebar. While discussing a legal issue with Ms. Galvan, Judge Block reached out as if to fasten a button on the front of Ms. Galvan's suit. Ms. Galvan was startled and offended. She backed away and buttoned her suit herself.

Judge Block's conduct was in violation of the Code of Judicial Ethics, canons 1, 2A, 3B(4) and 3B(5), and constitutes prejudicial misconduct.

C. On May 8, 2001, Judge Block presided over a contested juvenile dependency hearing. Deputy County Counsel Tanya Galvan represented the Department of Social Services.

During the hearing, Judge Block declared a recess and requested that Ms. Galvan and the attorneys for the father and the mother meet with him in chambers. After discussing certain issues in the case, the attorneys began to leave chambers to return to the courtroom to resume the proceedings. Judge Block asked Ms. Galvan to remain and to close the door.

Judge Block was seated behind his desk, with Ms. Galvan seated across from him. Judge Block told Ms. Galvan that he was attracted to her. Judge Block walked around his desk to Ms. Galvan and had Ms. Galvan stand. Judge Block kissed Ms. Galvan, putting his tongue in her mouth.

When Judge Block released Ms. Galvan, she left chambers and returned to court. Judge Block returned to the bench and presided over further proceedings in the case without disclosing what had happened in chambers.

Judge Block's conduct was in violation of the Code of Judicial Ethics, canons 1, 2A, 2B(1), 2B(2), 3B(4), 3B(5), 3E(1) and 3E(2),[3] and constitutes, at a minimum, prejudicial misconduct.

...

[3] Canon 1 states that a judge shall uphold the integrity and independence of the judiciary, canon 2A states that "a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," canon 2B(1) states that a judge "shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge," canon 2B(2) states that a judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge, canon 3B(4) states that a judge shall be patient, dignified and courteous to litigants, lawyers and others, canon 3B(5) states that a judge "shall perform judicial duties without bias or prejudice," canon 3E(1) states a judge "shall disqualify himself or herself in any proceeding in which disqualification is required by law," and canon 3E(2) states that a judge "shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification."

**COUNT TWO**

A. On August 2, 2000, during a conversation between Judge Block and attorneys and court staff in the courtroom, it was suggested as a joke that court interpreter Margie Stafford be held in contempt for being late.

When Ms. Stafford arrived in the hallway outside the courtroom, a public area where people were present, Deputy Rosas handcuffed Ms. Stafford over her protests and resistance and took her into the courtroom. The following then took place:

> THE COURT: Ms. Stafford, will you listen to the People please. What were you about to say?
> THE INTERPRETER: I said this better be a joke. Take them off.
> THE COURT: What were you going to say, Mr. –
> MR. DAILY: I was going to say perhaps this is the appropriate time for the order to show cause re contempt.
> THE COURT: All right. I understand bail is not available; is that correct?
> MR. DAILY: There is no bail for that.
> THE COURT: Ms. Stafford, I'm sorry but your vacation plans are somewhat awry.

Judge Block then told Ms. Stafford that it was a joke and had Deputy Rosas remove the handcuffs. Ms. Stafford felt humiliated.

Judge Block's conduct was in violation of the Code of Judicial Ethics, canons 1, 2A, 3B(4) and 3B(5), and constitutes prejudicial misconduct.

**…**

**COUNT THREE**

The Riverside County Superior Court engaged the services of independent employment counsel, Gary Scholick, to investigate the allegations made by Tanya Galvan (the subject matter of count one). On May 23, 2001, in connection with that investigation, Judge Block was interviewed by Mr. Scholick. Mr. Scholick advised Judge Block not to discuss the investigation with anyone. He also advised him that retaliation toward any of the persons named during the interview was prohibited and might violate the law. Judge Block told Mr. Scholick that he understood and would abide by his instructions.

On May 31, 2001, Judge Block telephoned Mr. Scholick and told him that another judge had told him that interpreter Margie Stafford had reported incidents involving Judge Block that raised issues of a hostile work environment. Judge Block said that Ms. Stafford had been involved in an incident with his courtroom deputy, but that no incident involving Ms. Stafford had anything to do with sexual

issues. Mr. Scholick advised Judge Block to keep the matter confidential and specifically not to speak to Ms. Stafford about the subject.

On June 5, 2001, Ms. Stafford visited Judge Block's courtroom to watch a trial that was open to the public. Upon observing Ms. Stafford seated in the public area of the courtroom, Judge Block instructed Deputy Sabas Rosas to tell Ms. Stafford that she would not be needed as an interpreter and that she was excused. Ms. Stafford told Deputy Rosas that she was not there as an interpreter, but was there because she had a personal interest in the case. Deputy Rosas related to Judge Block what Ms. Stafford had told him.

At a recess, Judge Block told Ms. Stafford not to leave. Judge Block had Ms. Stafford's supervisor, his courtroom clerk, his court reporter, and his bailiff come into his chambers. Judge Block told those assembled that he had heard rumors that Ms. Stafford had made allegations against him and that if the rumors were true, he did not think that it was appropriate for Ms. Stafford to be present in his courtroom.

Judge Block then had Ms. Stafford come into chambers with the others still present. Judge Block asked Ms. Stafford whether she had made allegations against him. When Ms. Stafford said that she had not, Judge Block told her that she was then welcome in his court.

By this conduct, Judge Block threatened banishment from a public courtroom, and threatened retaliation for complaints against him, potentially dissuading Ms. Stafford, the others present in chambers and others who became aware of his remarks, from making complaints against him. Judge Block's conduct was in violation of the Code of Judicial Ethics, canons 1, 2,[4] 2A, 2B(1) and 2B(2), and constitutes prejudicial misconduct.

**COUNT FOUR**

On January 7, 2001, Nechama Dina Denebeim was cited in Los Angeles for a violation of Vehicle Code section 12500(a) (unlicensed driver operating a vehicle) and section 24600/24353 (broken tail light). As of February 13, 2001, the deficiencies cited had been corrected by Ms. Denebeim. A misdemeanor complaint for failure to appear was mistakenly filed on February 22, 2001, for failure to appear on that date. Ms. Denebeim had appeared on that citation on February 16, 2001, and was given a notice to reappear on March 2, 2001.

[4] Canon 2 states that a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

Apparently this had been overlooked at the time the warrant for non-appearance was issued. Ms. Denebeim reappeared on March 2, and was given a new notice to reappear on March 15, 2001.

In early March 2001, the defendant's father, Yonason Denebeim, a long-time acquaintance of Judge Block's, telephoned Judge Block and complained about the manner in which his daughter had been treated by the court system regarding one of her appearances in Los Angeles traffic court, and asked him to look into the matter.

Ms. Denebeim's case was not assigned to Judge Block and was outside of his court's jurisdiction and would not have come before him for any purpose. Despite that, Judge Block had Ms. Denebeim appear in his chambers in Riverside County, where he had her relate her version of events.

On March 13, 2001, Judge Block telephoned Judge James Brandlin, the site managing judge for the Airport Court branch of the Los Angeles County Superior Court, regarding Ms. Denebeim's case. Judge Block expressed concerns regarding the manner in which the case was processed at the Airport Court and regarding the manner in which Ms. Denebeim was treated by court staff. Judge Block asked Judge Brandlin whether Ms. Denebeim's case could be handled without Ms. Denebeim appearing in Los Angeles, and whether Judge Block could personally verify that she currently possessed a valid driver's license, which he represented that she did.

Judge Brandlin responded by telling Judge Block that the defendant's appearance would be required, and that it would be inappropriate for Judge Block to verify the validity of the defendant's driver's license. Judge Brandlin followed up with a voice mail advising Judge Block not to contact him or his court again regarding the case, as it would be unethical to do so. Judge Brandlin then sent Judge Block a letter warning him that his involvement in the case might have created the appearance that the Denebeims would receive special treatment, and again advising him to not engage in any further ex parte contacts with the Los Angeles County Superior Court regarding the case while it was pending. Judge Block had no further involvement in the case.

Judge Block's conduct was in violation of the Code of Judicial Ethics, canons 1, 2, 2A and 3B(7),[5] and constitutes prejudicial misconduct.

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[5] Canon 3B(7) states, in relevant part, that a judge "shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." The canon then sets forth certain exceptions to the prohibition, none of which are applicable to this instance.

## DISCIPLINE

In adopting these findings and conclusions, the commission recognizes that some of the allegations in the Notice of Formal Proceedings are not resolved by the Stipulation. The commission, however, agrees that in light of Judge Block's retirement and the discipline, the disputed factual issues need not be resolved.[6] In addition, the allegation in Count Two that Judge Block made an offensive comment to Ms. Stafford is dismissed because the factual dispute cannot be resolved without a hearing and its resolution would not affect the discipline imposed.[7]

Similarly, the commission accepts the Stipulation's characterization of Judge Block's unethical conduct as conduct prejudicial to the administration of justice that brings the judicial office into disrepute, because the misconduct is at least that, and determining that one or more of the acts of misconduct constituted willful misconduct could not result in any greater discipline.

Judge Block's admitted misconduct with Ms. Galvan and Ms. Stafford, his deliberate attempt to intimidate witnesses during an investigation after having been counseled not to, and his attempt to intercede in a pending matter on behalf of a friend, is more than enough to support the imposition of a public censure and bar from assignments. Accordingly, based on the above findings and conclusions, the commission, as authorized by article VI, section 18(d) of the California Constitution, publicly censures Judge Block and bars him from receiving an assignment, appointment, or reference of work from any California state court. This is the maximum sanction the commission may levy against a retired judge, and the appropriate sanction for "the protection of the public, the enforcement of rigorous standards of judicial

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[6] The Stipulation states:

> It is alleged that Ms. Galvan did not consent to the kiss; Judge Block disputes this. The parties recognize that lack of consent would constitute a very serious aggravating circumstance. Nonetheless, the parties believe that it is unnecessary to resolve this factual issue at a hearing, for the following reasons: (1) Judge Block has retired from judicial office and has agreed to be barred from acting in a judicial capacity in the future. This sanction protects the public, the judicial system, and court employees from a repeat of such conduct. (2) The disputed issue is a factual one peculiar to this case, rather than an unanswered legal question of judicial ethics. The wrongfulness of the alleged misconduct is beyond debate. (3) The admitted misconduct is otherwise sufficient to support the proposed sanction.

[7] Paragraph B of Count Two of the Notice of Formal Proceedings reads:

> On or about the same day as the handcuffing incident described above, during a hearing over which you were presiding, Margie Stafford was leaning over a juvenile defendant for whom she was interpreting. You remarked to Ms. Stafford, in substance, that you knew why so many juveniles were requesting an interpreter. You then asked Ms. Stafford to approach the bench, and when she did, you said, in substance, that she knew why, and gestured toward and looked directly at Ms. Stafford's breasts. Ms. Stafford felt embarrassed and offended. Because of this incident and the handcuffing incident, she asked not to be assigned to your court again.

conduct, and the maintenance of public confidence in the integrity and independence of the judicial system."[8]

This decision shall constitute the public censure of Judge Block and a bar to Judge Block receiving an assignment, appointment, or reference of work from any California state court.

Commission members Judge Risë Jones Pichon, Justice Vance W. Raye, Ms. Lara Bergthold, Mr. Michael A. Kahn, Mrs. Crystal Lui, Mrs. Penny Perez, Ms. Ramona Ripston, Ms. Barbara Schraeger and Dr. Betty L. Wyman voted to impose this public censure and bar from receiving assignments. Commission members Judge Madeleine I. Flier and Mr. Marshall B. Grossman did not participate in this proceeding.

Dated: December 9, 2002

Honorable Risë Jones Pichon
Chairperson

[8] *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| Inquiry Concerning<br>Former Judge James R. Simpson, No. 168 | DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BARRING JUDGE SIMPSON FROM RECEIVING ASSIGNMENTS |

This is a disciplinary matter concerning Judge James R. Simpson, a judge of the Glendale Municipal Court from December 2, 1994 to January 21, 2000, and of the Los Angeles County Unified Superior Court from January 22, 2000 to December 10, 2001. Formal proceedings having been instituted, this matter came before the Commission on Judicial Performance pursuant to rule 127 of the Rules of the Commission on Judicial Performance.

The commission concludes, based on Judge Simpson's stipulation that, prior to his retirement, Judge Simpson presided over matters involving friends, gave favorable treatment to friends, and tried to influence other judicial officers and police in their handling of matters concerning the judge's friends. The commission hereby publicly censures Judge Simpson and bars him from receiving an assignment, appointment, or reference of work from any California state court.

## APPEARANCES

Judge Simpson is represented by attorneys Edward P. George, Jr., and Timothy L. O'Reilly of Long Beach, California. Trial Counsel for the Commission on Judicial Performance is Jack Coyle.

## PROCEDURAL HISTORY

A Notice of Formal Proceedings was filed on June 27, 2002, charging Judge Simpson with six counts of unethical conduct. Judge Simpson filed his answer on July 31, 2002. Pursuant to rule 121 of the Rules of the Commission on Judicial Performance, the commission requested the appointment of three special masters, and the Supreme Court appointed Justice Eileen C. Moore, presiding, Justice Dennis A. Cornell, and Judge Joan Marie Borba as masters. The masters held a prehearing conference on September 12, 2002, and the evidentiary hearing before the masters was scheduled to commence on December 9, 2002, in Santa Ana, California.

On November 20, 2002, Judge Simpson and Trial Counsel submitted a Stipulation for Discipline by Consent pursuant to rule 127 of the Rules of the Commission on Judicial

Performance.[1] On November 21, 2002, the commission issued an order vacating the hearing date in order that the commission might consider the Stipulation at its December 2002 meeting.

## THE STIPULATION FOR DISCIPLINE BY CONSENT

### A. Judge Simpson's Agreement to Discipline

Judge Simpson and Trial Counsel propose that the commission dispose of this matter by issuing a censure and bar from receiving an assignment, appointment, or reference of work from any California state court. Judge Simpson understands that if the commission accepts the proposal, the commission may articulate the reasons for its decision, and he agrees to accept any such explanatory language.

Judge Simpson has signed and submitted an affidavit consenting to the sanction of a censure and bar from any assignments, stating that his consent is freely and voluntarily given, admitting to the truth of the charges as set forth in the Stipulation, and waiving review by the Supreme Court.

### B. The Findings of Fact and Conclusions of Law

The Stipulation for Discipline sets forth findings of fact and conclusions of law tracking the allegations set forth in the Notice of Formal Proceedings:

#### COUNT ONE

On July 2, 1993, Allen Brandstater received a citation (number VQ08144) for violating Vehicle Code section 5204(a) (improper registration tags). Because Mr. Brandstater was a friend of Judge Simpson and was the campaign manager for his 1994 judicial campaign, Judge Simpson should have been disqualified from participating in the case pursuant to Code of Civil Procedure section 170.1(a)(6)(C).

On August 3, 1993, Mr. Brandstater appeared at the traffic counter of the Glendale Municipal Court and received an extension to September 17, 1993, to pay $10 bail and to show proof of correction. He failed to post bail or show proof of correction.

On March 8, 1994, Judge Barbara Burke issued a bench warrant for Mr. Brandstater for failure to appear. The bail amount on the warrant was $287.

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[1] With the issuance of this decision accepting the Stipulation for Discipline by Consent, the Stipulation is filed and is available to the public.

On September 27, 1995, although the case was not assigned to him, Judge Simpson had his court clerk obtain the file. Judge Simpson recalled the bench warrant and continued the matter to October 4, 1995.

On October 4, 1995, Judge Simpson continued the matter to November 15, 1995 for payment of $270. Mr. Brandstater did not appear in court on November 15, 1995, and did not make payment until November 21, 1995.

Judge Simpson violated the Code of Judicial Ethics, canons 1, 2A, 2B(1) and 3E. By recalling a bench warrant issued 18 months earlier by Judge Burke and continuing the matter twice, Judge Simpson violated canons 1 (failing to observe high standards of conduct "so that the integrity and independence of the judiciary will be preserved"), 2A (failing to respect and comply with the law or act in manner that promoted public confidence in integrity of judiciary), and 2B(1) (allowing a social or political relationship to influence judge's judicial conduct or judgment, or conveying the impression that an individual was in a special position to influence the judge).

Judge Simpson violated canon 3E(1) (judge shall disqualify himself in any proceeding in which disqualification is required by law) because, due to his relationship with Mr. Brandstater, "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code Civ. Proc. § 170.1(a)(6)(C).) The judge also violated canon 3E(2) by failing to disclose on the record his relationship to Mr. Brandstater.

Since Judge Simpson's actions were unjudicial, were conducted in bad faith, and were taken in his judicial capacity, his conduct was willful misconduct within the meaning of article VI, section 18 of the California Constitution. Judge Simpson's conduct was unjudicial in that it violated the Code of Judicial Ethics. Judge Simpson acted in bad faith by taking judicial actions for the improper purpose of benefiting his friend and former campaign manager, Allen Brandstater. In taking judicial actions in the case, Judge Simpson was acting in a judicial capacity.

**COUNT TWO**

Count one is incorporated by reference.

On May 23, 1997, Allen Brandstater was charged in a misdemeanor complaint (case number 7GL02340) with driving under the influence of alcohol in violation of Vehicle Code sections 23152(a) and 23152(b). The complaint alleged that Mr. Brandstater had a blood alcohol content of .20 percent or higher within the meaning of Vehicle Code section 23206.1.

On July 2, 1997, Mr. Brandstater's lawyer appeared before Judge Simpson for a pretrial hearing. Judge Simpson stated that he could not handle the matter

himself, declared a "conflict," and ordered the case transferred to Judge Laura Matz. Because of Judge Simpson's recusal and his relationship with Mr. Brandstater, Judge Simpson should have been disqualified from further participating in the case pursuant to Code of Civil Procedure section 170.3.

On August 19, 1997, Mr. Brandstater pled nolo contendere to a violation of Vehicle Code section 23152(b) and admitted the special allegation of a blood alcohol content of over .20 percent. Judge Matz sentenced Mr. Brandstater to, among other things, three years summary probation, a mandatory fine, a three month first offender alcohol treatment program (hereafter "DUI program"), and 50 extra Alcoholics Anonymous meetings.

On December 18, 1997, Judge Matz extended the deadline for Mr. Brandstater to pay the fine and attend the DUI program to March 18, 1998.

On April 9, 1998, a report of non-compliance with the DUI program requirement was filed with the court. On April 13, 1998, Judge Matz issued a bench warrant for Mr. Brandstater and set bail at $10,000. On April 14, 1998, Judge Matz revoked and reinstated Mr. Brandstater's probation and extended the proof of completion date to May 6, 1998.

On May 18, 1998, another report of non-compliance with the DUI program requirement was filed with the court. On May 19, 1998, despite the fact that he had recused himself and should have been disqualified from the case, Judge Simpson continued the matter to May 29, 1998, to allow Mr. Brandstater additional time to complete the DUI program and file proof of attendance at AA meetings.

On July 30, 1998, another report of non-compliance with the DUI program was filed with the court. On August 3, 1998, Judge Simpson revoked Mr. Brandstater's probation for failure to complete the DUI program, without appearances by the parties. On August 6, 1998, Judge Simpson ordered a bench warrant for Mr. Brandstater's arrest and set bail at $10,000.

Judge Simpson violated the Code of Judicial Ethics, canons 1, 2A, 2B(1) and 3E. By taking actions in Mr. Brandstater's case after he was disqualified, including continuing the case for 10 days when Mr. Brandstater failed to comply with the DUI school probation condition, and subsequently setting bail after revoking Mr. Brandstater's probation, Judge Simpson violated canons 1 (failing to observe high standards of conduct "so that the integrity and independence of the judiciary will be preserved"), 2A (failing to respect and comply with the law or act in manner that promoted public confidence in integrity of judiciary), and 2B(1) (allowing a social or political relationship to influence judge's judicial conduct or judgment, or conveying the impression that an individual was in a special position to influence the judge). Due to his relationship with Mr.

Brandstater, Judge Simpson should have [sic] not have participated in this case, and his judicial actions in the case violated canon 3E(1).

For the same reasons that were stated in Count One, Judge Simpson's conduct was willful misconduct within the meaning of article VI, section 18 of the California Constitution.

**COUNT THREE**

Count one is incorporated by reference.

On January 7, 1999, Mark Enzenauer received a citation (number 365243) for driving an unregistered vehicle in violation of Vehicle Code section 4000(a). On March 25, 1999, Mr. Enzenauer appeared before Glendale Municipal Court Commissioner Steven Lubell and pled guilty. Commissioner Lubell continued the matter to April 30, 1999 for proof of registration. On April 30, 1999, Mr. Enzenauer failed to appear and Commissioner Lubell issued a bench warrant and set bail at $500.

On May 11, 1999, Judge Simpson met in his chambers with Mr. Enzenauer and Mr. Brandstater and discussed Mr. Enzenauer's case. They told Judge Simpson that Mr. Enzenauer had received a registration ticket and had had difficulties in having his vehicle pass a smog inspection. The meeting took place while Commissioner Lubell was on the bench. Twice during the meeting, Judge Simpson called or had his clerk call Commissioner Lubell to summon him to Judge Simpson's chambers about the matter.

When Commissioner Lubell appeared in Judge Simpson's chambers later that afternoon, Mr. Enzenauer and Mr. Brandstater were present. Judge Simpson had Mr. Enzenauer's citation and was reviewing his case file. Judge Simpson asked Commissioner Lubell why Mr. Enzenauer had had to wait so long in his courtroom. Commissioner Lubell told Judge Simpson that he had not made Mr. Enzenauer wait that long. Mr. Brandstater told Commissioner Lubell that Mr. Enzenauer was a good person who had worked for him as a videographer, and Mr. Brandstater requested Commissioner Lubell's help. Judge Simpson asked Commissioner Lubell what could be done. Commissioner Lubell responded that Mr. Enzenauer could resolve the matter in open court.

Judge Simpson then ordered the case transferred back to Commissioner Lubell's court for further proceedings on May 12, 1999. Commissioner Lubell recalled the bench warrant, fined Mr. Enzenauer $135 on the ticket, and granted him an extension to June 11, 1999 to show proof of registration.

At the time of his actions, Judge Simpson knew that Mr. Enzenauer was a friend and business associate of Allen Brandstater. Due to Judge Simpson's relationship with Mr. Brandstater, Judge Simpson should have been disqualified

from participating in Mr. Enzenauer's case pursuant to Code of Civil Procedure section 170.1(a)(6)(C).

Judge Simpson violated the Code of Judicial Ethics, canons 1, 2A, 2B(1), 2B(2), 3B(7) and 3E. By discussing the case with Commissioner Lubell, in the presence of Mr. Brandstater and Mr. Enzenauer, Judge Simpson violated canons 1 (failing to observe high standards of conduct "so that the integrity and independence of the judiciary will be preserved"), 2A (failing to respect and comply with the law or act in manner that promoted public confidence in integrity of judiciary), 2B(1) (allowing social or political relationships to influence judge's judicial conduct or judgment, or conveying the impression that an individual was in a special position to influence the judge), and 2B(2) (lending prestige of judicial office to advance pecuniary or personal interests of others). By discussing the case with Commissioner Lubell outside the presence of the prosecution, Judge Simpson violated canons 2B(2) (judge shall not initiate communications with sentencing judge) and 3B(7) (judge shall not initiate ex parte communications). By transferring the case to Commissioner Lubell's courtroom, Judge Simpson violated canon 3E(1) (judge shall disqualify himself in any proceeding in which disqualification is required by law).

For the same reasons that were stated in Count One, Judge Simpson's conduct was willful misconduct within the meaning of article VI, section 18 of the California Constitution.

**COUNT FOUR**

Count one is incorporated by reference.

On September 14, 1999, Martha Thayer received a citation (number 393301) for failing to stop for a red light in violation of Vehicle Code section 21453(a). The officer who issued the ticket gave Ms. Thayer until October 20, 1999 to appear in court. The case was never assigned to Judge Simpson. In addition, because Ms. Thayer was a good friend of Allen Brandstater and had been a friend or acquaintance of Judge Simpson for more than 30 years, Judge Simpson should have been disqualified from participating in the case pursuant to Code of Civil Procedure section 170.1(a)(6)(C).

Subsequently, Mr. Brandstater visited Judge Simpson in his chambers and asked him whether there was a way Ms. Thayer could avoid paying the fine and whether traffic school would keep the ticket from appearing on her driving record. Judge Simpson told Mr. Brandstater that Ms. Thayer could go to traffic school. Mr. Brandstater left a copy of Ms. Thayer's ticket with Judge Simpson.

Ms. Thayer did not appear in court on October 20, 1999, nor did she contact the clerk's office on or before that date to request a continuance. On October 20, 1999, Judge Simpson, or his court clerk at the judge's direction,

contacted the clerk's office and requested that the matter be continued. As a result, Ms. Thayer's appearance date was continued to December 6, 1999.

Judge Simpson violated the Code of Judicial Ethics, canons 1, 2A, 2B(1), 2B(2) and 3E. By contacting the clerk's office and requesting that the matter be continued, Judge Simpson violated canons 1 (failing to observe high standards of conduct "so that the integrity and independence of the judiciary will be preserved"), 2A (failing to respect and comply with the law or act in manner that promoted public confidence in integrity of judiciary), 2B(1) (allowing social or political relationships to influence judge's judicial conduct or judgment, or conveying the impression that an individual was in a special position to influence the judge), and 2B(2) (lending prestige of judicial office to advance pecuniary or personal interests of others). Judge Simpson's failure to disqualify himself from the case violated canon 3E(1).

Since Judge Simpson's actions were unjudicial, were conducted in bad faith, and were taken in his judicial capacity, his conduct was willful misconduct within the meaning of article VI, section 18 of the California Constitution. Judge Simpson's conduct was unjudicial in that it violated the Code of Judicial Ethics. Judge Simpson acted in bad faith by taking judicial actions for the improper purpose of benefiting his friends, Martha Thayer and Allen Brandstater. By causing Ms. Thayer's case to be continued, Judge Simpson was acting in a judicial capacity.

**COUNT FIVE**

A. In approximately the summer of 1995, Judge Simpson contacted Glendale Municipal Court Commissioner Dona Bracke about an expired registration citation that Judge Simpson said had been issued to the son of a friend of his. The ticket was in warrant status. Judge Simpson asked Commissioner Bracke questions about the ticket, such as how such matters were handled.

B. In approximately the latter half of 1995 or early 1996, Judge Simpson went to Commissioner Bracke with another traffic ticket, told her that it had been issued to a friend of his, told her what the charge was and asked questions about the ticket, such as what the customary fine was.

C. In approximately 1996, Judge Simpson went to Commissioner Bracke's chambers with another traffic ticket that Judge Simpson told her had been issued to a friend of his. Judge Simpson asked Commissioner Bracke questions about the ticket, including what the normal fine would be. Commissioner Bracke later recused herself from the case because of the communication from Judge Simpson.

...

D. In approximately 1997, Judge Simpson called Commissioner Bracke to his chambers. Judge Simpson told Commissioner Bracke that the wife of a good

friend of his who owned a Pasadena restaurant had received a ticket for which she was supposed to have appeared in Commissioner Bracke's courtroom. Judge Simpson told Commissioner Bracke that his friend was a very good person and had catered some events for him. Judge Simpson said that his friend had gone to court in his wife's place because she was ill, but that he left when Commissioner Bracke did not call his wife's name or acknowledge him when he answered on her behalf. As a result, a warrant had issued.

Judge Simpson asked Commissioner Bracke what his friend could do about the warrant. Commissioner Bracke said that Judge Simpson's friend could post bail on the warrant or hire a lawyer to come in. Commissioner Bracke also said that Judge Simpson's friend could bring in documentation and that her practice was to hold a warrant for two weeks if someone had a medical excuse. Judge Simpson later told his friend that he needed to bring to court some documents or medical papers.

Approximately one or two days later, Judge Simpson came through the back door of Commissioner Bracke's courtroom with his friend. Judge Simpson was wearing his judicial robe. The courtroom was full of people. Judge Simpson had his arm around his friend's shoulder, looked at Commissioner Bracke and said that this was the friend whose wife's ticket he had told her about. Judge Simpson patted his friend on the shoulder and assured him that Commissioner Bracke would take care of him. Judge Simpson walked his friend into the audience section of the courtroom to sit down.

Commissioner Bracke put the matter toward the end of the calendar to try to avoid creating the appearance that another judge could bring a friend into court to receive special treatment. When Commissioner Bracke called the case, Judge Simpson's friend responded. He had brought some documents explaining why his wife was unable to come to court. Commissioner Bracke recalled the warrant and held it for one or two weeks for the man's wife to come to court. Later that day, Judge Simpson asked Commissioner Bracke if everything went okay with the citation. Commissioner Bracke told Judge Simpson that she recalled the warrant and held it.

When Judge Simpson's friend's wife later appeared in court, Commissioner Bracke recused herself from the case because of the communications from Judge Simpson.

Judge Simpson violated the Code of Judicial Ethics, canons 1, 2A, 2B(1), 2B(2) and 3B(7). By communicating with Commissioner Bracke about pending traffic cases involving his friends and acquaintances, Judge Simpson violated canons 1 (failing to observe high standards of conduct "so that the integrity and independence of the judiciary will be preserved"), 2A (failing to act in manner that promoted public confidence in integrity of judiciary), 2B(1) (allowing social relationships to influence judge's judicial conduct or judgment, or conveying the

impression that an individual was in a special position to influence the judge), and 2B(2) (lending prestige of judicial office to advance pecuniary or personal interests of others). By discussing cases with Commissioner Bracke outside the presence of one or both of the parties, Judge Simpson violated canon 3B(7) (judge shall not initiate ex parte communications).

Judge Simpson's conduct was prejudicial to the administration of justice and brought the judicial office into disrepute within the meaning of article VI, section 18 of the California Constitution. Prejudicial misconduct is "'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office....'" (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1104, cert. den. (1999) 525 U.S. 1070, citing *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 312.) Because Judge Simpson's purpose in approaching Commissioner Bracke is disputed, the parties do not stipulate that the judge's conduct was in bad faith, and hence willful.

**COUNT SIX**

In 1998, Judge Simpson asked to speak to Glendale Police Officer Randy Petersen in chambers. Once there, Judge Simpson showed Officer Petersen a ticket he had issued that day and told him that the ticket had been issued to someone Judge Simpson knew. Judge Simpson asked Officer Petersen about the circumstances of the ticket and how it could be handled. Judge Simpson's conduct implied that he wanted Officer Petersen to give his friend favorable treatment.

By communicating with Officer Petersen about a traffic ticket the officer had issued to the judge's acquaintance, Judge Simpson violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct "so that the integrity and independence of the judiciary will be preserved"), 2A (failing to act in manner that promoted public confidence in integrity of judiciary), 2B(1) (allowing a social relationship to influence judge's judicial conduct or judgment, or conveying the impression that an individual was in a special position to influence the judge), and 2B(2) (lending prestige of judicial office to advance pecuniary or personal interests of another).

Since Judge Simpson's actions were unjudicial, were conducted in bad faith, and were taken in his judicial capacity, his conduct was willful misconduct within the meaning of article VI, section 18 of the California Constitution. Judge Simpson's conduct was unjudicial in that it violated the Code of Judicial Ethics. Judge Simpson acted in bad faith by acting with the improper purpose of benefiting his acquaintance. By calling a police officer into his chambers to discuss a traffic ticket with the officer, Judge Simpson was acting in a judicial capacity.

### C. The Commission's Adoption of the Findings and Conclusions

The commission adopts these findings of fact and conclusions of law as its findings and conclusions. The commission also concurs with Judge Simpson and Trial Counsel that those allegations in Count Five in the Notice of Formal Proceedings that remain disputed need not be resolved.[2]

## DISCIPLINE

On the basis of these findings and conclusions, the commission, as authorized by article VI, section 18(d) of the California Constitution, publicly censures Judge Simpson and bars him from receiving an assignment, appointment, or reference of work from any California state court. This is the maximum sanction the commission may levy against a former judge, and the appropriate sanction for "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system."[3]

This decision shall constitute the public censure of Judge Simpson and a bar to Judge Simpson receiving an assignment, appointment, or reference of work from any California state court.

Commission members Judge Risë Jones Pichon, Justice Vance W. Raye, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Michael A. Kahn, Mrs. Crystal Lui, Mrs. Penny Perez, Ms. Ramona Ripston, Ms. Barbara Schraeger and Dr. Betty L. Wyman voted to impose this public censure and bar from receiving assignments. Commission member Mr. Marshall B. Grossman did not participate in this proceeding.

Dated: December 9, 2002

Risë Jones Pichon

Honorable Risë Jones Pichon
Chairperson

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[2] The facts stipulated to in paragraphs A through C of Count Five are less detailed than those that were set forth in the Notice of Formal Proceedings. The Stipulation explained:

> The parties have omitted from paragraphs A – C of this count certain facts alleged in the Notice of Formal Proceedings that are in dispute and cannot be resolved without a hearing. The parties believe that it is unnecessary to resolve these factual disputes because (1) Judge Simpson admits that his conduct in paragraphs A – C nevertheless violated the Code of Judicial Ethics, (2) the overall stipulated misconduct is sufficient to support the proposed discipline, and (3) since Judge Simpson is a former judge, resolution of the disputed facts at a hearing would not result in discipline more severe than a censure and a bar.

[3] *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.

FILED

FEB 24 2003

Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| Inquiry Concerning Former Judge James R. Simpson<br><br>No. 168 | MODIFICATION OF DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BARRING JUDGE SIMPSON FROM RECEIVING ASSIGNMENTS |

On December 9, 2002, the Commission entered its Decision and Order Imposing Public Censure and Barring Judge Simpson from Receiving Assignments.

The final paragraph on Page 10 is modified to read:

> Commission members Judge Risë Jones Pichon, Justice Vance W. Raye, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Michael A. Kahn, Mrs. Penny Perez, Ms. Ramona Ripston, Ms. Barbara Schraeger and Dr. Betty L. Wyman voted to impose this public censure and bar from receiving assignments. Commission members Mr. Marshall B. Grossman and Mrs. Crystal Lui did not participate in this proceeding.

The modification is to correct a clerical error concerning the participation of Mrs. Crystal Lui. The modification accurately reflects that Mrs. Crystal Lui had recused herself and did not participate in this matter. It has no other affect upon the Commission's decision and order.

Dated: February 24, 2003

Risë Jones Pichon

Honorable Risë Jones Pichon
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| | |
|---|---|
| Inquiry Concerning<br>Former Judge Vincent J. McGraw, No. 169 | DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BARRING JUDGE McGRAW FROM RECEIVING ASSIGNMENTS |

This is a disciplinary matter concerning Judge Vincent J. McGraw, a judge of the Fresno Municipal Court from October 5, 1989 to June 30, 1998, and a judge of the Fresno County Unified Superior Court from July 1, 1998 to September 20, 2002. Formal proceedings having been instituted, this matter came before the Commission on Judicial Performance pursuant to rule 127 of the Rules of the Commission on Judicial Performance.

The commission concludes, based on Judge McGraw's stipulation, that Judge McGraw during his 2002 campaign for reelection made false and misleading statements in response to questions posed by a television reporter, threatened to bring a legal action in an attempt to dissuade the publication of facts concerning him that he knew to be true, and engaged in improper campaign activities in and around the courthouse. The commission hereby publicly censures Judge McGraw and bars him from receiving an assignment, appointment, or reference of work from any California state court.

## APPEARANCES

Judge McGraw is representing himself. Trial Counsel for the Commission on Judicial Performance is Jack Coyle.

## PROCEDURAL HISTORY

A Notice of Formal Proceedings was filed on September 17, 2002, charging Judge McGraw with three counts of unethical conduct. Pursuant to rule 121 of the Rules of the Commission on Judicial Performance, the commission requested the appointment of three special masters. The Supreme Court appointed Justice Consuelo Maria Callahan, presiding, of the Court of Appeal, Third Appellate District; Judge Roger M. Beauchesne of the Superior Court of Stanislaus County; and Judge Donald Cole Byrd of the Superior Court of Glenn County.

Judge McGraw resigned from the bench effective September 20, 2002 and subsequently moved out of California.

On January 29, 2002, Judge McGraw and Trial Counsel submitted a Stipulation for Discipline by Consent pursuant to rule 127 of the Rules of the Commission on Judicial Performance.[1]

## THE STIPULATION FOR DISCIPLINE BY CONSENT

### A. Judge McGraw's Agreement to Discipline

Judge McGraw and Trial Counsel propose that the commission dispose of this matter by issuing a censure and bar from receiving an assignment, appointment, or reference of work from any California state court. Judge McGraw understands that if the commission accepts the proposal, the commission may articulate the reasons for its decision, and he agrees to accept any such explanatory language.

Judge McGraw has signed and submitted an affidavit consenting to the sanction of a censure and bar from any assignments, stating that his consent is freely and voluntarily given, admitting to the truth of the charges as set forth in the Notice of Formal Proceedings, and waiving review by the Supreme Court.

### B. Findings of Fact and Conclusions of Law

The Stipulation for Discipline by Consent sets forth findings of fact and conclusions of law tracking the allegations set forth in the Notice of Formal Proceedings.

### COUNT ONE

On January 12, 1999, the commission issued to Judge McGraw a notice of intended private admonishment. The private admonishment went into effect on January 26, 1999, when Judge McGraw informed the commission in writing that he would not contest the private admonishment. (Commission Rules 113, 114.) The "statement of facts and reasons" in the private admonishment included the following:

> In January 1998, the judges in the Fresno courts were given access to the Internet through the county's computer system. The policies of Fresno County and the Fresno courts specifically prohibited the use of county computers or the Internet in connection with sexually oriented, sexually explicit, or pornographic material. Judge McGraw was furnished with these policies when he was given Internet access. Beginning in January 1998, and continuing through August 1998, Judge McGraw frequently used the county computer in his chambers to access Internet sites containing sexually explicit materials. The judge's use of the computer for this purpose occurred on weekdays –

[1] With the issuance of this decision accepting the Stipulation for Discipline by Consent, the stipulation is filed and is available to the public.

> before, during and after regular court business hours – and on weekends. Records of the judge's Internet use maintained by Fresno County for the months of April 1998 through August 1998, indicate that the computer was logged on to these Internet sites, on average, approximately fifteen hours per month. Approximately eleven hours per month of this log on time occurred on weekdays between 8:00 a.m. and 5:00 p.m. The county did not maintain records of the judge's Internet use prior to April 1998. The judge's use of the computer violated the policies of Fresno County and the Fresno courts.
>
> On Friday, September 4, 1998, Judge McGraw was confronted about his inappropriate use of the computer by the presiding and assistant presiding judges of the Fresno courts. Judge McGraw was told that an investigation was underway concerning this matter and was given a copy of the county's records reflecting his Internet use in August. Judge McGraw admitted that he was the person accessing the sites reflected in the records. Judge McGraw also admitted that he was aware that his conduct violated the court and county policies prohibiting the use of the computer in connection with sexually explicit materials. During a second meeting that day with the presiding and assistant presiding judges, Judge McGraw admitted that he had been using the computer to access the Internet in the same manner and with the same frequency since January 1998, when the court obtained access to the Internet.
>
> [¶] . . . [¶]
>
> When asked about these matters by the commission, Judge McGraw admitted that his conduct breached county computer protocol and was without excuse.

Judge McGraw ran (unsuccessfully) as the incumbent Fresno County Superior Court judge in a contested race in the March 5, 2002 judicial election. On February 25 and 26, 2002, Judge McGraw participated in two interviews with a reporter for Fresno television station KMPH concerning the 1998 misuse of his court computer, which had become an issue in the campaign. The interviews were conducted in a television studio and were tape-recorded for possible future broadcast. During the interviews, Judge McGraw made the following false and misleading statements in response to questions posed by the reporter:

A. On February 25, 2002, in response to the question whether allegations that he had accessed pornographic sites on his courthouse computer were true, Judge McGraw stated, "I don't have any information of what you're talking

about," "I don't have any information whatsoever." When asked whether his statement was a denial, Judge McGraw stated, "[t]hat's a denial."

B. On February 26, 2002 (all subsequent statements through "K" were on February 26), Judge McGraw denied reports that in 1998 he had used his court computer to "surf the Internet for pornographic material," stating, "[n]o, that is not true. I categorically deny that."

C. Judge McGraw denied that he surfed the Internet for pornographic material on his work computer at the county courthouse in 1998 or at any other time, stating, "[t]hat did not take place."

D. Judge McGraw denied that he ever admitted to his then presiding judge that he had surfed the Internet for any kind of pornographic material, stating, "Not true. That did not happen.... In any way, shape or form."

E. Judge McGraw denied ever talking to his then presiding judge about "any of this," stating, "[n]o. I really don't know what you're talking about."

F. Judge McGraw denied that he ever admitted to his then presiding judge that he had misused his computer "in any way, shape or form, either in 1998 or since then," stating, "[n]o sir.... No. And, the questions you're asking me are very troubling because this is something that would have been the subject of judicial discipline and I have not been disciplined for these things that you are talking about."

G. Judge McGraw denied that he was disciplined by the Commission on Judicial Performance for improper use of his court computer, stating, "I have not been disciplined for these things that you are talking about."

H. Judge McGraw denied that he was ever privately disciplined by the Commission on Judicial Performance for improper use of his court computer or for any other reason "in any way, shape or form," stating, "[n]o ... [not] in any way."

I. Judge McGraw denied that he ever misused his court computer at any time throughout his career, stating, "[n]ot at any time ... throughout my career."

J. Judge McGraw stated that he initiated a discussion that day with the court executive officer to find out whether the court's computer system is serviced by in-house court technical personnel or by outside personnel provided by the county, and that he was informed by the court executive officer that the computers are serviced by in-house technical personnel. (In fact, Judge McGraw asked the court executive officer who had discovered that he had accessed pornographic Internet sites on his court computer.) Judge McGraw stated to the reporter that "the reason why that was important for me to know is because if our court

personnel had discovered this, most likely I would have been told about it, and that has not happened. That simply is not true."

K. Judge McGraw stated that his own campaign had "spent almost all day today trying to uncover some substantiation for this story and we have not been able to substantiate the story. The story is not true." Judge McGraw further stated, "[t]he story is not true. It is false."

On March 1, 2002, portions of the interviews with Judge McGraw, including his false statements described in paragraphs A, B, C, D, E, F and G, were broadcast by KMPH in Fresno as part of a news story concerning the upcoming judicial election. Judge McGraw appeared on the program live and read a statement on-air. In that statement he recited a retraction of the pre-recorded denials. He expressed regret for having made them. He stated that he should have responded with "no comment."[2]

Honesty is a "minimum qualification" expected of every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865.) Judge McGraw's conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved), 2A (failing to act in manner that promoted public confidence in integrity of judiciary), 4A(2) (conducting extrajudicial activities that demean the judicial office) and 5B(2) (knowingly misrepresenting qualifications or any other fact concerning himself as candidate for judicial office).

The conduct constitutes prejudicial misconduct, which is generally defined as conduct which would appear to an objective observer to be not only unjudicial conduct, but conduct prejudicial to the public esteem for the judicial office. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1104, citing *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294 at p. 312.)

Under these facts, prejudicial misconduct is also established by willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. (*Doan v. Commission, supra*, 11 Cal.4th at p. 312, quoting *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284, fn. 11.) In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. (*Broadman v. Commission, supra,* 18 Cal.4th at p. 1093.)

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[2] The commission notes that this statement was both ambiguous and misleading. Although the commission, its members and its staff are prohibited (with only a few exceptions) from disclosing any private discipline, there is no prohibition against a judge revealing that he or she had been privately disciplined.

## COUNT TWO

Toward the end of the February 26, 2002 KMPH interview, Judge McGraw threatened legal action against "the station" if it published the allegations that he had denied. Judge McGraw stated, "I'm concerned if these allegations are on your newscast that my reputation, my career, twelve years on the bench, a sitting judge, is going to be damaged." Judge McGraw further stated, "I've heard of no evidence so far to substantiate the allegations. And it sounds to me like this is reckless," and that "it troubles me that if this is the subject of media coverage, that my reputation will be injured. And I'm seriously considering whether or not I shouldn't be seeking counsel and considering a lawsuit." Judge McGraw also stated that he had considered "filing a lawsuit in order to protect my reputation against a reckless story. I have been provided with no basis for the story and I know the story is not true." Judge McGraw then re-asserted his denial of the allegations, stating, "I don't know what you're talking about. I know that the allegations are not true." Judge McGraw again denied that he ever misused a county computer, stating, "[a]t no time." Judge McGraw again denied surfing the Web for pornographic sites, stating, "[t]hat's not true."

Judge McGraw's threat to bring legal action and his reiteration that the allegations were not true and that the news story lacked factual basis were made for the purpose of attempting to dissuade the publication of facts concerning him that were true and known by him to be true prior to the March 5, 2002 election.

Judge McGraw's conduct violated the Code of Judicial Ethics, canons 1, 2A, 4A(2) and 5B(2), and constitutes prejudicial misconduct for the same reasons as the conduct covered by Count One.

## COUNT THREE

Prior to the March 5, 2002 election, Judge McGraw engaged in, or involved court employees in, improper campaign activities in and around the courthouse, as follows:

A. In October 2001, Judge McGraw distributed to several hundred court and county employees copies of a Petition in Lieu of Filing Fees and a request that the recipients support his candidacy for judicial office by collecting signatures on a petition. Judge McGraw provided a stamped envelope addressed to himself at his home address for the return of signed petitions to him. Judge McGraw's requests did not include a caution against the solicitation of signatures by court or county employees during working hours in court facilities. When this omission was brought to Judge McGraw's attention, he agreed with court administration's suggestion that the court should send a cautionary E-mail message to all affected court and county employees. Judge McGraw also agreed not to use any petitions circulated in this manner to county or court employees.

Although the requests for support were created using Judge McGraw's own private resources, he utilized court resources in the form of the court's interoffice mail system to distribute some or all of his requests for support.

Some court and/or county employees responded to Judge McGraw's request by soliciting signatures during working hours and/or in public facilities, activities which were prohibited by county ordinance. (Fresno County Ordinance Code, § 3.08.110(A)(1) and (2).) Some of [the] persons from whom Judge McGraw requested support were court employees subordinate to him.

B. Judge McGraw distributed a campaign brochure containing a photograph of himself and members of his judicial staff, who are employees of the Fresno county courts. Judge McGraw did not obtain the permission or consent of the staff members prior to including their photograph in his campaign brochure; some members of the staff complained about the unauthorized use of their photograph. (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 880-881; prejudicial misconduct found where judge used photograph of court staff in reelection campaign without permission.) When this complaint was brought to the attention of Judge McGraw by court administration, Judge McGraw discontinued distribution of the campaign brochure and re-printed the campaign literature, omitting the photograph of judicial staff.

C. Judge McGraw engaged court employees and staff in conversations about his election campaign during working hours, including asking employees to obtain signatures on a petition in lieu of filing fees and asking employees for other assistance with his campaign.

D. On February 20, 2002, after finishing the 8:30 a.m. calendar, Judge McGraw failed to give precedence to his judicial duties when he left the courthouse to attend to campaign-related activities prior to the call of the 10:00 a.m. small claims calendar. Judge McGraw returned to the courthouse that morning, but not on time for the 10:00 a.m. calendar, which required some participants in calendared matters to return after lunch.

Judge McGraw's conduct violated the Code of Judicial Ethics, canons 1, 2A, 2B(2) (lending prestige of judicial office to advance his pecuniary or personal interests), 3A (failing to give judicial duties precedence over all other activities) and 5 (engaging in political activity that creates the appearance of impropriety), and constitutes prejudicial misconduct, i.e., conduct which would appear to an objective observer to be not only unjudicial conduct, but conduct prejudicial to the public esteem for the judicial office.

**C. The Commission's Adoption of the Findings and Conclusions**

The Commission adopts these findings of fact and conclusions of law as its findings and conclusions.

## DISCIPLINE

The Supreme Court has indicated that the purpose of a disciplinary proceeding is "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system."[3] These goals support the issuance of a public censure and bar to assignment, even though Judge McGraw was defeated in his bid for re-election.

This decision is the only public determination that Judge McGraw (1) was privately admonished in 1999 for using the computer in his chambers to access Internet sites containing sexually explicit materials, (2) falsely denied, during his 2002 campaign for reelection, that he had been disciplined for accessing Internet sites containing sexually explicit material, (3) threatened legal action in an attempt to dissuade the publication of facts concerning him that he knew were true, and (4) engaged in improper campaign activities in and around the courthouse. This decision reassures the public that such misconduct will be investigated and disciplined even after a judge leaves office.

The censure and bar to assignments is the maximum sanction the commission may levy against a former judge and the appropriate sanction in this instance. In *Inquiry Concerning Judge Patrick Couwenberg* (2001), the commission found, inter alia, that the judge had deliberately and materially misrepresented his qualifications to facilitate his appointment to the bench. The commission removed Judge Couwenberg from the bench.[4] Here, Judge McGraw engaged in a similar dishonest course of conduct by knowingly uttering falsehoods to a television reporter, during his campaign for reelection, in an effort to keep information from the public.

On the basis of these findings and conclusions, the commission orders, as authorized by article VI, section 18(d) of the California Constitution, that Judge McGraw be publicly censured and barred from receiving an assignment, appointment, or reference of work from any California state court. This decision shall constitute the order of public censure and bar.

Commission members Judge Risë Jones Pichon, Justice Vance W. Raye, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Marshall B. Grossman, Mrs. Crystal Lui, Mrs. Penny Perez, Ms. Ramona Ripston and Ms. Barbara Schraeger voted to impose this public censure and bar from receiving assignments. Mr. Michael A. Kahn and Dr. Betty L. Wyman did not participate in this matter.

Dated: April 3, 2003

Risë Jones Pichon

Honorable Risë Jones Pichon
Chairperson

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[3] *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112, citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.

[4] Petition for review denied by California Supreme Court on January 16, 2002.

[No. 170. Mar. 2, 2005.]

# INQUIRY CONCERNING FORMER JUDGE DAVID E. WASILENKO

## SUMMARY

A disciplinary matter was brought concerning a superior court judge, who retired during the proceedings.

The Commission on Judicial Performance censured the retired judge and barred him from receiving any assignment, appointment, or reference of work from any California state court. The commission concluded that the judge had committed six counts of willful misconduct, three counts of prejudicial misconduct, and one count of improper action under Cal. Const., art. VI, § 18, subd. (d), regarding preferential treatment given to the judge's relatives and friends in handling cases. The judge met with a relative in his chambers and gave her advice about a speeding ticket. On several occasions, the judge diverted traffic cases to himself that involved his friends and friends of relatives, giving them more convenient procedural treatment and in some cases not imposing statutory fines. The commission determined that discussing the speeding ticket in chambers was improper action and, like the other acts, violated Cal. Code Jud. Ethics, canons 1, 2A, 2B(1), by creating an appearance and impression of favored treatment. The commission ruled that all of the other charged acts were willful misconduct because the judge abused his power by diverting the cases to himself and providing favorable substantive and procedural treatment to those with special access to the judge in violation of Cal. Code Jud. Ethics, canon 3B(1), and Code Civ. Proc., § 170, and by engaging in some ex parte communications in violation of canon 3B(7), regardless of the lawfulness of the decisions he made. The judge also violated Cal. Code Jud. Ethics, canons 3E(1), 3E(2), by failing to disqualify himself when required by Code Civ. Proc., § 170.1, subd. (a)(6)(C), and by failing to disclose information relevant to disqualification. His pattern of misconduct warranted the severest discipline available. (Opinion by Vance W. Raye, Chairperson.)

## HEADNOTES

(1) **Judges § 6.2—Discipline—Grounds—Ex Parte Communications—Exceptions.**—Normally, ex parte communications with defendants appearing on traffic infractions would contravene Cal. Code Jud. Ethics,

canon 3B(7). Nonetheless, to the extent that a judge is hearing such a case in the ordinary course of judicial business, by absenting himself, the district attorney impliedly, if not expressly, consents to the ex parte communications that necessarily occur in the judicial disposition of such matters. Adjudication of cases under such circumstances clearly is less than ideal. Moreover, the exigencies of the situation call for heightened vigilance on the part of the judge. Economic realities preclude the presence of prosecuting attorneys at most infraction trials. However, a judge involved in such a proceeding must be most circumspect in avoiding an appearance of lack of impartiality. The very absence of a prosecuting attorney makes it all the more important that the court at such trials use the utmost care to preserve not only the reality but also the appearance of fairness and lack of bias.

(2) **Judges § 6.2—Discipline—Canons—Uniform Statewide Standards.**—By their terms, the canons of the California Code of Judicial Ethics impose uniform statewide standards. Whenever an assigned case involves a party the judge knows, the judge must be particularly vigilant to ensure the appearance and reality of independence and impartiality. A judge may know a party more frequently in a small town than in a major metropolitan area, but the judge's ethical duties are the same irrespective of population statistics. Repeatedly diverting nonassigned cases so as to be in a position to afford preferential judicial treatment to family, friends and others specially situated is improper under the canons and intolerable in every county in the State of California.

(3) **Judges § 6.2—Discipline—Grounds—Willful Misconduct.**—There are three levels or types of judicial misconduct described in Cal. Const., art. VI, § 18, subd. (d), that may subject a judge to discipline by the California Commission on Judicial Performance. The most serious, willful misconduct, is defined by the California Supreme Court as consisting of (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. The use of the power of judicial office to benefit a friend is a casebook example of willful misconduct.

(4) **Judges § 6.2—Discipline—Grounds—Willful Misconduct—Elements.**—In order to determine whether a judge's conduct is unjudicial under the first prong of the willful misconduct standard, the conduct is measured with reference to the California Code of Judicial Ethics. The failure of a judge to comply with the canons suggests performance below the minimum level necessary to maintain public confidence in the administration of justice. The bad faith requirement for willful misconduct is satisfied when a judge is (1) performing a judicial act for a

corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority. The judicial capacity prong of the willfulness test has been defined as follows: A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose.

(5) **Judges § 6.2—Discipline—Grounds—Prejudicial Misconduct.**—Prejudicial misconduct is the second most serious type of judicial misconduct, and is a lesser included offense in willful misconduct. A primary distinction between willful and prejudicial misconduct is the presence or absence of bad faith. Unlike willful misconduct, prejudicial conduct does not require the presence of bad faith, but may occur when a judge, though acting in good faith, engages in conduct that adversely would affect the esteem in which the judiciary is held by members of the public who become aware of the circumstances of the conduct. Prejudicial misconduct may be committed by a judge either while acting in a judicial or nonjudicial capacity.

(6) **Judges § 6.2—Discipline—Grounds—Improper Action.**—The least serious type of misconduct is improper action, which consists of conduct that violates the California Code of Judicial Ethics, but which does not rise to the level of prejudicial misconduct. Improper conduct includes conduct that an objective observer aware of the circumstances would not deem to adversely affect the reputation of the judiciary.

(7) **Judges § 6.2—Discipline—Grounds—Action in Cases Not Assigned to Judge.**—It is an abuse of power for a judge to take action in cases not pending before the judge. A judge is dutybound to hear and decide all matters assigned to the judge except those in which he or she is disqualified (Cal. Code Jud. Ethics, canon 3B(1); Code Civ. Proc., § 170). The measure of the duty is coextensive with the limits of authority, that is, the judge is obligated to determine assigned cases, and forbidden to handle cases that are not before the judge as part of normal court business.

(8) **Judges § 6.2—Discipline—Grounds—Preferential Treatment.**—In instances of favoritism, public discipline has been imposed even for quantitatively minimal misconduct because the type of misconduct so seriously damages the reputation of the judiciary. The analysis does not

turn on whether the judge's handling of defendant's case was lawful, but rather on the judge's leniency, special handling, favoritism, being influenced, and the resulting damage to the judicial institution. The defendant is not sanctioned, even in the case of the classic "fix," but rather, the judge is disciplined for harming the reputation of the judiciary by setting up a preferential system for dispensing favors for family or friends or others specially situated. This is true notwithstanding that there may be greater moral reprehensibility when there is an unlawful fix. The gravamen of the wrongdoing is the two-track system of justice—one for those with special access to the judge, and the other for everyone else.

(9) **Judges § 6—Discipline—Willful Misconduct—Preferential Treatment.**—By affording family, friends and others with special connections access to a preferential track of justice in six matters, the judge engaged in unjudicial conduct, in bad faith, while in a judicial capacity, thereby satisfying the three-prong test for willful misconduct. The judge's conduct was unjudicial because it was in violation of Cal. Code Jud. Ethics, canons 1, 2A, and 2B(1).

(10) **Judges § 11—Disqualification—Grounds—Appearance of Bias.**—Cal. Code Jud. Ethics, canon 3E(1), requires a judge to disqualify himself or herself in any proceeding in which disqualification is required by law. The cross-reference "as required by law" includes Code Civ. Proc., § 170.1, subd. (a)(6)(C), requiring disqualification if for any reason a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. The judge should have disqualified from the case of a young woman he considered a daughter and from the case of a young man who had long-standing close connections to the judge, as did his parents.

(11) **Judges § 9—Disqualification—Duty to Disclose Relevant Information.**—Even in instances where disqualification is not required under Cal. Code Jud. Ethics, canon 3E(1), a judge is obligated under canon 3E(2), in all trial court proceedings, to disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification. The judge's failure to disclose on the record his personal and familial connections to persons appearing before him violated canon 3E(2).

(12) **Judges § 6—Discipline—Grounds—Ex Parte Communication.**—In instances where a defendant appeared without counsel on a straight traffic infraction, an issue of the district attorney's implied consent to ex parte communications was raised, since the district attorney has elected

not to appear in these matters. In cases where a misdemeanor is also charged, the district attorney does appear and, thus, there is no issue of implied consent by the prosecutor to ex parte communication with the defendant. Where the judge communicated with individuals also charged with misdemeanors in the absence of the prosecutor, the judge violated Cal. Code Jud. Ethics, canon 3B(7).

**(13) Judges § 6—Discipline—Willful Misconduct—Bad Faith.**—The establishment of the preferential track of justice, for the purpose of providing an expedited, convenient, favored procedure for a family member or friend or other person with special access to the judge was for a corrupt purpose, that is, *not* for the faithful discharge of judicial duties. By definition, such a corrupt purpose constitutes bad faith. In instances where the judge also conferred favored *substantive* treatment on defendants by not imposing statutory fees, the conferring of this additional favoritism confirms the judge's corrupt purpose and bad faith. The judge's repeated abuse of authority in cases that would not have come before him in the ordinary course of business cannot be deemed to be consistent with the faithful discharge of judicial duty, and constitutes bad faith.

**(14) Judges § 6—Discipline—Willful Misconduct—Judicial Capacity.**—The creation of the favored procedural and substantive tracks of justice and the fashioning of special treatment were done in the judge's judicial capacity and by reason of the power of his office.

**(15) Judges § 6.2—Discipline—Willful Misconduct—Unjudicial Conduct—Influence—Ex Parte Communication.**—Cal. Code Jud. Ethics, canon 2B(1), contains two prohibitions. The first provides that a judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, and the second states that a judge shall not convey or permit others to convey the impression that any individual is in a special position to influence the judge. Where the judge did not personally know the defendant, the judge did not allow his relationship with each *defendant* to influence him in violation of canon 2B(1). Because the judge learned that the defendants were friends with persons with whom the judge had close relationships, by putting the defendants on a preferential track, the judge did "convey the impression" that the judge's friends were in a "special position to influence" the judge's handling of the defendants' cases in violation of canon 2B(1). In addition, since the defendants were charged with misdemeanors, there was no basis for finding consent by the prosecutor to the ex parte communication that took place in these cases in violation of canon 3B(7). These combined violations of canons constitute unjudicial conduct and satisfy the first part of the test for willful misconduct.

(16) **Judges § 6.4—Discipline—Proceedings—Objective Standard.**—The gauge of judicial misconduct rests on an objective standard. Where the judge improperly diverted nonassigned cases to himself, his recall of warrants to avoid the arrest and booking of the defendants was an abuse of discretion since none of the cases was legitimately before the judge. The improper course of conduct constitutes a serious abuse of authority that is the antithesis of the "faithful discharge of judicial duty" and is bad faith as a matter of law.

(17) **Judges § 6—Discipline—Grounds—Censure—Improper Action—Appearance of Favoritism.**—The judge's private meeting in chambers with his close relative and discussion of the relative's options with respect to her traffic ticket created an appearance that he was providing her with favored treatment in the resolution of her ticket. Because the judge took no action on the relative's ticket, the misconduct constituted only improper action. Under the constitution, only prejudicial or willful misconduct, not improper action, can form the basis for censure.

(18) **Judges § 6.4—Discipline—Proceedings—Determination of Discipline—Factors.**—The question of the appropriate level of discipline to impose on a judge is examined in the context of the purposes of Commission on Judicial Performance disciplinary proceedings, which are protection of the public, ensuring evenhanded and efficient administration of justice, and the maintenance of public confidence in the integrity of the judicial system. The disposition of a judicial disciplinary case depends in large measure on the nature and number of charges found to be true. The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing lack of judicial temperament and inability to perform judicial functions in an evenhanded manner. Whereas an isolated incident of wrongdoing may arise from a momentary ethical lapse, a continuing pattern reflects poor judgment and lack of judicial temperament. As to a judge who has retired from the bench, the question of suitable judicial temperament remains relevant to the question of whether a censure and bar are necessary and appropriate. A further factor to be considered in terms of whether the judge manifests unsuitability for the bench is the judge's inability or unwillingness to change behavior after less severe discipline by the commission.

(19) **Judges § 6.2—Discipline—Grounds—Censure and Bar—Pattern of Preferential Treatment.**—In a disciplinary matter involving a retired judge, a censure and bar—the maximum discipline available—was the appropriate discipline for favoritism in handling cases. The censure was an effort to repair the past damage to the reputation of the judiciary, and

the bar was in order to safeguard the public going forward by precluding the judge from being a bench officer in California in the future. The judge committed nine incidents of willful misconduct. As the masters found, the judge engaged in a pattern of misconduct in which the judge repeatedly favored his friends with procedural shortcuts that were not available to citizens who had no relationship with the judge. There also were several instances where the judge afforded substantive breaks to the favored few. There was also the pattern, repeated in every count, of the judge diverting nonassigned cases to himself for his specialized handling. The overall scope of wrongdoing was alarming.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85.]

(20) **Judges § 6—Discipline—Proceedings—Determination of Discipline—Factors—Prior Discipline.**—The judge's prior discipline for remarkably similar misconduct demonstrates a lack of awareness of the problems and an unwillingness or inability to improve. The judge's failure or inability to reform suggests unsuitability for judicial office. In instances where the record does not suggest the judge has, or will be able to, overcome the trait leading to the misconduct, and that similar incidents will not recur, comparison of the discipline imposed in other cases is not fruitful.

(21) **Judges § 6.2—Discipline—Grounds—Removal from Office—Preferential Treatment.**—Affording preferential treatment to specially situated defendants constitutes a basis for removal, since mere censure would woefully fail to convey utter reproval of any judge who allows malice or other improper personal motivations to infect the administration of justice.

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**OPINION**

**RAYE, Chairperson.**—This disciplinary matter concerns Judge David E. Wasilenko (ret.), formerly a judge of the Yuba County Superior Court. Judge Wasilenko is charged in 10 counts, generally, of diverting cases to himself that were not pending before him and that otherwise would not have been assigned to him, and affording defendants—relatives, friends, and friends of friends—special favored procedural handling, and additionally in some instances, substantively lenient disposition of their traffic cases and related offenses. The judge is represented by James A. Murphy, Esq., and Harlan B. Watkins, Esq., of Murphy, Pearson, Bradley & Feeney of San Francisco, California. The examiners for the commission are Commission Trial Counsel Andrew Blum, Esq., and commission assistant trial counsel Bradford Battson, Esq.

Three special masters were appointed by the Supreme Court to hear and take evidence and to report to the commission. The masters are Hon. Rodney Davis, Associate Justice of the Court of Appeal, Third Appellate District; Hon. Ramona J. Garrett, Judge of the Solano County Superior Court; and Hon. John W. Runde, Judge of the San Mateo County Superior Court. They held an evidentiary hearing in Sacramento; in their final report to the commission, dated September 30, 2004, they found that Judge Wasilenko committed willful misconduct in six counts, prejudicial misconduct in three counts, and improper action in one count, based on findings and conclusions that we discuss here. We conclude that there were nine instances of willful misconduct, in counts two through 10, and that count one involved improper action.

Judge Wasilenko retired from his judicial office effective January 25, 2005, the day before the final oral argument before the commission. The judge did not appear at the oral argument hearing on January 26, 2005,[1] and both counsel stipulated at the hearing to waive oral argument before the commission. Accordingly, on that date the matter was taken under submission on the written record.

Article VI, section 18, subdivision (d) of the California Constitution, as pertinent to the disciplinary options available to the commission in this matter, provides that the commission may "censure a judge or former judge or remove a judge" for willful or prejudicial misconduct, and provides the commission may bar a former judge who is censured from receiving an assignment, appointment, or reference of work from any California state court. At least in light of the timing of the judge's retirement in this matter, we appear to be constitutionally prohibited by the foregoing from imposing discipline more severe than a censure and a bar against Judge Wasilenko. We do impose such maximum discipline and order Judge Wasilenko censured and barred, based on the statement of facts and conclusions and applicable law set forth in this decision.

## I. Findings of Fact

The operative pleading setting forth the charges against Judge Wasilenko is the first amended notice of formal proceedings, filed on November 18, 2003. Based on the evidence adduced at the hearing before the masters, they found most of the essential facts to be true as charged. To the extent that the masters found certain facts not to have been proven, the examiner does not object,

[1] The commission has been advised that Judge Wasilenko has been absent from the bench since mid-May 2004 pursuant to his physician's orders and that his nonappearance at the oral argument was due to health-related issues.

and we concur. However, the judge objects to the lack of certain findings by the masters, and we will discuss that topic separately. Our findings here are a summary of the masters' findings; we note in brackets or through more extended discussion any significant variation between our own findings and those proposed by the masters.

*Count One*

Sheila Messick received a speeding ticket on September 11, 1999. Messick is married to the judge's first cousin and the judge considers her a close relative. On Messick's initiative, she met with the judge in his chambers on September 24 and discussed a family matter with him. Thereafter, the topic of conversation switched to her ticket and the available options to resolve it. With Messick present, Judge Wasilenko had the file brought to his chambers by a clerk. The case would not have come before Judge Wasilenko in the ordinary course of judicial business and there was no representative of the district attorney's office present. Upon reviewing the file, the judge told Messick the amount of the fine, verified that she was eligible to attend traffic school, and told her the cost of attending school. Without further involvement of the judge, Messick did pay the standard fine and attended traffic school.

"The Judge did not believe he was hearing the matter or otherwise taking any action on Messick's citation. Instead he was answering her questions regarding the nature of the charges and expenses she was facing." Nonetheless, if the case had come before him through a regular assignment to his department, Judge Wasilenko believes he would have been disqualified under Code of Civil Procedure section 170.1 from hearing it.

*Count Two*

Heather Robinson was cited on October 25, 1999, for an expired vehicle registration. Robinson lived with the judge and his family from 1996 to 1998 while she was in high school, and again for several months during mid-1999. The relationship between the judge and Robinson is considered by both of them as that of father and daughter.

Robinson was not living with Judge Wasilenko when she received the citation, but she received mail via the judge's post office box, where a courtesy notice relating to the citation was mailed to her. The judge learned of the citation when he retrieved the notice from his mailbox.

It was stipulated that Robinson's vehicle was reregistered on November 15, 1999, although neither the judge nor Robinson has any recollection of any

discussion between them concerning the matter. Recollections by the judge and Robinson of other details are equally cloudy.

However, it is clear that Robinson "never appeared before [Judge Wasilenko] on the ticket." Nonetheless, on November 18 (three days after the car was reregistered), the judge requested that a clerk bring Robinson's file to his chambers. We find that the judge was alone in his chambers when the clerk arrived with the file.

Robinson's case would not have come before Judge Wasilenko in the ordinary course of judicial business and he made no disclosure, on the record or otherwise, concerning the familial relationship between him and the defendant. The judge wrote "dismissed as corrected" on the file and handed it back to the clerk. A statutorily mandated $10 administrative fee was not imposed by the judge. The masters resolved conflicting inferences and found the judge did have proof of the correction (i.e., evidence of the reregistration) prior to dismissing the case. We accept the masters' resolution and finding.

In their findings relating to count two, the masters describe certain generalized policies and procedures of the Yuba County Superior Court concerning "correctable" offenses.[2] These general practices come into play in other counts as well and are summarized as follows:

—In cases involving correctable traffic infractions, when a person mails or personally presents to a clerk in the clerk's office some proof of correction that has been signed off [verified] by law enforcement, a clerk dismisses the citation [closes the case] without any judicial involvement. In such instance, if there is no verification of the correction, a clerk submits the citation and available documentation to a judicial officer in chambers for a determination of the adequacy of proof of correction.

—There is a $10 dismissal fee fixed by Vehicle Code section 40611 applicable to the dismissal of such correctable infractions. Judge Wasilenko is of the view that he has discretion to waive this fee, and frequently does so, for financial hardship and to alleviate inconvenience to defendants.

—If someone sends documentary proof of correction to the clerk's office without paying the $10 dismissal fee, the documents are returned without dismissing the citation unless the party also has sent money to pay a fine for an accompanying offense listed in the citation. In the latter instance, a clerk will forward the file to a judge with a request to waive the $10 fee [in order

[2] Robinson's expired registration is an example of such a "correctable offense." Upon submission of proof of correction of the violation, that is, evidence of reregistration of the vehicle, the case may be dismissed.

to be able to close the file, thereby reducing the administrative burden of collecting the final $10. *Under no circumstance is a clerk permitted independently to waive the $10 fee.*][3]

—When original documents are sent in as proof of correction, they are placed in the file. If original documents are presented to a clerk at the window, the clerk makes a copy for the file, or a notation on the file, and returns the original. If proof of correction is presented in open court, the clerk includes a notation in the minutes that the citation was dismissed with proof of correction.

*Count Three*

Casey Landis was cited on December 14, 1999, for failure to stop at a stop sign. Landis and the judge knew each other through a variety of church and community connections. Landis also was friends with the judge's daughters and had visited the judge's home about three times; the judge was friends with the defendant's parents.

Prior to the due date for paying the fine, Landis telephoned the judge and told him that he was about to enter the military and therefore needed to clear up the pending citation; he inquired on the telephone whether he could do community service in lieu of paying the fine. The judge told Landis he would need to appear in court and that, then, the judge would "see what he could do" regarding community service.

On March 14, 2000, the judge had a clerk bring Landis's file to chambers and told the clerk he would handle the case as a "walk-in" the next day. On March 15, Landis appeared in open court before Judge Wasilenko. The judge made no disclosure concerning his relationship with Landis or Landis's parents. After Landis pled guilty, he told the judge he could not pay the fine; his request to perform community service was granted and the fee for attending traffic school was waived by the judge. The masters infer, based on the relationships between the judge and the defendant and his parents, that the judge acted, in part, "to provide a favored procedural track through the court system for someone he knew well." We concur. The judge's substantive disposition of Landis's citation was not more lenient than Landis otherwise likely would have received, and his financial situation made him a suitable person to have his fine converted to community service.

[3] The bracketed findings are ours. They are supported by testimony and we find them relevant. It is particularly significant that the clerks cannot waive the $10 fee if a person comes to their windows. By going directly to chambers, several of the defendants escaped paying the $10 fee through an exercise of (assumed) discretion by Judge Wasilenko that otherwise would not be available from a clerk in the clerk's office. The judge's surrogate daughter, Heather Robinson, did not even need to go to chambers to get this benefit (count two).

*Count Four*

Casey Landis—the same defendant as in count three, who had a direct personal relationship with the judge and the judge's daughters, as well as connections with the judge through his parents—was cited on September 22, 2000, for a malfunctioning vehicle light. On October 29, 2000, he was cited again for the malfunctioning light as well as for failing to have proof of insurance. Landis failed to appear, bail was increased and holds were placed on his driver's license.

On March 26, 2001, Landis came to court on a day that "walk-in" calendars were not scheduled. He met with Judge Wasilenko in chambers. The judge had a clerk bring the files for both citations to chambers, and based on Landis showing proof that he had insurance and that the light had been fixed, the judge released the holds on Landis's license and ordered him to complete community service under the judge's personal direction. The finding that the judge had proof of the corrections prior to his taking judicial action is based on the masters' resolution in the judge's favor of conflicting inferences. We accept the masters' resolution and finding.

The masters infer, based on the relationships between the judge and the defendant and his parents that the judge acted, in part, "to provide a favored procedural track through the court system for someone he knew well." We concur. There was no evidence that Landis was in need of expedited assistance in resolving his citations or that there was any inability on his part to use "standard court procedures." The sentence imposed, however, was not more lenient than that Landis otherwise likely would have received, and the 16 hours of community service may have been on the harsh side.

*Count Five*

Nathan Sokoloski was cited on August 10, 2001, and charged with two misdemeanors on September 5, relating to his being under age 21 while driving a motor vehicle containing alcoholic beverages. There are long-standing close connections between the judge and both Nathan and his parents of a nature requiring Judge Wasilenko to disqualify himself.

It is standard practice in Yuba County in cases such as Sokoloski's, when a minor is charged for the first time with possession of alcohol, to divert the defendant to a youth alcohol program run by Pathways, and upon completion of the program, for the case to be dismissed. Typically, the district attorney does not object to the referral to Pathways or to the later dismissal. Normally, however, a minor defendant would need to appear in court, or hire an attorney to appear, in order to be offered the Pathways referral.

Sokoloski's case was scheduled for arraignment on September 12, 2001, in Department 5 (Judge Wasilenko sat in Dept. 4). Prior to September 11, Nathan's father, Jerry Sokoloski, told Judge Wasilenko at a Kiwanis meeting about Nathan's case and that Nathan was attending a fire training program and could not come to court on the 12th, and inquired what to do. The judge explained the Pathways referral program, stated it was discretionary with the district attorney, and said he would talk to the district attorney about a continuance so that Nathan would not need to leave training to come to court.

On September 11, Judge Wasilenko arranged for Sokoloski's case to be heard in his department (despite its being assigned to a different department for the next day). He invited Deputy District Attorney Veronica Henderson and Attorney Jud Waggoman—both of whom were in court on other matters—into chambers. Neither Nathan nor any attorney retained to represent him was present in court or in chambers. The judge asked Waggoman to act as a " 'friend of the court' " in order to " 'make a special appearance' so that both sides would be present" when he continued the case "to enable Sokolo[]ski to stay at the fire academy."

In chambers, the judge disclosed to Henderson and Waggoman that he knew the defendant and his family, told them that the defendant wanted to be referred to Pathways and that he, Judge Wasilenko, "intended to send him there, but that one of Sokolo[]ski's parents had told the Judge that Sokolo[]ski . . . would be unable to appear in court on September 12, 2001." Henderson consented to a continuance to November 1, and Waggoman ostensibly waived time on behalf of the defendant. Judge Wasilenko continued the matter to November 1, ordered it transferred back to Department 5, and stated that he, the judge, personally would provide notice to the defendant and to Pathways.

After the in-chambers conference on September 11, one of Sokoloski's parents told the judge that Nathan would need more time to complete the Pathways program because the fire training program would not be completed until November 2001. The judge replied that the alcohol program could be continued until after Nathan completed his fire training, and based on that assurance from the judge, the parents felt no need to retain counsel to represent Nathan. Following up on the new information about the delay in Nathan's completion of the fire training, Judge Wasilenko had a clerk bring the file to his chambers on September 20, and in chambers told Deputy District Attorney Henderson that Sokoloski needed additional time to complete the Pathways program. Henderson had no objection to additional time being granted, and the judge continued the matter to March 5, 2002, and again transferred the case back to the department in which it originally was scheduled to be heard.

The judge knew he was having an ex parte communication about a pending case when he spoke with Nathan's father. As of the time of the hearing before the masters, the judge was of the view that "since he knew the Sokolo[]ski family and spoke with the defendant's father about the case, he should have recused himself from the case."

The masters infer, based on the relationships between the judge and the defendant and his parents, that the judge acted, in part, "to provide a favored procedural track through the court system for someone he knew well." We concur. However, despite the judge's intercession, it does not appear that Nathan received judicial rulings or referrals different from those he likely would have received had he (or any retained counsel) presented the same information to a different judge with Veronica Henderson as the prosecutor.

*Count Six*

Ryan Heenan was a passenger in the car driven by Nathan Sokoloski (count five) and was cited on August 10, 2001, and criminally charged with a misdemeanor on September 5 for being an underage passenger in possession of alcohol in a motor vehicle. Although Heenan knew the judge and his daughters, the judge does not recall knowing Heenan. As a first-time youthful alcohol offender, Heenan was a suitable candidate for diversion to the Pathways program. (See discussion of Pathways in count five, *ante*, at p. 37.)

Heenan failed to appear on September 6, 2001, in Department 5 for arraignment; Judge Dawson ordered the issuance of a bench warrant which was held until October 25, when Heenan failed a second time to appear, whereupon the warrant issued and was delivered to the Marysville Police Department [to effectuate the defendant's arrest].

At some time after they both were cited, Nathan Sokoloski suggested to Heenan that Heenan should talk to Judge Wasilenko about "what could be done to take care of the case." Nathan told Heenan that he, Nathan, was going to talk to the judge or already had done so. On November 5, Heenan went to the judge's courtroom, and after he had conversations with a couple of bailiffs, Heenan was invited by the judge into chambers. There was nothing scheduled in Heenan's case that day, and misdemeanor arraignments were heard in Department 5 before Judge Dawson at the time. Heenan introduced himself to Judge Wasilenko, showed him the citation, and told him he had not appeared on September 5 because he was "fighting a fire in Yellowstone National Park." The judge had a clerk bring Heenan's file to chambers; it was apparent from the file that Heenan was one of Sokoloski's codefendants in that the one complaint named three defendants—Sokoloski and Heenan, as well as Timothy Goetz, the defendant in count seven.

The masters resolved conflicting inferences in the judge's favor to find that he obtained the advance approval of Deputy District Attorney Veronica Henderson to proceed in her absence, and to recall the bench warrant, reinstate Heenan on his own recognizance (O.R.), and continue the case to give Heenan time to complete the Pathways program. We accept the masters' resolution and finding. Judge Wasilenko told Heenan to enroll in Pathways, and stated that when Heenan completed the program, his case would be dismissed. The judge continued the case to December 17, 2001, for proof of completion of the Pathways program. The masters infer that the judge's intent was to spare Heenan the need to be booked on the warrant when he had good cause for not appearing, and to afford him the opportunity of diversion to Pathways, such as other similarly situated defendants generally are. We concur.

When the judge recalled Heenan's warrant, he was not aware that it had already been sent to law enforcement to effectuate Heenan's arrest. Nonetheless, Judge Wasilenko was of the view that *judges* retained discretion to recall such a warrant, even though according to court policy, court *clerks* could not place a defendant on a walk-in calendar without the defendant first being booked into jail on the warrant. The court policy was adopted by the county judges at a meeting on January 25, 2000, as reflected in the minutes of the meeting introduced into evidence before the masters as exhibit 9, providing as follows: ". . . Adopt new policy as follows: On FTA's [failures to appear] *if the warrant has already gone to the law enforcement agency* and defendant requests to be placed on walk-in calendar *the defendant needs to be booked on said warrant,* if warrant has not gone out to the agency, then defendant can be placed on the walk-in calendar on a specific date and time. . . ." (Italics added.)

The masters construe the court policy as *not* depriving the *judges* of discretion to recall a warrant even after it had gone to law enforcement. They believe it deprived court clerks of any discretion, however. In other words, if a defendant came to the clerk's window with a warrant that had gone to law enforcement, the defendant would need to be booked prior to being allowed access to a judge through the walk-in calendar or otherwise. We concur in the masters' interpretation of the court policy. As noted by the masters, "being booked into jail is necessarily a traumatic experience." It is significant that a defendant such as Heenan, who bypassed the clerks, with direct access to the judge in chambers, avoids the booking trauma. We find that this is a distinct procedural and substantive benefit to Heenan that resulted from the special access that Judge Wasilenko afforded him.

*Count Seven*

Timothy Goetz (like Ryan Heenan in the previous count) was a passenger in the car being driven by Nathan Sokoloski (count five) and was cited on August 10, 2001, and criminally charged with a misdemeanor on September 5 for being an underage passenger in possession of alcohol in a motor vehicle. As a first-time youthful alcohol offender, Goetz also was a suitable candidate for diversion to the Pathways program. (See discussion concerning Pathways, *ante*, at p. 37.)

Goetz appeared before Judge Dawson in Department 5 on September 6, and was referred to Pathways and released on O.R., with the case continued to November 1 for proof of completion of the alcohol program. Goetz failed to appear on November 1 and Judge Dawson ordered the issuance of a bench warrant; the complaint was amended to add a charge for failure to appear—another misdemeanor. For reasons that are not clear, Judge Wasilenko arranged to have Goetz's file brought to chambers the following day, November 2. The masters do find, however, and we concur, that *no causal connection was shown* between Judge Wasilenko requesting the file and the fact that the warrant was not sent to law enforcement.

On November 5, the same day as Heenan (count five) met with Judge Wasilenko in chambers, Goetz also met with the judge in chambers. The judge testified that he recalled being told by Goetz that he too had missed a court date because he was fighting fires. As with Heenan, the masters resolve inferences in the judge's favor to find that he again obtained Veronica Henderson's advance approval, and then rereleased Goetz on O.R., rereferred him to Pathways, and continued his case for proof of completion of the Pathways program. We accept the masters' resolution and finding. Goetz completed the Pathways program in January 2002 and his case was dismissed.

As with Heenan, the masters again infer that the judge's intent was to spare Goetz the need to be booked on the warrant when he had good cause for not appearing, and to afford him the opportunity of diversion to Pathways, such as other similarly situated defendants generally are. We concur. It does not appear that Goetz received judicial rulings or referrals different from those he likely would have received had he (or any retained counsel) presented the same information to a different judge with Veronica Henderson as the prosecutor.

*Count Eight*

Anthony Franks was cited on December 11, 2001, and criminally charged on December 21 with a misdemeanor for driving with a suspended license.

He failed to appear in court on January 10, 2002, and Judge Dawson issued a bench warrant that was signed by Judge Curry on January 17, 2002, and delivered to the Marysville Police Department. A Department of Motor Vehicles hold was placed on Franks's license on January 16, 2002. Franks is a friend of Heather Robinson, the judge's surrogate daughter, but the judge did not recognize Franks when he met him in chambers and does not know him.

On March 6, 2002, Franks accompanied a defendant named Jacqueline Morris to her appearance in court before Judge Wasilenko that day. She was sentenced to community service and was told by the judge to wait until the end of the court session so that the judge could give her contact information regarding her community service. At the end of the calendar, Franks accompanied Morris into chambers. When the judge was finished dealing with Morris's referral to community service, Franks "inquired about Heather." The masters determined, and we concur, that Franks did the name dropping concerning Heather Robinson at the *outset* of his conversation with the judge. Following a brief discussion about Heather, Franks said he had a failure-to-appear matter, and wondered if he could get a walk-in appointment. The judge said "We'll take a look," and requested a clerk bring Franks's file to chambers. In the interim, the judge asked Franks why he had failed to appear. Franks responded, untruthfully, that he had been in the Butte County jail; the judge accepted Franks's false explanation at face value.

A clerk brought Franks's file to chambers. The case was not assigned to Judge Wasilenko and arraignments were handled in a different department. Again, the masters resolve inferences in the judge's favor to find that he again obtained Veronica Henderson's advance approval, and then recalled the bench warrant, ordered Franks released on O.R. and set the matter for arraignment on May 30, 2002. We accept the masters' resolution and finding. The judge did not require Franks to be booked on the warrant. As in count six, the masters again found that in not requiring Franks to be booked, Judge Wasilenko did not violate the court policy (see discussion of court policy, *ante*, at p. 40) that disallowed the court clerks any discretion concerning booking on a warrant that had gone to law enforcement. Again, we concur in the masters' interpretation of the court policy. But as with the situation involving Ryan Heenan who bypassed the clerks, Franks also avoided the trauma of being booked by reason of his direct access to the judge in chambers. We find that this is a distinct procedural and substantive benefit to Franks that resulted from the special access that Judge Wasilenko afforded him.

*Count Nine*

Erin Porter was cited on June 14, 2002, for failing to stop at a stop sign, failing to have proof of insurance, and for having an expired registration. The judge coached Porter in softball for a couple of years while she was in high school. She calls him "Dave" and is a friend of one his daughters. The judge knows Porter's parents and knows her, but does not consider her a friend.

On July 11, 2002, Erin Porter, accompanied by her friend, Erin Hendrix, went to the courthouse where they coincidentally met a court clerk, Lisa Perkins-Sparks, who was a friend of Hendrix. Porter was uncertain where she should go concerning her ticket, and Perkins-Sparks directed her to Department 5, which was presided over by Judge O'Connor at the time. Perkins-Sparks then entered Judge Wasilenko's chambers and conveyed greetings to him from "the Erins"; he asked that they be shown in, which Perkins-Sparks did, and then departed.

In chambers, Porter told Judge Wasilenko she thought she was going to have a trial later that morning on a ticket she had received. She told Judge Wasilenko she was not driving as fast as was stated on the ticket and asked him how to contest the ticket. After verifying from Porter that she had not stopped at the stop sign, as charged, he told her it did not matter how fast she was going; the issue was the failure to stop. The judge admits he counseled Porter to take responsibility for her actions, but denies that he was giving her legal advice concerning the feasibility of mounting a defense. The judge knew that if Porter wanted to contest guilt, her trial would be in a different department from his and that it would not occur until one or two months in the future.

Porter then told Judge Wasilenko she wanted to plead guilty and take care of the matter. Instead of sending her to Department 5 or the clerk's office, the judge had a clerk bring Porter's file to his chambers. Porter pled not guilty or nolo contendere to the stop sign violation and showed the judge and the clerk proof of registration and insurance as of the time of the citation. The judge imposed a fine and penalty assessment for the stop sign violation and dismissed the insurance and registration charges. He did not impose a statutory $10 fee due in connection with the dismissal of the registration violation.

*Count 10*

Kris Kraus was cited on January 30, 1999, for an expired registration and cracked windshield. Following her failure to appear as agreed, a hold was placed on her license on March 23, 1999. The judge and Kraus are longtime

friends and former neighbors on the same street. Their children played together, and the judge coached Kraus's two sons in Little League.

On June 10, 1999, Kraus went to Department 5 and waited all morning for her case to be heard by Judge Dawson, the judge presiding in that department. Her case had not been heard by noon; during the lunch recess, she coincidentally met Judge Wasilenko in the corridor. They talked about their families and Kraus went into the judge's chambers with him. In response to the judge's inquiry, Kraus said she had a ticket for which she had proofs of correction, adding that she had waited all morning for her case to be called and that she needed to return to work. The judge looked at Kraus's proofs, had a clerk bring the file to his chambers, and then dismissed the citation and the associated failure to appear without imposing the statutory $10 correction fee.

*Factual Issues Concerning Ex Parte Communications—Canon 3B(7)*

There is an issue that runs throughout this case, affecting both the findings and conclusions, that arises out of the policy of the Yuba County District Attorney not to staff pure traffic infraction cases in which the defendant appears without counsel and does not seek a trial. The policy is described by the masters as follows:

"The Yuba County District Attorney does not participate in the adjudication of traffic infractions unless the infraction is charged along with felonies or misdemeanors in a criminal complaint or a person receiving a citation charging an infraction is represented by an attorney and elects to contest the infraction in a court trial. In all other cases in which a citation is pending in the Yuba County Superior Court, the judges adjudicate the infractions without any involvement by the district attorney.

"There is no agreement with the Yuba County District Attorney that a judge need not disclose a conflict or potential conflict before adjudicating a traffic infraction or criminal charge."

Patrick McGrath, the Yuba County District Attorney, testified before the masters that the nonappearance policy is driven by budgetary and related personnel constraints and we so find. As correctly noted by the masters, however, McGrath made clear that he did not intend the policy to excuse a judge from the judge's ordinary duty to disclose an actual or potential conflict in any case. The masters found that implementation of the policy necessarily resulted in a judge having ex parte communications with the propria persona defendants who appeared on pure traffic infraction, nontrial matters.

**(1)** Normally, such ex parte communications would contravene California Code of Judicial Ethics canon 3B(7) (all further references to a canon are to

the California Code of Judicial Ethics). Nonetheless, to the extent that a judge is hearing such a case in the ordinary course of judicial business, we agree with the masters that by absenting himself, the district attorney impliedly, if not expressly, consents to the ex parte communications that necessarily occur in the judicial disposition of such matters. Adjudication of cases under such circumstances clearly is less than ideal. Moreover, the exigencies of the situation call for heightened vigilance on the part of the judge. We concur in the views expressed by the court in *People v. Marcroft* (1992) 6 Cal.App.4th Supp. 1, 4 [8 Cal.Rptr.2d 544] on this point: "Economic realities preclude the presence of prosecuting attorneys at most infraction trials . . . . However, a judge involved in such a proceeding must be most circumspect in avoiding an appearance of lack of impartiality. The very absence of a prosecuting attorney makes it all the more important that the court at such trials use the utmost care to preserve not only the reality but also the appearance of fairness and lack of bias."

We believe that all of the foregoing discussion rests on an assumption that the propria persona uncontested pure infraction cases are being heard in the ordinary course of judicial business. However, none of the cases that form the basis of the charges against Judge Wasilenko fit within that pattern. As will be discussed, the judge abused his power by hearing cases that were not legitimately pending before him. Mr. McGrath was not asked about the applicability of his policy to such a situation. In view of the silence of the record, we deem it inappropriate to make findings or conclusions based on assumptions. Further, since a resolution of the issue would not affect the outcome of our ultimate decision, we do not believe it necessary to refer the matter back to the masters for the taking of additional testimony on this limited point.

In the absence of evidence, we decline to make any findings or conclusions concerning canon 3B(7) except as to the counts where it is clear that the nonappearance policy is inapplicable. The masters found the policy inapplicable in count five because Nathan Sokoloski was charged with misdemeanors. We concur, and also agree with the masters that the judge's ex parte communications in connection with count five were in violation of canon 3B(7). (See discussion, *post*, at pp. 52–53.) Following the same line of reasoning, we find that since misdemeanors also were charged against Ryan Heenan (count six), Timothy Goetz (count seven) and Anthony Franks (count eight), the nonappearance policy again was inapplicable, and the ex parte communications that took place in each of those counts were in violation of canon 3B(7). (See discussion, *post*, at p. 55.)

*Factual Issues Concerning Demographics*

Judge Wasilenko, through his counsel, objects to the omissions in the masters' report of the facts that the judge was born in Marysville, has lived in Yuba County his entire life and that both Marysville and Yuba County are sparsely populated. No specific relevance is attributed to these facts, but counsel make passing references to "Marysville is a small community" and that the judge "regularly sees individuals that he is familiar with on some level before him in court on traffic matters." The suggested import of these facts is not explained.

**(2)** By their terms, the canons impose uniform statewide standards. Whenever an assigned case involves a party the judge "knows," the judge must be particularly vigilant to ensure the appearance and reality of independence and impartiality. The situation may arise more frequently in a small town than a major metropolitan area, but the judge's ethical duties are the same irrespective of population statistics. In any case, the demographics of Marysville and Yuba County are irrelevant to the misconduct engaged in by Judge Wasilenko. Repeatedly diverting nonassigned cases so as to be in a position to afford preferential judicial treatment to family, friends and others specially situated is improper under the canons and intolerable in every county in this state.

## II. Conclusions of Law

*The Three Levels of Judicial Misconduct*

**(3)** There are three levels or types of judicial misconduct described in article VI, section 18, subdivision (d), of the California Constitution that may subject a judge to discipline by the commission. The most serious, willful misconduct, is defined by the California Supreme Court as consisting of (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*); *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*).) The use of the power of judicial office to benefit a friend is a "casebook example of wilful misconduct." (*McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 194 [260 Cal.Rptr. 557, 776 P.2d 259] (*McCullough*).)

**(4)** In order to determine whether a judge's conduct is "unjudicial" under the first prong of the foregoing standard, the conduct is measured with reference to the California Code of Judicial Ethics. (*Dodds, supra*, 12 Cal.4th at p. 172; accord, *Oberholzer v. Commission on Judicial Performance* (1999)

20 Cal.4th 371, 395 [84 Cal.Rptr.2d 466, 975 P.2d 663].) " 'The failure of a judge to comply with the canons "suggests performance below the minimum level necessary to maintain public confidence in the administration of justice." ' " (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams II*), citing *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662 [34 Cal.Rptr.2d 641, 882 P.2d 358] (*Adams I*).)

The "bad faith" requirement for willful misconduct is satisfied when a judge is "(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, 18 Cal.4th at p. 1092.)

The "judicial capacity" prong of the willfulness test has been defined as follows: "A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose." (*Broadman, supra*, 18 Cal.4th at p. 1104, citing *Dodds, supra*, 12 Cal.4th at p. 172.)

**(5)** Prejudicial misconduct is the second most serious type of judicial misconduct, and is a lesser included offense in willful misconduct. (*Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 369, fn. 5 [188 Cal.Rptr. 880, 657 P.2d 372].) A primary distinction between willful and prejudicial misconduct is the presence or absence of bad faith. "Unlike wilful misconduct, prejudicial conduct does not require the presence of bad faith, but may occur when a judge, though acting in good faith, engages in conduct that adversely would affect the esteem in which the judiciary is held by members of the public who become aware of the circumstances of the conduct." (*Adams II, supra*, 10 Cal.4th at 878, citing *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 832 [264 Cal.Rptr. 100, 782 P.2d 239] (*Kloepfer*), and *McCullough, supra*, 49 Cal.3d at p. 191; accord, *Broadman, supra*, 18 Cal.4th at p. 1092.) Prejudicial misconduct may be committed by a judge either while acting in a judicial capacity, or in other than a judicial capacity. (*Adams II, supra*, 10 Cal.4th at p. 878, citing *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314 [267 Cal.Rptr. 293, 787 P.2d 591].)

**(6)** The least serious type of misconduct is improper action, which consists of conduct that violates the California Code of Judicial Ethics, but which does not rise to the level of prejudicial misconduct. (Rothman, Cal.

Jud. Conduct Handbook (2d ed. 1999) Improper Action or Dereliction of Duty, § 13.29, pp. 386–387 (Rothman).) Improper conduct includes conduct that an objective observer aware of the circumstances would not deem to adversely affect the reputation of the judiciary. (See *Adams II, supra*, 10 Cal.4th at p. 899 [judge's acceptance of gifts violated canons but in and of itself did not jeopardize the judge's objective appearance of independence and impartiality and thus was improper conduct, not prejudicial misconduct].)

*Judge Wasilenko's Two-track System of Justice*

In 2002, we removed Judge Platt from office for misconduct that included illegal "ticket fixing." (*Inquiry Concerning Platt* (2002) No. 162, Decision and Order Removing Judge Platt from Office, p. 1 [48 Cal.4th CJP Supp. 227, 231] (*Platt*). In an effort to distinguish Judge Wasilenko from Judge Platt, the judge's counsel assert that "Judge Wasilenko did not fix any tickets." (Original underscoring.) Counsel claim, instead, that the judge was dealing with what they call "correctable offenses" or "fix-it violations" that were subject to dismissal anyway upon proof that the violations had been corrected, suggesting that his actions therefore were proper.

There are three difficulties with these assertions. First, not all of the violations that are the subject of the charges against Judge Wasilenko were "correctable." In fact, most of the cases did *not* involve violations that fell within that category: Sheila Messick's speeding ticket in count one was not correctable; Casey Landis's stop sign violation in count three was not correctable; the underage alcohol violations by Nathan Sokoloski, Ryan Heenan and Timothy Goetz in counts five, six and seven were not correctable, nor were the failures to appear by Heenan and Goetz; Anthony Franks's failure to appear in count eight was not correctable; and Erin Porter's stop sign violation in count nine was not correctable.

**(7)** The second problem with the argument is that none of the subject cases was pending before Judge Wasilenko or would have come before him in the ordinary course of judicial business or normal case assignments. It is an abuse of power for a judge to take action in cases not pending before the judge. (Rothman, *supra*, Abuse of Judicial Power, § 3.40, p. 85 & fn. 155, citing four disciplinary decisions by this commission.) A judge is dutybound to *"hear and decide all matters assigned to the judge* except those in which he or she is disqualified." (Canon 3B(1); see Code Civ. Proc., § 170.) The measure of the duty is coextensive with the limits of authority, that is, the judge is obligated to determine assigned cases, and forbidden to handle cases that are not before the judge as part of normal court business. Judge Wasilenko's entire course of conduct in all 10 counts was completely improper and constituted a wholesale abuse of judicial power.

There is a final and most important deficiency in the judge's argument. The determination of whether he violated the canons does not turn on whether there was a "fix" or just a "fix-it." Rather, the gravamen of Judge Wasilenko's wrongdoing is that he set up a two-track system of justice, with special handling available for relatives, friends and others with special connections. The vice in this favoritism does not turn on the line-drawing the judge attempts, but rather, in the damage to the reputation of the judiciary from the double standard. Two earlier decisions by this commission illustrate the point.

In the first illustrative case, Judge Bruce A. Clark was publicly reproved in 1989 for *one incident* of misconduct involving two traffic tickets given to the daughter of a member of the California Assembly. In June 1988, the judge had an ex parte conversation in his home with the assemblywoman concerning her daughter's tickets. The cases were pending before Judge Clark, and based on the communication from the legislator, the judge struck the requirement that the daughter appear in court on the tickets, permitted her to attend traffic school in connection with both tickets, and ordered that both speeding counts be dismissed upon receipt of a traffic school completion certificate. The commission noted in its reproval letter to Judge Clark: "Because the communication from Assemblywoman Wright was in your own home, and because your judicial acts were in chambers, the prosecutor had no opportunity to participate in these proceedings, nor had the public any opportunity to observe them. The judicial decisions you made, *though lawful*, were unusually lenient." (Italics added.)

The commission determined that the judge's conduct violated the canons then in effect that correspond to the current canons 2A (requiring judges to promote public confidence in the integrity and impartiality of the judiciary), 2B(1) (prohibiting a judge from conveying or permitting others to convey the impression that any individual is in a special position to influence the judge), and 3B(7) (prohibiting ex parte communications in a pending proceeding).

In the second illustrative case, Judge B.J. Bjork was publicly admonished in 1995 for *two incidents* of misconduct. In the first underlying case, Judge Bjork was contacted in March 1994 by the clerk for another judge at that judge's request (Judge A), requesting that a member of Judge A's family, who had received a traffic citation, be permitted to attend traffic school. After Judge Bjork rejected the clerk's request, Judge A approached Judge Bjork personally, explained that the relative had previously failed to complete traffic school and requested that Judge Bjork grant the relative a second chance to attend traffic school. Judge Bjork granted the request. A few days later, in the second incident, Judge A again approached Judge Bjork on behalf of the same relative regarding a different traffic citation for driving with an inadequate muffler, for failing to be in possession of a valid driver's license, and for

failure to appear. Judge A indicated that he owned the car and was responsible for the inadequate muffler and for the relative's failure to appear. Based on those representations, and Judge A's statement that he would "take care of the other counts charged in the citation, and without any proof of correction, Judge Bjork dismissed the failure to appear charge, a misdemeanor."

As with Judge Clark, Judge Bjork was found to have violated the equivalent of today's canons 2A and 2B(1). There was no mention in the decision of violations of the ex parte canon, although that would appear to have occurred as well.

The *Clark* case involved only one incident, and there were only two incidents in the *Bjork* matter. Both cases resulted in public discipline. Judge Clark did not "fix" any ticket in the sense that the defendant did not receive a sentence she was not entitled to under the law. In the commission's words, "the decisions . . . made, *though lawful,* were unusually lenient." This is the very distinction that Judge Wasilenko raises with his emphasis on the fact that he was dealing with "fix-it" or "correctable" infractions. The distinction was not deemed determinative in the *Clark* matter.

Notwithstanding the "lawfulness" of Judge Clark's actions, he was publicly reproved for the one incident because of the *appearance of favoritism* and *special access* and the *ex parte contact.* The commission imposed discipline because of the favoritism and special treatment and the resulting harm done to the reputation of the judiciary from the appearance of special access and influence of a legislator. That the treatment was "lenient" would seem to refer to the fact that the legislator's daughter was granted a preferential procedural track that avoided any appearance in court—facts that correspond to Judge Wasilenko's preferential procedural fast track in counts two through 10.

Judge Bjork, on the other hand, would appear to have "fixed" the second ticket as respects the misdemeanor charge. Dismissal of that charge seems like a classic "fix," even though the point is not discussed in the decision. Judge Bjork's public admonishment, however, also was based on the *appearance of leniency and favoritism and special access* arising out of the fact that the defendant was a relative of another judge.

**(8)** The *Clark* matter involved "lenient but lawful" treatment of the defendant, while the *Bjork* matter involved "lenient and unlawful" handling by the judge. In both instances, public discipline was imposed for quantitatively minimal misconduct because the type of misconduct so seriously damages the reputation of the judiciary. *The analysis does not turn on the lawfulness issue,* but rather, on the leniency, special handling, favoritism, being influenced, and the *resulting damage to the judicial institution.* The

defendant is not sanctioned, even in the case of the classic "fix," but rather, the judge is disciplined for harming the reputation of the judiciary by setting up a preferential system for dispensing favors for family or friends or others specially situated. This is true notwithstanding that there may be greater moral reprehensibility when there is an "unlawful fix."

These two cases also highlight that the gravamen of the wrongdoing is the two-track system of justice—one for those with special access to the judge, and the other for everyone else. The nub of the problem is the appearance or reality that Lady Justice is blindfolded. Rather than justice being dispensed with an even hand without regard to who is before the court, the judge has lifted the blindfold, and seeing a relative or friend or some person with influence, the judge tips the scale and puts them on a special track for favored handling. This is corruption at the core of our system of impartial equal justice, and is intolerable. It is our duty to denounce the misconduct in no uncertain terms and to sanction it as the grave ethical violation that it is, in our best effort to ensure evenhanded justice, starting at the very point of access to the judge. That is the reason we impose the most severe sanction on Judge Wasilenko available to us under the circumstances.

The court clerk who was summoned to bring Heather Robinson's file to Judge Wasilenko's chambers knew of the father/daughter relationship between the judge and the defendant. Describing her reaction to witnessing the private handling by the judge of the case in chambers, the clerk testified before the masters that she "was mad after it happened" *because she had just paid her own daughter's ticket* and she "just didn't like it." The evil inherent in a two-track system of justice is so apparent; people "just don't like it" because it is so clearly wrong—yet these simple points obviously elude Judge Wasilenko.

*Counts Two, Three, Four, Five, Nine, 10*

**(9)** In these six counts, the masters applied the Supreme Court's three-prong standard for willful misconduct—(1) unjudicial conduct, (2) committed in bad faith, (3) while acting in a judicial capacity (see discussion, *ante*, at p. 46)—and found it satisfied. We reach the same conclusions for the same, and additional, reasons. We separately analyze the three parts of the test to show how each is satisfied.

Unjudicial Conduct: The masters concluded, as do we, that by affording family, friends and others with special connections access to a preferential track of justice, Judge Wasilenko violated canon 1 (requiring that a judge maintain high standards of conduct so as to uphold the integrity and independence of the judiciary), canon 2A (requiring a judge to respect and

comply with the law and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary), and 2B(1) (prohibiting a judge from allowing family, social or other relationships to influence the judge's judicial conduct or judgment, and prohibiting a judge from conveying or permitting others to convey the impression that any individual is in a special position to influence the judge) in all six counts. Those violations make the conduct unjudicial.

There were additional violations of the canons as follows:

**(10)** Canon 3E(1): This canon requires a judge to disqualify himself or herself in any proceeding in which disqualification "is required by law." As noted by the masters, the cross-reference "as required by law" includes Code of Civil Procedure section 170.1, subdivision (a)(6)(C), requiring disqualification if "[f]or any reason . . . [¶] . . . [¶] . . . [a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." In count two, the judge was handling a case not assigned to him, involving Heather Robinson, whom he considered a daughter. The judge was disqualified from handling the case based on his close relationship with the defendant. The masters so concluded and we agree. Additionally, Judge Wasilenko concedes he should have disqualified himself from hearing Nathan Sokoloski's case (count five). The masters concluded that his failure to do so violated canon 3E(1), and we agree.

**(11)** Canon 3E(2): Even in instances where disqualification is not required under canon 3E(1), a judge is obligated under canon 3E(2), in all trial court proceedings, to "disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification." The masters concluded, as do we, that Judge Wasilenko violated this canon by failing to disclose *on the record* the nature of his relationships with Casey Landis and Landis's parents in counts three and four, the long-term relationships between Erin Porter, her family, and the judge and his family in count nine, and similar personal and familial cross-connections with Kris Kraus in count 10.

**(12)** Canon 3B(7): We have discussed previously (*ante*, at p. 45) our reluctance to make conclusions on the current record concerning violations of canon 3B(7) (prohibiting ex parte communications) in the instances where the defendant appeared without counsel and did not contest a straight traffic infraction matter. These are the matters in which the district attorney does not appear. In cases where a misdemeanor also is charged, however, the district attorney does appear, and thus there is no issue of any implied consent by the prosecutor to ex parte communication with the defendant. Accordingly, the

masters found the ex parte communications in count five—where Nathan Sokoloski was charged with misdemeanors—to be in violation of canon 3B(7), and we agree.[4]

The combined violations of the foregoing canons make Judge Wasilenko's conduct "unjudicial" and satisfy the first of the three requirements for willful misconduct.

**(13)** Bad Faith: The masters' application to the facts of the "bad faith" portion of the test for willful misconduct led them to conclude that Judge Wasilenko acted in bad faith in these six counts, and we agree for the reasons stated by the masters as well as on additional grounds. As a starting point, the masters concluded in all six counts that Judge Wasilenko's handling of each of the cases was for the purpose of providing an *expedited, convenient, favored procedure* for a family member or friend or other person with special access to him. The establishment of this two-track procedural system, although not labeled as such by the masters, was found by them to be for a corrupt purpose, that is, *not* for the faithful discharge of judicial duty. We agree. By definition, such a corrupt purpose constitutes bad faith.

Additionally, the masters found, as do we, that Judge Wasilenko conferred favored *substantive* treatment on three of the defendants involved in these six counts by not imposing the $10 statutory correction fee on them. Included within this class of special beneficiaries was the judge's surrogate daughter, Heather Robinson (count two), who, as the masters note, was not even at the courthouse when her case was dismissed. The judge's friend Erin Porter (count nine) and friend and former neighbor Kris Kraus (count 10) also received this substantive benefit. The conferring of this additional favoritism further confirms the judge's corrupt purpose and bad faith.

As the masters and we have noted, none of the cases involved in these six counts was assigned to Judge Wasilenko and none would have come before him in the ordinary course of judicial business. We have stated our conclusion that the judge therefore abused his power. At least in the context of the patterned behavior here, the repeated abuse cannot be deemed to be consistent with the faithful discharge of judicial duty, and constitutes bad faith.

**(14)** Judicial Capacity: The creation of the favored procedural and substantive tracks by Judge Wasilenko in these six counts was done by him in his judicial capacity. The masters so concluded, as do we. Judge Wasilenko was able to fashion the special treatment in these six counts by reason of the

[4] By a parity of reasoning, we find violations of canon 3B(7) in counts six, seven and eight because they also all involved misdemeanor violations. (See discussion, *post*, at p. 55.)

power of his office. He acted in his judicial capacity, notwithstanding the gross impropriety of his actions.

Judge Wasilenko committed willful misconduct in counts two, three, four, five, nine and 10.

*Counts Six, Seven, Eight*

The masters concluded that Judge Wasilenko committed prejudicial misconduct in these three counts. The defendants—Ryan Heenan, Timothy Goetz and Anthony Franks—all had been charged with misdemeanor offenses. All three had failed to appear and warrants for their arrest had issued in all three cases; in counts six and eight, the warrants had been sent to law enforcement. The judge recalled the warrants in all three cases and in counts six and seven, he diverted the youthful alcohol offenders to the Pathways program.

The masters found that in each instance, the judge's actions "were in good faith" because "they were done for the purpose of making certain that a young man that had good cause for failing to appear was not placed at risk of being arrested and booked on a bench warrant." In counts six and seven, there was an additional purpose, according to the masters, which was to ensure that the young men were "not denied the opportunity to attend the Pathways program to which similarly situated young men are routinely referred." They find that none of the three received treatment that they would not have received from a different judge with Veronica Henderson as the prosecutor.

We respectfully disagree with the masters to the extent that we conclude that all three counts involve willful misconduct. We reach that conclusion by analyzing again the three-prong test for willful misconduct.

**(15)** *Unjudicial Conduct*: The masters concluded that the judge violated canons 1 and 2A in each count, and we agree. In addition, we find the conduct violated canon 2B(1), which contains two prohibitions—the first of which provides that a judge "shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment," and the second of which states that a judge shall not "convey or permit others to convey the impression that *any individual* is in a special position to influence the judge." (Italics added.) The judge did not know any of the three defendants—Heenan, Goetz or Franks. Prior to putting each defendant on a preferential track, however, he learned that Heenan and Goetz were passengers in the car driven by the judge's friend Nathan Sokoloski, and that they were codefendants with Sokoloski, and that Franks was a friend of the judge's surrogate daughter, Heather Robinson.

In each count, the masters expressly found that the judge did not allow his relationship with each *defendant* to influence his judicial conduct or judgment in violation of canon 2B(1). We accept the masters' conclusion. The masters do not discuss the further point of whether the judge was influenced by his relationship with the *defendants' friends.* Accordingly, there is no basis for concluding that the first portion of canon 2B(1) was violated in any of the three counts.

As to the second proscription of the canon, however, we are of the opinion, based on the masters' description of the facts and our reaction to them, that Judge Wasilenko, by his actions, did "convey the impression" that his friends, the Sokoloski family, were in a "special position to influence" his handling of the Heenan and Goetz matters, and that by reason of his father/daughter relationship with Heather Robinson, she was similarly situated to influence him respecting the Franks matter. It *looks to us*—that is to say the judge *did* "convey the impression"—that upon learning of the special relationships, he afforded the special handling. We conclude that the judge did violate the second proscription of canon 2B(1).

In addition, since Heenan, Goetz and Franks all were charged with one or more misdemeanors, the district attorney's policy of not appearing in pure infraction cases was inapplicable. As with count five discussed previously (*ante*, at pp. 52–53), there is no basis therefore for finding consent by the prosecutor to the ex parte communications that took place in these counts. Accordingly, we find the judge violated canon 3B(7) in each of these three counts.

These combined violations of the canons constitute unjudicial conduct and satisfy the first part of the test for willful misconduct.

Bad Faith: The masters concluded that Judge Wasilenko's motivation in these three counts was to use his judicial power to save the defendants the trauma of being booked into jail on the outstanding warrants, and in counts six and seven, additionally to protect Heenan's and Goetz's opportunities for diversion to the Pathways youth alcohol program.[5] They find that the judge was acting in "good faith" in taking steps to realize these objections; we understand this to be the masters' characterization of the judge's subjective intent.

We agree with the masters' conclusion that the judge was acting to spare these young men the trauma of being booked, and to afford Heenan and

[5] It is unclear that preservation of the option of referral to the Pathways program necessitated any action by Judge Wasilenko from chambers. At such time as the two defendants appeared properly and in due course before an assigned judge, the referral would appear to have been the standard practice in the county.

Goetz access to Pathways. However, we believe that there is a preliminary consideration concerning the *reason the judge interceded* on behalf of all three defendants. In that regard these three counts are indistinguishable from the other six counts involving willful misconduct, namely, that he was doling out preferential treatment because of special connections. It is true that Judge Wasilenko was not directly acquainted with the three defendants here. However, each of these three defendants had a direct and close link to the judge's family and close friends. The trigger point for the preferential treatment was the judge's realization of those connections. Thus, the conduct in these three counts appears to us to be part and parcel of the same two-track system based on connections leading to special access as the first six counts we discussed. The conduct cannot be reconciled with the faithful discharge of judicial duty and constitutes bad faith.

**(16)** We have already noted our agreement with the masters' interpretation of the Yuba County court policy concerning bookings on bench warrants that have gone to law enforcement (see discussion, *ante*, at p. 40), namely, that a judge, but not a clerk, retains discretion under the policy to excuse a defendant from being booked on a bench warrant upon a showing of good cause for the failure to appear. The masters' determination that the judge acted in good faith and their explanation of his intent in these three counts appears to rest on an assumed exercise of such discretion. Judge Wasilenko, however, abused his discretion since none of these cases was legitimately before him. A judge to whom the cases might be assigned might exercise discretion to recall the warrants to avoid the booking and arrest of the defendants, but Judge Wasilenko did not have such discretionary authority. In our view, the judge's actions in these three counts are part of the broad pattern of improperly diverting nonassigned cases to himself. That improper course of conduct constitutes a serious abuse of authority that is the antithesis of the "faithful discharge of judicial duty." The gauge of judicial misconduct rests on an objective standard (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1304 [240 Cal.Rptr. 859, 743 P.2d 919]) and we conclude that the judge acted in bad faith as a matter of law.

Since these three cases involved misdemeanors, there was no consent by the district attorney to the judge's ex parte communications with these three defendants in chambers. It was totally improper for them to have had the direct access to chambers—and it was only by that means that they avoided going through the clerk's office as a prerequisite for getting on a walk-in or other court calendar. Since the warrants for Heenan's and Franks's arrests already had gone to law enforcement, they avoided being booked only because they went to chambers. Thus, the two of them did receive a substantially lenient treatment from Judge Wasilenko. They would not have received a similar disposition from another judge because they could not have had their cases heard by another judge without being booked first.

Judicial Capacity: Judge Wasilenko was able to create the favored procedural and substantive tracks in these three counts by reason of the power of his office. He acted in his judicial capacity, notwithstanding that his conduct was seriously unethical.

Judge Wasilenko committed willful misconduct in counts six, seven and eight.

*Count One*

**(17)** We agree with the masters that Judge Wasilenko created an appearance and impression that he was providing his close relative, Sheila Messick, with favored treatment in the resolution of her traffic citation, a case not assigned to him. He did this by having a clerk bring her file to his chambers, where he was alone with Messick, and then discussing the ticket with her in a private meeting. The judge violated canons 1, 2A and 2B(1). However, the judge took no action on his relative's ticket; he only confirmed with her what her options were. Messick left the judge's chambers, paid her fine and attended traffic school. We concur with the masters that this misconduct constitutes improper action. As such, however, it cannot form the basis of the censure and bar we impose on Judge Wasilenko. Under the constitution, that level of discipline may rest only on prejudicial or willful misconduct. (Cal. Const., art. VI, § 18, subd. (d).)

## III. Discipline

**(18)** We examine the question of the appropriate level of discipline to impose on Judge Wasilenko in the context of the purposes of commission disciplinary proceedings, which have been described by the Supreme Court as "protection of the public, ensuring evenhanded and efficient administration of justice, and the maintenance of public confidence in the integrity of the judicial system." (*Kloepfer, supra*, 49 Cal.3d at pp. 864–865.) The disposition of a judicial disciplinary case "depends in large measure on the nature and number of charges found to be true." (*Furey v. Commission on Judicial Performance, supra*, 43 Cal.3d at p. 1307, fn. 2.) "The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing 'lack of temperament and ability to perform judicial functions in an even-handed manner.' [Citation.]" (*Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653 [175 Cal.Rptr. 420, 630 P.2d 954].)

Whereas an isolated incident of wrongdoing may arise from a momentary ethical lapse, a continuing pattern as engaged in by Judge Wasilenko "reflects poor judgment and lack of judicial temperament." (*Kloepfer, supra*, 49 Cal.3d at p. 848.)

Recognizing that Judge Wasilenko has retired from the bench, the question of "suitable judicial temperament" remains relevant to the question of whether a censure *and bar* are necessary and appropriate. A further factor to be considered in terms of whether the judge manifests unsuitability for the bench is the judge's inability or unwillingness to change behavior after less severe discipline by the commission. (See *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 339–340 [45 Cal.Rptr.2d 254, 902 P.2d 272] (*Doan*) [removal of judge who failed to learn from prior discipline for similar misconduct]; *McCullough, supra*, 49 Cal.3d at p. 199 [failure of judge to respond to prior public censure "evidences a lack of regard for the Commission, [the Supreme Court] and [the judge's] obligations as a judge"].)

**(19)** Applying the foregoing considerations to Judge Wasilenko's misconduct, we conclude that a censure and bar, the maximum discipline available to us under the circumstances, is the appropriate discipline. The censure is our effort to repair the past damage to the reputation of the judiciary, and the bar is in order to safeguard the public going forward by precluding Judge Wasilenko from being a bench officer in this state in the future.

Judge Wasilenko committed nine incidents of willful misconduct. The masters found, and we concur, that the judge engaged in a "pattern of misconduct in which the Judge repeatedly favored his friends with procedural shortcuts that were not available to citizens that had no relationship with the Judge." We agree with the masters that there also were several instances where the judge afforded substantive breaks to the favored few. There is also the pattern, repeated in every count, of Judge Wasilenko diverting nonassigned cases to himself for his specialized handling. The overall scope of wrongdoing is alarming.

Judge Wasilenko was privately admonished by the commission in 1993 for misconduct that is remarkably similar in three respects to that which is present here. The earlier discipline was based on wrongdoing that included (1) *transferring to his own court* in 1992 two cases in which the *judge's friends were the defendants*, without notice to the district attorney, following an *ex parte conversation* with one of the friends about a recent driving under the influence arrest, (2) presiding in 1990 over a criminal matter in which his *courtroom clerk was the defendant,* without *disclosing this basis of the disqualification on the record* and without obtaining a written waiver of disqualification from both parties and (3) *meeting ex parte* with probation officers to discuss their presentence reports. The admonishment stated that "the commission noted with approval that Judge Wasilenko demonstrated *awareness of these problems and a willingness to improve.*" (Italics added.)

In light of the judge's conduct in the cases here, during the period 1999 to 2002, and his testimony before the masters, he demonstrates he lacks

awareness of the problems and is either unwilling or unable to improve. At the hearing before the masters, although Judge Wasilenko recalled the 1990 incident concerning which he was disciplined for failing to disclose on the record, he disputed the similarity between that incident and his current failure to disclose on the record his familial relationship with Heather Robinson (count two). He further demonstrated his lack of awareness when, at the masters' hearing, he did not even recall the occasion in 1992 when he transferred his friends' cases to his courtroom following an ex parte communication.

**(20)** A judge's failure or inability to reform suggests unsuitability for judicial office. (*Platt, supra*, No. 162 at pp. 15–16 [48 Cal.4th CJP Supp. at pp. 248–249]; accord, *Doan, supra*, 11 Cal.4th at pp. 339–340; *McCullough, supra*, 49 Cal.3d at p. 197.) The Supreme Court has said that in instances where, as here, the record does not suggest the judge "has, or will be able to, overcome" the trait leading to the misconduct, and "that similar incidents will not recur . . . [,] comparison of the discipline imposed in other cases . . . is not fruitful." (*Kloepfer, supra*, 49 Cal.3d at pp. 866–867.) Nevertheless, a review of earlier decisions confirms that the types of misconduct we confront here do support removal or censure/bar.

Three years ago, we removed Judge Platt from office for establishing a similar two-track system of justice by handling and attempting to influence traffic and other cases involving family and friends on a preferential basis. (*Platt, supra*, No. 162 [48 Cal.4th CJP Supp. 227].)[6] The Supreme Court also has removed judges who engaged in misconduct in connection with the granting of preferential treatment based on friendship or influence.

In *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778 [119 Cal.Rptr. 841, 532 P.2d 1209] (*Spruance*), the judge was removed from office for numerous acts of misconduct, several of which included special treatment for himself as a defendant before another judge (*id.* at pp. 794, 799), as well as dispensing special treatment for friends and political supporters (*id.* at pp. 790–791 & fn. 11, 792–793, 798), and attempting to persuade the prosecutor to reduce charges against a friend in a case not pending before the judge (*id.* at pp. 790, fn. 10, 798). The judge in *Gonzalez v. Commission on Judicial Performance, supra*, 33 Cal.3d at pages 366–368, 370, 378, also was removed for misconduct that included attempts by the judge to intercede in criminal matters on behalf of friends and benefactors.

[6] Judge Platt was found to have committed five acts of willful misconduct and one act of prejudicial misconduct in connection with dismissing or attempting to dismiss four traffic tickets, requesting another judge to grant an O.R. release to a defendant, and mentioning in a telephone conversation with a court commissioner that a friend had received a traffic ticket.

In *Doan, supra*, 11 Cal.4th 294, the judge was removed; the misconduct included ex parte contacts with her former gardener (and others) and acting as an advocate for the gardener, including initiating efforts for his O.R. release, failing to disqualify herself or make requisite disclosures, and manipulating the bail review hearing over which she presided in order to accomplish an O.R. release. (*Id.* at pp. 316–319.) Judge Doan also presided over the pretrial conference, and attempted to influence its outcome, in a case in which the defendant was a close friend of a nephew who had loaned the judge money. (*Id.* at pp. 320–323.) In *McCullough, supra*, 49 Cal.3d 186, 192–193, the judge was removed for misconduct that included special handling of a friend's misdemeanor case following an improper ex parte communication; the judge continued the case for more than two years and then dismissed it without explanation.

**(21)** *Spruance, Gonzalez, Doan* and *McCullough* all involved misconduct beyond the preferential treatment afforded specially situated defendants. Nonetheless, it is clear that such wrongdoing constitutes a basis for removal, since as the court stated in *Spruance*, "Mere censure . . . would woefully fail to convey our utter reproval of any judge who allows malice or other improper personal motivations to infect the administration of justice." (*Spruance, supra*, 13 Cal.3d at p. 802.)

## IV. Conclusion

In light of Judge Wasilenko's retirement from the bench, we hereby impose a censure on him as the maximum discipline we can impose. Because of his demonstrated failure to reform, and his long-running pattern of misconduct, we determine that he is lacking in requisite judicial temperament, and therefore, to protect the public from his ever sitting as a bench officer, we hereby bar him from any assignment, appointment or reference of work from any California state court.

Commission members Justice Vance W. Raye, Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted to impose a censure and bar. There is currently one public member vacancy on the commission.

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING JUDGE WILLIAM R. DANSER,**<br><br>**No. 172** | **DECISION AND ORDER IMPOSING CENSURE AND BAR** |

This disciplinary matter concerns Judge William R. Danser (Retired), formerly a judge of the Santa Clara County Superior Court. The commission charges in count one that Judge Danser engaged in ticket fixing in 24 traffic cases. In one of those cases, Judge Danser is charged with improper communications with a court commissioner before whom the case was pending. He is charged with improperly transferring the remaining traffic cases to himself and then dismissing them without any legal basis.

Four additional counts charge the judge with misconduct in cases involving driving under the influence of alcohol (DUI). The judge transferred the four DUI cases to his department and then afforded preferential procedural and substantive treatment to the defendants.

The defendants in the traffic and the DUI cases were members of or closely connected to an inner circle of the judge's friends, acquaintances and court staff. They included players and employees of San Jose professional sports teams. Many of the defendants were friends of or had connections with Randy Bishop who was a friend of the judge and a detective previously with the Los Gatos Police Department.

A sixth count charges Judge Danser with abusing his judicial power by attempting to dismiss three citations issued to one of his own minor children. Finally, a seventh count charges the judge with improper demeanor and abuse of power in attempting to prevent the district attorney from obtaining a transcript of the plea and sentencing proceedings in one of the DUI cases.

Judge Danser is represented by James A. Murphy and Harlan B. Watkins of Murphy, Pearson, Bradley & Feeney of San Francisco. The examiners for the commission are Commission Trial Counsel Jack Coyle and Commission Assistant Trial Counsel Bradford Battson.

The Supreme Court appointed three special masters to hold an evidentiary hearing and to report to the commission. The masters are Hon. Harry E. Hull, Jr., Associate Justice of the Court of Appeal, Third Appellate District; Hon. Terrance R. Duncan, Judge of the Monterey County Superior Court; and Hon. Thomas E. Kelly, Judge of the Santa Cruz County Superior Court. Pursuant to a settlement agreement between the parties that later was incorporated in an order issued by the commission on July 22, 2004,[1] the masters took the matter under submission without a hearing. They issued their detailed 108-page Final Report (masters' report or M.Rpt.) to the commission on October 25, 2004. The masters concluded that Judge Danser committed willful misconduct in 34 instances and prejudicial misconduct in one other instance. We concur there were 34 instances of willful misconduct. We conclude there is insufficient evidence of any misconduct by Judge Danser in the remaining instance.

As the hearing before the masters was about to begin on the morning of July 19, 2004, the parties proposed a settlement that included Judge Danser's agreement to retire irrevocably. He did retire that same day. (See Order of July 22, Intro. ¶.) The settlement and subsequent order provide that specified charges against the judge were to be determined based on the transcript and exhibits from the judge's criminal trial (see discussion, *post*, p. 3). (*Id*., ¶ 2b.) The judge also stipulated that certain other charges were true (*id*., 2a), and that at a minimum, his actions constituted prejudicial misconduct within the meaning of article VI, section 18 of the California Constitution, and that under that section, the commission could issue a censure and bar against him. (Order of July 22, ¶ 3.)

Article VI, section 18, subpart (d) of the California Constitution, as pertinent to the disciplinary options available to the commission in this matter, provides that the commission may "censure a judge or former judge or remove a judge" for willful or prejudicial misconduct. That section also provides the commission may bar a former judge who is censured from receiving an

[1] A copy of the order is attached, incorporated herein, and described more fully in this opinion (*post*, p. 3). It is referred to as the "Order of July 22."

assignment, appointment, or reference of work from any California state court. Given Judge Danser's retirement, we construe the constitution as prohibiting the commission from imposing discipline more severe than a censure and a bar. Judge Danser's serious misconduct warrants the maximum discipline. Our decision to impose the censure and bar, rather than a removal from office, is because of the constitutional limit on our power.

Judge Danser also was prosecuted criminally for the conduct that underlies this disciplinary proceeding. The jury found him guilty of a felony and seven misdemeanors. The case is pending on appeal (Court of Appeal, Sixth Appellate District, Case No. H027912). The determination of this matter before the commission does not hinge in any manner on the outcome of the criminal appeal because our determinations concerning the *judicial misconduct* are independent of the ultimate decision of whether the conduct also is *criminal*.

Under the Order of July 22, Judge Danser stipulated to the truth of the facts alleged in count five, concerning his efforts to dismiss his son's tickets. (Order of July 22, ¶ 2a.) As to all the other allegations, however, the judge has agreed only that the masters, and ultimately the commission, are to determine the facts based on specified agreed evidence from the judge's criminal trial. (*Id*., ¶2b.) Based on a review of that evidence, we agree with the masters that the following facts are true.

I. Findings of Fact

A. The Traffic Matters

1. Count One – General Findings (see M.Rpt., pp. 14-19)

In March 1997, Judge Danser engaged in improper ex parte communications with Court Commissioner Gregory Saldivar about a traffic case against Anthony Granato that was pending before the commissioner. In addition, between March 2000 and December 2002, Judge Danser caused to be transferred to his court and then dismissed 24 traffic cases involving 20 different defendants. In nine of those cases, the judge also dismissed a related charge of failure to appear, alleged as a misdemeanor. Many of the defendants in the traffic cases had a relationship with Randy Bishop, a friend of the judge who, at the time, was an officer with the Los Gatos-Monte Sereno Police Department (LGPD). The remaining defendants were either friends or acquaintances of the judge or his former or then-current court staff.

Judge Danser had known Randy Bishop through Little League since 1996. The judge was involved in Los Gatos Little League from 1992 through 2002, and was president from 1998

to 2000. Bishop helped the players with pitching and batting techniques. He also ran a diversion program for juvenile offenders, primarily involving alcohol-related offenses, through which they could perform alternative community service. At the judge's request, Bishop referred young offenders to do maintenance work and other tasks for Little League. The judge and Bishop also had professional contact in connection with the issuance of search warrants. Judge Danser wrote a letter of recommendation for Bishop in support of a grant application.

From 1999 to July 2003, Bishop worked for the San Jose Sharks professional hockey team while he was an officer with LGPD. He handled law enforcement affairs for the Sharks, for which he was paid a total of more than $50,000 over that period. Judge Danser has been a Sharks fan since about 1990, and bought season tickets to their games; he bought four season tickets for the 2001-2002 season. The defendants whose traffic cases the judge dismissed included five players or employees of the Sharks, the girlfriend of a player, an employee of the Sharks' home arena, two employees of the San Jose Earthquakes soccer team (which was run by the Sharks or their marketing arm), the girlfriend of the Earthquakes' equipment manager, and the owner of a Los Gatos restaurant frequented by Sharks players.

None of the cases Judge Danser dismissed was assigned to him and none would have come before him in the ordinary course of judicial business. There also was no proper basis under Santa Clara County court practices for transfer of any of the cases to Judge Danser's department. Judge Danser was not assigned to a traffic court department at any time during the relevant period.

Judge Danser did not conduct a hearing in any of the subject traffic cases. He made no disclosures on the record of any ex parte communications or relationships to any of the defendants or other involved persons. None of the cases was on calendar when Judge Danser dismissed the respective tickets or other charges. None of the defendants appeared in court in any of the cases, nor did any retained counsel appear on behalf of any of them.

As will be discussed in the following findings concerning the individual tickets (*post*, pp. 5-17), Judge Danser claimed in nearly all of the traffic cases that Bishop had told him that he, Bishop, had the approval of the officer who issued the citation, or someone allegedly acting on the citing officer's behalf, to dismiss a given citation. Based on these alleged *oral* representations by Bishop, for which there was no corroboration, and without creating any record, the judge dismissed the cases. The judge asserted that Vehicle Code section 40500,

subdivision (d) authorized the dismissals. As pertinent here, that section provides that if an arresting officer or other officer of the same agency later determines that a citation should be dismissed "in the interest of justice," the *facts justifying such dismissal* shall be presented in the form of a *written* recommendation, filed with the court, and thereafter, the court may dismiss the case in connection with entering supporting findings *on the record*. As is critical, however, the section also states, "*under no circumstances* shall a *personal relationship* with any officer, public official, or law enforcement agency be grounds for dismissal." (Veh. Code § 40500(d), italics added.)

The masters rejected the judge's reliance on section 40500(d) as resting on a "plainly unsupportable interpretation of [the statute]," finding the defense to be part of a "subterfuge." (M.Rpt., p. 19.) The masters also correctly concluded that even if the conversations took place as claimed, they would not shelter the judge from the charges of judicial misconduct. On the contrary, they would buttress the conclusion of *willful* misconduct. (*Ibid*.) We concur with the masters that the statute cannot be twisted to cover these situations and that the claimed conversations likely are a sham or subterfuge. If the judge actually talked with Bishop as he claims, such ex parte communications contravened canon 3B(7) and are an additional basis for concluding the misconduct in those instances was willful. (See discussion, *post*, pp. 29-30.)

2. Count One – Specific Findings Concerning Individual Traffic Cases

a. Anthony Granato (see M.Rpt, pp. 20-22)

Granato was cited on December 14, 1996 for speeding and driving without a valid license. He was charged later with a misdemeanor for failure to appear on the original citation. At the time, Granato played for the Sharks. At the request of and as a favor to Randy Bishop, in March 1997 Judge Danser telephoned a court commissioner in the San Martin branch court, before whom the case was pending. The judge told the commissioner Granato wanted to plead guilty to the speeding violation and to have the other two charges dismissed. The judge also advised that no one would appear. Judge Danser and the commissioner had been friends for 25 years.

Prior to the hearing date, the commissioner decided not to accept a guilty plea in absentia, and continued the matter. Upon learning of the continuance, Judge Danser contacted another friend of his, an attorney, and asked him to resolve the matter for Granato. The attorney did not consult with Granato, but appeared before the commissioner ostensibly on Granato's behalf, and

entered a guilty plea to the speeding charge. The commissioner dismissed the remainder of the case.

In the aftermath of the *Granato* dismissal by the commissioner, Judge Danser's presiding judge advised him he was to discontinue further communications with court commissioners concerning pending cases to avoid the impression of pressuring them. Judge Danser subsequently told Randy Bishop that his presiding judge "was not happy with what [he] had done" in the *Granato* case. (M.Rpt., p. 22). From that point forward, when Bishop brought a case to the judge's attention or otherwise sought his intervention, instead of contacting the commissioner to whom the case had been assigned, the judge transferred the matter to his own department and then dismissed it himself.

b. Paul Pavicich (see M.Rpt., pp. 22-24)

Pavicich was cited on February 7, 2000 for failing to stop at a metering light on a freeway on-ramp. The citing officer from the California Highway Patrol (CHP) was two cars behind Pavicich, observed the violation, and testified that Pavicich admitted he drove through the red metering light. The Pavicich family is a prominent Los Gatos family and the judge knows various family members. Judge Danser knows Paul Pavicich from Little League, and in 2000, the two of them played in a golf foursome that also included Todd Mayo and Scott Cruse. (As will be discussed, the judge dismissed tickets issued to Pavicich, Mayo, Mayo's wife and Cruse's wife.)

Pavicich told Judge Danser at Little League about his ticket. The judge directed his clerk to get the file in the *Pavicich* case, which she did. On March 23, 2000, the judge dismissed the case. The minute order reflects the dismissal was in the "interests of justice." The judge claimed Bishop had told him that he, Bishop, had talked "to the guys" at the Highway Patrol. The judge admitted, however, that Bishop gave him no reason the ticket should be dismissed. (M.Rpt., p. 24.)

Neither Pavicich nor a retained attorney was present in court on March 23 when the case was dismissed. The minutes reflect, however, the defendant was represented on that occasion by an attorney named Daily. The judge testified that he told Terrence Daily, an attorney who happened to be present in court, "I am going to dismiss this ticket. You can be a big hero of the Pavicich family. I will put your name on it." (M.Rpt., p. 23.) According to the judge, he thought it would be "funny" to put Daily's name in the minutes. (*Id*. at p. 24.)

c. Todd Mayo (see M.Rpt., pp. 24-26)

Mayo was cited by the Campbell police on April 4, 2000 for speeding. Mayo and the judge had been friends since about 1996, through Little League and golf, and had other social connections. Mayo talked to Judge Danser about his ticket. The judge claimed he dismissed the ticket after Bishop said the issuing "cops" who had no objection to it being dismissed. (M.Rpt., pp. 25-26.)

Judge Danser dismissed the Mayo ticket on March 23, 2000, the same day as he dismissed the Pavicich ticket (§ b, *ante*, p. 6). The minute order states the dismissal was in the "interests of justice." The case was not calendared and there was no appearance by the defendant or retained counsel. (M.Rpt., p. 25.) Nonetheless, the minutes state that attorney "Daily" appeared. The judge admitted he directed this minute entry, again, because it "was kind of a funny thing." (*Ibid*.) Attorney Terrence Daily was in Judge Danser's court that day, but he testified he did not represent Mayo and did not authorize the use of his name in the minutes.

d. Robert Davis (see M.Rpt., pp. 26-27)

Davis was cited by an officer from the San Jose Police Department (SJPD) on September 26, 2000 for failing to stop at a stop sign. Davis testified that he did fail to stop. He was the telecommunications manager for the San Jose arena operated by the Sharks. Davis knew Randy Bishop, and although Davis denied speaking with Bishop about the ticket, Bishop told Judge Danser about it. The file was sent to Judge Danser's court on January 17, 2001, and the judge dismissed the case the following day. The minute order states the dismissal was in the "interests of justice." Judge Danser admits, however, the actual reason for the dismissal was as a favor to Bishop. Judge Danser testified he dismissed the ticket after Bishop told him "someone" had indicated it was "okay" to do so. (M.Rpt., p. 27.)

e. Joseph Will (see M.Rpt., pp. 28-29)

Will was cited by the SJPD on August 18, 2000 for speeding, and subsequently was charged with a misdemeanor failure to appear. Will had worked for the Sharks for many years and was the assistant to the Sharks' general manager. Will gave his ticket to Randy Bishop, who said he would see what could be done about it. Will assumed Bishop would "take care of" the ticket. (M.Rpt., p. 28.) Bishop told Judge Danser about the ticket and of Will's connection to the Sharks. The judge dismissed the ticket on February 6, 2001 "in the interests of justice," according to the minute order. The judge admitted the dismissal was in fact a favor to Bishop.

The ticketing officer testified he did not talk to Bishop about the ticket and that he never recommended to anyone that it be dismissed and knew of no reason it should be dismissed. The judge admitted Bishop provided no basis for a dismissal. Furthermore, even if there had been a request by the officer to dismiss the speeding ticket, such request would not provide a basis for dismissal of the failure to appear charge without any appearance by or on behalf of the defendant.

f. Evgeni Nabokov (see M.Rpt., pp. 29-31)

Nabokov was cited by the Santa Clara County sheriff on December 29, 2000 for driving without a license and unsafe passing. Nabokov was the Sharks' goalie and asked Bishop for advice concerning the ticket. Bishop talked to Judge Danser about the ticket and may have described the circumstances surrounding it. The judge knew Nabokov was a goalie for the Sharks. Judge Danser had his clerk obtain the file and on March 12, 2001, he dismissed the ticket. According to the minute order, the dismissal was in the "interests of justice," but the judge admitted in his testimony that the real reason was as a favor to Bishop.

The ticketing officer testified he never was contacted by anyone about the ticket and knew of no reason it should have been dismissed. The judge claimed Bishop told him that someone "at the police" had no objection to the dismissal, although admittedly, Bishop offered no basis for the dismissal. (M.Rpt., pp. 30-31.) The judge admitted that since Bishop brought the ticket to him initially, Bishop had an interest in the matter and could not be considered impartial.

g. Rhonda Sulpizio (see M.Rpt., pp. 31-32)

Sulpizio was cited by the CHP on January 15, 2001 for driving with an expired registration and without proof of financial responsibility. She subsequently was charged with a misdemeanor for failing to appear. At the time, Sulpizio was the girlfriend of former Sharks player Jeff Friesen. After Bishop learned of the ticket, he told Judge Danser that Sulpizio was the girlfriend of "one of the Sharks guys." (M.Rpt., p. 32.) The file was sent to Judge Danser's department at his request, and the following day, May 24, 2001, he dismissed all charges in the "interests of justice," according to the minute order.

Judge Danser testified he dismissed all charges after Bishop said he had seen either the registration or proof of insurance and that "everything was in order." (M.Rpt., p. 32.) The file does not indicate a dismissal based on correction of the registration or insurance violations, and there is no evidence of either. There also is no indication of payment of the $10 statutory fee

assessed in connection with dismissal of a correctible offense. Furthermore, there is no apparent basis for the dismissal of the failure to appear charge without an appearance by or on behalf of the defendant.

h. Debra Mayo (see M.Rpt., pp. 33-34)

Mayo was cited by the SJPD on September 18, 2001 for speeding. She is the wife of Todd Mayo, whose ticket Judge Danser previously dismissed (§ c, *ante*, p. 7). She knew the judge through her husband's Little League activities, and the Mayos had been to dinner with the judge and his wife. Debra Mayo told her husband about the ticket and he told Judge Danser about it. The judge asked Todd Mayo for the ticket and "agreed to help with the ticket or take care of it." (M.Rpt., p. 33.) After the file was sent to Judge Danser's department at the judge's request, he dismissed the ticket the following day, October 24, 2001. The minute order states the dismissal was in the "interests of justice," but the judge admitted he intervened as a favor for a friend. The judge claimed Bishop told him the issuing officer or agency did not object to the dismissal, but the issuing officer did not corroborate this claim during his testimony.

i. Gregory Jamison (see M.Rpt., pp. 34-38)

Jamison is the president and CEO of the Sharks and of Silicon Valley Sports and Entertainment, the marketing arm of the Sharks. He has known Randy Bishop since 1998 or 1999. Judge Danser dismissed three tickets issued to Jamison:

Citation 1: Jamison was cited by the Santa Clara County sheriff on January 20, 2000 for speeding. Shortly after the ticket was issued, Randy Bishop attempted to get the sheriff's office to dismiss the ticket, but the ticketing officer declined to consent to the dismissal. Jamison testified he paid this ticket in 2000, but there was no evidence of that fact. The check that Jamison thought was for this ticket was in fact in payment of a speeding ticket received by his son.

Citation 2: Jamison was cited by the CHP on January 20, 2001 for having unlawfully tinted windows in his vehicle. He was charged later with a misdemeanor failure to appear. Jamison has a cancelled check showing payment of this ticket in June 2001, but there is no record of payment in the court file.

By letter dated June 28, 2001, the Department of Motor Vehicles (DMV) notified Jamison that the two citations had not been paid and that his driver's license could not be issued until proof of payment or correction had been received by DMV. Jamison asked Bishop to

investigate, and Bishop subsequently told Judge Danser that Jamison's license was going to be suspended over some tickets Jamison claimed he had paid.

Citation 3: On August 5, 2001, an LGPD officer left a ticket on a vehicle registered to Jamison, for failure to display a front license plate and for unlawfully tinted windows. Jamison's son was driving the car at the time, but the father remembered receiving a copy of the ticket. Neither father nor son could remember showing proof of correction concerning either violation to anyone, and there is no proof of correction in the court file for Citation 3, nor is there evidence of payment of a statutory $10 correction fee. Nonetheless, on October 25, 2001, the day after the Citation 3 file was sent to Judge Danser's department, the judge dismissed the case, in the "interests of justice" according to the minute order.

At Judge Danser's request, the files for Citations 1 and 2 were sent to his department on November 7, 2001. On that day, the judge dismissed the underlying charge and the failure to appear charge in connection with Citation 1, even though he admits he knew of nothing to suggest Jamison had not been speeding. The judge was handling a preliminary hearing calendar that day. On November 7, Judge Danser also dismissed the tinted window violation charge in Citation 2, although again he admitted knowing of no basis for doing so.

Two months later, on January 2, 2002, the minutes for Citation 2 were "corrected" to add a dismissal of the failure to appear charge, in the "interests of justice" according to the minute order. The judge was handling a preliminary hearing calendar that day. The judge also exonerated bail and set aside the forfeiture, thereby entitling Jamison to a refund of the $310 fine he had paid. The judge's clerk prepared an abstract of judgment indicating Citation 1 had been dismissed; such an abstract was a prerequisite for the DMV to update its system. The judge called Bishop to notify him that the abstract had been prepared because of a concern that Jamison's license otherwise would be suspended.

Judge Danser concedes he had no evidence that Jamison had paid any of the tickets, and there is no evidence in any of the files suggesting payment or correction. The judge testified he dismissed a number of tickets for Jamison because he knew him to be "an important man with the Sharks" and "had no reason to disbelieve" the tickets had been paid. (M.Rpt., pp. 37-38.) Even if they had been paid, that would not have been a basis for dismissal of the tickets or of the failure to appear charges.

j. Shelby Holcomb (see M.Rpt., pp. 38-39)

Holcomb was cited by the CHP on August 1, 2001 for following too closely and driving with an expired registration. He admitted the latter violation. Holcomb was a personal trainer at the Fitness Clinic in Los Gatos during the period 2000 to 2002 and provided fitness training to the judge and the judge's sons. Holcomb discussed the ticket with the judge shortly after receiving it, and on October 31, 2001, Judge Danser dismissed the charges. According to the minute order, the dismissals were in the "interests of justice." Judge Danser testified that the real reason was that he wanted to help Holcomb.

According to Judge Danser, Bishop had told him that he, Bishop, had talked to somebody and "they had no objection" to a dismissal because the matter was not serious. (M.Rpt., p. 39.) The citing officer did not corroborate this claim. The judge admitted he knew of no reason why the officer allegedly was willing to have the ticket dismissed.

k. Kenneth Holbach (see M.Rpt., pp. 39-41)

Holbach received two tickets within a 5-hour period on October 18, 2001 from the same SJPD officer for speeding at the same intersection, violations which Holbach admitted. The defendant's brother, Ben Holbach, was a CHP officer and a friend of Bishop; the two regularly ate lunch together.

Shortly after the tickets were issued, Officer Holbach's father told him about the tickets. Officer Holbach had lunch with Randy Bishop a couple of days later and inquired if Bishop knew anyone the officer could talk to about getting the tickets "consolidated" so his brother could go to traffic school. The officer later gave Bishop copies of the tickets, which Bishop gave to Judge Danser.

On November 9, 2001, the day after the files were sent to Judge Danser's department, he dismissed both charges. The minute order states the dismissals were in the "interests of justice." Bishop relayed information of the dismissals to Officer Holbach.

Judge Danser testified that prior to dismissing these tickets Bishop had advised him that Bishop had ascertained that some police official had no objection to the dismissal. The arresting officer testified, however, that he had never told Bishop he approved of dismissal, nor had he recommended dismissal and he knew of no facts justifying dismissal.

l. Michael Ensley (see M.Rpt., pp. 41-44)

Ensley was cited by the SJPD on October 3, 2001 for speeding. Ensley testified that he was speeding. Nonetheless, the day after being cited, Ensley complained about the ticket to a waitress at the Southern Kitchen, a Los Gatos restaurant. A man sitting at the counter overheard Ensley's complaint and told him he could get the ticket fixed if Ensley made out a check to the Los Gatos Little League. Although Ensley claimed not to know this man, he gave him the ticket. On November 6, 2001, Ensley wrote a check for $200 to the Los Gatos Little League and gave it to another man he claimed not to know, but who allegedly had been sitting next to the first man to whom he had given the ticket previously. The check was deposited into the league's checking account in April 2002, with a hand-written note on it, "Major's Tigers." Judge Danser managed the league's "major league" team called the "Tigers."

Judge Danser was told of Ensley's ticket by Brad Tomy, a friend of the judge who served with him on the Little League board of directors. Ensley admitted he knew Tomy, but as the result of various testimonial denials by Ensley and Tomy, it is unclear how the check got from Ensley into the Little League account. The judge denied knowledge of Ensley's check to the Little League.

Judge Danser spoke with Tomy about the ticket and obtained the actual ticket from him. After directing his clerk to have the file sent to his department, the judge dismissed the ticket on December 4, 2001. The minute order states the dismissal was in the "interests of justice." Judge Danser hand-delivered a copy of the dismissal order to Tomy at the Little League field, and Ensley picked up a copy of the order at either the Southern Kitchen or the Los Gatos Roasting Company.

Judge Danser claimed he asked Bishop to look into the matter concerning Ensley's ticket and that he dismissed the ticket after Bishop told him that the officers involved had no objection to a dismissal. The ticketing officer testified he had no conversation with Bishop, never recommended dismissal and did not believe dismissal was warranted. Judge Danser admitted he never heard any reason why the ticket should be dismissed.

m. Stephanie Lynott (see M.Rpt., pp. 44-46)

Lynott was cited by the LGPD on June 12, 2001 for driving without a seat belt. She subsequently was charged with a misdemeanor failure to appear in connection with the original ticket. The judge knew Lynott as his three sons' second grade teacher at St. Mary's School in

Los Gatos. In about November 2001, Lynott phoned the Danser residence and spoke with either Judge Danser or his wife (who is a Santa Clara County Superior Court judge). Following that call, the ticket was delivered to Judge Danser, and on November 30, 2001, the file was sent to Judge Danser's department. On December 4, 2001, he dismissed both charges.

The judge admitted he had no reason to believe the ticket was unjustified. He dismissed it based on a conversation with Lynott and because of the "minor nature of the matter." (M.Rpt., p. 46.) He testified, "I knew what kind of person she was. I believed the story she was telling me, and the cost and effort of sort of putting this back into the system to me just did not seem worth it." (*Ibid*.) The judge's own improper diversion of the case to his department was the reason the ticket was "out of the system." Moreover, it was a simple matter to return the file to traffic court, where it belonged and where it should have been handled in the ordinary course of judicial business.

n. Peter Stemkowski (see M.Rpt., pp. 46-48)

Stemkowski was cited on January 7, 2002 by the CHP for speeding in a school zone. He was a radio analyst for the Sharks and a broadcast partner of Anthony Granato; it was Granato's ticket about which the judge spoke with the court commissioner in the San Martin branch court (§ a, *ante*, pp. 5-6). Stemkowski talked to Bishop about the ticket and Bishop spoke to Judge Danser about it. The judge knew Stemkowski was a Sharks broadcaster and Granato was coaching Little League with Judge Danser at the time.

On April 5, 2002, Judge Danser dismissed the ticket in the "interests of justice," according to the minute order. The judge claimed Bishop told him there was no objection to the dismissal, although concededly, Bishop did not tell the judge of any justification for the dismissal. The issuing officer, however, testified he was not contacted. According to the officer, he would have recommended against dismissal because Stemkowski was rude and went on a "verbal tirade" when the officer cited him. (M.Rpt., p. 48.)

o. Cataldo Maresco (see M.Rpt., pp. 48-49)

Maresco was given a speeding ticket by the CHP on February 14, 2002, and Maresco testified he was speeding. He is the owner of Aldo's Restaurant in Los Gatos and considers Randy Bishop a friend. Bishop ate at Aldo's on occasion with Sharks players. Shortly after receiving the ticket, Maresco talked to Bishop about it and gave him the actual ticket. Bishop told Judge Danser about the ticket and told him Maresco was a strong supporter of the police

department. On April 15, 2002, Judge Danser dismissed the ticket; the minute order states the dismissal was in the "interests of justice." The judge testified Bishop said there was no objection to a dismissal. The issuing officer testified he never recommended a dismissal and knew of no facts justifying such action.

p. Evgeni Nabokov (see M.Rpt., pp. 49-50)

Nabokov was cited by the CHP on April 4, 2002 for speeding and admitted in his testimony he was speeding. [2] Nabokov talked to Bishop about the ticket and left it in his locker, as requested by Bishop. Bishop then told Judge Danser about the ticket and gave it to him. The judge in turn gave the ticket to his clerk who had the file sent to Judge Danser's courtroom. On June 14, 2002, *while Judge Danser was on vacation*, he ordered the ticket dismissed. Judge Danser testified that Bishop told him the "people responsible" for issuing the ticket did not object to it being dismissed. The issuing officer testified he had no such conversation.

q. Phyllis Cruse (see M.Rpt., pp. 50-52)

Cruse was cited by the SJPD on May 9, 2002 for speeding. Cruse told her husband, Scott, about the ticket. At the time, Scott Cruse knew that Judge Danser had dismissed a ticket for their mutual friend, Todd Mayo (§ c, *ante*, p. 7). Both Scott and Phyllis Cruse were good friends with Judge Danser through a variety of social, sports and school connections. Scott asked Judge Danser at the Little League field "if he [the judge] could take care" of the ticket. (M.Rpt., p. 51.) On June 12, 2002, the case file was sent to the Hall of Justice "per Judge Danser." (*Ibid*.) Again *while Judge Danser was on vacation* on June 14, 2002 (see § p, *ante*), he ordered the ticket dismissed. The judge claimed Bishop reported "the officers" had no problem if the judge wanted to dismiss. (*Id*. at p. 52.) The issuing officer testified he was never notified the ticket was contested and knew no reason it should be dismissed.

r. Tadd Whitmire (see M.Rpt., pp. 52-53)

Whitmire was cited in Gilroy during or about June 2002 for a non-functioning taillight and for lacking proof of insurance. He was stopped two blocks from the home of Kathi Bringuel, Judge Danser's clerk, where he had just picked up Victoria Enos from a party. Enos is Whitmire's former wife and she recently had begun working as a courtroom clerk in Judge

[2] Nabokov was the defendant in another case handled by Judge Danser and his brief biographical description and connections to the judge and Bishop are set forth in section f, *ante*, page 8.

Danser's department. Enos contacted Bringuel and asked what they needed to do to take care of the ticket. Enos testified that Bringuel responded she "would look into it and take care of it." (R.T. 1062:20-24.) In contrast, Bringuel asserted she told Enos that since the ticket involved only a "fix-it" violation, Enos should just get the taillight fixed. (R.T. 2254:2-6.) There is *no* evidence concerning the disposition of the ticket. Although Bringuel testified the case was "heard in Judge Danser's department" (R.T. 2254:18-28), there is no evidence of a court record showing that to be a fact or of *any* involvement by Judge Danser with the ticket.

s. Erasmo Galvan (see M.Rpt., pp. 53-54)

Galvan was cited by the CHP on July 23, 2002 for making an improper U-turn. He is the father of Georgina Galvan-Colin who worked as a court reporter in Judge Danser's department from 2001 to 2003. The court reporter had heard that another staff person, Victoria Enos, had been able to get Tadd Whitmire's ticket (see § r, *ante*, p. 14) transferred to Judge Danser's department. After Galvan-Colin told the judge about the ticket, he told her to give the details to Bringuel; Galvan-Colin gave the actual ticket to Bringuel. Judge Danser directed Bringuel to get the file from traffic court, and on September 16, 2002, the judge dismissed the ticket. Judge Danser had Bringuel call the defendant's home to let him know the ticket had been dismissed. Bringuel also filled out an abstract of judgment showing the dismissal.

According to the judge, he was advised by Bishop prior to dismissing the ticket that the issuing officer/agency "had no problem" with the dismissal. (M.Rpt., p. 54.) The issuing officer testified he never received notice the ticket was being contested and knew of no reason it should be dismissed.

t. Mark Smith (see M.Rpt., pp. 54-56)

Smith was cited on September 21, 2001 by the LGPD for a non-functioning brake light. He subsequently was charged with a misdemeanor failure to appear in connection with the original ticket. Smith played for the Sharks at the time. Although he did not recall discussing the ticket with Bishop, Bishop nonetheless discussed it with Judge Danser. The judge knew Smith played for the Sharks. On September 17, 2002, the file was sent to Judge Danser's department and the judge dismissed both charges that day. The minute order states the dismissal was in the "interests of justice." At the judge's request, his clerk, Kathi Bringuel, phoned Smith to advise him of the dismissal and prepared an abstract of judgment for the DMV so that Smith's record of his non-appearance could be cleared more quickly.

The judge testified that Bishop told him Smith's ticket was a "fix-it" violation and that the brake light had been fixed. There is no proof of correction in the file. Bishop did not show the judge any proof of correction, and Smith testified he had no recollection of showing proof of correction to a law enforcement official. There is no evidence in the file of payment of the statutory $10 fee in connection with the dismissal upon correction of the violation. There also is no explanation for the dismissal of the failure to appear charge.

u. Dwayne DeRosario (see M.Rpt., pp. 56-58)

DeRosario was cited on June 25, 2002 by the SJPD for speeding. He subsequently was charged with a misdemeanor failure to appear. While he was a player with the San Jose Earthquakes soccer team, he heard Bishop tell the players at a meeting they should come to him with any legal issues. DeRosario told Bishop about the ticket. Bishop told the judge about it, adding the information that DeRosario was with the Earthquakes. On October 18, 2002, the judge dismissed both charges. The minute order states the dismissal was in the "interests of justice."

The judge admitted he involved himself with the matter solely because Bishop asked him to do so. He claims he dismissed it only after Bishop told him there was no objection, although concededly no basis was given for the dismissal. The citing officer testified he had not recommended a dismissal and did not know of any basis for dismissal. There is no explanation for the dismissal of the failure to appear charge.

v. Rebecca Linton (see M.Rpt., pp. 58-60)

On June 13, 2002, Linton was cited by the SJPD for a carpool lane violation. She admitted the violation in her testimony. She subsequently was charged with a misdemeanor failure to appear. At the time of the criminal trial, Linton was the fiancée of Malcolm Phillips, the Earthquakes' equipment manager. She talked to him about the ticket. Phillips had heard Bishop suggest at an Earthquakes' players meeting that the players should contact him with any "issues" because he was involved with law enforcement. Phillips talked to Bishop about Linton's ticket and gave him the paperwork. Bishop asked the judge to handle the ticket. The judge testified Bishop told him Linton had paid the ticket but that the check had been returned and that she just wanted to contest the failure to appear charge. Nonetheless, the judge dismissed both charges on December 16, 2002. He admitted he became involved because of Bishop's request.

The judge gave conflicting explanations for his actions. Initially he claimed Bishop told him Linton had come to court and been turned away. He also testified Bishop said there was no objection to a dismissal, although he later retracted this assertion. The judge also changed his testimony to state that Bishop had told him Linton had come to *Judge Danser's department* and had been sent away, causing the judge to "feel bad about her coming down there, having to make a second trip" to his court. (M.Rpt., p. 60.)

The citing officer testified he never was contacted concerning a possible dismissal. He had not recommended and did not know of any reason for a dismissal.

w. Bruce Morgan (see M.Rpt., pp. 60-62)

Morgan was cited on May 23, 2002 by the SJPD for an illegal left turn. He was charged later with a misdemeanor failure to appear. Morgan was the head athletic trainer for the Earthquakes. He testified Bishop stated at a player presentation that he, Bishop, was an officer with the LGPD and employed by the Sharks as part of the security staff, and that he might be able to help players with legal difficulties. Morgan had the resulting impression that Bishop could take care of traffic tickets. Morgan gave Bishop the ticket at Bishop's request and understood the ticket would be "expunged." (M.Rpt., p.61.)

Bishop told Judge Danser about Morgan's ticket, and on December 16, 2002, the judge dismissed the charges. The judge admitted he handled the case because Bishop asked him to do so. He claimed that he dismissed the charges only after Bishop told him there was no objection. The citing officer, however, testified he never received notice the ticket was being contested. He had not been contacted by Bishop and knew no reason to recommend dismissal. There is no evidence to justify the dismissal of the failure to appear charge.

B. The DUI's – Findings of Fact

Judge Danser also is alleged to have committed misconduct in connection with his handling of four cases in which the defendants were charged with driving under the influence of alcohol (DUI). The misconduct charges concerning the DUI's are set forth in counts two, three, eight and nine. We adopt the following findings of the masters:

1. Paul Dellanini (Count Two) (see M.Rpt., pp. 76, 77-80)

Dellanini was arrested in Gilroy on January 27, 2002; his blood alcohol level was .12 percent. He was a firefighter with the state Department of Forestry and wanted to avoid going to jail for the DUI.

Dellanini's sister, Patricia Corona, was a friend of Judge Danser's clerk, Kathi Bringuel, and the two had worked together at the court in San Jose. Corona was aware that Judge Danser typically would not impose jail or weekend work time as part of a sentence for a first-time DUI offense. Corona told Bringuel about Dellanini's arrest. Corona later told her mother they should have the case transferred to Judge Danser because he did not give jail sentences. Bringuel told the judge about the arrest and added that the defendant's mother had worked at the South County facility for many years and was embarrassed about her son's case and did not want it heard in South County. Judge Danser agreed to hear the case if Dellanini was prepared to plead guilty. The judge told Bringuel to calendar the case for plea and sentencing.

On March 15, 2002, Dellanini's case was transferred to San Jose. Judge Ray Cunningham, who was assigned to South County, testified he did not object to the transfer because he knew the defendant's mother quite well and he thought it was appropriate for the case to be transferred. Judge Cunningham and Judge Danser had been friends for nearly 25 years, shared season tickets to the Sharks, and socialized together at sports events.

Judge Danser was the only pretrial judge at the time that did not impose jail or weekend work for a first-time offense and blood alcohol level below .20 percent. At the South County facility, where a DUI case with a Gilroy arrest normally would be heard, the typical sentence in such a case would have included 48 hours in jail or 6 days of weekend work, with credit for 8 hours time-served.

On March 26, 2002, Dellanini appeared before Judge Danser without counsel and pled guilty to the offense of driving with a blood alcohol level of .08 percent or higher. The judge dismissed the DUI charge and imposed a sentence that was close to the minimum allowed by law. The sentence was more lenient than the defendant was otherwise likely to have received. Judge Danser did not sentence the defendant to any jail time or the weekend work program. There was no court reporter present and the judge did not disclose on the record his ex parte conversation with Bringuel or explain why the case was in his department.

2. Anna-Marie Keane (Count Three) (see M.Rpt., pp. 76, 80-87)

Keane was arrested by the Los Altos police on August 2, 2002 for a DUI. Her biggest concern was about going to jail. Keane knew Randy Bishop from Los Altos Police Officers Association (POA) golf tournaments and she told him about her arrest later in August 2002. About September 2002, Bishop told Judge Danser that someone who had participated in a POA

golf tournament had been arrested for DUI and that the case was pending in the Palo Alto branch court (where a case involving a Los Altos arrest would be assigned pursuant to local court rules).

Bishop asked Judge Danser if he would hear the case. The judge agreed, provided the defendant was willing to plead guilty. When Bishop asked what the likely sentence would be, the judge described terms that did not include jail time or weekend work. Bishop then reported to Keane that Judge Danser had agreed to hear her case if she would plead guilty, and that if she did so, she would not be going to jail. Bishop later gave the judge Keane's name and date of birth so the judge could get the case file.

Keane retained attorney Horner to represent her. Horner told her the case would be heard in Palo Alto and that a normal sentence would include weekend work. Keane told Horner that Judge Danser was going to bring the case to San Jose. On September 24, 2002, an attorney from Horner's office appeared before Judge Southard in Palo Alto for arraignment. A pretrial conference was set on that date for October 10. Normally at a pretrial conference, a representative from the district attorney's office would be present and the attorneys and the judge would discuss possible settlement; typically, a possible plea and sentence might be discussed.

Judge Danser's clerk, Kathi Bringuel, advised the judge that the *Keane* case was pending in Palo Alto. Judge Danser phoned Judge Southard's clerk on October 9, 2002 and asked that the file be sent to him for a pretrial conference on October 15, 2002. Judge Southard's clerk gave a note to Judge Southard, but he forgot about the matter until he discovered the note several days later under some papers on his bench. In the interim, the previously scheduled pretrial occurred before Judge Southard on October 10. He indicated a likely sentence, consistent with his normal practice for a "nonaggravated, nonmitigated" first-time DUI, which would include 10 days weekend work, minus one-day credit. (M.Rpt., p. 83.)

After the pretrial conference before Judge Southard, the case file was transferred to Judge Danser. Judge Southard testified that he transferred the file because he assumed Judge Danser had another case involving the same defendant and that the parties wanted to consolidate the matters for disposition. Judge Southard did not know Judge Danser's request for the transfer was at the behest of a friend of Judge Danser.

Without issuing a minute order, Judge Danser continued the case until October 29 and gave the new date to Bishop. Bishop told Keane to be present in court that date and Keane

relayed the information to her lawyer. Because of the lack of a minute order, the district attorney had no notice of the transfer or hearing.

Bishop placed a three-minute telephone call to Judge Danser's chambers at 8:48 a.m. on October 29, 2002 and was present in Judge Danser's courtroom, sitting next to Keane, when the case was called shortly thereafter. Keane was present with her lawyer, Horner. The judge was hearing felony motions that morning, and Deputy District Attorney (DDA) Tracy Gilliam was present in Judge Danser's courtroom on a law and motion matter. Gilliam was not assigned to misdemeanor DUI cases. She did not have a copy of the *Keane* file and did not know the case was on calendar until she arrived in court that morning.

Before proceeding with the *Keane* matter, Judge Danser did not hold a pretrial conference and sought no involvement or input from anyone from the district attorney's office. The judge called the *Keane* case at the beginning of the calendar and asked for appearances; attorney Horner announced he was present with the defendant. Keane entered a no contest plea to the offense of driving with a blood alcohol level of .08 percent or higher.

As the judge began to question Keane about the waiver of rights form Horner had filed, DDA Gilliam interrupted and asked Judge Danser who from the DA's office was assigned to the case. He replied, falsely, "This came from Palo Alto. They wanted to have it here for some reason, I said we'd do it." (M.Rpt., p. 85.) The judge asked Gilliam if she wanted to handle the case. She responded she did not know a lot about the case. The judge replied that it was "just a typical DUI case." (*Ibid*.) That statement was not true in light of Keane's high blood-alcohol test results of .223 percent at the time of the arrest and breath test results two hours later of .18 and .19 percent. All of those results would be considered high. In addition, this was not Keane's first offense, contrary to what Judge Danser told DDA Gilliam. Keane had an alcohol-related reckless driving conviction from 12 to 17 years previously. Although Judge Danser testified he never considered "stale priors" in sentencing, a prosecutor who was aware of the prior conviction would have been entitled to argue its relevance at sentencing.

Judge Danser accepted Keane's guilty plea, dismissed the DUI charge, and gave her a sentence close to the minimum allowable. The sentence was less than she likely would have received from Judge Southard. When DDA Gilliam questioned Judge Danser's failure to impose jail time in light of the .18 percent blood alcohol level, he stated he did not impose jail or weekend work time unless the level was over .20 percent.

At trial, Judge Danser offered three different explanations for why he transferred the case to himself. Ultimately, he said he "forgot" why Bishop and Keane wanted the case transferred. The inescapable inference is that he made the transfer as a favor to Bishop so that Keane could receive a lighter sentence than she otherwise would have received.

On November 1, 2002, three days after the *Keane* plea and sentencing hearing, DDA Gilliam sought to get a transcript of the hearing. Judge Danser attempted to prevent her from doing so, and his misconduct in that connection is the subject of count six (discussed *post*, pp. 24-25, 34).

3. Niklas Sundstrom (Count Eight) (see M.Rpt., pp. 87-90)

Sundstrom was arrested by the Campbell police on May 9, 2000 for DUI. Breath tests showed blood alcohol levels of .22 and .23 percent. Sundstrom played for the Sharks at the time. Randy Bishop referred Sundstrom to the attorney who represented him in the case. The case was set for arraignment in a court other than Judge Danser's department.

Someone, likely Bishop, asked Judge Danser if he would hear the case. Judge Danser agreed, provided Sundstrom would plead guilty. The judge asked his clerk to have the matter transferred to his department.

During Judge Danser's handling of the case, he afforded substantively lenient treatment to Sundstrom in two respects. First, although neither the defendant nor his counsel appeared for a hearing on June 23, 2000, the judge did not issue a bench warrant for the defendant's arrest, contrary to his normal practice. Second, Sundstrom pled guilty, thereby admitting a blood alcohol level of .20 percent or more. There is evidence, including Judge Danser's own testimony, that he usually imposed jail time in cases with blood alcohol at that level. In contrast to his usual practice, the judge did not impose jail or weekend work time on Sundstrom when he plead guilty. There was no court reporter at the sentencing hearing and the judge made no disclosures on the record of any ex parte communications about the case.

4. Edward Meyers (Count Nine) (see M.Rpt., pp. 90-92)

Meyers was arrested for DUI on December 22, 2001. Breath tests indicated blood alcohol levels of .19 and .20 percent. He was a sergeant for the Santa Clara County Department of Correction and worked at the county jail with the husband of Judge Danser's courtroom deputy/bailiff, Susan Taylor. The Meyers and Taylor families were friends. Meyers told Susan Taylor about the arrest shortly after it happened. She said she could ask Judge Danser if he

would take the case, explaining that he did not necessarily sentence first-time offenders to the weekend work program.

Susan Taylor told Judge Danser about Meyers's arrest, adding that Meyers was a friend who worked in the Department of Correction. She asked if the judge would hear her friend's case. The judge agreed, provided Sgt. Meyers was willing to plead guilty. Judge Danser had the case transferred to his department from Judge Erica Yew's department. Judge Yew normally sentenced DUI defendants to the weekend work program. Susan Taylor told Meyers his case would be heard in Judge Danser's department.

On February 5, 2002, Sgt. Meyers appeared with counsel before Judge Danser and pled guilty. The judge imposed a minimum sentence that did not include jail or weekend work time. He did not make any disclosures on the record that the defendant was a friend of his bailiff or concerning why the case was pending before him.

C. The Family Citations – Findings of Fact (Count Five) (see M.Rpt., pp. 94-97)

Judge Danser has stipulated to the truth of the allegations in count five concerning his attempts to dismiss three citations issued to one of his minor children. (Order of July 22, ¶ 2a.) A summary of the admitted facts is as follows:

1. On November 22, 2002, LGPD Officer Todd Fleming cited one of Judge Danser's minor children for failing to stop at a stop sign and for a violation in connection with his provisional driver's license. Upon learning of the citation, the judge phoned Bishop at home to complain about the ticket, threatening to file a formal complaint against Officer Fleming. The judge also phoned his friend, LGPD Captain Duino Giordano, and asked why Fleming had not given the child a break given the judge's position and his relationship with the LGPD. Judge Danser asked or suggested the ticket be dismissed. When Giordano called back to say the LGPD had no authority to dismiss the ticket, the judge expressed his unhappiness with that decision. The judge stated he would no longer make himself as readily available to the LGPD as he had in the past.

2. On November 12 and December 12, 2002, the LGPD issued citations to a vehicle registered to the judge and his wife. The vehicle was being driven on those dates by the same minor child referenced in the preceding section 1. Both citations were for parking without a permit and neither was timely paid. Although Vehicle Code section 40215, subdivision (a) provides that within 21 days after the issuance of a notice of parking violation, a person may

request an initial review by the issuing agency, no such request was made concerning either ticket.

On January 7, 2003, the judge phoned the LGPD, spoke with a records person and told her he was going to order the tickets dismissed. He asserted on the telephone that the tickets had been issued erroneously. Two days later, the judge sent a letter to the LGPD on his official court stationery ordering that the two parking citations be dismissed.

3. LGPD Chief of Police Scott R. Seaman sent Judge Danser a letter refusing to dismiss the two citations referenced in the preceding section 2. Approximately January 22, 2003, the judge again phoned his friend LGPD Captain Giordano, expressed anger at Chief Seaman's letter, and reiterated that he no longer would make himself available to the LGPD. The next day, the judge faxed Giordano a letter apologizing for the phone call, admitting it was "totally inappropriate." In the judge's faxed letter, he added, "perhaps my interaction with your officers and other employees at the police department should be on a more professional level and I will stop my informal contact with them." The judge requested that Giordano advise LGPD personnel of the changed relationship. (M.Rpt., pp. 96-97.)

4. On January 23, 2003, Judge Danser sent a letter to LGPD Chief Seaman on official court stationery concerning the parking citations referred to in section 2, falsely stating "there was no violation and the citations should not have been issued." The judge also made the misleading statement in his letter that his child "has a permit from the high school that allows him to park." In fact, the permit did not allow parking in a faculty space. The judge included two additional sarcastic comments in his letter: "It is nice to know that the police department has the resources to pursue such important matters" and "I now understand why the kids at the high school complain about the Los Gatos police officers."

5. On January 24, 2003, Judge Danser called Chief Seaman and spoke to his secretary, Nancy McVay, who offered to take a message since the chief was busy. The judge raised his voice and told McVay in a very angry tone that she could give the following message to the chief: "Don't send your officers to my house; don't contact me; as far as I'm concerned, business between us is done!" The judge added an additional disparaging remark about the LGPD.

D. Unjudicial Demeanor and Abuse of Power in Denying Transcript – Findings of Fact (Count Six, ¶ G) (see M.Rpt., pp. 103-106)

Judge Danser is charged with misconduct in connection with his attempts to prevent DDA Tracy Gilliam from obtaining a transcript of the *Keane* plea and sentencing hearing (see § 2, *ante*, pp. 18-21). We adopt the following findings of the masters:

On November 1, 2002, which was three days after the *Keane* plea and sentencing hearing, DDA Tracy Gilliam left a voicemail message at 9:00 a.m. in Judge Danser's department requesting a copy of the transcript of that earlier hearing. When the clerk, Kathi Bringuel, advised the judge of the message, he told her "it wasn't her [Gilliam's] case" and that Gilliam could not have the transcript. (M.Rpt., p. 104.) At 10:30 a.m., Bringuel left a whispered return voicemail message for Gilliam that "you're not hearing this from me," but that Gilliam was not getting the transcript without coming to court and requesting it from Judge Danser. (*Ibid*.) When Gilliam and Bringuel spoke directly by phone shortly thereafter, Bringuel said she did not know why the judge had disallowed the transcript and that Gilliam would need to ask the judge directly. Bringuel warned Gilliam that the judge was angry.

DDA Gilliam went to Judge Danser's courtroom shortly before 11:00 a.m.; the judge was on the bench. During a recess, Gilliam approached the court reporter, asked for a copy of the transcript, and started to give the reporter the case number. The judge interrupted and asked "That DUI?" When Gilliam replied in the affirmative, indicating she wanted a copy of the *Keane* transcript, Judge Danser said "Denied. You can't have it." The judge asked Gilliam why she wanted the transcript. She replied that her boss, Karyn Sinunu, had asked her to get it and that Gilliam was uncertain as to Sinunu's reasons. Gilliam said she would have Sinunu call the judge. He said he would refuse the call and that Sinunu would need to come over. (M.Rpt., p. 105.)

In refusing Gilliam's transcript request, Judge Danser stated "It's really none of your business" and that "it just happened that we were sentencing somebody when they [the DA's] were in there." (M.Rpt., p. 105.) Judge Danser appeared angry. Speaking in a loud voice, he said, "Screw your office. Screw Karyn Sinunu. Screw you. I don't care about your damn cases. You can keep your damn cases. If you want to take me from the bench, go ahead. I can do something else. I am so hot about this. Screw your office. And you can tell Karyn Sinunu I said screw her." (*Id*. at p. 106.)

Deputy Public Defender Susan Shores was present in court when Gilliam came in just before 11:00 a.m. Shores did not see Gilliam do anything rude or inappropriate in connection with her request for the transcript. Shores confirmed that the judge told Gilliam her office could stay out of his courtroom and said words to the effect of "you guys can go screw yourself." (M.Rpt., p. 106.)

Judge Danser testified he denied Gilliam's transcript request because she had not completed appropriate paperwork. The explanation is not credible. An attorney may obtain a non-confidential transcript, such as this, directly from the reporter without court approval. The judge admitted he had never previously interfered with the preparation of a transcript.

II. Conclusions of Law

Judge Danser has stipulated that he committed at least prejudicial misconduct in connection with the combined charges against him. This concession concerns the judge's *overall* conduct, but it does limit the issue to be decided by us. The remaining question is whether any of Judge Danser's admittedly improper actions satisfies the standard of the more serious willful misconduct. The masters concluded that in each instance but the traffic case involving Tadd Whitmire (§ r, *ante*, pp. 14-15), the judge committed willful misconduct; the masters determined that the *Whitmire* case involved prejudicial misconduct. We agree with the masters and their analyses that all instances except the one involve willful misconduct. As to *Whitmire*, we conclude there is no evidence of any action taken by Judge Danser.[3]

The levels or types of judicial misconduct that may subject a judge to discipline by the commission are described in article VI, section 18, subpart (d), of the California Constitution. The most serious form of wrongdoing, willful misconduct, is defined by the California Supreme Court as consisting of (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091 (*Broadman)*; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 (*Dodds*).)

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[3] The evidence concerning *Whitmire* is summarized in section r, *ante*, pp. 14-15. The case appears to have been transferred to Judge Danser's department, although even that was not established. No evidence linked Judge Danser to the transfer. Similarly, the case apparently was dismissed, but there is no evidence that demonstrates either that fact or that the judge took any actions concerning the case. Simply stated, there is *no* evidence of any conduct, let alone any misconduct, by Judge Danser.

In order to determine whether a judge's conduct is "unjudicial" under the first prong of the foregoing standard, the conduct is measured with reference to the California Code of Judicial Ethics. (*Dodds, supra,* 12 Cal.4th at p. 172; accord, *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 395 (*Oberholzer*).) "The failure of a judge to comply with the canons 'suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.'" (*Adams v. Commission on Judicial Performance (Adams II)* (1995) 10 Cal.4th 866, 878, citing *Adams v. Commission on Judicial Performance (Adams I)* (1994) 8 Cal.4th 630, 662.)

The "bad faith" requirement for willful misconduct is satisfied when a judge is "(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, 18 Cal.4th at p. 1092.)

The "judicial capacity" prong of the willfulness test has been defined as follows: "A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose." (*Broadman, supra,* 18 Cal.4th at p. 1104, citing *Dodds, supra*, 12 Cal.4th at p. 172.)

It is an abuse of power, and willful misconduct, for a judge to engage in a patterned behavior of handling cases that are not pending before the judge as part of normal court business. (*Inquiry Concerning Judge David E. Wasilenko*, No. 170 (CJP 2005), p. 24 (*Wasilenko*).)

The use of the power of judicial office to benefit a friend is a "casebook example of wilful misconduct." (*McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 194 (*McCullough*), citing *Spruance v. Commission on Judicial Qualifications* (1975)13 Cal.3d 778,798 (*Spruance*).) In this case, we again confront the vice inherent in a two-track system of justice, where favored treatment is afforded friends and other favored few, and which is easily recognized as "corruption at the core of our system of impartial equal justice, and ... intolerable." (*Wasilenko*, *supra*, p. 24.) A judge who runs such a two-track system commits willful misconduct. (*Ibid*.)

Corruption is inherent in Judge Danser's pervasive scheme of dismissing tickets without any proper basis, under the guise of being in "interest of justice." In fact, "ticket fixing is a quintessential bad act of a judge" (*Inquiry Concerning Judge Michael E. Platt*, No. 162 (CJP 2002), p. 20 (*Platt*).) It is "among the most obvious forms of abuse of authority … [–] 'an abuse that citizens unquestionably understand and are suspicious about.'" (*Id.* at p. 20, quoting masters' report.)

In each of the counts in which Judge Danser is charged with wrongdoing, the masters applied the Supreme Court's test for willful misconduct and found it satisfied, except in the *Whitmire* case, as noted. We reach the same conclusion for the same and additional reasons. We now separately analyze the three parts of the test to show how each is satisfied. The following discussion applies to each of the traffic matters, excluding *Whitmire*, that Judge Danser transferred to himself.

A. The Traffic Cases – Conclusions of Law (see M.Rpt., pp. 62-70)

1. Unjudicial Conduct

The masters concluded, as do we, that by improperly transferring the traffic cases to himself and then affording family, friends, court staff and others with special connections access to a preferential justice system, Judge Danser violated canon 1 (requiring a judge to maintain high standards of conduct so as to uphold the integrity and independence of the judiciary), canon 2 (requiring a judge to avoid impropriety and the appearance of impropriety in the judge's activities), and canon 2A (requiring a judge to respect and comply with the law and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary). [4]

Canon 2B(1) prohibits a judge from allowing family, social or other relationships to influence the judge's judicial conduct or judgment, and also prohibits a judge from conveying or

[4] In the *Granato* matter (§ a, *ante*, pp. 5-6), the judge sought to cause a dismissal through ex parte communications with the court commissioner before whom the case was pending and with a lawyer the judge contacted to act on the defendant's behalf. There is not an abuse of power in *Granato* related to an improper transfer, but instead, there is an equivalent abuse of judicial authority in the efforts to influence another bench officer. (Cf. *Platt*, *supra*, pp. 8-9, 13-14.) The conduct was in violation of canons 1, 2, 2A, 2B(1), and 2B(2); the provision of canon 3B(7) prohibiting ex parte contacts also was violated. The content of each implicated canon is discussed in the text. An additional provision of canon 2B(2) prohibits a judge from initiating communications with a sentencing judge, which Judge Danser also violated in his contacts and attempted influence over the commissioner.

permitting others to convey the impression that anyone is in a special position to influence the judge. Canon 2B(2) proscribes a judge from lending the prestige of judicial office to advance the pecuniary or other interests of the judge or others. Judge Danser violated both of these canons in each of the traffic cases by allowing his relationships with his friends, including Bishop and court staff and various defendants, to influence his judicial conduct and judgment. He also conveyed the impression that they were in a special position to influence him, and lent the prestige of his judicial office to advance the pecuniary and personal interests of his inner circle and of the defendants.

Canon 3B(7) contains dual prohibitions applicable here. First, this canon requires a judge to afford all interested persons, or counsel, a "full right to be heard according to law." In all of the traffic cases (except *Granato*), Judge Danser dismissed the cases without affording the prosecution a right to participate. While it appears that the DA typically does not appear in traffic matters in Santa Clara County, the citing law enforcement officer or agency is to be notified of contested citations and has a right to be heard. That right was abridged by Judge Danser in violation of canon 3B(7). (M.Rpt., p.64.) Second, the canon prohibits ex parte communications, with certain exceptions not applicable here. In the traffic matters, including *Granato*, the judge had repeated ex parte contacts. The contacts were with Bishop, other members of the judge's inner circle, and the commissioner and counsel in *Granato.* These ex parte contacts violated canon 3B(7).

In all of the traffic matters except *Granato*, the judge also violated canon 3B(8), requiring a judge to dispose of all judicial matters "fairly, promptly, and efficiently." Judge Danser's summary dismissals of the contested traffic cases deprived law enforcement of the right to be heard and thus the judge failed to dispose of the cases "fairly" in compliance with this canon.

Canon 3E(1) requires recusal when "disqualification is required by law," which, as relevant here, is required under Code of Civil Procedure section 170.1, subdivision (a)(6). That section requires disqualification if "[f]or any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." In all of the transferred traffic cases, the judge was disqualified, *at a minimum* under subdivision (C).

Under the related canon 3E(2), a judge is required to disclose *on the record* information the judge believes the parties or the lawyers might consider relevant to the question of disqualification, even if the judge believes there is no basis for disqualification. Having improperly transferred the cases to himself for an improper purpose, Judge Danser could not have had any legitimate subjective doubt that he was required to disqualify himself. Having failed to recuse, however, he certainly was required under canon 3E(2) to make requisite and proper disclosures. His failure to do so was in violation of this canon. Because *Granato* was not pending before Judge Danser, the dual disqualification/disclosure requirements of canon 3E are inapplicable.

Judge Danser claims he had judicial discretion to dismiss tickets based on Bishop's oral statements that the citing officer/agency had no objection to the dismissal. The masters concluded, as do we, that the entire attempted cover of reliance on Bishop was a subterfuge. Moreover, the section of the Vehicle Code the judge claimed empowered him to act in fact expressly disempowered him with the following language: "Under no circumstances shall a personal friendship with any officer, public official, or law enforcement agency be grounds for dismissal." (Veh. Code § 40500(d).) The point is also academic in that Judge Danser had no judicial authority over the transferred cases. A judge cannot confer judicial power or discretion on himself or herself by means of a wholesale pattern of illicit case transfers. (*Wasilenko, supra*, p. 21.)

To the extent Judge Danser did in fact seek the consent of any of the citing officers/agencies to dismiss any of the tickets issued to members of his inner circle, he thereby violated canons 2B(1) and 2B(2). Any such efforts, direct or indirect through Bishop, would demonstrate the judge was allowing his personal relationships to influence his judicial conduct and judgment. The actions also would have conveyed the impression that members of the inner circle were in a position to influence the judge, and would have lent the prestige of judicial office to advance their pecuniary or personal interests, in contravention of these two canons.

If such advance "approval" was sought from the citing officers, the communications were in violation of canon 3B(7), based on Judge Danser's own description of the conversations as having been out of the presence of the parties. Judge Danser also could not reasonably rely on Bishop as a messenger, given Bishop's own personal interest in the outcome of his friends' tickets. Moreover, if Judge Danser did in fact rely on Bishop as an intermediary in any regard,

he thereby denied fundamental fairness and due process to law enforcement, which also would contravene the separate provision of canon 3B(7) requiring that matters be handled "fairly."

Judge Danser's conduct was "unjudicial" under the *Broadman* standard because of the foregoing violations of the canons.

2. Bad Faith

The "bad faith" component of willful misconduct is satisfied because Judge Danser acted in each of the traffic cases, including *Granato*, "for a corrupt purpose," that is, a "purpose other than the faithful discharge of judicial duties." (*Broadman*, *supra*, 18 Cal.4th at p. 1092.)

In *Granato*, Judge Danser contacted the court commissioner and discussed a dismissal of the ticket. When the commissioner had second thoughts about dismissing the case in the absence of the defendant, the judge requested a lawyer to appear. In the *Platt* case, we found that it was prejudicial misconduct for Judge Platt to call a court commissioner to say that the judge's godfather had received a ticket and that the man was active in the community. There was no evidence in *Platt* that the case would come before the commissioner or that the judge asked the commissioner for favorable consideration. The contact alone was misconduct. (*Platt*, *supra*, p. 13.) Here, Judge Danser discussed a dismissal in an actual case pending before the commissioner. He was overtly "using the power of the bench to benefit a friend," an act the Supreme Court has cited as "a casebook example of wilful misconduct." (*McCullough*, *supra*, 49 Cal.3d at p. 194.)

After Judge Danser was advised by his presiding judge to avoid a repeat of *Granato* by abstaining from contacting court commissioners, Judge Danser shifted strategies and compounded his wrongdoing. He transferred the subsequent cases to his own department through a wholesale abuse of power, and as a means to bypass the commissioners to whom such cases normally were assigned. The transfers were the first step of the corrupt scheme of affording preferential treatment to his inner circle. The process culminated in the wholesale dismissals without legal justification. The entire scheme was patently for a corrupt purpose and in bad faith under *Broadman*.

3. Judicial Capacity

In dismissing the transferred traffic cases, Judge Danser was acting in his judicial capacity within the meaning of *Broadman*. (*Broadman*, *supra*, 18 Cal.4th at p. 1104.) That conclusion pertains notwithstanding his corrupt purpose. "[I]f a judge uses, or attempts to use,

his authority as a judge *for improper ends*, regardless of location, we consider the judge to be acting in his judicial capacity." (*Dodds*, *supra*, 12 Cal.4th at p. 172, italics added.) Judge Danser's assertion of influence over the court commissioner in the *Granato* matter also was an act taken in his judicial capacity. (See *Platt*, *supra*, p. 8-9, 13-14 [Judge Platt was acting in a judicial capacity and committed willful misconduct when he asked another judge to grant preferential treatment to a relative of a personal acquaintance of Judge Platt].)

B. The DUI Cases – Conclusions of Law (see M.Rpt., pp. 92-94)

Judge Danser also improperly transferred the four DUI cases to his courtroom following his improper ex parte communications. None of the cases was assigned to Judge Danser and none would have been assigned or transferred to him in the ordinary course of court business. Following each of the transfers, the judge afforded procedural preferences and imposed more lenient sentences than the defendants otherwise likely would have received. The judge's actions fulfill the three-fold test of *Broadman* for willful misconduct in that they were unjudicial, in bad faith and while he was acting in his judicial capacity.

As in the traffic cases, the judge's conduct in all four cases was unjudicial in that it violated canons 1, 2, 2A, 2B(1), 2B(2), as well as the ex parte prohibitions and the right to be heard provisions of 3B(7), the "fairness" standard of 3B(8), and canons 3E(1) and 3E(2). [5]

The judge's actions in the DUI cases constitute bad faith based on the same or similar considerations as in the traffic cases. The initial transfer of the cases to his department was an abuse of authority and for a corrupt purpose under *Wasilenko*, and thus in bad faith under *Broadman*. The fact that another bench officer may have facilitated one or more of the transfers does not exonerate Judge Danser. Judge Danser's corruption extended as well to affording preferential procedural treatment and lenient sentencing in order to benefit defendants with contacts in the judge's inner circle.

Finally, Judge Danser was acting in his judicial capacity in directing or causing the case transfers to his own department, accepting pleas and imposing sentences, notwithstanding the impropriety of all such acts. (*Dodds*, *supra*, 12 Cal.4th at p. 172.)

[5] The provisions of these several canons are summarized in the text, *ante*, at pages 27-29.

C. The Family Citations – Conclusions of Law (see M.Rpt., pp. 97-102)

1. Judge Danser's efforts to get the LGPD to dismiss the ticket issued to the judge's son by Officer Fleming constituted willful misconduct. His statements to Detective Bishop and Captain Giordano were unjudicial, in bad faith and in his judicial capacity.

The judge's statements were unjudicial in that they were in violation of canons 1, 2, 2A, 2B(1) and 2B(2). The content of the phone calls suggest the judge had been providing services to the police in exchange for an unspecified payback, and if the son's ticket were not dismissed, the judge would retaliate by withdrawing his special judicial services and by filing a complaint against Officer Fleming. His family relationship influenced his judicial conduct and judgment contrary to canon 2B(1). He lent the prestige of judicial office to advance his or his son's personal, familial and pecuniary interests in violation of canon 2B(2). In so doing, the judge did not observe the high standards of conduct required of a judge under canons 1 and 2. The conduct involved impropriety and the appearance thereof contrary to canon 2, and was inconsistent with promoting public confidence in the integrity and impartiality of the judiciary as required under canon 2A. The judge's purpose appears to be nothing other than to benefit himself or his son. The judge was using his power as a judge and therefore clearly was acting in his judicial authority. His actions, however, were not in the faithful discharge of judicial duties, and rather, were corrupt and in bad faith.

2. Vehicle Code section 40215, subdivision (a), provides that within 21 days after the issuance of a notice of parking violation, a person may request an initial review by the issuing agency. Rather than avail himself of that provision, Judge Danser adjudicated his son's tickets, determining for himself they had been improperly issued. Thereafter, in a flagrantly biased abuse of judicial power, he attempted to use his status as a judge to order them dismissed. The judge's oral and written dismissal orders constituted willful misconduct. (Cf. *Spruance*, *supra*, 13 Cal.3d at pp. 794, 799 [willful misconduct to solicit another judge to dismiss traffic ticket Judge Spruance had received].)

The judge's conduct was unjudicial in that it violated numerous canons. The conduct was incompatible with canon 2B(1) because the judge allowed his family relationship to influence his judicial conduct and judgment. He used the prestige of office to advance his or his son's personal, familial and pecuniary interests, contrary to canon 2B(2). The improper use of judicial stationery contravened canon 2B(4). The judge was disqualified from hearing his son's case

under Code of Civil Procedure section 170.1, subdivision (a)(1) (requiring disqualification when a person within the third degree of relationship to the judge is known to the judge to be a likely material witness) and subdivision (a)(6) (requiring disqualification when a person aware of the facts might reasonably entertain a doubt the judge would be impartial). Accordingly, his failure to recuse therefore contravened canon 3E(1). Because of the foregoing, the judge also violated canons 1, 2 and 2A.

Judge Danser acted in bad faith because he acted for the corrupt purpose of benefiting his son. In identifying himself on the phone as a judge, and using his judicial stationery, the judge was acting in a judicial capacity, albeit improperly so.

3. Judge Danser's statements to Captain Giordano that he would cease making himself available to LGPD officers was in retaliation for Chief Seaman's refusal to dismiss the parking tickets, and constituted willful misconduct. The threatened withdrawal of services carries an inherent suggestion that previous services were offered as part of a bargained exchange and in violation of canons 1, 2 and 2A. The judge's conduct was unjudicial for the additional reasons that the judge allowed his family relationships to influence his judicial conduct and judgment, in violation of canon 2B(1). Because the judge used the prestige of office to advance his or his son's personal, familial and pecuniary interests, he acted contrary to canon 2B(2). The judge was acting in his judicial capacity, and his inappropriate anger during his telephone conversation with Captain Giordano violated canon 3B(4) (requiring a judge to be patient, dignified, and courteous to persons with whom the judge deals in an official capacity.)

The judge's phone call and follow-up fax were to obtain preferential treatment for himself or his son and were patently corrupt. By invoking his powers as a judge in an effort to obtain the favorable treatment, the judge was acting in a judicial capacity.

4. Judge Danser's letter to Chief Seaman constituted willful misconduct. The letter had an improper sarcastic and derogatory tone, contained false and misleading statements, and evidenced a lack of impartiality toward Los Gatos police officers who likely might appear before the judge. Accordingly, it was unjudicial in that it contravened canons 1, 2, 2A and 3B(4).

The judge's conduct was unjudicial for the further reasons that he allowed his family relationships to influence his judicial conduct and judgment, contrary to canon 2B(1). The judge used the prestige of office to advance his or his son's personal, familial and pecuniary interests, and thereby acted contrary to canon 2B(2).

The purpose of the judge's conduct, while acting in a judicial capacity using judicial stationery, was for the corrupt purpose of obtaining favorable treatment for himself or his son.

5. The judge's telephone statements to Nancy McVay were in retaliation for Chief Seaman's refusal to dismiss the parking tickets, and constituted willful misconduct. The threatened withdrawal of services again carries an inherent suggestion that previous services were offered as part of a bargained exchange that was in violation of canons 1, 2 and 2A. The judge's conduct also was unjudicial in that he allowed his family relationships to influence his judicial conduct and judgment, in violation of canon 2B(1). The judge used the prestige of office to advance his or his son's personal, familial and pecuniary interests, and thereby acted contrary to canon 2B(2). The judge was acting in his judicial capacity, and his anger and undignified language during his telephone conversation with McVay violated canon 3B(4).

The purpose of the judge's conduct again was corrupt in that it was to obtain favorable treatment for himself or his son. By referencing his powers as a judge in his threatened retaliation ("Don't send your officers to my house"), the judge was acting in his judicial capacity. "[I]f a judge uses, or attempts to use, his authority as a judge for improper ends, regardless of location, we consider the judge to be acting in his judicial capacity." (*Dodds*, *supra*, 12 Cal.4th at p. 172.)

D. Unjudicial Demeanor and Abuse of Power in Denying Transcript – Conclusions of Law (see M.Rpt., pp. 106-107)

Judge Danser's statement to DDA Gilliam that "if you want to take me from the bench, go ahead; I can do something else []" suggests the judge knew that his handling of the *Keane* case could lead to judicial discipline. Because of this, the judge interfered with Gilliam's routine request for a transcript and tried to intimidate her and her office from pursuing the matter. The judge's actions constituted willful misconduct.

The conduct was unjudicial because it was contrary to several canons. The order denying production of the transcript violated canons 1, 2 and 2A. The judge's crude comments were highly discourteous and injudicious and constituted an inappropriate display of temper in violation of canon 3B(4).

The judge's actions were in bad faith, for the corrupt purpose of inhibiting the gathering of evidence relating to his handling of the *Keane* case. The judge used the power of his position and was acting in a judicial capacity in denying the request for a transcript.

III. Discipline

Our determination of the appropriate sanction to impose against Judge Danser is guided by the Supreme Court's explanation of the purpose of judicial discipline, the responsibility for which is entrusted to this commission by the California Constitution. According to the court, the purpose "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Broadman*, *supra*, 18 Cal.4th at pp. 1111-1112, citing *Adams II*, *supra*, 10 Cal. 4th at p. 912.) The combination of the shocking nature of this judge's behavior and the pervasive scope of his corruption clearly warrants the maximum discipline. Indeed, Judge Danser agrees that his conduct warrants a censure and bar. (Order of July 22, ¶ 3.)

In 2002, we removed Judge Michael E. Platt from office for misconduct that included ticket fixing on a scale that pales in significance compared to that of Judge Danser. In the following discussion, we highlight certain examples of Judge Danser's wrongdoing to demonstrate the egregiousness of his behavior. In doing so, we remain mindful of the overall magnitude of the corruption. There are, however, certain examples of behavior that stand out as shocking the conscience.

Near the outset of Judge Danser's ticket-fixing scheme, he dismissed two traffic tickets on March 23, 2000, following Bishop's intercession. The cases involved the judge's friends Paul Pavicich (§ b, *ante*, p. 6) and Todd Mayo (§ c, *ante*, p. 7). Neither defendant was present, and neither was represented by counsel when the tickets were dismissed. Consistent with his standard practice in the many fixed-ticket cases, the judge directed the falsification of the official court record to reflect a dismissal "in the interests of justice." In these two instances, he went further and falsified the record to reflect that attorney Terrence Daily had appeared on behalf of both defendants. Mr. Daily happened to be present in court that day, and the judge testified he thought it would be "funny" to put Daily's name in the minutes as counsel for the defendants. In the *Pavicich* case, according to the judge's testimony, the "fun" included using his judicial power to turn Mr. Daily into a "big hero of the Pavicich family," a prominent local family, by adding Daily's name to the minutes.

Two years later, on June 14, 2002, the judge again dismissed two tickets. One had been issued to Evgeni Nabokov, the Sharks' goalie (§ p, *ante*, p. 14), and other to the judge's friend,

Phyllis Cruse (§ q, *ante*, p. 14). Neither case was on calendar and neither defendant present in court – and Judge Danser *was on vacation* that day.

Judge Danser dismissed three tickets given to Gregory Jamison, the CEO of the Sharks organization (§ i, *ante*, pp. 9-10), because, as the judge testified, he knew Jamison to be "an important man with the Sharks" and because he "had no reason to disbelieve" Jamison had paid the tickets.

Judge Danser displayed shockingly inappropriate behavior in adjudicating his own son's tickets and engaging in the related abuses of power and threats directed at staff and officers of the Los Gatos Police Department.

The judge lied and misrepresented the facts to DDA Tracy Gilliam when she legitimately questioned why the *Keane* DUI sentencing hearing was taking place without a representative of the prosecutor's office present. (§ 2, *ante*, pp. 18-21.) Honesty is a *minimum* qualification expected of every judge (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865), and certainly is owed to litigants and counsel. Three days later when Ms. Gilliam sought to obtain a transcript of the proceedings she witnessed, the judge made comments indicating his awareness of the potential wrongdoing in connection with his earlier actions. He sought to prevent the DA's office from obtaining evidence of his conduct, as would be contained in a transcript. That alarming abuse of judicial power was compounded by Judge Danser's inappropriate anger and coarse language directed at Ms. Gilliam, her supervisor, and the prosecutor's office in general.

This opinion is issued as an unqualified denunciation of *all* of Judge Danser's misconduct in an effort to enforce rigorous standards of conduct. We thereby also seek to repair the damage Judge Danser has caused the reputation of the judiciary by his wholesale transgressions of those standards. We endeavor to rehabilitate and maintain ongoing public confidence in the integrity and independence of the judicial system by censuring Judge Danser in the strongest terms possible.

Judge Danser is seriously lacking in the requisite minimum qualities to be a judge. Our settlement agreement with him accomplished his early retirement. The final remedy available to us, a bar, is designed to protect the public going forward by ensuring Judge Danser does not wear a judicial robe again in this state. Judge Danser is hereby censured and barred from receiving an assignment, appointment, or reference of work from any California state court.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez and Ms. Barbara Schraeger voted to impose a censure and bar. Former commission member Justice Vance W. Raye abstained from the vote because he would complete his term as a member prior to the completion of this written decision. Commission member Justice Judith D. McConnell had not been appointed to the commission at the time of the vote and did not participate in this decision. Commission member Judge Risë Jones Pichon is recused and there is currently one public member vacancy on the commission.

Dated: June 2, 2005

/s/

Marshall B. Grossman
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| INQUIRY CONCERNING<br>JUDGE WILLIAM R. DANSER,<br><br>No. 172. | ORDER APPROVING STIPULATION AND DIRECTING DETERMINATION OF MATTER WITHOUT EVIDENTIARY HEARING AND ON OTHER AGREED TERMS |

The examiner and respondent proposed a stipulation on July 19, 2004 ("the Stipulation" hereafter) for determining this matter without an evidentiary hearing before the special masters and on other agreed terms as described below. Pursuant to the Stipulation, respondent William R. Danser has irrevocably retired from his judicial office effective July 19, 2004, and good cause otherwise appearing,

IT IS HEREBY ORDERED:

1. The Stipulation is hereby approved;

2. This matter is submitted to the special masters for the issuance of their final report pursuant to Commission Rule 129 without an evidentiary hearing and on the following terms and conditions:

a. Respondent stipulates to the truth of the allegations in Count Five of the First Amended Notice of Formal Proceedings, filed on February 17, 2004 ("Notice" hereafter);

b. The following specified counts in the Notice are submitted on the transcripts and exhibits from the criminal case against respondent (*People v. William R. Danser*, Santa Clara County Superior Court No. 210838) ("criminal case" hereafter): Count One except for subpart (R); Count Two; Count Three; Count Six, subpart (G) only; Count Eight; Count Nine;

c. Respondent stipulates that at a minimum he engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of article VI, section 18 of the California Constitution;

(1) A copy of the relevant transcripts and exhibits from the criminal case shall be delivered to each of the special masters as soon as practicable. Thirty days after receipt of such documents by the special masters, the examiner and respondent shall file proposed findings and conclusions pursuant to Commission Rule 129, subdivision (b), and sixty days after receipt of such documents, the special masters shall issue their final report. Pursuant to rule 129, subdivision (c), within the 60-day period, the masters may require such additional briefing and argument by the examiner and respondent as they may desire;

(2) In making their findings of fact and conclusions of law, including resolving conflicts in testimony or determining the credibility of a witness, the masters shall not rely on any verdict in the criminal case;

d. The following counts in the Notice are dismissed in the interest of justice: Count One, subpart (R) only; Count Four; Count Six except for subpart (G); Count Seven;

3. Following issuance of the special masters' final report, the matter shall be determined by the commission pursuant to its rules and the terms of the Stipulation, including but not limited to respondent's agreement that at a minimum he engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of article VI, section 18 of the California Constitution, that there is sufficient basis for the commission to issue a censure and bar against him pursuant to article VI, section 18 of the

Constitution, and that he waives his right of review by the California Supreme Court under article VI, section 18, subdivision (d) of the California Constitution;

4. Nothing contained herein affects the rights and duties of the commission respecting respondent under article VI, section 18, subdivision (c) of the Constitution.

Commission members Justice Vance W. Raye, Marshall B. Grossman, Esq., Judge Frederick P. Horn, Michael A. Kahn, Esq., Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez and Ms. Barbara Schraeger participated. Commission members Judge Risë Jones Pichon and Mrs. Crystal Lui did not participate. There is one vacancy on the commission.

Dated: July 22, 2004

/s/

Honorable Vance W. Raye
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING JUDGE ELAINE M. RUSHING,**<br><br>**No. 177** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 127)** |

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Elaine M. Rushing, a judge of the Sonoma County Superior Court since 1992. On February 16, 2006, the commission filed its Notice of Formal Proceedings (Notice) against Judge Rushing in which it charges her with misconduct as follows.

Count one charges that on the night of June 21, 2005, Judge Rushing committed the crimes of driving while under the influence of alcohol (DUI) in violation of Vehicle Code section 23152(a), and driving while having 0.08 percent or more, by weight, of alcohol in her blood in violation of section 23152(b) of that code. The first count also charges that following Judge Rushing's plea of no contest to criminal charges based on the drunk driving, she was convicted in Sonoma County Superior Court on August 8, 2005 of violating Vehicle Code section 23152(b) with an enhancement under section 23578 of that code (for a blood alcohol level of 0.20 percent or more).

Count two charges Judge Rushing with a course of dishonest conduct in connection with her efforts to avoid being arrested in connection with the DUI incident of June 21, 2005 after she drove her car into a ditch, following a hit-and-run property

damage collision involving a wall. The dishonest conduct is discussed further in this decision (*post*, pp. 4-5).

Count three relates to the judge's conduct at the scene where she drove her car into the ditch, and later while she was being transported by California Highway Patrol (CHP) officers from that scene. The charges are that Judge Rushing repeatedly invoked her judicial office, and that of her husband (who is an appellate court justice), in an effort to avoid being arrested, and otherwise to receive preferential treatment. The details of the judge's invocation of judicial office also are discussed further in this decision (*post*, pp. 5-7).

The Supreme Court appointed three special masters to hold an evidentiary hearing and to report to the commission. The masters are Hon. Laurence D. Rubin, Associate Justice of the Court of Appeal, Second Appellate District, Division Eight; Hon. Raymond J. Ikola, Associate Justice of the Court of Appeal, Fourth Appellate District, Division Three; and Hon. Suzanne N. Kingsbury, Presiding Judge of the El Dorado County Superior Court. Prior to the masters holding an evidentiary hearing, however, Judge Rushing and her counsel, James A. Murphy, Esq., and the examiner for the commission, Jack Coyle, Esq., (the parties) proposed a stipulated resolution of this inquiry to the commission, as follows.

By an amended Stipulation for Discipline by Consent (Stipulation), executed by the various parties on May 10 and 11, 2006, the parties proposed pursuant to Commission Rule 127(b) that this inquiry concerning Judge Rushing be resolved with Judge Rushing agreeing to the truth of the charges set forth in the Notice, and the imposition of a public censure. According to the terms of the Stipulation, Judge Rushing also agreed that in its decision and order imposing a censure, the commission "may articulate the reasons for its decision" and that she will "accept any such explanatory language that the commission deems appropriate." (Stipulation, p. 1.) Pursuant to the Stipulation, Judge Rushing "waives hearing, review, and any further proceedings." (*Ibid*.)

In connection with the Stipulation, Judge Rushing also executed on May 10, 2006, the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which she admitted the

truth of the charges, consented to the imposition of a censure, and waived all further proceedings and review by the California Supreme Court.

The proposed agreement, consisting of the Stipulation and Affidavit, was presented to the commission on May 11, 2006, which accepted it that day by a vote of 7 to 2. (Further details concerning the commission vote are set forth at the conclusion of this decision, *post*, at page 10.) This Decision and Order, and the findings and conclusions set forth herein, are based on the Stipulation and Affidavit.

## II. STIPULATED FACTS AND LEGAL CONCLUSIONS

### Count One

On the night of June 21, 2005, in Sonoma County, California, Judge Rushing committed the crimes of driving while under the influence of alcohol in violation of Vehicle Code section 23152(a) and driving while having 0.08 percent or more, by weight, of alcohol in her blood in violation of Vehicle Code section 23152(b). Breath tests revealed blood alcohol levels of 0.19 and 0.21 percent.

On August 8, 2005, upon a plea of no contest in Sonoma County Superior Court case number SCR-469285, Judge Rushing was convicted of violating Vehicle Code section 23152(b) with an enhancement under Vehicle Code section 23578 (for a blood alcohol level of 0.20 percent or more). The charge under Vehicle Code section 23152(a) was dismissed. Judge Rushing was placed on three years of informal probation, ordered to perform 10 days of work release, attend a 45-hour alcohol program, pay a mandatory fine, and comply with other conditions of probation.

Judge Rushing's conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved) and 2A (failing to comply with the law and failing to act in a manner that promotes public confidence in the integrity of the judiciary), and constituted prejudicial misconduct. (See *In the Matter Concerning Alvarez* (Dec. 27, 2005) Decision and Order, p. 2 [DUI found to be prejudicial misconduct].)

By letter dated June 24, 2005, Judge Rushing promptly reported her arrest to the commission as required by canon 3D(3). Upon her conviction, Judge Rushing issued a public apology to the people of Sonoma County in a local newspaper.

**Count Two**

In an effort to avoid being arrested for crimes related to her drinking and driving referenced in count one, Judge Rushing engaged in a course of dishonest conduct, as follows. While driving under the influence of alcohol on June 21, 2005, Judge Rushing collided with a wall at 5571 Crystal Drive in Santa Rosa, causing property damage. Judge Rushing sustained a minor head injury. She left that scene without notifying law enforcement or the property owners, and continued driving for approximately two miles until she drove her car into a ditch on Riebli Road in Sonoma County.

Judge Rushing remained under the influence of alcohol during the subsequent events of this count and the next. When a passerby stopped her car and asked Judge Rushing if she was all right, Judge Rushing told her to leave. When a second driver stopped and offered to call for help, Judge Rushing said, "we're fine" (even though she was alone) and told her not to call anyone. Judge Rushing also falsely told the second driver that her husband was with her.

Having been notified by someone other than Judge Rushing, California Highway Patrol (CHP) officers and other emergency personnel arrived at the scene at Riebli Road. When Firefighter Ramos found Judge Rushing sitting in the driver's seat, Judge Rushing falsely told him that she had not been the driver. She said that an unknown woman had been the driver, and then that an unknown man had been the driver. When Firefighter Ramos asked her where the keys to the car were, Judge Rushing said that the male driver had taken them when he fled the scene up a nearby hill.

When CHP Officer Holeman arrived on the scene as the investigating officer, he asked Judge Rushing what had happened. She falsely told him that she had not been the driver. Judge Rushing said that there had been two other people in the car with her, a man and a woman, and that the man had been driving. She said that she had met them at a friend's house, but did not know their names. She said that she had been sitting in the

back seat (even though the car had no back seat). When Officer Holeman asked Judge Rushing where the keys to the car were, she first told him that she thought they were in the car, then said that the male driver had taken the keys with him when he and the woman left the scene on foot, walking back toward the friend's house. She said that she had let the man drive her car because he and the woman were going to give her a ride home and then drive her car back to the friend's house. When Officer Holeman asked Judge Rushing how much alcohol she had consumed, she first answered "two bottles," then said, "two glasses." When the officer asked Judge Rushing what she had been drinking, she asked him why he was asking and again asserted that she had not been driving the car.

Judge Rushing's conduct violated canons 1 and 2A (failing to act at all times in a manner that promotes public confidence in the integrity of the judiciary), and constituted prejudicial misconduct. (See *Inquiry Concerning McGraw*, No. 169 (Apr. 3, 2003) Decision and Order, p. 5 [false and misleading statements to media by judge not acting in judicial capacity found to be prejudicial misconduct].)

**Count Three**

At the scene on Riebli Road, referenced in count two, and while being transported from that scene, Judge Rushing repeatedly invoked her judicial office, and that of her husband, in an effort to avoid being arrested for crimes related to her drinking and driving and to otherwise receive preferential treatment, as follows.

Judge Rushing identified herself to Firefighter Ramos by showing him her Sonoma County Court Judge identification badge. When Judge Rushing was asserting her false story that she was not the driver to Officer Holeman, she repeatedly told him that she was a superior court judge in Sonoma County. She also repeatedly requested that Officer Holeman call her husband who, she informed the officer, was an appellate court justice.

When Officer Holeman told Judge Rushing that he had determined that she had in fact been the driver, and that he needed her to answer some questions and perform some field sobriety tests, she responded to the effect of, "but I'm a judge, and I told you I

wasn't the driver." She then declined to answer any more questions and declined to perform any field sobriety tests.

When Officer Holeman placed Judge Rushing under arrest for driving under the influence, she persisted in telling him that she was a superior court judge. She told him that because she was a judge he should not be arresting her. She also repeatedly requested that he call her husband, the appellate court justice.

When Judge Rushing was handcuffed and placed in a patrol vehicle, she began complaining about the handcuffs and asked Officer Holeman if he had seen her superior court judge identification badge. She asked him if he knew she was a judge. She told him that he did not need to be doing what he was doing and that he could remove the handcuffs. Officer Holeman explained that they could not be removed, pursuant to CHP policy. Judge Rushing then said that the handcuffs were too tight. Officer Holeman helped her out of the car, checked the handcuffs himself and had another CHP officer check them to confirm that they were not too tight and had been placed on her in a manner consistent with CHP policy.

Judge Rushing was helped back into the car, and when Officer Holeman was transporting her to a CHP office, she repeatedly told him that he should remove the handcuffs. Officer Holeman again advised her that he could not do so, pursuant to CHP policy. Judge Rushing then told Officer Holeman that in her courtroom she goes against court policies for CHP and other officers, and that he should extend that courtesy to her. She persisted in telling Officer Holeman that she was a superior court judge and that her husband was an appellate court justice.

Judge Rushing's conduct violated canons 1, 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and 2B(2) (lending prestige of judicial office to advance personal interests); see commentary to canon 2B(2), stating that judge must not use position to gain preferential treatment when stopped by a police officer. Because Judge Rushing was not acting in a judicial capacity when she attempted to obtain preferential treatment, she committed

prejudicial, rather than willful misconduct. (See *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 317-319 (*Kennick*).)

**Other Factors Relevant To Discipline**

Judge Rushing has no prior discipline. Numerous people, primarily from the legal community, have submitted letters in support of Judge Rushing's remaining in judicial office.

## III. DISCIPLINE

The starting point of our analysis concerning the appropriate level of discipline is the Supreme Court's admonition that the purpose of judicial discipline "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112 (*Broadman*), citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.)

Based on Supreme Court decisions, the commission has identified several factors that are relevant to determining appropriate discipline in furtherance of the foregoing overall disciplinary objectives enunciated in *Broadman*. (Decision and Order Removing Judge Ross from Office, Inq. 174 (2005), p. 64.) As relevant here, the factors include the number and nature of the acts of misconduct; the existence of prior discipline; whether the judge appreciates that he or she committed misconduct; the judge's general integrity; the likelihood of future misconduct; the impact of the misconduct on the judicial system; and the judge's veracity. In many respects, the various considerations overlap one another. Applying these standards here, we are satisfied that the stipulated censure is the appropriate level of discipline.

The number of acts of misconduct is relevant to the question of discipline, but not according to any rigid formula. (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307.)

> The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct

establishing "lack of temperament and ability to perform judicial functions in an even-handed manner." [Citation.]

(*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918, quoting from *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.)

Judge Rushing admits she committed three instances of prejudicial misconduct. Prejudicial misconduct, committed outside of a judge's official capacity may be the basis for removal or censure (Cal. Const., art. VI, §18, subd. (d)), but is generally considered less serious than willful misconduct in office. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284.)

There is no indication of any pattern of behavior similar to that charged in the Notice, or of any lack of judicial temperament. Nonetheless, Judge Rushing's DUI, as well as the hit-and-run property damage incident involving the wall, and her resulting criminal conviction are utterly irreconcilable with minimum standards expected of a judge, and as stipulated (see *ante*, p. 5) with the requirements of canons 1 and 2A.

Judge Rushing's conduct following her attempts to drive while drunk is particularly egregious. Falsifying stories to persons seeking to offer early assistance, and to emergency personnel and the arresting CHP officers reflects poorly on Judge Rushing's integrity and without doubt seriously negatively impacts the public perception of her, and of the judiciary in general. Judge Rushing left the scene after colliding with a residential wall, lied to citizens offering her initial assistance, and provided a fabricated story to emergency personnel and the investigating officers that she was not the driver. None of this behavior can be reconciled with either canon 1 or 2A or with the standard set by the Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865, that honesty is a "minimum qualification" expected of every judge.

Judge Rushing also repeatedly invoked her judicial office and that of her husband in an effort to avoid arrest and otherwise receive preferential treatment. She stipulates (see *ante*, pp. 6-7) that her conduct in this regard is inconsistent with canons 1, 2A, and 2B(2). In the *Kennick* case, the Supreme Court found Judge Kennick's attempts to invoke the prestige of office as a basis for receiving preferential treatment from the California

Highway Patrol the day after his arrest for drunk driving to be "reprehensible." (*Kennick, supra,* 50 Cal.3d. at p. 340.) The commission views Judge Rushing's comparable behavior similarly.

Although Judge Rushing's overall conduct here is seriously at odds with the canons and expected judicial behavior, the commission recognizes that all three instances of wrongdoing arose out of one drunken lapse of judgment to get behind the wheel of her car. However, that lapse is no more excusable here than when anyone else makes a similar mistake while under the influence.

Judge Rushing's veracity and integrity have been seriously impugned. Her attempts to obtain preferential treatment, however, were unsuccessful. There was no on-bench misconduct and there was no direct adverse affect on the administration of justice per se. Several people, primarily from the legal community, have submitted letters in support of Judge Rushing remaining in judicial office.

In assessing the likelihood of whether Judge Rushing will commit future misconduct, the commission has taken into consideration the judge's assurance to the commission that she has modified her behavior to ensure she will not reoffend. She has no prior history of any alcohol-related offenses or misconduct, and she has no prior discipline by the commission during more than 14 years on the bench. The judge promptly acknowledged to the public and to the commission the serious nature of, and her expressions of remorse over, her wrongdoing. Finally, Judge Rushing has stipulated to the imposition of this serious discipline as the appropriate sanction that is commensurate with her admitted serious wrongdoing.

Based on the foregoing analysis and appraisal of Judge Rushing's wrongdoing, the commission concludes the misconduct here does not rise to the level of wrongdoing in which the Supreme Court has imposed the ultimate sanction of removal from office. The commission also concludes that the purposes of judicial discipline as enunciated in *Broadman* – protection of the public, enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of

the judicial system – can be accomplished through a censure. Accordingly, the commission hereby imposes this public censure of Judge Rushing.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Ms. Patricia Miller, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to accept the parties' settlement proposal and to issue this decision and order imposing a public censure pursuant to the stipulated agreement. Commission members Mr. Michael A. Kahn and Mr. Jose Miramontes voted to reject the proposed settlement, and dissent from this decision and order imposing the public censure, on the ground that the public interest would be better served if the matter were decided after the development of a full factual record following a hearing before the special masters. Commission member Justice Judith D. McConnell is recused, and commission member Mrs. Crystal Lui did not participate in this matter.

Dated: June _8_ , 2006

_____/s/_____

Marshall B. Grossman
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING JUDGE BERNARD J. SCHWARTZ,**<br><br>**No. 178** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 127)** |

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Bernard J. Schwartz, a judge of the Riverside County Superior Court since 2003. On February 22, 2006, the commission filed its Notice of Formal Proceedings (Notice) against Judge Schwartz in which it charges him with misconduct as follows.

Count one charges that on the night of July 16, 2005, Judge Schwartz committed the crimes of driving while under the influence of alcohol (DUI) in violation of Vehicle Code section 23152(a), and driving while having 0.08 percent or more, by weight, of alcohol in his blood in violation of section 23152(b) of that code. The first count also charges that following Judge Schwartz's plea of no contest to criminal charges based on the drunk driving, he was convicted in San Luis Obispo County Superior Court on September 6, 2005 of violating Vehicle Code section 23152(b).

Count two charges that before and after Judge Schwartz's arrest related to the DUI on July 16, 2005, the judge repeatedly attempted to avoid being arrested and incarcerated and otherwise to receive preferential treatment because of his status as a judge.

Pursuant to a Stipulation for Discipline by Consent (Stipulation), Judge Schwartz, his counsel Edward P. George, Jr., Esq., and the examiner for the commission, Jack Coyle, Esq. (the parties), propose pursuant to Commission Rule 127(b) that this inquiry be resolved with Judge Schwartz agreeing to the truth of the charges set forth in the Notice, and the imposition of a public censure. The Stipulation was signed by the various parties on April 25, 27 and 28, 2006. According to the terms of the Stipulation, Judge Schwartz also agreed that in the decision and order imposing a censure, the commission "may articulate the reasons for its decision" and that he will "accept any such explanatory language that the commission deems appropriate." (Stipulation, p. 1.) Pursuant to the Stipulation, Judge Schwartz "waives hearing, review, and any further proceedings." (*Ibid*.)

In connection with the Stipulation, Judge Schwartz also executed on April 25, 2006, the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which he admitted the truth of the charges, consented to the imposition of a censure, and waived all further proceedings and review by the California Supreme Court.

The proposed agreement, consisting of the Stipulation and Affidavit, was presented to the commission on May 10, 2006, which accepted it that day by a vote of 9 to 0. (Further details concerning the commission vote are set forth at the conclusion of this decision, *post*, at page 8.) This Decision and Order, and the findings and conclusions set forth herein, are based on the Stipulation and Affidavit.

## II. STIPULATED FACTS AND LEGAL CONCLUSIONS

### Count One

On the night of July 16, 2005, in Pismo Beach, California, Judge Schwartz committed the crimes of driving while under the influence of alcohol in violation of Vehicle Code section 23152(a) and driving while having a 0.08 percent or higher blood alcohol level in violation of Vehicle Code section 23152(b). Judge Schwartz had a blood alcohol level of 0.17 to 0.18 percent, as evidenced by his breath tests. On September 6, 2005, upon a plea of no contest in San Luis Obispo County Superior Court case number M376280, Judge Schwartz was convicted of violating Vehicle Code section 23152(b).

(The charge under Vehicle Code section 23152(a) was dismissed.) He was placed on probation for three years with standard conditions for a first DUI offense.

Judge Schwartz's conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved) and 2A (failing to comply with the law and failing to act in a manner that promotes public confidence in the integrity of the judiciary), and constituted prejudicial misconduct. (See *In the Matter Concerning Alvarez* (Dec. 27, 2005) Decision and Order, p. 2 [DUI found to be prejudicial misconduct].)

**Count Two**

Before and after Judge Schwartz's arrest by the Pismo Beach Police Department for the crimes referenced in count one, he repeatedly attempted to avoid being arrested and incarcerated and otherwise to receive preferential treatment because he was a judge, as follows.

Pismo Beach Police Officer Trimble observed Judge Schwartz's vehicle "swerving all over the road" and pulled him over after he twice violated Vehicle Code section 21460(a) (driving to the left of double parallel solid lines). It appeared to the officer that Judge Schwartz had been drinking. When the officer requested that the judge take a preliminary alcohol screening (PAS) test, the judge responded, "Did you run my license yet?" When the officer said that he had not and again asked the judge to take the PAS test, the judge responded, "Why don't you run my license and then we can talk?" When the officer asked the judge if he was trying to say he was a police officer, Judge Schwartz responded, "No, I'm a judge."

Pismo Beach Police Sergeant Portz arrived on the scene and Judge Schwartz took a PAS test. (From this point on, the conversations were tape recorded.) Officer Trimble informed the judge that the test indicated that his blood alcohol level was 0.15, which was over the legal limit of 0.08 percent. The judge asked if he could just go back to the hotel (where he was staying for the weekend) and leave his car. The officer told the judge "my hands are tied" and there was "nothing I can do."

Officer Trimble then asked Judge Schwartz questions regarding his drinking and driving. The judge claimed to have had only "a couple of glasses of wine," denied being under the influence of alcohol, and asked, "Is this really necessary, all this stuff we have to go through?" Sergeant Portz responded that they had to do their job "unbiased."

After Judge Schwartz performed poorly on field sobriety tests, Officer Trimble asked if he would agree to another PAS test. The judge again asserted, "I'm really not under the influence. I've had a couple of drinks, but I'm really not under the influence." Sergeant Portz again told him, "we're just trying to do our job, unbiased and fairly to everybody."

When Judge Schwartz took a second PAS test, Officer Trimble informed him that it indicated a higher alcohol level (0.18) than the first test. When the officer told the judge that he was under arrest and asked that he place his hands behind his back, the judge responded, "Can you consider the circumstances of it, and I can just leave my car here, and take me back to the hotel; is that a possibility?" Sergeant Portz again told him, "we have to be fair and unbiased, sir." The judge responded, "But you know what this is going to do; this will substantially impair my career." Officer Trimble said, "If I let you go, it could impair my career." The judge then said, "You don't have to let me drive; you could just let me go home." Officer Trimble told him, "I can't do that."

Judge Schwartz persisted by asking, "can't you guys consider the circumstances?" Sergeant Portz responded, "Sir, I've already told you that we've made our decision. This is the way it's got to happen." The judge again asserted, "This really is going to affect my career, I don't know if you realize that." When Sergeant Portz suggested that the judge would still have a job, the judge responded, "No, no, I really won't." The judge informed the officers that he would have to "self-report" the DUI to the Commission on Judicial Performance.

After being placed in a patrol car, Judge Schwartz said, "You know what? Just leave my car there; just take me back to the hotel and I'll go to sleep. You can have my keys." After Sergeant Portz told the judge two more times that they had to be "fair" with everyone, the judge responded, "I know. But, I'm all of a mile away from the hotel….

I know you guys are doing your job, but this is not good for me. I'm running for election next year and this is not a good time."

After Judge Schwartz was taken to the police station, he asked to speak to a "lieutenant or captain." Sergeant Portz told the judge that he would first have to take the breath test (that the judge had chosen to take rather than a blood test) to determine his blood alcohol level. Later, but still before taking the breath test, the judge again asked, "Is there a lieutenant or captain or somebody that I can speak to?" The sergeant again told him that he would first have to take the test.

Judge Schwartz again talked about the Commission on Judicial Performance and being up for reelection and losing his judgeship. Sergeant Portz again told him that they had to be "fair and unbiased." The judge responded, "But, this is a substantial issue with my career. All you have to do is just take me back to the hotel and I'll go to sleep and wake up in the morning and get my car." He again asked the sergeant, "Is there someone I can talk to before I take the test?" The sergeant reiterated that the judge first had to take the test. When the sergeant informed the judge that the result of the breath test was ".17, .18," the judge recognized "that's not good" and again asked to speak to a lieutenant or captain.

After Sergeant Portz informed Judge Schwartz that he would be held in custody until the next morning or until his wife, who was several hours away, could pick him up, he asked the sergeant if the sergeant could telephone the "on-call judge." Despite the sergeant telling Judge Schwartz that he could not "because you are a citizen of the State of California and we're treating you like everybody else," Judge Schwartz persisted in asking him to call a judge that Judge Schwartz could talk to.

Judge Schwartz's efforts to obtain preferential treatment having failed, he told Sergeant Portz and Officer Trimble "there is no professional courtesy here anymore" and "this is bullshit." Judge Schwartz then stated, "You guys come in and appear before me" in court on certain matters. When the sergeant asked the judge why he brought that up, the judge said, "because I'm not being treated fairly." The sergeant responded, "We're

treating you about as fair as we can, same as everybody else. What you are asking for is special treatment." Judge Schwartz acknowledged, "To some degree, I guess."

Judge Schwartz's conduct violated the Code of Judicial Ethics, canons 1, 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and 2B(2) (lending prestige of judicial office to advance personal interests); see commentary to canon 2B(2), stating that judge must not use position to gain preferential treatment when stopped by a police officer. Because Judge Schwartz was not acting in a judicial capacity when he attempted to obtain preferential treatment, he committed prejudicial, rather than willful misconduct. (See *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 317-319 (*Kennick*).)

**Other Facts Relevant to Discipline**

By letter of July 18, 2005, Judge Schwartz promptly reported his arrest to the commission as required by canon 3D(3). Judge Schwartz has no prior discipline.

## III. DISCIPLINE

The purpose of judicial discipline "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112 (*Broadman*), citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.)

The commission has identified several overlapping factors that are relevant to determining appropriate discipline in furtherance of the disciplinary objectives enunciated in *Broadman*. (Decision and Order Removing Judge Ross from Office, Inq. 174 (2005), p. 64.) As relevant here, the factors include the number and nature of the acts of misconduct; the existence of prior discipline; whether the judge appreciates that he or she committed misconduct; the judge's general integrity; the likelihood of future misconduct; and the impact of the misconduct on the judicial system. Applying these standards here, we are satisfied that the stipulated censure is the appropriate level of discipline.

The number of acts of misconduct is pertinent to the question of discipline, not according to any rigid formula, *Furey v. Commission on Judicial Performance* (1987)

43 Cal.3d 1297, 1307, but rather, for determining whether the wrongdoing was isolated, or part of a course of conduct establishing "lack of temperament and ability to perform judicial functions in an even-handed manner." (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918, quoting from *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.)

Judge Schwartz admits he committed two instances of prejudicial misconduct. Prejudicial misconduct, committed outside of a judge's official capacity may be the basis for removal or censure (Cal. Const., art. VI, §18, subd. (d)), but is generally considered less serious than willful misconduct in office. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284.)

There is no indication of any pattern of behavior similar to that charged in the Notice, or of any broader issue concerning lack of judicial temperament. Nonetheless, Judge Schwartz's DUI and his resulting criminal conviction are utterly irreconcilable with minimum standards expected of a judge, and as stipulated (see *ante*, p. 3) with the requirements of canons 1 and 2A.

Judge Schwartz's conduct when he was stopped by the police and in connection with his arrest is particularly offensive. He repeatedly invoked his judicial office in an effort to avoid arrest and otherwise to receive preferential treatment. The judge stipulates (see *ante*, p. 6) that his conduct in this regard is inconsistent with canons 1, 2A, and 2B(2). In the *Kennick* case, the Supreme Court found Judge Kennick's attempts to invoke the prestige of office as a basis for receiving preferential treatment from the California Highway Patrol the day after his arrest for drunk driving to be "reprehensible." (*Kennick, supra,* 50 Cal.3d. at p. 340.) The commission views Judge Schwartz's comparable behavior similarly.

Although Judge Schwartz's overall conduct here is seriously at odds with the canons and expected judicial behavior, the commission recognizes that all of the wrongdoing arose out of one drunken lapse of judgment to get behind the wheel of his car. However, that lapse is no more excusable here than when anyone else makes a similar mistake while under the influence.

In assessing the likelihood of whether Judge Schwartz will commit future misconduct, the commission has taken into consideration the judge's assurance to the commission that the behavior in question was aberrational; implicit in that assurance is the concept that the judge will not reoffend. The judge has no prior history of any alcohol-related offenses or misconduct, and he has no prior discipline by the commission. The judge promptly self-reported his arrest to the commission. He has acknowledged to the commission the serious nature of, and his expressions of remorse over, his wrongdoing. Finally, Judge Schwartz has stipulated to the imposition of this serious discipline as the appropriate sanction that is commensurate with his admitted serious wrongdoing.

Based on the foregoing analysis and appraisal of Judge Schwartz's wrongdoing, the commission concludes the misconduct here does not rise to the level of wrongdoing in which the Supreme Court has imposed the ultimate sanction of removal from office. The commission also concludes that the purposes of judicial discipline as enunciated in *Broadman* – protection of the public, enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system – can be accomplished through a censure. Accordingly, the commission hereby imposes this public censure of Judge Schwartz.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to accept the parties' settlement proposal and to issue this decision and order imposing a public censure pursuant to the stipulated agreement. Commission members Mr. Michael A. Kahn and Mrs. Crystal Lui did not participate in this matter.

Dated: June _8_, 2006

_____/s/_____

Marshall B. Grossman
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING FORMER JUDGE RONALD C. KLINE,**<br><br>**No. 181** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BAR PURSUANT TO STIPULATION (Commission Rule 127)** |

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns former Judge Ronald C. Kline (Judge Kline). Judge Kline was appointed to the Orange County Superior Court in 1995 and elected to a six-year term in 1996; he did not seek reelection and his final term of office expired at the end of 2002.

On December 12, 2005, Judge Kline pled guilty to four federal felony counts of possession of child pornography. Pursuant to article VI, section 18, subdivision (c) of the California Constitution, when an *active* judge is convicted of a felony under California or federal law and the conviction becomes final, the commission "shall remove a judge from office." Under subdivision (e) of section 18, a judge removed by the commission is "ineligible for judicial office, including receiving an assignment, appointment, or reference of work from any California state court, and pending further order of the [California Supreme Court] is suspended from practicing law in this State." As respects a *former* judge such as Judge Kline, the maximum sanction the commission may impose, based on a final felony conviction, is the imposition of a censure and a bar from receiving

an assignment, appointment, or reference of work from any California state court (censure and bar). (Cal. Const., art. VI, § 18, subd. (d).)

Judge Kline and his counsel, Edward P. George, Jr., Esq., and the examiner for the commission, Jack Coyle, Esq., (the parties) have entered into an agreement by which the commission was requested to commence these formal proceedings against Judge Kline and in which the judge agreed to the imposition of a censure and bar; the judge agreed further that the commission may refer the matter to the State Bar of California. The agreement was presented to the commission on May 10, 2006, which accepted it by a vote of 8 to 0. (Further details concerning the commission vote are set forth at the conclusion of this decision, *post*, at page 4.)

## II. STIPULATION FOR DISCIPLINE

The Stipulation, signed by the various parties on April 27 and May 1, 2006, provides that upon acceptance of the agreement by the commission, a Notice of Formal Proceedings (Notice) will be issued by the commission simultaneously with the issuance of the commission's decision. The Notice is to include the charge that Judge Kline was in criminal possession of child pornography on November 5, 2001 in violation of title 18, United States Code, section 2252A(a)(5)(B). (Stipulation, p. 1.)

The parties further agree that pursuant to Commission Rule 127(b), the new inquiry, commenced with the filing of the Notice, be resolved with Judge Kline agreeing to the truth of the stipulated charge, and the imposition of a censure and bar, and further, that the commission may disclose information concerning this matter to the State Bar. (Stipulation, pp. 1, 2.)

According to the terms of the Stipulation, Judge Kline also agrees that in the decision and order imposing a censure and bar, the commission "may articulate the reasons for its decision" and that he will "accept any such explanatory language that the commission deems appropriate." (Stipulation, p. 2.) Pursuant to the Stipulation, Judge Kline "waives hearing, review, and any further proceedings." (*Ibid*.)

In connection with the Stipulation, Judge Kline also executed on April 27, 2006, the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which he admitted the

truth of the charge, consented to the imposition of a censure and bar, and waived all further proceedings and review by the California Supreme Court.

This Decision and Order, and the findings and conclusions set forth herein, are based on the Stipulation and Affidavit.

## III. STIPULATED FACTS AND LEGAL CONCLUSIONS

On November 5, 2001, law enforcement authorities executed a search warrant on Judge Kline's residence. Images that constituted child pornography, as defined in title 18, United States Code, sections 2256(8)(A) and (C), were found on a computer and computer disks in the residence. As a result, Judge Kline was indicted in *United States v. Ronald C. Kline*, CR No. 02-40(A) – CBM, and on December 12, 2005, in the United States District Court, Judge Kline pleaded guilty to four felony counts of possession of child pornography in violation of title 18, United States Code, section 2252A(a)(5)(B). By pleading guilty, Judge Kline admitted that he is, in fact, guilty. He has not yet been sentenced [as of the date of the Stipulation].

Judge Kline's conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct so that the integrity of the judiciary will be preserved) and 2A (failing to comply with the law and acting at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (As Judge Kline was not acting in a judicial capacity, the conduct cannot be considered "willful misconduct in office." *Broadman v. Commission on Judicial Performance* 18 Cal.4th 1079, 1091.)

Commission of a felony, regardless of the underlying facts of the crime, is a sufficient basis upon which to impose the maximum judicial discipline. In the case of a sitting judge, the constitution mandates removal from judicial office upon finality of a felony conviction. (Cal. Const., art. VI, § 18, subd. (c).) However, Judge Kline has not been in judicial office since his last term of office expired at the end of 2002. The commission previously has interpreted the constitution as prohibiting discipline more

severe than a censure and bar for a former judge. (See *Inquiry Concerning Danser*, No. 172 (June 23, 2005) Decision and Order, p. 3.)

## IV. DISCIPLINE

As noted, if Judge Kline were a sitting judge, the commission would be compelled to remove him from office upon his felony conviction becoming final. The stipulated censure and bar is the maximum sanction the commission may impose upon a former judge, such as Judge Kline. (Cal. Const., art. VI, § 6, subd. (d).) Based upon the parties' stipulation, and good cause appearing, the commission hereby censures former Judge Ronald C. Kline and bars him from receiving an assignment, appointment, or reference of work from any California state court.

Commission members Mr. Marshall B. Grossman, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to accept the parties' settlement proposal and to issue this decision and order imposing a censure and bar pursuant to the stipulated agreement. Commission member Judge Frederick P. Horn is recused, and commission members Mr. Michael A. Kahn and Mrs. Crystal Lui did not participate in this matter.

Dated: June _15_ , 2006

_____/s/_____

Marshall B. Grossman
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING FORMER JUDGE SUSANNE S. SHAW,**<br><br>**No. 183** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BAR PURSUANT TO STIPULATION (Commission Rule 127)** |

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns former Judge Susanne S. Shaw (Judge Shaw). Judge Shaw was a judge of the Orange County Municipal Court from 1985 to 1998, and a judge of the Orange County Superior Court from 1998 to September 30, 2006, when she retired from judicial office. Judge Shaw and her counsel, Edith R. Matthai, Esq., and the examiner for the commission, Andrew Blum, Esq., (the parties) have entered into a stipulation (Stipulation) by which the commission was requested to approve the filing of a proposed Notice of Formal Proceedings (Notice) and in which the judge agreed to the imposition of a censure and bar from receiving assignments, appointments, or reference of work from any California state court. As respects a *former* judge, this appears to be the maximum sanction the commission may impose. (Cal. Const., art. VI, § 18 (d).) Pursuant to the Stipulation, Judge Shaw, by signed affidavit, admits the truth of the charges in the Notice and waives all further proceedings and review by the Supreme Court. (Rule 127 (d).) The Stipulation was presented to the commission on December 6, 2006, which accepted it by a vote of 9 to 0. Pursuant to the Stipulation, the commission also approved the Notice of Formal Proceedings which is filed concurrently with this decision.

Judge Shaw is charged in the Notice with five counts of prejudicial misconduct related to her handling of five different criminal cases in 2003 and 2004. In each case, Judge Shaw treated individuals who appeared before her in a rude and demeaning manner in violation of canon 1, 2A, and 3B(4). She berated, scolded, and belittled attorneys, litigants, witnesses, and a prospective juror. In two cases, she improperly suggested that the defendant's testimony was untruthful, reflecting prejudgment and a lack of impartiality. (Canon 3B(5).) Judge Shaw's abusive conduct drew harsh criticism from the Court of Appeal in appellate decisions arising out of three of the cases. (*People v. Urias* (July 31, 2006, G035179) [2006 WL 2128631] [nonpub.opn.]; *People v. Matteotti* (June 24, 2005, G033801) [nonpub. opn.]; *People v. Quila* (October 26, 2004, G032666) [nonpub. opn.].) In one appeal, the defendant's conviction was reversed partly as a result of "the atmosphere of unfairness" created by Judge Shaw's "caustic, condescending" remarks to the defendant and his counsel. (*People v. Urias, supra,* at pp. 3, 8.)

Judge Shaw has a record of discipline for similar misconduct. She has received two advisory letters and a public admonishment for conduct that is inconsistent with her duty to be patient, dignified, and courteous to persons with whom the judge deals in an official capacity. (Canon 3B(4).) The prior discipline is discussed at pages 25-26, *post.*

The following findings of fact and conclusions of law are based on the Stipulation.

## II STIPULATED FACTS AND LEGAL CONCLUSIONS

### COUNT ONE

In June 2003, Judge Shaw presided over the trial of *People v. Ramon Quila*, No. 02HF0567, in which the defendant was accused of stabbing and attempting to murder another attendee at a wedding reception. On October 26, 2004, the Court of Appeal affirmed the defendant's convictions, but severely criticized Judge Shaw's judicial demeanor during the trial. (See *People v. Quila* (Oct. 26, 2004, G032666) [nonpub. opn.].)

A. During the trial, Judge Shaw lacked patience, dignity and courtesy when dealing with witnesses and counsel, as follows:

1. When defense counsel asked the victim to draw a diagram during cross-examination, the following exchange occurred:

> Q. Could you please, with the court's permission, go down to that board and draw a diagram, if you could, of the inside area, the lobby area, of the parking lot or the outside?
>
> A. Like what do you mean?
>
> THE COURT: Well, is the hall rectangular? Is it square or rectangular or is it round?
>
> THE WITNESS: Square.
>
> THE COURT: So you have to do this because you are the guy under oath, and then you can put [the] hall here and whatever and if that's the lobby, like that. And then think big, okay? Hold on a second. Here you are. Try the black one or the green one. Make it beautiful.

(R.T. 50-51.)

2. When the victim was being cross-examined about being treated at the hospital after he had been stabbed, the following exchange occurred:

> Q. Were you in a bed or a chair?
>
> A. In a bed.
>
> Q. In a bed? And what point in time did you get an IV, if at all?
>
> THE COURT: Who cares? How's that relevant?

(R.T. 81.)

3. When a witness ("Mr. G.") was testifying through an interpreter about his location at a particular time, Judge Shaw said:

> But, Mr. [G.], you were just asked if you were outside after that and you said no. Outside is the same in English as it is in Spanish. Outside is under the – not under a ceiling. Outside means under the air and the front entrance. Outside a building means outside. So you are giving inconsistent statements. If you don't understand a question, ask us, okay?

(R.T. 100.)

4. When the prosecution was examining its expert witness, a trauma surgeon, on his qualifications, Judge Shaw said to the witness, "How many stab wounds do you think you can estimate you have seen in your wonderful tour of duty as a trauma surgeon?" (R.T. 120.)

5. During defense counsel's cross-examination of the same expert about the victim's wounds, the following exchange occurred:

> Q. How long will have death occurred absent antibiotic intake [sic]?
>
> THE COURT: That's a silly --
>
> [PROSECUTOR]: Objection, relevance.
>
> THE COURT: You know what, that's kind of a silly question because they go to the hospital not voluntarily, do you know what I mean?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Well, you would have had the greatest malpractice suit in the whole world if you didn't fix him, but how long would it have taken to watch him die?

(R.T. 127-128.)

6. The following exchange occurred during defense counsel's cross-examination of the security guard:

> Q. How do you know they were friends of Mr. Lemus? Did they look like him?
>
> THE COURT: Well, my friends don't look like me. What kind of question is that?
>
> THE WITNESS: I don't remember all the people that were there at the hall.
>
> Q. What makes you say that they were Mr. Lemus's friends?
>
> [PROSECUTOR]: That calls for speculation.
>
> [DEFENSE COUNSEL]: Your Honor –
>
> THE COURT: Overruled.
>
> [DEFENSE COUNSEL]: -- the witness testified –
>
> THE COURT: I know what he said. Excuse me, let me make the rulings. You do your part and I will do mine. Thanks.

(R.T. 164.)

7. The following exchange occurred later during defense counsel's cross-examination of the security guard:

> Q. Okay. My question was those three people, Mr. Cuevas Quila was not there yet, so listen to the question, please.

THE COURT: Well, you don't know that he wasn't there yet.

[DEFENSE COUNSEL]: Initially he was not --

THE COURT: You know what, you make so many conclusions and you presume so much in your questions, counsel, and you're misstating the evidence and I'm not going to be a part of that, and that is my objection to you.

(R.T. 174.)

8. At one point, the interpreter for the security guard (Mr. G.) requested a clarification about the pronunciation of the name of the victim, who weighed about 280 pounds, and the following exchange occurred:

THE INTERPRETER: Lemus?

THE COURT: Yes, whatever. Americans would say Lamus so, you know, let's let it go.

THE INTERPRETER: Just for the witness.

THE COURT: You know what, Mr. [G.], the big guy, okay? You couldn't miss him, right?

(R.T. 193.)

9. During the direct testimony of the victim's cousin, the following exchange occurred:

THE COURT: I thought that when he ran out to his car was after the stabbing?

[PROSECUTOR]: No.

THE COURT: Well, it would sure be nice to put it in context, wouldn't it?

[PROSECUTOR]: Okay. Because I think I asked him.

THE COURT: Well --

By [PROSECUTOR]:

Q. Before the stabbing, had you seen him before that?

[PROSECUTOR]: I could just clarify with the witness.

THE COURT: That would sure be nice.

(R.T. 230.)

10. After a witness testified that a woman had re-entered a building, the following exchange occurred:

> By [DEFENSE COUNSEL]:
>
> Q. Did you hear anything that lady said as she was entering?
>
> THE COURT: Did you hear anything from that lady? Like did she belch or did she say anything?

(R.T. 449.)

11. During the direct testimony of the defendant's teenage daughter ["A."], the following exchange occurred:

> Q. [by DEFENSE COUNSEL:] What did you see your dad do? Just tell me specifically what your dad did physically.
>
> THE WITNESS: He took something and he gave it to the guy so he would stop -- so he would stop hitting me.
>
> THE COURT: He gave it to the guy?
>
> THE WITNESS: Yeah.
>
> By [DEFENSE COUNSEL]:
>
> Q. You mean he hit somebody?
>
> THE COURT: No, don't.
>
> [PROSECUTOR]: Objection, leading.
>
> [DEFENSE COUNSEL]: I don't understand what --
>
> THE COURT: Counsel, I know, isn't it special, but you don't know what you are saying, but you are leading her. Isn't that special? Come on. You know exactly what you are doing. Don't get into it with me.

(R.T. 562.)

12. When Judge Shaw called upon the prosecutor to cross-examine A., the judge remarked, "Rise to the challenge." (R.T. 568.)

13. When the defendant testified on direct examination about his background, the following exchange occurred:

> THE COURT: ... May 4th, '03, what did you do for a living?
>
> [PROSECUTOR]: '02?
>
> THE COURT: '02, excuse me.

WITNESS: I hurt my waist and my arms in my job. I wasn't receiving any opinion [sic] kind of disability compensation.

THE COURT: Okay. That's all. Then nothing, he was doing nothing.

(R.T. 650-651.)

14. Later during the defendant's direct examination, when defense counsel told Judge Shaw that he wanted to find out what lobby the defendant was talking about, the judge stated in front of the jury: "I don't think there is any one of us that doesn't know except you." (R.T. 672.)

15. The following exchange occurred during cross-examination of the defendant:

THE COURT: The court reporter is having a real problem because he [the defendant] is not being responsive and he is being louder than the interpreter and she can't hear the interpreter. So you are going to have to ask shorter questions or, you know, and I'm going to have to stop him and yes, no and do whatever. Anyway ---

By [PROSECUTOR]:

Q. When you first see [A.] in the lobby, are you standing right where that stick figure is where it says RC1?

A. I walked –

Q. Well, it's –

THE COURT: It's yes or no, sir. I mean --

THE WITNESS: Yes, yes.

By [PROSECUTOR]:

Q. And [A.] is up here towards the left of the doors entering into the salon, yes or no?

A. Yes.

Q. Okay. You can have a seat.

[DEFENSE COUNSEL]: Your Honor, I'm sorry, if the interpretation could be done consecutively, maybe the reporter would not have such a hard time.

THE COURT: It's impossible. You know what, I would like you to trade places for a minute and see how wonderful you can be. It's not the court reporter that's having problems with his interpretation. She's having

problems because your client is yelling and talking loudly and she can't hear at the same time the softness of the interpreter's voice.

[DEFENSE COUNSEL:] If the interpreter were to finish, the defendant --

THE COURT: You know what, when you become a judge, in the meantime, let me do it. Thanks.

(R.T. 713-714.)

Judge Shaw's conduct violated the Code of Judicial Ethics, canons 1 (duty to observe high standards of conduct), 2A (duty to act in manner that promotes public confidence in the judiciary), and 3B(4) (duty to be patient, dignified, and courteous to persons with whom judge deals in official capacity), and constituted prejudicial misconduct. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 839, 849; *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 534.)

B. During the *Quila* trial, Judge Shaw also improperly commented on the credibility of witnesses, as follows:

1. After the defendant testified that when he went to leave his five-year-old son at the end of the reception hall, he told his son, "There is going to be a shoot-out outside," Judge Shaw remarked in front of the jury, "I'm sure to say to his five-year-old there is going to be a shoot-out, I will be back in a minute, really." (R.T. 666.)

2. On cross-examination, the prosecutor asked the defendant why he took a knife with him when he went to look for his children. (R.T. 703-704.) The defendant replied: "Because I could see there was a lot of danger. The person told me this is becoming very dangerous." When the prosecutor objected on hearsay grounds, Judge Shaw responded:

Well, you know what, ladies and gentlemen, it's not for the truth of the matter stated and so, you know, it's kind of hard to unring the bell, but it's total hearsay. Just that it was said, whether or not you believe that anyway.

(R.T. 704.)

Judge Shaw's conduct violated the Code of Judicial Ethics, canons 1, 2A, 3B(4), and 3B(5), and constituted prejudicial misconduct. (See *Dodds v. Commission on*

*Judicial Performance* (1995) 12 Cal.4th 163, 176; *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739, 744, 748.)

**COUNT TWO**

In January 2004, in *People v. Angel Matteotti*, No. 02CF0637, Judge Shaw presided over a trial involving charges of child molestation. During the trial, Judge Shaw lacked patience, dignity and courtesy when dealing with defense counsel as follows:

1. When the victim's mother was being asked about when the defendant and her daughter returned to California from Seattle, Judge Shaw interjected, "How's she going to know that when she was in the joint? Thank you very much." (R.T. 154.)

2. When defense counsel was examining the defendant's mother about a conversation she had with the victim ("R."), the following exchange occurred:

> Q. Did she say whether a man had touched her in her vaginal area?
>
> A. Yes.
>
> THE COURT: Well, is that leading or what?
>
> [DEFENSE COUNSEL]: Well, you objected as vague.
>
> THE COURT: Well, you know what, you don't get to testify for her. Thank you very much.
>
> [DEFENSE COUNSEL]: I don't want to.
>
> THE COURT: If that wasn't leading, what was?
>
> [DEFENSE COUNSEL]: I would like her to tell the story.
>
> THE COURT: I would like her to tell it without you leading.
>
> [DEFENSE COUNSEL]: Okay.
>
> By [DEFENSE COUNSEL]:
>
> Q. What did [R.] tell you?
>
> [PROSECUTOR]: Objection, hearsay.
>
> [DEFENSE COUNSEL]: It's prior inconsistent statement.
>
> THE COURT: As to what?
>
> [DEFENSE COUNSEL]: As to [R.] denying being sexually molested at the motel.
>
> THE COURT: Okay. Well, now that you have already told her the answer, now what?

(R.T. 305-306.)

3. After the prosecutor objected to a question posed to a witness by defense counsel, Judge Shaw said, "Sustained. Can we stay to the issues here because I would sure love to get -- I think you made your point, whatever that might be." (R.T. 444.)

On June 24, 2005, the Court of Appeal affirmed the defendant's convictions, but was critical of Judge Shaw's "style" and demeanor as evidenced by the above remarks. (*People v. Matteotti* (June 24, 2005, G033801) [nonpub. opn.].)

Judge Shaw's conduct violated the Code of Judicial Ethics, canons 1, 2A, and 3B(4), and constituted prejudicial misconduct. (See *Kloepfer v. Commission*, *supra*, 49 Cal.3d at pp. 839, 849; *McCartney v. Commission*, *supra*, 12 Cal.3d at p. 534.)

**COUNT THREE**

In 2004, Judge Shaw presided over the case of *People v. Francisco Nunez*, No. 03HF1159. The defendant was charged with first-degree burglary. During the proceedings in the case, Judge Shaw lacked patience, dignity and courtesy when dealing with the defendant and his attorney, as follows:

1. During an unscheduled pretrial appearance by the parties on August 31, 2004, the following colloquy took place:

> THE COURT: Well, [the prosecutor and county counsel] are here on a subpoena that you have evidently issued … and I don't know why I'm even here. This case isn't even on calendar. I'm happy to hear it. There is no affidavit from you why we are even here. There is no motion why we are even here, and I don't know what [sic] the substance of why we are even here.
>
> [DEFENSE COUNSEL]: Your Honor --
>
> THE COURT: No, not Your Honor. Your Honor would like you to say what it is, what the subject matter is here for that I'm not motioned on.

(R.T. 6-7.)

After defense counsel tried to explain, Judge Shaw stated: "I don't know of any law that allows you to go into chambers to say whatever you think any time you want any day you want just to appear in my court when I'm set for trial on another case this morning and to take up the court's time." (R.T. 7-8.) When defense counsel asked the

judge to review the case of *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305 before making a ruling, the following exchange took place:

> THE COURT: Isn't that nice of you? But why isn't that in your motion knowing that you were going to appear in front of me and take my time away from my jury trial? Now you are popping out all these little -- there's no motion before the court.
>
> [DEFENSE COUNSEL]: Well, Your Honor, I guess we have a disagreement as to the proper procedure.
>
> THE COURT: No, you have a problem with that procedure.

(R.T. 11.)

When defense counsel stated that he was following the procedures set forth in *Barrett* and another case, and had been told by the judge's courtroom clerk that it was not necessary to calendar the matter, Judge Shaw sarcastically stated: "Oh, yeah, my clerk makes rulings like that." (R.T. 12.)

2. On November 8, 2004, during direct examination, defense counsel asked the defendant to look at a photograph and point to the front door of the apartment that was allegedly burglarized. After the defendant pointed at the left side of the photograph, the following exchange took place:

> Q. Is that on the left side right here?
>
> A. Yeah.
>
> [DEFENSE COUNSEL]: Okay. Let the record reflect --
>
> THE COURT: Thank you for identifying it for him.
>
> [DEFENSE COUNSEL]: May the record --
>
> THE COURT: You know, I'm tired of you doing that. If you want him to mark something, that's fine, but don't point to it and say oh, that window?
>
> [DEFENSE COUNSEL]: Excuse me, Your Honor.
>
> THE COURT: I do not --
>
> [DEFENSE COUNSEL]: Your Honor --
>
> THE COURT: I do not want you doing that.

(R.T. 141.)

Judge Shaw's comment "Thank you for identifying it for him []" was sarcastic and her other comments were made in a raised voice.

3. Judge Shaw also raised her voice at defense counsel during an ensuing discussion in chambers. After defense counsel pointed out to Judge Shaw that the defendant had pointed with his finger at one side of the photograph, the following exchange took place:

> THE COURT: Well, then good. Do you have a pen in your hand right now?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Good. Use it. Have him mark it.
>
> [DEFENSE COUNSEL]: That's fine. I will do that.
>
> THE COURT: Good.
>
> [DEFENSE COUNSEL]: I was merely asking him.
>
> THE COURT: Oh, that's what that is?
>
> [DEFENSE COUNSEL]: Yes, Your Honor, that's what it was.
>
> THE COURT: Sure.

(R.T. 144-145.)

Judge Shaw's comments "Oh, that's what that is []" and "Sure []" were made in a sarcastic tone of voice.

4. On November 9, 2004, during cross-examination of the defendant, Judge Shaw improperly conveyed to the jury her disbelief of the defendant's testimony by mocking his description of how he knocked on a window:

> Q. So you had to pull [the screen] enough where you can get your entire fist to knock?
>
> A. Not entire fist. I went like this (indicating).
>
> Q. Well, you had to pull it out enough for you to --
>
> [DEFENSE COUNSEL]: Excuse me, Your Honor, the record should reflect that the witness with his right hand reached under the top piece of paper of the pad, and in a knocking motion, touched the pad underneath it. And his hand –
>
> THE COURT: But it was – okay.

THE WITNESS: And his hand was with his knuckles curled at the second knuckle.

THE COURT: Yes, it wasn't a regular knock with his index finger. Did you see how he did that, ladies and gentlemen? Turn around and show them. Show them how you knocked.

THE WITNESS: How I knocked? Like this (indicating).

THE COURT: Oh, you knocked like that now? Like this or how did you do it? Show them how you did it.

THE WITNESS: All right.

THE COURT: No face them and show them.

(R.T. 194-195.)

Judge Shaw's conduct violated the Code of Judicial Ethics, canons 1, 2A, and 3B(4), and constituted prejudicial misconduct. (See *Kloepfer v. Commission*, *supra*, 49 Cal.3d at pp. 839, 849; *McCartney v. Commission*, *supra*, 12 Cal.3d at p. 534.)

**COUNT FOUR**

In December 2004, Judge Shaw presided over the trial in *People v. Joseph Urias*, No. 04HF1198. The defendant was charged with and convicted of aggravated assault. The Court of Appeal later reversed the conviction. (*People v. Urias* (July 31, 2006, G035179) [2006 WL 2128631] [nonpub. opn.] [hereafter *Urias*].) During the trial, Judge Shaw became embroiled and lacked patience, dignity and courtesy when dealing with the defendant and both attorneys, as follows:

1. When defense counsel ("Ms. F.") said at the beginning of trial that she had a doctor's appointment two days later, Judge Shaw told her to reschedule it. When defense counsel stated that she had scheduled the appointment three months previously and could not reschedule it, Judge Shaw said: "You know, I hear this all day long…. You guys aren't a bunch of babies." (R.T. 32.)

2. On the second page of testimony on the first day of trial, the prosecutor asked the alleged victim ("Mr. W."), "[D]id you say how long you [and the defendant] have been living together?" Mr. W. replied, "No, I --." Even though Mr. W. had not testified

about that, Judge Shaw interrupted and stated: "You have though. Thank you." (R.T. 46.)

3. During the direct examination of Mr. W., after defense counsel asked to approach the bench on a matter relevant to a pending question, Judge Shaw made the following sarcastic remarks in front of the jury: "Well, you know, you can cover those things on cross-examination. I don't see any issues with it myself. Come on up here and tell me about all these great issues here. I mean, he is describing something." (R.T. 76.)

4. The Court of Appeal found that Judge Shaw also "occasionally lectured and scolded the prosecutor…." (*Urias, supra*, at p. *8.) When the prosecutor asked to play the tape of Mr. W.'s 911 call, but told Judge Shaw that she only had two copies of the transcript because she had made extra copies of the wrong transcript, Judge Shaw stated in front of the jury: "Unbelievable. Okay. So I need sixteen copies, seventeen copies." While court staff was making copies, Judge Shaw told the jury: "Well, I told them I was going to be their tax dollar at work. You guys are on your own." (R.T. 88.)

5. When the prosecutor asked Mr. W. to identify on a photograph where on his head he received an injury, Judge Shaw interrupted the answer and stated: "I mean, it speaks for itself, doesn't it? That red stuff isn't ketchup." When the prosecutor said, "Okay," Judge Shaw said: "Really, come on. These jurors are not that idiotic." (R.T. 93.)

6. The defense theory was that Mr. W. started the fight because he was angry at his roommate (the defendant), who had said that he was going to move out without paying any more rent. Prior to trial, Judge Shaw stated that on the rent dispute, the attorneys could only ask, "[D]id you guys have an argument about the payment of rent and moving out []" or "having to move out? End of case. What is [sic] the details of that, who cares." (R.T. 30-31.) When defense counsel stated that the fact that Mr. W. was having financial trouble "might be a motive for him to become frustrated []" with the defendant's decision not to pay any more rent, Judge Shaw responded: "Well, it might, might, might, should have, could have, would have. I'm not here for might. I'm here for

what is. [¶] So anyways, I'm here for whether or not one person assaulted another." (R.T. 30-31.)

During the prosecutor's direct examination, Mr. W. testified that about two weeks before the alleged assault, he and the defendant had a verbal dispute about Mr. W. moving out, and the defendant yelled at him. (R.T. 47-48.) During cross-examination, Mr. W. was questioned about the "dispute" about the "apartment and rent...." (R.T. 107.) Mr. W. testified: "It wasn't about rent. It was more about when I was moving out." (R.T. 107.) Shortly thereafter, defense counsel asked Mr. W.: "[I]sn't it true Mr. Urias was planning to move out, as well?" After a relevance objection, Judge Shaw referred to her pretrial ruling and stated that "[t]hat's part of the 402 motion." Judge Shaw refused defense counsel's request to approach the bench and added:

> If you weren't listening to my 402 motions, and that's why we have them outside of the presence of the jury, that if they have -- I will make a comment then. Ladies and gentlemen --

(R.T. 109.)

When defense counsel tried to interrupt, Judge Shaw stated: "No, no, you know what, you are violating my rule and I'm going to tell the jury." (R.T. 109.) Addressing the jury, Judge Shaw stated:

> Ladies and gentlemen, I make rulings in this case long before the case and I made the rulings in this case and you decide what the facts are. And if there was some sort of a civil dispute over whatever it might have been, this is not the way to do it, okay? That's why we have civil courtrooms. And so you are not to -- any concern about what [sic] the underlying dispute is of no relevance to this case as to these present charges. Thank you.

(R.T. 109-110.)

When defense counsel again asked Mr. W., "Do you know whether or not Mr. Urias was planning to move out?," Judge Shaw told defense counsel to "stop it or I'm going to hold you in contempt." (R.T. 110.) When defense counsel asked if she could make a record, Judge Shaw replied, "Yes, I'm going to make a record myself." (R.T. 110-111.)

In chambers, Judge Shaw accused defense counsel of violating her 402 rulings. Judge Shaw stated: "When I make a ruling, I'm not just some fly by night here that's sitting here and I don't want you to take me on or me to take you on in front of the jury." When defense counsel pointed out that the judge had allowed the prosecutor to ask "certain questions on direct[,]" Judge Shaw responded that defense counsel "did not object to any of it." (R.T. 111.) The judge then accused defense counsel of failing to object so that she could circumvent her pretrial ruling. Addressing defense counsel, Judge Shaw stated: "[Y]ou know what, I might not be good looking, but I'm not stupid. You are always waiting for a little door so you can say oh, yeah." (R.T. 113.)

The Court of Appeal found that Judge Shaw's "'elementary school scolding of defense counsel' was unwarranted." (*Urias, supra*, at p. *5.)

7. In front of the jury, Judge Shaw was unnecessarily critical of how defense counsel tried to impeach Mr. W. with a prior inconsistent statement. After defense counsel asked Mr. W. whether he testified at the preliminary hearing that the defendant was "face forward on top of me[,]" the following colloquy took place:

> THE COURT: Wait a minute, wait a minute. Hold on.
>
> [DEFENSE COUNSEL]: I'm sorry.
>
> THE COURT: Since when -- what is that?
>
> [DEFENSE COUNSEL]: Impeachment.
>
> THE COURT: No, it's not. That is so improper. If you want to ask him and let him read supposably [sic] what the question was and then ask about it, you may.
>
> [DEFENSE COUNSEL]: I'm not --
>
> THE COURT: Excuse me, that's the way you do it.
>
> [DEFENSE COUNSEL]: I'm not refreshing his recollection. I'm impeaching --
>
> THE COURT: I'm refreshing yours.
>
> [DEFENSE COUNSEL]: -- with a prior statement.
>
> THE COURT: Get over here and let him read it.

(R.T. 143.)

The Court of Appeal found that Judge Shaw improperly stated her command ("Get over here and let him read it") in an "imperious, disrespectful way…." (*Urias, supra*, at p. *6.)

When defense counsel changed her mind about what testimony to impeach the witness with, the following colloquy took place:

> THE COURT: No, no, no, that was page ten that you were referring to, line 21 down to 25, weren't we? Did you change programs on me or what?
>
> [DEFENSE COUNSEL]: I did.
>
> THE COURT: Pardon?
>
> [DEFENSE COUNSEL]: I did.
>
> THE COURT: Well, then show him what was before.
>
> [DEFENSE COUNSEL]: I don't think I need to. I don't have to impeach him with that. I'm going to --
>
> THE COURT: Well, that assumes that you are impeaching him at all.

(R.T. 144.)

8. In front of the jury, Judge Shaw criticized defense counsel for trying to mark as an exhibit a diagram that had been introduced at the preliminary hearing, without first bringing up the matter outside the presence of the jury. Judge Shaw stated: "Well, you know what, I have a real problem with that because I have a problem with when a diagram is being made, there are questions with it and so I'm not allowing you to mark that as Defense E without the questions then going with it." (R.T. 177-178.) Judge Shaw added, in front of the jury: "And that should have been handled in a 402 motion, also." (R.T. 178.) The proceedings then continued in chambers. At the end of the chambers conference, for no apparent reason, Judge Shaw stated, "I have had it up to here with both of you." (R.T. 180.)

9. On redirect examination, Mr. W. testified that he mentioned to a doctor the night of the altercation that he had suffered an injury to his eye. (R.T. 188.) On recross, defense counsel asked Mr. W. whether the police report mentioned the alleged injury to his eye. Judge Shaw sustained an objection on the ground that the question called for

speculation. (There was no hearsay objection.) So defense counsel asked the witness whether he had reviewed the police report. (R.T. 190.) The following colloquy then took place:

> THE COURT: You know what, that doesn't make it hearsay? I mean, come on. What part of my rulings don't you respect? You know what, we took the same evidence course. That's hearsay, isn't it?
>
> [DEFENSE COUNSEL]: Well --
>
> THE COURT: Would you agree to that?
>
> [DEFENSE COUNSEL]: Not --
>
> THE COURT: Even if he reads it, it's hearsay, Ms. [F.], so stop it.
>
> [DEFENSE COUNSEL]: I'm just looking for impeachment.
>
> THE COURT: Isn't that nice. But you know what, you know, I make rulings. You are to abide by them. You got it?

(R.T. 190-191.)

The Court of Appeal found that Judge Shaw's "demeaning lecture" was "wholly uncalled for. It was enough to sustain the objection. Making fun of a lawyer in front of the jury is unacceptable, particularly where, as here, the lawyer is doing her best to represent her client and, while perhaps making mistakes from time to time, is not demonstrating disrespect of the court." (*Urias, supra*, at p. *7.)

10. When defense counsel asked Officer Jason Scheafer on cross-examination whether he wrote his report on August 3, the following colloquy took place:

> THE COURT: Why are we even going into this? Is this -- could I see you at the bench for a minute?
>
> [DEFENSE COUNSEL]: I'm almost done.
>
> THE COURT: I don't care whether you're almost done or not. Come on up.

(R.T. 227.)

11. Mr. W. testified that while he was lying on the floor during the altercation, he grabbed a log and lifted it about "four or five inches off of the ground," but put it down when the defendant told him, "Don't make it worse than it is." (R.T. 85.) When defense counsel asked Officer Scheafer whether Mr. W. told him he picked up a log, thinking

about hitting the defendant, and the prosecutor objected on hearsay grounds, Judge Shaw stated: "Sustained. Oh, hello, good. Amazing." (R.T. 229.)

12. When defense counsel asked Officer Scheafer, "When Mr. [W.] told you that he lifted a log --" and the prosecutor objected that it "misstates facts not in evidence[,]" Judge Shaw stated: "It's still hearsay. I mean, what is the matter?" (R.T. 230-231.)

13. After an in chambers conference, defense counsel asked Officer Scheafer whether he recalled testifying at the preliminary hearing that Mr. W. was vague about what happened during the log incident. (R.T. 233.) Judge Shaw interrupted and the following colloquy took place in front of the jury:

> THE COURT: Well, you know what, any time that you refer to a preliminary hearing -- you know, I hate to sound like I'm giving a lesson here when we have all been out of law school a long time, but if you tell me that that is the proper procedure to ask somebody about a preliminary hearing transcript without telling the district attorney and the court what page you are talking about and giving him an opportunity to read it then, you know, I mean, then I would like to see what the procedure is. Because if we are having an amendment to evidence class, I'm excited about it, but I would sure like to hear the basis for it.
>
> [DEFENSE COUNSEL]: If you --
>
> THE COURT: And out of courtesy, Rules of Court and so forth, I want to know what page you are referring to.
>
> [DEFENSE COUNSEL]: Okay. Thank you, Your Honor. I'm referring to page 59 of the preliminary hearing --
>
> THE COURT: Hold on. And that's improper the way you are doing it and you know it. So, you know, and if this was your first time that we are doing this throughout the trial, you know, I wouldn't be all upset about it. But hold on a minute.
>
> [DEFENSE COUNSEL]: Well --
>
> THE COURT: Wait a minute. What lines are you talking about?
>
> [DEFENSE COUNSEL]: Line nine.
>
> THE COURT: Through?
>
> [DEFENSE COUNSEL]: Sixteen.
>
> ...
>
> THE COURT: Have you read this?

[PROSECUTOR]: Yes.

[DEFENSE COUNSEL]: For clarification, I would also like to add lines three through five.

THE COURT: There's no such thing as clarification.

(R.T. 233-234.)

The Court of Appeal found that Judge Shaw's lecturing of defense counsel was demeaning. (*Urias, supra*, at p. *7.)

14. On direct examination, the defendant testified that after an exchange of words between him and Mr. W., the defendant "noticed that he [Mr. W.] put his food down and then the next thing I know, he was pursuing up here []" (referring to a diagram). When the prosecutor did not object, Judge Shaw stated: "Pursuing calls for a conclusion." (R.T. 321.) Judge Shaw continued:

> If you are not going to object, I mean, you know, ladies, I have to present evidence by way of the Evidence Code and it's amazing around here what's happening. Okay. And I'm not going to be trying your case for you, and it's not your first case. You all know that it's, you know, I need you to go by the Evidence Code. Thank you.

(R.T. 322.)

15. On cross-examination, the prosecutor asked the defendant if, prior to the altercation, Mr. W. gave him "a dirty look." Defense counsel objected that the question misstated the evidence. Judge Shaw then asked the defendant, "What kind of a look was it?" (R.T. 371.) The following exchange then occurred in front of the jury:

THE WITNESS: It was a look like he had something to say to me.

By [PROSECUTOR]:

Q. Something to say like Happy Birthday or something not nice?

[DEFENSE COUNSEL]: Objection, argumentative, misstate [sic] the evidence.

THE COURT: Overruled.

THE WITNESS: Like where is my rent money kind of look.

By [PROSECUTOR]: Your Honor, I would move to strike that as nonresponsive.

THE COURT: That was convenient, wasn't it, Mr. Urias?

THE WITNESS: She asked me, Your Honor.

THE COURT: Yes, that's nice.

THE WITNESS: He had nothing else to say.

THE COURT: Well, that's great. That's nice that you can interpret what somebody is going to say to you.

[DEFENSE COUNSEL]: Your Honor, I just --

THE COURT: You know what, don't start again today with me, ladies, because you know what, there are Evidence Code procedures and I have made rulings in this case. And if we were here on a landlord/tenant situation, we would be here on that.

So I would ask that both of you refrain from taking me on today because you know what, I'm tired of it. I have had it to here, so stop.

[DEFENSE COUNSEL]: Okay.

THE COURT: And I want you to conduct yourselves professionally by the Evidence Code.

And I want you not to slip in things that were -- I don't know how you could possibly tell that that was that kind of a look, so anyways --

(R.T. 371-373.)

The Court of Appeal found that Judge Shaw's "sarcastic comments were inappropriate and unjustified[,]" and expressing derision for the defendant's answers and implying that he was deceitful "was unfair and constituted misconduct." (*Urias, supra*, at p. *6.)

16. After the prosecutor asked the defendant on cross-examination about the glare that Mr. W. gave him before the altercation, Judge Shaw disparaged the defendant's testimony during the following exchange:

THE WITNESS: I wasn't exactly focusing on the glare per se. I was focused on --

THE COURT: You know what, I'm past the glare or whatever look he had on his face that made you say you look like a clown or you are a clown, Mr. Urias.

THE WITNESS: It wasn't the look, Your Honor. It was the whole demeanor of the -- of the evening.

THE COURT: Well, whatever that is.

(R.T. 385.)

17. Mr. W. testified that the altercation began when the defendant hit him over the head with a wineglass. (R.T. 63.) The defendant admitted that he had been drinking wine and that prior to the altercation, he walked toward the kitchen to get something to drink. (R.T. 319.) However, the defendant testified on cross-examination that he did not know whether he was going to the kitchen to refill his wineglass. (R.T. 465-466.) The defendant also testified that he did not have his wineglass in his hand when he walked toward the kitchen or to the point where he first had physical contact with Mr. W. (R.T. 465-466.)

There ensued the following exchange:

> Q. [by PROSECUTOR]: Okay. Because just a second ago when I asked you if you recalled if you had your wine glass in your hand, you said you didn't recall. Are you now telling me that you do recall that you did not have your wine glass?
>
> [DEFENSE COUNSEL]: Objection, misstates the evidence.
>
> THE COURT: Overruled.
>
> THE WITNESS: After the fact, when all the events took place, I know that I didn't have the wine glass in my hand.
>
> By [PROSECUTOR]:
>
> Q. I just asked you --
>
> THE COURT: She is just asking you whether or not when you went to the kitchen, whether you had your wine glass in your hand. How difficult is that?
>
> THE WITNESS: No, I said -- I already answered no.
>
> THE COURT: Okay.
>
> By [PROSECUTOR]:
>
> Q. Okay. You didn't say a second ago that you didn't recall whether you had it or not?
>
> THE COURT: Don't worry about it. It's argument[at]ive and we'll never get it.

(R.T. 466-467.)

Then, on redirect examination, defense counsel asked the defendant, "Did you tell the officer whether or not you had a wine glass in your hand?" (R.T. 472.) After sustaining an objection, Judge Shaw reversed herself and took over the examination, as follows:

> THE COURT: No, did you tell him you had a wine glass in your hand?
>
> THE WITNESS: No.
>
> THE COURT: Is that "yes" or "no"?
>
> THE WITNESS: No.
>
> THE COURT: Thank you.
>
> By [DEFENSE COUNSEL]:
>
> Q. When he asked you if you had a wine glass in your hand, did you give a response?
>
> A. I did.
>
> Q. What was that response?
>
> A. I said I could have.
>
> [PROSECUTOR]: Your Honor, I would object. It calls for hearsay.
>
> THE COURT: Okay. He said he could have. Okay. Now you said could have. I thought you said just now that you said no?
>
> THE WITNESS: You asked me what I told the officer and I didn't tell him that I had the wine glass. I said I could have had it.
>
> THE COURT: I asked you yes or no and you said no.

(R.T. 473.)

The Court of Appeal found that Judge Shaw's comments improperly suggested that Mr. Urias's testimony was "inconsistent and deliberately untruthful." (*Urias, supra*, at p. *8.)

On July 31, 2006, the Court of Appeal, partly due to Judge Shaw's "persistent and indefensible misconduct," reversed the conviction and held that the defendant was entitled to a retrial before a different judge. (*Urias*, *supra*, at pp. *2, 10.) The court found that Judge Shaw "belittled, scolded and punished" defense counsel in front of the jury, made "caustic, condescending remarks" to the defendant and his counsel, created an

"atmosphere of unfairness," and "substantively undermined the defense theory of the case." (*Id*. at pp. *2, 3, 8.)

Judge Shaw's conduct violated the Code of Judicial Ethics, canons 1, 2A, 3B(4), and 3B(5), and constituted prejudicial misconduct. (See *Kloepfer v. Commission*, *supra*, 49 Cal.3d at pp. 839, 849; *McCartney v. Commission*, *supra*, 12 Cal.3d at p. 534.)

**COUNT FIVE**

On December 20, 2004, Judge Shaw presided over jury selection in *People v. Troy Kercheval*, No. 03HF1721, and mistreated a prospective juror ("A.H."). After the prospective juror told the judge, in response to her inquiry about whether she had a time problem, that she was studying to become a social worker and had to finish a paper, Judge Shaw said:

> Well, that's nice. I've got lots of things to do, too. My problems are of constitutional proportions, so you are going to have to do that at night.

(R.T. 13.)

Although Judge Shaw ordered the prospective jurors to return to court at 1:30 p.m., A.H. did not return to court until 1:57 p.m. Because A.H. had been in the jury box, Judge Shaw replaced her with a new prospective juror. When A.H. returned to the courtroom, the following exchange took place:

> THE COURT: It's now three minutes to 2:00. You were ordered back here at 1:30.
>
> PROSPECTIVE JUROR []: Yes.
>
> THE COURT: But I don't care what your excuse is. It's totally unacceptable unless there was some dire emergency that kept you from being here at 1:30 and I don't have time to talk to you. So I'm ordering you back here tomorrow morning at 8:30 to talk to me about it. I will see you tomorrow morning at 8:30.
>
> It's very upsetting to me. I couldn't go on. I can't wait for you. I have lots of things to do to try to get people out of here before Christmas.
>
> PROSPECTIVE JUROR []: I cannot comment? I'm just telling you Jamboree [Road], they are repairing and I was there for twenty minutes and I couldn't get in because nobody was here to help me to tell me which room to go.

THE COURT: Well, what room would you go to other than this one?

PROSPECTIVE JUROR []: I know, but I couldn't find it, you know. I was here. I went to another room and it was locked and so that's why I went to another lady and I'm here for thirty minutes to get in and nobody was there to help me.

THE COURT: Isn't it funny that all these people found their way back? I don't have time to talk to you right now. So leave your phone number and you are going to have to come back and talk to me about that. Very serious when you don't follow my orders. And I have a big job to do here and it's not on whim or passion or whatever. But you guys are on order to be here and so that's the thing.

(R.T. 86-87.)

Judge Shaw's treatment of the prospective juror violated the Code of Judicial Ethics, canons 1, 2A, and 3B(4), and constituted prejudicial misconduct. (See *Kloepfer v. Commission*, *supra*, 49 Cal.3d at pp. 839, 849; *McCartney v. Commission*, *supra*, 12 Cal.3d at p. 534.) The judge's order that the prospective juror return to court the following morning amounted to an abuse of authority. (See *Kloepfer v. Commission*, *supra*, 49 Cal.3d at p. 857; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 701-702, fn. 19.) To Judge Shaw's credit, she rescinded her order before it was enforced.

## III. OTHER FACTS RELEVANT TO DISCIPLINE

Judge Shaw has a record of prior discipline for similar misconduct. In 1988, the commission issued an advisory letter to her for conduct that included making inappropriate remarks to defendants, and drawing a picture of a hanged man and having her bailiff deliver it to the investigating officer during a preliminary hearing. In 1989, in a second advisory letter, the commission reminded her of the provisions of then canon 3A(3) (the predecessor to canon 3B(4)) imposing the duty to be patient, dignified, and courteous to persons with whom judge deals in official capacity, and reminded her of the importance of adhering to contempt law.

In 2000, the commission publicly admonished Judge Shaw for conduct that included (1) making a statement to a slightly built white male she was incarcerating that

suggested that skinny white males in prison are particularly vulnerable to sexual assault and (2) making demeaning, discourteous, and undignified comments to a prosecutor who refused to reduce a driving under the influence charge. In the public admonishment, the commission pointedly noted that "Judge Shaw must appreciate that unless she takes steps to control her admitted weakness for blurting out something that would have been better left unsaid, her comments will on occasion embarrass or demean a litigant or attorney."

## IV. DISCIPLINE

The purpose of judicial discipline "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112 (*Broadman*), citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.)

The commission has identified several factors that are relevant to determining appropriate discipline in furtherance of the disciplinary objectives enunciated in *Broadman*. (*Inquiry Concerning Ross,* No. 174, Decision and Order Removing Judge Ross from Office, (2005), p. 64.) As relevant here, the factors include the number and nature of the acts of misconduct; the existence of prior discipline; the likelihood of future misconduct; and the impact of the misconduct on the judicial system. Applying these standards here, it is clear that the stipulated censure and bar from assignment is the appropriate level of discipline.

The number of acts of misconduct is pertinent to the question of discipline, not according to any rigid formula, *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307, but rather, for determining whether the wrongdoing was isolated, or part of a course of conduct establishing "lack of temperament and ability to perform judicial functions in an even-handed manner." (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918, quoting from *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.)

In 2003, we removed Judge Bruce Van Voorhis from office based on four acts of willful misconduct and seven instances of prejudicial misconduct that were indicative of a lack of judicial temperament. (*Inquiry Concerning Van Voorhis,* No. 165, Decision and

Order Removing Judge Bruce Van Voorhis from Office (2003).) Here, the stipulated facts include forty-two instances in which Judge Shaw made remarks reflecting a lack of patience, dignity, and courtesy, constituting prejudicial misconduct. Judge Shaw also admits to acts of prejudicial misconduct involving abuse of authority, embroilment, and prejudgment. The instances of misconduct occurred in five separate cases over a two year period. Under these circumstances, Judge Shaw's actions cannot be characterized as isolated occurrences. Rather, they establish a persistent pattern of abusive and demeaning conduct that is seriously at odds with the canons and expected judicial temperament. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 866.)

Judge Shaw continued to treat those who appeared before her in an abusive and demeaning manner after receiving two advisory letters and a public admonishment for similar conduct. As noted, the commission commented in its public admonishment of Judge Shaw in 2000 that she needed to cease blurting out inappropriate comments. Judge Shaw obviously failed to heed this warning. The "failure of past sanctions to effect a change in conduct also suggests a lack of ability to reform and unsuitability for judicial office." (*Inquiry Concerning Platt,* No. 162, Decision and Order Removing Judge Michael E. Platt from Office (2002), p. 15.)

Repeated admonishment from the Court of Appeal also has been unsuccessful in causing Judge Shaw to reform her intemperate judicial demeanor. The judge's abusive and demeaning treatment of defendants, attorneys, and a prospective juror continued even after the Court of Appeal harshly criticized her judicial demeanor in *People v Quila* (Oct. 26, 2004, G032666 [nonpub. opn.].) (See counts 3(2-4), 4, & 5.)

The adverse impact of the judge's misconduct on the judicial system has been substantial. Judge Shaw's misconduct jeopardized the parties' right to a fair trial and, in one case, contributed to the reversal of a criminal conviction. (*People v. Urias* (July 31, 2006, G035179) [2006 WL 2128631] [nonpub. opn.].) The Court of Appeal found that Judge Shaw "belittled, scolded and punished" defense counsel in front of the jury, made "caustic, condescending remarks" to the defendant and his counsel, created an

"atmosphere of unfairness," and "substantively undermined the defense theory of the case." (*Id*. at pp. *2, 3, 8.) Such improper and indefensible behavior compromises public confidence in the judicial system.

Judge Shaw's persistent mistreatment of those who appear before her, and her inability to control her behavior despite repeated admonishments from the commission and the Court of Appeal convinces us of the high probability she will continue her unethical behavior if she were to sit in a judicial capacity in the future. Accordingly, the commission concludes that the maximum sanction that may be imposed upon a former judge, public censure and bar, is necessary for the protection of the public and the reputation of the judiciary. Based upon the parties' stipulation, and good cause appearing, the commission hereby censures former Judge Susanne S. Shaw and bars her from receiving an assignment, appointment, or reference of work from any California state court.

Commission members Mr. Marshall B. Grossman, Mr. Michael A. Kahn, Mrs. Crystal Lui, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon and Ms. Barbara Schraeger voted to accept the parties settlement and to issue this decision and order imposing a censure and bar pursuant to the stipulated agreement. Commission member Judge Frederick P. Horn is recused and commission member Mr. Lawrence Simi did not participate in this matter.

Dated: December 21, 2006

/s/

Marshall B. Grossman

Chairperson

[No. 179. June 26, 2007.]

INQUIRY CONCERNING JUDGE ROBERT B. FREEDMAN

## SUMMARY

A disciplinary action was brought concerning a superior court judge. The Commission on Judicial Performance found that the judge had failed to timely rule in numerous matters; that he had regularly submitted false salary affidavits under Gov. Code, § 68210, and Cal. Const., art. VI, § 19, during times when his rulings were overdue; and that he had failed to timely act on many fee waiver applications.

The Commission on Judicial Performance issued a severe public censure. The commission adopted the masters' conclusion that the judge committed prejudicial misconduct and also concluded that his reckless submission of erroneous salary affidavits at times when he was aware he had overdue rulings was willful misconduct. The commission adopted the masters' conclusion that the judge violated Cal. Code Jud. Ethics, canons 3A, 3B(8), by his persistent delays and failure to act on fee waiver applications, and the commission also concluded that this conduct violated Cal. Code Jud. Ethics, canons 1, 2A. The commission determined that the judge was not likely to commit misconduct in the future because he understood the seriousness of his misconduct and had carried out his responsibilities without incident since the inception of commission proceedings. Many judges and attorneys testified to his good character, skills, and contributions to the judiciary. (Opinion by Frederick P. Horn, Chairperson.)

## HEADNOTES

(1) **Judges § 8—Duties—Timely Ruling on Submitted Matters.**—The California Constitution provides that a judge may not receive a salary while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision (Cal. Const., art. VI, § 19). However, the withheld salary is not forfeited; once the overdue matters are completed, the judge is again entitled to receive his or her salary, including those amounts that were not paid during the period of delay. To implement the constitutional provision, Gov. Code, § 68210,

requires judges to execute an affidavit attesting to their compliance with the Constitution in order to receive their salaries. The provisions that deny judges their salaries if they fail to rule in the time allowed by law reflect the judgment of the Legislature and the electorate that this period of 90 days affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases. Failure to decide a matter within the 90-day period is cause for judicial discipline.

(2) **Judges § 6.2—Willful Misconduct—Elements.**—The most serious form of wrongdoing is willful misconduct, which is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. Conduct inconsistent with the provisions of the California Code of Judicial Ethics is generally considered unjudicial conduct, but that code is not the only standard by which a judge's conduct may be measured. The bad faith requirement for willful misconduct is satisfied when a judge is (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority. "Conscious disregard" means that because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith.

(3) **Judges § 6.2—Judicial Misconduct—Willful Misconduct—Judicial Capacity.**—For purposes of a determination of willful misconduct, a judge acts in a judicial capacity when the judge is performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge, or when the judge uses or attempts to use the authority of the judicial office for an improper purpose.

(4) **Judges § 6.2—Judicial Misconduct—Prejudicial Misconduct—Definition.**—Prejudicial misconduct, the second most serious category of judicial misconduct, is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is either conduct which a judge undertakes in good faith but which nevertheless would appear to

an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office, or willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. To constitute prejudicial conduct, a judge's actions must bring the judicial office into disrepute, that is, the conduct would appear to an objective observer to be prejudicial to public esteem for the judicial office.

(5) **Judges § 6.2—Judicial Misconduct—Improper Action—Definition.**—The least serious type of judicial misconduct is improper action. It is conduct that violates the California Code of Judicial Ethics, but that does not rise to the level of prejudicial misconduct. Improper action thus includes unjudicial conduct that an objective observer aware of the circumstances would not necessarily deem to have an adverse effect on the reputation of the judiciary.

(6) **Judges § 6.4—Determining Appropriate Discipline—Mitigating Evidence.**—Evidence in mitigation may be used in considering the totality of the circumstances that are pertinent to a determination of the appropriate discipline for judicial misconduct.

(7) **Motions and Orders § 1—Motions—When Matter Submitted.**—Under Cal. Rules of Court, rule 2.900, a matter is submitted when either of the following first occurs: (1) the court orders it submitted, or (2) the date a final paper is filed or argument is heard, whichever is later.

(8) **Judges § 8—Duties—Precedence over Other Matters.**—Cal. Code Jud. Ethics, canon 3A, provides that judicial duties prescribed by law are to take precedence over all other matters.

(9) **Judges § 8—Duties—Hearing and Deciding Matters Assigned.**—Cal. Code Jud. Ethics, canon 3B(1), requires judges to hear and decide all matters assigned to them.

(10) **Judges § 6.2—Prejudicial Misconduct—Persistent Failure to Timely Decide Matters.**—The judge's persistent and repeated failure over a four-year period to decide matters within 90 days of submission violates Cal. Code Jud. Ethics, canons 1, 2A, 3A, and 3B(8), and constitutes prejudicial misconduct.

(11) **Judges § 6.2—Failure to Timely Rule on Submitted Matters.**—Substantial and persistent failure to rule on submitted matters without substantial justification may well cause criticism and bring the judicial office into disrepute.

(12) **Judges § 6.2—Willful Misconduct—Prejudicial Misconduct—False Salary Affidavits.**—A judge who signed salary affidavits affirming that he had no matters under submission for over 90 days after being advised that he had matters under submission for over 90 days engaged in willful misconduct. The judge engaged in prejudicial misconduct where the evidence did not prove that the judge was made aware of the delayed matters before signing the salary affidavits. A judge who executes a salary affidavit affirming he or she has no overdue rulings should take care to ensure that the statement is true when it is made. It is unjudicial and damaging to the public esteem for judicial office for a judge to submit false statements to obtain salary to which the judge is not then entitled.

(13) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Determining Appropriate Discipline—Factors.**—The Commission on Judicial Performance has identified various factors that may be relevant when determining what discipline is appropriate in a given case. The factors are (1) the number of acts of misconduct; (2) the existence of prior discipline; (3) whether the judge appreciates the inappropriateness of his or her conduct; (4) the judge's integrity; (5) the likelihood of future misconduct; and (6) the impact of the misconduct on the judicial system.

(14) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Determining Appropriate Discipline—Factors—Number of Acts of Misconduct.**—The number of acts of misconduct is relevant to discipline to the extent it shows either isolated incidents or a pattern of misbehavior that demonstrates that the judge lacks judicial temperament and the ability to perform judicial functions in an even-handed manner.

(15) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Determining Appropriate Discipline—Factors—Failure to Appreciate and Admit Misconduct.**—A judge's lack of appreciation of misconduct and failure to recognize and admit impropriety are indications that a judge lacks the capacity to reform.

(16) **Judges § 6.4—Discipline—Proportionality Review.**—The commission's determination of the appropriate discipline is not predetermined by prior decisions involving similar misconduct, any more than it is appropriate for the commission to ignore all that has gone before.

(17) **Judges § 6.2—Censure—Grounds—Failure to Timely Rule and False Salary Affidavits.**—A judge who failed to timely rule in numerous matters and submitted false salary affidavits committed serious misconduct that taken alone might warrant removal from office. However, he

was a respected and talented jurist who was strongly supported in the disciplinary proceeding by a significant number of attorneys and colleagues. Counsel for parties in a number of the delayed matters supported the judge in the disciplinary proceedings and testified that they would not hesitate to appear before him in future cases. Other than the subject misconduct, there was no evidence presented that called the judge's abilities as a jurist or his suitability for the bench into question. The judge had not been the subject of any relevant prior discipline, he acknowledged his wrongdoing and was contrite, and he was unlikely to offend again. For those reasons, a severe public censure was appropriate.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85.]

## OPINION

**HORN, Chairperson.**—Under California law, judges are expected to decide matters submitted to them within 90 days of submission, and are prohibited from receiving their salaries during times when they have undecided matters under submission for more than 90 days. (Cal. Const., art. VI, § 19; *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4 [220 Cal.Rptr. 833, 709 P.2d 852] (*Mardikian*).) To implement the latter provision, the Government Code requires judges to regularly execute affidavits declaring they are in compliance with the law and entitled to salary. (Gov. Code, § 68210.) In this disciplinary proceeding, Judge Robert B. Freedman of the Alameda County Superior Court is charged by an amended notice of formal proceedings (Notice) in three counts with (1) failing to decide causes submitted to him for decision within 90 days, (2) executing and submitting numerous salary affidavits falsely stating that he had no causes under submission to him for decision for more than 90 days when he did have such matters under submission, and (3) failing to act on over 200 fee waiver applications by litigants within the time allowed by law.

A panel of three special masters appointed by the California Supreme Court heard evidence in this disciplinary proceeding, made factual findings and issued their conclusions of law. The masters found that between 2000 and 2004 Judge Freedman failed to timely rule in 21 of the 23 specified causes charged in the Notice, that he regularly submitted false salary affidavits during times when his rulings were overdue, and that in 2003, he failed to timely dispose of over 200 applications for waiver of court fees by litigants in the Alameda County Superior Court. The masters concluded Judge Freedman's failure to complete his assigned duties on a timely basis and his submission of false affidavits were conduct "prejudicial to the administration of justice that [brought] the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).)

We have reviewed the evidence taken by the masters and have considered their findings and conclusions. In large part, we adopt or defer to the masters' findings and conclusions, including in part their conclusion that Judge Freedman committed prejudicial misconduct when he was aware that he had overdue rulings and submitted false salary affidavits anyway. In certain instances which we discuss, we conclude, based on the masters' findings, that Judge Freedman's reckless submission of erroneous salary affidavits at times when he was aware he had overdue rulings, with disregard for whether they were true or false, was willful misconduct. Misconduct of such gravity has warranted removal from office. However, in view of the unique circumstances of this case, including exceptional mitigating evidence, we have determined to issue this severe public censure.

## PROCEDURAL HISTORY

Judge Freedman was appointed to the Municipal Court of Alameda County in January 1996, and became a judge of the Alameda County Superior Court in July 1998. On September 15, 2006, after a preliminary investigation and the issuance of an initial notice of formal proceedings, the commission issued its first amended notice of formal proceedings in this matter. The Notice charged Judge Freedman in three counts with the following misconduct:

Count 1: Delaying rulings on matters for more than 90 days after they were submitted to him in 23 instances in the period 2000 to 2004. The Notice charged that a number of the delays occurred after Judge Freedman had twice been warned by presiding judges about overdue rulings, once in April 2001, and again around the end of December 2002.

Count 2: Executing and submitting false state and county salary affidavits during the periods June 2000 to April 2001, August 2002 to February 2003, June 2003 to August 2004, and October 2004, all periods in which Judge Freedman allegedly had matters under submission upon which he had not ruled for more than 90 days.

Count 3: In the first half of 2004, failing to act "within applicable deadlines" on litigants' applications for waiver of the requirement they pay filing and other court fees. Under the law that applied, if the applications were not denied within five days of filing, they were automatically granted. The delays caused the Alameda County Superior Court to order refunds to some litigants whose applications were denied late, at a total cost to the court of $9,894.

The Supreme Court appointed three special masters at the commission's request. (Rules of Com. on Jud. Performance, rule 121.)[1] The special masters were the Hon. Eugene M. Premo, Associate Justice of the Court of Appeal, Sixth Appellate District, the Hon. Kathryn Doi Todd, Associate Justice of the Court of Appeal, Second Appellate District, Division Two, and the Hon. William A. Mayhew, Judge of the Superior Court of Stanislaus County. The masters held an evidentiary hearing, and their report was filed with the commission on February 14, 2007. Judge Freedman is represented in this proceeding by Joseph P. McMonigle and Kathleen M. Ewins of San Francisco. The examiners for the commission are Andrew Blum and Valerie Marchant.

The masters found virtually all the charges were proved by clear and convincing evidence. They found that Judge Freedman had delayed rulings in 21 of the 23 charged instances (count 1), that he had "regularly" executed false salary affidavits during periods when his rulings were delayed (count 2), and that he had delayed in ruling on "approximately 200" applications for fee waivers, with resulting refunds to litigants (count 3).

The masters found in mitigation that Judge Freedman is a hardworking, industrious, and highly competent judge who has not committed other misconduct and is unlikely to offend again. Their findings were based in large part on testimony by a number of judges and attorneys who described Judge Freedman's good character, skills, and contributions to the judiciary.

In their legal conclusions, the masters determined that Judge Freedman committed prejudicial misconduct in connection with all the charges. As explained in the following discussion, we adopt and summarize the masters' findings of fact, and adopt most of their conclusions of law.

## DISCUSSION

## I.

## GENERAL PRINCIPLES

### A. *Judicial Salary Law*

**(1)** The California Constitution provides that a judge may not receive a salary "while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." (Cal. Const., art. VI,

[1] All further references to rules are to the Rules of the Commission on Judicial Performance, unless otherwise specified.

§ 19; see also, e.g., *Hassanally v. Firestone* (1996) 51 Cal.App.4th 1241, 1244 [59 Cal.Rptr.2d 625].) However, the withheld salary is not forfeited; once the overdue matters are completed, the judge is again entitled to receive his or her salary, including those amounts that were not paid during the period of delay. (*Hassanally, supra*, at p. 1244.) To implement the constitutional provision, Government Code section 68210 requires judges to execute an "affidavit" attesting to their compliance with the Constitution in order to receive their salaries.[2] These provisions have been California law since 1879. (See Cal. Const., art. VI, former § 24, adopted in Cal. Const. of 1879 [requiring execution of affidavit affirming no cause pending for 90 days to receive salary].) The provisions that deny judges their salaries if they fail to rule in the time allowed by law "reflect the judgment of the Legislature and the electorate that this period [90 days] affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases." (*Mardikian, supra*, 40 Cal.3d at p. 477, fn. 4.) Failure to decide a matter within the 90-day period is cause for judicial discipline. (*Mardikian, supra*, at p. 485; see also, e.g., *Hassanally, supra*, at p. 1244.)

B. *Standards for Imposition of Discipline*

In determining whether Judge Freedman has committed misconduct, we apply the law of judicial discipline as it has evolved in California. The levels or types of judicial misconduct that may subject a judge to discipline by the commission are described in article VI, section 18, subdivision (d), of the California Constitution. The commission must prove the charges against Judge Freedman by clear and convincing evidence. (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 313 [45 Cal.Rptr.2d 254, 902 P.2d 272]; *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.] The evidence need not establish the fact beyond a reasonable doubt." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).)

1. *Willful Misconduct.*

**(2)** The most serious form of wrongdoing is willful misconduct, which is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. (*Broadman, supra*, 18 Cal.4th at p. 1091; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48

[2] Government Code section 68210 provides: "No judge of a court of record shall receive his salary unless he shall make and subscribe before an officer entitled to administer oaths, an affidavit stating that no cause before him remains pending and undetermined for 90 days after it has been submitted for decision."

Cal.Rptr.2d 106, 906 P.2d 1260].) Conduct inconsistent with the provisions of the California Code of Judicial Ethics is generally considered unjudicial conduct, but that code is not the only standard by which we may measure a judge's conduct. (*Dodds, supra*, at p. 173, fn. 2.) The "bad faith" requirement for willful misconduct is satisfied when a judge is "(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, at p. 1092.) In *Broadman*, the Supreme Court described "conscious disregard" as follows: "Because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith." (*Ibid.*)

**(3)** Finally, a judge acts in a "judicial capacity" when the "judge is . . . performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose." (*Broadman, supra*, 18 Cal.4th at p. 1104, citing *Dodds v. Commission on Judicial Performance, supra*, 12 Cal.4th at p. 172.)

2. *Prejudicial Misconduct.*

**(4)** Our Supreme Court has defined prejudicial misconduct, the second most serious category of judicial misconduct, as follows: "Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is '*either* "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" [citation] *or* "willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity" [citation].' [Citation.] In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring 'the judicial office into disrepute,' that is, the conduct would appear to an

objective observer to be prejudicial to ' "public esteem for the judicial office." ' [Citation.]" (*Broadman, supra*, 18 Cal.4th at pp. 1092–1093, original italics.)

3. *Improper Action.*

**(5)** The least serious type of judicial misconduct is improper action. It is conduct that violates the California Code of Judicial Ethics, but that does not rise to the level of prejudicial misconduct. (Rothman, Cal. Jud. Conduct Handbook (2d ed. 1999) § 13.29, pp. 386–387.) Improper action thus includes unjudicial conduct that an objective observer aware of the circumstances would not necessarily deem to have an adverse effect on the reputation of the judiciary. (See *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 897–899 [42 Cal.Rptr.2d 606, 897 P.2d 544].)

4. *Consideration of Mitigating Evidence.*

**(6)** Evidence in mitigation may be used in considering the totality of the circumstances that are pertinent to our determination of the appropriate discipline. (*Broadman, supra*, 18 Cal.4th at p. 1112; see also *Adams v. Commission on Judicial Performance, supra*, 10 Cal.4th at p. 912.)

## II.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Our findings of fact are taken primarily from those of the special masters, whose factual findings we defer to or adopt in their entirety, supplemented with additional evidentiary detail and our own findings where additional findings are necessary to our decision and shown by clear and convincing evidence. (*Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d at p. 275 [commission has authority to make its own findings]; but see also, e.g., *Broadman, supra*, 18 Cal.4th at p. 1090 [factual findings of masters on issues of credibility may be given special weight because masters have "the advantage of observing the demeanor of the witnesses"].) Although we agree with most of the legal conclusions the masters reached, we also make our own legal conclusions based on our independent review of the record. (See *Broadman, supra*, at p. 1090 [commission's power to reach legal conclusions].)

A. *Count 1—Findings of Fact*

Count 1 of the Notice is subdivided into 23 lettered subcounts, each corresponding to one or more instances of delay in a case assigned to Judge

Freedman. The masters found by clear and convincing evidence that Judge Freedman had delayed rulings over 90 days in 21 of the 23 instances charged in the Notice. The parties do not object to these findings, and we adopt and summarize them below. The delayed rulings occurred in three distinct periods, during which Judge Freedman had at least one delayed matter[3] pending: June 16, 2000, to April 19, 2001, August 4, 2002, to February 7, 2003, and June 16, 2003, to November 3, 2004.

2000–2001

From 2000 until early 2002, Judge Freedman was assigned to preside over criminal cases in the Oakland courthouses of the Alameda County Superior Court. During that time, he occasionally sat as a substitute judge in the civil law and motion department. During those temporary assignments, among other matters, Judge Freedman heard motions in the *Alameda, Paula, Bellamy, CSK, Contra Costa*, and *BART* cases,[4] identified in the Notice as subcounts A through G. The following delays occurred in those matters:

1. Count 1A (*Alameda*). *Alameda* was submitted on March 23, 2000. The 90th day after submission was June 21, 2000. Judge Freedman did not decide the matter until April 16, 2001, 299 days after the matter had been under submission for 90 days.

2. Count 1B (*Paula*). *Paula* was submitted on November 20, 2000. Judge Freedman did not decide the matter until March 19, 2001, 29 days after the matter had been under submission for 90 days.

3. Count 1C (*Bellamy*). The *Bellamy* matter was submitted on November 29, 2000. Judge Freedman did not decide the matter until March 23, 2001, 24 days after the matter had been under submission for 90 days.

4. Count 1D (*CSK*). The *CSK* matter was submitted on January 5, 2001. Judge Freedman did not decide the matter until April 19, 2001, 14 days after the matter had been under submission for 90 days.

5. Count 1E. The masters found the delay charged in count 1E was not proved because no evidence was submitted in support of the charge. We adopt the finding, and dismiss count 1E.

6. Count 1F (*Contra Costa*). The *Contra Costa* matter was submitted on January 11, 2001. Judge Freedman decided the matter on April 16, 2001, five days late.

[3] We use the term "delayed matters" to refer to matters that were under submission to Judge Freedman but undecided for 90 days or more.

[4] We do not reproduce the full names and numbers of the cases in the text, because those details are not relevant to our discussion.

7. Count 1G (*BART*). The *BART* matter was submitted to Judge Freedman for decision on January 16, 2001, but he did not decide it until April 19, 2001, three days late.

During the period in which these delays occurred, Judge William McKinstry was the presiding judge of the Alameda County Superior Court. Presiding judges are required to monitor the status of submitted cases in their courts to ensure that "no cause under submission remains undecided and pending for longer than 90 days." (Cal. Rules of Court, rule 10.603(c)(3) [former rule 6.603].) In early March 2001, Judge McKinstry inquired about the status of submitted cases, and learned from the court's senior research attorney that Judge Freedman had delayed matters in the *Alameda, Bellamy,* and *Paula* cases, and that the *Contra Costa* case had been under submission to Judge Freedman for at least 60 days.

Judge McKinstry met with Judge Freedman a few days after learning of these decisional delays, and supplied him with a list of the overdue and soon-to-be overdue matters. Soon after the meeting, Judge Freedman decided the *Paula* matter (on Mar. 19, 2001) and the *Bellamy* matter (on Mar. 23, 2001), but the other overdue case, *Alameda*, at that point nearly a year past submission, remained undecided.

On April 11, 2001, Judge McKinstry sent Judge Freedman a memo urging him to decide his remaining overdue matters, and again identified the *Alameda* and *Contra Costa* matters by name. In the memo, Judge McKinstry reminded Judge Freedman that his duty to decide cases took priority over other matters, and that his "indecision" could result in discipline by this commission. Judge McKinstry also reminded Judge Freedman of a judge's obligation to submit accurate salary affidavits stating he or she has no overdue matters as a condition of receiving salary.

On April 16, 2001, Judge Freedman decided the *Alameda* and *Contra Costa* matters. On April 19, 2001, Judge McKinstry sent Judge Freedman another memo, again urging him to decide his remaining delayed matters, and listing specifically the by then overdue *BART* and *CSK* matters. Judge McKinstry informed Judge Freedman that he would be relieved of all committee matters effective April 23, 2001, if he had not cleared his backlog of delayed matters. In the April 19 memo, Judge McKinstry again reminded Judge Freedman that judges must execute an affidavit attesting that they have no delayed matters to be entitled to salary. On the same day, April 19, 2001, Judge Freedman decided the *BART* and *CSK* matters, clearing his backlog of overdue matters.

2002–2003

In early 2002, Judge Freedman was reassigned to a civil department of the Alameda County Superior Court in Oakland. Judge McKinstry had been succeeded by Presiding Judge Harry Sheppard. While in his civil assignment and during Judge Sheppard's tenure as presiding judge, Judge Freedman failed to timely decide the matters charged in counts 1H to 1J.

1. Count 1H (*Slauson*). On May 6, 2002, a matter in the *Slauson* case[5] was submitted to Judge Freedman. Judge Freedman did not decide the matter until January 31, 2003, 179 days overdue.

2. Count 1I (*O'Toole*). On July 2, 2002, a matter in the *O'Toole* case was submitted to Judge Freedman. The parties wrote to Judge Freedman on September 25, 2002, to inquire about the status of the matter, and wrote again to Judge Freedman in January 2003. Judge Freedman did not decide the matter until February 7, 2003, 130 days overdue.

3. Count 1J (*Willard*). On July 8, 2002, a matter in the *Willard* case[6] was submitted to Judge Freedman. Judge Freedman filed his decision in the *Willard* matter on January 15, 2003, 101 days overdue.

On or around December 27, 2002, while all three of the matters charged for the 2002–2003 period were pending and overdue for rulings, Presiding Judge Sheppard learned from the lead research attorney that Judge Freedman again had matters that had been pending and under submission for longer than 90 days. Judge Sheppard met with Judge Freedman within a week of December 27, 2002, discussed the overdue rulings with him, and showed or gave him a list of the overdue cases. In the month following that meeting, Judge Freedman filed his rulings in the three overdue matters, *Slauson*, *O'Toole*, and *Willard*.

2003–2004

After clearing his backlog in early 2003, Judge Freedman continued to hear civil cases, and he again fell behind on his rulings. At the end of November 2003, Judge Freedman was appointed to the position of assistant presiding judge, and was assigned to supervise the Hayward branch of the Alameda

[5] The Notice charged two delayed matters in the *Slauson* case in count 1H, one occurring in this 2002–2003 period, and the second in the 2003–2004 period. The discussion in the text relates to the first delay.

[6] There was a second matter in *Willard* in which Judge Freedman was alleged to have delayed a ruling, but the masters found it was not proven. The parties do not object to the finding. We adopt it, and dismiss that part of count 1J.

County Superior Court. The Hayward branch was larger than many other county superior courts. In addition to his duties as supervising judge, Judge Freedman also heard law and motion calendars, family law calendars, and court trials, among other things. The Notice charged and we find that Judge Freedman incurred delays of over 90 days before ruling in the following matters:

1. Count 1H (*Slauson*). On March 18, 2003, a second matter in the *Slauson* case was submitted to Judge Freedman. That matter was still undecided on June 16, 2003, 90 days after submission. Attorneys in the *Slauson* matter e-mailed Judge Freedman about the delay in ruling on October 16, 2003, and he responded on the following day, October 17, 2003. The attorneys wrote again to request a ruling on December 15, 2003, and again on February 11, 2004. Though the evidence is equivocal whether and when Judge Freedman received the letters sent in December and February, we find based on his testimony that he personally responded to the attorney's e-mail in October 2003, and responded again to an e-mail followup on April 7, 2004, promising a ruling in the matter as soon as possible. We find, as did the masters,[7] that at least in early October 2003, and again in April 2004, the evidence clearly and convincingly shows Judge Freedman had been reminded his ruling in the second *Slauson* matter was overdue. The matter remained undecided until October 13, 2004, 485 days overdue.

2. Count 1K (*Nwokoro*). On July 2, 2003, Judge Freedman took a matter in the *Nwokoro* case under submission. Judge Freedman did not decide the matter until September 7, 2004, 343 days overdue.

3. Count 1L (*Morgan-Lincoln*). On September 11, 2003, Judge Freedman took a matter in the *Morgan-Lincoln* case under submission. Judge Freedman decided the matter on August 22, 2004, 256 days overdue.

4. Count 1M (*Levy*). On November 25, 2003, Judge Freedman took a matter in the *Levy* case under submission. He did not decide it until November 3, 2004, 254 days overdue.

5. Count 1N (*Mar/Dan*). On December 16, 2003, Judge Freedman took a matter in the *Mar/Dan* case under submission. Judge Freedman did not decide the matter until August 26, 2004, 164 days overdue.

6. Count 1*O* (*Bell*). On December 22, 2003, following a court trial, the *Bell* case was submitted to Judge Freedman for decision. The matter was not

[7] The masters identify the matter as the "second matter in the *Willard* case," but their statement of the facts establishes they are actually referring to the second matter in the *Slauson* case.

decided by March 21, 2004, 90 days after submission. In April 2004, one of the parties, Beasley, wrote to Judge Freedman to request a ruling. Beasley wrote again about the ruling on May 3, 2004, and again on July 1, 2004. The evidence does not clearly and convincingly establish that Judge Freedman actually received or saw the letters sent before July 2004, but we find, based on Judge Freedman's admissions, that he received and reviewed Beasley's July 1, 2004 letter. Beasley also telephoned Judge Freedman's clerk several times to express frustration with the delay. Judge Freedman was aware from some of these communications that the case had been pending for a long period of time. Judge Freedman decided the matter on July 2, 2004, 194 days after submission, and one day after receiving Beasley's letter of July 1.

7. Count 1P (*Kassoff*). In the *Kassoff* case, Judge Freedman heard a matter and it was submitted to him for decision on January 8, 2004. He had not decided it by April 7, 2004, the 90th day after submission. The masters did not address the point in their report, but we find based on Judge Freedman's testimony and the documentary record that on June 6, 2004, one of the attorneys in the matter wrote to Judge Freedman about the status of the matter. The record does not establish when Judge Freedman saw the letter, but the evidence establishes he was aware of the matter by July 31, 2004, when he directed his clerk to set a hearing for August 2004, and to inform counsel that he expected to rule in August 2004. Judge Freedman decided the matter on August 31, 2004, 146 days overdue.

8. Count 1Q (*Weaver*). In the *Weaver* case, a matter was submitted to Judge Freedman for decision on March 16, 2004. Judge Freedman did not decide the matter until September 9, 2004, 87 days overdue.

9. Count 1R (*Natnat*). On March 17, 2004, a matter in the *Natnat* case was submitted to Judge Freedman. The 90th day after submission passed on June 15, 2004. At the hearing before the special masters, Judge Freedman testified he began work on the matter around August 11, 2004, when a second copy of briefing by one of the parties was filed at the court's request. Judge Freedman decided the matter on August 24, 2004, 70 days overdue.

10. Count 1S (*Tibbs*). On May 6, 2004, Judge Freedman heard a matter in the *Tibbs* case, and it was submitted to him for decision. He did not decide it until August 30, 2004, 26 days overdue.

11. Count 1T (*Caswell*). In the *Caswell* case, a matter was submitted to Judge Freedman for decision on May 18, 2004. He did not decide it until September 7, 2004, 20 days overdue.

12. Count 1U (*Teixiera*). On June 2, 2004, Judge Freedman heard a matter and it was submitted in the *Teixiera* case. He decided it on September 7, 2004, 7 days overdue.

In mid-to-late August 2004, then Presiding Judge Barbara Miller asked the lead research attorney to check the court's computerized docket and report to her on any cases that were under submission to the court's judges for more than 90 days. Judge Miller learned from the report she received that Judge Freedman had a number of overdue matters. On August 23, 2004, Judge Miller met with Judge Freedman and delivered a letter to him instructing him to decide the overdue matters and relieving him of his duties as supervising judge. The masters found Judge Freedman was contrite and apologetic at the meeting. Judge Miller also instructed Judge Freedman in the letter that if he did not self-report the delays to this commission, Judge Miller would make a report.

As we find, and the master's findings demonstrate, Judge Miller's warnings and instructions resulted in decisions in most of the delayed cases. Between the end of August 2004 and early November 2004, Judge Freedman decided all his overdue cases. On September 15, 2004, he self-reported to the commission, as requested by Judge Miller. Since then, Judge Freedman has not allowed any submitted matter to remain undecided for over 90 days.

## Reasons for Delays

The reasons for Judge Freedman's decisional delays varied. The masters found that Judge Freedman simply failed to keep track of some of the charged matters, although the masters did not identify those matters. However, based on Judge Freedman's testimony, we find that he failed to keep track of the *Alameda* (count 1A), *CSK* (count 1D), *Nwokoro* (count 1K), *Morgan-Lincoln* (count 1L), *Levy* (count 1M), *Mar/Dan* (count 1N), *Weaver* (count 1Q), *Natnat* (count 1R), and *Tibbs* (count 1S) matters. We also find that before August 2004, despite the warnings by Judge McKinstry in 2001 and Judge Sheppard in late 2002, Judge Freedman failed to implement any meaningful tracking system to ensure he was aware of matters that he had under submission. He also failed to take advantage of the court's computerized case management system, DOMAIN,[8] a system with which he was very familiar and which was capable of generating a list of submitted matters that might have alerted him to his overdue matters. Apart from some testimony

[8] DOMAIN is a computerized case management system that includes document imaging of all filed documents in Alameda County Superior Court cases. The system allowed judges (and others) to view images of filed documents from their computers. Court files can be accessed by party names or case numbers. At least by August 2004, and probably in 2002 and 2003, the DOMAIN system could be used by an individual Alameda County judge to access a list of all cases that judge had under submission awaiting rulings and the dates on which rulings were due. Judge Hernandez, the current presiding judge, testified that Judge Freedman "was unique in his ability to understand the DOMAIN technology component and the civil component and serve as the person to blend all of that together."

that the system was occasionally unreliable, no cogent explanation was offered why Judge Freedman did not effectively use this system to track his cases.

**(7)** In other instances of delay charged in count 1, the delays were fostered at least in part by Judge Freedman's erroneous belief that some matters were not submitted to him until certain tasks he alone had in mind were performed. Under the rules of court, a matter is submitted when either of the following first occurs: (1) the court orders it submitted, or (2) the date a final paper is filed or argument is heard, whichever is later. (Cal. Rules of Court, rule 2.900 [former rule 825].) The masters identify one such matter, *Bellamy* (count 1C), in which Judge Freedman ordered the matter taken under submission at the hearing on the matter, but which he believed would not be truly under submission until he had completed additional unspecified post-hearing tasks. Based on Judge Freedman's testimony, it appears in addition that Judge Freedman erroneously believed that the *Contra Costa* (count 1F), *BART* (count 1G), *Slauson* (count 1H), *Willard* (count 1J), and *Natnat* (count 1R) matters were not submitted to him on the submission dates found by the masters. The masters considered and rejected Judge Freedman's explanation of his understanding of the dates of submission, and we adopt their findings.

The masters also found that in some instances, Judge Freedman knew the delayed matters had been pending for long periods of time, but simply failed to act on them within 90 days of submission. The masters identified the *Bell* (count 1*O*) and *Slauson* (count 1H [second delay]) matters as instances in which Judge Freedman was reminded at some point by counsel or parties that the matters were pending, but still failed to act on them. We adopt those findings, and based on our own review of evidence, also include *Kassoff* (count 1P) in this category.

**(8)** Judge Freedman explained that in some instances his other commitments interfered with his ability to decide pending matters. It is undisputed in these proceedings that Judge Freedman was an active participant in numerous voluntary administrative activities with both the Alameda County Superior Court and the statewide Judicial Council. He was chair of the superior court's Information Technology Committee, a member of the Judicial Council's Civil and Small Claims Advisory Committee, the co-chair of a statewide group working on rules for temporary judges, and participated in other activities that took him away from his regularly assigned courtroom duties. While these activities may be laudable in the abstract, they do not excuse or mitigate his failure to attend to his first duty, to resolve the matters brought before him for judicial decision. (See Cal. Code Jud. Ethics, canon 3A [judicial duties prescribed by law to take precedence over all other matters]; *id.*, canon 3B(1) **(9)** [judges to hear and decide all matters assigned to them].) To the extent

Judge Freedman was distracted from his duty by these activities after he had been chastised by Judge McKinstry, they tend to aggravate rather than mitigate his misconduct.

In sum, we find that Judge Freedman failed to timely decide matters pending before him in 21 of the 23 instances charged in count 1 of the Notice. We also find that after 2001, despite warnings and offers of assistance from Presiding Judge McKinstry in 2001, and further warnings from Presiding Judge Sheppard in 2003, Judge Freedman failed to take appropriate action to monitor and track his caseload to avoid additional delay, and failed to adjust his workload in ways that could have helped him timely resolve the matters he had under submission.

B. *Count 1—Conclusions of Law*

**(10)** We conclude, as the masters did, that Judge Freedman's persistent and repeated failure over a four-year period to decide the matters charged and proved in count 1 within 90 days of submission was prejudicial misconduct. We adopt the masters' conclusions that Judge Freedman's delays violated canons 3A and 3B(8) of the California Code of Judicial Ethics. Canon 3A provides the "judicial duties prescribed by law shall take precedence over all other activities of every judge." Canon 3B(8) requires that "[a] judge shall dispose of all judicial matters fairly, promptly, and efficiently."

In addition, we conclude independently that Judge Freedman's conduct violated canons 1 and 2A of the California Code of Judicial Ethics as well. Canon 1 requires judges to "participate in establishing, maintaining, and enforcing high standards of conduct," and requires they "personally observe those standards so that the integrity and independence of the judiciary will be preserved." Canon 1 is intended in part to preserve public confidence in the judiciary, and violations of the Code of Judicial Ethics "diminish public confidence in the judiciary and thereby do injury to the system of government under law." (Advisory Com. com., 23 pt. 4 West's Ann. Cal. Codes, Court Rules (2006) foll. canon 1, p. 341.) Canon 2A provides that a judge shall "respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Judge Freedman's persistent and unjustified failure to rule in numerous cases, sometimes for long periods of time and after he had been counseled about excessive delay by two presiding judges, fell well below the high standards of conduct expected of the judiciary, and injured public confidence in the judiciary.

**(11)** The evidence amply supports the masters' conclusion that Judge Freedman's persistent, unjustified, and repeated failure to decide the matters

submitted to him as charged in count 1 constitutes prejudicial misconduct. It is established that substantial and persistent failure to rule on submitted matters without substantial justification "may well cause criticism and bring the judicial office into disrepute." (*Mardikian, supra*, 40 Cal.3d at pp. 482, 485; see also *In re Creede* (1986) 42 Cal.3d 1098, 1099 [233 Cal.Rptr. 1, 729 P.2d 79]; *In re McCullough* (1987) 43 Cal.3d 534, 535 [236 Cal.Rptr. 151, 734 P.2d 987].) In several of the delayed cases, litigants directly pointed out to Judge Freedman that the delays were actually or potentially harming their interests, and requested decisions. Judges are employed by the state to decide cases; when they fail to do so without substantial justification, their failure tends to cast the judicial office into disrepute and to lower public esteem for the judiciary. We adopt the masters' conclusion that the 21 decisional delays charged and proven in count 1 were prejudicial misconduct.

C. *Count 2—Findings of Fact*

In count 2, Judge Freedman was charged with submitting an unspecified number of false salary affidavits at unspecified times during the periods June 2000 to April 2001, August 2002 to February 2003, June 2003 to August 2004, and October 2004. The periods in which Judge Freedman is charged with submitting false affidavits correspond to the times the matters charged in count 1 were delayed. As noted, the findings on the two counts overlap.

The masters found, as do we, that Judge Freedman regularly signed and submitted false salary affidavits during the three periods of delay alleged and proven in count 1. This finding is based on Judge Freedman's testimony he regularly signed and submitted monthly state and biweekly county affidavits during the three periods of delay alleged and proven in count 1.

In view of the broad language of the Notice, it is arguable these findings are sufficient to sustain the charge and the master's conclusion that Judge Freedman committed prejudicial misconduct. However, because we believe these findings alone are insufficient to explain the result we reach in this case, we find the following facts were also established by clear and convincing evidence.

Alameda County judges receive salary payments in part from both the State of California and Alameda County (county). The county makes salary payments every two weeks, the state once a month. To get paid by the county, Judge Freedman had to submit salary affidavit forms to the county (the county affidavits). The county affidavit form stated that the signer had no "causes" then pending that had been under submission for more than 90 days. Judge Freedman typically received the county affidavit forms for signature a few days before the end of the pay period they covered, and signed them on

the same day they were presented to him, near the end of the pay period. The county affidavit form provided blanks in which the signer was to enter the ending date of the subject pay period and the date of signature. The form stated that the form was required to be completed pursuant to the constitutional and statutory provisions requiring judges to decide submitted matters within 90 days or forgo their salaries. However, the county form did not include any statement that the declaration was made under penalty of perjury or other form of affirmation that the content of the document was true.

The state affidavit form required the judge to declare under penalty of perjury that "no cause remains pending and undetermined that has been submitted to me in said court for decision for the period of ninety days prior to the first day of ___, (year)." Judge Freedman typically postdated the form, that is, he filled in the blank for the ending date of the period with a date about 30 days after the affidavit was signed. For example, in a state salary affidavit he signed around August 1, 2004 (a time when he had numerous delayed cases), Judge Freedman attested under penalty of perjury that "no cause remains pending and undetermined that has been submitted to me in said court for decision for the period of ninety days prior to the first day of September 1, 2004."

We find there is clear and convincing evidence that at specific points, Judge Freedman was aware from contemporaneous reminders and requests that he had delayed matters pending, and during those times, continued to execute state and county salary affidavits. In connection with count one, we found that Judge Freedman knew he had delayed matters pending for periods of time in *Bell*, *Slauson* (second delay), and *Kassoff*, based on reminders from counsel or parties. We further find he continued to sign salary affidavits during those periods of time. In addition, we find Judge Freedman signed salary affidavits at times he was aware of overdue matters in *Alameda*, *Slauson* (first delay), *O'Toole*, and *Willard*. In each of those matters, he signed at least one salary affidavit after being informed of the overdue matter by the presiding judge and before deciding the matter.

There is clear and convincing evidence that Judge McKinstry told Judge Freedman in mid-March 2001 of the delay in the *Alameda* matter, and gave him a list of overdue matters that included the *Alameda* matter. That matter was not resolved until April 16, 2001. Based on this evidence, we find Judge Freedman knew the *Alameda* matter was delayed from mid-March 2001 until he decided it on April 16, 2001. Judge Freedman nonetheless submitted a state salary affidavit dated March 30, 2001, and county affidavits shortly before March 31, 2001, and again shortly before April 14, 2001.

There is also clear and convincing evidence Judge Freedman executed false salary affidavits when he was aware he had delayed matters in the *Slauson*

(first delay), *O'Toole*, and *Willard* cases. Presiding Judge Sheppard informed Judge Freedman no later than January 4, 2003, that these matters were delayed. Judge Freedman signed a state affidavit within a few days of January 7, 2003. *Willard* was decided on January 15, 2003. Shortly before January 17, 2003, Judge Freedman signed a county affidavit. The *Slauson* and *O'Toole* matters were not decided until January 31, 2003, and February 7, 2003, respectively.

Notwithstanding clear and convincing evidence that Judge Freedman executed salary affidavits when he was aware that he had delayed matters pending, a question remains whether Judge Freedman was consciously aware he was making false statements at the moment he signed the affidavit. The masters accepted Judge Freedman's testimony that he was not consciously aware of the delayed matters when he signed the affidavits. We are troubled by this finding, and based on the cold record of the transcript of the hearing, we probably would not agree with it. However, the special masters appointed by the Supreme Court are experienced jurists, who had the advantage of seeing and hearing Judge Freedman testify. While this commission retains the authority to override the factual findings of the special masters, even on matters of credibility of witness testimony, we are mindful that the credibility findings of the masters may be given "special weight" where they are based on the masters' observations of the witnesses' demeanor at a hearing. (See, e.g., *Broadman, supra*, 18 Cal.4th at p. 1090.) As we discuss next, though, Judge Freedman's testimony shows a disconnect in his thinking that impels our conclusion he committed willful misconduct in those instances when there is clear and convincing evidence he had been informed of delayed matters prior to signing salary affidavits.

D. *Count 2—Conclusions of Law*

The masters concluded Judge Freedman's falsification of salary affidavits during the subject time periods violated canons 1 and 2A of the California Code of Judicial Ethics, and was prejudicial misconduct. They reasoned that because Judge Freedman was not thinking about whether he had overdue cases when he signed salary affidavits, and signed in a "rote, unthinking way," the evidence did not show "actual malice or that he acted recklessly or with utter indifference to the accuracy of the statements. . . ." The masters concluded that, at worst, Judge Freedman "should have known that the statements he was signing were inaccurate"; accordingly, under *Broadman*, such "mere negligence" could not be willful misconduct. (See *Broadman, supra*, 18 Cal.4th at p. 1092 [willful misconduct connotes something more than that the judge "should have known" better; "mere negligence" can never be willful misconduct].) The masters concluded there was a pervasive pattern of repeated prejudicial misconduct, regardless of the judge's state of mind.

We agree with the masters' conclusions except as to those specific instances in which we find that Judge Freedman executed salary affidavits at times when he was aware he had delayed matters. In those instances, we conclude he committed willful, not prejudicial, misconduct by signing the affidavits. Judge Freedman acknowledged that in some instances he continued to sign salary affidavits after being informed that a matter was delayed. He testified he was not thinking about those matters at the time he signed the affidavits, which he executed "by rote," "without thinking," and without "connect[ing] the dots" between the "time status" of his matters and the "process of signing salary affidavits." The masters relied on this testimony for their finding that Judge Freedman was not "consciously aware" of his delayed matters when he was signing salary affidavits. We conclude that this testimony establishes that Judge Freedman acted with utter indifference to whether the affidavits he executed were true or false.

In *Broadman*, the Supreme Court established that willful misconduct occurs not only when a judge, acting in a judicial capacity, intentionally acts unjudicially with a "corrupt purpose," but also when a judge acts with "reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power." (*Broadman, supra*, 18 Cal.4th at p. 1092.) Though the discussion in *Broadman* occurred in the context of an abuse of judicial authority, the principle expressed (that a reckless disregard of the law is equivalent to an intentional disregard of the law) applies with equal force to this situation, in which a judge has recklessly submitted false salary affidavits. Applying that principle, we conclude that Judge Freedman's utter disregard for the truth or falsity of salary affidavits he signed when he knew he had delayed matters pending satisfies the "bad faith" element of willful misconduct.[9]

Judge Freedman does not disagree that the submission of a false salary affidavit is prejudicial misconduct. He nonetheless argues count 2 was not proven, because there is no evidence he submitted any false "state and county salary affidavits," as charged in the Notice. We agree with the masters that this contention is without merit.

As to the county affidavits, Judge Freedman argues the charge was not proven because he did not execute the county affidavits under penalty of perjury, and therefore the documents cannot be "affidavits," as that term is defined by law and charged in the Notice. It is true the county form requires the signer to "declare" he or she has no cases under submission and pending for more than 90 days, but does not require any oath of any kind that the

[9] There is no question the other elements of willful misconduct are satisfied. Making false official statements is clearly unjudicial. The duty to execute salary affidavits is part of the administrative duties of a judge, and is therefore done in a "judicial capacity."

declaration is true.[10] We nonetheless emphatically reject this technical objection to the language of the Notice. The term "salary affidavit" is used in the Notice, and is in common usage among judges. It refers to the statements judges sign to get their salaries. It is a statement made in a judge's official capacity for the express purpose, stated by the document itself, of complying with the judicial salary provisions of the Constitution and the Government Code. Whether or not the statement is made under penalty of perjury, it is clearly and obviously unjudicial to falsify it. Moreover, Judge Freedman admitted in his answer that he had "executed state and county salary affidavits."

We also reject Judge Freedman's argument that the state affidavits were not proven to be "false." The state form requires the judge to declare under penalty of perjury: "no cause remains pending and undetermined that has been submitted to me in said court for decision for the period of ninety days prior to the first day of ___, (year)." Judge Freedman typically postdated the document to a date about 30 days after the affidavit was signed. Based on his practice of postdating the affidavits, Judge Freedman argues the examiner failed to prove his state affidavits were "false" because it is technically impossible to swear to the truth of a future state of events. This argument is without merit.

The Constitution prohibits a judge from being paid when the judge has delayed matters. If accepted, Judge Freedman's claim would mean a judge who has matters that are actually overdue could truthfully execute a state affidavit and obtain salary based on an unenforceable promise that the judge would be in compliance with the law by the time the affidavit was effective. The argument also implies that by making that promise successively, the same judge could continue to execute similar affidavits (and receive salary) indefinitely, without ever clearing his or her backlog of delayed cases. That position is both patently specious and contrary to the clear intent of the Constitution that judges who have overdue matters are not to be paid their salaries until they have decided them. (See, e.g., *Meyers v. Kenfield* (1881) 62 Cal. 512, 513–514 [construing Cal. Const., art. VI, former § 24].) Moreover, it is contrary to the general understanding among judges of the salary affidavit procedure. (See Rothman, Cal. Jud. Conduct Handbook, *supra*, § 6.19, p. 168 [advising judges that if they discover they have a case over 90 days, they must have submitted at least one false affidavit, and must not submit another until the case is decided].)

[10] Under the Code of Civil Procedure, an "affidavit" must be made "under oath" and must be taken before an officer authorized to administer oaths. (Code Civ. Proc., § 2003; see also Black's Law Dict. (7th ed. 1999) p. 58 ["affidavit" is a statement "sworn to by the declarant before an officer authorized to administer oaths"].)

**(12)** A judge who executes a salary affidavit affirming he or she has no overdue rulings should take care to ensure that the statement is true when it is made. There is no question Judge Freedman knew the law, for he signed the state and county affidavits for the express purpose of receiving his salary. It is unjudicial and damaging to the public esteem for judicial office for a judge to submit false statements to obtain salary to which the judge is not then entitled. We therefore reject Judge Freedman's technical arguments based on the form of his affidavits.

E. *Count 3—Findings of Fact*

The Notice charged in count 3 that in early 2004, Judge Freedman failed to rule timely on "over 200" fee waiver applications submitted by litigants in civil and family law matters in the Hayward branch of the Alameda County Superior Court. The Notice charged that as a result, in February 2005, the court refunded $9,984 in fees to litigants whose applications had been denied too late. The conduct alleged in count 3 is charged as violating canons 1, 2A, 3A and 3B(8) of the California Code of Judicial Ethics.

"Fee waiver applications" are applications by litigants to proceed with their court cases without paying the filing and other fees that are ordinarily charged by the superior courts. The procedure for proceeding in superior court without paying filing or other fees is provided for by the Government Code and the California Rules of Court. (Gov. Code, § 68511.3; Cal. Rules of Court, rule 3.50 et seq. [former rule 985].) The rule that applied in 2003 was former rule 985. Under that rule, a litigant who wanted to proceed without paying court fees had to file a standard Judicial Council application form. (Former rule 985(a).) The rule allowed the superior court to delegate the function of reviewing and granting the applications to the "court clerk," but only a judge could deny them. (Former rule 985(d).) In either case, if the judge or the clerk failed to rule on the application within five days of filing, the application was granted automatically. (Former rule 985(e).)

The masters found that Judge Freedman had failed to act in a timely fashion on "approximately 200 fee waiver applications." The finding was based on undisputed evidence that Judge Freedman had personally taken over the handling of fee waiver applications when he was assigned to be the supervising judge in Hayward in November 2003. He fell behind, and a "substantial number" of applications were denied after the five days for a ruling had elapsed. There were complaints from litigants, and Presiding Judge Miller ordered a refund to the litigants whose applications were denied late. More than $9,000 was refunded pursuant to the order. These findings were supported by Judge Freedman's testimony before the masters. Finally, it was

uncontradicted the late denials caused "irate" litigants to complain, and that the complaints caused Presiding Judge Miller to order fee refunds. We adopt the masters' findings.

F. *Count 3—Conclusions of Law*

Based on their findings of fact, the masters concluded Judge Freedman's conduct violated canons 3A (judicial duties to take precedence over other matters) and 3B(8) (judge to dispose of matters promptly) of the California Code of Judicial Ethics. We agree, and also find violations of canons 1 (independence and integrity of judiciary) and 2A (judges to respect and comply with the law so as to promote public confidence), for the same reasons we found violations of the same canons in connection with the delayed matters charged in count 1. (See pt. II.B. of the Discussion, *ante*, p. 240.) The number of applications that were improperly denied as the result of Judge Freedman's failure to act, combined with the adverse effect of the improper denials on the litigants and on the public's perception of the court, is enough to establish that Judge Freedman's actions were violations of his duty to follow the law and perform his judicial duties competently (canon 2A), and also would tend to adversely affect the public perception of the integrity of the judiciary (canon 1).

The masters also concluded Judge Freedman had committed prejudicial misconduct, because his conduct was "prejudicial to the public's esteem for the judicial office." We agree, and adopt the masters' conclusion. Judge Freedman's conduct was unjudicial because he (1) failed to rule timely on a substantial number of applications after taking responsibility to do so, and (2) even though the rules provided applications were to be automatically granted if they were not acted on within five days of filing, applications that Judge Freedman had not acted on timely were nonetheless denied. Superior court fees are a significant burden, especially to individual litigants of limited means. Such fees are also a significant source of revenue for the courts. An objective observer would tend to hold the judiciary in lower esteem if informed that a supervising judge of the superior court failed to act on over 200 applications for fee waivers, with the result those applications were automatically granted whether meritorious or not. Moreover, the same observer would have the same reaction upon learning the court had failed to follow the law, and had denied the applications even though the judge's inaction and the law required the court to grant them.[11]

[11] For the reasons stated in the text, we reject Judge Freedman's contention his conduct was at most improper action. Substantial and persistent failure to rule timely can be prejudicial misconduct, even though the delays do not cast doubt on the judge's independence or integrity. (*Mardikian, supra*, 40 Cal.3d at p. 485.)

## III.

## DISCIPLINE

### A. *Introduction*

We turn now to the most difficult and individualized part of our decision, the determination of the discipline most appropriate to the facts and circumstances of the case before us. As we explain below, we find Judge Freedman has committed egregious and persistent misconduct which would warrant removal if considered alone. However, we have also considered Judge Freedman's otherwise exemplary performance as a jurist, the high esteem in which he is held by his peers and attorneys who appear before him, his acknowledgement of wrongdoing and acceptance of responsibility for his actions, and our perception that he is unlikely to offend again. Based on all the circumstances of this unusual case, we have determined to impose a severe public censure.

### B. *Analysis*

**(13)** The commission has identified various factors that may be relevant when determining what discipline is appropriate in a given case. The factors are (1) the number of acts of misconduct; (2) the existence of prior discipline; (3) whether the judge appreciates the inappropriateness of his or her conduct; (4) the judge's integrity; (5) the likelihood of future misconduct; and (6) the impact of the misconduct on the judicial system. (*Inquiry Concerning Ross* (2005) No. 174, Decision and Order Removing Judge Ross from Office, pp. 63–64 [49 Cal.4th CJP Supp. 79, 137–138]; *Inquiry Concerning Van Voorhis* (2003) No. 165, Decision and Order Removing Judge Van Voorhis from Office, p. 31 [48 Cal.4th CJP Supp. 257, 295].) In the discussion that follows, we discuss each of the elements in turn, after which we review the decisions of the Supreme Court and this commission in cases that have involved allegations that judges unreasonably delayed their rulings and executed false salary affidavits.

#### 1. *Number of Acts of Misconduct.*

**(14)** The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern of misbehavior that demonstrates that the judge lacks judicial temperament and the " ' "ability to perform judicial functions in an even-handed manner." ' " (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958] [pervasiveness of misconduct over the judge's entire career demonstrated unfitness for office].) We have found numerous

instances of prejudicial and willful misconduct. Judge Freedman delayed rulings in 21 instances between 2001 and 2004, even after warnings from successive presiding judges. During that time, Judge Freedman rarely if ever stopped regularly executing salary affidavits. The pattern of wrongdoing is further exacerbated by the judge's widespread failure to rule on fee waiver applications. This pattern of disturbing and pervasive misconduct warrants severe discipline.

2. *Prior Discipline.*

Judge Freedman was issued an advisory letter in 1998 for failing to timely substitute out of a matter as counsel before he was appointed to the bench. There is no other evidence of prior discipline by the commission. We attribute little significance to this prior discipline. It came early in Judge Freedman's career as a judge, the misconduct involved was not of the same kind or gravity as the misconduct presented here, and it does not have direct bearing on Judge Freedman's fitness to continue to serve on the bench. (Cf., e.g., *Inquiry Concerning Velasquez* (2007) No. 180, Decision and Order Removing Judge Velasquez from Office, p. 44 [49 Cal.4th CJP Supp. 175, 216] [finding public censure inadequate remedy for current misconduct in view of judge's record of prior serious discipline, including previous public censure].)

Despite Judge Freedman's lack of prior relevant discipline, it is significant that before this proceeding began, Judge Freedman had been counseled by presiding judges about delayed matters and nonetheless twice allowed the problem to recur. He was specifically warned in writing in 2001 by Judge McKinstry of his duty to submit truthful salary affidavits, but continued to execute affidavits "without thinking." (Cf. *Inquiry Concerning Van Voorhis, supra*, No. 165, at pp. 38–39 [48 Cal.4th CJP Supp. at pp. 303–304] [judge had been counseled by presiding judge regarding his demeanor, but then resumed the same or similar misconduct within several weeks].)

3. *Whether the Judge Appreciates the Inappropriateness of His Conduct.*

**(15)** A judge's lack of appreciation of misconduct and failure to recognize and admit impropriety are indications that a judge lacks the capacity to reform. (See, e.g., *Inquiry Concerning Velasquez, supra,* No. 180, at p. 45 [49 Cal.4th CJP Supp. at p. 218].) Judge Freedman's testimony indicates he understands the nature of his wrongdoing, and recognizes its impropriety. He testified he should have kept track of his cases and should have considered whether he had overdue cases when he signed salary affidavits, but did not do either. In addition, the evidence shows Judge Freedman worked to eliminate his delayed cases when they were brought to his attention in 2001, 2003 and

2004, and expressed regret for his conduct in his interview with Judge Miller in 2004. Judge Freedman admitted most but not all of the charges against him. We believe Judge Freedman appreciates the nature and extent of the misconduct, and has acknowledged the errors he has committed.

4. *The Judge's Integrity.*

The masters found, as do we, that "[i]t is clear Judge Freedman is respected as a thoughtful, intelligent, compassionate, and hard-working jurist." That finding is supported by the testimony of numerous judges and attorneys, including Judges Sheppard, Miller, and Hernandez, all of whom served as presiding judges over Judge Freedman and who testified to his good character, industry, and value to the bench.

The substance of the testimony of the two former presiding judges and the present presiding judge of the superior court in which Judge Freedman sits has significant persuasive value. Judge Hernandez, the current presiding judge, testified to his complete confidence in Judge Freedman. Judge Sheppard testified to Judge Freedman's contributions to the superior court bench, to his work ethic, and to his extraordinary competence as a judge. Judge Miller testified to his contributions to the court, her "enormous" respect for his judgment, and his productive work for the court. Numerous attorneys, including nine who were counsel in delayed matters, testified or submitted declarations in support of Judge Freedman. Attorneys described him as "intelligent and thoughtful," "respectful and fair," "hardworking," and "an excellent judge."

Apart from the misconduct charged in this matter, there is no evidence that Judge Freedman lacks integrity, and there is strong evidence of his good qualities as a trial court judge. The esteem of his peers and his overall competence, work ethic, and superior ability, suggest that he is capable of reform, and that his removal from office is not necessary to protect the public. (See *Doan v. Commission on Judicial Performance, supra*, 11 Cal.4th at p. 314; *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 341 [267 Cal.Rptr. 293, 787 P.2d 591].)

5. *Likelihood of Future Misconduct.*

The evidence supports the conclusion that Judge Freedman is not likely to commit misconduct in the future. His testimony before the special masters and his remarks to this commission in argument indicate that he now understands how serious his misconduct was. He admitted most of the charges almost entirely. When he explained his conduct, he acknowledged that his reasons for acting as he did were incorrect or based on an incorrect

view of the law. Since 2004, Judge Freedman has been entrusted with significant new judicial responsibility, and no further misconduct has occurred. The evidence strongly establishes his value as a public servant. In our view Judge Freedman does not pose an ongoing threat to the public.

6. *Impact on the Judicial System.*

Judge Freedman's misconduct is grave, and has had an obvious and palpable adverse impact on the public's perception of the integrity of the judiciary and on the administration of justice. We believe an objective observer would be shocked and angered that Judge Freedman repeatedly signed salary affidavits without thinking, "by rote," and with reckless disregard for the truth of the statements he was making. Moreover, his numerous and sometimes lengthy decisional delays harmed individual litigants and had an adverse impact on the administration of justice in Alameda County.

*History of Public and Private Discipline in Cases Involving Delay and False Salary Affidavits.*

Judge Freedman urges that removal from office in this case would be a significant departure from the treatment of misconduct of similar character in prior discipline cases. As he points out, in these past cases, on the varying facts presented, neither the Supreme Court nor this commission has found the misconduct so egregious as to warrant removal from office.

For example, in *In re McCullough, supra*, 43 Cal.3d at page 535, the Supreme Court considered a recommendation by this commission for censure based on the judge's failure to timely decide cases. Judge McCullough failed to timely decide "a case submitted to his court for a period of three years, nine months," despite repeated reminders from the parties and three private admonishments from this commission. (*Ibid.*) He also "continued to execute salary affidavits and to receive his salary even though submitted cases remained pending and undecided in his court for periods in excess of 90 days." (*Ibid.*) The Supreme Court agreed with the commission's conclusion that Judge McCullough's "failure to promptly decide cases, despite private admonishments and inquiries from the commission and the parties, and his disregard of California law in executing salary affidavits and in receiving his salary, was 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute.' " (*Ibid.*) The Supreme Court adopted the commission's recommendation for censure without further comment on the facts.

Other Supreme Court cases have reached similar results on similar facts. (See *Mardikian, supra*, 40 Cal.3d at pp. 478–479 [hardworking and overworked judge had numerous significant and unjustified delays and submitted

salary affidavits during periods of delay up to a year, despite repeated communications with this commission about delayed matters; censured for prejudicial misconduct]; *In re Jensen* (1978) 24 Cal.3d 72, 73 [154 Cal.Rptr. 503, 593 P.2d 200] [judge who unjustifiably delayed rulings and "nevertheless" submitted salary affidavits that inaccurately said he did not was censured]; *In re Creede, supra*, 42 Cal.3d at p. 1099 [judge censured for delays over a five-year period and execution of "erroneous" salary affidavits, with a finding that the judge did not knowingly falsify the affidavits].)

The commission's public disciplinary decisions are similar. For example, in 1998, we publicly admonished a judge for seven-month and 13-month delays in two civil matters.* (*Public Admonishment of Judge Robert H. Oliver* (1998).) The admonishment noted that Judge Oliver also had executed sworn salary declarations stating he had no delayed cases during the periods of the delayed matters, some after he received reminders that one of the cases was overdue. In 1995, a judge stipulated to a public reproval for delaying cases, and the commission noted in its public statement that the judge had continued to execute salary affidavits during a period of delay of over a year. (*Public Reproval of Judge Thomas Breen* (1995).)

**(16)** Judge Freedman contends we should not remove him from office because no other judge has yet been removed for the same or similar misconduct. We emphatically reject that proposition and will not limit the scope of discipline to be imposed in future cases involving similar misconduct. (See, e.g., *Broadman, supra*, 18 Cal.4th at p. 1112 [proportionality review is "neither required nor determinative"].)

Our determination of the appropriate sanction to impose on Judge Freedman is not predetermined by prior decisions in which judges were not removed from office for delay and falsification of salary affidavits, any more than it is appropriate for us to ignore all that has gone before. (See, e.g., *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1318 [240 Cal.Rptr. 859, 743 P.2d 919] [though each case turns on its facts, it is "worth comparing" other judicial discipline cases]; see also, e.g., *Inquiry Concerning Hall* (2006) No. 175, Decision and Order Removing Judge Hall from Office, pp. 26–28 [49 Cal.4th CJP Supp. 146, 170–172] [reviewing precedent in consideration of discipline].) We consider those prior decisions as a factor in our ultimate decision to censure Judge Freedman.

*Reporter's Note: The original decision incorrectly referred to the two delayed matters in the *Public Admonishment of Judge Robert H. Oliver* as civil cases. They were both criminal matters.

ORDER

**(17)** Judge Freedman has committed serious misconduct that taken alone might warrant removal from office. However, he is a respected and talented jurist who was strongly supported in this proceeding by a significant number of attorneys and colleagues, including two former presiding judges and the present presiding judge of the court in which he sits. Two of those former presiding judges were called as witnesses by the examiner, and testified not only to their high opinion of Judge Freedman and their confidence in him, but to facts that support this decision to censure him. Counsel for parties in a number of the delayed matters supported Judge Freedman in these proceedings and testified that they would not hesitate to appear before him in future cases. Other than the subject misconduct, there was no evidence presented that called Judge Freedman's abilities as a jurist or his suitability for the bench into question. Judge Freedman has not been the subject of any relevant prior discipline, he has acknowledged his wrongdoing and is contrite, and we are satisfied he is unlikely to offend again. For those reasons, and after careful consideration of the unique circumstances of this case, we have determined to issue this severe public censure of Judge Robert B. Freedman.

Commission members Hon. Frederick P. Horn, Hon. Judith D. McConnell, Hon. Katherine Feinstein, Ms. Patricia Miller, Ms. Barbara Schraeger, and Mr. Lawrence Simi voted in favor of all the findings and conclusions expressed herein and in the foregoing order of severe public censure of Judge Freedman. Mr. Jose C. Miramontes voted for removal. Mr. Marshall B. Grossman and Mr. Michael A. Kahn did not participate. There are two vacancies on the commission.

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| **INQUIRY CONCERNING JUDGE CHRISTOPHER J. SHELDON,**<br><br>**No. 186** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 127)** |

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Christopher J. Sheldon, a judge of the Riverside County Superior Court. On January 12, 2009, the commission filed its Notice of Formal Proceedings (Notice) against Judge Sheldon in which it charges him with misconduct in routinely leaving the courthouse for the day before noon and after the conclusion of his dependency calendar without receiving authorization for his half-day absences and without notifying his supervising judges.

The Supreme Court appointed three special masters to hold an evidentiary hearing and to report to the commission. The masters are Hon. Stuart R. Pollak, Associate Justice of the Court of Appeal, First Appellate District, Division Three; Hon. Bradley L. Boeckman; Judge of the Shasta County Superior Court, and Hon. Joyce M. Cram, Judge of the Contra Costa County Superior Court. Prior to the masters holding an evidentiary hearing, however, Judge Sheldon and his counsel, Reg A. Vitek, Esq., and Heather L. Rosing, Esq., and the examiner for the commission, Andrew Blum, Esq., (the parties) proposed a stipulated resolution of this inquiry to the commission, as follows.

By Stipulation for Discipline by Consent (Stipulation), executed by the parties on March 18, 2009, the parties proposed pursuant to Commission Rule 127(b) that this inquiry concerning Judge Sheldon be resolved with the imposition

of a public censure based on the agreed stipulated facts and conclusions of law as set forth in this decision, and with Judge Sheldon's agreement to tender his irrevocable resignation from judicial office in writing to the Governor of California, said resignation to be effective October 23, 2009, and to not preside over any judicial proceedings as of May 12, 2009. From May 12, 2009 until October 23, 2009, Judge Sheldon will be on leave from the bench approved by his presiding judge. According to the terms of the Stipulation, Judge Sheldon has agreed that he shall not at any time seek or hold judicial office in California, whether by election or appointment, and shall not seek or accept judicial assignment, appointment or reference of work from any California state court. Judge Sheldon also agreed that in its decision and order imposing a censure, the commission may articulate the reasons for its decision.

In connection with the Stipulation, Judge Sheldon executed the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which he admitted the truth of the stipulated facts, consented to the imposition of a censure, and waived review by the California Supreme Court.

The proposed agreement, consisting of the Stipulation and Affidavit, was approved by the commission on March 23, 2009. This Decision and Order, and the findings and conclusions set forth herein, are based on the Stipulation and Affidavit.

## II. STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Sheldon served on the Riverside County Municipal Court from October 21, 1989 to January 21, 1992, and was appointed to the Riverside County Superior Court on January 23, 1992.

Judge Sheldon has been assigned to the juvenile dependency department in Indio since August 2005. The dependency calendar routinely concludes before

noon. Since early 2007 through late 2008,[1] Judge Sheldon routinely left the courthouse for the day after the calendar concluded. Judge Sheldon did not inform his supervising judges of his routine absences during court hours, and did not seek or receive authorization for these half-day absences. On occasion, the juvenile delinquency judge in Indio handled ex parte dependency matters due to Judge Sheldon's afternoon absences. Judge Sheldon generally did not seek to make himself available for other judicial work during these absences.

Judge Sheldon's conduct violated the Code of Judicial Ethics, canons 1 (failing to observe high standards of conduct), 2A (failing to act at all times in a manner that promotes public confidence in the judiciary), and 3C(1) (failure to diligently discharge administrative responsibilities and to cooperate with other judges and court officials in the administration of court business) and constituted prejudicial misconduct. Judge Sheldon's failure to seek or to receive authorization for his half-day absences also violated California Rules of Court, rule 10.608(3).

Judge Sheldon received a public admonishment in 1998 for his conduct in handling his misdemeanor pretrial calendar from July 1995 to March 1996. Judge Sheldon frequently failed to take the bench or left the bench during portions of this calendar. He allowed the clerks to enter pleas and execute documents imposing sentence in his absence, and to stamp his signature on constitutional rights waiver forms. On occasion, Judge Sheldon left the courthouse or would jog on a courthouse staircase during his pretrial calendar. The commission found that

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[1] Judge Sheldon disputes the allegation in the Notice of Formal Proceedings that he routinely left the courthouse "[s]ince approximately January 2006," but admits that he routinely left from early 2007 through late 2008. Since the precise dates would not affect the parties' recommendation as to discipline, the parties stipulated to the dates admitted by Judge Sheldon. The commission agrees that this change does not affect the determination of the appropriate level of discipline. In the commission's view, Judge Sheldon's practice of working short days warrants the discipline imposed in this decision, regardless of whether he started leaving the courthouse in early 2006 or 2007.

Judge Sheldon's handling of his pretrial calendar violated canons 1, 2A, 3A, 3B(1) and 4A(3).

## III. DISCIPLINE

Article VI, section 18, subsection (d) of the California Constitution provides that the commission may "censure a judge . . . for action . . . that constitutes . . . conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Judge Sheldon concedes that he engaged in prejudicial misconduct.

The purpose of a commission disciplinary proceeding is not punishment, "but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity . . . of the judicial system." (*Broadman* v. *Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.) The commission believes that this purpose is best served by the discipline proposed in the Stipulation: a public censure with an agreement that Judge Sheldon will resign and will not at any time seek or hold judicial office or seek or accept judicial assignment.

By regularly absenting himself from the courtroom before noon without the approval of his supervising judges for a period of almost two years, Judge Sheldon has demonstrated a flagrant disregard for his obligations to his fellow judges, the public, and the reputation of the judiciary. A judge's responsibilities are not limited to the completion of the daily calendar. Judges who conclude their calendars early in the day may be assigned other duties, including presiding over cases other courts are unable to handle due to time limitations or disqualification and handling ex parte motions. Unapproved absences can have a significant impact on the operation of the court, especially in a county such as Riverside with a longstanding and well-publicized backlog of court cases.

California Rules of Court, rule 10.608(3) requires that a judge request "approval of the presiding judge for any intended absence of one-half day or more, within a reasonable time before the intended absence." Judge Sheldon concedes that he violated his administrative duty under this rule by failing to seek approval for his regular half-day absences. Canon 3C(1) requires a judge to diligently discharge administrative responsibilities and to cooperate with other judges and court officials in the administration of court business. As this canon makes clear, "administrative duties must be discharged with the same diligence as adjudicative duties." (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 546.) In *Ryan v. Commission on Judicial Performance,* the Supreme Court determined that Judge Ryan's practice of leaving the courthouse the moment his adjudicative duties were completed, usually in the early afternoon, violated the Code of Judicial Ethics and constituted prejudicial misconduct. (*Id.* at pp. 545-546.)

Public confidence in the integrity of the judiciary is seriously undermined when a judge routinely leaves the courthouse early without approval. Taxpayers of the State of California have a right to expect that judges are available to provide the services for which they are paid. As stated by Judge Rothman, "The public does not owe judges extra time off, or anything other than what the law allows, in gratitude for the hard work judges must expend." (Rothman, California Judicial Conduct Handbook, (3d ed. 2007) § 6.11, p. 265). Judge Sheldon's routine of working part-time while being paid a full-time salary is utterly unacceptable and casts disrepute upon the judicial office.

Judge Sheldon's misconduct is made even more egregious by the fact that he was publicly admonished in 1998 for conduct including abandonment of his judicial responsibilities. In that disciplinary matter, the commission found that Judge Sheldon abdicated certain adjudicatory responsibilities to his clerk, and left the courthouse or jogged on the courthouse stairs during his pretrial calendar.

Unfortunately, the issuance of a public admonishment did not deter Judge Sheldon from abandoning his judicial responsibilities in the future.

The commission concludes that acceptance of the Stipulation to a public censure, which includes Judge Sheldon's agreement to tender his irrevocable resignation from judicial office and to not thereafter seek or hold judicial office or seek or accept judicial assignment, is in the best interest of the public. The agreement in the Stipulation, which provides that the judge's resignation will be effective October 23, 2009, and that he will take approved leave from the bench as of May 12, 2009, affords protection to the public in the most expeditious manner by avoiding the delay of further proceedings. Accordingly, the commission hereby censures Judge Christopher J. Sheldon.

Commission members Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Peter Flores, Esq., Mr. Marshall B. Grossman, Esq., Mr. Samuel A. Hardage, Hon. Frederick P. Horn, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, and Mr. Nathaniel Trives voted to issue this decision and order imposing a public censure pursuant to the stipulated disposition.

Dated: April 15, 2009

Hon. Judith D. McConnell
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING FORMER COMMISSIONER ANN DOBBS | DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BAR PURSUANT TO STIPULATION (Commission Rule 116.5) |

This disciplinary matter concerns Ann Dobbs, a former commissioner of the Los Angeles County Superior Court. Former Commissioner Dobbs retired from the court on October 31, 2007. Former Commissioner Dobbs and her counsel, Heather L. Rosing, Esq., have stipulated pursuant to commission rule 116.5 to the imposition of a public censure and bar prohibiting former Commissioner Dobbs from seeking or holding judicial office, or accepting a position or an assignment as a judicial officer, subordinate judicial officer or judge pro tem with any court in the state of California, or accepting a reference of work from any California state court, at any time in the future. The Stipulation for Imposition of Censure and Bar (Stipulation) was approved by the commission on June 24, 2009, pursuant to the following terms and conditions as set forth in the Stipulation.

TERMS AND CONDITIONS OF STIPULATION

1. The Stipulation resolves the preliminary investigation out of which the preliminary investigation letter of December 10, 2008, arose.

2. The commission has jurisdiction over the matter pursuant to article VI, section 18.1, of the California Constitution. The allegations before the commission are sufficiently serious to warrant the institution of formal proceedings pursuant to that section of the Constitution.

3. The settlement provided by this agreement is in the best interests of both the commission and Ms. Dobbs because, among other reasons, it adequately protects the public and will avoid the delay and costs of formal proceedings.

4. The commission shall issue a censure and bar based on the agreed Stipulated Facts and Legal Conclusions set forth herein.

5. Ms. Dobbs resigned from her position as a court commissioner with the Los Angeles County Superior Court on October 31, 2007.

6. Ms. Dobbs shall not seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time in the future.

7. If Ms. Dobbs fails to comply with any of the terms and conditions of this agreement, the commission may withdraw the censure and bar and resume its investigation. Failure to comply with the terms and conditions of this agreement will constitute additional and independent grounds for discipline.

8. The commission may disclose to the State Bar of California all or any part of the information provided to the commission by the Los Angeles County Superior Court, and all or any part of the additional information obtained through the commission's preliminary investigation in this matter.

9. Ms. Dobbs waives any further proceedings and review in this matter, including any further response to either preliminary investigation letter (commission rule 111(a)), formal proceedings (commission rule 118, et seq.), and review by the California Supreme Court (Cal. Rules of Court, rule 9.60).

10. The commission may articulate the reasons for its decision in its decision and order imposing censure and bar.

## STIPULATED FACTS AND LEGAL CONCLUSIONS

Ann Dobbs was a commissioner in the Family Law Department of the Los Angeles County Superior Court from March 2001 until October 31, 2007, when she retired. Commissioner Dobbs failed to decide numerous cases in a timely manner. In California, judicial officers are expected to decide cases within 90 days of the date they are taken under submission. When Commissioner Dobbs retired in 2007, 15 cases over which she had presided had been under submission for over 90 days without her having decided them, and another 14 cases that she had under submission for less than 90 days had not been decided. Commissioner Dobbs never decided any of these cases.

Under California law, judges are expected to decide matters submitted to them within 90 days of submission and are prohibited from receiving a salary while any cause remains "pending and undetermined for 90 days after it has been submitted for decision." (Cal. Const., art. VI, § 19; *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4.) While the 90-day period is not absolute, it has been used by the commission as a benchmark for determining delay in submitted cases. (See Decision and Order Imposing Public Censure on Judge Robert B. Freedman (2007) and Decision and Order Removing Judge Robert G. Spitzer From Office (2007).) Canon 3B(8) of the California Code of Judicial Ethics requires judges, including commissioners, to dispose of all judicial matters "fairly, promptly, and efficiently." The Advisory Committee commentary to canon 3B(8) states that a judge "should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs," and requires judges to be "expeditious in determining matters under submission." The commission has stated that inordinate delay in deciding cases is unacceptable in all cases, but a judge's failure to decide family law matters can be particularly egregious in light of the harm to the parties caused thereby. (Public Reproval of Judge Thomas P. Breen (1995).)

When Commissioner Dobbs was hired in 2001, the Los Angeles County Superior Court had a tracking system in place whereby reports were generated at the end of each month showing the cases each bench officer had under submission between 30 and 60 days, between 60 and 90 days, and for more than 90 days. These reports were, and still are, given to all bench officers of the Los Angeles County Superior Court each month.

Between 2003 and 2007, Commissioner Dobbs's cases appeared in the 30-60-day and 60-90-day categories of the Cases Under Submission reports. Some of her cases were under submission for more than 90 days during that period.

At various times in 2006 and 2007, Commissioner Dobbs prepared the case status information for the cases under submission list herself, rather than allowing her courtroom clerk to do so. At times, her reporting did not accurately reflect the status of all of the cases she had under submission. Some cases Commissioner Dobbs had taken under submission never appeared on the Cases Under Submission reports, including some cases that were undecided for more than 90 days.

Between 2006 and 2007, the court transferred some of Commissioner Dobbs's newly assigned matters each week to another judge. Over the course of that period, a total of 354 cases were transferred. Commissioner Dobbs still did not complete all of her submitted cases on time. On two occasions in 2007, Commissioner Dobbs was given one week off during which she was to complete her submitted cases. During that time off, she did not complete any submitted cases.

To implement the provision of the California Constitution prohibiting a judge from receiving a salary while any case remains undecided for 90 days after it has been submitted for decision, judges are required to execute an affidavit attesting that they have no case pending for more than 90 days in order to receive a salary. (Gov. Code § 68210.) Although Commissioner Dobbs was not a judge, salary affidavits were distributed to all Los Angeles County Superior Court commissioners with their paychecks or direct deposit notices for signature each month. Between 2002 and 2007, Commissioner Dobbs did not sign any salary affidavits. The court did not realize until after her retirement that she had not been signing salary affidavits.

In 2007, Commissioner Dobbs's supervising judge sent her three complaints from family law litigants about her delays. Tracy Harris complained to the court on June 11, 2007, about Commissioner Dobbs's delay of nearly five years in ruling on her case. Commissioner Dobbs's supervising judge sent the Harris complaint to Commissioner Dobbs for her response on June 28, 2007. Suzanne Lynch complained to the court on August 13, 2007, about Commissioner Dobbs's delay of eleven months in ruling on her case. Commissioner Dobbs's supervising judge sent the Lynch complaint to Commissioner Dobbs for her response on September 5, 2007. Julia (Bandrapalli) Stokes complained on September 28, 2007, about Commissioner Dobbs's delay of six months in entering judgment on her case. Commissioner Dobbs's supervising judge sent the Bandrapalli complaint to Commissioner Dobbs for her response on October 12, 2007. While Commissioner Dobbs acknowledged her receipt of the complaints to her supervising judge, she failed to respond to the allegations in the three complaints.

When Commissioner Dobbs retired in October 2007, she agreed to complete work on undecided cases at home. Commissioner Dobbs took approximately 30 undecided

cases home with her. Of the cases Commissioner Dobbs took home with her, the following 15 had been under submission for over 90 days:

1. *Allain* (case no. BD 371793) submitted on March 1, 2006;
2. *Bannan* (case no. BD310701) submitted on June 26, 2005;
3. *Beuerman* (case no. BD055815) submitted on July 16, 2007;
4. *Blackburn* (case no. BD116967) submitted in February 2003 and September 2005;
5. *Dvorin* (case no. YD048141) submission date unclear; date vacated by minute order dated September 22, 2006 but no new submission date set;
6. *Ellis* (case no. BD319194) submitted on July 13, 2005;
7. *Goldman* (case no. BD407997) submitted on November 17, 2006;
8. *Harris* (case no. BD322099) submitted on March 23, 2005 and August 29, 2007;
9. *Lynch* (case no. BD364093) submitted on November 2, 2006;
10. *Mullins* (case no. BD383098) submitted on July 23, 2007;
11. *Needleman* (case no. BD393615) submitted on July 20, 2007;
12. *Perez* (case no. BD379993) submitted on March 27, 2007;
13. *Polo* (case no. BD391297) submitted on February 7, 2007;
14. *Stott* (case no. YD046723) date of submission unclear, probably soon after May 1, 2007;
15. *Striff* (case no. PD037298) submitted on January 22, 2007.

Of the cases Commissioner Dobbs took home with her, the following 14 had been under submission for less than 90 days:

1. *Adger* (case no. BD391595) submitted on October 17, 2007;
2. *Allen* (case no. BD448597) submitted on August 16, 2007;
3. *Aronson* (case no. BD420664) submitted on October 23, 2007;
4. *Birdwell* (case no. BF017596) submitted on September 14, 2007;
5. *Cooper* (case no. BF026368) submitted on August 2, 2007;
6. *Di Paola* (case no. BD377295) submitted on August 29, 2007;
7. *Glassman* (case no. BD240596) submitted on October 31, 2007;
8. *Grifka* (case no. BD413029) submitted on August 29, 2007;
9. *Hamilton* (case no. BD375899) submitted on October 2, 2007;
10. *Kim* (case no. D229695) submitted on October 12, 2007;
11. *Locatell* (case no. BD390299) submitted on October 5, 2007;
12. *Moore* (case no. BD385251) submitted on October 19, 2007;
13. *Nielsen* (case no. BD4007195) submitted on October 22, 2007;
14. *Serrano* (case no. YD032093) submitted on October 26, 2007.

During the three months following her retirement, Commissioner Dobbs did not complete any of these cases. On January 31, 2008, the court retrieved all of the files she had taken home. Several judicial officers were required to review and complete Commissioner Dobbs's undecided cases. Mistrials were declared in at least 15 cases.

Some cases were decided based upon the reporter's transcript of previous proceedings before Commissioner Dobbs; however, a number of cases had to be retried.

Former Commissioner Dobbs has expressed both embarrassment and remorse for her delays in completing some of the matters she took under submission.

Former Commissioner Dobbs's conduct violated the Code of Judicial ethics, canons 1 (failing to observe high standards of conduct), 2A (failing to act at all times in a manner that promotes public confidence in the judiciary), 3B(8) (failing to dispose of all judicial matters fairly, promptly and efficiently ), and 3C(1) (failing to cooperate with other judges and court officials in the administration of court business), and constituted prejudicial misconduct. Former Commissioner Dobbs's misconduct caused significant harm to family law litigants and to the court, and seriously undermined the integrity of the judiciary.

## DISCIPLINE

Article VI, section 18, subsection (d) of the California Constitution provides that the commission may "censure a judge . . . for action . . . that constitutes . . . conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Former Commissioner Dobbs concedes that she engaged in prejudicial misconduct.

The purpose of a commission disciplinary proceeding is not punishment, "but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity . . . of the judicial system." (*Broadman* v. *Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.) The commission believes that this purpose is best served by the discipline proposed in the Stipulation.

Commissioner Dobbs's failure to timely complete so many of her cases over a substantial period of time convinces the commission that there is a strong likelihood that the same pattern of delayed rulings on submitted matters would continue if she were to serve as a judicial officer in the future. Through her misconduct, the commissioner demonstrated an unconscionable disregard for the rights of litigants and the reputation of the judiciary. "Litigants and the public have a right to expect judges to take action on matters assigned to them in an expeditious and efficient manner. A judge's failure to act

deprives litigants of resolution of their disputes and grievances through the court system." (*Inquiry Concerning Judge Robert G.* Spitzer, No. 182, Decision and Order Removing Judge Spitzer from Office (2007) at p. 13.) Commissioner Dobbs's protracted delays have had a significant and palpable impact on the litigants, both financially and emotionally.

The judiciary has also been adversely impacted. Substantial and persistent failure to rule on submitted matters serves "to damage the esteem of the public for the judiciary." (*In re Creede* (1986) 42 Cal.3d 1098, 1099; see also *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 482.) Moreover, Commissioner Dobbs's delays required Los Angeles County Superior Court to expend its resources in investigating the delays and reassigning the commissioner's undecided cases after she retired. Other judicial officers were required to review and decide the commissioner's undecided matters and a number of cases had to be retried.

Accordingly, the commission concludes that the severe sanction of a public censure and bar is necessary for the protection of the public and the reputation of the judiciary. Good cause appearing, the commission hereby censures former Commissioner Ann Dobbs and bars her from receiving an assignment, appointment, or reference of work from any California state court.

Commission members Hon. Judith D. McConnell, Hon. Katherine Feinstein, Peter E. Flores, Esq., Marshall B. Grossman, Esq., Mr. Samuel A. Hardage, Hon. Frederick P. Horn, Ms. Barbara Schraeger, Ms. Maya Dillard Smith, Ms. Sandra Talcott, and Mr. Nathaniel Trives voted to issue this decision and order imposing a public censure and bar pursuant to the stipulated disposition. Commission member Mr. Lawrence Simi did not participate.

Dated: July 15, 2009

Honorable Judith D. McConnell
Chairperson

## PROOF OF SERVICE

I, the undersigned, am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action. My business address is 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102. I declare as follows:

On July 15, 2009, I served the attached:

**DECISION AND ORDER**
**IMPOSING PUBLIC CENSURE AND BAR**
**PURSUANT TO STIPULATION**
**(Commission Rule 116.5)**

on all interested parties in this matter, by delivering a true copy as follows:

Heather L. Rosing, Esq.
Klinedinst PC
501 West Broadway, Suite 600
San Diego, California 92101
FAX: (619) 238-8707

☒ **(BY U.S. MAIL)** I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.

☒ **(BY FACSIMILE TRANSMISSION)** I caused such document to be transmitted to the addressee's facsimile number noted. The facsimile machine I used complied with Rule 2003(3) and the transmission was reported as complete and without error. Pursuant to Rule 2003(6), I caused the machine to print a transmission record of the facsimile transmission, a copy of which is attached to this declaration as required by Rule 2008(e)(4).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed by me on July 15, 2009 at San Francisco, California.

Judith R. Starks

[No. 185. Jan. 5, 2010.]

INQUIRY CONCERNING JUDGE PETER J. MCBRIEN

## SUMMARY

A disciplinery action was brought concerning a superior court judge who, while presiding over a family law case, repeatedly threatened a mistrial if the proceedings were not concluded quickly enough. The judge demanded that the husband produce an irrelevant document, threatened his attorney with contempt, and informed his employer of a possible violation of law revealed by the document. The judge abruptly ended the trial because it had exceeded the anticipated time, before the husband had completed his case and without allowing additional evidence.

The Commission on Judicial Performance imposed a severe public censure on the judge. The commission found that the judge engaged in prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 2A, 3B(7), by abruptly ending the trial and denying due process. He engaged in prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 2, 3B(4), by improperly threatening contempt. He engaged in willful misconduct and violated Cal. Code Jud. Ethics, canons 2, 3E(2), by failing to disclose his contact with the husband's employer and to disqualify himself under Code Civ. Proc., § 170.1, subd. (a)(6)(a)(iii), and Cal. Code Jud. Ethics, canon 3E(1), for appearance of partiality. His long and respected tenure on the bench was a factor in mitigation. (Opinion by Judith D. McConnell, Chairperson.)

## HEADNOTES

(1) **Judges § 6.4—Discipline—Proceedings—Burden of Proof.**—The California Commission on Judicial Performance, through its examiner, has the burden of proving the charges against a judge by clear and convincing evidence. Evidence of a charge is clear and convincing so long as there is a high probability that the charge is true. Factual findings of the masters are entitled to great weight because the masters have the advantage of observing the demeanor of the various witnesses.

(2) **Judges § 8—Duties—Compliance with Law.**—Cal. Code Jud. Ethics, canon 2A, provides that a judge shall respect and comply with the law and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Cal. Code Jud. Ethics, canon 3B(7), provides that a judge shall accord a full right to be heard according to the law.

(3) **Judges § 6.2—Discipline—Grounds—Prejudicial Misconduct.**—Prejudicial misconduct is conduct prejudicial to the administration of justice that brings the judicial office into disrepute (Cal. Const., art. VI, § 18, subd. (d)). Prejudicial misconduct while acting in a judicial capacity does not require bad faith; rather, it is conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.

(4) **Judges § 6.2—Discipline—Grounds—Denying Due Process by Abruptly Terminating Trial.**—The public has a right to expect that trials will be conducted in an evenhanded and procedurally regular manner that does not exalt efficiency over fairness. Abruptly terminating a trial in the middle of a witness's testimony is contrary to commonly held precepts of due process and the expectations of litigants, witnesses, and attorneys. The term "due process of law" asserts a fundamental principle of justice which is not subject to any precise definition but deals essentially with the denial of fundamental fairness, shocking to the universal sense of justice. A prime corollary of the foregoing rule is that a trial judge should not prejudge the issues but should keep an open mind until all the evidence is presented to the judge. Conducting a trial by a stopwatch can curtail the parties' right to present evidence on material disputed issues and lead to a denial of due process. Unexpected testimony and changing positions of the parties can alter the amount of time necessary to fairly present a case.

(5) **Judges § 6.4—Discipline—Proceedings—Mitigating Factors in Determining Appropriate Discipline.**—While a judge's years on the bench and limited record of discipline may be taken into account in determining the appropriate level of discipline, they do not mitigate or excuse willful or prejudicial conduct.

(6) **Judges § 8—Duties—Impropriety—Relations with Parties.**—Cal. Code Jud. Ethics, canon 2, requires a judge to avoid impropriety and the appearance of impropriety. Cal. Code Jud. Ethics, canon 3B(4), requires a judge to be patient, dignified, and courteous to all parties with whom the judge deals in an official capacity.

(7) **Judges § 6.2—Discipline—Grounds—Threats of Contempt.**—Threats of contempt without proper justification have been found to constitute prejudicial misconduct and willful misconduct.

(8) **Judges § 8—Duties—Disclosing Information Relevant to Disqualification.**—Cal. Code Jud. Ethics, canon 3E(2), imposes a duty upon a judge to disclose information that is reasonably relevant to a question of disqualification.

(9) **Judges § 6.2—Discipline—Grounds—Willful Misconduct.**—Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. Failure to comply with the canons of judicial ethics is generally considered to constitute unjudicial conduct. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority. A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose.

(10) **Judges § 8—Duties—When Reporting Crime.**—Where there are others in the courtroom who have knowledge of potential criminal conduct revealed during the course of a proceeding, a judge is not obliged to report the crime but it is not necessarily improper for the judge to do so. In deciding whether to report a potential crime, a judge must be sensitive to the obligation to remain impartial. Given the enormous burden to remain impartial and be perceived as such throughout proceedings before the court, a judge could properly conclude that his or her impartiality, or the perception of same, would be impaired were he or she to initiate prosecution of those appearing before the court. Further, if the judge does report the crime, he or she must avoid becoming an advocate in the process of making the report. More importantly, a judge who reports a crime must inform the parties that such a report has been made.

(11) **Judges § 11—Disqualification—Grounds—Appearance of Partiality.**—Under circumstances where a person aware of the facts would reasonably entertain a doubt that a judge would be able to be impartial under Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii), and Cal. Code Jud. Ethics, canon 3E(1), the judge has an obligation to disqualify.

(12) **Judges § 6.4—Discipline—Proceedings—Not Intended as Punishment.**—The purpose of a Commission on Judicial Performance disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

(13) **Judges § 6.4—Discipline—Proceedings—Factors Relevant to Discipline—Number and Seriousness of Acts of Misconduct.**—The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern which demonstrates that the judge lacks judicial temperament and the ability to perform judicial functions in an even-handed manner. In addition to the number of acts of misconduct, the nature and seriousness of the misconduct is an important factor in the Commission on Judicial Performance's consideration.

(14) **Judges § 6.4—Discipline—Proceedings—Factors Relevant to Discipline—Failure to Appreciate or Admit Impropriety.**—A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform.

(15) **Judges § 6.4—Discipline—Proceedings—Factors Relevant to Discipline—Dishonest or Inconsistent Testimony.**—Intentional dishonesty, particularly under oath, is considered to be antithetical to the role of a judge. A judge who gives sworn testimony must take care to ensure that the testimony is truthful and accurate. Even an unintentional inconsistency in testimony creates an appearance of impropriety.

(16) **Judges § 6.2—Censure—Grounds—Abruptly Terminating Trial and Inappropriately Investigating Crime.**—A judge's misconduct had a significant adverse impact on the judicial system. His decision in a family law matter was reversed on appeal as a result of his conduct in abandoning the trial, costing the parties substantial expense and delays. Moreover, a judge who abruptly and precipitously abandons a trial, improperly threatens contempt, inappropriately investigates potential criminal activity and sends evidence of a potential crime to a litigant's employer while continuing to preside over the case lowers public esteem for the judiciary. Although the judge's misconduct adversely impacted the judicial system, throughout his long tenure on the family law bench he worked to improve the family law system in the county as set forth in the masters' findings of factors in mitigation. The purpose of judicial discipline as enunciated by the California Supreme Court and the

Commission on Judicial Performance could be accomplished through a severe censure pursuant to the provisions of Cal. Const., art. VI, § 18.

[Cal. Forms of Pleading and Practice (2010) ch. 317, Judges, § 317.85.]

**OPINION**

**McCONNELL, Chairperson.—**

## I

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Peter J. McBrien, a judge of the Sacramento County Superior Court. Judge McBrien was appointed to the municipal court in 1987 and became a superior court judge in 1989. While presiding over a family law matter over a period of months, Judge McBrien engaged in a course of serious misconduct which rendered the trial fundamentally unfair, denied a litigant his due process right to complete his presentation of evidence, and culminated in the judge's lengthy investigation of a litigant's possible violation of the law without disclosing his actions to the parties. We conclude that a severe public censure is warranted based on the gravity of this misconduct, coupled with Judge McBrien's pervasive lack of accountability and insight into the impropriety of his conduct.

The Commission on Judicial Performance commenced this inquiry with the filing of its notice of formal proceedings (Notice) on September 25, 2008. The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters are Hon. Dennis A. Cornell, Justice of the Court of Appeal, Fifth Appellate District, Hon. Gail Andler, Judge of the Orange County Superior Court, and Hon. Denise de Bellefeuille, Judge of the Santa Barbara County Superior Court. Judge McBrien is represented by James A. Murphy of Murphy, Pearson, Bradley & Feeney in San Francisco, California. The examiners for the commission are Commission Trial Counsel Andrew Blum and commission assistant trial counsel Valerie Marchant.

A three-day evidentiary hearing was held in Sacramento April 1 to 3, 2009, followed by an oral argument in San Francisco on May 29, 2009. The masters' report to the commission containing their findings of fact and conclusions of law was filed on June 23, 2009. The report includes a concurrence and dissent by Judge Andler.

The Notice charges Judge McBrien in count IA[1] with the following four instances of misconduct in his handling of the dissolution matter of *Carlsson v. Carlsson* (Super. Ct. Sac. County, 2006, No. 04FL02489) over a period of months:

1. Terminating and abandoning the trial before Mr. Carlsson had completed his case and without offering the parties an opportunity to present additional evidence in violation of the parties' right to due process.

2. Threatening Mr. Carlsson's attorney, Sharon Huddle, with contempt if her client did not produce his statement of economic interests. The documents were requested by Judge McBrien even though they were not offered by either party or relevant to the proceedings.

3. Requesting a copy of the transcript of Mr. Carlsson's testimony concerning his real estate ownership and his disclosures on his statement of economic interests and sending the transcript to Mr. Carlsson's employer, California's Department of General Services (DGS). Mr. Carlsson was terminated from his employment as a result of information provided by Judge McBrien. Judge McBrien continued to preside over the case without disclosing to the parties his actions with regard to the transcript.

4. Being discourteous and impatient toward Mr. Carlsson's attorney and curtailing the parties' right to present evidence by repeatedly threatening a mistrial if the proceedings were not concluded quickly enough.

Each of these charges has been proven by clear and convincing evidence at the hearing before the special masters. Judge McBrien's actions constitute one instance of willful misconduct (count IA(3)), two instances of prejudicial misconduct (count IA(1) & (2)) and one instance of improper action (count IA(4)).

## II

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

**(1)** The commission, through its examiner, has the burden of proving the charges against Judge McBrien by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true." (*Ibid.*)

[1] On the first day of the evidentiary hearing, two other counts charged in the Notice were dismissed on the motion of the examiner (Rules Com. on Jud. Performance, rule 128(b)).

Factual findings of the masters are entitled to great weight because the masters have " 'the advantage of observing the demeanor of the various witnesses.' " (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878 [81 Cal.Rptr.2d 58, 968 P.2d 958] (*Fletcher*).) The findings of fact in this decision are adopted from the factual findings of the masters which we have determined are supported by clear and convincing evidence based on our own review of the record.[2] The facts as to each count have been summarized and paraphrased from the masters' findings.

We adopt the masters' conclusions of law, except for count IA(2) and (3) on which we reach our own conclusions of law based on our independent review of the record and the law. (See *Fletcher, supra*, 19 Cal.4th at p. 878 [commission has expertise with respect to legal conclusions].)

A. *Count IA(1)—Abandoning Trial*

1. *Findings of Fact*

The charges involve Judge McBrien's handling of a trial in the dissolution of the marriage of Ulf and Mona Carlsson. Mrs. Carlsson was represented by attorney Charlotte Keeley and Mr. Carlsson was represented by attorney Sharon Huddle.

Judge McBrien has been assigned to the family law division of the Sacramento County Superior Court since 1989. The family law division requires attorneys to provide a time estimate when they set a matter for trial. If the estimate is for two days or less, the trial is assigned to one of the judges in the family law division. If the attorneys estimate the trial will be more than two days, the trial is sent to the master calendar in another building to be assigned to another superior court judge. Most family law attorneys in Sacramento County prefer to have their cases tried by judges in the family law division, and thus try to avoid estimates of more than two days.

Judge McBrien believed he had the discretion to declare a mistrial if the attorneys did not complete their case within the time estimate. He testified that it is "part of the general family law culture in Sacramento County" that attorneys are expected to adhere to their time estimate or make a request for

[2] All references to the masters' factual findings and legal conclusions are to those of the majority. The concurring and dissenting report found the examiner failed to prove count IA(4) and concluded that Judge McBrien engaged in one instance of prejudicial misconduct (count IA(1)) and two instances of improper action (count IA(2) & (3)).

more time. The local rules in effect at the time of the trial in 2006 did not authorize a judge to declare a mistrial when a trial exceeded its time estimate.[3]

The *Carlsson* trial was estimated at two days. The disputed trial issues were child and spousal support, division of property, including the family home and a fourplex rental unit, division of Mr. Carlsson's retirement account, and attorney fees. In the statement of issues filed before the trial, both parties requested the court to award the residence and rental property to Mr. Carlsson; however the value of the properties was a subject of dispute. On March 2, 2006, the first day of trial, Ms. Keeley filed a trial brief in which she modified her earlier appraisals of both the residence and the fourplex but still disagreed with Mr. Carlsson's valuation of the two properties. There was also a dispute concerning a possible third party interest in the fourplex. Mr. Carlsson maintained that he had entered into a partnership agreement with Joseph Mayo on the rental property. Mrs. Carlsson disputed the partnership claim in the fourplex.

Judge McBrien presided over the *Carlsson* trial a full day on March 2, the morning of March 3, and the afternoon of March 9, 2006. The trial commenced at 9:18 a.m. on Thursday, March 2, 2006. Ms. Huddle, who had not filed a trial brief, advised the judge that Mr. Carlsson no longer wanted the fourplex awarded to him and wanted it sold, which would eliminate the necessity of presenting evidence on the value of the fourplex. Ms. Keeley still insisted that the fourplex be awarded to Mr. Carlsson.

As it was approaching 1:00 p.m. on the first day of trial, Ms. Huddle stated "Your Honor, I am going to have to eat." Judge McBrien responded that he planned on "going forward" because he had another trial the next day that had "statutory preference." He stated that he wanted to ensure that the *Carlsson* trial was completed by noon the next day, "*Otherwise, we may as well call a mistrial right now.*" (Italics added.) When Ms. Huddle informed the judge she had not had breakfast and assumed there would be a lunch break, Judge McBrien stated they could take a short break, but: "*All I'm telling you is if it's not completed by noon, it's a mistrial. . . . I'm telling you exactly what my availability is and if you want a mistrial at this point, you're welcome to it.*" (Italics added.) When Ms. Huddle reminded the judge that the matter had been set for two full days, Judge McBrien replied that she had her

[3] The day after the *Carlsson* trial ended, the Court of Appeal issued a decision in another case which held that a superior court judge could not declare a mistrial because the parties exceeded their time estimate unless there is a local court rule that notified the parties of this possibility. (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672 [40 Cal.Rptr.3d 509].) The local rules for the family law division of the Sacramento County Superior Court were amended after the *Blumenthal* decision and after the *Carlsson* trial authorizing the court to declare a mistrial if the parties exceed their time estimate.

"choices" and he was not going to give her another afternoon. Judge McBrien testified that he did not actually intend to declare a mistrial if the trial was not completed by noon the next day but threatened the mistrial to encourage Ms. Huddle to move the case along because she "never completes her case within the time estimate."

When the trial reconvened after a short lunch recess, Judge McBrien agreed to grant Ms. Huddle's request for an "additional" half day to try the case. In fact, the "additional" half day only enabled the parties to have two full days consistent with their trial estimate. The first day of trial recessed at 4:00 p.m., after Ms. Keeley rested her case and Ms. Huddle had called her second witness.

The trial reconvened the next morning, March 3, 2006, at 8:47 a.m. and recessed at 12:07 p.m. Although the trial was still within the time estimate, Judge McBrien continued to express his frustration with the pace of the trial. When Ms. Huddle made a request to have the matter continued to accommodate a witness who was undergoing chemotherapy, Judge McBrien responded, "*I don't know whether this is a slow Motion for a Mistrial or what?*" (Italics added.) When Ms. Huddle paused and explained that she was checking to make sure several exhibits had signatures, Judge McBrien responded, "*Your time is waning, but go ahead.*" (Italics added.) The trial recessed for the day at 12:07 p.m.

The trial resumed at 1:30 p.m. on March 9, 2006. At 2:18 p.m., Ms. Huddle called a real estate appraiser who testified extensively about the fair market value of the family residence and the fourplex. When Ms. Huddle requested a break to use the restroom after the appraiser's testimony, Judge McBrien warned her that she was "*approaching a mistrial.*" He allowed a five-minute break, but guaranteed her that "*if this is not completed by 4:30, there will be a mistrial.*" (Italics added.)

At 4:09 p.m., Ms. Keeley recalled her appraiser who testified that Mr. Carlsson's appraiser had made a miscalculation in his report which resulted in an error of $100,000 in the appraisal. At 4:27 p.m., Ms. Huddle recalled her appraiser to ask him to respond to Mrs. Carlsson's appraiser's criticisms. The appraiser admitted that he made a mistake in his calculations but insisted the mistake did not substantially change the property's fair market value. As he was explaining the reasons for this conclusion, Judge McBrien interrupted and stated: "Pardon me. I have an EPO. Court is in recess." An EPO refers to a call from law enforcement requesting an emergency protective order. Judge McBrien was on duty to receive EPO requests at the time.

Judge McBrien left the bench to take the call on a mobile phone used for EPO requests. Although he does not specifically recall what occurred in this case, his normal practice is to first talk to the operator who puts him through to the peace officer making the EPO request. The phone records show that the judge received a call at 4:28 p.m., which lasted one minute and another call at 4:29 p.m., which lasted one minute and 53 seconds.

Judge McBrien believes he was still on the phone with the operator when he briefly returned to the doorway of the courtroom and the following exchange occurred:

"THE COURT: *We're going to have to adjourn this. The County operator is on the phone. This trial has ended.*

"MS. HUDDLE: Your Honor, I don't even have my client's attorney fees costs put on.

"THE COURT: *Then I'll reserve over that issue or you can get a mistrial, one or the other.*

"MS. KEELEY: We don't want a mistrial. We'll reserve over that issue.

"MS. HUDDLE: But your Honor, the house that we're evaluating—

[*Judge exits room*]

"MS. KEELEY: We'll arrange another date. Don't panic.

"MS. HUDDLE: Is that what he said?

"MS. KEELEY: I'm going to ask for the him [*sic*] to reserve.

"THE WITNESS: May I go?

"MS. HUDDLE: *Is he coming back? I'm in the middle of my examination.*

"MS. KEELEY: *Ms. Huddle, I'm not prepared for a mistrial.*" (Italics added.)

After Judge McBrien exited the courtroom for the second time, the attorneys and parties remained with the court reporter and the clerk for about 10 to 15 minutes waiting for the judge to return. The clerk went into chambers to check on the status of the case but does not recall if the judge was still there. Eventually the clerk told the attorneys and the parties that the

proceedings were over. Judge McBrien never returned to the courtroom. Mr. Carlsson did not have an opportunity to rest his case.

The reporter's transcript states that the proceedings ended at 4:29 p.m. The EPO mobile phone records show an outgoing call to Judge McBrien's house at 4:35 p.m. that lasted one minute.

Judge McBrien testified the trial had to end by 4:30 p.m., although he conceded that the courthouse is open until 6:00 p.m. and he did not determine whether the attorneys and staff could stay beyond 4:30 p.m.

In his deposition testimony, Judge McBrien explained that he did not return to the courtroom after he completed the EPO call because there was nobody there. However, at the hearing before the masters, he acknowledged having no independent recollection of whether he looked into the courtroom to see if anyone was still there. The masters found, as do we, that Judge McBrien left the courthouse while the parties were waiting for him to return. According to the judge, he left because the parties were one minute short of receiving their two-day trial and the trial could not have concluded in one minute.

The next morning, March 10, 2006, Ms. Huddle was informed that the parties could file a three-page brief with closing arguments and a three-page brief addressing attorney fees. Mr. Carlsson's closing brief objected to the procedure of concluding the trial with briefs because Mr. Carlsson's redirect testimony was not concluded and rebuttal testimony was not allowed. By stipulation, the parties submitted several exhibits with their closing briefs. However, Mr. Carlsson stated in his brief that additional testimony concerning these exhibits would have supported his position concerning the division of property and his pension.

On March 30, 2006, Judge McBrien issued a decision in the *Carlsson* dissolution. Both properties were ordered to be sold. Mrs. Carlsson was awarded spousal support. Judge McBrien awarded each party half of the community interest in Mr. Carlsson's retirement, and did not order a segregated account as requested by Mr. Carlsson. Attorney fees of $35,000 were awarded to Mrs. Carlsson.

The Court of Appeal, Third Appellate District, reversed Judge McBrien's judgment and remanded the matter for a new trial in a published decision. (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 295 [77 Cal.Rptr.3d 305] (*Carlsson*).) The appellate court concluded Judge McBrien rendered the trial fundamentally unfair and violated Mr. Carlsson's due process right to a fair hearing when he "abruptly ended the trial in the middle of a witness's testimony, prior to the completion of one side's case and without giving the parties the opportunity to introduce or even propose additional evidence." (*Id.* at p. 292.)

Despite this appellate decision, Judge McBrien still does not believe that he denied Mr. Carlsson's right to due process and a fair hearing. He points out that he provided the parties with more time in the courtroom than a normal two-day court calendar would have allowed. However, he acknowledges that he does not typically end a trial that is not completed within the time estimate without determining what additional evidence is to be presented and providing an opportunity to trail the trial to another day if he determines more time is needed. In this case, he believes it was the obligation of the attorneys to ask for additional time if needed.

2. *Conclusions of Law*

**(2)** The masters concluded Judge McBrien violated California Code of Judicial Ethics canons 2A (judge shall respect and comply with law and act in a manner that promotes public confidence in the integrity and impartiality of judiciary) and 3B(7) (judge shall accord full right to be heard according to law) "by abandoning and terminating the trial in the middle of Mr. Carlsson's case-in-chief, and in the middle of a witness's testimony." Further, the masters concluded that the judge violated Mr. Carlsson's constitutional right to due process and a fair trial, and his actions constituted prejudicial misconduct. We concur and reach the same conclusions of law.

**(3)** Prejudicial misconduct is "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) Prejudicial misconduct while acting in a judicial capacity does not require bad faith; rather, it is "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284 [110 Cal.Rptr. 201, 515 P.2d 1].)

**(4)** The manner in which Judge McBrien suddenly and precipitously abandoned the *Carlsson* trial is manifestly unjudicial conduct prejudicial to public esteem for the judicial office. The public has a right to expect that trials will be conducted in an evenhanded and procedurally regular manner that does not "exalt efficiency over fairness." (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1368, 1367–1369 [63 Cal.Rptr.3d 483, 163 P.3d 160].) Abruptly terminating a trial in the middle of a witness's testimony is contrary to commonly held precepts of due process and the expectations of litigants, witnesses, and attorneys. " 'The term "due process of law" asserts a fundamental principle of justice which is not subject to any precise definition but deals essentially with the denial of fundamental fairness, shocking to the universal sense of justice.' [Citation.] . . . '. . . A prime corollary of the foregoing rule is that "A trial judge should not prejudge the issues but should

keep an open mind until all the evidence is presented to him." ' [Citation.]" (*Carlsson, supra*, 163 Cal.App.4th at pp. 290–291.) The Court of Appeal held Judge McBrien "openly violated these precepts." (*Id.* at p. 291.) We concur.

In his testimony before the masters and in his briefs to the commission, Judge McBrien remained steadfast that he was entitled to terminate the trial the moment the parties reached their time estimate. We adamantly disagree. As the appellate court observed, conducting a trial by a stopwatch can curtail the parties' right to present evidence on material disputed issues and lead to a denial of due process. (*Carlsson, supra*, 163 Cal.App.4th at p. 292.) Unexpected testimony and changing positions of the parties can alter the amount of time necessary to fairly present a case. In the *Carlsson* case, the parties changed their appraisals of the value of the properties and positions on who should be awarded the properties after the time estimate was given. Furthermore, Mr. Carlsson's appraiser was shown to have made a miscalculation in his appraisal during the last hour of the last day of trial as estimated.

The question here is not a judge's authority to set reasonable time restrictions on the presentation of evidence or to exclude irrelevant or cumulative evidence. Judge McBrien cut off the presentation of evidence without determining what remaining evidence the parties intended to present or even taking the matter under submission. As the attorneys, parties, witness, and court staff waited in the courtroom uncertain how to proceed, Judge McBrien called his residence and left the courthouse without determining if the parties were waiting for him to return.

As the masters state: "Judge McBrien was obliged to return to the courtroom after he completed the extremely brief EPO call, explain if (and why) he was going to excuse the testifying witness, advise the parties as to whether they would have the opportunity to submit additional evidence and file closing briefs, and take the case under submission. Instead, he suddenly and precipitously declared the trial was over even before he determined the nature of the EPO request, and acted in a way that was contrary to his usual practice in such a situation. The entirety of the record demonstrates that Judge McBrien was preoccupied with efficiency at the expense of ensuring a party's constitutional right to be heard."

In Judge McBrien's view, it was Ms. Huddle's obligation to affirmatively request additional time to present evidence. We find this position to be patently unreasonable under the circumstances of this case. If Judge McBrien had announced at the end of the day that he was taking the matter under submission because the parties had exceeded their time estimate, Ms. Huddle would have had the opportunity to request additional time and make a record of the remaining evidence she proposed to offer. Had her request been denied,

the court's ruling could have been reviewed by a higher court. Instead, after walking off the bench to take an EPO call, Judge McBrien briefly reentered the courtroom to announce, "This trial has ended," and walked out as Ms. Huddle was trying to explain that she had additional evidence to present. The next day Ms. Huddle was informed that she could submit closing briefs. Under these circumstances, we believe a reasonable attorney would assume that the judge had terminated the trial and would not take additional evidence. Moreover, Ms. Huddle objected to the summary termination of the trial in her closing brief and pointed out that she had additional evidence to present.

**(5)** In this and each of the counts, Judge McBrien urges the commission to consider his years on the bench and limited record of discipline in determining the level of misconduct. While these facts may be taken into account in determining the appropriate level of discipline, they "[do] not mitigate or excuse willful or prejudicial conduct." (*Broadman, supra*, 18 Cal.4th at p. 1112; see *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865 [264 Cal.Rptr. 100, 782 P.2d 239].) In our view, his years on the bench should have provided Judge McBrien with better judgment than he exercised in terminating the *Carlsson* trial.

B. *Count IA(2)—Threat of Contempt*

1. *Findings of Fact*

Mr. Carlsson and Scott Moore found the fourplex at issue in these proceedings and wanted to purchase and renovate it as an investment rental property, but neither had money to buy it. Their friend Don Minkoff agreed to purchase the property and fund the cost of the renovation. Although there was no written contract, the parties orally agreed that Mr. Carlsson and Mr. Moore would renovate the property and pay Mr. Minkoff back with interest after the reconstruction was complete and they were able to refinance. The title to the property was to be held jointly by all three according to the verbal agreement. Mr. Carlsson still owed about $16,000 to Mr. Minkoff at the time of the trial, the loan was due in 2005, and Mr. Minkoff had never attempted to collect it.[4]

Mr. Carlsson met Mr. Minkoff through his job at DGS. On March 3, 2006, Ms. Keeley cross-examined Mr. Carlsson concerning the potential conflict of interest in taking a loan from Mr. Minkoff who did business with the State of California. Mr. Minkoff was a real estate developer who had contractual

[4] Mr. Moore had to withdraw from the venture in July 2002, when he was recalled to active duty in the service. The Moores signed over their interests to the Carlssons and Minkoffs. Mr. Carlsson testified that he then entered into a partnership agreement with Joseph Mayo whereby Mr. Mayo invested time and money into the renovation in exchange for an interest in the fourplex. The existence and terms of this agreement were issues in dispute at the trial.

relationships with DGS, including a contract for the lease of a building owned by Mr. Minkoff. Mr. Carlsson testified that he did not believe he had listed the fourplex or his personal investment arrangement with Mr. Minkoff on the economic disclosure forms which he was required to file with the Fair Political Practices Commission (FPPC). When Ms. Keeley completed her cross-examination, the following exchange occurred between Judge McBrien and Mr. Carlsson:

"THE COURT: Ms. Huddle? [¶] First, let me, just for a point of clarification, *when you said you filed this statement or document with the Fair Political Practices Board, is that a document commonly called a, 'Statement of Economic Interests'?*

"[MR. CARLSSON]: *I would have to look at it. It gets thrown in front of us, we sign it, turn it in.*

"THE COURT: You don't have to complete any documents.

"[MR. CARLSSON]: There is a box where you like—whatever I have doesn't apply, and with so many other forms that we are given, it's just like a formality of paperwork. It just gets filed.

"THE COURT: This is filed with the Secretary of State?

"[MR. CARLSSON]: *I have no idea. I give it to our Secretary and she takes care of it.*" (Italics added.)

On redirect, Mr. Carlsson testified that his job did not require him to make decisions concerning any property related to Mr. Minkoff. Judge McBrien interrupted as Mr. Carlsson was testifying and the following exchange occurred:

"THE COURT: I am going to have to adjourn this proceeding. They are awaiting me downtown. So we will resume on Thursday at 1:30. [¶] *I would ask you to bring a copy of your 2004, whatever this document is, that you filed with the Fair Political Practices Commission with the Secretary of State.*

"THE WITNESS: *Okay.*

"THE COURT: Thank you.

"MS. KEELEY: *Your Honor, would we need copies of that document for 2002 and 2003?*

"THE COURT: *You should probably bring them for those years, but you also might want to talk to an attorney who specializes in that area because there are potential penalties far beyond what we're talking about today.*" (Italics added.)

Judge McBrien offered several explanations as to why he requested the statement of economic interests: Mr. Carlsson might have violated the Fair Political Practices Act (FPPA) if he failed to disclose Mr. Minkoff's interests in the fourplex; the FPPC might have the power to confiscate or place a lien on the fourplex if Mr. Carlsson failed to disclose the potential conflict which would prevent the division and disposition of property; and the documents could be relevant to the value of the fourplex if they contained valuation information.

As to the last explanation, Judge McBrien conceded that the form, which he is familiar with, could not have been relevant to determining the value of the property in the dissolution case. The form provides only check boxes with ranges for such value, such as $100,001 to $1 million. Judge McBrien also admitted that he had never heard that the FPPC had the power to place a lien or confiscate property as penalty for nondisclosure. As the masters observed, Judge McBrien ruled upon the case without the statement of economic interests (which Mr. Carlsson never provided) which refutes his assertion that the documents were relevant to the pending dissolution matter. We concur, and find that Judge McBrien wanted the documents to determine whether Mr. Carlsson might have violated the FPPA, an issue that was not relevant to the proceeding before him.

When the trial reconvened on March 9, 2006, Judge McBrien asked Ms. Huddle if her client got legal advice regarding the disclosure forms. Ms. Huddle replied that she had found him a lawyer. Then the following exchange took place:

"THE COURT: *Did he bring the documents with him*?

"MS. HUDDLE: He never went to work. He is on disability; he doesn't have them.

"THE COURT: *So, he has violated my request to bring those documents?*

"MS. HUDDLE: *The way I heard you say it, it was a suggestion that he bring them.*

"THE COURT: *Do you want me to have the record read?*

"MS. HUDDLE: He would have to go to work to see if he even has a copy.

"THE COURT: *Ma'am, I would suggest that he send somebody to his workplace to get those documents before we conclude this trial.*

"MS. HUDDLE: Your Honor, I would like to impose an objection. I know it's what the Court would like, but I would like to impose an objection to those records because *they are irrelevant to the division of the community property—*

"THE COURT: Overruled. *I am not indicating that they are relevant. They are going to clarify his testimony. However, they may be relevant to other proceedings. That's why I advised him to go and talk to independent Counsel.*

"MS. HUDDLE: The independent Counsel wanted $5,000. He doesn't have $5,000 to give him before they will talk to him. The firm is Sweeney and Greene—

"THE COURT: In any case, he can send somebody to go get those records.

"MS. HUDDLE: *I am going to have to advise him to take the Fifth Amendment if there is some claim, some potential criminal action and he has been unable to discuss it with an attorney who actually knows the law.* I can't have him testify and—

"THE COURT: *I think you're too late for that.*

"MS. HUDDLE: Too late?

"THE COURT: *He has already testified regarding the sum and substance of that and his employer will have a copy of the documents.*

"MS. HUDDLE: Are you indicating that he can't take the Fifth Amendment now?

"THE COURT: I'm not indicating anything. *I'm indicating that you need to send somebody to his employment to pick up those documents.*

"MS. HUDDLE: If he is taking the Fifth Amendment, then those documents would be part of it.

"THE COURT: Those documents are on file with the Secretary of State. I could go to the Secretary of State's Office and get a copy of them.

"MS. HUDDLE: Ms. Keeley never raised this issue. If she believed it was really an issue, why didn't Ms. Keeley get those documents? We're here at trial now and—

"THE COURT: *Ms. Huddle, you are out of the* [*sic*] *order. It was my request, not Ms. Keeley's request.*

"MS. HUDDLE: I think you would potentially, although I don't know—

"THE COURT: Ms. Huddle, do you wish to ask your client to send somebody to get the records?

"MS. HUDDLE: If he provides those and he gets charged with something for having provided them—

"THE COURT: Yes or no?

"MS. HUDDLE: Is the Court indicating that he cannot assert his Fifth Amendment?

"THE COURT: I'm not indicating any such thing. *The documents are not a part of the Fifth Amendment. It's what he states out of his mouth that is a part of the Fifth Amendment.* [¶] Those are public documents at this point. They are on file—assuming they are the ones that he described—on file at the Secretary of State's Office. *As a convenience to the Court, I have asked him to bring us a copy.*

"MS. HUDDLE: I suppose—this is all on the record. I don't know what to do in a situation like this *when you're actually asking him to produce evidence which might incriminate him and it's not even the opposing side presenting it.*

"THE COURT: ***Ms. Huddle, am I to take that as a 'no' placing you in the possibility of contempt*?**

"MS. HUDDLE: No. I will tell him to go get the records—

"THE COURT: I'm not suggesting that he needs to—

"MS. HUDDLE:—if the Court is ordering him to produce [them].

"THE COURT:—absent himself. *I'm suggesting he needs to send somebody, given the fact that he hasn't done it in the week that's transpired to go get it so he can also attend this trial.*

"MS. HUDDLE: We will have to find if somebody here will go and do it and if it's there—

"THE COURT: Ms. Huddle.

"MS. HUDDLE: I don't know who—

"THE COURT: *Ms. Huddle, you don't need to think out loud.*" (Italics & boldface added.)

At the hearing before the special masters, Judge McBrien testified that he never ordered Mr. Carlsson to provide the forms, but simply made a request or a suggestion. Judge McBrien acknowledged he did not have the authority to hold Ms. Huddle in contempt because there had not been an order. Instead, he was "explaining the landscape." According to Judge McBrien: "That means that she's resisting. I'm getting, for the most part, stronger and stronger in my wording. And eventually it's going to become an ever-so-clear order, if need be, at which point if she continues her course of resistance, the possibility of contempt becomes an option."

Judge McBrien testified that he was frustrated with Ms. Huddle's failure to understand that she could not assert a Fifth Amendment privilege to prevent disclosure of a document that must be made available to the public. The masters concluded that while Judge McBrien may have been frustrated with Ms. Huddle's attempted assertion of a Fifth Amendment right, this was not the reason he threatened her with contempt. We concur and find Judge McBrien threatened Ms. Huddle with contempt to compel her to produce the documents he had requested.

Ms. Huddle testified to being "extremely concerned" when Judge McBrien mentioned the possibility of contempt. She perceived his comments as a threat "that I could potentially be put in jail if I didn't comply with what he wanted."

2. *Conclusions of Law*

**(6)** The masters concluded that Judge McBrien's threat of contempt violates California Code of Judicial Ethics canon 2 which requires a judge to avoid impropriety and the appearance of impropriety and canon 3B(4) which requires a judge to be patient, dignified and courteous to all parties with whom the judge deals in an official capacity. The masters reasoned, "While the threats of contempt may have been empty, Judge McBrien violated these canons because his statements during this exchange would have been perceived as threatening contempt." The masters determined that the conduct

constitutes improper action. We concur in all of the foregoing, except we determine that the wrongdoing constitutes prejudicial misconduct.

Once again Judge McBrien claims that his conduct was not inappropriate. He maintains that his words to Ms. Huddle do not constitute misconduct because a reasonable lawyer would not perceive his comments as an actual threat of contempt. The masters disagreed and so do we. In our view, an objective person would interpret the comment "*am I to take that as a 'no' placing you in the possibility of contempt*?" as a threat of contempt.

Judge McBrien concedes that he did not have authority to threaten contempt because he had not made an order. Nevertheless, he raised the possibility of contempt if Ms. Huddle failed to produce a document he had no right to order her to produce in the first place.

**(7)** Threats of contempt without proper justification have been found to constitute prejudicial misconduct and willful misconduct. (*Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d at pp. 846–847, 848–849 [prejudicial misconduct found where judge threatened witness with contempt for continuing to answer a question after an objection was raised, and threatened a defendant with contempt for whispering to his lawyer]; *Inquiry Concerning Ross* (1998) No. 141, Decision and Order Imposing Censure and Bar, pp. 5–7 [48 Cal.4th CJP Supp. 19, 26] [willful misconduct when judge threatened attorney with contempt if he said " 'one more word' " to embarrass the attorney because the judge was angry with him based on previous disputes].) The masters did not find that Judge McBrien's statement was made in bad faith or that he actually intended to hold Ms. Huddle in contempt. Rather, they found that his words could reasonably be interpreted as a threat of contempt. Having deferred to this finding, we do not believe Judge McBrien's conduct amounts to willful misconduct. However, raising the possibility of contempt for failure to comply with a *request* to produce documents that were not relevant to the proceeding reflects adversely on the judiciary and is prejudicial to public esteem for the judiciary. We conclude that Judge McBrien's conduct constitutes prejudicial misconduct.

### C. *Count IA(3)—Ordering the Transcript and Sending It to Mr. Carlsson's Employer*

#### 1. *Findings of Fact*

At some point after Mr. Carlsson was cross-examined concerning whether he had disclosed his loan from Mr. Minkoff on his statement of economic interests, Judge McBrien asked his clerk to have the court reporter prepare a partial transcript of that cross-examination. Judge McBrien testified that he

asked for the partial transcript to "ensure that what [he] thought he had heard, [he] had actually heard." The court reporter, Robbi Joy, testified that the clerk approached her during a break in the trial and said Judge McBrien wanted the part of the transcript that dealt with Mr. Carlsson's employment, and "he instructs you not to tell anyone." When asked at his deposition if he instructed his clerk to tell the court reporter not to tell anyone, Judge McBrien responded, "Not to my recollection." The clerk did not recall the judge instructing her not to tell the attorneys and could not imagine that he would make such a request. The masters found that the allegation concerning the instruction was not proven. We defer to that finding.

Although Judge McBrien requested the transcript sometime between March 3 and 10, 2006, he did not receive the transcript at that time. In May 2006, after having issued a decision in the trial, Judge McBrien made a second request for the transcript. In September 2006, Judge McBrien's clerk called Ms. Joy and made a third request for the transcript. Ms. Joy e-mailed the transcript to the clerk's e-mail address.

According to Judge McBrien, when he read the transcript, he was concerned that Mr. Carlsson may have violated the FPPA by not disclosing his business relationship with Mr. Minkoff. He had been thinking about the issue for some time before he received the transcript. He discussed the matter with two other judges and concluded that he had an obligation to report a possible crime and that he should send the transcript to Mr. Carlsson's employer, DGS, rather than the FPPC. One of the judges with whom he consulted knew Linda Cabatic, the general counsel at DGS, whom Judge McBrien had had some professional contact with in the late 1970's. Judge McBrien called Ms. Cabatic and said "words to the effect that a DGS employee had testified in court and that he was concerned about the testimony in connection with disclosure of a reporting issue." On September 11, 2006, Judge McBrien faxed the transcript to Ms. Cabatic. This was the first time Judge McBrien had reported a litigant or attorney for possible criminal activity in any case.

Judge McBrien continued to preside over posttrial contested matters in the *Carlsson* dissolution case without disclosing his actions, including conducting a hearing on a posttrial motion nine days after he faxed the transcript to Mr. Carlsson's employer. He disqualified himself on November 7, 2006, after learning DGS took disciplinary action against Mr. Carlsson.

After receiving the transcript from Judge McBrien, DGS dismissed Mr. Carlsson from his employment based on his willful failure to disclose his joint ownership of the fourplex with Mr. Minkoff.

2. *Conclusions of Law*

**(8)** The masters concluded that Judge McBrien violated California Code of Judicial Ethics canons 2 (appearance of impropriety) and 3E(2) (duty to disclose information that is reasonably relevant to question of disqualification). We concur. Further, the masters concluded that his actions in making three requests for the transcript, sending the transcript to Mr. Carlsson's employer while telling the employer that the transcript involved a reporting matter, failing to notify the parties about his action, and continuing to preside over posttrial motions constituted prejudicial misconduct. We conclude that these actions constitute willful misconduct.

**(9)** Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his judicial capacity. (*Broadman, supra*, 18 Cal.4th at p. 1091.)

Failure to comply with the canons of the California Code of Judicial Ethics is generally considered to constitute unjudicial conduct. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662 [34 Cal.Rptr.2d 641, 882 P.2d 358].)

A judge acts in bad faith "only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, 18 Cal.4th at p. 1092.)

"A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose." (*Broadman, supra*, 18 Cal.4th at p. 1104.) Judge McBrien was acting in his judicial capacity when he requested the transcript, sent it to Mr. Carlsson's employer, and continued to preside over posttrial matters.

Having determined that Judge McBrien engaged in unjudicial conduct in a judicial capacity, the remaining question is whether he acted in bad faith. We conclude that he did. Through his embroilment, Judge McBrien abandoned his role as a neutral arbitrator and acted for a purpose other than the faithful discharge of his duties. (See *Inquiry Concerning Spitzer* (2007) No. 182, Decision and Order Removing Judge from Office, pp. 19–26 [49 Cal.4th CJP Supp. 254, 275–280]; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 535–536 [247 Cal.Rptr. 378, 754 P.2d 724].)

The masters determined that Judge McBrien did not act in bad faith because he believed he had a duty as a judicial officer to report a possible violation of law. Even if we accept that this was the judge's motivation in faxing the transcript to Mr. Carlsson's employer, the masters concluded that "Judge McBrien's conduct went far beyond the consideration of whether he had such a duty in this case, and that Judge McBrien engaged in an investigation during the course of the trial and post-trial period, as to whether Mr. Carlsson's conduct violated the FPPA."

After Mr. Carlsson was cross-examined about whether he disclosed his joint ownership with Mr. Minkoff in documents he was required to file pursuant to the FPPA, Judge McBrien independently questioned Mr. Carlsson about his statements of economic interests. The judge made a sua sponte request of Mr. Carlsson to produce the documents by the next day, and suggested that Mr. Carlsson consult with an attorney because of "potential penalties far beyond what we're talking about today." Before the trial ended, Judge McBrien requested a copy of Mr. Carlsson's testimony concerning his disclosures on the statement of economic interests without notifying the attorneys. Even after the termination of the trial, Judge McBrien persisted in his efforts to obtain the transcript.

It is evident that Judge McBrien repeatedly requested the transcript and reported Mr. Carlsson to his employer for a purpose wholly unrelated to the dissolution action before him. As the masters observed, "Judge McBrien did not simply learn of a possible violation of the law by presiding over the *Carlsson* trial, he 'join[ed] the fray' through his investigation and lengthy pursuit of the issue." (Quoting from Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 2.01, p. 37.) Moreover, Judge McBrien did not report Mr. Carlsson's testimony to the FPPC, the Attorney General or the district attorney, agencies with authority to investigate a criminal violation, but instead sent the transcript to Mr. Carlsson's employer.

We understand that Judge McBrien conferred with two other judges before making this decision. However, there is no evidence that these judges knew the extent to which Judge McBrien had become involved in investigating whether Mr. Carlsson had violated the law or knew that the judge continued to preside over contested matters in the case without disclosing his actions to the parties.

**(10)** We have not ignored that Mr. Carlsson's testimony implicated a possible violation of law. Where, as here, there are others in the courtroom who have knowledge of the potential criminal conduct revealed during the course of the proceeding, a judge is not obliged to report the crime but it is not necessarily improper for the judge to do so. (See Rothman, Cal. Judicial

Conduct Handbook, *supra*, § 5.68 at pp. 253–255.) In deciding whether to report a potential crime, a judge must be sensitive to the obligation to remain impartial. "[G]iven the enormous burden to remain impartial and be perceived as such throughout proceedings before the court, a judge could properly conclude that his or her impartiality, or the perception of same, would be impaired were he or she to initiate prosecution of those appearing before the court." (*Id.* at p. 253.) Further, if the judge does report the crime, he or she must avoid "becoming an advocate" in the process of making the report. (*Id.* at p. 254, boldface omitted.) More importantly, a judge who reports a crime must inform the parties that such a report has been made. (Rothman, Cal. Judicial Conduct Handbook (Apr. 2008 supp.) 2006/2007 Judicial Ethics Update, § I.C.2., p. 2.)

**(11)** The masters concluded that Judge McBrien became so personally embroiled as to make him unfit to conduct further proceedings. We concur. Judge McBrien has given various explanations for his failure to disclose or disqualify: he did not know whether DGS already had the information he faxed to Ms. Cabatic; he did not know for sure whether Mr. Carlsson had failed to make the necessary disclosure on his statement of economic interests; and he believed Mr. Carlsson may not have been aware of what was included on the form when he signed it because his secretary filled it out. These explanations do not excuse the judge's failure to disclose or disqualify. Judge McBrien knew the transcript might contain evidence of improper activity by Mr. Carlsson—that is why he provided the transcript to DGS. Under these circumstances, a person aware of the facts would reasonably entertain a doubt that the judge would be able to be impartial. (Code Civ. Proc., § 170.1(a)(6)(A)(iii); Cal. Code Jud. Ethics, canon 3E(1).) As such, Judge McBrien had an obligation to disqualify regardless of whether he knew for certain whether Mr. Carlsson had violated the law or whether the agency would take action.

We conclude that Judge McBrien's course of conduct as charged and proven in this count constitutes willful misconduct.

D. *Count IA(4)—Demeanor*

1. *Findings of Fact*

From the beginning of the trial, Judge McBrien manifested his impatience with Ms. Huddle. As reflected in the factual findings on count IA(1), the judge repeatedly threatened to declare a mistrial if the trial was not completed within the two-day estimate, even threatening a mistrial if the trial was not completed by the end of a day and a half. The masters found the mistrial threats were exclusively directed at Ms. Huddle, and were not provoked by

disrespectful or inappropriate conduct but "triggered by such conduct as questioning witnesses, asking for breaks when the trial went through the lunch hour, making objections, or discussing evidentiary issues."

Judge McBrien made derogatory and discourteous remarks to Ms. Huddle independent of his mistrial threats. He admonished her not to "think out loud" as she attempted to voice an objection. When Ms. Huddle attempted to make a record of the seriousness of her witness's illness to explain why she had requested a continuance of his testimony, Judge McBrien admonished her that "[t]his is not a law school class," and she did not have to explain her motives. Ms. Huddle testified that the judge used a demeaning voice when he made this comment, as if she were being scolded. Judge McBrien testified he made the law school comment to point out that she did not have to give detailed explanations as required in law school, but admitted that someone could have perceived his comment as demeaning. All of Judge McBrien's discourteous remarks were made in open court in the presence of Ms. Huddle's client and the public.[5]

2. *Conclusions of Law*

The masters concluded that Judge McBrien violated California Code of Judicial Ethics canons 2 (appearance of impropriety) and 3B(4) (judge shall be patient, dignified, and courteous) by being discourteous to Ms. Huddle, repeatedly threatening a mistrial to pressure her to finish her case, and addressing her in a derogatory manner. They further concluded that his misconduct constitutes improper action. We concur and reach the same conclusions of law.

Although Judge McBrien may have been frustrated by the slow pace of the trial and Ms. Huddle's lack of preparation, we agree with the masters that the "conduct of trial judges is governed by the canons, not the actions of attorneys."

E. *Mitigating Evidence*

At the hearing before the special masters, Judge McBrien called numerous judges and attorneys and a licensed clinical social worker who works with the Sacramento County Superior Court family law division as character witnesses. Based on this testimony, the masters found in mitigation that Judge McBrien is extremely hard working, has played an active role in improving the family law system in Sacramento County, is respected by attorneys who

[5] Ms. Joy testified that during a break she overheard an ex parte conversation between Judge McBrien and Ms. Keeley questioning Ms. Huddle's competence. We defer to the masters' finding that this allegation was not proven.

frequently appear in front of him and judges who serve with him, and has served as a mentor to new judges in the family law division. We adopt these findings.

F. *Prior Discipline*

Judge McBrien received a public admonishment in 2002 based on his misdemeanor conviction which "arose out of the 1999 cutting of trees, and removal of limbs from trees, on public land adjacent to his residence." The admonishment states: "The trees were growing in a nature center located in a public park owned by the County of Sacramento. The trees included mature oaks, and were cut for the purpose of improving the view of a nearby river from the McBrien residence." Judge McBrien agreed to the public admonishment pursuant to a stipulation.

As the masters state, "For reasons that are not clear, Judge McBrien felt compelled to testify extensively about the matter." Judge McBrien testified he wanted to explain what happened in the tree incident because he had been "vilified" by the Sacramento News and Review, which called him "Chainsaw McBrien" and still portrayed him "as the Paul Bunyan of Sacramento." He testified: "In fact, it involved one limb on one tree. And at the time that the tree was cut—by an arborist, not me personally—I did not know that it was against the law." Further, he testified that he had the tree removed "to enhance the fire safety of our residence and the residence next to us." When cross-examined about the language in the admonishment which stated that "*trees*" were cut for *the purpose of improving his view*, Judge McBrien testified he did not dispute the language in the public admonishment and agreed to the public admonishment "[p]robably to avoid a hearing." (Italics added.)

After the evidentiary hearing before the masters, the parties stipulated to the examiner's admission of additional exhibits regarding the underlying facts of the prior disciplinary matter and Judge McBrien's admission of a written statement to clarify his hearing testimony.

The examiner introduced Judge McBrien's sworn statement taken at a deposition in August 2001 during the investigation in the prior proceeding. The masters found that Judge McBrien's testimony at the hearing regarding the facts underlying his prior public admonishment were inconsistent with his testimony at the 2001 deposition. We concur. At the deposition, the judge testified he observed a tree trimmer cut a limb from a tree in his backyard and later saw a limb fall from another tree after the tree trimmer got out of the tree. He also testified that he subsequently learned the trimmer had worked on five mature trees and three small trees.

Judge McBrien submitted the following statement to the special masters after the hearing: "Judge McBrien's [hearing] testimony regarding the arborist's trimming of oak trees related to his own personal observation and not to the extent of the tree trimming activity that was the subject of the misdemeanor charge. Judge McBrien observed only one large limb cut from the oak tree in question and apologizes if there was any confusion regarding this testimony. Judge McBrien acknowledges that the limb he observed being removed was not the only cutting done by the arborist. The point Judge McBrien was attempting to make by way of his testimony was that it did not make any difference whether the oak tree was on private or public land; the prohibitory ordinance made any cutting without a permit a misdemeanor. While view enhancement was an intended effect of the trimming, the testimony of Judge McBrien on April 3, 2009 was true and correct to his best recollection."

The masters found in aggravation that Judge McBrien gave testimony inconsistent with his prior sworn testimony regarding the underlying matter of his prior public admonishment and improperly tried to use the special masters' hearing as a public forum to address a grievance with the media on a prior disciplinary matter. We concur.

## III

## DISCIPLINE

### A. *Introduction*

**(12)** We now turn to the most difficult part of our decision, the determination of the appropriate discipline. The purpose of a commission disciplinary proceeding " 'is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman, supra*, 18 Cal.4th at pp. 1111–1112, quoting *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].) Based on the record before us and after careful consideration, we have come to the conclusion that this purpose is best served by a public censure, the second most serious level of discipline that can be imposed.

Judge McBrien's conduct in the *Carlsson* case is unbefitting a judge and casts disrepute upon the judiciary. Particularly troubling is his inability to understand and accept the impropriety of his conduct as exemplified by the shifting and disingenuous explanations he has offered during the course of these proceedings. While these factors alone might warrant removal from

office, other considerations have persuaded us that a severe public censure is the appropriate discipline. Those considerations include mitigating factors found by the masters concerning the judge's reputation in the legal community and contributions to the family law system in Sacramento County, a lengthy tenure on the bench without previous discipline for on-bench misconduct, and the fact that the misconduct, although serious, occurred within the context of one case.[6] We now turn to a discussion of the factors we have considered in reaching our decision.

B. *Analysis of Disciplinary Factors*

In reaching our decision, we have considered those factors previously identified by the commission as relevant to determining the appropriate discipline as pertinent to this case. (*Inquiry Concerning Ross* (2005) No. 174, Decision and Order Removing Judge from Office, pp. 63–64 [49 Cal.4th CJP Supp. 79, 138–139]; *Inquiry Concerning Van Voorhis* (2003) No. 165, Decision and Order Removing Judge from Office, p. 31 [48 Cal.4th CJP Supp. 257, 275–276]; see also Policy Declarations of the Com. on Jud. Performance, policy 7.1 [nonexclusive factors relevant to sanctions].)

1. *Number of Acts and Seriousness of Misconduct.*

**(13)** The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern which demonstrates that the judge lacks judicial temperament and the " ' "ability to perform judicial functions in an even-handed manner." ' " (*Fletcher, supra*, 19 Cal.4th at p. 918.) In addition to the number of acts of misconduct, the nature and seriousness of the misconduct is an important factor in the commission's consideration. (*Broadman, supra*, 18 Cal.4th at pp. 1112–1113; Policy Declarations of the Com. on Jud. Performance, policy 7.1(1)(b).) Judge McBrien has engaged in one instance of willful misconduct, two incidents of prejudicial misconduct, and one incident of improper action. Under the California Constitution, improper action is not a basis for censure or removal. (Cal. Const., art. VI, § 18, subd. (d).) Accordingly, we do not consider the judge's improper action in reaching our determination to censure Judge McBrien. The remaining three instances of misconduct demonstrate a pattern of serious wrongdoing throughout the course of presiding over the *Carlsson* case warranting severe discipline.

[6] This should not be construed as suggesting that removal may never be warranted based on multiple incidents of misconduct within the context of one case. In fact, removal may be based on a single act of serious misconduct. (*Inquiry Concerning MacEachern* (2008) No. 184, Decision and Order Removing Judge from Office, p. 19 [49 Cal.4th CJP Supp. 289, 307].)

2. *Prior Discipline.*

As previously indicated, Judge McBrien was publicly admonished in 2002. The fact that Judge McBrien has engaged in subsequent serious misconduct is an aggravating factor. However, we also take into consideration that the previous discipline was for off-bench misconduct that was not similar to the misconduct in this case.

3. *Appreciation of Misconduct.*

**(14)** "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) No. 162, Decision and Order Removing Judge from Office, p. 15 [48 Cal.4th CJP Supp. 227, 248].) Consideration of this factor weighs strongly in favor of severe discipline.

Prior to his final appearance before the commission, Judge McBrien repeatedly denied any wrongdoing or impropriety in his conduct. In his testimony before the masters, the judge expressed his view that walking out of the trial while a witness was testifying and never returning was an appropriate response to Ms. Huddle's failure to complete her case within her time estimate. Despite an appellate decision holding to the contrary, Judge McBrien remained steadfast that he did not violate the parties' due process rights. He views his statement to Ms. Huddle raising the possibility of contempt as "a poor choice of words" but fails to recognize that a reasonable observer could perceive his words and tone as a threat of contempt. Contrary to the masters' conclusion, he denies becoming embroiled. He contends that he did not "join the fray" because he did not take a position on whether Mr. Carlsson violated the law, while ignoring that he testified to having "an overlying concern as to whether or not Mr. Carlsson had violated the FPPC rules," and reported Mr. Carlsson to DGS for that reason. Finally, Judge McBrien denies being impatient with or discourteous to Ms. Huddle, despite a transcript that reflects unrelenting threats of a mistrial and multiple disparaging remarks directed exclusively at Ms. Huddle in the presence of her client.

At the hearing before the masters, Judge McBrien was asked about his statement in a letter to the commission acknowledging that he "had acted badly . . . for which I deserve to be rebuked." What he meant, he explained, is that he "acted badly" by failing to leave a complete record so that the Court of Appeal and the public would understand the reasons for his actions. When asked if he did anything else wrong in the case, he responded, "I don't believe that I did."

In his oral argument before the commission, Judge McBrien belatedly showed some recognition of his wrongdoing. He acknowledged that he had

engaged in misconduct by failing to return to the bench after taking the EPO call to determine if the parties had additional relevant evidence to present and by failing to disclose that he sent the partial transcript to Mr. Carlsson's employer. Acceptance of responsibility at the last opportunity has limited impact after well over a year of recalcitrant excuses and denials to the masters and the commission. (*Inquiry Concerning MacEachern, supra*, No. 184 at p. 23 [49 Cal.4th CJP Supp. at pp. 310–311].)

4. *Likelihood of Future Misconduct.*

Judge McBrien's failure to appreciate the full extent and gravamen of his misconduct indicates an inability to reform which in turn suggests a likelihood of future misconduct. However, we also recognize that a lengthy tenure on the bench with no previous discipline for on-bench misconduct and the fact that the misconduct occurred within the context of one case could suggest that the misconduct is isolated to this case rather than representing a pattern which is likely to reoccur. As such, we are not convinced that removal is necessary to protect the public from future misconduct.

5. *The Judge's Integrity and Honesty.*

**(15)** The misconduct itself does not involve dishonesty. However, the fact that Judge McBrien gave testimony inconsistent with his prior sworn statement concerning his prior public admonishment and provided inconsistent statements and testimony on other subjects relevant to this proceeding is a matter of concern in terms of the judge's honesty and integrity. We have previously considered intentional dishonesty, particularly under oath, to be antithetical to the role of a judge. (*Inquiry Concerning MacEachern, supra*, No. 184 at pp. 19–22 [49 Cal.4th CJP Supp. at pp. 307–310]; *Inquiry Concerning Ross, supra*, No. 174 at pp. 68–69 [49 Cal.4th CJP Supp. at pp. 141–142].)

The masters did not make a finding that Judge McBrien gave intentionally false testimony on the subject of his prior admonishment. Although we are deeply troubled by Judge McBrien's testimony on this subject, the question of whether it was intentionally false was not litigated to the extent that we can make this determination on our own accord in this proceeding. However, as did the masters, we consider Judge McBrien's inconsistent testimony concerning his prior admonishment to be an aggravating factor. A judge who gives sworn testimony must take care to ensure that the testimony is truthful and accurate. Even an unintentional inconsistency in testimony creates an appearance of impropriety. This was not an area of examination that took Judge McBrien by surprise; he broached the subject on his own accord. Further, we concur with the masters' conclusion that Judge McBrien's use of

the hearing before the special masters as a public forum to address a grievance with the media on a prior disciplinary matter was highly inappropriate and constitutes an aggravating factor.

Also disturbing are Judge McBrien's disingenuous attempts to explain why he requested Mr. Carlsson's statements of economic interests and the transcript of Mr. Carlsson's testimony. Even at his oral argument before the commission, he persisted in his attempt to persuade us that he thought the documents could have an impact on the valuation of the fourplex. The masters were not persuaded and neither are we. Rather, we consider the judge's strained attempts to relate these documents to the issues before him in the trial to be another example of his refusal to accept responsibility for his wrongdoing.

Judge McBrien has provided other self-serving statements and testimony during these proceedings which have subsequently been shown to be inaccurate based on the transcripts of the *Carlsson* trial and other documentary evidence admitted at the hearing before the special masters. He explains these inaccuracies as being the result of his bad memory. Even if this were the case, his failure to check the record before making representations to the commission and the masters on material issues reflects an arrogant indifference toward these proceedings.

6. *Impact on the Judicial System.*

**(16)** Judge McBrien's misconduct has had a significant adverse impact on the judicial system. His decision in *Carlsson* was reversed on appeal as a result of his conduct in abandoning the trial, costing the parties substantial expense and delays. Moreover, a judge who abruptly and precipitously abandons a trial, improperly threatens contempt, inappropriately investigates potential criminal activity and sends evidence of a potential crime to a litigant's employer while continuing to preside over the case lowers public esteem for the judiciary.

Although Judge McBrien's misconduct in this case has adversely impacted the judicial system, we appreciate that throughout his long tenure on the family law bench he has worked to improve the family law system in Sacramento County as set forth in the masters' findings of factors in mitigation.

## ORDER

Having carefully considered and balanced the various factors that contribute to our decision, we have determined that the purpose of judicial discipline

as enunciated by the Supreme Court and this commission can be accomplished through a severe censure. Pursuant to the provisions of article VI, section 18 of the California Constitution, we hereby impose a severe public censure on Judge Peter J. McBrien.

Commission members Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Peter E. Flores, Jr., Hon. Frederick P. Horn, Mr. Lawrence Simi, Ms. Sandra Talcott, and Mr. Nathaniel Trives voted in favor of all of the findings and conclusions expressed herein and in the foregoing order of a severe public censure. Commission members Ms. Maya Dillard Smith and Ms. Barbara Schraeger concur as to the factual findings and legal conclusions expressed herein, but dissent as to the order of severe public censure and would have removed Judge McBrien from office. Commission members Mr. Marshall Grossman and Mr. Samuel Hardage did not participate in this matter.

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| **INQUIRY CONCERNING FORMER JUDGE BRETT C. KLEIN,**<br><br>**No. 187** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BAR PURSUANT TO STIPULATION (Commission Rule 127)** |

## I. INTRODUCTION AND PROCEDURAL SUMMARY

This disciplinary matter concerns former Judge Brett C. Klein (Judge Klein), a judge of the Los Angeles County Superior Court from January 23, 1990 to November 30, 2009, when he irrevocably retired from judicial office.

The commission filed a Notice of Formal Proceedings (Notice) on January 14, 2010, charging Judge Klein with misconduct constituting an abuse of authority and reflecting embroilment, bias and a failure to be patient, dignified and courteous in his handling of a hearing in a class action lawsuit. Judge Klein and his counsel, Reginald A. Vitek, Esq., and the examiner for the commission, Andrew Blum, Esq., (the parties) submitted a Stipulation for Discipline by Consent (Stipulation) to the commission pursuant to Commission rule 127. Pursuant to the Stipulation, the judge agreed to the imposition of a censure and bar from holding judicial office in California or receiving assignments, appointments, or references of work from any California state court. If Judge Klein fails to comply with any of the terms and conditions of the agreement, the commission may withdraw the censure and proceed with formal proceedings. In an affidavit of consent for discipline filed with the Stipulation pursuant to rule 127 (d), Judge Klein admits the truth of the charges in the Notice and waives all further proceedings and review by the Supreme Court. According to the terms of the Stipulation, Judge Klein also agrees that in the decision and order imposing a censure and bar, the commission may articulate the reasons for its decision. The Stipulation was accepted by the commission on January 27, 2010.

## II. STIPULATED FACTS AND LEGAL CONCLUSIONS

*Jacqueline Cohen, et al. v. Windsor Fashions, Inc.* (Los Angeles Superior Court No. BC381468) was a class action lawsuit against a women's clothing store chain. The suit alleged that Windsor Fashions violated the Song-Beverly Credit Card Act (Civ. Code, §§ 1747-1748.95) by asking customers who made purchases by credit card for personal identification information. Plaintiffs were represented by Neil Fineman. Defendant was represented by Dennis Kass.

The case was assigned to Judge Susan Bryant-Deason. In November 2008, Judge Bryant-Deason certified the class and granted preliminary approval of a settlement reached by the parties after mediation. The terms of the settlement included a permanent injunction prohibiting Windsor Fashions from requesting and recording personal identification information from credit card purchasers, its agreement to purge information already obtained, and the issuance to class members of a $10 voucher that could be used at any California Windsor Fashions store. The settlement agreement also provided for the payment by Windsor Fashions of a $2,500 award to plaintiff Jacqueline Cohen for her services as the class representative, and for payment of $125,000 in attorney's fees and costs to Attorney Fineman.

After giving notice of the settlement to the class members and receiving no objections, the parties filed a joint application for final approval of the settlement, which included a proposed final approval order. The final approval hearing, referred to as a fairness hearing, was set for the morning of January 16, 2009, a Friday. Because Judge Bryant-Deason was ill that day, Judge Klein presided over the fairness hearing. Judge Klein had reviewed the court file on January 15, 2009.

During the January 16 hearing, Judge Klein engaged in a pattern of sarcasm and improper remarks toward the attorneys, as exemplified by the following:

THE COURT: How did [class plaintiff] come to learn that this was a violation of law to ask for her phone number? Did she already know it that day?

MR. FINEMAN: That day, she did not know it.

THE COURT: Someone mentioned it to her at a cocktail party?
(R.T. 5:18-23.)

[¶] ... [¶]

THE COURT: There's nothing in the court records to identify her other than this name, which is probably more common than the most common legal fictitious name for a woman, which would be Jane Doe. There are probably more Jacqueline Cohens than there are Jane Does in the world; right?
(R.T. 6:15-20.)

[¶] ... [¶]

THE COURT: Surely [Windsor Fashions] know[s] what the average customer purchase is.

MR. KASS: I'm not qualified to discuss that. I have not had that conversation with them.

THE COURT: This is the lawyer's way of saying I don't know?
(R.T. 17:2-7.)

[¶] ... [¶]

THE COURT: ... So you reduced your charges for the typing time?

MR. FINEMAN: Yes, Your Honor.

THE COURT: To what level?

MR. FINEMAN: That's a good question, Your Honor. I'd have to go back.

> THE COURT: Thank you. I appreciate the praise.
> (R.T. 23:26 – 24:3.)
>
> [¶] ... [¶]
>
> THE COURT: Would your [$]395 rate have been higher or would you have used the higher rate if you had decided to sign your declaration rather than to file it unsigned or would it have been the same?
> (R.T. 27:13-16.)

At the end of the hearing, Judge Klein said that he was taking the matter under submission. That afternoon, Judge Klein revised paragraphs 8 and 9 in the proposed final approval order, which concerned payment of attorney's fees and costs and payment of the incentive award to class representative Cohen. Judge Klein did so by typing new paragraphs 8 and 9 and pasting them over the corresponding paragraphs in the proposed final approval order. Instead of receiving payment in cash, the new paragraphs 8 and 9 provided that Mr. Fineman and Ms. Cohen would be paid in the form of $10 gift cards for Windsor Fashions. Paragraph 8 provided that Mr. Fineman was to receive 12,500 gift cards, with 3,500 cards due in January 2009 and 750 due every month for the following twelve months. Paragraph 9 provided that Ms. Cohen would receive 250 gift cards in January 2009. Judge Klein signed and dated the order, and crossed off the word "Proposed" on the caption.

Judge Klein had not mentioned during the January 16 hearing that he was considering making such changes to the proposed settlement. On the afternoon of January 16, Judge Klein instructed his clerk to email the order to the attorneys. The email message to the attorneys, which Judge Klein dictated to his clerk, was: "The Final Approval Order was signed and filed this afternoon. A scan is attached. (Five pages, pdf format.)"

On January 16, 2009, Judge Klein transmitted the order to the Metropolitan News-Enterprise, a local daily legal newspaper. On January 21, 2009, the

Metropolitan News-Enterprise published a disparaging article about the *Cohen* case settlement that described Judge Klein's January 16 order with approval. The article resulted in further publicity and Internet postings critical of the case and Mr. Fineman.

On January 29, 2009, Judge Klein sent an email message to Judge Bryant-Deason in which he stated that his January 16 ruling in *Cohen* "troubles me," and referred to the provisions in paragraphs 8 and 9 of his order as "unusual." He suggested that he could order sua sponte reconsideration of the joint motion for final approval and then recuse himself so that Judge Bryant-Deason could decide the matter. On February 2, 2009, on Judge Klein's own motion, he ordered reconsideration of the ruling, and set the matter for February 13 in Judge Bryant-Deason's department. On February 9, Judge Bryant-Deason advanced the date to February 9, vacated Judge Klein's January 16 ruling and entered a new final order providing for a plaintiff's award of $2,500 and attorney's fees of $125,000, to be paid as originally approved.

Judge Klein's conduct displays bias and embroilment, and constitutes an abuse of authority. His conduct also reflects a failure to be patient, dignified and courteous to those appearing before him. Judge Klein's conduct violates the Code of Judicial Ethics, canons 1 (judge shall observe high standards of conduct), 2A (judge shall act at all times in a manner that promotes public confidence in the judiciary), 3B(4) (judge shall be patient, dignified, and courteous to persons with whom the judge deals in an official capacity), and 3B(5) (judge shall not perform judicial duties with bias or prejudice, or engage in conduct that would reasonably be perceived as bias or prejudice). Judge Klein's conduct constitutes, at a minimum, conduct prejudicial to the administration of justice that brings the judicial office into disrepute pursuant to article VI, section 18(d)(2) of the California Constitution.

## OTHER FACTS RELEVANT TO DISCIPLINE

In 2002, Judge Klein received an advisory letter for improper and unprofessional remarks at a hearing about an attorney who was not present. The remarks suggested bias and embroilment. In 2004, Judge Klein was publicly admonished for abusing his authority and displaying bias and embroilment through actions he took after a judgment he had entered was reversed by the Court of Appeal. The Court of Appeal had found that Judge Klein acted "arbitrarily and capriciously" in reducing a damages award to plaintiffs in a personal injury case and remanded the case to him with instructions to enter judgment in accordance with the evidence. Judge Klein failed to follow the remand instructions. (Pub. Adm. No. 33.)

## III. DISCIPLINE

Article VI, section 18, subsection (d) of the California Constitution provides that the commission may "censure a judge... for action... that constitutes... conduct prejudicial to the administration of justice that brings the judicial office into disrepute." By the terms of the Stipulation, Judge Klein concedes that his conduct was, at a minimum, prejudicial misconduct.

The stipulated censure and bar is the maximum sanction the commission may impose upon a former judge. (Cal. Const., art. VI, § 8, subd. (d).) We have determined that this is the appropriate discipline based on the serious nature of the misconduct and Judge Klein's history of discipline for similar misconduct.

As noted in the stipulated facts, Judge Klein has previously been disciplined for misconduct reflecting bias and embroilment, for making improper remarks about an attorney, and for abusing his authority. Despite this disciplinary history, Judge Klein continued to engage in the same type of misconduct in his handling of the case of *Jacqueline Cohen, et al. v. Windsor Fashions, Inc.* His embroilment and bias are manifested through the highly unorthodox manner in which he modified the proposed final order to provide for the payment of $125,000 in attorney's fees in $10 gift cards rather than cash and by his action in transmitting the order to the

press. Judge Klein abandoned his role as a neutral arbitrator and gave the appearance of being punitive toward the plaintiffs' attorney and grandstanding to the press. Further, his conduct in the case demonstrates a continued pattern of making improper comments toward those with whom he deals in his judicial capacity.

With Judge Klein's prior discipline in mind, we conclude that the misconduct in the present matter demonstrates a continuing "course of conduct establishing a 'lack of temperament and ability to perform judicial functions in an even-handed manner.' [Citation.]" (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.App.4th 865, 918, quoting from *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.) As such, the commission determines that the discipline proposed in the Stipulation is necessary for the protection of the public and maintenance of public confidence in the integrity of the judiciary.

Based upon the parties' stipulation, and good cause appearing, the commission hereby censures former Judge Brett C. Klein and bars him from holding judicial office in the state of California and from receiving an assignment, appointment, or reference of work from any California state court.

Commission members Hon. Judith D. McConnell, Hon. Katherine Feinstein, Peter Flores, Esq., Marshall B. Grossman, Esq., Mr. Samuel A. Hardage, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, and Mr. Nathaniel Trives voted to issue this decision and order imposing a public censure and bar pursuant to the Stipulation. Commission member Hon. Frederick P. Horn did not participate in the vote.

Dated: February 2, 2010

Hon. Judith D. McConnell
Chairperson

[No. 188. Sept. 23, 2010.]

# INQUIRY CONCERNING JUDGE JOSEPH W. O'FLAHERTY

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance publicly censured the judge. The Commission concluded that the judge violated Cal. Code Jud. Ethics, canons 1, 2A, 3B(2) and 3B(7). The judge engaged in willful misconduct through his intentional disregard of the law, abuse of authority, embroilment, and failure to afford a litigant his right to be heard. The judge ordered a small claims plaintiff to have no contact with three women and to stay away from a credit union without complying with any of the procedural requirements for the issuance of a restraining order and without affording the plaintiff notice or an opportunity to be heard. The evidence did not support the assertion that the plaintiff, directly or indirectly, abused, threatened or intimidated the women during the court proceeding or at any previous time. The judge was familiar with the requirements for issuance of a restraining order and knew that he was not complying with those requirements when he issued the no-contact order. The judge had previously been publicly admonished for misconduct that involved disregard of the law and abuse of authority. The judge's failure to acknowledge his wrongdoing was particularly troubling given his prior discipline. (Opinion by Judith D. McConnell, Chairperson.)

## HEADNOTES

**(1) Judges § 6—Discipline—Willful Misconduct—Intentional Disregard of Law—Abuse of Authority—Embroilment—Failure to Afford Litigant Right to Be Heard.**—A superior court judge violated Cal. Code Jud. Ethics, canons 1, 2A, 3B(2) and 3B(7), and was publicly censured, where the judge ordered a small claims plaintiff to have no contact with three women and to stay away from a credit union without complying with any of the procedural requirements for the issuance of a restraining order and without affording the plaintiff notice or an opportunity to be heard. The judge engaged in willful misconduct through his intentional

disregard of the law, abuse of authority, embroilment, and failure to afford a litigant the right to be heard.

[Cal. Forms of Pleading and Practice (2010) ch. 317, Judges, § 317.85.]

**(2) Judges § 6—Discipline—Public Confidence.**—The public expects and embraces the concept that a judge shall be faithful to the law. This is so fundamental to a system of justice that it serves as a basic cornerstone of public confidence.

**(3) Judges § 6—Discipline—Proceedings—Burden of Proof—Clear and Convincing Evidence.**—In a judicial disciplinary proceeding, the examiner has the burden of proving the charges by clear and convincing evidence. Evidence of a charge is clear and convincing so long as there is a high probability that the charge is true. Factual findings of the masters are entitled to great weight because the masters have the advantage of observing the demeanor of the witnesses.

**(4) Injunctions § 9—Temporary Restraining Orders—Issuance—Proof of Harassment—Great or Irreparable Harm.**—The issuance of a temporary restraining order requires the filing of an affidavit by the person requesting the order showing reasonable proof of harassment as defined by statute, and that great or irreparable harm would result to the person being harassed.

**(5) Judges § 6—Discipline—Embroilment.**—Embroilment is the process by which the judge surrenders the role of impartial fact finder/decision maker, and joins the fray.

**(6) Judges § 6—Discipline—Willful Misconduct.**—Willful misconduct by a judge is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity.

**(7) Judges § 6—Discipline—Unjudicial Conduct.**—Failure to comply with the Cal. Code, Jud. Ethics is generally considered to constitute unjudicial conduct.

**(8) Judges § 6—Discipline—Bad Faith.**—A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful

judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

**(9) Injunctions § 1—Exercise of Power—Caution—Strict Compliance with Law.**—The power to restrict a person's freedom of movement and contact with other individuals is a weighty responsibility which should be exercised with caution and in strict compliance with the law.

**(10) Judges § 6—Discipline—Capacity to Reform.**—A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform.

**(11) Judges § 6—Discipline—Impact of Judge's Misconduct.**—With respect to the appropriate discipline to be imposed in a judicial disciplinary proceeding, the impact of a judge's misconduct on the litigants and judicial system is an important factor to consider. Abuse of judicial authority and conscious disregard of the law are the antithesis of what the public expects of a judge. The integrity of the judiciary depends on public confidence that judges will faithfully comply with the law and act within the bounds of their authority. Intentionally bluffing a litigant manifestly diminishes public esteem for the judiciary.

**(12) Judges § 6—Discipline—Purpose.**—The purpose of judicial discipline is the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity of the judiciary.

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**OPINION**

**McCONNELL, Chairperson.**—

## I

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Joseph W. O'Flaherty, a judge of the Placer County Superior Court. The Commission on Judicial Performance commenced this inquiry with the filing of its notice of formal proceedings (Notice) on February 3, 2010. The Notice charges Judge O'Flaherty with disregard of the law, abuse of authority, embroilment and denial of due

process. It alleges that the misconduct occurred during a court proceeding in which the judge issued a no-contact order without following any of the applicable procedural requirements and without affording plaintiff notice or an opportunity to be heard.

The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters are Hon. Stephen J. Kane, Associate Justice of the Court of Appeal, Fifth Appellate District, Hon. Larry W. Allen, Judge of the San Bernardino County Superior Court, and Hon. Allan D. Hardcastle, Judge of the Sonoma County Superior Court. Judge O'Flaherty is represented by James A. Murphy of Murphy, Pearson, Bradley & Feeney in San Francisco, California. The examiners for the commission at the hearing before the special masters were Commission Trial Counsel Andrew Blum and Assistant Trial Counsel Valerie Marchant.[1] At the oral argument before the commission, commission attorney Charlene Drummer served as the examiner.

A two-day evidentiary hearing was held in Sacramento on April 27 to 28, 2010. The masters' report to the commission containing their findings of fact and conclusions of law was filed on June 30, 2010. An oral argument before the commission was heard in San Francisco on August 25, 2010.

**(1)** The masters concluded that Judge O'Flaherty engaged in willful misconduct, the most serious form of judicial misconduct, through his intentional disregard of the law, abuse of authority, embroilment, and failure to afford a litigant his right to be heard. Based on our independent review of the record we agree. Judge O'Flaherty ordered a small claims plaintiff to have no contact with three women and to stay away from a credit union without complying with any of the procedural requirements for the issuance of a restraining order and without affording the person who was the subject of the order notice or an opportunity to be heard. As did the masters, we reject Judge O'Flaherty's contention that his actions were justified and necessary to address an emergency situation brought on by the plaintiff's harassing and intimidating conduct toward the women. Having observed the videotape of the subject proceedings and reviewed the entire record of the hearing before the special masters, we unequivocally concur with the masters' finding that the evidence does not support the assertion that the plaintiff, directly or indirectly, abused, threatened or intimidated the women during the court proceeding or at any previous time. Judge O'Flaherty issued the no-contact

[1] Mr. Blum was appointed to the Lake County Superior Court after the hearing before the special masters.

order based on the comments and reaction of the women after plaintiff left the courtroom. The women had not filed a petition for a restraining order or described any conduct by plaintiff which would constitute proof of threats or harassment justifying the issuance of a restraining order. Judge O'Flaherty was familiar with the procedural requirements for issuance of a restraining order and knew that he was not complying with those requirements when he issued the no-contact order.

**(2)** This is not the first time Judge O'Flaherty has abused his authority and failed to be faithful to the law. In 2004, he was publicly admonished for misconduct that involved disregard of the law and abuse of authority. Despite his prior discipline and the unanimous conclusion of three special masters that he committed willful misconduct in the present case, Judge O'Flaherty insists that his actions do not amount to misconduct. Judge O'Flaherty's continued failure to accept the inherent obligation of a judge to adhere to the law and the limits of judicial authority convinces us that he should be publicly censured. As we stated in Judge O'Flaherty's 2004 public admonishment, " 'The public expects and embraces the concept that a judge shall be faithful to the law. This is so fundamental to a system of justice that it serves as a basic cornerstone of public confidence.' " (*Inquiry Concerning O'Flaherty* (2004) 49 Cal.4th CJP Supp. 1, 25, quoting from the special masters' report.)

## II

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. *Findings of Fact*

**(3)** The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true." (*Ibid.*) Factual findings of the masters are entitled to great weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Ibid.*; see *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 230–232.)

We adopt the masters' factual findings in their entirety, with one minor exception as discussed below. Based on our own independent review of the

record, we have determined that the following factual findings are supported by clear and convincing evidence.

### 1. *Findings Concerning the Hearing Before Judge O'Flaherty*

Judge O'Flaherty has been a trial judge in Placer County for approximately 20 years.

On December 8, 2008, Judge O'Flaherty presided over the small claims matter of *Herold v. Golden 1 Credit Union* (Super. Ct. Placer County, No. RSC13621). Herold, an independent car dealer, alleged that an employee of Golden 1, Cynthia Rapozo, made derogatory remarks about independent car dealers which caused Bonnie Davis to break a contract with him for the sale of a car. The comments were allegedly made on May 6, 2008, when Herold and Davis went to the credit union together to obtain financing for Davis. In attendance at the small claims hearing were Herold, Davis, Rapozo, and Melissa Burgess, a supervisor at Golden 1.

Herold commenced his presentation by reading from a prepared statement. Before he finished his first sentence, Judge O'Flaherty interrupted him and told him that he should tell it in his own words. As Herold attempted to explain what happened without the use of his notes, Judge O'Flaherty interrupted him numerous times with questions and comments generally critical of Herold's defamation claim. In contrast to Herold, Davis was allowed to give a lengthy narrative without interruption. After hearing from both Rapozo and Burgess, the judge told Herold that his defamation case against the credit union "isn't even close to a libel." Herold responded that the witnesses were not telling the truth and would have to "sleep with it at night." Judge O'Flaherty responded, "See . . . how you're getting emotional? You were getting emotional—." Herold denied being emotional. He said he knew he was 100 percent right regardless of what the judge decided, so "whatever decision you make, great . . . I mean life goes on. Tomorrow's another day." Judge O'Flaherty responded, "If that's the way you want it." Herold stated: "You tell me I can't prove my case, but you won't even let me. Three months. I can't even tell you my whole story and, you know, . . . so it's fine. I got my $100 satisfaction and lost business. I'm satisfied now. Okay? You can dismiss the case. I mean that's—I just feel . . . ." Judge O'Flaherty then dismissed the case and Herold walked out of the courtroom.

Immediately after Herold left the courtroom, Davis, Rapozo and Burgess conversed among themselves. Davis said, "He's got my address." Rapozo started crying and expressed concern that Herold would "come after" her. She

said, "This guy's a lunatic" and "I'm scared of that man . . . ." Rapozo said, "He's come back in and tried to confront me before." Davis stated that she received a "demand letter from him." Burgess and Davis attempted to console Rapozo. Although none of these comments was made directly to Judge O'Flaherty, he overheard them. He ordered the bailiff to return Herold to the courtroom.

When Herold returned, the following exchange took place:

"COURT: All right. Now, I'm a little bit concerned about you. I think frankly, I'm going to put it bluntly. I think you've been abusing these people, and I don't like it. And these women are all three of you [*sic*] afraid of you. Now I'm going to tell you this. I'm not going to issue a formal restraining order which I have the right to do. If there's any contact between you and these three people in the next few months, then I will issue a formal restraining order on the spot and you will have to pay the fees and then if you violate that restraining order, then it's a criminal case. Do you understand that?

"HEROLD: I do, Your Honor.

"COURT: There is to be no contact with them.

"HEROLD: I understand.

"COURT: I really—after you left I did not like their reaction at all. For whatever reason, they've made—you've made them afraid of you and I'm not going to have that. You understand?

"HEROLD: I understand. I'm not a violent person. It's just—

"COURT: You are to have no contact with them whatsoever. Whatever you've done and I've listened to this and bluntly, frankly, you're light years away from having a case against anybody. To put it—and I really didn't like—because I can gather from these three people, these two people are business people. Their job is to satisfy people. And you've gotten to the point that they're afraid of you. And frankly, that's not going to happen when I'm concerned. Do you understand that?

"HEROLD: I understand it, Your Honor.

"COURT: Well, I hope you're right.

"HEROLD: I'm also a customer of Golden 1 Credit Union too, so what does that mean, I can't do—

"COURT: You will have no contact with any of these three people. [Addressing Golden 1] What do you want to do about that?

"HEROLD: Does that mean I got to pull my accounts out of Golden 1—

"COURT: What do you want to do about that? You don't want to do that, right?

"BURGESS: Right. I think that if he just stays away from our branch—

"COURT: Stay away from their branch. You can have contact with other branches. Do you know—which branch is it?

"BURGESS: Roseville on Douglas Boulevard.

"COURT: Are there other branches in the area?

"BURGESS: Not in this area—

"COURT: How about Sacramento?

"BURGESS: There are branches in Sacramento and on the west side of Roseville.

"COURT: Oh, okay. You will not have—what street are you on?

"BURGESS: Santa Clara Drive.

"COURT: You will not have any contact in the Santa Clara branch for at least the next 90 days. Do you understand that?

"HEROLD: I understand that 100%.

"COURT: All right. Good luck, sir.

"HEROLD: Thank you very much."

When Herold went to the clerk's office the next day, December 9, 2008, to inquire about the restraining order, the clerk was unable to provide any information because the file had not been returned to the main courthouse. Approximately 20 days later, Herold learned there was no restraining order against him.

The minutes of the small claims proceeding include the following handwritten note under a heading that reads "THE COURT MAKES THE FOLLOWING ORDERS": "Golden One is dismissed from action . . . plaintiff to have no contact with defendants or restraining order will be issued. Plaintiff is to stay away from Santa Clara Drive branch for 90 days."

In his answer to the Notice, Judge O'Flaherty asserted that he did not review these minutes until after he was contacted by the commission. The masters found Judge O'Flaherty reviewed the minutes on the day of the small claims hearing. This finding is based on the judge's testimony that he initialed the second page of the document that was admitted as the minutes/judgment of the proceedings on the day of the hearing. We do not adopt this finding. In the commission's view, there is not substantial evidence to establish that Judge O'Flaherty reviewed the first page of the minute order with the aforementioned no-contact order at the time he initialed the second page of the document.

### 2. *Findings Concerning Evidence of Threats or Intimidation*

The masters found that "Herold did not, directly or indirectly, abuse, threaten or intimidate these women on December 8 or at any previous time." Judge O'Flaherty contends that there was substantial evidence presented from multiple witnesses that Herold engaged in intimidating and threatening behavior both before and during the small claims hearing. However, the masters, who were in a position to observe the demeanor of the witnesses, view the actual proceeding on videotape and consider the totality of the evidence, rejected those witnesses' characterization of Herold's demeanor. The masters state: "The aggregate testimony of O'Flaherty, Davis, Hanson (court clerk), and Gutierrez (courtroom deputy) describes Herold as emotional, acrimonious, angry, intimidating and threatening. Those characterizations of his demeanor and language are not supported by the evidence. Nor does the evidence support the assertion that Herold 'stormed out of the courtroom' to the extent that it is meant to say that he walked out loudly or angrily. He was displeased and frustrated, but he never raised his voice, displayed anger or made any threats, directly or indirectly. He did display his frustration to the extent he tossed or dropped what appeared to be a day planner on the table in front of him, but it was not done in an angry manner. O'Flaherty testified that up until Herold left the first time, the level of acrimony at the hearing was within the normal range of small claims hearings."

Based on our own viewing of the videotape and consideration of all the evidence presented at the hearing before the special masters, we concur with these findings. Herold displayed restraint and composure in the face of the judge's frequent interruptions of his presentation and repeated comments disparaging his case. We observe, as did the masters, that "at no time during the court proceedings did Herold by words, expression, conduct or body language, demonstrate an intimidating or threatening manner to anyone." Contrary to the judge's testimony that Herold sat close to Davis as an intimidating tactic, the videotape shows Herold separating his chair from the others at the outset of the hearing. Herold remained calm even after being unexpectedly returned to the courtroom and greeted with the judge's stern rebuke, "I think you've been abusing these people, and I don't like it."

Judge O'Flaherty contends that Herold had engaged in intimidating and threatening behavior towards the women prior to the small claims hearing. As did the masters, we find that the evidence does not substantiate this claim. We concur with the masters' finding that while Rapozo appeared upset when Herold left the courtroom the first time, neither Davis nor Burgess displayed any signs of personal distress or fear. Rapozo made statements to the other women that she was afraid that Herold would "come after" her because he had "tried to confront" her before. However, Judge O'Flaherty made no inquiries to determine the circumstances of Herold's return to the credit union or whether Rapozo's fear was objectively reasonable and justified.[2] The masters found that none of the comments made by defendants "describe[s] any conduct by Herold that would constitute a harassing course of conduct." We agree.

Judge O'Flaherty's reliance on Davis's statement that she received a letter from Herold demanding payment of $2,000 for breach of contract as evidence of intimidation is misplaced. Far from being a tactic of intimidation, a plaintiff is required, where possible, to demand payment from the defendant prior to filing a small claims action. (Code Civ. Proc., § 116.320, subd. (b).)[3] Moreover, at the hearing before the masters, Davis testified that Herold had

[2] During the small claims hearing, Herold mentioned that he had received a letter from the vice-president of Golden 1 and talked to managers at the branch. Whether these conversations took place in person or by phone and the subject of the conversations was not pursued. At the hearing before the special masters, Herold testified that he only returned to Golden 1 once after the incident and Rapozo was not present. He had a few conversations with the vice-president at Golden 1 and encouraged him to discipline Rapozo for making disparaging comments about independent car dealers. This was the only evidence presented concerning Herold's contacts with employees at Golden 1, including Rapozo, after the incident that was the subject of the small claims proceeding.

[3] Judicial Council of California mandatory form SC-100 (Plaintiff's Claim and ORDER to Go to Small Claims Court) states: "You must ask the Defendant (in person, in writing, or by phone) to pay you before you sue." (Boldface omitted.)

not threatened her verbally or in writing, and that she did not feel intimidated by Herold at the small claims hearing.

Judge O'Flaherty's reliance on Herold's statement that he sued Davis "to get her to come in" as evidence that Herold was intimidating Davis is also misguided. Herold testified that his attorney recommended that he "sue both of them [Golden 1 and Davis]" to get Davis into court "instead of approaching her." He also testified that he sued her because she broke the contract to purchase the car. Herold exercised his right to sue a party who he believed had breached a contract—this does not constitute evidence of intimidation.

### 3. ***Findings Concerning Issuance of an Order***

The masters found that Judge O'Flaherty's statements and conduct after Herold was returned to the courtroom "establish beyond a doubt" that he ordered Herold not to have contact with the three women for 90 days. We are in complete agreement. Judge O'Flaherty told Herold in no uncertain terms at least six times that he was to stay away from the women, specified the amount of time the order was in effect, and repeatedly asked Herold if he understood what he was being told.

Judge O'Flaherty is adamant that he did not issue and did not intend to issue a no-contact order against Herold. Relying heavily on his initial comment to Herold that he was not going to issue a "formal restraining order," the judge maintains that he was simply issuing a warning and attempting to obtain Herold's "agreement" to stay away from the women rather than issuing a court order. The precise words he refers to are, "I'm not going to issue a formal restraining order which I have the right to do. If there's any contact between you and these three people in the next few months, then I will issue a formal restraining order on the spot and you will have to pay the fees and then if you violate that restraining order, then it's a criminal case." Judge O'Flaherty acknowledges that the law does not authorize the issuance of "informal" restraining orders and that a restraining order could not be issued "on the spot" if Herold had contact with the women.

More importantly, Judge O'Flaherty's subsequent statements establish that he was ordering Herold to have no contact with the women rather than seeking an agreement: "There is to be no contact with them"; "You are to have no contact with them whatsoever"; "You will have no contact with any of these three people"; "Stay away from their branch"; "You will not have any contact [with] the Santa Clara [Drive] branch for at least the next 90 days." The judge asked Herold several times if he understood what he was

being told. After the last command, Herold indicated that he "underst[oo]d that 100%" and left the courtroom. Judge O'Flaherty then told the women to let him know immediately if Herold had any contact with them.

There is no reasonable way to interpret the judge's words other than as an order. At no time was Herold asked if he would agree to stay away from the women, nor told that he was just being given a warning. As Special Master Hardcastle said during closing argument before the special masters, "It doesn't sound to me like there's a negotiation going on. It sounds to me like this is a command."

The masters found that Herold subjectively believed that the judge's words and tone meant that he was under a court order not to have any contact with the women, and that Herold's belief was objectively reasonable. We agree.

Judge O'Flaherty concedes that his words may have given the appearance that he was issuing an order, but insists this was not his intent. We find that Judge O'Flaherty's unequivocal choice of words and emphatic tone of voice while speaking to Herold manifest his intent to issue a no-contact order, or at least to "bluff" Herold into believing he was under such an order. Significantly, Judge O'Flaherty testified that he was essentially bluffing Herold into believing that a restraining order with resulting fees and possible criminal proceeding would issue "on the spot" if he had any contact with defendants. We have no doubt that Judge O'Flaherty wanted Herold to believe he was subject to a restraining order, an order the judge knew he did not have authority to issue.

**(4)** The issuance of a temporary restraining order requires the filing of an affidavit by the person requesting the order showing reasonable proof of harassment as defined by statute,[4] and that great or irreparable harm would result to the person being harassed. Judge O'Flaherty was aware of the statutory requirements for issuance of a restraining order based on his extensive experience handling harassment petitions. Thus, he knew that he did not have authority to issue a no-contact order based only on the women's

[4] Harassment is defined as unlawful violence, a credible threat of violence, or a willful course of conduct that seriously alarms, annoys or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff. (Code Civ. Proc., § 527.6, subd. (b).)

Within 15 days, or, if good cause appears to the court, 22 days from the date the temporary restraining order is issued, a hearing must be held on the petition for injunction with notice to the defendant. (Code Civ. Proc., § 527.6.)

statements after Herold left the courtroom, or "on the spot" if Herold had contact with the women during the next 90 days.

#### 4. ***Findings Concerning Embroilment and Due Process Violation***

**(5)** The masters found that while it was not inappropriate under these circumstances for Judge O'Flaherty to have Herold brought back to the courtroom to address Rapozo's fear, his subsequent conduct demonstrated a lack of impartiality and embroilment. We concur. "Embroilment is the process by which the judge surrenders the role of impartial factfinder/decisionmaker, and joins the fray." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 2.01, p. 37.) As the masters found, "[O]nce Herold was returned to the courtroom, O'Flaherty's conduct and statements demonstrated that, rather than acting as an impartial jurist, he became a forceful advocate for the women and became embroiled in the matter to the extent that he issued orders that were neither requested nor legally proper."

The masters also found that "Herold was denied basic due process rights during the second hearing [after his return to the courtroom]." We agree. Herold was not present when the women made comments that caused Judge O'Flaherty to order his return to the courtroom. When Herold returned, the judge did not inform him of the factual basis for the no-contact order except to say that the women were fearful of him ["For whatever reason, they've made—you've made them afraid of you and I'm not going to have that."]. Herold was not afforded an opportunity to ask questions or to respond to the accusation that he had harassed the women. As Herold attempted to explain that he is not a violent person, he was interrupted by Judge O'Flaherty, who told him he was to have "no contact with them whatsoever . . . you're light years away from having a case against anybody . . . they're afraid of you. . . ."

#### 5. ***Prior Discipline***

Judge O'Flaherty was publicly admonished in 2004 for telling prospective jurors in two criminal trials that they could lie to get out of jury duty if they thought they might be racially biased.

### B. *Conclusions of Law*

The masters concluded that Judge O'Flaherty engaged in willful misconduct. We reach the same conclusion.

**(6)** Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his judicial capacity. (*Broadman, supra*, 18 Cal.4th at p. 1091.) That Judge O'Flaherty was acting in his judicial capacity is not in dispute.

**(7)** Failure to comply with the California Code of Judicial Ethics canons of judicial ethics is generally considered to constitute unjudicial conduct. (*Adams v. Commission on Judicial Performance (Adams*) (1994) 8 Cal.4th 630, 662 [34 Cal.Rptr.2d 641, 882 P.2d 358].) We conclude, as did the masters, that Judge O'Flaherty violated canons 1 (a judge shall uphold the integrity of the judiciary), 2A (a judge shall respect and comply with the law), 3B(2) (a judge shall be faithful to the law), and 3B(7) (a judge shall accord every person who has a legal interest in the proceeding the right to be heard) of the California Code of Judicial Ethics in that he abused his authority, disregarded the law and denied a person who had a legal interest in proceedings before him the right to be heard. As such, his conduct was unjudicial.

**(8)** A judge acts in bad faith "only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, 18 Cal.4th at p. 1092.) Judge O'Flaherty acted in bad faith because he issued a no-contact order with knowledge that it was beyond his judicial authority to do so and because he acted with a conscious disregard for the limits of his authority.

Judge O'Flaherty contends that he did not act in bad faith because he did not intend to issue a no-contact order. As previously discussed, we reject the judge's characterization of his comments as a "good-faith misstatement" during an emergency situation and find that his intent was to order rather than warn Herold to stay away from the three women. While we defer to the masters' finding that the judge did not act for a corrupt purpose, this does not mean he did not act in bad faith. Bad faith in this context does not require a corrupt purpose. (*Broadman, supra*, 18 Cal.4th at p. 1092.) Judge O'Flaherty acted in bad faith by consciously disregarding the limits of his judicial authority regardless of his motivation.

Judge O'Flaherty's contention that he acted in good faith because he believed his actions were a necessary response to an emergency situation is misguided. The law provides an expedited process for the issuance of temporary restraining orders, a process Judge O'Flaherty failed to follow. (Code Civ. Proc., § 527.6, subd. (c).) Judge O'Flaherty acknowledged that a

temporary restraining order can be issued "very fast." Had there actually been an emergency situation, the judge's unenforceable no-contact order would have provided no protection to the women.

**(9)** We do not suggest that Judge O'Flaherty was required to ignore the women's comments after Herold left the courtroom. He could have told them, for instance, where to obtain forms for filing a petition for a restraining order without commenting on the merits of such a petition. What he could not do was issue a no-contact order without complying with applicable statutory requirements and constitutional due process guarantees. The power to restrict a person's freedom of movement and contact with other individuals is a weighty responsibility which should be exercised with caution and in strict compliance with the law.

## III

## DISCIPLINE

We now reach the ultimate question of the appropriate discipline to be imposed. After careful consideration, we have determined to publicly censure Judge O'Flaherty.

**(10)** Crucial to our determination is the fact that Judge O'Flaherty was previously publicly admonished for abusing his authority and disregarding the law and yet continues to show no acceptance or understanding of the limits of his authority. "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248; see also *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 920–921 [81 Cal.Rptr.2d 58, 968 P.2d 958]; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 866 [264 Cal.Rptr. 100, 782 P.2d 239].) Judge O'Flaherty insists that he did not engage in misconduct despite a unanimous report from three special masters which concludes that he engaged in willful misconduct and clearly and unequivocally explains the basis for that conclusion. When asked at oral argument before the commission whether he recognized any impropriety in his conduct, Judge O'Flaherty responded that he "misspoke to Herold" which he described as a mistake rather than misconduct. In order to justify his own conduct, he continues to characterize Herold's conduct and demeanor during the court proceeding in a manner that is inconsistent with the findings of the masters and the video recording of the proceedings. Our determination of the appropriate level of discipline might have been different if we were confident that Judge O'Flaherty understood and accepted the impropriety of his actions. (*Inquiry Concerning Platt*, at p. 248; see also *Fletcher*, at pp. 920–921; *Kloepfer*, at p. 866.) Unfortunately, he has made it clear that he does not.

Judge O'Flaherty's failure to acknowledge his wrongdoing is particularly troubling given his prior discipline. (See *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 301–302; *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 339–340 [45 Cal.Rptr.2d 254, 902 P.2d 272]; *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 199 [260 Cal.Rptr. 557, 776 P.2d 259] [failure to respond to prior discipline "evidences a lack of regard for the Commission, this court and his obligations as a judge."].) We see a disturbing similarity between the misconduct that resulted in his 2004 public admonishment and his misconduct in the present case. In both cases, Judge O'Flaherty has demonstrated a willingness to circumvent the law in favor of procedures he considers more effective. In the case leading to his prior discipline, he believed he could tell jurors to lie under oath to get off the jury because he was concerned they would not be honest about their racial bias. (*Inquiry Concerning O'Flaherty, supra*, 49 Cal.4th CJP Supp. 1.) In the present case, he thought he was justified in issuing an unlawful no-contact order because the issuance of a lawful restraining order might trigger an investigation of Rapozo by the credit union and would have "onerous" collateral consequences to Herold. Judge O'Flaherty testified that he has given essentially the same "warning" he gave Herold in many other cases where there was no petition for a restraining order pending before him and "it usually works." We note that in the case that led to his prior discipline, Judge O'Flaherty also maintained that his conduct should not be subject to discipline because his intentions were good. (*Id.* at p. 24.) It appears that Judge O'Flaherty believes he is entitled to disregard the law without consequence as long as, in his mind, the ends justify the means.

**(11)** The impact of a judge's misconduct on the litigants and judicial system is another important factor we consider. (*Inquiry Concerning Van Voorhis, supra*, 48 Cal.4th CJP Supp. at pp. 299–300.) Herold's due process rights were violated and his freedom of association and movement unlawfully restricted. Further, Judge O'Flaherty's misconduct adversely impacts the reputation of the judiciary. Abuse of judicial authority and conscious disregard of the law are the antithesis of what the public expects of a judge. The integrity of the judiciary depends on public confidence that judges will faithfully comply with the law and act within the bounds of their authority. Finally, intentionally bluffing a litigant manifestly diminishes public esteem for the judiciary.

**(12)** The purpose of judicial discipline is the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity of the judiciary. (*Broadman, supra*, 18 Cal.4th at pp. 1111–1112.) For the foregoing reasons, we have determined that this purpose is best served through the imposition of a public censure.

## ORDER

Pursuant to the provisions of article VI, section 18 of the California Constitution, we hereby impose a public censure on Judge Joseph W. O'Flaherty.

Commission members, Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Anthony Capozzi, Mr. Peter E. Flores, Jr., Mr. Samuel Hardage, Hon. Frederick P. Horn, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, and Mr. Nathaniel Trives voted in favor of all of the findings and conclusions expressed herein and in the foregoing order of a public censure.

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| **INQUIRY CONCERNING JUDGE DEANN M. SALCIDO,**<br><br>**No. 189** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 127)** |

## I

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge DeAnn M. Salcido, a judge of the San Diego Superior Court since 2002. The commission filed a Notice of Formal Proceedings on September 20, 2010, charging Judge Salcido with allowing herself to be videotaped while conducting proceedings in her courtroom for the purpose of promoting herself for a role in a potential television entertainment program and telling an entertainment attorney representing the producer that she would set her more interesting cases on the day of the filming; making numerous improper remarks and engaging in improper conduct while court proceedings were being filmed; engaging in a pattern of improper conduct on other occasions, including making demeaning and discourteous remarks regarding litigants, court staff, attorneys and others; and placing a defendant into custody for contempt without affording her due process or complying with the legal requirements for contempt.

By Stipulation for Discipline by Consent (Stipulation), executed October 18, 2010, Judge Salcido and her counsel, Heather Rosing, Esq., and the examiner for the commission, Gary Schons, Esq., have requested that the commission resolve this matter by imposition of a public censure provided that Judge Salcido resign from the bench and not seek or hold judicial office and not seek or accept judicial assignment, appointment, or reference of work from any California state court. Pursuant to the Stipulation, Judge Salcido has agreed to tender her irrevocable resignation from judicial office within five days of the issuance of this decision, said resignation to be effective immediately. By

signed affidavit, Judge Salcido renders her free and voluntary consent to the Stipulation, admits the truth of the stipulated facts and waives all further proceedings and review by the Supreme Court. (Rule 127(d).) The Stipulation provides that if Judge Salcido fails to comply with any of its terms and conditions, the commission may withdraw the censure and proceed with formal proceedings, and her failure to comply with the terms and conditions of the Stipulation may constitute additional and independent grounds for discipline.

## II

## STIPULATED FACTS AND LEGAL CONCLUSIONS

The following findings of fact and conclusions of law are based on the Stipulation. In the signed Stipulation, Judge Salcido "expressly admits that the foregoing facts are true and that she agrees with the stated legal conclusions."

### COUNT ONE

On January 26, 2009, Judge Salcido had the husband of her courtroom bailiff videotape her on the bench presiding over a variety of matters for approximately one hour. She did so to promote herself for a role in a potential television entertainment program featuring a judge. She provided the January 26 tape to an entertainment lawyer, who showed it to a production coordinator for existing television shows featuring judges (hereafter "the producer").

Judge Salcido thereafter was informed by the entertainment attorney that the producer would be interested in filming her conducting proceedings in the courtroom. On May 1, 2009, she allowed the producer to film proceedings in her courtroom for the entire day. The purpose of the filming was to promote herself for a role in a potential television entertainment program featuring a judge.

No request was made pursuant to California Rules of Court, rule 1.150, to record any portion of proceedings on January 26, 2009, or on May 1, 2009, nor would an order granting such a request have been properly issued as the filming was for the judge's personal purposes. The judge did not provide advance notice of the filming to the litigants or counsel whose cases were heard during filming on January 26, 2009; advance

notice of the filming was provided to some of the litigants or counsel whose cases were heard on May 1, 2009.

In an email message dated March 5, 2009, sent by the judge to the entertainment lawyer, the judge suggested that filming in her courtroom be scheduled for April 24. She told him that she has "been setting my more interesting defendants and those with substance abuse issues for Friday April 24th." On March 9, 2009, following his suggestion that filming occur on May 1, Judge Salcido sent an email message in which she told him that "I will line up my most interesting cases for the afternoon of [Friday] May 1st." These statements give the appearance that the judge was scheduling cases based on their possible appeal in a videotape to be used to promote herself for a television program. It also creates an appearance of impropriety for the judge to represent that she would manipulate her calendar for non-judicial purposes.

The conduct described above violated canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 2B(2) (improper use of the prestige of judicial office) and 3A (a judge's duties shall take precedence over all other activities). The conduct constitutes prejudicial misconduct within the meaning of the California Constitution, article VI, section 18, subsection (d), which provides that a judge may be disciplined for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Prejudicial misconduct includes "'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office....'" (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1104, citing *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 312.)

## COUNT TWO

A. Count Two A

On May 1, 2009, while proceedings in her courtroom were being filmed, Judge Salcido made the following improper remarks:

1. Around 10:43 a.m., she asked defendant Faustino Valdez, who was entering a change of plea to a charge involving marijuana, "You were born in 1980?" After he responded "yes," she remarked, "You look older than me. That's what smoking will do to you."

2. Around 10:53 a.m., defendant Juan Molina pled guilty to engaging in lewd conduct in public. The judge asked counsel for information about the case and was informed that the defendant had urinated in public and then turned around, exposing himself. After noting the number of days the defendant spent in custody, she joked, "Wow. Seventy-two days in custody giving new meaning to the term zip it." After ordering the defendant to stay away from a certain location, she joked, "Because I think they'll recognize you in more ways than one." She later joked, "again, new meaning to the term zip it."

3. Around 11:07 a.m., after placing Rodolf Rodriguez on probation, Judge Salcido made the following remark: "What that means is don't come before the court on another case ... 'cause you will definitely be screwed and we don't offer Vaseline for that."

The judge used the term "screwed" on other instances on May 1. Around 10:22 a.m., after defense counsel stated that defendant John Hedley had not been given written proof of attendance at AA meetings, she stated, "Then he would be screwed." Around 2:48 p.m., she remarked to defendant Shell, who had not appeared in court as ordered, "you basically screwed yourself by not coming in." She also used the word "screwed" in the Jason Chavez matter, as set forth below.

4. Around 11:13 a.m., after being informed that Deputy Public Defender Longman wanted a chambers conference in *Sparks*, she stated, "Sidebar please," then

asked, "Did I roll my eyes at the camera?" and laughed. The statement about rolling her eyes at the camera was made in a low voice to court staff, off the record.

5. Defendant Dustin Coombs appeared to request early termination of probation so that he could enlist in the military. His stepfather appeared with him. When the judge asked defendant Coombs why he had needed a reassignment for public service work, he explained that his mother had lost her home and that he had moved to North Carolina with her. Around 11:24 a.m., Judge Salcido remarked, "I'm supposed to put my national defense in your hands, but you can't come up here without your stepdad and you're [¶] ... [¶] tied to the hip with your mom? And I'm supposed to put my national security in your hands."

6. Around 2:34 p.m., while presiding over the *Dupre* family law matter in which an order modifying child visitation had been requested, the judge remarked to the parents, "I don't mean any disrespect to either one of you, but thankfully I don't live with either one of you. So I don't know where the daughter has been."

7. Around 2:44 p.m., after defendant Stephen Stoflitt admitted a probation violation and requested reinstatement in a domestic violence program, the judge told him that she could sentence him to 60 days in jail instead. When he said that he would prefer to do the program, she warned him twice that if he returned with another excuse she would slam him "like a tidal wave." The judge asked him if he understood that he was "going to do double or nothing" and whether he was "a gambling man." When the defendant replied that he was not a gambling man, she said, "Well, you're gambling, you're gambling right now." When the defendant said that he was "trying to show that I can do what I'm supposed to," Judge Salcido had the audience read aloud a slogan posted in the courtroom, "Do or do not, there is no try." Before reinstating the defendant into the program, she said, "I will put you in jail and we're doing double or nothing now. [¶] ... [¶] You're prepared to double down? [¶] ... [¶] Sixty days now or 120 minimum later. You want to take 120 later?"

8. Around 3:21 p.m., defendant Daniel Lopez appeared in custody and admitted a probation violation. Judge Salcido gave him the option of an immediate 60-

day jail sentence or reenrolling in a program, but facing a longer jail sentence if he failed to complete that program. After the defendant said that he wanted to reenroll in the program and his counsel requested a moment to confer with his client, the judge remarked to the courtroom audience, "You guys know he doesn't want to do that don't you? Yeah. Does he need to call the lifeline? Try to tell him. Let's make a deal. I think he needs to call the lifeline. Yeah. Want to poll the audience? What should he do? Take the deal, take the deal, take the deal. The audience says, of course, the audience isn't going into custody. Really easy for you to tell him to take the deal because you're going to go home tonight and sleep on your pillows." The judge and the courtroom audience repeatedly laughed at these comments. Counsel then said that defendant Lopez was not choosing the custody option because he was the only person available to take care of his 75-year-old mother, who was in poor health. The judge remarked, "Then God help her." She later said to the defendant, whom she appeared to think had called her "sir," "did you say sir? [¶] ... [¶] I was like, I know I shaved this morning," to laughter from the audience.

9. Around 3:29 p.m., the judge was told that defendant Jason Chavez, who had appeared before her earlier in the day, had tested positive for marijuana. The judge remarked to the courtroom, "He's not too clean?" to which the audience responded with a loud "woo." She said "THC," and the audience again said "woo." The judge then asked the audience, "Can I get a woo, woo, woo?" The audience responded as requested, and the judge and others in the courtroom laughed. The judge remarked, "See why my sons are screwed? I can just look at someone and I can tell." As she recalled the matter she remarked, in reference to the defendant and quoting him, "'It's been years, Your Honor.'" The judge then told the defendant that it was her job to judge credibility, and remarked, "Did you take me for a fool?" After the defendant responded, "No, Your Honor," she asked, "Did you think I don't know what I'm doing?" After the defendant said he was going to try to do what is right, Judge Salcido said to the audience, "Here's that word again, it's pretty famous," and over the defendant's attempts to explain, had the courtroom audience repeat the slogan "Do or do not, there is no try." When calling the

next case, she said, in apparent reference to this case, "If I had a dollar for everybody who told me they were clean I wouldn't need to work anymore."

10. Around 3:37 p.m., Judge Salcido remarked to defendant Gregory Armstrong, who had failed to appear in court the day before, "Do you want tissue now or later because you're going into custody right now." Before remanding him, she stated, "Did you think by coming in the next day, they wouldn't let you see me? You thought by coming in the next day, oh, I won't see Judge Salcido, they'll send me next door. How do you like me now? Things don't work that way."

11. Around 3:45 p.m., defendant Ana Earls appeared and admitted to having an alcohol and drug abuse problem. Judge Salcido asked her what type of alcohol and she said it was vodka. The judge then asked, "Any type of vodka?" After Earls said, "Any type," the judge said, "Blame it on the a-a-a-a-alcohol," to laughter from the court audience.

12. Around 3:51 p.m., a defendant appeared who had mental health issues. After ascertaining that he had been hearing voices, the judge asked, "Okay. And we talked, right? You're going to tell me if they say 'hurt the judge, hurt the judge.'"

13. Around 4:06 p.m., the judge asked defendant Jay Anderson, "Do you smoke a little chronic every now and then?" The audience laughed. After adding as a term of his probation that he not consume alcohol and that he be subject to random testing, she said, "So that means if you come here and you test at your DV classes and they find that you had some Budweisers, not only will I put you in jail because it was Budweiser instead of Heineken, you will be in jail because it's a violation of your probation."

14. Around 4:10 p.m., Judge Salcido commented that defendant Tyrone McCoy was smiling, and then remarked to him that "they might like your smile in jail," to which the audience responded with a loud "oooo" and then laughter.

15. Around 4:10 p.m., defendant Jemeelah Coleman appeared unrepresented; she apparently had failed to comply with a condition of probation. Judge Salcido advised her that she would allow her to serve 24 hours in custody, instead of the

customary 48 hours, for the violation of probation. The judge advised Coleman that she had a right to be counseled by an attorney before admitting the violation and being sentenced, and informed her that she would have to come back on Monday if she wanted to speak with an attorney. At one point the judge told her, "But I might not be so gracious on Monday." After further discussion, the defendant said that she wanted to "do the 24 hours." When the defendant paused after the judge said that this meant she would waive her right to speak with an attorney, the judge asked, "You want to ask the lifeline? You need a lifeline?" The audience laughed at these remarks.

16. Around 4:27 p.m., defendant Ladonte Wilson appeared without proof of volunteer work, and blamed his mother for not following through. Judge Salcido asked if his mother was at court, and Wilson said she was at work. The judge responded, "I'm surprised, she hasn't cut the cord obviously. Cut the cord, Mom. Cut the cord." After Wilson was remanded, the judge concluded proceedings by stating, "I suggest you don't call your mama."

17. Around 4:29 p.m., defendant Leo Clemens appeared and responded to the judge's earlier request (3:57 p.m.) that he identify a "tool" that he had learned to use to control his anger. He had previously been unable to do so. Judge Salcido said, "Hallelujah, amen, praise the Lord, thank you very much," and the audience applauded. She then said to the audience, "can I get a woo woo?" and the audience responded as asked.

B. Count Two B

Between April 2009 and April 2010, Judge Salcido engaged in improper conduct and made improper remarks regarding litigants, court staff, attorneys and others, as follows:

1. On April 21, 2009, around 3:09 p.m., in-custody defendant John Love appeared and entered a guilty plea to battery. During the sentencing discussion that followed, the case was passed because of Love's attitude. When Judge Salcido recalled the case about 20 minutes later, she ascertained that a woman sitting in the audience was with Love, then told her that she had to leave the courtroom, saying, "You need to wait

outside because he's agitated ... he's not behaving well." After taking a guilty plea from Love again, the judge elicited during sentencing that he was from St. Louis and said, "I like the accent, it's working for me."

2. On June 9, 2009, around 10:27 a.m., Judge Salcido raised concerns regarding an August 7, 2008 order entered by Judge Peter Gallagher in a criminal case involving defendant Sean Strange. After checking the court file, the judge commented, "Ah, Judge Gallagher, aka assistant public defender." At 10:34 a.m., the *Strange* case was trailed, and several other matters were heard. At 10:39 a.m., during a pause in proceedings in one of those other matters, the judge commented to court staff in a low voice, "Is that ridiculous that Judge Gallagher did that. I mean it's a sex offender case. Yeah, whatever, you know. A DV statute says it's mandatory but, you know, we're the judge, we can do what we want. Quote. Justice be damned."

3. On June 9, 2009, around noon, defendant Andrew Davis entered a guilty plea to a charge of violating Penal Code section 148. The judge asked the defense counsel to describe the facts of the case before imposing sentence; after he did so, she said, in reference to Deputy District Attorney Richard Huffman, who was not present, "and you couldn't get a 415 out of Mr. Huffman? [¶] ... [¶] Did you tell him he was going into the military? [¶] ... [¶] Mr. Huffman, if you're going into the military, he practically drives you there." (Defendant Davis was not going into the military.)

4. On June 9, 2009, around 3:28 p.m., the defense attorney in *Nicolazzo* argued that there was no dating relationship for purposes of the domestic violence statutes. In summarizing the cases the attorney had cited, Judge Salcido said that certain authorities would "tell me that booty calls are exempt from domestic violence statutes," and continued to use the phrase "booty call." She later remarked, "Yeah well, he got a taste of it though right? [¶] ... [¶] That's what I'm saying. If he's stalking her, he got a taste of it. They don't stalk unless they've got something."

5. On June 30, 2009, around 3:11 p.m., attorney Alan Spears appeared regarding his pregnant client Justine Means, who was in Maine. Attorney Spears, who was seeking a continuance, said that his client felt unable to travel because of the

pregnancy, and gave the judge a physician's letter that noted her due date. Judge Salcido stated that pregnant people traveled all the time, and noted that the physician's letter did not say that the defendant was at high risk or subject to bed rest. After the prosecutor said that she did not object to a continuance, the judge said that she would grant it. As the judge explained that she was granting the continuance for discovery reasons, not because Means was pregnant, she ripped up the physician's letter, and either threw the pieces in the trash herself or handed the pieces to her clerk to put into the trash.

6. On July 6, 2009, around 2:08 p.m., when defendant Steve Moore appeared in court wearing an Oakland Raiders jersey, Judge Salcido remarked, "You did not come in here with that shirt," and asked, "Which doors you want to walk out with, that's the Charger door [the public exit], that's the Raider door [the door for defendants going into custody]?" She then said, "Chargers door? Raiders door? Chargers door? Raiders door?" and repeatedly asked the defendant which door he wanted to go through when he left. She remarked, "365 days of the year I'm a Chargers fan. Hello, we don't take a break." The judge asked a woman present in the courtroom who was connected with the case, "Would you say he's smart, coming here in a Raiders shirt? No? What does that say about you, Dena, and the kind of men you pick?"

7. On July 6, 2009, around 2:38 p.m., while reviewing a request for modification of the terms of a protective order in the *Houmi* case, the judge remarked, "I can't do this because it's not consistent with the statute. [¶] ... [¶] I mean I can send it up to Judge Deddeh since he's the one who doesn't want to follow the statute."

8. On July 8, 2009, around 2:08 p.m., defendant Dawn Elliott appeared on an adjudicated driving under the influence case. Judge Salcido questioned her as to whether she had brought proof of attendance at AA meetings. When Elliott began to explain, the judge remarked, "I really feel like I need some popcorn to listen to this." She later stated that if Elliott failed to bring proof of the AA meetings to the next court appearance, "you will go to jail," and also said, "then you're going to go to jail."

9. On July 8, 2009, Judge Salcido made several remarks criticizing DPD Longman, some of which also created the appearance of discouraging the exercise of the

right to counsel. Around 2:12 p.m. on July 8, 2009, defendant Marilyn Hanbury appeared without counsel. Her father was present in court. After the defendant appeared to look to her father for guidance before responding to a question from the judge, the judge remarked, "Proud moment there Dad, huh," in a joking manner. She then asked the defendant if she wanted to wait for the "luxurious opportunity" to speak to an attorney that day or whether she wished to continue the case so she would not have to wait all day.

The judge passed the *Hanbury* case until about 2:21 p.m., at which time she was told that the defendant had gone to talk to an attorney. The judge remarked to the defendant's father, "You're going to be stuck here for two more hours, Dad. He's named Mr. Longman for a reason." She also said, "All she had to do was say 'not guilty' and you can come back and be real quick. But now you got Mr. Longman, also known as Mr. Federal Case." The judge and others in the courtroom laughed after these remarks.

Next, around 2:22 p.m., Judge Salcido told defendant Uriel Rivera that there was an infraction offer on his case. She said that if he wanted to consult "the public defender, Mr. Longman, it might take you a few hours, you see how long it takes for him to get to you"; she also told Rivera he could enter a not guilty plea and return on another date.

Around 2:25 p.m., the judge remarked to defendant Rodney Rouse that if he wanted to resolve the matter that day he had "to wait for Mr. Longman and he's the slowest public defender we have in the courthouse." When the defendant said that he wanted to resolve it that day, she said, "Oh Lordy. FYI, if he takes too long, I get grumpy." After the judge conveyed the offer to defendant Rouse, he said that he would "take it right now." She commented shortly thereafter, "Then you don't need to wait for Mr. Longman, who takes years off your life." The judge and others in the courtroom laughed after these remarks about DPD Longman.

Similarly, on July 28, 2009, near the end of the court day, during a discussion in open court not connected to a particular case, Judge Salcido repeatedly referred to DPD Longman as "Mr. Federal Case" and complained that she never got out of court early when he was in her department. And, on May 1, 2009, while waiting for DPD Longman, the bailiff jokingly asked the judge if she wanted her to Taser him; after the judge

responded in a bantering manner that she did not want her to Taser him, the judge asked either the bailiff or someone else present in the courtroom, "Do you want to Taser him?"

10. On July 28, 2009, at about 10:06 a.m., during a case discussion with a privately retained attorney, Judge Salcido remarked regarding football player Shawne Merriman, "Although I do have it on a reliable source he likes to play with Ecstasy pills." She further remarked, "A friend of mine personally observed it, it was at his house."

11. On October 26, 2009, around 9:38 a.m., the judge called the Paul Cody matter. Cody claimed that the East County Court was not allowing him to complete his program. Judge Salcido stated that "East County Court is being immature. Being sore losers." There was laughter in the court. She then stated that "You don't want to give them your money anyway. [¶] ... [¶] Okay. Sorry, sir. You know we can't force people to be mature."

12. On October 26, 2009, around 9:48 a.m., defendant Raul Castaneda had difficulty answering Judge Salcido's inquiry as to whether he had discussed the case with his attorney. The judge stated, "I need some aromatherapy spray right now." She sprayed a substance from a bottle and said, "This is my stress relief spray"; she then sighed heavily and laughed. During her subsequent questioning of Castaneda, after he said that he had not talked to anyone that day about his case, she stated, in reference to his attorney, "What do you think she was, your secretary?"

13. On October 27, 2009, around 8:36 a.m., before calling the calendar, Judge Salcido stated to the audience, "You guys have no sense of humor. Did we steal it when you came through the electronic metal detectors or something? Yeah. Get back your sense of humor, you're allowed to have one in court, even though they try to suck the life out of you here in the courthouse. God, you guys are dead, you guys are like, dead. I'm like, God, I need a warm up, I need a warm up comedian before I come out. Okay. Yes, sir. Are you ready? You're volunteering? All right. See? Okay. We're getting the fun back in the courthouse. Fun, courthouse, they don't have to be separate."

14. On October 27, 2009, around 8:59 a.m., Judge Salcido called the case of Emilia Bryant. When Bryant said that she was attempting to get a job in a restaurant,

the judge stated, "And this is a restaurant to be a waitress where you actually get to wear clothes?" After correcting the spelling and grammar of her resume in front of the courtroom audience, the judge told Bryant that she could "take my suggestions or you can leave it," but added, "You can see where my effort has gotten me. So maybe you might want to take my suggestions." When she asked defendant Bryant what she had been doing and she started to answer "School and --," the judge interrupted, "No, you've been hanging out with dogs and wondering why you get fleas." The judge commented several times that the shoes Bryant was wearing were "hoochie shoes."

15. In approximately early 2010, the judge made remarks in court disparaging the general clerical staff as follows. On a number of occasions, she referred to the business office staff as "cucumbers." For example, on one occasion around March or April 2010, when it was suggested that a case be postponed to the afternoon, she said words to the effect that "no, because the cucumbers might lose the file." On another occasion around March or April 2010, after referring to the clerical staff as "cucumbers," the judge then added that "they aren't even potatoes because potatoes have eyes." On more than one occasion around March or April 2010, she made the "potatoes" comment to the courtroom audience and added that "they aren't corn because corn has ears." On January 7, 2010, around 10:32 a.m., after a defendant appearing on a warrant referred to information he had received from a clerk, Judge Salcido stated, "Sir, most of those clerks, I wouldn't trust a guinea pig to. Let alone my freedom."

On May 20, 2010, around 2:30 p.m., during a discussion about a paperwork mix-up in a certain case, Judge Salcido sarcastically said, "however, I was going to say another word, the brilliant people in the back office decided not to file your paperwork in the court's file ... ." Judge Salcido later commented "Aye, aye, aye, aye, aye. This is what I have to work with, all right, every day."

16. On February 22, 2010, around 10:11 a.m., Judge Salcido engaged in banter with the courtroom audience regarding Tiger Woods, during which she stated, "I'm sure he's nice. Ask all the hookers in the nation, he's very nice to them."

17. On February 22, 2010, court operations supervisor Beverly Harris had assigned a backup clerk to Judge Salcido's department who had to leave at 3:30 p.m. Around 3:50 p.m., while waiting for a replacement clerk, the judge made disparaging comments about Harris in open court, some of which referred to an email she had sent to the courtroom clerk earlier that day. The judge's remarks included, "the supervisor decided to send us a clerk that had to leave at 3:30," "That was what they taught them at Management 101 seminars that they go to," and "How to get the most of your employees. Let them know they could be fired." Harris then entered the courtroom; the judge asked her, "Did you know we finish at 5:00?"

18. On February 24, 2010, the defendant in *People v. Henson* appeared without counsel for arraignment on an alleged probation violation. After asking defendant Henson about his relationship with the subject of a protective order issued in the case, Judge Salcido made the following comments:

> Court: Are you guys together or not together?
>
> Defendant: Nope. We haven't been together for like over a year now. But she's the whole reason why I have to keep coming back to court.
>
> Court: She is, or the fact that you broke the law?
>
> Defendant: No, she is. She's –
>
> Court: Oh, you didn't break the law? You're an innocent man on probation?
>
> Defendant: -- All's I've been doing is trying to influence –
>
> Court: You're an innocent man on probation?
>
> Defendant: Yes.
>
> Court: Is that what you're trying to tell me, you're an innocent man? I've met my first innocent man on probation. He's completely innocent, he's on probation?

Defendant: Have, have you went over the case?

Court: Oh my gosh, you're innocent.

19. Between October 2009 and March 2010, when a defendant appearing in department 3 accidentally called Judge Salcido "sir," the judge pushed herself away from the bench while seated in her chair and stated, "Do these look like the clothes of a sir?" She then raised her leg above the bench, holding her leg by the ankle, and stated, "Do these look like the boots of a sir?"

20. On April 27, 2010, around 9:58 a.m., the defendant in case number C267890 appeared without counsel, seeking to modify a term of his probation to allow him to travel out of state. After explaining to him that he was required to "formally notice" a motion to modify the terms of probation, Judge Salcido reappointed the public defender and continued the matter to May 4. After the defendant left the courtroom, the judge handled four other matters, and the recording was stopped at approximately 10:13 a.m. Shortly thereafter, before the recording was restarted, the judge stated to the audience of approximately 30 people, from the bench, words to the effect of: "Do you remember that guy on formal probation?" After someone in the audience said "yes," she said words to the effect of: "You know why I wouldn't modify his probation without going through required procedures?" then said words to the effect that "Because he's a sex offender."

The conduct described above under Count Two demonstrated a pattern of misconduct and violated canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall promote public confidence in the integrity and impartiality of the judiciary), 3B(3) (a judge shall require order and decorum in proceedings), and 3B(4) (a judge shall be patient, dignified, and courteous). It constitutes prejudicial misconduct.

COUNT THREE

On January 7, 2010, around 10:03 a.m., defendant Chadira Gipson appeared in case number C287545 for a change of plea. As set forth below, Judge Salcido took

Gipson into custody for direct contempt without affording her due process or complying with the legal requirements for direct contempt, and without sentencing her; she also directed comments to the courtroom audience that failed to uphold a high standard of conduct:

> Court: Oh, Chadira Gipson.
>
> Counsel: Good morning, Your Honor, Michael Kern appearing on behalf of Ms. Gipson, who's present for the court, before the court out of custody for change of plea to a 415(2) as a misdemeanor.
>
> [¶] ... [¶]
>
> Court: So, the *Chadira Gipson* matter. All right. And it's going to be an added -- what count five?
>
> Counsel: I think that's correct, Your Honor.
>
> Court: A 415(2)?
>
> Counsel: Yes.
>
> [¶] ... [¶]
>
> Court: All right. So, Ms. Gipson, is that how I pronounce your last name?
>
> Defendant: Yes.
>
> Court: Why don't you have her speak next to the microphone. Ms. Gipson, have you had a chance to talk about the facts of this case with your court-appointed attorney?
>
> Defendant: Yes.
>
> Court: Did you get all of your legal questions answered?
>
> Defendant: Yes.

Court: I can't hear you. You need to speak up or use the microphone.

Defendant: Yes.

Court: Thank you. Were the consequences of pleading guilty explained to you?

Defendant: Yes.

Court: Oh, no, no, no, no. Counsel?

Counsel: Yes.

Court: You know how I am with the defendants who don't show the proper respect to the judge. I don't deal well with eye-rolling attitudes. And I am about to sentence her. So maybe you want to take her outside and let her know whose courtroom this is.

Counsel: Sure. We've discussed the case, Your Honor, I just need to --

Court: I just directed you to take her outside --

Counsel: Sure.

Court: And let her know whose house she's in.

Counsel: Thank you.

Court: Mm-hmm. I'm about to sentence her.

Defendant: For what? [or So what?]

Court: Excuse me, go grab her. Yeah, go grab her for direct contempt of court.

Bailiff: Come back in.

Court: I don't play in here. I don't know who you think you're playing with.

Bailiff: Come back in, take a seat.

Court: Put her in, in the tank.

Bailiff: Okay. Come on over here actually.

Court: She's in direct contempt of court.

Bailiff: Come on over here.

Court: For saying "so what" when I said I was about to sentence her.

Defendant: I didn't say it, I said "do what."

Court: Be quiet. Anybody else feel like they're lucky today? [Laughter] I guarantee you we're not in Las Vegas people.

The judge then called a few other matters. Around 10:12 a.m., outside the presence of the defendant, she told defense counsel, "I'm not trying to punish you, counsel, but I'm not ready to deal with her yet." After further discussion, counsel asked Judge Salcido if she would recall the case. The judge said, "Not right now," and then called two other matters.

At 10:22 a.m., Judge Salcido asked defense counsel if he needed "to go somewhere else because I'm not intending to call her case for a while. [¶] ... [¶] I think she needs some time to reflect. [¶] ... [¶] She has a lot of reflection to do. So, um, do you have to go to any other courtrooms?" When defense counsel responded that he did not, the judge said, "All right. Well, unfortunately, she don't know how to act." Shortly thereafter, Judge Salcido told court staff that she was recusing herself and the case was sent to department 11, where Gipson was released and entered her change of plea. The contempt proceeding was not pursued.

Judge Salcido's conduct in *Gipson* constituted an abuse of authority and demonstrated embroilment. It violated canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a

judge shall promote public confidence in the integrity and impartiality of the judiciary), 3B(2) (a judge shall be faithful to the law), 3B(4) (a judge shall be patient, dignified, and courteous) and 3B(7) (a judge shall accord to every person who has a legal interest in a proceeding the right to be heard). The judge's conduct, at a minimum, constitutes prejudicial misconduct.

## III

## DISCIPLINE

Article VI, section 18, subsection (d) of the California Constitution provides that the commission may "censure a judge ... for action ... that constitutes willful misconduct in office, ... or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Judge Salcido concedes that her conduct as stipulated in the first two counts was prejudicial to the administration of justice that brings the judicial office into disrepute (prejudicial misconduct) and that her conduct as stipulated in the third count constitutes, at minimum, prejudicial misconduct. The purpose of a commission disciplinary proceeding is "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity ... of the judicial system." (*Broadman* v. *Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.) The commission concludes that this purpose is best served by the discipline proposed in the Stipulation: a public censure with an agreement that Judge Salcido will resign and will not at any time seek or hold judicial office in California or seek or accept judicial assignment from any California state court.

Judge Salcido admits that she engaged in thirty-nine separate instances of prejudicial misconduct. "The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing 'lack of temperament and ability to perform judicial functions in an even-handed manner.'[Citation.]" (*Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653; *Inquiry Concerning Judge Bruce Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 296.) The numerous incidents of misconduct as described in the stipulated facts

cannot be characterized as isolated occurrences. Rather, they establish a pattern of misconduct which demonstrates a temperament ill-suited for judicial office.

In many instances, Judge Salcido's misconduct made a mockery of the judicial system. She used her court proceedings as an audition for her own television entertainment program, giving the unseemly appearance of playing to the cameras and the audience. While the cameras were rolling, the proceedings took on the atmosphere of a game show. Defendants were asked if they wanted to use "a life line," and "which door" they wanted to walk out. Another defendant was told "we're doing double or nothing now," and asked if he was prepared to "double down." The judge repeatedly solicited audience participation and even polled the audience: "Can I get a woo, woo?"; "Does he need to call the lifeline?"; asking the audience to repeat the slogan, "Do or do not, there is no try."; "What should he do? Take the deal, take the deal, take the deal." In response, the audience laughed and "wooed" without admonishment from the court. Judge Salcido failed to appreciate that "a courtroom is not the Improv and the presider's role model is not Judge Judy." (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1008.) The judge's showmanship behavior together with her statement to the producer that she would line up her more interesting cases for the day of the filming created the appearance that she was more interested in promoting herself for a role in a television show than in delivering justice to those who appeared before her.

It is self-evident that crude comments and sexually suggestive jokes from a judge have no place in a courtroom. Yet, Judge Salcido made manifestly inappropriate remarks of a lewd nature in an open courtroom as the proceedings were being filmed. For instance, she ordered a defendant charged with exposing himself in public to stay away from a certain location because "they'll recognize you in more ways than one." When a defendant smiled, she remarked to him that "they might like your smile in jail." In a particularly offensive instance, she told a defendant that he would be "screwed" if he violated his probation and "we don't offer Vaseline for that." We have previously condemned joking or making a casual comment about the possibility of an inmate having to endure same gender rape while incarcerated, which "may be perceived as not only an

indifference to and acceptance of a tragic reality in our criminal justice system, but as a perhaps unintended admission of its inevitability under present conditions." (*Public Admonishment of Judge Susanne S. Shaw* (2000), p. 15.)

Even when not auditioning for her own television show, Judge Salcido engaged in conduct that was seriously at odds with her duty under the canons to be patient, dignified and courteous to litigants, attorneys, and those with whom she deals in an official capacity and to maintain decorum in the proceedings. (Code of Judicial Ethics, canons 3B(3), (4).) In open court, the judge ridiculed and belittled litigants, referred to court clerical staff as "cucumbers" who "aren't even potatoes because potatoes have eyes" or "corn because corn have ears," ridiculed a deputy district attorney, and made several disparaging remarks about an assistant public defender, often in the presence of his potential client. When a defendant accidentally called her "sir," Judge Salcido demonstrated a disturbing lack of decorum by raising her leg above the bench, holding her leg by the ankle, and stating, "Do these look like the boots of a sir?"

We appreciate that each judge has his or her own style, and that "a modest injection of humor at the appropriate time" can have a place in the courtroom. (Rothman, Cal. Judicial Conduct Handbook, (3d ed. 2007) § 3.42, p. 140.) "However, the cultivation of a particular judicial personality may not be used as an excuse for unethical conduct. ... regardless of the judge's style, she or he must respect the litigants and attorneys who appear in her or his court." (*Public Admonishment of Judge Susanne S. Shaw* (2000), p. 14.) Judicial humor should never be used in a courtroom, as it was by Judge Salcido, to ridicule, embarrass or disparage others, or in a manner that diminishes the dignity of the judicial process. Judge Salcido's brand of "humor," as exemplified by the stipulated facts is, without question, unbefitting a judge.

The utter lack of decorum and inappropriate judicial demeanor exhibited in the stipulated misconduct reflects poorly, not only on Judge Salcido, but on the reputation of the entire judiciary. "The public looks to judges to set the tone of judicial proceedings." (*Inquiry Concerning Judge Bruce Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 312.) Unfortunately, the tone set by Judge Salcido was undignified, unprofessional, and

degrading to litigants, attorneys and court staff. Members of the public observing the proceedings on the day the producer was filming could not help but wonder if they were in a courtroom or on the set of a reality television program. On other occasions, her courtroom took on a comedy show atmosphere. She told the courtroom audience that they had no sense of humor, stating: "God, you guys are dead, you guys are like, dead. I'm like, God, I need a warm up, I need a warm up comedian before I come out. Okay, Yes, sir. Are you ready? You're volunteering? ... We're getting fun back in the courthouse. Fun, courthouse, they don't have to be separate." Judges are expected to administer justice and resolve serious issues, not to provide entertainment. Judge Salcido's misconduct cheapens the dignity of the court and undermines public confidence in and respect for the judicial system.

Judge Salcido's misconduct also includes abuse of authority and embroilment through her incarceration of a defendant for direct contempt without affording the defendant due process or complying with the requisite legal procedures. The importance of strict adherence to statutory and constitutional procedural requirements before exercising the "ultimate weapon" of contempt has been repeatedly emphasized by the Supreme Court and this commission. (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533; *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1314; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 694; *Public Admonishment of Judge Lisa Guy-Schall* (1999), p. 1; see also *Koehler v. Superior Court of San Mateo County* (2010) 181 Cal.App.4th 1153, 1171.) It should have been apparent to Judge Salcido that she could not summarily remand a defendant to custody for what she perceived to be contemptuous conduct without affording the defendant any due process.

Based on the totality of the judge's misconduct, we conclude that the stipulated disposition, including the judge's agreement to resign and not thereafter hold judicial office or accept judicial assignment, is in the best interest of the public and the reputation of the judiciary. In accordance with the terms of the Stipulation, and good cause appearing, we hereby censure Judge DeAnn Salcido.

Commission members Hon. Katherine Feinstein, Mr. Anthony P. Capozzi, Esq., Hon. Frederick P. Horn, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, and Mr. Nathaniel Trives voted to accept the Stipulation and to issue this decision and order. Commission members Hon. Judith D. McConnell and Mr. Peter E. Flores, Jr., Esq. were recused and commission member Mr. Samuel A. Hardage did not participate in this matter.

Dated: November 10, 2010

Honorable Katherine Feinstein
Vice-Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING JUDGE SALVADOR SARMIENTO,**<br><br>**No. 191** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 127)** |

## I

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Salvador Sarmiento, a judge of the Orange County Superior Court since 2003. On February 21, 2012, the commission filed its Notice of Formal Proceedings (Notice) against Judge Sarmiento charging him with attempting to influence an Orange County Superior Court commissioner to waive a $300 civil assessment on his wife's traffic citation and to bypass standard procedures in the setting of a trial date.

The Supreme Court appointed three special masters to hold an evidentiary hearing and to report to the commission. The masters are Hon. Vance W. Raye, Presiding Justice of the Court of Appeal, Third Appellate District, Hon. Suzanne N. Kingsbury, Judge of the El Dorado County Superior Court, and Hon. Ronni B. MacLaren, Judge of the Alameda County Superior Court. Prior to the masters holding an evidentiary hearing, however, Judge Sarmiento and his counsel, Randall A. Miller, Esq., and the examiner for the commission, Gary W. Schons, Esq., (the parties) proposed a stipulated resolution of this inquiry to the commission, as follows.

By a Stipulation for Discipline by Consent (Stipulation), the parties propose, pursuant to Commission Rule 127(b), that this inquiry concerning Judge Sarmiento be resolved with the imposition of a public censure based upon the stipulated facts and legal conclusions. In addition to consenting to the proposed discipline, Judge Sarmiento expressly admits the truth of the stipulated facts and agrees with the stipulated legal

conclusions, including that he engaged in prejudicial misconduct. According to the terms of the Stipulation, Judge Sarmiento also agrees that in its decision and order imposing a public censure, the commission may articulate the reasons for its decision and include explanatory language the commission deems appropriate. Pursuant to the Stipulation, Judge Sarmiento waives hearing, review and any further proceedings.

Judge Sarmiento also executed on June 9, 2012, the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which he admits the truth of the charges as modified by the Stipulation, consents to the imposition of a public censure, and waives review by the California Supreme Court.

This Decision and Order imposing a public censure is issued following the commission's vote (as indicated at the conclusion of this decision) to accept the stipulated agreement. The findings and conclusions, set forth herein, are based on the Stipulation and Affidavit.

## II

## STIPULATED FACTS AND LEGAL CONCLUSIONS

On November 18, 2010, Judge Sarmiento's wife received a traffic citation from the Santa Ana Police Department for violating Vehicle Code section 21950(a) (failing to yield to pedestrian in crosswalk). She intended to challenge the ticket on the basis that the crosswalk was unmarked. The ticket was filed with the court on December 21, 2010. On December 22, a "courtesy notice" was sent by the court to the judge's wife. A courtesy notice lists the cost to pay the ticket (bail), methods for making payment, and the amount due to the court to attend traffic school (bail plus a fee of about $50). The bail amount was $234. The pay-or-appear-by date was January 19, 2011.

No action was taken on the ticket by the January 19 deadline. The matter was referred to the court's collection unit. On January 24, a delinquency notice was sent to the judge's wife. It provided a 10-day grace period to either pay or appear, and stated that failure to do so would result in additional fees that may include a $300 civil assessment and other fees.

No action was taken on the ticket within the grace period, and on Monday, February 7, 2011, a final notice was sent to the judge's wife. The final notice stated that an additional $300 civil assessment (and $25 in other fees) was now owed. The notice stated that if the judge's wife appeared within 10 days of the notice and showed good cause for failure to appear or pay the fine, the court may vacate the civil assessment (referred to as a CIVA). The notice explained that "Good cause may be defined as failure to pay or appear because you were serving military duty overseas, hospitalized, or incarcerated, or for other extraordinary reasons." The final notice also stated that if the judge's wife did not pay in full or show good cause, the court may take certain other action.

A traffic ticket that is not delinquent may be set for trial by a traffic clerk upon posting of bail; it may be set for arraignment without any payment. After a CIVA is added, a collections clerk may set the ticket for trial only upon posting of the original bail plus the CIVA; it may be set for arraignment without any payment. For both delinquent tickets and tickets that are not delinquent, it is the court's policy that staff may set a court date at the counter window only upon the appearance of either the ticket recipient or an attorney for the recipient. A trial date for a non-delinquent ticket or a ticket in CIVA status also may be set by a judicial officer, upon the appearance in court of either the ticket recipient or an attorney appearing on his or her behalf. The collections staff does not have the authority to vacate a CIVA unless it can be demonstrated that it was added in error, e.g., that ticket payment in fact was timely made.

Judge Sarmiento has been a judicial officer in the Orange County Superior Court since July 1997. From July 1997 through late August 2003, he served as a commissioner. Since then he has been a judge. Judge Sarmiento has been assigned to department 50 of the Central Justice Center in Santa Ana since approximately February 2010.

In February 2011, traffic matters were being heard in Central in department 54 by Commissioner Carmen Luege, who was hired by the court in June 2009. Departments 50 and 54 are on the second floor, and share a common hallway between the courtrooms and chambers.

On February 9, 2011 around 3:30 p.m., Judge Sarmiento spoke with a traffic clerk about the ticket, in the traffic staff area behind the counter windows. The judge told her that he needed to take care of his wife's ticket, or words to that effect. The clerk accessed the ticket on the court's case management system (called Vision) and told the judge that she could not act on the ticket because it was in collections. She printed out minutes for the ticket and wrote "$609.00" at the top, which is the amount that would have been due to the court for traffic school (original bail of $234, plus the $300 CIVA and $25 in related fees, plus a $50 traffic school fee). The traffic clerk gave the minutes to the judge and referred him to a collections staff member. (At this time traffic staff and collections staff were located in the same area, on the first floor.) The judge spoke briefly with collections staff.

On the morning of Thursday, February 10, 2011, the judge approached Commissioner Luege about his wife's ticket, during a brief break in her traffic calendar. Judge Sarmiento initially greeted the commissioner in the hallway in back of the courtrooms. He then walked with her into the entryway area of her chambers, where they stood and talked.

Judge Sarmiento told Commissioner Luege that his wife got a ticket, that it had been sitting on his desk but he had forgotten about it, and that there was now a civil assessment. Commissioner Luege does not recall the judge's exact words. Judge Sarmiento admits that he asked Commissioner Luege to address the CIVA. He admits that in doing so, he was seeking to have her vacate the CIVA.

Commissioner Luege responded by saying that she had to get back to court, and would get back to him. The commissioner did not intend to remove the CIVA, but wanted time to think about how to tell Judge Sarmiento "no" in a way that would not be offensive to him.

Judge Sarmiento then left a folded piece of paper on the commissioner's desk without saying what it was. Commissioner Luege returned to her courtroom without looking at the paper left by the judge. When she returned to chambers after the morning

traffic calendar had concluded, she discovered that it was the minutes for his wife's ticket containing the clerk's original "$609.00" notation at the top.

Judge Sarmiento's regular courtroom clerk was absent on February 10, and a substitute clerk was filling in. After Judge Sarmiento concluded his afternoon calendar on February 10, he gave the substitute clerk a copy of the courtesy notice for his wife's ticket and asked him to check the status of the ticket. The substitute clerk accessed the ticket on Vision and told Judge Sarmiento that the last action taken was the addition of the CIVA. The judge responded that he was going to talk to "Carmen," and left.

Around 4:00 p.m., Judge Sarmiento returned to Commissioner Luege's chambers, where she was sitting at her desk reviewing correspondence. He told her that he had checked and that she had not done anything on the ticket, or words to that effect. He asked whether he could "at least get a trial date." When the commissioner said that she was not sure that she could give him a trial date, the judge did not respond. The commissioner then told Judge Sarmiento that she would give him a trial date.

She walked into the traffic courtroom with the judge. The regular courtroom clerk had temporarily stepped out. The commissioner instructed the backup clerk (who had only a few weeks of experience with traffic matters) to set a trial date for the ticket; the commissioner said nothing regarding the CIVA. The backup clerk provided a trial date of March 16, 2011. The commissioner and the judge left the courtroom. Judge Sarmiento admits that in approaching Commissioner Luege in the afternoon, he bypassed normal procedures for obtaining a trial date, and sought and obtained favorable treatment on behalf of his wife.

Thereafter, without consulting Commissioner Luege (and not at the instruction of Judge Sarmiento), the backup clerk accessed the ticket on Vision and made various entries, including entries vacating the CIVA and related fees. Shortly thereafter, the regular clerk returned to the courtroom and learned what the backup clerk had done; this was then brought to the attention of Commissioner Luege. At the commissioner's direction, later that afternoon, the backup clerk corrected the erroneous entries vacating the CIVA and related fees.

During the period after the backup clerk had vacated the CIVA and related fees, but before those erroneous entries were corrected, Judge Sarmiento went downstairs to the collections staff area to post bail. When the collections clerk accessed the ticket, bail was listed at $234 (the original bail) because the entries vacating the CIVA had not yet been corrected. The judge paid $234.

On March 16, 2011, the judge's wife entered a guilty plea and the CIVA and related fees were paid.

Judge Sarmiento's conduct violated the Code of Judicial Ethics, canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 2B(1) (a judge shall not allow family, social or other relationships to influence the judge's judicial conduct or judgment), 2B(2) (judge shall not lend the prestige of judicial office to advance pecuniary or personal interest of judge or others), and and 3B(7) (improper ex parte communications prohibited). The judge's conduct constitutes prejudicial misconduct.

## III

## DISCIPLINE

By attempting to influence another judicial officer on behalf of his wife, Judge Sarmiento engaged in serious judicial misconduct which severely damages the reputation of the judiciary. The public has a right to expect that justice will be dispensed with an even hand and without favoritism. Judge Sarmiento's conduct makes it more difficult for judges throughout the state to maintain the trust and respect of the public. The commission recently emphasized that the use of the judicial office to provide procedural shortcuts or lenient dispositions to family and friends in traffic matters "subverts the impartiality of the judicial system and undermines respect for the judiciary as a whole." (*Inquiry Concerning Stanford* (2012) 53 Cal.4th CJP Supp. 1, 25.) We issue this public censure in an effort to restore public confidence in the integrity and impartiality of the judiciary.

Judge Sarmiento's misconduct is aggravated by the fact that he requested preferential treatment from his subordinate, a commissioner, who is employed by the court. This placed the commissioner in the uncomfortable position of having to find a way to say "no" to the judge without offending her superior.

While Judge Sarmiento's misconduct is seriously at odds with a judge's duty to uphold the impartiality and integrity of the judiciary, we have determined that censure rather than removal is the appropriate discipline because we are not convinced, based on this single incident of misconduct, that Judge Sarmiento lacks "the temperament and ability to perform judicial functions in an even-handed manner." (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing "lack of temperament and ability to perform judicial functions in an even-handed manner."].) The judge's lack of prior discipline for similar misconduct during his lengthy tenure as a judicial officer contributes to this conclusion.

In assessing whether removal is necessary to fulfill our mandate to protect the public, we consider the likelihood of future misconduct. An appreciation for the impropriety of one's actions is essential to a willingness and capacity to reform. (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp 227, 248 ["A judges failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform."].) By the terms of the Stipulation, Judge Sarmiento acknowledges engaging in serious misconduct that warrants the imposition of this severe sanction.

We conclude that the purpose of judicial discipline – protection of the public, enforcement of rigorous standards of judicial conduct and the maintenance of public confidence in the integrity and independence of the judicial system – can be accomplished through a censure. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112.) Accordingly, the commission hereby imposes this public censure of Judge Sarmiento. (Cal. Const. art. VI, §18 (d).)

Commission members Mr. Lawrence J. Simi, Hon. Erica R. Yew, Anthony P. Capozzi, Esq., Hon. Judith D. McConnell, Nanci E. Nishimura, Esq., Ms. Maya Dillard Smith, Ms. Sandra Talcott, Mr. Adam N. Torres, and Mr. Nathaniel Trives voted to accept the parties' settlement proposal and to issue this decision and order imposing a public censure pursuant to the stipulated agreement. Commission member Hon. Frederick P. Horn was recused. Commission member Ms. Mary Lou Aranguren did not participate.

Dated: July 5, 2012



Lawrence J. Simi
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING<br>FORMER JUDGE PAUL D. SEEMAN | DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BAR PURSUANT TO STIPULATION<br>(Commission Rule 116.5) |

This disciplinary matter concerns Paul D. Seeman, a former judge of the Alameda County Superior Court. Mr. Seeman served as a court commissioner from August 2, 2004, until he was appointed to the bench on March 27, 2009. The commission authorized a preliminary investigation in this matter on June 29, 2011, pursuant to which the commission sent its preliminary investigation letter to Mr. Seeman on February 1, 2013.

Mr. Seeman resigned from the bench on March 19, 2013. On August 1, 2013, Mr. Seeman pled no contest to one felony charge of elder abuse (Pen. Code, § 368(d)) and one felony charge of perjury (Pen. Code, § 118(a)). Mr. Seeman was sentenced on October 22, 2013.

After settlement negotiations with commission staff counsel, Mr. Seeman and his counsel agreed to propose that the pending preliminary investigation be resolved by the imposition of a censure and bar. Mr. Seeman and his counsel have stipulated, pursuant to commission rule 116.5, to the imposition of a public censure and bar prohibiting Mr. Seeman from seeking or holding judicial office, or accepting a position or an assignment as a judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accepting a reference of work from any California state court, at any time in the future.

The Stipulation for Imposition of Censure and Bar ("Stipulation") was approved by the commission on December 5, 2013, pursuant to the following terms and conditions as set forth in the Stipulation.

## TERMS AND CONDITIONS OF STIPULATION

1. This agreement resolves the preliminary investigation out of which the preliminary investigation letter of February 1, 2013, arose.

2. The commission has jurisdiction over the matter pursuant to article VI, section 18, of the California Constitution. The allegations before the commission are sufficiently serious to warrant the institution of formal proceedings pursuant to that section of the Constitution.

3. The settlement provided by this agreement is in the best interests of both the commission and Mr. Seeman because, among other reasons, it adequately protects the public and will avoid the delay and costs of formal proceedings.

4. The commission shall issue a censure and bar based on the agreed Stipulated Facts and Legal Conclusions set forth herein. Mr. Seeman has agreed to accept a censure and bar, which is the maximum discipline the commission can impose on a former judge.

5. Mr. Seeman resigned from his position as a judge with the Alameda County Superior Court on March 19, 2013.

6. Mr. Seeman has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time in the future.

7. Mr. Seeman has agreed to be disbarred by the State Bar of California.

8. If Mr. Seeman fails to comply with any of the terms and conditions of this agreement, the commission may withdraw the censure and bar and resume its investigation. Failure to comply with the terms and conditions of this agreement will constitute additional and independent grounds for discipline.

9. Mr. Seeman waives any further proceedings and review in this matter, including any further response to the preliminary investigation letter (commission rule 111(a)), formal proceedings (commission rule 118, et seq.), and review by the California Supreme Court (Cal. Rules of Court, rule 9.60).

STIPULATED FACTS AND LEGAL CONCLUSIONS

## I. Misconduct Relating to Mr. Seeman's Handling of Anne Nutting's Financial Affairs

In 1998, Paul Seeman was an attorney living across the street from Lee and Anne Nutting. Lee Nutting was 89 years old. Anne Nutting was 85 years old. They had no children and no family or friends living nearby. Mr. Seeman did not know the Nuttings well.

In December 1998, the Nuttings' home was deemed unsuitable for habitation due to an accumulation of possessions and lack of upkeep, so they moved to a hotel. Mr. Seeman offered to help them obtain permission to return to their home. They agreed.

In January 1999, Mr. Seeman entered into a written retainer agreement for legal services with the Nuttings regarding their home, estate planning, and other miscellaneous matters. At that time, Mr. Seeman had almost no experience with estate planning. Mr. Seeman began billing the Nuttings for professional services and continued to do so monthly until at least the end of July 2004.

Also in January 1999, Mr. Seeman had the Nuttings each execute a Durable Power of Attorney ("DPOA"), which Mr. Seeman had prepared. Mr. Seeman was named as the agent for the principal in each DPOA. Mr. Seeman did not advise the Nuttings in writing that they should seek independent counsel before signing the documents.

Mr. Seeman discovered that the Nuttings' financial affairs were in a state of disarray. The Nuttings gave Mr. Seeman access to their home, where he found numerous stock certificates, which he collected and took to a broker who set up a brokerage account for the Nuttings that had a beginning value in excess of $1,000,000.

Mr. Seeman also helped the Nuttings with their taxes. He retained a tax accountant for them and began paying their taxes. At times, he had Mrs. Nutting make out checks for "taxes" that were payable to him personally, rather than to the Internal Revenue Service or the Franchise Tax Board.

In December 1999, Mr. Nutting passed away.

In January 2000, Mr. Seeman opened a client trust account with funds belonging to Mrs. Nutting (the "Trust Account"). Mrs. Nutting periodically gave Mr. Seeman checks to deposit into the Trust Account. From 2000 until 2010, Mr. Seeman maintained a Quicken ledger to record the debits and credits for the Trust Account.

In early 2004, Mr. Seeman applied for the position of commissioner with the Alameda County Superior Court.

In June 2004, when Mrs. Nutting was 91 years old, Mrs. Nutting's stock brokerage account was changed from an account for which Mr. Seeman had a power of attorney to an account naming him as the pay-upon-death beneficiary. As long as Mr. Seeman was the pay-upon-death beneficiary of the account, if Mrs. Nutting predeceased him, he would have obtained sole ownership of the account, which was worth approximately $2,000,000.

Around the same time, Mr. Seeman's name was added to two of Mrs. Nutting's bank accounts. One account contained approximately $200,000 and the other account contained approximately $250,000. If Mrs. Nutting had predeceased Mr. Seeman, he would have obtained sole ownership of each account.

In July 2004, Mr. Seeman prepared a will for Mrs. Nutting that named 13 different charitable organizations as the beneficiaries of her estate and named his wife as the executor of her estate. He also prepared a declaration of trust in which he was designated as the successor trustee and sole beneficiary, and a second declaration of trust in which his wife was the successor trustee and he was the sole beneficiary. The sole asset of each trust was Mrs. Nutting's residence. Mrs. Nutting decided not to sign these draft trust documents.

On August 2, 2004, Mr. Seeman became a court commissioner.

After Mr. Seeman became a commissioner, he continued to handle some of Mrs. Nutting's financial affairs, including her taxes and payment of utilities and other expenses via the Trust Account, in the same manner as he had before he became a commissioner, and he continued to act as her fiduciary.

In August 2004, Mr. Seeman changed the Trust Account from a client trust account to a joint account between himself and Mrs. Nutting. If Mrs. Nutting predeceased him, Mr. Seeman would have obtained sole ownership of the funds in the Trust Account.

Between 2004 and 2010, Mr. Seeman on a number of occasions commingled his personal funds with Mrs. Nutting's funds in the Trust Account and failed to keep a proper accounting of the Trust Account.

Between 2004 and 2006, Mr. Seeman used money in the Trust Account to pay some of his personal American Express bills. These transactions totaled over $5,000.

On September 10, 2004, Mr. Seeman borrowed approximately $250,000 from Mrs. Nutting. He signed an unsecured "Simple Promissory Note" for $250,000 at 3 percent interest, with monthly interest payments to be made on the first of every month, starting in November 2004. Mr. Seeman made interest-only payments for eight months and then stopped making any payments after July 2005.

In May 2007, Mrs. Nutting contacted an attorney who directed Mr. Seeman to remove his name from all of her accounts and to take no further action with respect to her affairs. Mr. Seeman did not comply with this directive, and he continued to use and control the Trust Account, and could have accessed the other accounts from which he did not remove his name.

On March 27, 2009, Mr. Seeman became a judge. He continued to handle Mrs. Nutting's financial affairs, including her taxes and payment of utilities and other expenses via the Trust Account, and he continued to act as her fiduciary.

From 2000 until 2010, Mr. Seeman had exclusive access to and use of the Trust Account. The bank statements for the Trust Account were sent to Mr. Seeman and not to Mrs. Nutting.

In February 2010, Mr. Seeman was asked by an individual acting on Mrs. Nutting's behalf to repay the $250,000 loan he took from Mrs. Nutting. He told Mrs. Nutting that he was still paying the monthly interest payments into the Trust Account. Mr. Seeman's representation was false, and he knew it was false.

Mrs. Nutting died on April 17, 2010.

Mr. Seeman repaid the loan plus interest in November 2010.

On August 1, 2013, Mr. Seeman pled no contest to one charge of felony elder abuse (Pen. Code, § 368(d)) in connection with his handling of Mrs. Nutting's financial affairs.

Mr. Seeman's conduct while he was an attorney constituted a breach of fiduciary duty and violated Probate Code sections 4232 (duty of holder of power of attorney to act solely in the interest of the principal and to avoid conflicts of interest), 4233 (duty of holder of power of attorney to keep property separate and distinct from other property in a manner adequate to identify the property clearly as belonging to the principal), 4236 (duty of holder of power of attorney to keep records of all transactions entered into on behalf of the principal), 21350 (no provision of any instrument shall be valid to make a donative transfer to the person who drafted the instrument), and 21351(b) (draft instrument making donative transfer to person who drafted it must be reviewed by independent attorney); Rules of Professional Conduct, rule 3-300 (attorney

shall not enter into a business transaction with a client, or acquire a pecuniary interest adverse to a client, unless the transaction is fair and reasonable to the client and is fully disclosed in writing to the client, the client is advised in writing that the client may seek the advice of independent counsel and is given the opportunity to do so, and the client consents in writing to the terms of the transaction), rule 4-100 (attorney may not commingle client funds with personal funds), and rule 4-400 (attorney cannot induce a client to make a substantial gift to the attorney); and Penal Code section 368(d) (theft from an elder).

Mr. Seeman's conduct when he was a bench officer violated Penal Code section 368(d) (theft from an elder) and Government Code section 89503 (annual gift limit), and violated the following canons of the Code of Judicial Ethics: canon 1 (a judge shall personally maintain high standards of conduct so the integrity of the judiciary can be preserved), canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities), canon 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity of the judiciary), canon 4D(6) (a judge shall not accept a loan from anyone, with certain exceptions that do not apply here), and canon 4E(1) (a judge shall not serve as executor, . . . attorney in fact, or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties).

**II. Failure to Disclose in Statements of Economic Interests (Form 700's)**

Mr. Seeman signed Statements of Economic Interests (Form 700's) under penalty of perjury on the following dates: February 22, 2005; January 12, 2006; February 14, 2007; January 16, 2008; January 12, 2009; March 27, 2009; April 2, 2009; January 12, 2010; and January 5, 2011. The Form 700's were filed with the Alameda County Superior Court and the Fair Political Practices Commission.

On each of the dates set forth above, Mr. Seeman failed to disclose the $250,000 personal loan he received from Mrs. Nutting. He also failed to disclose investments he made in different properties through Trust Deed Investments, Inc. and the income he received from those investments. Mr. Seeman did disclose income from Trust Deed Investments, Inc. on the January 2011 Form 700. Mr. Seeman also filed an Amended Form 700 in October of 2011, declaring the loan retroactively for 2004.

On August 1, 2013, Mr. Seeman pled no contest to one charge of felony perjury (Pen. Code, § 118(a)) in connection with his failure to disclose on his Form 700's.

Mr. Seeman's conduct violated Penal Code section 118(a) and Government Code section 87200 et seq. His conduct also violated canons 1, 2, and 2A.

**III. False Statement in DMV Application for Title or Registration**

On August 26, 2004, Mr. Seeman filled out a California Department of Motor Vehicles Application for Title or Registration for a car, handwrote that the purchase price of the car was $10,000, and signed the application under penalty of perjury under the laws of the State of California. In fact, the purchase price of the car was $28,045. Mr. Seeman's statement on the application regarding the purchase price of the car was false.

Mr. Seeman's conduct violated Penal Code sections 115 and 118(a), and Vehicle Code section 20. His conduct also violated canons 1, 2, and 2A.

**IV. Improperly Accessing DMV records**

On four occasions, while he was a judge, Mr. Seeman caused court personnel to access Department of Motor Vehicles registration records to obtain information regarding the license plates of vehicles belonging to certain individuals for a purpose unrelated to the faithful discharge of his judicial duties.

Mr. Seeman's conduct violated Vehicle Code section 1808.45. His conduct also violated canons 1, 2, 2A, and 3B(11) (a judge shall not use for any purpose unrelated to judicial duties nonpublic information acquired in a judicial capacity).

DISCIPLINE

Article VI, section 18, subdivision (d) of the California Constitution provides that the commission may "censure a judge or former judge . . . for action . . . that constitutes . . . conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Mr. Seeman has stipulated that his conduct constituted prejudicial misconduct and willful misconduct and seriously undermined the integrity of the judiciary.

The purpose of a commission disciplinary proceeding is not punishment, "but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the

maintenance of public confidence in the integrity . . . of the judicial system." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.) The commission believes that this purpose is best served by the discipline proposed in the Stipulation, which constitutes the maximum discipline that may be imposed by the commission on a former judge.

Accordingly, the commission concludes that the severe sanction of a public censure and bar is necessary for the protection of the public and the reputation of the judiciary. Good cause appearing, the commission hereby censures former judge Paul D. Seeman and bars him from receiving an assignment, appointment, or reference of work from any California state court.

Commission members Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Hon. Thomas M. Maddock; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Lawrence J. Simi; Mr. Richard Simpson; Ms. Maya Dillard Smith; Ms. Sandra Talcott; and Mr. Adam N. Torres voted to issue this decision and order imposing a public censure and bar pursuant to the stipulated disposition. Commission member Ms. Mary Lou Aranguren did not participate.

Dated: December 16, 2013

Honorable Ignazio J. Ruvolo
Commission Member

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE SCOTT STEINER** | **DECISION AND ORDER IMPOSING CENSURE PURSUANT TO STIPULATION (Rule 116.5)** |

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Scott Steiner, a judge at the Orange County Superior Court.

Judge Steiner, acting through his counsel, Paul S. Meyer, Esq., and commission staff counsel proposed to settle the preliminary investigation instituted by the commission in this matter through the issuance of a public censure under the terms and conditions stated below, and upon the stipulated statement of facts and conclusions of law. A Stipulation for Discipline by Consent (Stipulation) signed and executed by Judge Steiner, Mr. Meyer, and Victoria B. Henley, Director-Chief Counsel of the Commission on Judicial Performance is attached to this decision and order. Pursuant to rule 116.5 of the Rules of the Commission on Judicial Performance, the proposed Stipulation was approved by the commission on August 20, 2014.

The terms and conditions of the Stipulation provide that, upon approval of the Stipulation, the commission shall resolve the matters alleged in the pending preliminary investigation with the issuance of a censure based upon the agreed stipulated facts and legal conclusions. Further, the parties agree that the commission's decision and order imposing a censure will be made public and the commission may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

In signing the Stipulation, Judge Steiner expressly admits that the stipulated facts are true and that he agrees with the stated legal conclusions, and waives any further proceedings and review in this matter including formal proceedings and review by the Supreme Court. Accordingly, pursuant to article VI, section 18(d) of the California Constitution, the commission issues this public censure based on the following stipulated statement of facts and conclusions of law:

## STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Steiner has been a judge of the Orange County Superior Court since January 2011.

### I. Engaging in Sexual Activity in Chambers

Judge Steiner engaged in sexual activity in his chambers on multiple occasions, with two women with whom he was engaged in personal relationships. This included engaging in sexual intercourse with Ms. A. in his chambers on one occasion in the evening in early 2012 and engaging in sexual intercourse with Ms. B. in his chambers on two occasions during the work day, although not while court was in session, in May 2012. Both women were former students in law school classes taught by the judge; Ms. A. had been an intern working for the judge, and Ms. B. was an attorney practicing before the Orange County Superior Court.

Judge Steiner's conduct constituted failure to observe high standards of conduct, failure to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, failure to conduct himself in a manner that does not demean the judicial office, and misuse of court facilities. Judge Steiner's conduct was contrary to the California Code of Judicial Ethics, canon 1, which requires judges to personally observe high standards of conduct so that the integrity and independence of the judiciary will be preserved; canon 2A, which requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and canon 4A(2), which requires judges to conduct all of their extrajudicial activities so

that they do not demean the judicial office. Judge Steiner's conduct constituted, at a minimum, conduct prejudicial to the administration of justice that brings the judiciary into disrepute.

While certain media reports raised concerns that the judge's relationship with Ms. B. may have involved a "quid pro quo" arrangement in which the judge assisted Ms. B., an attorney, in obtaining employment in exchange for sex, there was a lack of evidence of any such "quid pro quo" arrangement and an insufficient basis for further proceedings regarding the nature of the relationship.

## II. Contacting Attorneys in District Attorney's Office Regarding Ms. A.'s Employment Application

When Ms. A. applied for a position with the Orange County District Attorney's Office, Judge Steiner wrote her a letter of recommendation. Ms. A. was interviewed for the position on or about February 14, 2012. She was not called back for a further interview.

Thereafter, Judge Steiner called the district attorney's office and asked about the interview process of Ms. A. When informed by an attorney who at one time had been his supervisor that Ms. A. had not passed the initial interview, Judge Steiner made a statement to the effect of, "Well, I guess writing a letter of recommendation means nothing." He sounded perplexed and irritated. Judge Steiner had also contacted another attorney in the office after sending a letter of recommendation for Ms. A. The judge asked whether his letter of recommendation had been received. He later asked the same attorney about the interview process and why Ms. A. had not been hired, and asked whether there was anything specific about Ms. A. that could use improvement.

In his contacts, Judge Steiner did not ask that any particular action be taken with respect to Ms. A.'s application, such as requesting that it be reconsidered. Judge Steiner had worked in the Orange County District Attorney's Office before he became a judge, and the persons to whom he spoke were a former colleague and an attorney who at one time had been his supervisor. Although Judge Steiner's contacts were with a former

colleague and supervisor, attorneys in the district attorney's office regularly appeared before Judge Steiner.

Canon 2B(2) prohibits judges from lending the prestige of judicial office to advance the pecuniary or personal interests of the judges or others. One exception to canon 2B(2) permits judges to serve as a reference or provide a letter of recommendation based on their personal knowledge (canon 2B(2)(e)). Judge Steiner's conduct in initiating contact with the district attorney's office about the employment application of Ms. A., at or around the time he was engaged in a sexual relationship with Ms. A., in order to follow up on a letter of recommendation he had sent on Ms. A.'s behalf, asking questions about the interview and hiring processes, and expressing irritation that his recommendation had not resulted in her hiring, exceeded the scope of conduct permitted by canon 2B(2)(e). This conduct also was contrary to canon 2B(1), which provides that a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment, and shall not convey the impression that any individual is in a special position to influence the judge. In addition, the conduct violated canon 2A, which provides that judges shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The conduct was, at a minimum, conduct prejudicial to the administration of justice that brings the judiciary into disrepute.

## III. Assigning Ms. B's Cases to Other Judges After Disqualifying

After Judge Steiner became involved in a sexual relationship with Ms. B., he began disqualifying himself from cases in which she appeared before him. However, in several instances, Judge Steiner disqualified himself from her cases, which had previously been set for trial or hearing, and then assigned those cases to other judges.

Code of Civil Procedure section 170.3 provides that if a judge determines himself or herself to be disqualified, the judge "shall notify the presiding judge of the court of his or her recusal and shall not further participate in the proceeding, except as provided in Section 170.4, unless his or her disqualification is waived by the parties . . . ."

Code of Civil Procedure section 170.4 provides, in pertinent part:

> (a) A disqualified judge, notwithstanding his or her disqualification may do any of the following:
> (1) Take any action or issue any order necessary to maintain the jurisdiction of the court pending *the assignment of a judge not disqualified.*
> (2) Request *any other judge agreed upon by the parties* to sit and act in his or her place.
> (3) Hear and determine purely default matters.
> (4) Issue an order for possession prior to judgment in eminent domain proceedings.
> (5) Set proceedings for trial or hearing.
> (6) Conduct settlement conferences.

(Italics added.)

Judge Steiner has expressed the belief that assigning the cases was within the spirit of the limited acts he was permitted to perform once disqualified. However, assigning a case to another judge is not among the actions the Code of Civil Procedure allows a disqualified judge to take. While a disqualified judge may set proceedings for trial or hearing, this does not mean that a disqualified judge may assign the trial or hearing to a specific judge at that time, particularly in view of the italicized provisions above.

Judge Steiner's conduct in assigning cases in which he was disqualified to other judges was contrary to canon 2A, which requires judges to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; canon 3B(2), which requires judges to be faithful to the law; and canon 3E(1), which requires judges to disqualify themselves in any proceeding in which disqualification is required by law. The conduct constituted conduct prejudicial to the administration that brings the judiciary into disrepute.

## IV. Failure to Disqualify as to Attorney Steven Baric

Judge Steiner and attorney Steven Baric are longstanding and very close friends, but did not have any common financial interests. Despite their very close friendship, Judge Steiner failed to disqualify when Mr. Baric appeared before him. In the case of *People v. Patten*, 11CM15072, Mr. Baric and the prosecution made multiple appearances

before the judge for the purpose of seeking continuances; Judge Steiner did not disqualify himself, although the judge believes that he made an oral disclosure, and the record reflects no disclosure of their relationship.

Canon 3E(1) requires a judge to disqualify in any proceeding in which disqualification is required by law. Canon 3E(2) requires a judge to disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.

Judge Steiner has expressed the view that disclosure, rather than disqualification, may be sufficient, despite the existence of a close, longstanding friendship, where an attorney's appearance is for an uncontested motion or does not involve an issue of substance. However, unless the proceedings are among those listed in Code of Civil Procedure section 170.4, *supra*, or disqualification is waived, a judge who has a disqualifying relationship, such as a very close longtime friendship, may not preside. Disclosure is not sufficient when disqualification is required.

Judge Steiner's conduct in failing to disqualify himself as to Mr. Baric was contrary to canon 3E(1), and constituted prejudicial misconduct.

**V. Mitigation**

In mitigation, the commission noted that Judge Steiner has expressed great remorse and contrition regarding his conduct in engaging in sexual activity in chambers with two women with whom he was involved in personal relationships. The judge acknowledges wrongdoing and apologizes.

## DISCIPLINE

Under the California Constitution, imposition of a public censure is the most severe sanction that can be imposed on an active California judge short of removal. (Cal. Const. Art. I, § 18(d).) In accepting this Stipulation, the commission has determined that imposition of a censure is appropriate and necessary to fulfill the commission's mandate

to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and independence of the judiciary.

Judges are expected to maintain and personally observe "high standards of conduct" and "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (Canons 1, 2A.) "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." (Canon 2A advisory committee commentary.) In the commission's view, engaging in sexual intercourse in the courthouse is the height of irresponsible and improper behavior by a judge. It reflects an utter disrespect for the dignity and decorum of the court and is seriously at odds with a judge's duty to avoid conduct that tarnishes the esteem of the judicial office in the public's eye. In addition, by engaging in sexual activity in chambers during court hours, Judge Steiner risked exposing court employees who might overhear or otherwise become aware of the libidinous conduct to a hostile work environment. As Judge David M. Rothman states in his California Judicial Conduct Handbook, when a judge's sexual conduct is not conducted in private or "takes place on public property or by use of public resources, the conduct moves from private to public concern and demeans the judicial office under canon 4A(2)." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 8.71, p. 439.)

In determining that censure is the appropriate sanction in this matter, the commission has taken into consideration that Judge Steiner has acknowledged wrongdoing and expressed remorse and contrition. An appreciation for the impropriety of one's actions indicates a capacity to reform. (*Censure of Judge Salvador Sarmiento* (2012) p. 7.) As such, the commission believes this censure adequately protects the public.

Judge Steiner's other misconduct involving his contacts with the district attorney's office on Ms. A.'s behalf and failure to disqualify would alone not warrant a censure in the commission's view. However, consideration of these incidents of misconduct in aggregate with the misconduct related to the judge's sexual activities bolsters the commission's conclusion that censure is the appropriate sanction. (*Fletcher v.*

*Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [the number of incidents of misconduct is relevant in determining the appropriate level of discipline].)

Accordingly, the commission hereby imposes this public censure on Judge Steiner.

Commission members Hon. Erica R. Yew; Ms. Mary Lou Aranguren; Hon. Thomas M. Maddock; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Lawrence J. Simi; Mr. Richard Simpson and Mr. Adam N. Torres voted to accept the parties' settlement proposal and to issue this decision and order imposing public censure pursuant to the stipulated agreement. Commission members Anthony P. Capozzi, Esq.; Ms. Maya Dillard Smith and Ms. Sandra Talcott voted to reject the proposed settlement, dissent from this decision and order imposing public censure, and would have instituted formal proceedings.

Dated: September 2, 2014

Honorable Erica R. Yew
Chairperson

# STIPULATION

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING JUDGE SCOTT STEINER | STIPULATION FOR DISCIPLINE BY CONSENT (Rule 116.5) |

Pursuant to Rules of the Commission on Judicial Performance, rule 116.5, Judge Scott Steiner, of the Orange County Superior Court, represented by counsel, and counsel for the commission ("the parties") submit this proposed disposition of the matters set forth in the commission's preliminary investigation letter dated February 18, 2014. The parties request that the commission resolve this matter by imposition of a censure. The settlement provided by this agreement is in the best interests of both the commission and Judge Steiner because, among other reasons, it adequately protects the public and will avoid the delay and the expense of further proceedings.

## TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Scott Steiner.

2. The commission shall issue a censure based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing a censure may articulate the reasons

for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Steiner waives any further proceedings and review in this matter, including formal proceedings (commission rules 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Steiner.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a censure on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions:

## STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Steiner has been a judge of the Orange County Superior Court since January 2011.

**I. Engaging in sexual activity in chambers**

Judge Steiner engaged in sexual activity in his chambers on multiple occasions, with two women with whom he was engaged in personal relationships. This included engaging in sexual intercourse with Ms. A. in his chambers on one occasion in the evening in early 2012 and engaging in sexual intercourse with Ms. B. in his chambers on two occasions during the work day, although not while court was in session, in May 2012. Both women were former students in law school classes taught by the judge; Ms. A. had been an intern working for the judge, and Ms. B. was an attorney practicing before the Orange County Superior Court.

Judge Steiner's conduct constituted failure to observe high standards of conduct, failure to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, failure to conduct

himself in a manner that does not demean the judicial office, and misuse of court facilities. Judge Steiner's conduct was contrary to the California Code of Judicial Ethics, canon 1, which requires judges to personally observe high standards of conduct so that the integrity and independence of the judiciary will be preserved; canon 2A, which requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and canon 4A(2), which requires judges to conduct all of their extrajudicial activities so that they do not demean the judicial office. Judge Steiner's conduct constituted, at a minimum, conduct prejudicial to the administration of justice that brings the judiciary into disrepute.

While certain media reports raised concerns that the judge's relationship with Ms. B. may have involved a "quid pro quo" arrangement in which the judge assisted Ms. B., an attorney, in obtaining employment in exchange for sex, there was a lack of evidence of any such "quid pro quo" arrangement, and an insufficient basis for further proceedings regarding the nature of the relationship.

## II. Contacting attorneys in District Attorney's Office regarding Ms. A.'s employment application

When Ms. A. applied for a position with the Orange County District Attorney's Office, Judge Steiner wrote her a letter of recommendation. Ms. A. was interviewed for the position on or about February 14, 2012. She was not called back for a further interview.

Thereafter, Judge Steiner called the District Attorney's Office and asked about the interview process of Ms. A. When informed by an attorney who at one time had been his supervisor that Ms. A. had not passed the initial interview, Judge Steiner made a statement to the effect of, "Well, I guess writing a letter of recommendation means nothing." He sounded perplexed and irritated. Judge Steiner had also contacted another attorney in the office after sending a letter of recommendation for Ms. A. The judge asked whether his letter of recommendation had been received. He later asked the same attorney about the

interview process and why Ms. A. had not been hired, and asked whether there was anything specific about Ms. A. that could use improvement.

In his contacts, Judge Steiner did not ask that any particular action be taken with respect to Ms. A.'s application, such as requesting that it be reconsidered. Judge Steiner had worked in the Orange County District Attorney's Office before he became a judge, and the persons to whom he spoke were a former colleague and an attorney who at one time had been his supervisor. Although Judge Steiner's contacts were with a former colleague and supervisor, attorneys in the District Attorney's Office regularly appeared before Judge Steiner.

Canon 2B(2) prohibits judges from lending the prestige of judicial office to advance the pecuniary or personal interests of the judges or others. One exception to canon 2B(2) permits judges to serve as a reference or provide a letter of recommendation based on their personal knowledge (canon 2B(2)(e)). Judge Steiner's conduct in initiating contact with the District Attorney's Office, at or around the time he was engaged in a sexual relationship with Ms. A., about the employment application of Ms. A., to follow up on a letter of recommendation he had sent on Ms. A.'s behalf, ask questions about the interview and hiring processes, and express irritation that his recommendation had not resulted in her hiring, exceeded the scope of conduct permitted by canon 2B(2)(e), and also was contrary to canon 2B(1), which provides that a judge shall not allow family, social political or other relationships to influence the judge's judicial conduct or judgment, and shall not convey the impression that any individual is in a special position to influence the judge. In addition, the conduct violated canon 2A, which provides that judges shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The conduct was, at a minimum, conduct prejudicial to the administration of justice that brings the judiciary into disrepute.

## III. Assigning Ms. B's cases to other judges after disqualifying

After Judge Steiner became involved in a sexual relationship with Ms. B., he began disqualifying from her cases when she appeared before him. However, in several instances, Judge Steiner disqualified from her cases, which had previously been set for trial or hearing, and then assigned those cases to other judges.

Code of Civil Procedure section 170.3 provides that if a judge determines himself or herself to be disqualified, the judge "shall notify the presiding judge of the court of his or her recusal and shall not further participate in the proceeding, except as provided in Section 170.4, unless his or her disqualification is waived by the parties...."

Code of Civil Procedure section 170.4 provides, in pertinent part:

> (a) A disqualified judge, notwithstanding his or her disqualification may do any of the following:
>
> (1) Take any action or issue any order necessary to maintain the jurisdiction of the court pending *the assignment of a judge not disqualified.*
>
> (2) Request *any other judge agreed upon by the parties* to sit and act in his or her place.
>
> (3) Hear and determine purely default matters.
>
> (4) Issue an order for possession prior to judgment in eminent domain proceedings.
>
> (5) Set proceedings for trial or hearing.
>
> (6) Conduct settlement conferences.

(Italics added.)

Judge Steiner has expressed the belief that assigning the cases was within the spirit of the limited acts he was permitted to perform once disqualified. However, assigning a case to another judge is not among the actions the Code of Civil Procedure allows a disqualified judge to take. While a disqualified judge

may set proceedings for trial or hearing, this does not mean that a disqualified judge may assign the trial or hearing to a specific judge at that time, particularly in view of the italicized provisions above.

Judge Steiner's conduct in assigning cases in which he was disqualified to other judges was contrary to canons 2A, which requires judges to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; canon 3B(2), which requires judges to be faithful to the law; and canon 3E(1), which requires judges to disqualify themselves in any proceeding in which disqualification is required by law. The conduct constituted conduct prejudicial to the administration that brings the judiciary into disrepute.

**IV. Failure to disqualify as to attorney Steven Baric**

Judge Steiner and attorney Steven Baric are longstanding and very close friends, but did not have any common financial interests. Despite their very close friendship, Judge Steiner has failed to disqualify when Mr. Baric has appeared before him. In the case of *People v. Patten*, 11CM15072, Mr. Baric and the prosecution made multiple appearances before the judge for the purpose of seeking continuances; Judge Steiner did not disqualify, and the record reflects no disclosure of their relationship, although the judge believes that he made an oral disclosure.

Canon 3E(1) requires a judge to disqualify in any proceeding in which disqualification is required by law. Canon 3E(2) requires a judge to disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification.

Judge Steiner has expressed the view that disclosure, rather than disqualification, may be sufficient, despite the existence of a close, longstanding friendship, where an attorney's appearance is for an uncontested motion or does not involve an issue of substance. However, unless the proceedings are among

those listed in Code of Civil Procedure section 170.4, *supra*, or disqualification is waived, a judge who has a disqualifying relationship, such as a very close longtime friendship, may not preside. Disclosure is not sufficient when disqualification is required.

Judge Steiner's conduct in failing to disqualify as to Mr. Baric was contrary to canon 3E(1), and constituted prejudicial misconduct.

**V. Mitigation**

In mitigation, the commission noted that Judge Steiner has expressed great remorse and contrition regarding his conduct in engaging in sexual activity in chambers with two women with whom he was involved in personal relationships. The judge acknowledges wrongdoing and apologizes.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Steiner expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: July 22, 2014.

Judge Scott Steiner
Respondent

Dated: 7-22-, 2014.

Paul Meyer, Esq.
Attorney for Respondent

Dated: 7.28, 2014.

Victoria B. Henley
Director-Chief Counsel

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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|---|---|
| **IN THE MATTER CONCERNING JUDGE CORY WOODWARD** | **DECISION AND ORDER IMPOSING CENSURE PURSUANT TO STIPULATION (Rule 116.5)** |

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Cory Woodward, a judge at the Kern County Superior Court.

Judge Woodward, acting through his counsel, Paul S. Meyer, Esq., and commission staff counsel proposed to settle the preliminary investigation instituted by the commission in this matter through the issuance of a public censure under the terms and conditions stated below, and upon the stipulated statement of facts and conclusions of law. A Stipulation for Discipline by Consent (Stipulation) signed and executed by Judge Woodward, Mr. Meyer, and Victoria B. Henley, Director-Chief Counsel of the Commission on Judicial Performance is attached to this decision and order. Pursuant to rule 116.5 of the Rules of the Commission on Judicial Performance, the proposed Stipulation was approved by the commission on August 20, 2014.

The terms and conditions of the Stipulation provide that, upon approval of the Stipulation, the commission shall resolve the matters alleged in the pending preliminary investigation with the issuance of a censure based upon the agreed stipulated facts and legal conclusions. Further, the parties agree that the commission's decision and order imposing a censure will be made public and the commission may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

In signing the Stipulation, Judge Woodward expressly admits that the stipulated facts are true and that he agrees with the stated legal conclusions, and waives any further

proceedings and review in this matter including formal proceedings and review by the Supreme Court. Accordingly, pursuant to article VI, section 18(d) of the California Constitution, the commission issues this public censure based on the following stipulated statement of facts and conclusions of law:

## STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Woodward has been a judge of the Kern County Superior Court from January 2007 to the present. He served as a commissioner for the Kern County Superior Court from approximately March 2003 to January 2007.

### I. Misconduct Related to Relationship with Courtroom Clerk

Judge Woodward was assigned to a civil department from January through June 2012. The judge was assigned to a criminal department from July through December 2012. He was assigned to a family law department from January through approximately July 2013.

An experienced courtroom clerk was assigned to Judge Woodward in January 2012. She served as his clerk in the civil department through June 2012. From approximately July 2, 2012 through August 10, 2012, she was the judge's assigned courtroom clerk in the criminal department; however, during that period, she was receiving training in criminal trials in other departments. From approximately August 10, 2012 through October 26, 2012, the clerk was assigned to a probate department presided over by another judicial officer. The clerk was absent on leave for the remainder of the year.

From January 2, 2013 through April 2, 2013, the clerk served as Judge Woodward's courtroom clerk in the family law department. On April 2, 2013, she was reassigned to the department of another judicial officer, effective April 3, 2013.

From approximately July 2012 through mid-May 2013, Judge Woodward was involved in an intimate relationship with the clerk. From the start of the intimate relationship through the date on which the court reassigned the clerk in April 2013, Judge

Woodward did not attempt to ensure that he would not be working in the same courtroom with a clerk with whom he had an intimate relationship, and instead opposed and resisted any efforts to reassign the clerk. When Judge Woodward was reassigned from a civil department to a criminal department in July 2012, and when he was reassigned to a family law department in January 2013, he informed court administration that he wanted the clerk to continue serving as his courtroom clerk, rather than seeking to have her reassigned. As set forth in section II below, on two occasions thereafter, when court administration and the presiding judge recommended or proposed that the clerk be reassigned, Judge Woodward resisted rather than allowing the clerk to be reassigned; he also resisted upon being informed in April 2013 that the clerk was being reassigned.

During Judge Woodward's intimate relationship with the clerk, he engaged in sexual activity with her in chambers. He also engaged in sexual activity with her in public places.

On one occasion between January and March 2013, while Judge Woodward was in the courtroom and off the bench during a break in proceedings, he made an inappropriate sexual gesture toward the clerk while a member of the public was present in the audience (unbeknownst to the judge).

Between approximately May 2012 and April 2013, Judge Woodward used the court's computers to regularly exchange personal emails or texts with the clerk, not of an overtly sexual nature, that were unrelated to court business. During the intimate relationship with the clerk, Judge Woodward occasionally passed notes of a sexual nature to her during court proceedings. He allowed her to address him in an overly familiar manner in the courthouse in the presence of other court staff, or within the hearing of other court staff or others (by allowing her to use a longstanding nickname used by the judge's friends and colleagues). When Judge Woodward accompanied the clerk on her lunch break, he sometimes allowed her to return to court slightly late.

Judge Woodward's conduct violated the California Code of Judicial Ethics, canons 1 (a judge shall personally observe high standards of conduct so that the integrity

of the judiciary will be preserved), 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 2B(1) (a judge shall not allow family, social or other relationships to influence the judge's judicial conduct), 3C(1) (a judge shall diligently discharge the judge's administrative responsibilities impartially, on the basis of merit, and in a manner that promotes public confidence in the integrity of the judiciary), 3C(2) (a judge shall cooperate with other judges and court officials in the administration of court business), 3C(5) and its predecessor canon 3C(4) (a judge shall avoid nepotism and favoritism) and 4A(2) (a judge shall conduct all of the judge's extrajudicial activities so that they do not demean the judicial office). The judge's conduct constitutes prejudicial misconduct.

**II. Misleading the Court**

On February 7, 2013, the court executive officer (CEO) spoke with Judge Woodward in chambers and advised him that the clerk's husband had reportedly expressed concern to the clerk about the judge's "relationship" with her. The CEO recommended that the clerk be reassigned and asked Judge Woodward what he wanted to do. Judge Woodward said he would speak with the clerk and get back to the CEO. Shortly thereafter, Judge Woodward called the CEO and said that he (the judge) would not be making any change to the clerk's assignment, or words to that effect. Judge Woodward said something to the effect that the clerk had talked to her husband, that they may be separating, and that her husband was angry with her. (The CEO did not specifically ask the judge about the nature of his relationship with the clerk. Judge Woodward did not indicate to the CEO, either directly or indirectly, that his relationship with the clerk was other than a professional one.) Judge Woodward thereby misled the CEO into believing that there was no need to reassign his courtroom clerk, with whom the judge was then involved in an intimate relationship.

In March 2013, Judge Woodward and Family Law Supervising Judge John Fielder met with Presiding Judge Colette Humphrey in her chambers. There was a discussion

concerning a complaint that had been made about the behavior of Judge Woodward's clerk. The presiding judge was told that another clerk had complained that Judge Woodward's clerk addressed him by a nickname and engaged in flirtatious behavior toward him. Presiding Judge Humphrey suggested reassigning Judge Woodward's clerk. Judge Woodward declined. He stated that she was a good clerk. (Judge Fielder expressed the view that a family law department was very demanding, that Judge Woodward's clerk was a good clerk, and that the court could not reassign a clerk every time another clerk complained.) During this meeting, Judge Woodward misled his supervising and presiding judges into believing that there was no need to reassign his courtroom clerk, with whom he was then involved in an intimate relationship.

The court subsequently received another complaint about the clerk's conduct toward Judge Woodward. On April 2, 2013, a deputy court executive officer (DCEO) met with Judge Woodward to inform him that the clerk was being reassigned, effective April 3, 2013. During the meeting with the DCEO, Judge Woodward made statements indicating that his relationship with the clerk was professional. He objected to the reassignment and said that he wanted to address the matter with Supervising Judge Fielder. During the April 2 meeting, Judge Woodward misled the DCEO into believing that there was no need to reassign his courtroom clerk, with whom he was then involved in an intimate relationship.

On April 3, 2013, Judge Woodward met with the DCEO and Supervising Judge Fielder to protest the reassignment of the clerk. The DCEO explained that the court was reassigning the clerk in response to reports of inappropriate behavior toward Judge Woodward, including the use of a nickname. Judge Fielder expressed dismay that the court was making a decision to move a judge's assigned courtroom clerk and expressed the view that there was no valid reason for the reassignment and that the clerk was being treated unfairly.

Judge Woodward said that if he had been told the use of a nickname was a problem, he would have told the clerk to stop, and also said he did not "understand what's going on." Judge Fielder said to Judge Woodward that the "problem is people

think something is going on between the two of you." Judge Woodward did not respond. Judge Fielder also stated words to the effect that the court "can't be reacting to something when someone thinks this is a Peyton Place when this isn't." Judge Woodward did not respond. During the April 3 meeting, Judge Woodward misled his supervising judge and the DCEO into believing that there was no need to reassign his courtroom clerk, with whom Judge Woodward was then involved in an intimate relationship. (A day or two after April 3, Judge Woodward told Judge Fielder that he would not contest the clerk's reassignment.)

In early May 2013, Judge Woodward met with the presiding judge and assistant presiding judge to address possible security concerns raised by the fact that the husband of Judge Woodward's clerk had contacted the court. During that meeting, Judge Woodward misled his court's presiding judge and assistant presiding judge about the nature of his relationship with the clerk. (Later in May 2013, Judge Woodward contacted the presiding judge and disclosed the intimate relationship with the clerk.)

Judge Woodward's conduct violated the Code of Judicial Ethics, canons 1 (a judge shall personally observe high standards of conduct so that the integrity of the judiciary will be preserved), 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 2B(1) (a judge shall not allow family, social or other relationships to influence the judge's judicial conduct), 3C(1) (a judge shall diligently discharge the judge's administrative responsibilities impartially, on the basis of merit, and in a manner that promotes public confidence in the integrity of the judiciary) and 3C(2) (a judge shall cooperate with other judges and court officials in the administration of court business). The judge's conduct constitutes willful misconduct.

## III. Prior Discipline

Judge Woodward received a private admonishment in 2010 for improper handling of a contempt.

## IV. Mitigation

Judge Woodward has expressed great remorse and contrition. He acknowledges wrongdoing and apologizes.

Presiding Judge Humphrey believes that Judge Woodward is very well regarded as a judge, is considered to be hardworking, intelligent and punctual, and displays appropriate demeanor. Supervising Judge Fielder believes that Judge Woodward is known and respected as a very hardworking and conscientious judicial officer.

## DISCIPLINE

Under the California Constitution, imposition of a public censure is the most severe sanction that can be imposed on an active California judge short of removal. (Cal. Const. Art. I, § 18(d).) In accepting this Stipulation, the commission has determined that imposition of a censure is appropriate and necessary to fulfill the commission's mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and independence of the judiciary.

Judges are expected to maintain and personally observe "high standards of conduct" and "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (Canons 1, 2A.) "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." (Canon 2A advisory committee commentary.) In the commission's view, engaging in sexual intercourse in the courthouse and exchanging communications of a sexual nature during court proceedings is the height of irresponsible and improper behavior by a judge. It reflects an utter disrespect for the dignity and decorum of the court and is seriously at odds with a judge's duty to avoid conduct that tarnishes the esteem of the judicial office in the public's eye. As Judge David M. Rothman states in his California Judicial Conduct Handbook, when a judge's sexual conduct is not conducted in private or "takes place on public property or by use of public resources, the conduct moves from private to public concern and demeans the judicial office under canon 4A(2)." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 8.71, p. 439.)

Judge Woodward's misconduct related to sexual activity in the courthouse is aggravated by the fact that the conduct took place with a member of his court staff. Judge Rothman states that "it is fundamental that a judge not be placed in a supervisory role over someone with whom the judge has a close personal relationship." (Rothman, *supra*, § 6.27, p. 281.) Moreover, Judge Woodward potentially exposed other court staff to a hostile work environment through his intimate communications and sexual activities with the clerk in the courthouse. In fact, the intimacy of the relationship was sufficiently overt that the court received more than one complaint concerning the clerk's overly familiar and flirtatious behavior towards Judge Woodward, and rumors circulated that "something [was] going on between" the judge and his clerk. Judge Woodward's conduct placed the court administration and his presiding judges in the uncomfortable position of having to bring these concerns to his attention. However, rather than taking the concerns, which he knew to be legitimate, seriously and agreeing to the clerk's transfer, the judge misled the court as to the nature of the relationship and opposed the transfer.

In the commission's view, Judge Woodward's misconduct in misleading court administration and his superior judicial officers in an effort to prevent the clerk's reassignment is as egregious as his misconduct related to his libidinous activities with his clerk. Court officials and supervising and presiding judges must be able to rely on the integrity and honesty of judicial officers in the performance of their duties. (See *Inquiry Concerning Judge Kelly A. MacEachern* (2008) 49 Cal.4th CJP Supp. 289, 305.) This requires more than the avoidance of outright untruths; it demands that judges avoid material omissions in fulfilling their duty to cooperate fully with court officials and other judges in the administration of court business. By misleading the court as to the nature of his relationship with his clerk and opposing her reassignment, Judge Woodward impeded administrative efforts to appropriately respond to complaints and concerns about the clerk's inappropriate personal interactions with the judge. Not only should Judge Woodward have acceded to the recommended reassignment of the clerk, he should himself have requested her transfer as soon as the intimate relationship began.

Judge Woodward has engaged in a course of misconduct that the commission considers sufficiently serious to warrant removal from office if it were not for the presence of a number of mitigating factors. In determining that censure rather than removal is the appropriate sanction in this matter, the commission has taken into consideration that Judge Woodward has acknowledged wrongdoing and expressed great remorse and contrition. An appreciation for the impropriety of one's actions indicates a capacity to reform. (*Censure of Judge Salvador Sarmiento* (2012) p. 7.) As such, the commission is satisfied that Judge Woodward is unlikely to engage in misconduct of a similar nature in the future. Moreover, the judge's full and forthright cooperation with the commission's investigation has assisted the commission in reaching a prompt disposition of this matter. Finally, according to his presiding and supervising judges, he is a respected, hardworking, intelligent and conscientious judge.

Accordingly, the commission hereby imposes this public censure on Judge Woodward.

Commission members Hon. Erica R. Yew; Hon. Thomas M. Maddock; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Lawrence J. Simi; Mr. Richard Simpson and Mr. Adam N. Torres voted to accept the parties' settlement proposal and to issue this decision and order imposing public censure pursuant to the stipulated agreement. Commission members Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Ms. Maya Dillard Smith and Ms. Sandra Talcott voted to reject the proposed settlement, dissent from this decision and order imposing public censure, and would have instituted formal proceedings.

Dated: September 2, 2014

Honorable Erica R. Yew
Chairperson

# STIPULATION

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING JUDGE CORY WOODWARD | STIPULATION FOR DISCIPLINE BY CONSENT (Rule 116.5) |

Pursuant to Rules of the Commission on Judicial Performance, rule 116.5, Judge Cory Woodward of the Kern County Superior Court, represented by counsel, and commission staff counsel ("the parties") submit this proposed disposition of the matters set forth in the commission's preliminary investigation letters dated October 31, 2013 and March 28, 2014. The parties request that the commission resolve this matter by imposition of a censure. The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Woodward because, among other reasons, in light of the stipulated facts and legal conclusions, a censure adequately protects the public and will avoid the delay and the expense of further proceedings.

## TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Cory Woodward.

2. The commission shall issue a censure based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing a censure may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Woodward waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Woodward.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a censure on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions:

## STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Woodward has been a judge of the Kern County Superior Court from January 2007 to the present. He served as a commissioner for the Kern County Superior Court from approximately March 2003 to January 2007.

### I. Misconduct related to relationship with courtroom clerk

Judge Woodward was assigned to a civil department from January through June 2012. The judge was assigned to a criminal department from July through December 2012. He was assigned to a family law department from January through approximately July 2013.

An experienced courtroom clerk was assigned to Judge Woodward in January 2012. She served as his clerk in the civil department through June 2012. From approximately July 2, 2012 through August 10, 2012, she was the judge's

assigned courtroom clerk in the criminal department; however, during that period, she was receiving training in criminal trials in other departments. From approximately August 10, 2012 through October 26, 2012, the clerk was assigned to a probate department presided over by another judicial officer. The clerk was absent on leave for the remainder of the year.

From January 2, 2013 through April 2, 2013, the clerk served as Judge Woodward's courtroom clerk in the family law department. On April 2, 2013, she was reassigned to the department of another judicial officer, effective April 3, 2013.

From approximately July 2012 through mid-May 2013, Judge Woodward was involved in an intimate relationship with the clerk. From the start of the intimate relationship through the date on which the court reassigned the clerk in April 2013, Judge Woodward did not attempt to ensure that he would not be working in the same courtroom with a clerk with whom he had an intimate relationship, and instead opposed and resisted any efforts to reassign the clerk. When Judge Woodward was reassigned from a civil department to a criminal department in July 2012, and when he was reassigned to a family law department in January 2013, he informed court administration that he wanted the clerk to continue serving as his courtroom clerk, rather than seeking to have her reassigned. As set forth in section II below, on two occasions thereafter when court administration and the presiding judge recommended or proposed that the clerk be reassigned, Judge Woodward resisted rather than allowing the clerk to be reassigned; he also resisted upon being informed in April 2013 that the clerk was being reassigned.

During Judge Woodward's intimate relationship with the clerk, he engaged in sexual activity with her in chambers. He also engaged in sexual activity with her in public places.

On one occasion between January and March 2013, while Judge Woodward was in the courtroom and off the bench during a break in proceedings, he made an inappropriate sexual gesture toward the clerk while a member of the public was present in the audience (unbeknownst to the judge).

Between approximately May 2012 and April 2013, Judge Woodward used the court's computers to regularly exchange personal emails or texts with the clerk, not of an overtly sexual nature, that were unrelated to court business. During the intimate relationship with the clerk, Judge Woodward occasionally passed notes of a sexual nature to her during court proceedings. He allowed her to address him in an overfamiliar manner in the courthouse in the presence of other court staff, or within the hearing of other court staff or others (by allowing her to use a longstanding nickname used by the judge's friends and colleagues). When Judge Woodward accompanied the clerk on her lunch break, he sometimes allowed her to return to court slightly late.

Judge Woodward's conduct violated the Code of Judicial Ethics, canons 1 (a judge shall personally observe high standards of conduct so that the integrity of the judiciary will be preserved), 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 2B(1) (a judge shall not allow family, social or other relationships to influence the judge's judicial conduct), 3C(1) (a judge shall diligently discharge the judge's administrative responsibilities impartially, on the basis of merit, and in a manner that promotes public confidence in the integrity of the judiciary), 3C(2) (a judge shall cooperate with other judges and court officials in the administration of court business), 3C(5) and its predecessor canon 3C(4) (a judge shall avoid nepotism and favoritism) and 4A(2) (a judge shall conduct all of the judge's extrajudicial activities so that they do not demean the judicial office). The judge's conduct constitutes prejudicial misconduct.

## II. Misleading court

On February 7, 2013, the court executive officer (CEO) spoke with Judge Woodward in chambers, and advised him that the clerk's husband had reportedly expressed concern to the clerk about the judge's "relationship" with her. The CEO recommended that the clerk be reassigned, and asked Judge Woodward what he wanted to do. Judge Woodward said he would speak with the clerk and get back to the CEO. Shortly thereafter, Judge Woodward called the CEO and said that he (the judge) would not be making any change to the clerk's assignment, or words to that effect. Judge Woodward said something to the effect that the clerk had talked to her husband, that they may be separating, and that her husband was angry with her. (The CEO did not specifically ask the judge about the nature of his relationship with the clerk. Judge Woodward did not indicate to the CEO, either directly or indirectly, that his relationship with the clerk was other than a professional one.) Judge Woodward thereby misled the CEO into believing that there was no need to reassign his courtroom clerk, with whom the judge was then involved in an intimate relationship.

In March 2013, Judge Woodward and Family Law Supervising Judge John Fielder met with Presiding Judge Colette Humphrey in her chambers. There was a discussion concerning a complaint that had been made about the behavior of Judge Woodward's clerk. The presiding judge was told that another clerk had complained that Judge Woodward's clerk addressed him by a nickname and engaged in flirtatious behavior toward him. Presiding Judge Humphrey suggested reassigning Judge Woodward's clerk. Judge Woodward declined. He stated that she was a good clerk. (Judge Fielder expressed the view that a family law department was very demanding, that Judge Woodward's clerk was a good clerk, and that the court could not reassign a clerk every time another clerk complained.) During this meeting, Judge Woodward misled his supervising and presiding

judges into believing that there was no need to reassign his courtroom clerk, with whom he was then involved in an intimate relationship.

The court subsequently received another complaint about the clerk's conduct toward Judge Woodward. On April 2, 2013, a deputy court executive officer (DCEO) met with Judge Woodward to inform him that the clerk was being reassigned, effective April 3, 2013. During the meeting with the DCEO, Judge Woodward made statements indicating that his relationship with the clerk was professional. He objected to the reassignment, and said that he wanted to address the matter with Supervising Judge Fielder. During the April 2 meeting, Judge Woodward misled the DCEO into believing that there was no need to reassign his courtroom clerk, with whom he was then involved in an intimate relationship.

On April 3, 2013, Judge Woodward met with the DCEO and Supervising Judge Fielder to protest the reassignment of the clerk. The DCEO explained that the court was reassigning the clerk in response to reports of inappropriate behavior toward Judge Woodward, including the use of a nickname. Judge Fielder expressed dismay that the court was making a decision to move a judge's assigned courtroom clerk, and expressed the view that there was no valid reason for the reassignment and that the clerk was being treated unfairly.

Judge Woodward said that if he had been told the use of a nickname was a problem, he would have told the clerk to stop, and also said he did not "understand what's going on." Judge Fielder said to Judge Woodward that the "problem is people think something is going on between the two of you." Judge Woodward did not respond. Judge Fielder also stated words to the effect that the court "can't be reacting to something when someone thinks this is a Peyton Place when this isn't." Judge Woodward did not respond. During the April 3 meeting, Judge Woodward misled his supervising judge and the DCEO into believing that there was no need to reassign his courtroom clerk, with whom Judge Woodward was

then involved in an intimate relationship. (A day or two after April 3, Judge Woodward told Judge Fielder that he would not contest the clerk's reassignment.)

In early May 2013, Judge Woodward met with the presiding judge and assistant presiding judge to address possible security concerns raised by the fact that the husband of Judge Woodward's clerk had contacted the court. During that meeting, Judge Woodward misled his court's presiding judge and assistant presiding judge about the nature of his relationship with the clerk. (Later in May 2013, Judge Woodward contacted the presiding judge, and disclosed the intimate relationship with the clerk.)

Judge Woodward's conduct violated the Code of Judicial Ethics, canons 1 (a judge shall personally observe high standards of conduct so that the integrity of the judiciary will be preserved), 2 (a judge shall avóid impropriety and the appearance of impropriety), 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 2B(1) (a judge shall not allow family, social or other relationships to influence the judge's judicial conduct), 3C(1) (a judge shall diligently discharge the judge's administrative responsibilities impartially, on the basis of merit, and in a manner that promotes public confidence in the integrity of the judiciary) and 3C(2) (a judge shall cooperate with other judges and court officials in the administration of court business). The judge's conduct constitutes willful misconduct.

**III. Prior discipline**

Judge Woodward received a private admonishment in 2010 for improper handling of a contempt. (Priv. Adm. 232.)

**IV. Mitigation**

Judge Woodward has expressed great remorse and contrition. He acknowledges wrongdoing and apologizes.

Presiding Judge Humphrey believes that Judge Woodward is very well regarded as a judge, and is considered to be hard working, intelligent and punctual,

and to display appropriate demeanor. Supervising Judge Fielder believes that Judge Woodward is known and respected as a very hard working and conscientious judicial officer.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Woodward expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: 7/21, 2014

Judge Cory Woodward

Dated: 7/22, 2014

Paul S. Meyer, Esq.
Attorney for Judge Woodward

Dated: 7/28, 2014

Victoria B. Henley
Director-Chief Counsel

FILED
MAY 18 2015
COMMISSION ON
JUDICIAL PERFORMANCE

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING FORMER JUDGE MARC A. GARCIA,**<br><br>**No. 195** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BAR PURSUANT TO STIPULATION (Commission Rule 127)** |

INTRODUCTION AND PROCEDURAL SUMMARY

This disciplinary matter concerns former judge Marc A. Garcia, who was a judge of the Merced County Superior Court from 2007 until his resignation on May 15, 2015. The commission filed a Notice of Formal Proceedings on March 5, 2015, charging Judge Garcia[1] with misconduct in failing to disclose on his Statements of Economic Interests for the years 2008 through 2012, executed under penalty of perjury, the $250,000 in income he received from the Terms of Dissolution agreement of a joint venture formed to provide indigent defense services through a contract with the county, and failing to disqualify in matters in which the attorney from whom he received the payments appeared before him.[2]

By Stipulation for Discipline by Consent (Stipulation), Judge Garcia and his counsel, Edith R. Matthai, Esq., and the examiner for the commission, Gary W. Schons, Esq., proposed that the commission resolve this matter by imposition of a censure and bar prohibiting Judge Garcia from seeking or holding judicial office, or accepting a position

[1] Former judge Garcia is referred to as Judge Garcia with reference to conduct and events that took place while he was an active judge.

[2] The Notice of Formal Proceedings also charged the judge with creating an appearance of impropriety by entering into an agreement that provided that he had an interest in future payments to be made under a government contract for which he would not be providing services, after he took the bench. Pursuant to stipulation, the parties agreed that it was not necessary to resolve this disputed issue as it would not affect the disposition of the case.

or an assignment as a judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accepting reference of work from any California state court, at any time in the future. (The Stipulation is attached to this decision.) The Stipulation includes the following terms and conditions:

1. The agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Garcia.

2. The commission shall issue a censure and bar based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. Upon acceptance by the commission, the Stipulation, the judge's affidavit of consent and the commission's decision and order shall be made public.

4. Judge Garcia waives any further proceedings and review in this matter, including formal proceedings (Commission rule 118 et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

5. Pursuant to the agreement, Judge Garcia agrees to irrevocably resign from his position as judge effective May 15, 2015.

Pursuant to rule 127, the Stipulation was approved by the commission on May 13, 2015. Former judge Garcia resigned from the bench, effective May 15, 2015. Accordingly, the commission issues this censure and bar based on the terms and conditions of the Stipulation and based on the following Stipulated Facts and Legal Conclusions.

## STIPULATED FACTS AND LEGAL CONCLUSIONS

Pursuant to the Stipulation, Judge Garcia expressly admitted the truth of the following facts and agreed to the following stated legal conclusions.

In 1999, then attorney Marc Garcia was hired as an associate by the Merced law firm of Morse & Pfeiff. In 2001, he was made a partner and the firm name was changed to Morse, Pfeiff & Garcia. At the time, Merced County had separate contracts with about a dozen attorneys to provide indigent defense services when the public defender declared a conflict. That group included attorneys Garcia and Thomas Pfeiff, who was one of several attorneys with contracts for juvenile representation.

In January 2003, a request for proposal was issued by Merced County for a contract to provide alternate indigent defense services for a flat fee. The law firm of Morse, Pfeiff & Garcia submitted a proposal, and was awarded the indigent defense services contract for a five-year term starting in fiscal year 2003/2004 and ending with fiscal year 2007/2008 (contract number 2003093). The contract specified a fixed amount per year, increasing from $1 million to $1.15 million, for a total contract price of approximately $5.6 million. Payments were made by the county monthly.

The Morse, Pfeiff & Garcia law firm acted as both administrator of the contract and a provider of legal services. The contract provided for subcontracts with 8 to 10 attorneys, and Garcia and Pfeiff also handled cases under the contract.

The party contracting with the county, referred to as "Attorney," was identified as the law firm Morse, Pfeiff & Garcia. Attorney Pfeiff signed the contract and all later amendments. The contract and amendments were signed on behalf of the county by the chair of the county Board of Supervisors, and approved as to form by county counsel.

Shortly before January 2004, the firm of Morse, Pfeiff & Garcia dissolved and attorney Garcia opened his own law office in Merced, known as The Garcia Law Firm. On January 1, 2004, concurrent with the dissolution of the Morse, Pfeiff & Garcia general partnership, the Garcia Law Firm and the Law Offices of Morse & Pfeiff entered into a Joint Venture Agreement, which was signed by attorneys Garcia, Pfeiff and Cindy Morse.

The Joint Venture Agreement formed a "new general partnership" between the two firms. The joint venture was limited to the indigent defense contract: "This agreement forms a Joint Venture between the general partnership of Morse & Pfeiff and Garcia Law Firm to administer Merced County Contract 2003[0]93." The name of the joint venture was "Morse, Pfeiff & Garcia." Its location was the office address of Morse & Pfeiff. The Joint Venture Agreement provided that attorney Garcia was to receive 45.662 percent of the net profits annually under the indigent defense contract, payable monthly, and Morse & Pfeiff was to receive 54.33 percent.

On March 30, 2004, the Joint Venture Agreement was amended to provide that the County of Merced was to receive 90 days written notice prior to the withdrawal or suspension of a joint venturer and that it would be the duty of the non-withdrawing or non-expelled joint venturer to provide written notice to the county.

In April 2004, an "Assignment of Merced County Contract No. 2003093 and Consent of County of Merced" was executed to reflect the change in structure of the contracting "Attorney." Amendment No. 1 to the contract also was executed, to change the name of the contracting Attorney to the "Morse and Pfeiff and Garcia Joint Venture."

In May 2006, an amendment to the Joint Venture Agreement was executed by attorneys Garcia, Pfeiff and Morse, renaming the joint venture "Merced Defense Associates (M.D.A.)," which became known as MDA.

In July 2007, a two-year extension to the indigent defense contract was approved by the county, for fiscal year 2008/2009 through fiscal year 2009/2010 (Amendment No. 2). The number of subcontracting attorneys was increased and the fixed amount for fiscal year 2007/2008 was increased to $1.5 million. The fixed amount was set at approximately $1.6 million for 2008/2009 and $1.7 million for 2009/2010.

In early October 2007, attorney Marc Garcia's judicial appointment was announced. On November 29, 2007, an agreement dissolving the joint venture was signed by attorney Garcia on behalf of the Garcia Law Firm and by Pfeiff on behalf of Morse & Pfeiff, as follows:

DISSOLUTION OF JOINT VENTURE
(Merced Defense Associates)

> The Law Offices of Morse and Pfeiff (hereafter Morse and Pfeiff) and the Garcia Law Firm (hereafter Garcia), for due consideration, hereby dissolve the joint venture known as Merced Defense Associates. The entity known as Merced Defense Associates shall be the sole property of Morse and Pfeiff as of November 29, 2007.

A separate one-page agreement specifying the financial terms was also executed by attorneys Garcia and Pfeiff on November 29, 2007, as set forth below. It provided

that MDA would pay Garcia $250,000, in monthly payments of $4,516 starting in January 2008, and that the payments would cease if the county terminated or did not renew the indigent defense services contract:

TERMS OF DISSOLUTION OF JOINT VENTURE
(Merced Defense Associates)

The parties to this agreement, the Law Offices of Morse and Pfeiff (hereinafter Morse and Pfeiff) and the Garcia Law Firm (hereinafter Garcia), agree to dissolve the joint venture known as Merced Defense Associates under the terms expressed in this agreement. Upon execution of this agreement the joint venture shall terminate on November 29, 2007 and the entity known as Merced Defense Associates shall become the sole property of Morse and Pfeiff. The Dissolution of Joint Venture executed by the parties is herein incorporated by this reference.

The parties agree to the following terms:

1. Merced Defense Associates shall pay to Garcia the sum of four thousand five hundred sixteen dollars ($4,516.00) on or about the first of each month commencing January 1, 2008. The funds shall be deposited into a blind trust account established by Garcia;
2. Said payments shall continue until any one of the following:
   A. Merced Defense Associates has paid a total of two hundred fifty thousand dollars ($250,000.00) into the account, or;
   B. The contract between the County of Merced and Merced Defense Associates to provide indigent defense services is terminated by Merced County, or;
   C. The contract between the County of Merced and Merced Defense Associates expires and is not renewed, or;
   D. The compensation currently provided for in the contract between the County of Merced and Merced Defense Associates is materially reduced.

> If at any time ownership of the entity known as Merced Defense Associates is transferred, for consideration, from Morse and Pfeiff to a buyer prior to payment of the entire amount mentioned in 2A above payments from Morse and Pfeiff shall continue until the entire amount is paid.

Pfeiff had emailed Garcia on November 28, attaching what he described as the two documents needed to dissolve the joint venture. He stated in the email that the "Dissolution to Dissolve the Joint Venture is the one we provide to the county," and that the "other one has the terms and incorporates the Dissolution" and "is for our business purposes only." Pfeiff's email stated that he did not plan to voluntarily relinquish the indigent defense contract at renewal time, but could not predict his intentions that far in advance, and had included a provision that the payments to Garcia would terminate if the contract was not renewed for any reason.

In January 2008, after taking the bench, Judge Garcia began receiving monthly payments of $4,516 pursuant to the Terms of Dissolution agreement. The payments were made by check payable to Marc Garcia, and were drawn on the account of "Law Offices of Morse & Pfeiff." The checks were signed by the Morse & Pfeiff office manager. The monthly payments continued through August 2012, until Judge Garcia had been paid $250,000. (In August 2011, during the normal course of processing all judicial mail, a judicial secretary opened an envelope addressed to Judge Garcia that contained a $4,516 check to the judge from Morse & Pfeiff. The judge instructed the secretary not to open any of his judicial mail in the future.)

In a June 2008 letter from Pfeiff to the county analyst who was the primary county contact for the indigent defense services contract from 2003 through 2012, Pfeiff stated, "You recently requested confirmation that Marc Garcia no longer has an interest in MDA. I have enclosed herewith a copy of our agreement terminating his interest." The one-page Dissolution of Joint Venture was attached. The Terms of Dissolution agreement was not attached.

When Judge Garcia took the bench in 2007, he was initially assigned to a civil department. In 2009, he was reassigned from a civil department to a criminal

department. He heard preliminary hearings and felony trials in 2009, and misdemeanors in 2010. Since 2011 he had been assigned to a felony trial department. Pfeiff and other MDA attorneys regularly appeared before him. He did not disclose to his presiding judges the Terms of Dissolution agreement or that pursuant to the Terms of Dissolution agreement, he was receiving monthly payments as described above.

In mid-2009, Pfeiff presented the county with a request for approval of a contract extension. In October 2009, a three-year extension to the contract was approved, from fiscal year 2010/2011 through fiscal year 2012/2013 (Amendment No. 3). The fixed amount was set at approximately $1.7 million for 2011/2012, and $1.8 million for 2012/2013. In July 2011, a two-year extension was approved, for fiscal years 2013/2014 and 2014/2015 (Amendment No. 4).

The county was not at any point made aware, including in 2009 when it agreed to renew the indigent defense contract, by Judge Garcia or otherwise, of either the Terms of Dissolution agreement or that the judge was receiving ongoing payments pursuant to that agreement as described above.

On Judge Garcia's Statements of Economic Interests for the years 2008 through 2012, executed under penalty of perjury, he failed to disclose the $250,000 in income he received pursuant to the Terms of Dissolution agreement. In March 2014, he filed amended Statements of Economic Interests for the years 2008 through 2012. He reported the income on Schedule C as "Sale of Interest in joint venture agreement in MDA." The source of income is identified as "Merced Defense Associates/Morse & Pfeiff."

Judge Garcia's conduct violated the Code of Judicial Ethics, canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety in the integrity of the judiciary) and 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

From 2009 through August 2012, while Judge Garcia was assigned to a criminal department and payments to him pursuant to the Terms of Dissolution agreement were ongoing, the judge failed to disqualify himself in matters in which attorney Pfeiff

appeared before him, including numerous MDA cases. Judge Garcia failed to disclose his ongoing financial relationship with Pfeiff and MDA. He also failed to disclose the ongoing financial relationship with Pfeiff and MDA in matters in which other MDA attorneys appeared before him.

Judge Garcia's conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3E(1) (a judge shall disqualify himself or herself in any proceeding in which disqualification is required by law), 3E(2)(a) (in all trial court proceedings, a judge shall disclose information relevant to disqualification) and former canon 3E(2) (predecessor to canon 3E(2)(a)).

The Notice of Formal Proceedings alleged that the Terms of Dissolution agreement provided that Judge Garcia had an interest in future payments to be made under a government contract for which he would not be providing services, after he took the bench. It was alleged that by entering into that agreement and accepting payments pursuant to it, he violated the Code of Judicial Ethics, canons 1, 2, 2A, 4A(1) (a judge shall conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially), 4D(1)(b) (a judge shall not engage in financial and business dealings that involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to appear before the court on which the judge serves), and 4D(4) (a judge shall manage personal investments and financial activities so as to minimize the necessity for disqualification and as soon as reasonably possible, a judge shall divest himself or herself of investments and other financial interests that would require frequent disqualification). Judge Garcia disputed that there was any impropriety in the Terms of Dissolution agreement or in his receipt of funds pursuant to the agreement. In light of former judge Garcia's irrevocable resignation from judicial office and stipulation to the imposition of a censure and bar, it is not necessary to resolve these disputed issues as they would not affect the disposition of the case.

The Notice of Formal Proceedings further alleged that in furtherance of Judge Garcia's interest in continuing to receive payments under the Terms of Dissolution

agreement, he concealed the fact that he had entered into an agreement in which he had an interest in future payments under the MDA contract, and concealed the fact that he was receiving payments from funds paid by the county to MDA after he took the bench and was no longer performing services under the MDA contract. Judge Garcia disputed that there was any intent on his part to conceal the agreement or payments under the Terms of Dissolution agreement, but admitted that his conduct could give rise to an appearance of concealment and thereby violate the Code of Judicial Ethics, canons 1, 2, and 2A. In light of former judge Garcia's irrevocable resignation from judicial office and stipulation to the imposition of a censure and bar, it is not necessary to further resolve these disputed issues as they would not affect the disposition of the case.

Judge Garcia's conduct was, at a minimum, conduct prejudicial to the administration of justice that brings the judicial office into disrepute pursuant to article VI, section 18(d)(2) of the California Constitution.

Judge Garcia had no prior discipline.

DISCIPLINE

Article VI, section 18(d) of the California Constitution provides that the commission may "censure a judge or former judge ... for action ... that constitutes willful misconduct in office, ... or conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . ." Former judge Garcia concedes that his conduct as stipulated was, at a minimum, prejudicial to the administration of justice that brings the judicial office into disrepute. The failure to disclose on state financial disclosure forms, filed under penalty of perjury, $250,000 received from the dissolution of a joint venture in a county contract for indigent defense, and the failure to disclose or disqualify when attorneys who had an interest in the contract appeared before the judge seriously undermine public confidence in the integrity and impartiality of the judiciary.

The purpose of a commission disciplinary proceeding is "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity ... of the judicial system." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams v. Commission on*

*Judicial Performance* (1995) 10 Cal.4th 866, 912.) The commission believes that this purpose is best served by the discipline proposed in the Stipulation, which constitutes the maximum discipline that may be imposed on a former judge.

Accordingly, the commission hereby censures former judge Marc A. Garcia and bars him from receiving an assignment, appointment, or reference of work from any California state court.

Commission members Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Ms. Mary Lou Aranguren; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Lawrence J. Simi; Mr. Richard Simpson; Ms. Sandra Talcott; and Mr. Adam N. Torres voted to issue this decision and order imposing a public censure and bar pursuant to the Stipulation.

Date: May 18, 2015



Hon. Erica R. Yew, Chairperson

# STIPULATION

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COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br>JUDGE MARC A. GARCIA,<br><br>No. 195 | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 127) |

Pursuant to Rules of the Commission on Judicial Performance, rule 127, Judge Marc A. Garcia of the Merced County Superior Court, represented by counsel Edith R. Matthai of Robie and Matthai, and commission examiner Gary W. Schons, Esq. ("the parties") submit this proposed disposition of Inquiry No. 195. The parties request that the commission resolve this matter by imposition of a censure and bar.

The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Garcia because, among other reasons, in light of the stipulated facts and legal conclusions, and the judge's agreement to resign from office, a censure and bar adequately protects the public and will avoid the delay and expense of further proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Garcia.

2. The commission shall issue a censure and bar based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing a censure and bar may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation, the judge's affidavit of consent and the commission's decision and order shall be made public.

5. Judge Garcia waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. Pursuant to this agreement, Judge Garcia has agreed to irrevocably resign from his position as a judge effective May 15, 2015. Judge Garcia shall use accrued vacation or other leave time and be absent from the bench between the date of this agreement and May 15, 2015. Judge Garcia represents and warrants that he has sufficient vacation/leave time to be absent from the bench between the date of this agreement and May 15, 2015, and that his presiding judge will allow him to be absent during that period.

Judge Garcia shall tender his irrevocable resignation from judicial office in writing to the Governor of California, within two days of being notified by the commission in writing of its acceptance of the proposed disposition. The commission's decision imposing a censure and bar pursuant to this stipulation shall issue as soon as practicable after the effective date of the judge's resignation.

7. If Judge Garcia fails to resign in accordance with this agreement, the commission shall continue the pending formal proceedings. Failure to comply with the terms and conditions of this agreement may also constitute additional and independent grounds for discipline.

8. The commission may reject this proposed disposition and continue the formal proceedings. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Garcia.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a censure and bar on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions:

STIPULATED FACTS AND LEGAL CONCLUSIONS

In 1999, then attorney Marc Garcia was hired as an associate by the Merced law firm of Morse & Pfeiff. In 2001, he was made a partner and the firm name was changed to Morse, Pfeiff & Garcia. At the time, Merced County had separate contracts with about a dozen attorneys to provide indigent defense services when the Public Defender declared a conflict. That group included attorneys Garcia and Pfeiff, who was one of several attorneys with contracts for juvenile representation.

In January 2003, a request for proposal was issued by Merced County for a contract to provide alternate indigent defense services for a flat fee. The law firm of Morse, Pfeiff & Garcia submitted a proposal, and was awarded the indigent defense services contract for a five-year term starting in fiscal year 2003/2004 and ending with fiscal year 2007/2008 (contract number 2003093). The contract specified a fixed amount per year, increasing from $1 million to $1.15 million, for a total contract price of approximately $5.6 million. Payments were made by the county monthly.

The Morse, Pfeiff & Garcia firm acted as both administrator of the contract and a provider of legal services. The contract provided for subcontracts with 8 to 10 attorneys, and Garcia and Pfeiff also handled cases under the contract.

The party contracting with the county, referred to as "Attorney," was identified as the firm Morse, Pfeiff & Garcia. Attorney Pfeiff signed the contract and all later amendments. The contract and amendments were signed on behalf of the county by the Chair of the County Board of Supervisors, and approved as to form by County Counsel.

Shortly before January 2004, the firm of Morse, Pfeiff & Garcia dissolved and attorney Garcia opened his own law office in Merced, known as The Garcia Law Firm. On January 1, 2004, concurrent with the dissolution of the Morse, Pfeiff & Garcia general partnership, the Garcia Law Firm and the Law Offices of Morse & Pfeiff entered into a Joint Venture Agreement, which was signed by attorneys Garcia, Pfeiff and Morse.

The Joint Venture Agreement formed a "new general partnership" between the two firms. The joint venture was limited to the indigent defense contract: "This agreement forms a Joint Venture between the general partnership of Morse & Pfeiff and

Garcia Law Firm to administer Merced County Contract 2003[0]93." The name of the joint venture was "Morse, Pfeiff & Garcia." Its location was the office address of Morse & Pfeiff. The Joint Venture Agreement provided that attorney Garcia was to receive 45.662 percent of the net profits annually under the indigent defense contract, payable monthly, and Morse & Pfeiff was to receive 54.33 percent.

On March 30, 2004, the Joint Venture Agreement was amended to provide that the County of Merced was to receive 90 days written notice prior to the withdrawal or suspension of a joint venturer and that it would be the duty of the non-withdrawing or non-expelled joint venturer to provide written notice to the county.

In April 2004, an "Assignment of Merced County Contract No. 2003093 and Consent of County of Merced" was executed to reflect the change in structure of the contracting "Attorney." Amendment No. 1 to the contract also was executed, to change the name of the contracting Attorney to the "Morse and Pfeiff and Garcia Joint Venture."

In May 2006, an amendment to the Joint Venture Agreement was executed by attorneys Garcia, Pfeiff and Morse, renaming the joint venture "Merced Defense Associates (M.D.A.)," which became known as MDA.

In July 2007, a two-year extension to the indigent defense contract was approved by the county, for fiscal year 2008/2009 through fiscal year 2009/2010 (Amendment No. 2). The number of subcontracting attorneys was increased and the fixed amount for fiscal year 2007/2008 was increased to $1.5 million. The fixed amount was set at approximately $1.6 million for 2008/2009 and $1.7 million for 2009/2010.

In early October 2007, attorney Marc Garcia's judicial appointment was announced. On November 29, 2007, an agreement dissolving the joint venture was signed by attorney Garcia on behalf of the Garcia Law Firm and by Pfeiff on behalf of Morse & Pfeiff, as follows:

DISSOLUTION OF JOINT VENTURE
(Merced Defense Associates)

The Law Offices of Morse and Pfeiff (hereafter Morse and Pfeiff) and the Garcia Law Firm (hereafter Garcia), for due

consideration, hereby dissolve the joint venture known as Merced Defense Associates. The entity known as Merced Defense Associates shall be the sole property of Morse and Pfeiff as of November 29, 2007.

A separate one-page agreement specifying the financial terms was also executed by attorneys Garcia and Pfeiff on November 29, 2007, as set forth below. It provided that MDA would pay Garcia $250,000, in monthly payments of $4,516 starting in January 2008, and that the payments would cease if the county terminated or did not renew the indigent defense services contract:

TERMS OF DISSOLUTION OF JOINT VENTURE
(Merced Defense Associates)

The parties to this agreement, the Law Offices of Morse and Pfeiff (hereinafter Morse and Pfeiff) and the Garcia Law Firm (hereinafter Garcia), agree to dissolve the joint venture known as Merced Defense Associates under the terms expressed in this agreement. Upon execution of this agreement the joint venture shall terminate on November 29, 2007 and the entity known as Merced Defense Associates shall become the sole property of Morse and Pfeiff. The Dissolution of Joint Venture executed by the parties is herein incorporated by this reference.

The parties agree to the following terms:

1. Merced Defense Associates shall pay to Garcia the sum of four thousand five hundred sixteen dollars ($4,516.00) on or about the first of each month commencing January 1, 2008. The funds shall be deposited into a blind trust account established by Garcia;
2. Said payments shall continue until any one of the following:
   A. Merced Defense Associates has paid a total of two hundred fifty thousand dollars ($250,000.00) into the account, or;
   B. The contract between the County of Merced and Merced Defense Associates to provide indigent defense services is terminated by Merced County, or;

C. The contract between the County of Merced and Merced Defense Associates expires and is not renewed, or;

D. The compensation currently provided for in the contract between the County of Merced and Merced Defense Associates is materially reduced.

If at any time ownership of the entity known as Merced Defense Associates is transferred, for consideration, from Morse and Pfeiff to a buyer prior to payment of the entire amount mentioned in 2A above payments from Morse and Pfeiff shall continue until the entire amount is paid.

Pfeiff had emailed Garcia on November 28, attaching what he described as the two documents needed to dissolve the joint venture. He stated in the email that the "Dissolution to Dissolve the Joint Venture is the one we provide to the county," and that the "other one has the terms and incorporates the Dissolution" and "is for our business purposes only." Pfeiff's email stated that he did not plan to voluntarily relinquish the indigent defense contract at renewal time, but could not predict his intentions that far in advance, and had included a provision that the payments to Garcia would terminate if the contract was not renewed for any reason.

In January 2008, after taking the bench, Judge Garcia began receiving monthly payments of $4,516 pursuant to the Terms of Dissolution agreement. The payments were made by check payable to Marc Garcia, and were drawn on the account of "Law Offices of Morse & Pfeiff." The checks were signed by the Morse & Pfeiff office manager. The monthly payments continued through August 2012, until Judge Garcia had been paid $250,000. (In August 2011, during the normal course of processing all judicial mail, a judicial secretary opened an envelope addressed to Judge Garcia that contained a $4,516 check to the judge from Morse & Pfeiff. The judge instructed the secretary not to open any of his judicial mail in the future.)

In a June 2008 letter from Pfeiff to the county analyst who was the primary county contact for the indigent defense services contract from 2003 through 2012, Pfeiff stated, "You recently requested confirmation that Marc Garcia no longer has an interest in

MDA. I have enclosed herewith a copy of our agreement terminating his interest." The one-page Dissolution of Joint Venture was attached. The Terms of Dissolution agreement was not attached.

When Judge Garcia took the bench in 2007, he was initially assigned to a civil department. In 2009, he was reassigned from a civil department to a criminal department. He heard preliminary hearings and felony trials in 2009, and misdemeanors in 2010. Since 2011 he has been assigned to a felony trial department. Pfeiff and other MDA attorneys regularly appeared before him. He did not disclose to his presiding judges the Terms of Dissolution agreement or that pursuant to the Terms of Dissolution agreement, he was receiving monthly payments as described above.

In mid-2009, Pfeiff presented the county with a request for approval of a contract extension. In October 2009, a three-year extension to the contract was approved, from fiscal year 2010/2011 through fiscal year 2012/2013 (Amendment No. 3). The fixed amount was set at approximately $1.7 million for 2011/2012, and $1.8 million for 2012/2013. In July 2011, a two-year extension was approved, for fiscal years 2013/2014 and 2014/2015 (Amendment No. 4).

The county was not at any point made aware, including in 2009 when it agreed to renew the indigent defense contract, by Judge Garcia or otherwise, of either the Terms of Dissolution agreement or that the judge was receiving ongoing payments pursuant to that agreement as described above.

On Judge Garcia's Statements of Economic Interests for the years 2008 through 2012, executed under penalty of perjury, he failed to disclose the $250,000 in income he received pursuant to the Terms of Dissolution agreement. In March 2014, he filed amended Statements of Economic Interests for the years 2008 through 2012. He reported the income on Schedule C as "Sale of Interest in joint venture agreement in MDA." The source of income is identified as "Merced Defense Associates/Morse & Pfeiff."

Judge Garcia's conduct violated the Code of Judicial Ethics, canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety in the integrity of the judiciary) and 2A (a judge shall respect

and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

From 2009 through August 2012, while Judge Garcia was assigned to a criminal department and payments to him pursuant to the Terms of Dissolution agreement were ongoing, the judge failed to disqualify himself in matters in which attorney Pfeiff appeared before him, including numerous MDA cases. Judge Garcia failed to disclose his ongoing financial relationship with Pfeiff and MDA. He also failed to disclose the ongoing financial relationship with Pfeiff and MDA in matters in which other MDA attorneys appeared before him.

Judge Garcia's conduct violated the Code of Judicial Ethics, canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety in the integrity of the judiciary), 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 3E(1) (a judge shall disqualify himself or herself in any proceeding in which disqualification is required by law), 3E(2)(a) (in all trial court proceedings, a judge shall disclose information relevant to disqualification) and former canon 3E(2) (predecessor to canon 3E(2)(a)).

The notice of formal proceedings alleged that the Terms of Dissolution agreement provided that Judge Garcia had an interest in future payments to be made under a government contract for which he would not be providing services, after he took the bench. It was alleged that by entering into that agreement and accepting payments pursuant to it, he violated the Code of Judicial Ethics, canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety in the integrity of the judiciary), 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 4A(1) (a judge shall conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially), 4D(1)(b) (a judge shall not engage in financial and business dealings that involve the judge in frequent transactions or

continuing business relationships with lawyers or other persons likely to appear before the court on which the judge serves), and 4D(4) (a judge shall manage personal investments and financial activities so as to minimize the necessity for disqualification and as reasonably possible, a judge shall divest himself or herself of investments and other financial interests that would require frequent disqualification). Judge Garcia disputes that there was any impropriety in the Terms of Dissolution agreement or in his receipt of funds pursuant to the agreement. In light of Judge Garcia's agreement to resign from judicial office and stipulation to the imposition of a censure and bar, it does not appear necessary to resolve these disputed issues as they would not affect the disposition of the case.

The notice of formal proceedings further alleged that in furtherance of Judge Garcia's interest in continuing to receive payments under the Terms of Dissolution agreement, he concealed the fact that he had entered into an agreement in which he had an interest in future payments under the MDA contract, and concealed the fact that he was receiving payments from funds paid by the county to MDA after he took the bench and was no longer performing services under the MDA contract. Judge Garcia disputes that there was any intent on his part to conceal the agreement or payments under the Terms of Dissolution agreement, but admits that his conduct could give rise to an appearance of concealment and thereby violate the Code of Judicial Ethics, canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety in the integrity of the judiciary), and 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). In light of Judge Garcia's agreement to resign from judicial office and stipulation to the imposition of a censure and bar, it does not appear necessary to further resolve these disputed issues as they would not affect the disposition of the case.

Judge Garcia's conduct was, at a minimum, conduct prejudicial to the administration of justice that brings the judicial office into disrepute pursuant to article VI, section 18(d)(2) of the California Constitution.

## II. Prior Misconduct

Judge Garcia has no prior discipline.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Garcia expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: _____, 2015

Judge Marc A. Garcia
Respondent

Dated: April 4, 2015

Edith R. Matthai, Esq.
Attorney for Judge Garcia

Dated: April 2, 2015

Gary W. Schons, Esq.
Examiner

## II. Prior Misconduct

Judge Garcia has no prior discipline.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Garcia expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: April 6, 2015

Judge Marc A. Garcia
Respondent

Dated: April 4, 2015

Edith R. Matthai, Esq.
Attorney for Judge Garcia

Dated: April 2, 2015

Gary W. Schons, Esq.
Examiner

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COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br>JUDGE MARC A. GARCIA,<br><br>No. 195 | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 127) |

Pursuant to Rules of the Commission on Judicial Performance, rule 127(d), Judge Marc A. Garcia submits the following affidavit of consent:

1. I consent to a public censure and bar from receiving assignments, appointments, or references of work from any California state court, and will irrevocably resign from judicial office, as set forth in the Stipulation for Discipline by Consent.

2. My consent is freely and voluntarily rendered.

3. I admit the truth of the charges in Count 1 A and B in the Notice of Formal Proceedings and Count 1 C only to the extent specifically set forth in the Stipulation for Discipline by Consent.

4. I waive all further proceedings and review by the Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of April 2015.

Judge Marc A. Garcia
Respondent

FILED
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COMMISSION ON
JUDICIAL PERFORMANCE

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING JUDGE JAMES M. PETRUCELLI, No. 193** | **MODIFIED DECISION AND ORDER IMPOSING PUBLIC CENSURE*** |

## I

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Fresno County Superior Court Judge James M. Petrucelli. The commission commenced this inquiry with the filing of its Notice of Formal Proceedings (Notice) on October 8, 2014. The Notice charged Judge Petrucelli with engaging in judicial misconduct by calling the Fresno County jail and ordering the own recognizance (OR) release of a person he knew socially, Jay Ghazal. The Notice charged the judge with ordering the OR release based on his personal knowledge of Ghazal and ex parte communications with Attorney Jonathan Netzer who was a personal friend of both Ghazal and the judge. Ghazal had been arrested on spousal abuse charges, and his release violated a statute that prohibits an OR release on such charges prior to a hearing in open court and notice to the prosecution. The Notice also charged Judge Petrucelli with misconduct in conversing with Ghazal at a fundraiser event held the evening of Ghazal's release and, at Ghazal's request, calling a local defense attorney about representing Ghazal in the criminal matter.

The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters are the Honorable Stuart R. Pollak, Associate Justice of the Court of Appeal, First Appellate District, Division Three; the Honorable Bradley L. Boeckman, Judge of the Shasta County Superior Court; and the

* The commission's decision and order entered August 18, 2015, was modified by order entered August 27, 2015. The modification did not have an effect on the order imposing discipline.

Honorable Ronni B. MacLaren, Judge of the Alameda County Superior Court. Judge Petrucelli is represented by Kathleen M. Ewins, Esq. and David S. McMonigle, Esq. of Long & Levit, LLP in San Francisco, California. The examiners for the commission are Gary W. Schons, Esq. and Assistant Trial Counsel Valerie Marchant, Esq.

A three-day evidentiary hearing was held before the special masters commencing February 2, 2015. The masters filed their report containing their findings of fact and conclusions of law on April 10, 2015. The commission heard oral argument on July 8, 2015.

The masters concluded that Judge Petrucelli engaged in prejudicial misconduct in ordering the OR release of Ghazal under circumstances that violated the California Code of Judicial Ethics, canon 1 (a judge shall uphold the integrity of the judiciary), canon 2 (a judge shall avoid impropriety and the appearance of impropriety), canon 2A (a judge shall respect and comply with the law), canon 2B(1) (a judge shall not allow social relationships to influence judicial conduct), canon 2B(2) (a judge shall not lend the prestige of judicial office to advance the personal interests of others), canon 3B(2) (a judge shall be faithful to the law), and canon 3B(7) (a judge shall accord to every person who has a legal interest in the proceeding the right to be heard). The masters concluded, "In the eyes of the public, Ghazal's OR release tends to reflect special treatment obtained as a result of personal connections between Ghazal, Netzer and Petrucelli, and thereby tends to diminish public confidence in the objectivity and impartiality of the judiciary." We agree, and also determine that the judge engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In issuing this censure, the most severe discipline that may be imposed short of removal,[1] we seek to assure the public that judicial action reflecting preferential treatment to friends or family, even if undertaken in good faith, is seriously at odds with the standards of judicial conduct expected of judges in this state.

[1] See California Constitution, article VI, section 18, subdivision (d).

## II

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Findings of Fact

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*)

Factual findings of the masters are entitled to special weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Broadman, supra,* 18 Cal.4th at p. 1090; *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232 (*Freedman*).) In keeping with this standard of deference set by the Supreme Court, we adopt the factual findings of the masters in their entirety. When material to our decision, we make additional factual findings shown by clear and convincing evidence based on our independent review of the record. (*Inquiry Concerning Spitzer* (2007) 49 Cal.4th CJP Supp. 254, 261; *Freedman, supra,* 49 Cal.4th CJP Supp. at p. 232; *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1] (*Geiler*).)

**OR Release of Ghazal**

Judge Petrucelli and Attorney Netzer had been close friends for several years, a friendship developed through their mutual patronage of a cigar shop in Fresno, international trips together in 2012 and 2013, and membership in a men's group referred to as "HBC"[2] that congregated at the cigar shop. HBC members hosted monthly or quasi-monthly get-togethers at their homes. Judge Petrucelli would disqualify from any matter in which Netzer appeared before him.

Fresno businessman Jay Ghazal and Judge Petrucelli met about 10 years ago and became socially acquainted through their mutual membership in HBC and social

[2] HBC stands for Having Big Cigars.

gatherings at the homes of HBC members, including a barbecue at the judge's home in August 2013. The judge would disqualify if Ghazal appeared before him as a criminal defendant.

Ghazal was arrested on Friday night, July 12, 2013, on charges of felony spousal abuse related to an incident with his wife. Ghazal contacted Attorney Netzer from the holding cell. During that evening and into early Saturday morning, Netzer and Ghazal communicated several times by phone and during Netzer's visit to the jail. Ghazal was "scared and frazzled" because he had not been booked, and thus could not bail out.

At approximately 9:00 a.m. Saturday morning, Netzer sent the following text message to the judge:

> Good morning Jim. One of our HBC members was arrested last night on a domestic violence claim. He's asked that I bail him out this morning. In 22 years of practice, th[is] is a first for me. Do you have any suggestions for me before I head down to jail? Thanks!

The judge promptly called Netzer and was told that Ghazal was arrested after an incident with his wife in which he grabbed her by the wrist. Netzer told the judge that Ghazal had been in custody for 12 hours without being booked and was scared. The judge volunteered to call the jail.

The judge had heard that Ghazal and his wife were obtaining a divorce, but was not aware of prior domestic violence in the relationship. He was under the impression that Ghazal's wife had not been physically injured.

After talking with Netzer, Judge Petrucelli called the jail to ask about Ghazal's booking status, and when he would be available for release on bail. He was transferred to Officer Marylou Merancio who testified that, after he identified himself as Judge Petrucelli, the judge stated he wanted to have an inmate released. The masters found a more complete and accurate statement is that the judge asked when Ghazal would be available for release on bail. Officer Merancio told the judge she would have her supervisor, Officer Crystal Galindo, contact him.

Officer Galindo called the judge at 9:51 a.m., after ascertaining that Ghazal had recently been booked on several charges including felony spousal abuse. The masters found that either Officer Galindo first asked Judge Petrucelli if he wanted Ghazal to be released on his own recognizance or Judge Petrucelli first asked about an OR release, but in all events the judge stated that he would like, or would be comfortable with, an OR release.[3] As Judge Petrucelli concedes, who first mentioned the possibility of an OR release is largely immaterial since the judge is responsible for making the order.

Officer Galindo contacted a retired correctional officer for advice and was told that telephonic release orders were not frequent, but were not uncommon. After Judge Petrucelli's identity as a judge was verified and the judge confirmed that "he wanted to do an over the phone release of inmate Ghazal," Lieutenant Michael Porter authorized Ghazal's release. The judge told jail personnel he would be willing to come to the jail and sign any required paperwork, but was informed that would not be necessary. Lieutenant Porter had been familiar with what had been referred to as "honor releases"[4] or "telephonic releases" for 25 years; however, they were rare and it had been some 10 to

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[3] The examiner requests that the commission find that the judge admitted he formed the intent to OR release Ghazal before he spoke to Officer Galindo. This request is based on Judge Petrucelli's testimony that he "probably" made the decision to OR release Ghazal while he was waiting for Officer Galindo to call him (after his initial phone contact with Officer Merancio). However, the judge also testified that if he was going to pinpoint a period in time when he decided to order the OR release, "it would probably be at the time or right before [he] talked with Officer Galindo, and she said, 'Did you want him released?' And [he] said, 'Yeah, I'm comfortable with that.' She said, 'Do you want to release him on his own recognizance?' [He] said, 'Yeah, let me know what I need to do, I'd like to do that.'" When Special Master Pollak asked who first raised or mentioned the possibility of an OR release, the judge responded that he did not recall and could not say unequivocally, but thinks he said something to Officer Galindo like "'I'm comfortable with that,'" but he "very well may have said I want him released." Because the judge's testimony on this point was equivocal, we conclude the masters correctly found that the first mention of an OR release could have come from either the judge or Officer Galindo.

[4] The term "honor release" was used by some witnesses in reference to a telephonic OR release.

15 years since he had last handled one. He instructed jail personnel to complete a written form that existed for that purpose. When the form could not be found, the "honor release" was entered in the jail's tracking system. Ghazal was released at 10:48 a.m. on Saturday morning.

The release was in violation of Penal Code section 1270.1 (hereafter section 1270.1). That statute provides that before any person arrested for certain offenses, including spousal abuse, may be released on his or her own recognizance, a hearing must be held in open court and the prosecuting attorney and defense attorney must be given "a two-court-day written notice and an opportunity to be heard on the matter."

We find the following facts which were not included in the masters' report concerning the information available to Judge Petrucelli at the time he ordered Ghazal's release to be relevant to our determinations and supported by clear and convincing evidence based on our independent review of the record. The judge had never met or talked to Ghazal's wife. The only information the judge obtained about the facts and circumstances of the arrest came from Netzer, and the judge assumed this information came from Netzer's communications with Ghazal. The judge failed to take any steps to check whether Ghazal had a prior criminal history, or to ask Netzer if there had been prior domestic violence incidents.

**Contact at Fundraiser and Connecting Ghazal with an Attorney**

On the evening of Ghazal's release, Judge Petrucelli attended a charitable fundraising event attended by approximately 2,000 people, including both Ghazal and Netzer. Ghazal approached the judge and mentioned his upcoming court date. The judge told Ghazal that he could not discuss the matter, but that Ghazal should stay away from his wife. Ghazal asked Judge Petrucelli if he could help him find an attorney and the judge responded that he would see what he could do. The following Monday morning, the judge called Attorney Roger Nuttall, a well-respected criminal defense attorney, and asked if he was willing to speak with an acquaintance who had been arrested on spousal abuse charges. Nuttall said he was, and the judge called Ghazal and gave him Nuttall's contact information.

**Subsequent Events at Court**

Monday morning following Ghazal's release, Gayle Sherwood, a supervisor at the superior court, received an email from a correctional officer at the jail advising that Judge Petrucelli had "honor released" Ghazal, but there was no paperwork to forward to the court reflecting the action. This triggered a series of phone calls and emails between court personnel and the judge and his clerk to determine what had occurred and how the situation should be handled. The judge confirmed that he had ordered the release and stated he would sign any required paperwork. The judge's courtroom clerk sent the following email to a supervising judicial assistant:

> After speaking further with Judge, this was not something out of the ordinary or special. He said that he has never been asked to sign anything before so he's not sure about the paperwork or procedures on their/our end. He will be happy to sign something if you need him to for paperwork purposes in order to have the calendar setting done correctly but neither of us are sure what that might be at this moment. (He tried to phone earlier but was unable to reach you. If you need anything from him, defendant information, etc. then he will be happy to provide that to you if you come up.) Hope that helps.

That afternoon, Judge Petrucelli called Sherwood expressing his concern for the apparent confusion caused by the absence of normal paperwork. Sherwood testified that the judge was irate and confused; the masters found the judge testified credibly that he was simply frustrated and embarrassed by the confusion and extra work he had caused. During his conversation with Sherwood, the judge confirmed that he had authorized Ghazal's release and indicated he would disqualify from presiding over Ghazal's case. Sherwood testified the judge said something to the effect of "you know how these DV [domestic violence] cases are."

Since neither Sherwood nor the more experienced supervisors she reached out to had any experience with this type of "honor release" from jail, they had to create documents. Ghazal's matter ultimately was placed on calendar before a different judge.

When the matter was brought to the attention of Presiding Judge Gary Hoff, he promptly spoke with Judge Petrucelli. Judge Hoff told Judge Petrucelli that it was improper for him to handle a matter that was not assigned to him. Judge Petrucelli looked "shocked" and "dumbfounded." He stated that he thought his conduct was proper based on his understanding that other judges granted telephonic releases, but assured Judge Hoff that he would not do it again.

Judge Hoff told the judge that the matter would need to be reported to the commission and that he would give the judge the opportunity to self-report. Shortly after this conversation, Judge Petrucelli reported the matter to the commission.[5]

**Judge Petrucelli's State of Mind**

After listening critically to Judge Petrucelli's testimony and observing his demeanor, the masters accepted "the truth of his testimony that he believed he was acting properly when he authorized the OR release" based on his awareness that other judges in the past had ordered telephonic OR releases. This finding is supported by the following evidence.

Judge Petrucelli was a deputy sheriff in Fresno between 1974 and 1989. While working in the jail, he was aware of judges ordering telephonic OR releases and had seen a standard form that was used in connection with such releases. Shortly after he took judicial office, the judge had a conversation with then-Presiding Judge James Quashnick who confirmed that telephonic releases were ordered from time to time. Based on the testimony of numerous judges, attorneys, and sheriffs, the masters found the practice was utilized occasionally in the past, and less frequently in recent years. Other witnesses confirmed their understanding that the practice was still in occasional use, tending to confirm that its discontinuance was not universally known, and corroborating Judge Petrucelli's testimony that he thought the practice still existed. Lieutenant Porter knew of a printed form to be completed for such a release, although the form could not be located

[5] We do not consider Judge Petrucelli's self-report to the commission to be a mitigating factor when he did so at the direction of his presiding judge and was told the presiding judge would report him if he did not do so himself.

at the time of Ghazal's release. During the judge's discussions with jail personnel, no one suggested that there was any impropriety in authorizing Ghazal's OR release.

Based on his personal knowledge of Ghazal's reputation as an upstanding member of the community, Judge Petrucelli concluded Ghazal was not a flight risk or a danger to his wife or others. He believed Ghazal would be subject to an emergency protective order upon release.

The masters found that the judge's belief that his actions were proper was corroborated by his reaction when questioned by his presiding judge. Judge Petrucelli acknowledged what he had done without attempting to conceal or twist the facts and Judge Hoff perceived that Judge Petrucelli was truly "amazed" to learn he had done something improper and that the past practice with which he was familiar was no longer considered appropriate.

Based on the foregoing evidence, we adopt the masters' finding that Judge Petrucelli believed he was acting in accordance with an established practice. Nevertheless, we consider the judge to have been exceedingly remiss in failing to inquire whether the "honor release" practice he became aware of years earlier was still considered proper, whether it was ever considered proper in a matter in which the judge would otherwise be disqualified, and whether there had been any changes in the law that would prohibit such a release.[6] Such inquiries might have prevented the judge from going down the path that led to these proceedings and this censure. The following additional facts from the record which were not included in the masters' report support our finding in this regard.

Judge Petrucelli could not recall the last time he heard of a judge issuing a telephonic OR release, but thought it was probably years and years ago. Judge Hoff may have been aware of the telephonic OR release practice in the past, but since becoming a

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[6] In addition to section 1270.1, enacted in 1999, the Victim's Bill of Rights (Marsy's Law), enacted in 2008, significantly expands the rights of victims in California, including requiring the court to consider the safety of the victim and the victim's family in fixing the amount of bail and release conditions for the defendant. (Cal. Const., art. I, § 28, subd. (b).)

judge in 1994, he has not heard of any judge, other than Judge Petrucelli, issuing a telephonic OR release. Judge Hoff has had several terms as presiding judge since the early 2000's. When Justice Gene M. Gomes was a superior court judge in Fresno from 1982 to 2002, he occasionally received calls from attorneys requesting an OR release of their client. He does not know if the practice has ended, but believes if it does still occur, it is less frequent because of changes in the law, such as the Victims Bill of Rights, which limit a judge's authority to engage in this practice. Earlier in his practice, Attorney Nuttall occasionally called a judge on the weekend to request an OR release for a client, even in a domestic violence case. Although Nuttall believes the practice is still ongoing, but less frequent, he stopped asking for telephonic releases around 2000 because times had changed, he thought it put the judge in an awkward position, and he no longer felt comfortable doing this.

Significantly, witnesses who confirmed the existence of a telephonic release practice in Fresno County described it in terms that would not have authorized Ghazal's release based on the limited information obtained by Judge Petrucelli. When Justice James Ardaiz was a trial judge in Fresno from 1981 until 1988, he occasionally received calls at home from attorneys requesting an OR release of a client. He only considered the request for nonviolent offenses, he insisted on being apprised accurately of the facts by either speaking with the arresting officer or the district attorney (DA), and he would require that the DA be contacted to determine if he or she objected to an OR release. When Lenore Schreiber was a judge in Fresno County from 1978 until 1982, she occasionally received calls at home from attorneys requesting an OR release for their clients. She asked the attorneys a series of questions, including whether the arrestee had an arrest record or prior convictions, the circumstances of the arrest, and she tried to speak with the arresting officer. Before Judge Ralph Nunez retired from the Fresno County Superior Court in 2003, he sometimes received calls from attorneys over the weekend requesting an OR release. If the attorney could not provide information on the arrestee's criminal background and arrest history, he called the jail to get the information.

In contrast to the process used by other judges, Judge Petrucelli relied entirely on information provided by Netzer, information he assumed came from Ghazal, and made no effort to determine independently the facts that led to the arrest, whether the wife was injured, or whether Ghazal had a history of domestic violence or criminal convictions. Nor did he make any effort to determine if Ghazal's wife or the DA objected to the release.

The masters also found that the examiner failed to prove that Judge Petrucelli acted for the corrupt purpose of using his judicial office to benefit a friend – a purpose other than the faithful discharge of judicial duties. The masters found that the judge ordered Ghazal's release because he was "genuinely concerned that an individual was being held in jail for some 12 hours unable to obtain release either on bail or on his own recognizance," and not simply because of his acquaintance with Ghazal or his friendship with Netzer.

Based on a cold record of the transcript of the hearing, we have difficulty agreeing with the masters' factual finding that the judge acted out of concern for a citizen rather than for the sole purpose of helping Netzer and Ghazal, a friend and acquaintance. The fact that the judge did not inquire whether other citizens were being held in jail for a long period without being able to post bail might suggest otherwise. However, the special masters are experienced jurists who had the advantage of seeing and hearing Judge Petrucelli testify over two days. While the commission has the authority to override the findings of the special masters, we are mindful that credibility determinations of the special masters are to be given "special weight" where they are based on the masters' observations of the witness's demeanor at a hearing. (*Broadman, supra,* 18 Cal.4th at p. 1090; *Freedman, supra,* 49 Cal.4th CJP Supp. at p. 243.) Therefore, we defer to the masters' finding that the judge did not act for a corrupt purpose or in bad faith.

## B. Conclusions of Law

### 1. OR Release

*Level of Misconduct*

The masters concluded that in ordering the OR release of Ghazal, Judge Petrucelli violated canons 1, 2, 2A, 2B(1), 2B(2), 3B(2), and 3B(7). We agree and adopt these legal conclusions as our own.[7]

A violation of the Code of Judicial Ethics constitutes one of three levels of judicial misconduct: willful misconduct, prejudicial misconduct, or improper action. A judge who engages in willful or prejudicial misconduct may be subject to censure or removal. (Cal. Const., art. VI, § 18, subd. (d).) The masters concluded that Judge Petrucelli engaged in prejudicial misconduct by ordering Ghazal's OR release. Prejudicial misconduct is "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) Prejudicial misconduct while acting in a judicial capacity does not require bad faith; rather, it is "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (*Geiler, supra,* 10 Cal.3d at p. 284.) We concur with the masters that the judge's conduct in ordering the OR release of an acquaintance based on the request of a friend diminishes public confidence in the objectivity and impartiality of the judiciary.

The examiner maintains that the judge committed willful misconduct, the most serious form of judicial misconduct. Willful misconduct is unjudicial conduct that is committed in bad faith by a judge acting in a judicial capacity. (*Broadman, supra,* 18 Cal.4th at p. 1091.) Neither party disputes that Judge Petrucelli engaged in unjudicial

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[7] The judge was also charged with violating canon 3E(1), which requires disqualification as required by law. The masters declined to reach a legal conclusion with respect to this canon. As discussed later, we conclude the judge violated canon 3E(1) in ordering an OR release in a matter for which he was disqualified.

conduct[8] and was acting in a judicial capacity when he ordered Ghazal's release. The issue in dispute is whether the judge acted in bad faith.

A judge acts in bad faith "only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra,* 18 Cal.4th at p. 1092.)

In *Broadman,* the Supreme Court held that the intentional commission of an act the judge "should have known" was beyond the judge's lawful authority is insufficient to prove that the judge acted in bad faith. However, the court stated:

> Because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith.

(*Broadman, supra,* 18 Cal.4th at pp. 1091-1092.)

The examiner urges the commission to address whether the particular circumstances here establish that Judge Petrucelli acted in "conscious disregard" of the limits of his judicial authority, or with a "reckless or utter indifference" to whether he was acting within his judicial power. In the examiner's view, the judge's state of mind was "tantamount to willful ignorance," because he relied on a practice he learned of years earlier and made no inquiry as to any applicable law before acting. The examiner also contends that the judge acted for a corrupt purpose even if he believed the process he employed was proper because his purpose was not the faithful discharge of judicial

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[8] Failure to comply with the canons of judicial ethics is generally considered to constitute unjudicial conduct. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662 [34 Cal.Rptr.2d 641, 882 P.2d 358].)

duties, but to obtain the release of someone he knew whose well-being was the subject of a friend's concern.

We consider the judge's failure to make inquiries into the current state of the law and the propriety of authorizing a telephonic release of an inmate charged with spousal abuse to be exceptionally careless and irresponsible. However, based on the factual findings of the masters to which we have deferred, we conclude that this state of mind does not constitute clear and convincing evidence that the judge acted with a conscious disregard or a reckless or utter indifference to the limits of his judicial authority or for a corrupt purpose. The masters provided the following persuasive support for their conclusion that Judge Petrucelli did not act in bad faith: the judge testified credibly that he believed he was acting within his authority; the judge's experience as a deputy sheriff and his conversation with then-Presiding Judge Quashnick shortly after he took the bench provided a basis for his belief that telephonic releases were appropriate; the evidence established the practice was ongoing, although to a far more limited extent; and correctional officers did not question the judge's authority to OR release Ghazal and mentioned a form that had been used for telephonic releases.

We agree with the examiner that Judge Petrucelli *should have* known to make further inquiries before relying on a practice he learned of years earlier and *should have* considered whether the practice he relied on included ordering the release of persons with whom a judge had a relationship requiring disqualification. However, *should have* does not constitute bad faith. In the context of willful misconduct, *Broadman* equates bad faith with actual malice. (*Broadman, supra,* 18 Cal.4th at pp. 1091-1092.) We do not suggest that bad faith can only be established through an admission by the judge that he or she consciously acted outside the bounds of judicial authority. In *Freedman*, *supra,* 49 Cal.4th CJP Supp. 223, the judge testified he was not conscious of his delayed matters when he signed salary affidavits attesting that he did not have delayed cases under submission. The masters found this testimony to be credible. The commission adopted the masters' factual finding concerning the judge's state of mind, but concluded that in those instances where the judge executed salary affidavits shortly after being informed of

having delayed matters, he acted with an utter indifference to whether the affidavits were true or false.

However, under the circumstances of this case, the evidence does not prove by clear and convincing evidence that Judge Petrucelli acted with an utter indifference to whether his actions exceeded his judicial authority.

The examiner also urges us to reject the masters' finding that the judge did not act for a corrupt purpose, and instead find that he acted for the sole purpose of helping an acquaintance at the behest of his good friend, a purpose other than the faithful discharge of judicial duties. Although our review of the record has given us pause, we decline to reject the masters' finding that the judge did not act for a corrupt purpose in deference to the special weight to which the credibility findings of the special masters are entitled.

Commission decisions cited by the examiner do not convince us to reject the masters' conclusion that Judge Petrucelli did not act in bad faith. In each of those cases, the masters made factual findings that the judge acted in bad faith, supporting the conclusion that the judge engaged in willful misconduct. (*Inquiry Concerning Stanford* (2012) 53 Cal.4th CJP Supp. 1 (*Stanford*) [judge conceded he acted for a purpose other than the faithful discharge of judicial duties by, in nine instances, diverting traffic tickets of family and friends to his own court and suspending fees and fines]; *Inquiry Concerning O'Flaherty* (2010) 50 Cal.4th CJP Supp. 1 [judge issued no-contact order with knowledge that it was beyond his judicial authority to do so]; *Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227 [masters rejected the judge's testimony that he did not realize that his actions were wrong when he dismissed several traffic tickets not before him for people he knew and attempted to influence other judicial officers on behalf of people he knew].)

For these reasons, we adopt the masters' legal conclusion that Judge Petrucelli's conduct in authorizing the OR release of Ghazal constitutes prejudicial misconduct.

*Canon 3E(1) Violation*

The Notice charged the judge with violating canon 3E(1), which requires a judge to disqualify in any *proceeding* in which disqualification is required by law. Judge

Petrucelli does not dispute that he would have been disqualified from presiding over Ghazal's criminal case in court and from presiding over any matter in which Netzer represented a party. However, he maintains that a telephonic OR release from jail is not subject to disqualification because it does not constitute a "proceeding" within the meaning of canon 3E(1). The examiner urges the commission to find a violation of canon 3E(1) because the judge's failure to disqualify encompasses "the essence of the misconduct."

The terminology section of the Code of Judicial Ethics defines both "impending proceeding" and "pending proceeding." An "impending proceeding" is defined as:

> [A] proceeding or matter that is imminent or expected to occur in the near future. The words "proceeding" and "matter" are used interchangeably, and are intended to have the same meaning.

A "pending proceeding" is defined as:

> [A] proceeding or matter that has commenced. A proceeding continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition. The words "proceeding" and "matter" are used interchangeably, and are intended to have the same meaning.

Both definitions refer to specific canons, but neither refers to 3E(1).

Judge Petrucelli took judicial action after Ghazal had been arrested, but before the matter appeared in court. Because canon 3E(1) refers only to "proceeding," rather than "pending" or "impending" proceeding, we must address the question of whether a proceeding requiring disqualification includes matters that are expected to occur in court in the near future or is limited to court proceedings.

The rules governing interpretation of statutes, constitutional provisions and voter initiatives provide guidance. First, words must be construed in accordance with their usual and ordinary meaning. (*The Recorder v. Commission on Judicial Performance* (1999) 72 Cal.App.4th 258, 268-269 [85 Cal.Rptr.2d 56] (*Recorder*); *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 [36 Cal.Rptr.2d 563, 885 P.2d 976].) Second, where there is ambiguity, the language must be given a fair and reasonable

interpretation, with due regard to the purpose sought to be accomplished. (*Cedars of Lebanon Hosp. v. County of L.A.* (1950) 35 Cal.2d 729, 734-735 [221 P.2d 31, 15 A.L.R.2d 1045].)

First, we look at the ordinary meaning of "proceeding" and "matter" (the terminology section of the Code of Judicial Ethics states that "proceeding" and "matter" are used interchangeably and are intended to have the same meaning). Common dictionary definitions of proceeding include event, official record of a thing said or done, legal action, and transaction. (Merriam-Webster's Collegiate Dict. (11th ed. 2012) p. 990; *Santos v. Brown* (2015) 238 Cal.App.4th 398, 416.) "Matter" in this context is defined as a subject under consideration, a subject of disagreement or litigation, something to be proved in law. (Merriam-Webster's Collegiate Dict. (11th ed. 2012) p. 766.)

The Supreme Court has described the term "proceeding" as malleable, the meaning of which depends on the context and subject to which it relates. (*Recorder, supra*, 72 Cal.App.4th at p. 270.) "'[P]roceeding' in a legal context generally refers to the conduct of *judicial* business." (*Santos, supra,* 238 Cal.App.4th at p. 416.) Judge Petrucelli does not dispute that he was taking judicial action when he ordered Ghazal's release. In the commission's view, the usual or ordinary meaning of proceeding, both in a common and legal context, encompasses judicial action in ordering an OR release from jail.

To the extent there is ambiguity, we interpret "proceeding" in a manner that effectuates the intent or purpose of the canon. The purpose of a canon requiring disqualification as required by law is to "assure the parties and the public of the integrity and fairness of the judicial process." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 7.00, p. 293.) Thus, disqualification benefits not only the parties, but the public as a whole. (Flamm, Judicial Disqualification (2d ed. 2007) § 17.5, p. 497.) If "proceeding" is limited to actions pending in court, a judge with a disqualifying interest would not be disqualified from making probable cause determinations and signing search and arrest warrants. (See *In re Krull* (Iowa 2015) 860 N.W.2d 38 [magistrate

reprimanded for violating Iowa rule requiring disqualification from any "proceeding" in which the judicial officer's impartiality might reasonably be questioned by signing a pre-arrest warrant to search the residence of a person with whom the judge had a relationship requiring disqualification].) A narrow interpretation of "proceeding" that excludes judicial action taken before a criminal case is filed would defeat the intent of canon 3E(1) – to assure the public that judicial action will be exercised impartially. This purpose is best accomplished through an interpretation of "proceeding" that encompasses pre-filing judicial determinations.

Having determined that canon 3E(1) applies to the telephonic OR release process employed by Judge Petrucelli, we turn to the question of whether the judge was required to disqualify. Grounds for disqualification by law include when a person aware of the facts might reasonably entertain a doubt about the judge's impartiality, when the judge believes there is a substantial doubt as to his or her ability to be fair, and when the judge has personal knowledge of disputed facts. (Code of Civ. Proc., §§ 170.1(a)(6)(A)(ii), (iii); 170.1(a)(1)(A), (B).) Judge Petrucelli testified that he would disqualify from any matter in which Netzer appeared as an attorney and from any criminal case in which Ghazal was a defendant. Moreover, while the judge describes Ghazal as an "acquaintance," the relationship is sufficiently close that a person aware of the facts might reasonably entertain a doubt about the judge's impartiality. (Code of Civ. Proc., § 170.1(a)(6)(A)(iii).) The judge, Netzer, and Ghazal belonged to HBC, a group of 10 to 13 individuals who socialized together and hosted social events at their homes every month or two. Ghazal attended approximately half of these events. The judge made judicial determinations in relation to his decision to OR release Ghazal based on his personal knowledge and opinion of Ghazal. Further, through his contacts with HBC members, the judge acquired information about Ghazal's relationship with his wife that could be material to the spousal abuse charges for which Ghazal was arrested and prosecuted. He also considered facts he knew from his personal relationship with Ghazal, such as Ghazal's close relationship with his daughter, in making a judicial determination concerning his flight risk.

As Special Master MacLaren observed in her inquiry of the judge:

> [I]s this a fair statement, that factors that caused you [the judge] to believe that this would be an appropriate situation for an honor release, namely, that this was someone known in the community, a person of relative good standing, you were unaware of any past run-ins with the law, did not believe him to be a flight risk or a danger to the public, that that's what – that's what made you comfortable going forward with asking for the honor release . . . . [¶] . . . [¶] . . . And it was those same facts that also would have caused you to disqualify yourself because . . . that would be information you have about this individual and a prior relationship that would raise doubts about your ability to be fair?

The judge agreed this was a fair statement.

For these reasons, we conclude that Judge Petrucelli violated canon 3E(1) by failing to disqualify from making a determination concerning Ghazal's release from jail.

**2. Contacts at Fundraising Event and Assisting Ghazal in Retaining an Attorney**

The masters concluded that Judge Petrucelli's brief remarks to Ghazal at a fundraiser on the evening of his release and the calls he made to put Ghazal in touch with an attorney do not constitute misconduct. We agree that the brief remarks at the fundraiser, a contact initiated by Ghazal, do not constitute misconduct. However, we conclude that the judge's efforts to assist Ghazal in retaining an attorney constitutes a violation of canons 2 (judge shall avoid appearance of impropriety) and 2A (judge shall act in a manner that promotes public confidence in the integrity and impartiality of the judiciary). The judge called Attorney Nuttall[9] about representing Ghazal after having just taken judicial action to obtain Ghazal's release. He then called Ghazal on his cell phone and gave him Nuttall's contact information. Under these circumstances, the judge's efforts to put Ghazal in touch with Nuttall reinforces the appearance that he was acting to benefit a friend and undermines public confidence in the impartiality of the judiciary.

[9] Judge Petrucelli recuses from hearing Nuttall's cases.

## III

## DISCIPLINE

Judge Petrucelli has engaged in serious misconduct involving the misuse of judicial office, conduct that reflects poorly on the impartiality and integrity of the judiciary. Considered together with his history of prior discipline, his misconduct might warrant removal. However, after careful consideration of the multiple factors discussed below, including that this is an isolated incident, and in deference to the masters' finding that the judge acted in good faith, we have determined to impose this severe censure rather than the ultimate sanction of removal.[10]

Determining the appropriate discipline depends to a large extent on the nature and number of incidents of misconduct. (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307, fn. 2 [240 Cal.Rptr. 859, 743 P.2d 919].) First, we look to whether the misconduct is an isolated incident or whether there are a number of incidents demonstrating a pattern of misconduct. (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958].) Although Judge Petrucelli committed multiple ethical violations within a course of conduct, the crux of his misconduct involved the OR release of Ghazal. There is no indication that he has engaged in a pattern of similar misconduct. As such, we agree with the masters that the misconduct is an isolated incident and does not reflect a pattern.

It is not only the number of incidents of misconduct that guides our determination of the appropriate level of discipline. The nature and seriousness of the misconduct is an equally important consideration. A single incident of misconduct may itself be sufficiently serious, particularly if of a corrupt nature, to warrant severe discipline, including removal. (*Inquiry Concerning MacEachern* (2008) 49 Cal.4th CJP Supp. 289, 307.)

Judge Petrucelli has committed serious misconduct, though not of a corrupt nature. Not only did he abuse his authority by taking judicial action in a matter that had not been

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[10] In our analysis of the appropriate level of discipline, we include the aggravating and mitigating factors discussed in the masters' report to the extent we consider those factors to be aggravating or mitigating.

assigned to him and contrary to section 1270.1, he did so under circumstances that created the appearance that he was providing special treatment to his friend and acquaintance. The commission has repeatedly condemned conduct that creates the appearance of a "two-track system of justice – one for those with special access to the judge, and the other for everyone else." (E.g., *Inquiry Concerning Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 51; *Platt, supra,* 48 Cal.4th CJP Supp. 227; *Stanford, supra,* 53 Cal.4th CJP Supp. at p. 43; *Inquiry Concerning Mills* (2013) 57 Cal.4th CJP Supp. 1, 13.) Providing procedural shortcuts or lenient treatment to friends or family "subverts the impartiality of the judicial system and undermines respect for the judiciary as a whole." (*Stanford, supra,* 53 Cal.4th CJP Supp. at p. 25.) While many of the commission decisions in this regard involve traffic tickets, we consider the release of a person arrested for spousal abuse to be even more serious and detrimental to public esteem for the judiciary because it raises public safety concerns.

In aggravation, the judge failed to make independent inquiries concerning the facts and circumstances of the domestic abuse incident that led to Ghazal's arrest and failed to comply with section 1270.1. The limitations on issuing OR releases of defendants arrested for spousal abuse protect the victim by giving the prosecutor and the victim notice and an opportunity to object to the defendant's release.[11] Without that opportunity, the victim's safety could be jeopardized.

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[11] The legislative history of section 1270.1 states in pertinent part: "The Legislature . . . finds that it is necessary that a judge or magistrate be fully informed of all aspects of the charged crimes and any and all possible relevant background information about the defendant, including prior violent acts, the threat of prior violent acts, possession of dangerous and deadly weapons, prior arrests and convictions, violations of law, jail incident reports, and the existence of any other relevant information and, in particular, information that may bear on the danger the defendant may present to the public and the likelihood that defendant may commit future crimes if released pending trial. [¶] . . . The Legislature further finds that it is necessary for both the victim or victims to have the opportunity to be heard regarding the setting of bail in order to bring relevant information to the court's attention." (Stats. 1999, ch. 703, § 1, p. 5082.)

Judge Petrucelli testified that he was not aware of section 1270.1. When asked whether, as a judge, he had a duty to be knowledgeable about the law, he testified, "Certainly that is my duty, but today as much as we do, I don't know that I can keep up with or any judge can keep up on all of the changes and all of the different laws that we deal with." Section 1270.1 was enacted in 1999 and the Victim's Bill of Rights (Marsy's Law), which includes other pertinent rights and protections guaranteed to victims, was enacted in 2008. The public has a right to expect that judges keep abreast of changes in the law before taking judicial action, particularly changes that affect public safety.

A Fresno County district attorney stated that the district attorney's office would be deeply concerned about anyone booked on domestic violence charges being released without notice and without an opportunity for the district attorney to be heard. He believes it diminishes the criminal justice system for one branch to act unilaterally without complying with the requirements of the statute. We agree.

Judge Petrucelli presented evidence of his background in working on domestic violence issues and his sensitivity to victims of domestic violence. He was instrumental in instituting a roundtable in Fresno County to work on ways to provide assistance to victims of domestic violence and to educate the public about domestic violence. He received awards for his work with domestic violence. This background makes it all the more troubling that Judge Petrucelli was not sensitive to the risks inherent in releasing a person arrested for spousal abuse without contacting the alleged victim, the police or the prosecutor or conducting a criminal background check. Instead, his conduct created the appearance that he allowed his personal relationships with Ghazal and Netzer to overshadow his judicial responsibility to ensure public safety and treated this case differently than he treated other domestic violence cases.

We have also taken into consideration Judge Petrucelli's history of prior discipline. Judge Petrucelli previously has been disciplined three times: he was publicly admonished in 2007 and received two advisory letters, in 2001 and 2002. For the most part, the basis of the prior discipline pertained to the judge's courtroom demeanor and did not involve conduct similar to the misconduct in this matter. However, the judge's 2002

advisory letter included his misconduct in failing to disqualify in matters involving an attorney with whom he had practiced and had a continued financial arrangement (he did disclose) in violation of canon 3E(1), the same canon he violated in this matter.

In mitigation, Judge Petrucelli acknowledges the impropriety and serious nature of his misconduct and immediately took responsibility when confronted by his presiding judge. This is an important factor since recognition of the impropriety and nature of wrongdoing is essential to a willingness and capacity to reform. (*Platt, supra,* 48 Cal.4th CJP Supp. at p. 248.)

Further, the record supports the masters' finding that Judge Petrucelli is a dedicated, hardworking judge who has contributed positively to the workings of the court and to his community. Judicial colleagues described his excellent work ethic and willingness to accept all assignments. Attorneys and others who appear or work in the judge's courtroom praised the judge's judicial behavior and performance. Members of the community described Judge Petrucelli's commitment to public service and to charitable causes and programs.

Balancing the foregoing factors, the commission concludes that the purposes of judicial discipline – protection of the public, enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system – can be accomplished through a severe censure. Accordingly, pursuant to article VI, section 18 of the California Constitution, the commission hereby imposes this public censure of Judge Petrucelli.

Commission members Hon. Erica R. Yew, Ms. Pattyl A. Kasparian, Hon. Thomas M. Maddock, Hon. Ignazio J. Ruvolo, Mr. Richard Simpson, and Mr. Adam N. Torres voted in favor of all the findings and conclusions expressed herein and in the order imposing a severe public censure. Commission members Ms. Mary Lou Aranguren and Ms. Sandra Talcott voted in favor of imposition of a severe public censure and all the findings and conclusions expressed herein, except the commission's conclusion that the

judge's conduct in ordering Ghazal's OR release does not constitute willful misconduct. Commission members Dr. Michael A. Moodian and Nanci E. Nishimura, Esq. did not participate. Commission member Anthony P. Capozzi, Esq. was recused.

Date: August 27, 2015

Hon. Erica R. Yew
Chairperson

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COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| **INQUIRY CONCERNING JUDGE JOHN A. TRICE,**<br><br>**No. 196** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 127)** |

## I

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge John A. Trice, a judge of the San Luis Obispo County Superior Court since 2003. On October 23, 2015, the commission filed its Notice of Formal Proceedings (Notice) against Judge Trice.

The Supreme Court appointed three special masters to hold an evidentiary hearing and to report to the commission. The masters are Hon. M. Kathleen Butz, Justice of the Court of Appeal, Third Appellate District; Hon. Anthony J. Mohr, Judge of the Los Angeles County Superior Court; and Hon. Stanford E. Reichert, Judge of the San Bernardino County Superior Court.[1] Prior to the masters holding an evidentiary hearing, however, Judge Trice and his counsel, Eugene G. Iredale, Esq., and the examiner for the

[1] On January 20, 2016, Judge Trice filed with the commission a "Suggestion for Recusal of Judge Anthony Mohr." On January 21, 2016, Judge Mohr filed an answer to Judge Trice's suggestion for recusal, and on January 25, 2016, filed a supplemental declaration. On January 22, 2016, Judge Trice filed a "Supplemental Memorandum in Support of Motion for Recusal." On January 22, 2016, the examiner filed a "Response to Respondent's Suggestion for Recusal of Judge Anthony Mohr." It was not necessary for the commission to make a determination on the judge's recusal motion, because the commission considered and accepted this Stipulation without the participation or involvement of the special masters, and the Stipulation resolves this matter without a hearing and without further involvement of the special masters. Subsequent to the filing of Judge' Trice's "Suggestion for Recusal," Judge Mohr did not participate in any decisions or proceedings related to this matter, other than filing his answer and supplemental declaration in connection with respondent's motion to recuse.

commission, Gary W. Schons, Esq., (the parties) proposed a stipulated resolution of this inquiry to the commission, as follows.

By a Stipulation for Discipline by Consent (Stipulation), the parties proposed, pursuant to Commission Rule 127(b), that this inquiry concerning Judge Trice be resolved with the imposition of a public censure based upon the stipulated facts and legal conclusions. Judge Trice expressly admits the truth of the stipulated facts and agrees with the stipulated legal conclusions. According to the terms of the Stipulation, Judge Trice also agrees that in its decision and order imposing a public censure, the commission may articulate the reasons for its decision and include explanatory language the commission deems appropriate. Pursuant to the Stipulation, Judge Trice waives further proceedings and review in this matter, including formal proceedings (rule 118, et seq.) and review by the California Supreme Court (Cal. Rules of Court, rule 9.60).

Judge Trice also executed on January 22, 2016, the requisite Affidavit of Consent (Affidavit) under rule 127(d) in which he admits the truth of the charges as modified by the Stipulation, consents to the imposition of a public censure, and waives review by the California Supreme Court.

This Decision and Order imposing a public censure is issued following the commission's vote to accept the stipulated agreement. The findings and conclusions, set forth herein, are based on the Stipulation and Affidavit, which are attached to this decision.

## II

## STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge John A. Trice became a judge of the San Luis Obispo County Superior Court in 2003, following his election to that office. His current term began in January 2015.

**Count One A**

In 1990, judgment was entered in the marital dissolution matter of *John A. Trice v. Dawna L. Trice*, No. DR17310. Pursuant to the judgment, which was drafted by the judge's counsel, Judge Trice, then an attorney, was ordered to pay his ex-wife her interest

in his future military retirement and pension benefits "as and when received." A formula was provided to calculate the ex-wife's share of the pension benefit ultimately awarded. This provision was also contained in a Marital Settlement Agreement (MSA), signed by Judge Trice, that was incorporated into the judgment. That provision provided as follows:

> The Court specifically retains jurisdiction over Petitioner's retirement benefits with the Un[it]ed States Air [F]orce and Petitioner is ordered to pay to Respondent her interest in the retirement and pension benefits as and when received on the following formula: Respondent's interest equals one-half (1/2) times the gross monthly benefits times a fraction, the numerator of which is 3,402 points and the denominator of which is the total number of points accumulated by Petitioner in past and future service in the United States Air [F]orce and/or Reserve duty.

Dawna[2] was represented in the dissolution proceeding by attorney Patrick Perry, a certified family law specialist. In 2004, Perry was appointed as a commissioner by the San Luis Obispo County Superior Court, and continues to serve in that capacity. In 1990, after the divorce was final, Dawna remarried and moved to Arizona where she has maintained the same residence (and same telephone number) to the present.

In late 2011 or early 2012, Judge Trice recognized that he would be eligible to retire from the Air Force in June 2012 on his 60th birthday (June 14, 2012) and to then begin to receive his military pension benefits. He also recognized that the divorce judgment entitled his ex-wife to a specific portion of those benefits based on the formula provided in the judgment and MSA. (Judge Trice retained a copy of the judgment and MSA in his chambers.) Judge Trice also knew, and had records of, the precise number of points he had earned during his active and Reserve military service (4,082), which had ended in 2002 when he ceased his Reserve service.

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[2] In order to avoid confusion, Judge Trice's ex-wife and current wife, Mary Trice, are referred to, in this decision, by their first names.

In March 2012, Judge Trice received correspondence from the Air Force confirming his eligibility to retire and to begin to receive pension benefits in June. On March 26, 2012, he made application for his retirement benefits. In April 2012, Judge Trice received correspondence from the Air Force informing him that he would be placed on the Air Force Retired List, effective June 14, 2012, and that a pay account for his benefit was being established. The letter also provided an address and phone number for "any questions concerning retired pay." Judge Trice called the Air Force and advised an Air Force representative that his ex-wife had an interest in a portion of his pension benefits. Judge Trice was advised that in order for his ex-wife to receive direct payment from the Air Force, she would have to apply and provide certain documentation.

At about this time, Judge Trice recalls that he had a couple of informal conversations with his bench colleague Commissioner Perry, with whom he was on a friendly basis and with whom he would have lunch on a regular basis.

According to the judge, in both of these conversations, he posed hypothetical questions to Commissioner Perry concerning an ex-spouse's interest in his or her former spouse's military pension, where the military spouse had been promoted in rank after the divorce. The questions were posed as hypotheticals to avoid the conflict Commissioner Perry would have in advising the judge concerning his divorce from Dawna. One conversation concerned whether the ex-spouse's interest would be based on the military spouse's rank at the time of divorce, or at the time of retirement when the rank was higher. According to the judge, Commissioner Perry opined that it would be at the higher rank. The second conversation, according to the judge, concerned whether the military spouse was responsible for determining the amount the ex-spouse was entitled to where there had been a change in rank post-divorce, and whether the ex-spouse should be contacted. According to the judge, the commissioner opined that if the court had retained jurisdiction over the matter, it was up to the person who wished to modify the judgment to go back to court to obtain a subsequent order concerning the pension. According to the judge, he interpreted what the commissioner said to mean that if Dawna wanted her share of the pension, she could go back to court and get an order as to the specific amount

she was entitled to. Judge Trice recalls that the second conversation ended with either he or the commissioner making a "joke" to the effect that if the ex-spouse did not make a claim on the pension, the military spouse could keep the money. The judge recalls that either he or the commissioner responded, "No, can't do that."

On a day subsequent to these informal conversations, Judge Trice had a conversation with Commissioner Perry about his military pension benefits. Judge Trice was in his chambers when Commissioner Perry happened to walk by. Judge Trice called the commissioner into his chambers. Judge Trice had the judgment and MSA out on his desk as he was trying to determine his ex-wife's share of the retirement benefits based on the formula provided in the judgment. According to Judge Trice, he told Commissioner Perry his final service points – 4,082 – and the commissioner, using the formula in the judgment, which included Dawna's "share" of the judge's points, and an estimate that Judge Trice provided of what his benefit amount would be based on his salary as a Lieutenant Colonel, calculated an estimate of Dawna's share. According to the judge, the commissioner calculated that Dawna's share was approximately 40 percent of the retirement benefit, that Judge Trice would retain approximately $900 per month, and that Dawna was entitled to approximately $700 per month.

In June 2012, Judge Trice became eligible to receive his monthly military retirement payments. That month he received correspondence from the Air Force which showed his gross retired pay ($2,394), deductions for taxes and his current wife's survivor benefit, and net pay ($2,076.38). On July 2, Judge Trice received his first monthly benefit payment for the period June 14-30, 2012, in the gross amount of $1,356.60, of which, after deduction for taxes, $1,228.44 was directly deposited into a savings account Judge Trice had designated at the San Luis Obispo Credit Union (SLOCU). That account was in the names of the judge and his current wife Mary Trice (Mary). On August 1, Judge Trice received his first full month's pension benefit – $2,076.38 – which was directly deposited into this credit union account. Thereafter, he received this payment (or an adjusted amount) monthly.

Judge Trice claims that at the time he did not pay attention to that portion of the judgment which required him to pay his ex-wife her share of the pension benefits "as and when received," despite having the judgment readily at hand in his chambers, and having recently referred to that precise provision of the judgment in order to derive the payment formula for his ex-wife's share. Judge Trice admits he did not advise Dawna that he had retired from the Air Force and was receiving the pension benefit. He assumed she would be able to determine that fact from several close relatives she had in the military. The judge has stated that he told his adult son and daughter that he had retired from the Air Force. The judge admitted that he did not want to notify his ex-wife and then have to do the work to get her share of the benefit to her directly from the Air Force.

Judge Trice admits that he had the means and ability to contact his ex-wife. In addition, Judge Trice spent three days in Arizona in September 2013, when he attended their son's wedding ceremony. He interacted with Dawna on each of those days, including at the rehearsal dinner and wedding. At no time did he advise her that he was retired and receiving the pension benefits. The judge has stated that he relied on his belief that in 1990, Dawna had received a copy of a forensic accountant's report which set out the specific date of his eligibility for retirement benefits. Finally, Judge Trice had no knowledge that any of Dawna's family relations knew that she was entitled to receive a portion of his military retirement benefits. Instead of paying Dawna her share of the pension benefits "as and when received," each month, Judge Trice directed a transfer from his credit union savings account, into which he received the benefit payment directly from the Air Force, into a separate checking account at the credit union. For the months of August, September, and October 2012 he transferred $700, the value of Dawna's share as estimated by Commissioner Perry, according to the judge, into the checking account. The checking account was owned solely by Judge Trice and Mary; it was not a trust account and Dawna was not named as a beneficiary of the account.

In September 2012, Judge Trice and Mary met with their financial advisor, Joan Parker, CFP. Judge Trice informed Parker that his ex-wife was entitled to a portion of his military retirement benefits, which he estimated was 30 percent of the benefit, and that he

was setting aside $700 per month. The judge told Parker that his ex-wife had not claimed her share of his pension and that he was setting the money aside in a savings account in case she was to claim it at a later date. The judge said he assumed he would have to pay the money to his ex-wife or the government at some later date.

In a letter dated October 12, 2012, Parker advised Judge Trice that based on the information he had given her, he should set aside only $440 as his ex-wife's (net) share because he was paying taxes on the entire pension benefit. On October 19, Judge Trice withdrew $1,000 from the checking account (presumably to recover the "excess" payments into the account) and thereafter transferred $440 monthly into that account.

On April 17, 2014, Commissioner Perry contacted Dawna by phone. He asked if she was aware that the judge had retired from the military and if she was receiving her share of his military pension. Dawna informed the commissioner that she did not know the judge had retired and that she had not been receiving her share of his pension payments.

On April 25, 2014, Commissioner Perry submitted a letter of complaint to the commission concerning the judge's failure to have paid Dawna her share of his military pension.

On May 1, 2014, a final deposit of $440 was made into the SLOCU checking account (from the SLOCU savings account). As of that date, the balance in the checking account was $9,895.

Commissioner Perry provided the names of two family law attorneys to Dawna. Dawna subsequently hired attorney Christopher Duenow. On May 21, 2014, Duenow contacted the judge by phone. Duenow told the judge that he was in violation of the divorce judgment because he had not paid Dawna her share of his military pension benefits for two years. The judge told Duenow words to the effect of, "I assumed she didn't want it because she didn't make a claim for it."

On May 22, 2014, Duenow met with the judge in chambers for almost an hour to discuss a resolution to the pension arrears issue. On May 23, Duenow had a telephone conference with the judge and Mary. The judge offered to settle for $10,000. The judge

made a statement to Duenow wherein he stated that he failed to make the pension payments to Dawna on advice he claimed to have received from Commissioner Perry. (This matter is discussed further below.)

Later that day, Duenow sent the judge and Mary an email that included as an attachment a calculation of the amount owed to Dawna, $22,769.17 ($20,819 in principal and $1,950.17 in interest).

On May 24, 2014, Dawna received an email from Mary, which stated:

> Hi Dawna,
>
> I want to share a little history with you.
>
> Two years ago John was notified that he could receive retirement income from the service. He knew of your judgment/order and sought professional CPA and legal advice to figure out the percentage because it is a complicated calculation.
>
> First he talked to Pat Perry, who said that since he no longer represented you, he could assist John in the calculation, which he did. He also specifically told John that it was not his responsibility to initiate the order and that it was yours. That advice was reiterated by the Air Force representative in Denver when John called them to start drawing his retirement. They indicated they needed a copy of the court order from you and could not make the calculation until you provided a W-4 and withholding information.
>
> He then contacted our financial advisor, who did the calculation again and came up with a figure that he should set aside for you, which he did. That money has been waiting for you and has amounted to approximately $9,800. We have paid state and federal taxes on the entire amount for the past two years, which further complicates the calculation. The figure that Duenow has come up with is about double what everyone advised John to set aside. He contacted our CPA again yesterday to re-run the numbers. There is obviously a mistake somewhere and if it is on John's side it will be corrected. There was absolutely no intention to defraud you.

> I have chosen to write this email because I feel you and I have had a friendly relationship and I am upset that you probably think John has done something dishonest when he was following professional advice. I am also upset because I am assuming that when you called Pat Perry, he neglected to give you this history and probably just flippantly said something to the effect of "Oh, he's been drawing retirement for two years."
>
> So there is John's side of the story.
> I hope this helps and we can get back to where we were.
>
> Mary

On June 9, 2014, the judge spoke with Parker by phone asking her to review Duenow's calculation of what the judge owed his ex-wife in arrears. The judge subsequently provided to Parker copies of pension statements for June 21, 2012, and June 20, 2013 through May 20, 2014, and a copy of the page from the MSA that contained the formula for dividing the pension. On the MSA page, the judge had handwritten in his service point total, 4,082.

On June 19, 2014, Parker wrote a letter to the judge and Mary wherein she provided her calculation of the amount owed to Dawna as of May 31, 2014, $15,600. In arriving at this figure, Parker calculated the interest owed to Dawna using the daily interest rates for 52-week Treasury Bills rather than the legal interest rate of 10 percent. Further, Parker noted in the letter that if she had been aware that Dawna's share of the judge's pension was about 41.7 percent, as indicated by the formula in the MSA, "and not 30%" (as the judge had told her on September 26, 2012), she would have recommended that he set aside $650 per month rather than $440.

On July 10, 2014, Duenow sent the judge and Mary an email setting forth the terms of Dawna's final counteroffer. Dawna offered to settle her claim for $20,000, which Duenow indicated was a discounted amount in consideration for the taxes the judge had paid on Dawna's share of the pension. Mary subsequently sent Duenow an

email stating that the judge could pay $19,000 forthwith and $1,750 in August. Duenow responded that the judge's offer was agreeable.

Thereafter, in July 2014, the judge, Dawna, and Duenow signed a stipulation addressing the pension arrears, Stipulation Re Payment of Military Benefits Pending Direct Distribution Order. The stipulation stated that the 1990 dissolution judgment "provided that John pay Dawna her interest in John's retirement benefits with the United States Air Force as and when received." The stipulation stated that "[t]o satisfy all arrears for non-payment of Dawn's [*sic*] interest in John's retirement benefits through June, 2014, John shall pay Dawna $19,000 upon full execution of this stipulation." The stipulation further stated that John was to pay Dawna $1,750 for July and August 2014, and then $750 per month thereafter until Dawna began receiving direct payment of her share from the military.

In conjunction with the stipulation, the judge, Dawna, and Duenow also signed a Qualifying Court Order re: Military Retirement Benefits, the purpose of which was to allow Dawna to receive direct payment of her share from the military. This order provided that Dawna's share of the pension benefit was 44.6 percent (rather than 41.7 percent), because of the amount deducted from the gross pension amount to pay for a spousal survivor benefit for Mary.

The judge made the payments to Dawna that were required under the terms of the stipulation. Beginning on or about October 31, 2014, Dawna began receiving her share of the judge's military pension directly from the military.

Judge Trice's course of conduct with respect to complying with the provisions of the judgment requiring him to pay his ex-wife the designated portion of his military retirement benefits "as and when received on the following formula" demonstrated a disregard of the command of the judgment and his legal obligation to abide by it. Setting aside a rough approximation based on incomplete information of the ex-wife's share of the benefit in an account in the judge's name, and under his control, did not reflect a good faith effort to comply with the judgment. Additionally, the advice the judge received from the Air Force, and the opinions he recalls were expressed by Commissioner Perry in response

to his hypothetical questions were not based on the complete provision of the facts necessary to obtain a valid legal opinion upon which Judge Trice was entitled to rely.

The information the judge received from the Air Force related solely to an ex-spouse obtaining an order for the Air Force to pay the ex-spouse directly. This was not what the judgment provided for; rather, the judgment required the judge to pay his ex-wife "as and when" he received the benefits. Dawna did not need to apply to the Air Force in order to receive her share of the pension benefits; the judge was obligated to pay her directly under the terms of the judgment.

The opinions the judge asserts that Commissioner Perry expressed in response to his hypothetical questions did not justify the judge's course of conduct. In particular, under the terms of the divorce judgment, the judge's rank at the time of his military retirement was not relevant to the calculation of Dawna's share of his military pension, and there was no need for her to obtain a further court order to obtain her share. If the judge wished to seek a modification of the judgment due to promotions in rank he received post-divorce, then it was incumbent on him to seek a modification order from the court.

Further, the advice the judge received from the Air Force and the opinions he recalls were expressed by Commissioner Perry did not take into account that the judge did not advise his ex-wife he was retired and receiving retirement benefits. Without this information, the judge's ex-wife had no reason to affirmatively seek direct payment from the Air Force or a modification or enforcement order from the court.

The judge's ex-wife's interest in his military pension was not contingent on her requesting it; rather, she was an owner of her community share of the pension, with a present, existing, and equal interest. (See *Fithian v. Fithian* (1977) 74 Cal.App.3d 397, 403.)

The judge's failure to advise his ex-wife he was retired and receiving the pension benefit, given the terms of the judgment, violated his fiduciary duties to his ex-wife as set forth in Family Code sections 721 and 2102.

Judge Trice's failure to make the pension payments to his ex-wife, Dawna, for nearly two years, and his deliberate failure to inform her that he was retired and receiving his pension, constituted prejudicial misconduct. His conduct violated the Code of Judicial Ethics, canons 1 (a judge shall personally observe high standards of conduct so that the integrity of the judiciary will be preserved); 2 (a judge shall avoid impropriety and the appearance of impropriety); and 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

**Count One B**

As discussed above, on May 23, 2014, the judge and Mary participated in a conference call with Dawna's attorney, Duenow, to discuss a resolution to the pension arrears issue. During the call, Judge Trice made a statement to the effect that the reason he had not made payments to Dawna is that Commissioner Perry had told him it was not his responsibility to initiate payments to her, and that it was Dawna's responsibility to initiate the process to obtain her share of his retirement benefit.

On or around July 15, after he had received and signed the Stipulation Re Payment of Military Benefits Pending Direct Distribution Order, Judge Trice met with Judge Barry LaBarbera in his chambers. Judge Trice informed Judge LaBarbera that he had signed a stipulation to pay pension benefit arrears to his ex-wife pursuant to their dissolution judgment and to arrange for future direct payment from the military. Judge Trice told Judge LaBarbera that he had not paid his ex-wife her share of the retirement benefits based on advice he had received from Commissioner Perry to the effect that it was not his responsibility to initiate payments to her, and that it was Dawna's responsibility to initiate the process to obtain her share of his retirement benefit. Judge Trice asked Judge LaBarbera if he would handle the stipulation by reviewing and signing it.

On Friday morning, July 18, 2014, Judge Trice called Court Executive Officer Susan Matherly on her cell phone. The purpose of the call was to make arrangements with Matherly to have the settlement stipulation given directly to Judge LaBarbera for judicial approval and his signing.

On July 21, 2014, Matherly spoke with the judge in chambers for about 30-45 minutes. The judge told Matherly that when he retired from the military he had talked to Commissioner Perry about what to do about his pension. The judge said he asked the commissioner, "Do I tell her? Give it to her?" or words to that effect. The judge said the commissioner told him, "You can put it in trust but can't cut her a check because you don't know what the withholdings are," and, "Don't spend it, put it in a trust and wait for her to ask for it," or words to that effect.

The statements the judge made to Duenow, Judge LaBarbera, and Matherly, which the judge attributed to Commissioner Perry, were untrue because they misstated Commissioner Perry's opinions, as described by the judge. Commissioner Perry never told the judge not to pay Dawna her share of the pension benefits. Nor did he tell the judge to put Dawna's share in a trust account and to wait for her to contact him. Dawna was the commissioner's former client, to whom he owed a continuing fiduciary obligation of loyalty and confidentiality. (*Oasis West Realty LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

The statements Judge Trice attributed to Commissioner Perry implied that Commissioner Perry had given him advice that was contrary to the interests of the commissioner's former client, and contrary to the terms of the Judgment of Dissolution and the MSA. By making these statements to Duenow, Judge LaBarbera, and Matherly, the judge was, intentionally or not, impugning the integrity of Commissioner Perry by asserting that he gave advice that was contrary to the interests of a former client, about the very matter he represented the former client in, and that was contrary to the terms of a court judgment.

Judge Trice's statements about advice he had received from Commissioner Perry constituted prejudicial misconduct. His conduct violated the Code of Judicial Ethics, canons 1, 2, and 2A. (See *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 371 [judge's comments from the bench and in chambers impugning character and competence of judicial colleagues violated canon 2A]; *Censure of Judge Jose A.*

*Velasquez* (1997) p. 3 [judge's public statements disparaging judicial colleagues and local attorneys, made both on and off bench, constituted willful misconduct].)

**Count One C**

As previously discussed, on July 15, 2014, the judge signed two documents in connection with resolving the pension arrears issue with Dawna – a Stipulation Re Payment of Military Benefits Pending Direct Distribution Order, and a Qualifying Court Order re: Military Retirement Benefits. The terms of the stipulation are set forth above on page 10.

On July 15, Judge Trice called Duenow's office and spoke to Duenow's paralegal, Gina Goodwin. The judge informed Goodwin that he had signed the stipulation and that they would receive it shortly. The judge further stated that he had arranged for Judge LaBarbera to sign the stipulation, and that he wanted Duenow's office to submit it through CEO Matherly. The judge and Duenow had not previously discussed or agreed to this arrangement. On July 15, Goodwin prepared a memorandum to Duenow documenting her conversation with the judge, which states:

> Judge Trice just called. He says he is going to be busy now, but relayed some info for me to pass along to you. [¶] He is concerned about submitting the document to the Court here. He thinks the Judges will start DQing themselves to keep from signing this doc. He has arranged for Judge LaBarbera to sign off on the document. He would like for us to submit it through Susan Matherly (court executive officer). She is on vacation until Monday. He has signed the doc and sent it back to us with a check for Dawna enclosed. We should receive it shortly.

During the chambers conference with Matherly on July 21, 2014, the judge told Matherly that he had called her on the previous Friday (July 18) because the parties were stipulating that Judge LaBarbera would sign the stipulation, and he wanted her to process the stipulation.

Matherly subsequently received the stipulation and order from Duenow's office and, pursuant to her conversation with Judge Trice, she left the documents on Judge LaBarbera's desk. Matherly did not discuss the documents with Judge LaBarbera.

On July 28, 2014, Judge LaBarbera signed the stipulation and order. The documents were then returned to Matherly and she had them filed with the court.

As a party to the proceeding, Judge Trice was without authority to determine who would handle the stipulation and order. Even as a judge, Judge Trice had no authority to assign the handling of the stipulation and order he entered into with Dawna to Judge LaBarbera. The authority to assign and reassign cases rests with the presiding judge. (Cal. Rules of Court, rule 10.603(b).) (In July 2014, Judge Dodie Harman was the presiding judge.) Further, Judge Trice was disqualified from presiding over the matter because he had a financial interest in the proceeding and was a party. (Code Civ. Proc., § 170.1(a)(3)(A) & (4).) A judge who is disqualified from a case may take certain limited actions in the case, but those actions do not include assigning the case to another judge. (See Code Civ. Proc., § 170.4(a).)

In selecting a particular judge to act on the stipulation, Judge Trice was acting beyond the limits of his lawful judicial power and he knew or should have known that he was acting beyond the limits of a judge's authority. In his conversation with Duenow's paralegal, Gina Goodwin, on July 15, 2014, the judge told Goodwin that he had arranged for Judge LaBarbera to sign the stipulation because he was "concerned" that if the document was submitted to the court, the court's judges would "start DQing themselves to keep from signing" it. In other words, Judge Trice was motivated by a desire to have the stipulation signed and to avoid the possibility of the court's judges disqualifying themselves *en masse*.

By directing who would be assigned to handle the stipulation and order, Judge Trice abused his authority, failed to uphold the integrity of the judiciary (canon 1), failed to avoid impropriety and the appearance of impropriety (canon 2), failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), and used his judicial position to advance his personal interests

(canon 2B(2)). Moreover, because the judge was acting in his judicial capacity when he directed CEO Matherly to submit the stipulation and order to Judge LaBarbera his conduct constituted willful misconduct.

**Count Two A**

On May 1, 2013, Judge Harman, who was the assistant presiding judge and supervising judge of the criminal team, which included Judge Trice, was looking for Judge Trice to discuss coverage of the next day's calendars. Judge Harman learned from the judicial secretary that Judge Trice had left for the day.

At 5:12 p.m., Judge Harman sent an email to Judge Trice. Before sending the email she spoke with Judge LaBarbera, who was the presiding judge, about Judge Trice leaving the courthouse earlier that afternoon. Judge LaBarbera directed her to inquire about Judge Trice's whereabouts that afternoon, as was her duty as a supervising judge, and reviewed and approved the following email, which Judge Harman drafted. Judge Harman sent this email to Judge Trice at 5:12 p.m.:

> I was trying to find you this afternoon to talk about tomorrow's calendars. I may need to get some help from you and wanted to see if you could help out. I was told you had left for the day so I was just wondering where you were because you did not check with me if we were covered before you left. If you could let me know where you were and if you are available to help with calendars tomorrow I would appreciate it.
>
> Thanks, Dodie

That evening at 9:34 p.m., Judge Trice responded to Judge Harman with the following email, which he copied to the CEO, Matherly, and three of the court's judges, Judges LaBarbera, Charles Crandall, and Michael Duffy:

> Dear Ms. Assistant Presiding Judge and Criminal Team "Supervising Judge" –

As I told you last week, we have Veteran's Treatment Court meetings every Wednesday until kick-off on June 14th.

I can't help tomorrow.

I handled my calendar today, DIO's morning calendar today, DIOs 2960 calendar today with two court trials and 3 search warrants. Then I went to the Vet's Hall for the meeting, which turns out – he cancelled, so I talked with the V.A. rep for about an hour and came home. I just got done handling an after hours search warrant and a 20 page Pen Register Request. I'm sure you are just as busy with your physical therapy, workout time and all.

I don't appreciate you checking on me – I don't work for you and never will. I was elected by the citizens of this county, unlike you. I would hope you and your pals upstairs would have better things to do with your time as Superior Court Judges than keep a journal on another Judge's comings and goings.

Pathetic. . . . get a life. I look forward to running against you for P.J. The Court will be a lot better off without you in some position of assumed power. Good luck in the campaign.

Have a really nice night.

My civil attorneys say I should have no more contact with you or [Judge] Tangeman without an impartial witness or reporter present. I plan to take their advice.

Sincerely,

John A. Trice, Judge
San Luis Obispo Superior Court

As supervising judge of the criminal team, Judge Harman was responsible for ensuring that there was judicial coverage for all of the criminal court calendars. Consistent with that responsibility, Judge Harman's May 1, 2013 email to Judge Trice advised him that she had been looking for him that afternoon to talk about the next day's

calendars, asked where he had been that afternoon since he did not check with her before leaving, and asked if he would be available to help with the next day's calendars.

Judge Trice's email response to Judge Harman included comments that were disparaging ("I was elected by the citizens of our county, unlike you"), and comments that were undignified and discourteous ("Pathetic. . . . get a life," "The Court will be better off without you in some position of assumed power"). Judge Trice also implied that he would not speak to Judge Harman without a "witness or reporter" present.

Judge Trice's conduct violated canons 1, 2A, 3B(4), and 3C(2) (a judge shall cooperate with other judges and court officials in the administration of court business).

At a minimum, the judge's conduct constituted improper action.

**Count Two B**

The San Luis Obispo County Superior Court employs nine court reporters who work for the court under the supervision of Tammy Denchfield, Director of Court Operations. At a judges' meeting on October 3, 2014, the judges had agreed to continue a policy and practice that the nine court reporters would be randomly rotated and assigned to a judge for an eight-week period, this despite some of the judges complaining about having to work with court reporter Claire Trout.

On October 30, 2014, the court was scheduled for the next court reporter rotation (two months), effective November-December 2014. Tammy Denchfield was responsible for preparing the rotation and sending it out to the judges and court staff. Her office was sending the rotation out that afternoon.

Before sending the rotation schedule out, Denchfield addressed Judge Trice's request to keep court reporter Lisa Andrews, who was then assigned to his department, with Presiding Judge Harman. Judge Harman told Denchfield to do what she needed to do. Denchfield then directed Anna Hernandez, the supervising court reporter, to send the rotation out. Denchfield left for the day, around 4:30 p.m., her normal work schedule, and was starting a vacation leave the next day.

When Denchfield arrived home at 5:00 p.m. she received the following email from Judge Trice on her iPad:

> Tammy – I was notified that Claire Trout has been re-assigned to our courtroom. I will not work with her. She has been rude to my other staff, the public and attorneys assigned to our court. We have several high profile, high stress cases coming up on our calendar, we cannot have such a person with us when trying to serve the public.

At 5:04 p.m., Denchfield forwarded the email to Susan Matherly.

At 5:05 p.m., Matherly forwarded the email to Judge Harman.

The next day, October 31, at 8:14 a.m., Judge Harman responded to Matherly by email:

> Susan:
> I believe rotations should be the same for everybody. The same issues have been raised by a number of judges. Bottom line is if she does something then it should be reported by him and dealt with by her supervisor.
>
> None of us have been able to exclude a particular reporter from our courtroom. The problem should be dealt with if there is one instead of saying particular judges refuse particular reporters.

At 8:31 a.m., Matherly responded to Judge Trice by email, as follows:

> The first thing you should realize is that this is a labor issue. The rotations are part of a labor agreement between the court and SEIU. I believe rotations should be the same for everybody. As you may recall, the same issues have been raised by a number of judges at our most recent judges' meeting and it was agreed that if she does something it should be reported to her supervisor so we can deal with the behavior. None of the judges have been able to exclude a particular reporter from their courtrooms. The problem should be dealt with if there is one instead of saying particular judges can refuse particular reporters. The process should be fair to both the other judges and the reporters. I am happy to sit down and discuss this with you at your convenience.

At 8:47 a.m. on October 31, Judge Trice responded to Matherly by email as follows:

> I will not work with her. This has been a stressful year for Frances and I and we don't need to add more tension in our courtroom. If Chris Money, Barry [LaBarbera], Dodie [Harman] or Jeff Burke didn't want a bailiff or employee in their courtroom for a good reason, they were always moved. I will be given the same consideration. One male bailiff was moved completely out of this building a few years ago based on personal conflict with a female judge. Linda Hurst routinely refuses to accept certain personnel in her courtroom. I will be given the same consideration.
>
> Our department has always gone the extra mile to help out this court. We have a "well-oiled", efficient department.
>
> She either moves, or the P.J. can move me and my staff. I will not call my calendar on Tuesday with her in the courtroom. I will order her out of the room in public view.
>
> If there is still resistance to this, I would like a special Judge's meeting to be scheduled before Tuesday.

At 9:28 a.m., Matherly sent the judge the following email:

> I'm sorry but we cannot make an exception to the court reporter rotation policy.

At 9:36 a.m., the judge responded:

> Please schedule a special Judge's meeting.

On November 1, 2014, the judge sent Matherly the following email:

> I don't need a meeting. I'll suck it up for 8 weeks. [¶] Sorry for any stress this caused you.

Judge Trice may have had legitimate concerns about court reporter Trout, who had just been assigned to his courtroom. However, his concerns about Trout were based on conduct that had occurred in the past, and that predated the October 3, 2014 judges' meeting at which all of the judges agreed that Trout would be rotated through every department. Further, the assignment of courtroom staff is not a matter within the judge's

purview. Judge Trice's statement to CEO Matherly that he would refuse to call his calendar if Trout was in the courtroom, and to "order her out of the room in public view," was intemperate, and inconsistent with his obligation to cooperate with court officials in the administration of court business.

The judge's conduct violated canons 1, 2A, 3B(4), 3C(1) (a judge shall not, in the performance of administrative duties, engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice), and 3C(2).

At a minimum, the judge's conduct constituted improper action.

**Count Three**

Judge Trice and criminal defense attorney David Hurst are close personal friends. The judge and Hurst became friends while they were both employed by the San Luis Obispo County District Attorney's (DA) Office in the 1980's. While with the DA's office, they socialized often, including playing golf together and occasionally taking vacations together. Hurst left the DA's office in 1996 and went into private practice. Since then, Hurst and the judge have continued their friendship. Hurst considers the judge one of his four "best friends." Hurst has been to the judge's house at least 20 times. They watch sports events together and Hurst typically goes to the judge's house on Thanksgiving. They socialize together outside of work approximately once a month. In 2014, when Hurst was suffering from a knee injury that made it difficult for him to drive his manual transmission Porsche automobile, he traded cars with the judge's wife at her suggestion. While the trade was in place, the judge on approximately four occasions drove Hurst's Porsche to work and parked it in the judges' parking lot.

Since the judge took the bench in 2003, Hurst has frequently appeared in his court representing criminal defendants. The judge does not disqualify himself in cases in which Hurst appears as counsel of record, nor does he disclose on the record the fact or nature of his relationship with Hurst.

Judge Trice's position is that he is not disqualified from handling cases in which Hurst represents a defendant, and that he need not disclose his personal relationship with Hurst because the opposing representative in all of his criminal cases are 20-year veterans

of the DA's office who are aware of his relationship with Hurst, and who have never raised any concern of personal bias or prejudice, or the appearance of impropriety because of the relationship.

Under canon 3E(1), a judge is obligated to disqualify himself or herself in any proceeding in which disqualification is required by law. The circumstances under which a trial court judge is disqualified are set forth in Code of Civil Procedure section 170.1. Judge Trice's close friendship with Hurst would arguably appear to be a disqualifying circumstance under section 170.1(a)(6)(A)(iii), which provides that a judge shall be disqualified if "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

Even if the judge's friendship with Hurst did not require his disqualification, the judge nevertheless had an obligation to disclose their relationship on the record. Canon 3E(2)(a) provides that in all trial court proceedings, a judge shall disclose on the record "information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification."

At a minimum, the judge's conduct violated canon 3E(2) and constituted improper action.

**Prior Discipline**

In 2012, Judge Trice received an advisory letter for continuing to preside over matters in a case after "voluntarily recusing" from a new trial motion.

**Aggravating or Mitigating Factors**

Judge Trice enlisted in the Air Force in 1972. He served eight years active duty, and thereafter 18 years in the Reserves. He was promoted to the rank of Lieutenant Colonel in 1997. He was awarded three Air Force Meritorious Service Medals during his military service.

Judge Trice worked for the San Luis Obispo County District Attorney's Office from 1984 through 2002. He was selected to serve as that office's first Felony Trial Team Leader in 1988. He handled over 140 jury trials and successfully prosecuted two

of the county's four death penalty cases. Additionally, he served on the Governor's Arson Task Force.

In 2003, he started the county's first Mental Health Treatment Court, and in 2013 started the county's first Veteran's Treatment Court.

**Count Two A**

Judge Trice acknowledges that his conduct in stating that he would not call his calendar, and would order the court reporter out of the room in public view was both improper and intemperate. In mitigation, the evidence shows that he relented and apologized less than 24 hours after the inappropriate email: "I don't need a meeting. I'll suck it up for 8 weeks. Sorry for any stress this caused you."

**Count Three**

Judge Trice believed that disclosure of his friendship with attorney Hurst was not required because the deputy district attorneys in his court had actual knowledge of his long friendship with Hurst. Upon reflection, Judge Trice now appreciates that a formal disclosure to all parties, including defendants, was the required course of conduct. He will make formal disclosure in the future.

## III.

## DISCIPLINE

The commission has determined to accept the Stipulation and impose this public censure, the most severe sanction that may be imposed short of removal, because it fulfills the commission's mandate to protect the public and maintain public confidence in the integrity of the judicial system while resolving this matter without the delay of further proceedings. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112; Cal. Const., art. VI, §18, subd. (d).)

Judge Trice's failure to comply with a court order that he make payments to his ex-wife "as and when" his military benefits were received is an affront to the authority and dignity of the judicial system he serves. It is a fundamental principle of our system of government that no person is above the law. (*Jenkins v. Knight* (1956) 46 Cal.2d 220, 223.) This principle is particularly important as applied to those who are sworn to uphold

the law. Our society depends upon our citizens' compliance with orders, decisions and judgements of our courts. That compliance, in turn, depends upon citizens' respect for the courts. When a judge fails to comply with a judgment or order of the court, public respect for the institution of the judiciary and the rule of law is undermined.

Judge Trice engaged in other misconduct that undermines public confidence in the integrity of the judiciary, including acting beyond his authority in directing what judge would be assigned to handle the stipulation and order in connection with the pension arrears owed to his ex-wife and attributing statements to Commissioner Perry that were untrue. The judge's misconduct related to his intemperate email exchanges with the supervising judge and the CEO were unprofessional and disparaging. A judge's failure to cooperate with supervising judges and court officials in a professional manner makes the demanding job of administering court business more difficult and stressful for those involved.

In determining that a public censure is the appropriate sanction, the commission has taken into consideration that Judge Trice acknowledged engaging in multiple incidents of misconduct as stated in the Stipulation, and that his history of prior discipline during his 13 years on the bench is limited to one advisory letter (the lowest level of discipline).

Commission members Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Ms. Sandra Talcott; and Mr. Adam N. Torres voted to accept the parties' settlement proposal and to issue this decision and order imposing a public censure pursuant to the stipulated agreement. Commission member Ms. Mary Lou Aranguren voted to reject the Stipulation. Commission member Richard Simpson did not participate.

Dated: February 4, 2016

Hon. Erica R. Yew,
Chairperson

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COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| INQUIRY CONCERNING JUDGE JOHN A. TRICE, No. 196 | STIPULATION FOR DISCIPLINE BY CONSENT (Rule 127) |

Pursuant to Rules of the Commission on Judicial Performance, rule 127, Judge John A. Trice, of the San Luis Obispo Superior Court, represented by counsel, Eugene Iredale, and the examiner, Gary W. Schons, ("the parties") submit this proposed disposition of Inquiry No. 196. The parties request that the commission resolve this matter by imposition of a censure.

The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Trice because, among other reasons, in light of the stipulated facts and legal conclusions, a censure adequately protects the public and will avoid the delay and expense of further proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the Inquiry Concerning Judge Trice, No. 196.

2. The commission shall issue a censure based on the agreed Stipulated Facts and Legal Conclusions set forth herein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing censure may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation, the judge's affidavit of consent, and the commission's decision and order shall be made public.

5. Judge Trice waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. The commission may reject this proposed disposition and resume formal proceedings. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Trice.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a censure on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions:

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge John A. Trice became a judge of the San Luis Obispo County Superior Court in 2003, following his election to that office. His current term began in January 2015.

**Count One A**

In 1990, judgment was entered in the marital dissolution matter of *John A. Trice v. Dawna L. Trice*, No. DR17310. Pursuant to the judgment, which was drafted by the judge's counsel, Judge Trice, then an attorney, was ordered to pay his ex-wife her interest in his future military retirement and pension benefits "as and when received." A formula was provided to calculate the ex-wife's share of the pension benefit ultimately awarded. This provision was also contained in a Marital Settlement Agreement (MSA), signed by Judge Trice, that was incorporated into the judgment. That provision provided as follows:

> The Court specifically retains jurisdiction over Petitioner's retirement benefits with the Un[it]ed States Air [F]orce and Petitioner is ordered to pay to Respondent her interest in the retirement and pension benefits as and when received on the following formula: Respondent's interest equals one-half (1/2) times the gross monthly benefits times a fraction, the numerator of which is 3,402 points and the denominator of which is the total number of points accumulated by Petitioner in past and future service in the United States Air [F]orce and/or Reserve duty.

Dawna was represented in the dissolution proceeding by attorney Patrick Perry, a certified family law specialist. In 2004, Perry was appointed as a commissioner by the San Luis Obispo County Superior Court, and continues to serve in that capacity. In 1990, after the divorce was final, Dawna remarried and moved to Arizona where she has maintained the same residence (and same telephone number) to the present.

In late 2011 or early 2012, Judge Trice recognized that he would be eligible to retire from the Air Force in June 2012 on his 60th birthday (June 14, 2012) and to then begin to receive his military pension benefits. He also recognized that the divorce judgment entitled his ex-wife to a specific portion of those benefits based on the formula provided in the judgment and Marital Settlement Agreement. (Judge Trice retained a copy of the judgment and Marital Settlement Agreement in his chambers.) Judge Trice also knew, and had records of, the precise number of points he had earned during his active and Reserve military service (4,082), which had ended in 2002 when he ceased his Reserve service.

In March 2012, Judge Trice received correspondence from the Air Force confirming his eligibility to retire and to begin to receive pension benefits in June. On March 26, 2012, he made application for his retirement benefits. In April, 2012, Judge Trice received correspondence from the Air Force informing him that he would be placed on the Air Force Retired List, effective June 14, 2012, and that a pay account for his benefit was being established. The letter also provided an address and phone number for "any questions concerning retired pay." Judge Trice called the Air Force and advised an Air Force representative that his ex-wife had an interest in a portion of his pension benefits. Judge Trice was advised that in order for his ex-wife to receive direct payment from the Air Force, she would have to apply and provide certain documentation.

At about this time, Judge Trice recalls that he had a couple of informal conversations with his bench colleague Commissioner Perry, with whom he was on a friendly basis and with whom he would have lunch on a regular basis.

According to the judge, in both of these conversations, he posed hypothetical questions to Commissioner Perry concerning an ex-spouse's interest in his or her former spouse's military pension, where the military spouse had been promoted in rank after the divorce. The questions were posed as hypotheticals to avoid the conflict Commissioner Perry would have in advising the judge concerning his divorce from Dawna. One conversation concerned whether the ex-spouse's interest would be based on the military spouse's rank at the time of divorce, or at the time of retirement when the rank was higher. According to the judge, Commissioner Perry opined that it would be at the higher rank. The second conversation, according to the judge, concerned whether the military spouse was responsible for determining the amount the ex-spouse was entitled to where there had been a change in rank post-divorce, and whether the ex-spouse should be contacted. According to the judge, the commissioner opined that if the court had retained jurisdiction over the matter, it was up to the person who wished to modify the judgment to go back to court to obtain a subsequent order concerning the pension. According to the judge, he interpreted what the commissioner said to mean that if Dawna wanted her share of the pension, she could go back to court and get an order as to the specific amount she was entitled to. Judge Trice recalls that the second conversation ended with either he or the commissioner making a "joke" to the effect that if the ex-spouse did not make a claim on the pension, the military spouse could keep the money. The judge recalls that either he or the commissioner responded, "No, can't do that."

On a day subsequent to these informal conversations, Judge Trice had a conversation with Commissioner Perry about his military pension benefits. Judge Trice was in his chambers when Commissioner Perry happened to walk by. Judge Trice called Commissioner Perry into his chambers. Judge Trice had the judgment and Marital Settlement Agreement out on his desk as he was trying to determine his ex-wife's share of the retirement benefits based on the formula provided in the judgment. According to Judge Trice, he told Commissioner Perry his final service

points – 4,082 – and the commissioner, using the formula in the judgment, which included Dawna's "share" of the judge's points, and an estimate that Judge Trice provided of what his benefit amount would be based on his salary as a Lt. Colonel, calculated an estimate of Dawna's share. According to the judge, the commissioner calculated that Dawna's share was approximately 40% of the retirement benefit, that Judge Trice would retain approximately $900 per month, and that Dawna was entitled to approximately $700 per month.

In June 2012, Judge Trice became eligible to receive his monthly military retirement payments. That month he received correspondence from the Air Force which showed his gross retired pay ($2,394), deductions for taxes and his current wife's survivor benefit, and net pay ($2,076.38). On July 2, Judge Trice received his first monthly benefit payment for the period June 14-30, 2012, in the gross amount of $1,356.60, of which, after deduction for taxes, $1,228.44 was directly deposited into a savings account Judge Trice had designated at the San Luis Obispo Credit Union (SLOCU). That account was in the names of the judge and his current wife Mary Trice. On August 1, Judge Trice received his first full month's pension benefit – $2,076.38 – which was directly deposited into this credit union account. Thereafter, he received this payment (or an adjusted amount) monthly.

Judge Trice claims that at the time he did not pay attention to that portion of the judgment which required him to pay his ex-wife her share of the pension benefits "as and when received," despite having the judgment readily at hand in his chambers, and having recently referred to that precise provision of the judgment in order to derive the payment formula for his ex-wife's share. Judge Trice admits he did not advise Dawna that he had retired from the Air Force and was receiving the pension benefit. He assumed she would be able to determine that fact from several close relatives she had in the military. The judge has stated that he told his adult son and daughter that he had retired from the Air Force. The

judge admitted that he did not want to notify his ex-wife and then have to do the work to get her share of the benefit to her directly from the Air Force.

Judge Trice admits that he had the means and ability to contact his ex-wife. In addition, Judge Trice spent three days in Arizona in September 2013, when he attended their son's wedding ceremony. He interacted with Dawna on each of those days, including at the rehearsal dinner and wedding. At no time did he advise her he was retired and receiving the pension benefits. The judge has stated that he relied on his belief that in 1990, Dawna had received a copy of a forensic accountant's report which set out the specific date of his eligibility for retirement benefits. Finally, Judge Trice had no knowledge that any of Dawna's family relations knew that she was entitled to receive a portion of his military retirement benefits. Instead of paying Dawna her share of the pension benefits "as and when received," each month, Judge Trice directed a transfer from his credit union savings account, into which he received the benefit payment directly from the Air Force, into a separate checking account at the credit union. For the months of August, September, and October 2012 he transferred $700, the value of Dawna's share as estimated by Commissioner Perry, according to the judge, into the checking account. The checking account was owned solely by Judge Trice and Mary; it was not a trust account and Dawna was not named as a beneficiary of the account.

In September 2012, Judge Trice and Mary met with their financial advisor, Joan Parker, CFP. Judge Trice informed Parker that his ex-wife was entitled to a portion of his military retirement benefit, which he estimated was 30% of the benefit, and that he was setting aside $700 per month. The judge told Parker that his ex-wife had not claimed her share of his pension and that he was setting the money aside in a savings account in case she was to claim it at a later date. The judge said he assumed he would have to pay the money to his ex-wife or the government at some later date.

In a letter dated October 12, 2012, Parker advised Judge Trice that based on the information he had given her, he should set aside only $440 as his ex-wife's (net) share because he was paying taxes on the entire pension benefit. On October 19, Judge Trice withdrew $1,000 from the checking account (presumably to recover the "excess" payments into the account) and thereafter transferred $440 monthly into that account.

On April 17, 2014, Commissioner Perry contacted Dawna by phone. He asked if she was aware that the judge had retired from the military and if she was receiving her share of his military pension. Dawna informed the commissioner that she did not know the judge had retired and that she had not been receiving her share of his pension payments.

On April 25, 2014, Commissioner Perry submitted a letter of complaint to the commission concerning the judge's failure to have paid Dawna her share of his pension.

On May 1, 2014, a final deposit of $440 was made into the SLOCU checking account (from the SLOCU savings account). As of that date, the balance in the checking account was $9,895.

Commissioner Perry provided the names of two family law attorneys to Dawna. Dawna subsequently hired attorney Christopher Duenow. On May 21, 2014, Duenow contacted the judge by phone. Duenow told the judge that he was in violation of the divorce judgment because he had not paid Dawna her share of his military pension benefits for two years. The judge told Duenow words to the effect of, "I assumed she didn't want it because she didn't make a claim for it."

On May 22, 2014, Duenow met with the judge in chambers for almost an hour to discuss a resolution to the pension arrears issue. On May 23, Duenow had a telephone conference with the judge and Mary Trice. The judge offered to settle for $10,000. The judge made a statement to Duenow wherein he stated that he failed to make the pension payments to Dawna on advice he claimed to have received from Commissioner Perry. (This matter is discussed further below.)

Later that day, Duenow sent the judge and Mary an email that included as an attachment a calculation of the amount owed to Dawna, $22,769.17 ($20,819 in principal and $1,950.17 in interest).

On May 24, 2014, Dawna received an email from Mary Trice, which stated:

> Hi Dawna,
>
> I want to share a little history with you.
>
> Two years ago John was notified that he could receive retirement income from the service. He knew of your judgment/order and sought professional CPA and legal advice to figure out the percentage because it is a complicated calculation.
>
> First he talked to Pat Perry, who said that since he no longer represented you, he could assist John in the calculation, which he did. He also specifically told John that it was not his responsibility to initiate the order and that it was yours. That advice was reiterated by the Air Force representative in Denver when John called them to start drawing his retirement. They indicated they needed a copy of the court order from you and could not make the calculation until you provided a W-4 and withholding information.
>
> He then contacted our financial advisor, who did the calculation again and came up with a figure that he should set aside for you, which he did. That money has been waiting for you and has amounted to approximately $9,800. We have paid state and federal taxes on the entire amount for the past two years, which further complicates the calculation. The figure that Duenow has come up with is about double what everyone advised John to set aside. He contacted our CPA again yesterday to re-run the numbers. There is obviously a mistake somewhere and if it is on John's side it will be corrected. There was absolutely no intention to defraud you.

> I have chosen to write this email because I feel you and I have had a friendly relationship and I am upset that you probably think John has done something dishonest when he was following professional advice. I am also upset because I am assuming that when you called Pat Perry, he neglected to give you this history and probably just flippantly said something to the effect of "Oh, he's been drawing retirement for two years."
>
> So there is John's side of the story.
> I hope this helps and we can get back to where we were.
>
> Mary

On June 9, 2014, the judge spoke with Parker by phone asking her to review Duenow's calculation of what the judge owed his ex-wife in arrears. The judge subsequently provided to Parker copies of pension statements for June 21, 2012, and June 20, 2013 through May 20, 2014, and a copy of the page from the MSA that contained the formula for dividing the pension. On the MSA page, the judge had handwritten in his service point total, 4,082.

On June 19, 2014, Parker wrote a letter to the judge and Mary wherein she provided her calculation of the amount owed to Dawna as of May 31, 2014, $15,600. In arriving at this figure, Parker calculated the interest owed to Dawna using the daily interest rates for 52-week Treasury Bills rather than the legal interest rate of 10 percent. Further, Parker noted in the letter that if she had been aware that Dawna's share of the judge's pension was about 41.7 percent, as indicated by the formula in the MSA, "and not 30%" (as the judge had told her on September 26, 2012), she would have recommended that he set aside $650 per month rather than $440.

On July 10, 2014, Duenow sent the judge and Mary an email setting forth the terms of Dawna's final counteroffer. Dawna offered to settle her claim for $20,000, which Duenow indicated was a discounted amount in consideration for

the taxes the judge had paid on Dawna's share of the pension. Mary Trice subsequently sent Duenow an email stating that the judge could pay $19,000 forthwith and $1,750 in August. Duenow responded that the judge's offer was agreeable.

Thereafter, in July 2014, the judge, Dawna, and Duenow signed a stipulation addressing the pension arrears, Stipulation Re Payment of Military Benefits Pending Direct Distribution Order. The stipulation stated that the 1990 dissolution judgment "provided that John pay Dawna her interest in John's retirement benefits with the United States Air Force as and when received." The stipulation stated that "[t]o satisfy all arrears for non-payment of Dawn's [*sic*] interest in John's retirement benefits through June, 2014, John shall pay Dawna $19,000 upon full execution of this stipulation." The stipulation further stated that John was to pay Dawna $1,750 for July and August 2014, and then $750 per month thereafter until Dawna began receiving direct payment of her share from the military.

In conjunction with the stipulation, the judge, Dawna, and Duenow also signed a Qualifying Court Order re: Military Retirement Benefits, the purpose of which was to allow Dawna to receive direct payment of her share from the military. This order provided that Dawna's share of the pension benefit was 44.6% (rather than 41.7%), because of the amount deducted from the gross pension amount to pay for a spousal survivor benefit for Mary Trice.

The judge made the payments to Dawna that were required under the terms of the stipulation. Beginning on or about October 31, 2014, Dawna began receiving her share of the judge's military pension directly from the military.

Judge Trice's course of conduct with respect to complying with the provisions of the judgment requiring him to pay to his ex-wife the designated portion of his military retirement benefits "as and when received on the following formula" demonstrated a disregard of the command of the judgment and his legal obligation to abide by it. Setting aside a rough approximation based on

incomplete information of the ex-wife's share of the benefit in an account in the judge's name, and under his control, did not reflect a good faith effort to comply with the judgment. Additionally, the advice the judge received from the Air Force, and the opinions he recalls were expressed by Commissioner Perry in response to his hypothetical questions were not based on the complete provision of the facts necessary to obtain a valid legal opinion upon which Judge Trice was entitled to rely.

The information the judge received from the Air Force related solely to an ex-spouse obtaining an order for the Air Force to pay the ex-spouse directly. This was not what the judgment provided for; rather, the judgment required the judge to pay his ex-wife "as and when" he received the benefits. Dawna did not need to apply to the Air Force in order to receive her share of the pension benefits; the judge was obligated to pay her directly under the terms of the judgment.

The opinions the judge asserts that Commissioner Perry expressed in response to his hypothetical questions did not justify the judge's course of conduct. In particular, under the terms of the divorce judgment, the judge's rank at the time of his military retirement was not relevant to the calculation of Dawna's share of his military pension, and there was no need for her to obtain a further court order to obtain her share. If the judge wished to seek a modification of the judgment due to promotions in rank he received post-divorce, then it was incumbent on him to seek a modification order from the court.

Further, the advice the judge received from the Air Force and the opinions he recalls were expressed by Commissioner Perry did not take into account that the judge did not advise his ex-wife he was retired and receiving retirement benefits. Without this information, the judge's ex-wife had no reason to affirmatively seek direct payment from the Air Force or a modification or enforcement order from the court.

The judge's ex-wife's interest in his military pension was not contingent on her requesting it; rather, she was an owner of her community share of the pension,

with a present, existing, and equal interest. (See *Fithian v. Fithian* (1977) 74 Cal.App.3d 397, 403.)

The judge's failure to advise his ex-wife he was retired and receiving the pension benefit, given the terms of the judgment, violated his fiduciary duties to his ex-wife as set forth in Family Code sections 721 and 2102.

Judge Trice's failure to make the pension payments to his ex-wife, Dawna, for nearly two years, and his deliberate failure to inform her that he was retired and receiving his pension, constituted prejudicial misconduct. His conduct violated the Code of Judicial Ethics, canons 1 (a judge shall personally observe high standards of conduct so that the integrity of the judiciary will be preserved); 2 (a judge shall avoid impropriety and the appearance of impropriety); and 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

**Count One B**

As discussed above, on May 23, 2014, the judge and Mary Trice participated in a conference call with Dawna's attorney Duenow to discuss a resolution to the pension arrears issue. During the call, Judge Trice made a statement to the effect that the reason he had not made payments to Dawna is that Commissioner Perry had told him it was not his responsibility to initiate payments to her, and that it was Dawna's responsibility to initiate the process to obtain her share of his retirement benefit

On or around July 15, after he had received and signed the Stipulation Re Payment of Military Benefits Pending Direct Distribution Order, Judge Trice met with Judge Barry LaBarbera in his chambers. Judge Trice informed Judge LaBarbera that he had signed a stipulation to pay pension benefit arrears to his ex-wife pursuant to their dissolution judgment and to arrange for future direct payment from the military. Judge Trice told Judge LaBarbera that he had not paid his ex-wife her share of the retirement benefits based on advice he had received from Commissioner Perry to the effect that it was not his responsibility to initiate

payments to her, and that it was Dawna's responsibility to initiate the process to obtain her share of his retirement benefit. Judge Trice asked Judge LaBarbera if he would handle the stipulation by reviewing and signing it.

On Friday morning, July 18, 2014, Judge Trice called Court Executive Officer Susan Matherly on her cell phone. The purpose of the call was to make arrangements with Matherly to have the settlement stipulation given directly to Judge LaBarbera for judicial approval and his signing.

On July 21, 2014, Matherly spoke with the judge in chambers for about 30-45 minutes. The judge told Matherly that when he retired from the military he had talked to Commissioner Perry about what to do about his pension. The judge said he asked the commissioner, "Do I tell her? Give it to her?" or words to that effect. The judge said the commissioner told him, "You can put it in trust but can't cut her a check because you don't know what the withholdings are," and, "Don't spend it, put it in a trust and wait for her to ask for it," or words to that effect.

The statements the judge made to attorney Duenow, Judge LaBarbera, and CEO Matherly, which the judge attributed to Commissioner Perry, were untrue because they misstated Commissioner Perry's opinions, as described by the judge. Commissioner Perry never told the judge not to pay Dawna her share of the pension benefits. Nor did he tell the judge to put Dawna's share in a trust account and to wait for her to contact him. Dawna was the commissioner's former client, to whom he owed a continuing fiduciary obligation of loyalty and confidentiality. (*Oasis West Realty LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

The statements Judge Trice attributed to Commissioner Perry implied that Commissioner Perry had given him advice that was contrary to the interests of the commissioner's former client, and contrary to the terms of the Judgment of Dissolution and the MSA. By making these statements to Duenow, Judge LaBarbera, and Matherly, the judge was, intentionally or not, impugning the integrity of Commissioner Perry by asserting that he gave advice that was contrary

to the interests of a former client, about the very matter he represented the former client in, and that was contrary to the terms of a court judgment.

Judge Trice's statements about advice he had received from Commissioner Perry constituted prejudicial misconduct. His conduct violated the Code of Judicial Ethics, canons 1, 2, and 2A. (See *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 371 [judge's comments from the bench and in chambers impugning character and competence of judicial colleagues violated canon 2A; *Censure of Judge Jose A. Velasquez* (1997) p. 3 [judge's public statements disparaging judicial colleagues and local attorneys, made both on and off bench, constituted willful misconduct].)

**Count One C**

As previously discussed, on July 15, 2014, the judge signed two documents in connection with resolving the pension arrears issue with Dawna – a Stipulation Re Payment of Military Benefits Pending Direct Distribution Order, and a Qualifying Court Order re: Military Retirement Benefits. The terms of the stipulation are set forth above on page 10.

On July 15, Judge Trice called Duenow's office and spoke to Duenow's paralegal, Gina Goodwin. The judge informed Goodwin that he had signed the stipulation and that they would receive it shortly. The judge further stated that he had arranged for Judge LaBarbera to sign the stipulation, and that he wanted Duenow's office to submit it through CEO Matherly. The judge and Duenow had not previously discussed or agreed to this arrangement. On July 15, Goodwin prepared a memorandum to Duenow documenting her conversation with the judge, which states:

> Judge Trice just called. He says he is going to be busy now, but relayed some info for me to pass along to you. [¶] He is concerned about submitting the document to the Court here. He thinks the Judges will start DQing themselves to keep from signing this doc. He has arranged for Judge LaBarbera to sign off on the document. He would like for us to submit it through

> Susan Matherly (court executive officer). She is on vacation until Monday. He has signed the doc and sent it back to us with a check for Dawna enclosed. We should receive it shortly.

During the chambers conference with CEO Matherly on July 21, 2014, the judge told Matherly that he had called her on the previous Friday (July 18) because the parties were stipulating that Judge LaBarbera would sign the stipulation, and he wanted her to process the stipulation.

Matherly subsequently received the stipulation and order from Duenow's office and, pursuant to her conversation with Judge Trice, she left the documents on Judge LaBarbera's desk. Matherly did not discuss the documents with Judge LaBarbera.

On July 28, 2014, Judge LaBarbera signed the stipulation and order. The documents were then returned to Matherly and she had them filed with the court.

As a party to the proceeding, Judge Trice was without authority to determine who would handle the stipulation and order. Even as a judge, Judge Trice had no authority to assign the handling of the stipulation and order he entered into with Dawna to Judge LaBarbera. The authority to assign and reassign cases rests with the presiding judge. (Cal. Rules of Court, rule 10.603(b).) (In July 2014, Judge Dodie Harman was the presiding judge.) Further, Judge Trice was disqualified from presiding over the matter because he had a financial interest in the proceeding and was a party. (Code Civ. Proc., § 170.1(a)(3)(A)&(4).) A judge who is disqualified from a case may take certain limited actions in the case, but those actions do not include assigning the case to another judge. (See, Code Civ. Proc., § 170.4(a).)

In selecting a particular judge to act on the stipulation, Judge Trice was acting beyond the limits of his lawful judicial power and he knew or should have known that he was acting beyond the limits of a judge's authority. In his conversation with Duenow's paralegal, Gina Goodwin, on July 15, 2014, the judge told Goodwin that he had arranged for Judge LaBarbera to sign the stipulation

because he was "concerned" that if the document was submitted to the court, the court's judges would "start DQing themselves to keep from signing" it. In other words, Judge Trice was motivated by a desire to have the stipulation signed and to avoid the possibility of the court's judges disqualifying themselves en masse.

By directing who would be assigned to handle the stipulation and order, Judge Trice abused his authority, failed to uphold the integrity of the judiciary (canon 1), failed to avoid impropriety and the appearance of impropriety (canon 2), failed to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), and used his judicial position to advance his personal interests (canon 2B(2)). Moreover, because the judge was acting in his judicial capacity when he directed CEO Matherly to submit the stipulation and order to Judge LaBarbera his conduct constituted willful misconduct.

**Count Two A**

On May 1, 2013, Judge Harman, who was the assistant presiding judge and supervising judge of the criminal team, which included Judge Trice, was looking for Judge Trice to discuss coverage of the next day's calendars. Judge Harman learned from the judicial secretary that Judge Trice had left for the day.

At 5:12 p.m., Judge Harman sent an email to Judge Trice. Before sending the email she spoke with Judge LaBarbera, who was the presiding judge, about Judge Trice leaving the courthouse earlier that afternoon. Judge LaBarbera directed her to inquire about Judge Trice's whereabouts that afternoon, as was her duty as a supervising judge, and reviewed and approved the following email, which Judge Harman drafted. Judge Harman sent this email to Judge Trice at 5:12 p.m.:

> I was trying to find you this afternoon to talk about tomorrow's calendars. I may need to get some help from you and wanted to see if you could help out. I was told you had left for the day so I was just wondering where you were because you did not check

with me if we were covered before you left. If you could let me know where you were and if you are available to help with calendars tomorrow I would appreciate it.

Thanks, Dodie

That evening at 9:34 p.m., Judge Trice responded to Judge Harman with the following email, which he copied to the CEO Susan Matherly, and three of the court's judges, Judges LaBarbera, Charles Crandall, and Michael Duffy:

> Dear Ms. Assistant Presiding Judge and Criminal Team "Supervising Judge" –
>
> As I told you last week, we have Veteran's Treatment Court meetings every Wednesday until kick-off on June 14th.
>
> I can't help tomorrow.
>
> I handled my calendar today, D10's morning calendar today, D10s 2960 calendar today with two court trials and 3 search warrants. Then I went to the Vet's Hall for the meeting, which turns out – he cancelled, so I talked with the V.A. rep for about an hour and came home. I just got done handling an after hours search warrant and a 20 page Pen Register Request. I'm sure you are just as busy with your physical therapy, workout time and all.
>
> I don't appreciate you checking on me – I don't work for you and never will. I was elected by the citizens of this county, unlike you. I would hope you and your pals upstairs would have better things to do with your time as Superior Court Judges than keep a journal on another Judge's comings and goings.
>
> Pathetic. . . . get a life. I look forward to running against you for P.J. The Court will be a lot better off without you in some position of assumed power. Good luck in the campaign.

Have a really nice night.

My civil attorneys say I should have no more contact with you or [Judge] Tangeman without an impartial witness or reporter present. I plan to take their advice.

Sincerely,

John A. Trice, Judge
San Luis Obispo Superior Court

As supervising judge of the criminal team, Judge Harman was responsible for ensuring that there was judicial coverage for all of the criminal court calendars. Consistent with that responsibility, Judge Harman's May 1, 2013 email to Judge Trice advised him that she had been looking for him that afternoon to talk about the next day's calendars, asked where he had been that afternoon since he did not check with her before leaving, and asked if he would be available to help with the next day's calendars.

Judge Trice's email response to Judge Harman included comments that were disparaging ("I was elected by the citizens of our county, unlike you"), and comments that were undignified and discourteous ("Pathetic ... get a life," "The Court will be better off without you in some position of assumed power"). Judge Trice also implied that he would not speak to Judge Harman without a "witness or reporter" present.

Judge Trice's conduct violated canons 1, 2A, 3B(4), and 3C(2) (a judge shall cooperate with other judges and court officials in the administration of court business).

At a minimum, the judge's conduct constituted improper action.

**Count Two B**

The San Luis Obispo County Superior Court employs nine court reporters who work for the court under the supervision of Tammy Denchfield, Director of Court Operations. At a judges' meeting on October, 3, 2014, the judges had

agreed to continue a policy and practice that the nine court reporters would be randomly rotated and assigned to a judge for an eight-week period, this despite some of the judges complaining about having to work with court reporter Claire Trout.

On October 30, 2014, the court was scheduled for the next court reporter rotation (two months), effective November-December 2014. Tammy Denchfield was responsible for preparing the rotation and sending it out to the judges and court staff. Her office was sending the rotation out that afternoon.

Before sending the rotation schedule out, Denchfield addressed Judge Trice's request to keep court reporter Lisa Andrews, who was then assigned to his department, with Presiding Judge Harman. Judge Harman told Denchfield to do what she needed to do. Denchfield then directed Anna Hernandez, the supervising court reporter, to send the rotation out. Denchfield left for the day, around 4:30 p.m., her normal work schedule, and was starting a vacation leave the next day.

When Denchfield arrived home at 5:00 p.m. she received the following email from Judge Trice on her iPad:

> Tammy – I was notified that Claire Trout has been re-assigned to our courtroom. I will not work with her. She has been rude to my other staff, the public and attorneys assigned to our court. We have several high profile, high stress cases coming up on our calendar, we cannot have such a person with us when trying to serve the public.

At 5:04 p.m. Denchfield forwarded the email to Susan Matherly.

At 5:05 p.m., Matherly forwarded the email to Judge Harman.

The next day, October 31, at 8:14 a.m., Judge Harman responded to Matherly by email:

> Susan:
> I believe rotations should be the same for everybody. The same issues have been raised by a number of judges. Bottom line is if she does something then it

should be reported by him and dealt with by her supervisor. None of us have been able to exclude a

particular reporter from our courtroom. The problem should be dealt with if there is one instead of saying particular judges refuse particular reporters.

At 8:31 a.m., Matherly responded to Judge Trice by email, as follows:

> The first thing you should realize is that this is a labor issue. The rotations are part of a labor agreement between the court and SEIU. I believe rotations should be the same for everybody. As you may recall, the same issues have been raised by a number of judges at our most recent judges' meeting and it was agreed that if she does something it should be reported to her supervisor so we can deal with the behavior. None of the judges have been able to exclude a particular reporter from their courtrooms. The problem should be dealt with if there is one instead of saying particular judges can refuse particular reporters. The process should be fair to both the other judges and the reporters. I am happy to sit down and discuss this with you at your convenience.

At 8:47 a.m. on October 31, Judge Trice responded to Matherly by email as follows:

> I will not work with her. This has been a stressful year for Frances and I and we don't need to add more tension in our courtroom. If Chris Money, Barry [LaBarbera], Dodie [Harman] or Jeff Burke didn't want a bailiff or employee in their courtroom for a good reason, they were always moved. I will be given the same consideration. One male bailiff was moved completely out of this building a few years ago based on personal conflict with a female judge. Linda Hurst routinely refuses to accept certain personnel in her courtroom. I will be given the same consideration.
>
> Our department has always gone the extra mile to help out this court. We have a "well-oiled", efficient department.

> She either moves, or the P.J. can move me and my staff. I will not call my calendar on Tuesday with her in the courtroom. I will order her out of the room in public view.
>
> If there is still resistance to this, I would like a special Judge's meeting to be scheduled before Tuesday.

At 9:28 a.m., Matherly sent the judge the following email:

> I'm sorry but we cannot make an exception to the court reporter rotation policy.

At 9:36 a.m., the judge responded:

> Please schedule a special Judge's meeting.

On November 1, 2014, the judge sent Matherly the following email:

> I don't need a meeting. I'll suck it up for 8 weeks. [¶] Sorry for any stress this caused you.

Judge Trice may have had legitimate concerns about court reporter Trout, who had just been assigned to his courtroom. However, his concerns about Trout were based on conduct that had occurred in the past, and that predated the October 3, 2014 judges meeting at which all of the judges agreed that Trout would be rotated through every department. Further, the assignment of courtroom staff is not a matter within the judge's purview. Judge Trice's statement to CEO Matherly that he would refuse to call his calendar if Trout was in the courtroom, and to "order her out of the room in public view," was intemperate, and inconsistent with his obligation to cooperate with court officials in the administration of court business.

The judge's conduct violated canons 1, 2A, 3B(4), 3C(1) (a judge shall not, in the performance of administrative duties, engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice), and 3C(2).

At a minimum, the judge's conduct constituted improper action.

**Count Three**

Judge Trice and criminal defense attorney David Hurst are close personal friends. The judge and Hurst became friends while they were both employed by the San Luis Obispo County District Attorney's Office in the 1980's. While with the DA's office, they socialized often, including playing golf together and occasionally taking vacations together. Hurst left the DA's office in 1996 and went into private practice. Since then, Hurst and the judge have continued their friendship. Hurst considers the judge one of his four "best friends." Hurst has been to the judge's house at least 20 times. They watch sports events together and Hurst typically goes to the judge's house on Thanksgiving. They socialize together outside of work approximately once a month. In 2014, when Hurst was suffering from a knee injury that made it difficult for him to drive his manual transmission Porsche automobile, he traded cars with the judge's wife at her suggestion. While the trade was in place, the judge on approximately four occasions drove Hurst's Porsche to work and parked it in the judges' parking lot.

Since the judge took the bench in 2003, Hurst has frequently appeared in his court representing criminal defendants. The judge does not disqualify himself in cases in which Hurst appears as counsel of record, nor does he disclose on the record the fact or nature of his relationship with Hurst.

Judge Trice's position is that he is not disqualified from handling cases in which Hurst represents a defendant, and that he need not disclose his personal relationship with Hurst because the opposing representative in all of his criminal cases are 20-year veterans of the district attorney's office who are aware of his relationship with Hurst, and who have never raised any concern of personal bias or prejudice, or the appearance of impropriety because of the relationship.

Under canon 3E(1), a judge is obligated to disqualify himself or herself in any proceeding in which disqualification is required by law. The circumstances under which a trial court judge is disqualified are set forth in Code of Civil Procedure section 170.1. Judge Trice's close friendship with Hurst would

arguably appear to be a disqualifying circumstance under section 170.1(a)(6)(A)(iii), which provides that a judge shall be disqualified if "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

Even if the judge's friendship with Hurst did not require his disqualification, the judge nevertheless had an obligation to disclose their relationship on the record. Canon 3E(2)(a) provides that in all trial court proceedings, a judge shall disclose on the record "information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification."

At a minimum, the judge's conduct violated canon 3E(2) and constituted improper action.

**Prior Discipline**

In 2012, Judge Trice received an advisory letter for continuing to preside over matters in a case after "voluntarily recusing" from a new trial motion.

**Aggravating or Mitigating Factors**

Judge Trice enlisted in the U.S. Air Force in 1972. He served eight years active duty, and thereafter 18 years in the Reserves. He was promoted to the rank of Lieutenant Colonel in 1997. He was awarded three Air Force Meritorious Service Medals during his military service.

Judge Trice worked for the San Luis Obispo County District Attorney's Office from 1984 through 2002. He was selected to serve as that office's first Felony Trial Team Leader in 1988. He handled over 140 jury trials and successfully prosecuted two of the county's four death penalty cases. Additionally, he served on the Governor's Arson Task Force.

In 2003, he started the county's first Mental Health Treatment Court, and in 2013 started the county's first Veteran's Treatment Court.

**Count 2A**

Judge Trice acknowledges that his conduct in stating that he would not call his calendar, and would order the court reporter out of the room in public view was both improper and intemperate. In mitigation, the evidence shows that he relented and apologized less than 24 hours after the inappropriate email: "I don't need a meeting. I'll suck it up for 8 weeks. Sorry for any stress this caused you."

**Count 3**

Judge Trice believed that disclosure of his friendship with Mr. Hurst was not required because the deputy district attorneys in his court had actual knowledge of his long friendship with Mr. Hurst. Upon reflection, Judge Trice now appreciates that a formal disclosure to all parties, including defendants, was the required course of conduct. He will make formal disclosure in the future.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Trice expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: 1/22, 2016

Judge John A. Trice
Respondent

Dated: 22 January, 2016

Eugene Iredale, Esq.
Attorney for Respondent

Dated: January 25, 2016

Gary W. Schons, Esq.
Examiner for the Commission

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BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING JUDGE JOHN A. TRICE, No. 196 | AFFIDAVIT OF CONSENT FOR DISCIPLINE |

Pursuant to Rules of the Commission on Judicial Performance, rule 127(d), Judge John A. Trice submits the following affidavit of consent in Inquiry No. 196:

1. I consent to a public censure, as set forth in the Stipulation for Discipline by Consent.

2. My consent is freely and voluntarily rendered.

3. I admit the truth of the charges as modified by the Stipulation for Discipline by Consent.

4. I waive review by the Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22 day of January, 2016.

Judge John A. Trice

Respondent

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BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| **INQUIRY CONCERNING JUDGE MICHAEL S. WILLIAMS,**<br><br>**No. 200** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 127)** |

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Michael S. Williams, a judge of the Napa County Superior Court. On June 14, 2017, the commission filed its Notice of Formal Proceedings (Notice) against Judge Williams in which it charges him with taking without permission at least two business card holders from The City Club of San Francisco while there attending a dinner held by the American Academy of Matrimonial Lawyers.

By Stipulation for Discipline by Consent (Stipulation), Judge Williams and his counsel, Edith R. Matthai, Esq., of Robie and Matthai, and the examiner for the commission, Mark A. Lizarraga, Esq., proposed that the commission resolve this matter by imposition of a censure, with the agreement that Judge Williams will tender his irrevocable resignation from office, effective December 5, 2017, and will not thereafter seek or hold judicial office, or accept a position or an assignment as a judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accept reference of work from any California state court. The judge has also agreed to take approved leave from the bench as of October 20, 2017. Pursuant to the Stipulation, Judge Williams waives any further proceedings and review in this matter, including formal proceedings (Rules of Com. on Jud. Performance, rule 118 et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60). (The Stipulation is attached to this decision.)

Pursuant to commission rule 127, the Stipulation was approved by the commission on July 12, 2017. Accordingly, the commission issues this censure based on the terms

and conditions of the Stipulation and based on the following Stipulated Facts and Legal Conclusions.

## II. STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Michael S. Williams became a judge of the Napa County Superior Court in 2012. His current term began in January 2015. Judge Williams previously served as a court commissioner from 2001 to 2012.

**Count One**

On the evening of March 9, 2016, Judge Williams attended a "Judges' Night" dinner held by the Northern California chapter of the American Academy of Matrimonial Lawyers ("AAML") at The City Club of San Francisco. On his way out of the event, Judge Williams took two business card holders belonging to The City Club. The cardholders were sitting on a table near the elevators on the 10th floor of the building. The cardholders contained the business cards of the City Club's managers. Judge Williams pocketed one cardholder, walked away, returned and took one more before taking an elevator down to the first floor. The cardholders were consistent with the art deco décor of The City Club, were of value to The City Club and its managers, and were estimated by The City Club to be worth between $30 and $50 each.

On March 28, 2016, an AAML Fellow told Judge Williams that he had been seen on video taking the cardholders and suggested that he return them to The City Club and self-report. On March 29, 2016, Judge Williams sent a package to The City Club that contained the cardholders and a letter of apology. In the letter, Judge Williams wrote, "I have no excuse but that I had a couple of glasses of wine and was not thinking of what I was doing." On March 30, 2016, Judge Williams sent the Commission on Judicial Performance a letter stating that on an "unexplainable impulse" he had taken two cardholders as he was leaving a bar dinner in San Francisco a couple weeks previously, but that he had returned them. Judge Williams later wrote to the commission that he took the cardholders so that he could display some "joke business cards" that he and a friend had printed about 40 years ago and that he recently found.

Judge Williams expresses deep remorse, embarrassment and regret over his actions.

Judge Williams's conduct violated the Code of Judicial Ethics, canons 1, 2, and 2A, and was conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

**Prior Discipline**

Judge Williams has no prior discipline.

## III. DISCIPLINE

Article VI, section 18, subsection (d) of the California Constitution provides that the commission may "censure a judge . . . for action . . . that constitutes . . . conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Judge Williams concedes that he engaged in prejudicial misconduct.

The purpose of a commission disciplinary proceeding is not punishment, "but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity . . . of the judicial system." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112, citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912.) The commission believes that this purpose is best served by the discipline proposed in the Stipulation.

Judge Williams's conduct seriously undermines public confidence in the integrity of the judiciary. The judge's agreement to resign effective December 5, 2017, and not to seek or hold judicial office thereafter affords protection to the public and the reputation of the judiciary in the most expeditious manner by avoiding the delay of further proceedings.[1] Accordingly, we impose this censure pursuant to the terms and conditions of the attached Stipulation.

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[1] Commission rules for formal proceedings provide for the appointment of special masters, an evidentiary hearing before the special masters, the filing of a special masters' report, briefing to the commission, and an appearance before the commission prior to the issuance of a commission decision. (Rules of Com. on Jud. Performance, rules 121, 123,

Commission members Hon. Ignazio J. Ruvolo; Mr. Richard Simpson; Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Hon. Michael B. Harper; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; and Mr. Adam N. Torres voted to issue this decision and order imposing a public censure pursuant to the Stipulation. Commission member Hon. Erica R. Yew was recused.

Date: July 17, 2017

Hon. Ignazio J. Ruvolo
Chairperson

129, 130, 132, 134.) The commission notes that if this Stipulation were not accepted, this process would not be completed before December 5, 2017.

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BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br>JUDGE MICHAEL S. WILLIAMS,<br><br>No. 200 | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 127) |

Pursuant to Rules of the Commission on Judicial Performance, rule 127, Judge Michael S. Williams of the Napa County Superior Court, represented by counsel Edith R. Matthai of Robie and Matthai, and commission examiner Mark A. Lizarraga, Esq. ("the parties") submit this proposed disposition of Inquiry No. 200. The parties request that the commission resolve this matter by imposition of a censure; a resignation from office effective December 5, 2017; and an agreement that Judge Williams will not seek or hold judicial office, accept a position or an assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time after December 5, 2017.

The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Williams because, among other reasons, in light of the stipulated facts and legal conclusions, and the judge's agreement to resign from office and not to serve as a judicial officer after his resignation, a censure adequately protects the public and will avoid the delay and expense of further proceedings. In addition, in the absence of a stipulated disposition, commission proceedings could not be completed before December 5, 2017. Should Judge Williams resign before commission proceedings

are concluded, the highest discipline that the commission could impose would be a censure and a bar which, in effect, is the disposition proposed by this stipulation.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the Inquiry Concerning Judge Williams, No. 200.

2. The commission shall issue a censure based on the agreed Stipulated Facts and Legal Conclusions set forth herein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing censure may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Judge Williams waives any further proceedings and review in this matter, including formal proceedings (commission rule 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

5. Pursuant to this agreement, Judge Williams has agreed to irrevocably resign from his position as a judge effective December 5, 2017. He also has agreed to be absent from the bench after October 19, 2017, and represents that he has sufficient leave time to be absent from the bench between October 20, 2017 and his permanent resignation date of December 5, 2017, and that his presiding judge will allow him to be absent from October 20, 2017, until his permanent resignation date of December 5, 2017.

6. Judge Williams also agrees that he will not seek or hold judicial office, accept a position or an assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time after December 5, 2017.

7. If Judge Williams attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the censure and reinstitute formal proceedings as to all of the charges in the notice of formal proceedings. The commission may also refer the matter to the State Bar of California.

8. If Judge Williams fails to resign in accordance with this agreement, the commission may withdraw the censure and resume its formal proceedings as to all of the

charges in the notice of formal proceedings. Failure to comply with the terms and conditions of this agreement may also constitute additional and independent grounds for discipline.

9. The commission may reject this proposed disposition and continue with the formal proceedings. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Williams.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a censure on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions:

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Michael S. Williams became a judge of the Napa County Superior Court in 2012. His current term began in January 2015. Judge Williams previously served as a court commissioner from 2001 to 2012.

**Count One**

On the evening of March 9, 2016, Judge Williams attended a "Judges' Night" dinner held by the Northern California chapter of the American Academy of Matrimonial Lawyers ("AAML") at The City Club of San Francisco. On his way out of the event, Judge Williams took two business card holders belonging to The City Club. The cardholders were sitting on a table near the elevators on the 10th floor of the building. The cardholders contained the business cards of the City Club's managers. Judge Williams pocketed one cardholder, walked away, returned and took one more before taking an elevator down to the first floor. The cardholders were consistent with the art deco décor of The City Club, were of value to The City Club and its managers, and were estimated by The City Club to be worth between $30 and $50 each.

On March 28, 2016, an AAML Fellow told Judge Williams that he had been seen on video taking the cardholders and suggested that he return them to The City Club and self-report. On March 29, 2016, Judge Williams sent a package to The City Club that contained the cardholders and a letter of apology. In the letter, Judge Williams wrote, "I have no excuse but that I had a couple of glasses of wine and was not thinking of what I

was doing." On March 30, 2016, Judge Williams sent the Commission on Judicial Performance a letter stating that on an "unexplainable impulse" he had taken two cardholders as he was leaving a bar dinner in San Francisco a couple weeks previously, but that he had returned them. Judge Williams later wrote to the commission that he took the cardholders so that he could display some "joke business cards" that he and a friend had printed about 40 years ago and that he recently found.

Judge Williams expresses deep remorse, embarrassment and regret over his actions.

Judge Williams's conduct violated the Code of Judicial Ethics, canons 1, 2, and 2A, and was conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

**Prior Discipline**

Judge Williams has no prior discipline.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Williams expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: June 27, 2017

Judge Michael S. Williams
Respondent

Dated: July 6, 2017

Edith R. Matthai, Esq.
Attorney for Judge Williams

Dated: July 7, 2017

Mark A. Lizarraga, Esq.
Examiner

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BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br>JUDGE MICHAEL S. WILLIAMS,<br><br>No. 200 | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 127) |

Pursuant to Rules of the Commission on Judicial Performance, rule 127(d), Judge Michael S. Williams submits the following affidavit of consent:

1. I consent to a public censure; agree not to seek or hold judicial office, accept a position or an assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time after December 5, 2017; agree to irrevocably resign from judicial office, effective December 5, 2017; and agree to be absent from the bench after October 19, 2017, as set forth in the Stipulation for Discipline by Consent.

2. My consent is freely and voluntarily rendered.

3. I admit the truth of the charges in Count One of the Notice of Formal Proceedings only to the extent specifically set forth in the Stipulation for Discipline by Consent.

4. I waive all further proceedings and review by the Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27 day of June, 2017.

Judge Michael S. Williams
Respondent

ACCEPTANCE OF STIPULATION FOR IMPOSITION OF DISCIPLINE
IN THE INQUIRY CONCERNING JUDGE MICHAEL S. WILLIAMS, NO. 200

The foregoing Stipulation for Discipline by Consent is accepted by the Commission on Judicial Performance.

Dated: July 13, 2017

Honorable Ignazio J. Ruvolo
Chairperson
Commission on Judicial Performance

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**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING JUDGE GARY G. KREEP,** **No. 198** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE** |

## I.

## INTRODUCTION

This disciplinary matter concerns San Diego County Superior Court Judge Gary G. Kreep. The commission commenced this inquiry with the filing of its Notice of Formal Proceedings (Notice) on October 12, 2016.

Judge Kreep is represented by James A. Murphy, Esq., and Janet L. Everson, Esq., of Murphy, Pearson, Bradley & Feeney in San Francisco, California. The examiners for the commission are commission trial counsel Mark A. Lizarraga, Esq., and commission assistant trial counsel Sei Shimoguchi, Esq.

The Notice charged Judge Kreep with multiple acts of misconduct between 2012 and 2015, including misconduct during his judicial campaign, failing to take adequate steps to withdraw as counsel of record before taking the bench, issuing checks on his law practice account after taking the bench, making numerous comments in the courtroom reflecting a lack of courtroom decorum and an appearance of bias, engaging in improper ex parte communications, acting out of hostility toward the San Diego City Attorney's Office after they filed a "blanket" challenge against the judge, telling an African-American court employee that she should not say she did not win a Halloween costume contest "due to racism" or words to that effect, failing to give an adequate opportunity to be heard, and soliciting legal opinions from counsel not on the case.

The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters were Hon. Dennis A. Cornell, Retired, Justice of the Court of Appeal, Fifth Appellate District; Hon. Louis R. Mauro, Justice of the Court of Appeal, Third Appellate District; and Hon. Randy Rhodes, Judge of the Los Angeles County Superior Court.

An eight-day evidentiary hearing was held before the special masters commencing February 6, 2017. The masters filed their report containing their findings of fact and conclusions of law on April 20, 2017. The commission heard oral argument on June 28, 2017.

The masters found that all charges were proven by clear and convincing evidence, except for counts three (alleged independent investigation in connection with ex parte temporary restraining order), six (alleged failure to afford opportunity to be heard), and 11 (alleged ex parte communication). The masters concluded that Judge Kreep engaged in 29 acts of misconduct, including one act of willful misconduct.[1] We conclude that the masters' factual findings are supported by clear and convincing evidence based on our independent review of the record, and adopt them in their entirety.[2] We adopt the masters' legal conclusions on all counts except count 1C (misrepresentation on statement of economic interest), where we determine that Judge Kreep engaged in prejudicial misconduct rather than improper action.

---

[1] The parties filed written objections to the masters' findings and conclusions. Judge Kreep objected only to the masters' findings and/or conclusions in counts 1D [authoring fundraising letters opposing a nonjudicial candidate], 1E [failure to report accrued election expenses], 1F [use of his personal bank account and credit card for campaign expenses], 4 [improper response to blanket challenge], and 5 [comment to court employee reflecting racial bias]. The examiner objected only to the masters' legal conclusions in counts 1C [misrepresentations on Fair Political Practices Commission financial disclosure form] and 7 [comment about Filipino accent].

[2] The factual findings of the masters we have adopted are either quoted verbatim from the masters' report or summarized and paraphrased, as indicated in this decision. Record citations have been omitted in quoted excerpts from the masters' report.

We agree with the special masters' general assessment of Judge Kreep's judicial style during the time of the charged conduct.

> Judge Kreep expressed sensitivity to how individuals appearing in his courtroom might perceive his prior activities as an attorney, yet he was tone deaf to how attorneys might react to the casual way he ran his courtroom or the comments he made about their appearance and ethnicity. Although he worked diligently on his assigned cases, participated in judicial education opportunities, and volunteered for community outreach, he nevertheless delegated, delayed or ignored some of his most pressing ethical responsibilities. He had a sincere desire to connect with people and to help them in the courtroom, but his approach was improper for a judicial officer. Despite the numerous complaints about his conduct during his first year or so as a judge, the evidence suggests he now has an assignment that works for him and for the public.

We have determined to issue a severe public censure, the highest level of discipline available under the California Constitution short of removal. (Cal. Const., art. VI, § 18.) This decision is based largely on Judge Kreep's pervasive pattern of misconduct evidencing a lack of sensitivity to the adverse impact of his conduct on others and the public's esteem for the judiciary, and his failure to appreciate and accept the impropriety of some of his misconduct. While these factors might otherwise warrant removal from office, we have also taken into consideration that most of the judge's misconduct occurred during his first year on the bench and the record suggests he has since made efforts to modify his judicial style to avoid the type of conduct that led to these proceedings.

## II.

## LEGAL STANDARDS

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*) Factual findings of the masters are entitled to special weight because the masters have "the advantage of

observing the demeanor of the witnesses." (*Ibid*; *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232.) Legal conclusions of the masters are entitled to less deference because the commission has expertise with respect to the law of judicial misconduct. (See, e.g., *Broadman, supra*, 18 Cal.4th at p. 1090*; Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 880 (*Adams*); *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878 (*Fletcher*).)

A violation of the California Code of Judicial Ethics constitutes one of three levels of judicial misconduct: willful misconduct, prejudicial misconduct, or improper action. (Cal. Const., art. VI, § 18, subd. (d).) Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his judicial capacity. (*Broadman, supra*, 18 Cal.4th at p. 1091.) The second most serious level of misconduct is prejudicial misconduct, "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) The least serious level of misconduct, improper action, occurs when the judge's conduct violates the canons, but the circumstances do not rise to the level of prejudicial misconduct and do not bring the judiciary into disrepute. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 82; *Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89, citing *Adams, supra*, 10 Cal.4th at pp. 897-899.)

## III.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### COUNT ONE

A. Misrepresentations on judicial election campaign Web site.

Judge Kreep was charged with misrepresenting on his campaign Web site that he was the current president of the Family Values Coalition (FVC), the Justice Political Action Committee (JPAC), and the California Justice Political Action Committee (CALJPAC), and that FVC was a current nonprofit California corporation.

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

While Judge Kreep was a candidate for judicial office in San Diego in 2012, he paid Darshan Brahmbhatt, his "quasi-adoptive son," to create an election campaign Web site for him.[3] The only instructions Judge Kreep gave Mr. Brahmbhatt was to include a list of his endorsers (which Judge Kreep provided) and a link for people who wanted to make donations.

The Web site created by Mr. Brahmbhatt included, among other things, a link to Judge Kreep's biography. Without informing Judge Kreep, Mr. Brahmbhatt copied the biography from the Web site for the United States Justice Foundation (USJF), an organization Judge Kreep co-founded. Judge Kreep was involved with the USJF until shortly before he was sworn in as a judge.

Judge Kreep did not receive a "final draft" of the Web site before it "went live" in April 2012, but he looked at the Web site once during his campaign. Shortly after the Web site first went up, Judge Kreep told Mr. Brahmbhatt he did not like the content of the Web site, but did not specify what he did not like or what he wanted changed.

The link to Judge Kreep's biography was in plain sight on his Web page. However, Judge Kreep did not review the biography when he looked at his election campaign Web site after the Web site went up.

The biography on Judge Kreep's election campaign Web site stated, in part, "Gary co-founded [JPAC] in 1985" and "served as President of JPAC since then." "Gary co-founded [CALJPAC] in 1996" and "served as President of CALJPAC since then." "Gary co-founded [FVC] in 1998" and he "has served as the President of FVC since then. FVC is a nonprofit California corporation organized under [Internal Revenue Code section] 501(c)(4)."

[3] Although this case includes time periods when Gary Kreep was not yet a judge, we will generally refer to him as Judge Kreep for ease of reference.

With respect to the accuracy of the representations made on the Web site, we adopt the following factual findings of the masters.

"The phrase 'President . . . since then' means Judge Kreep was the current president of FVC, JPAC, and CALJPAC. (Black's Law Dict. (6th ed. 1990) p. 1385 ['in its apparent sense . . . [since] includes the whole period between the event and the present time].) Judge Kreep's Web site represented that FVC was an existing nonprofit corporation in 2012.

"The statements about FVC and Judge Kreep's position with FVC, JPAC and CALJPAC were false at the time of Judge Kreep's 2012 campaign. Judge Kreep was not the president of FVC and FVC was not in operation in 2012. The State administratively terminated CALJPAC prior to 2012. Nevertheless, Judge Kreep resigned his position with JPAC and CALJPAC on February 24, 2012. Therefore, he was not the president of FVC, JPAC or CALJPAC at the time his Web site said he was the current president of those organizations."

2. Conclusions of Law.

A candidate for judicial office must comply with the provisions of canon 5. (Cal. Code Jud. Ethics, canons 6E and 6F.) Canon 5B(2), as in effect in 2012, provided that a candidate for judicial office shall not knowingly or with reckless disregard for the truth misrepresent any fact concerning the candidate. (Cal. Code Jud. Ethics, former canon 5B(2) [now found at canon 5B(1)(b)].) False information provided during a campaign for judicial office may constitute prejudicial misconduct. (See, e.g., *Inquiry Concerning Couwenberg* (2001) 48 Cal.4th CJP Supp. 205, 220-221; *Public Reproval of Judge Bruce Van Voorhis* (1992) p. 2.) In addition, a candidate for judicial office is responsible for ensuring the veracity of the statements published on his or her judicial election campaign Web site, even when the statements are posted by campaign staff. (Cal. Code Jud. Ethics, canon 5B(2) [a candidate shall review and approve the content of all campaign materials produced by the candidate or his or her campaign committee before their dissemination]; *Public Admonishment of Judge Tara M. Flanagan* (2017)

p. 4 (*Flanagan*); *Public Admonishment of Judge Charles R. Brehmer* (2012) p. 4 (*Brehmer*); *Public Admonishment of Judge Paul E. Zellerbach* (2011) p. 6 (*Zellerbach*).)

We concur with and adopt the following findings and conclusions of the masters.

"Judge Kreep acknowledged he was responsible for ensuring that his campaign Web site was accurate. The false statements could have been identified but Judge Kreep did not check all the links on his campaign Web site or review his biography. Although there is no evidence Judge Kreep made knowing misstatements on his campaign Web site, he engaged in a reckless disregard for their truth by failing to confirm the veracity of the statements contained on his campaign Web site, in violation of former canon 5B(2) of the California Code of Judicial Ethics.

"Candidate Kreep's false Web site statements constituted improper action."

Neither party objected to these conclusions.

B. Failure to resign as president or chairman of three political action committees.

Judge Kreep was charged with failing to resign as president of JPAC, president of CALJPAC, and chairman of the Republican Majority Campaign (RMC) before he became a candidate for judicial office, as required by canon 5A(1).

1. Findings of Fact.

We adopt the following factual findings of the masters.

"On February 13, 2012, Judge Kreep filed a Candidate Intention Statement and a Declaration of Intention to become a candidate for superior court judge (Office number 34) with the San Diego County Registrar of Voters. He paid his filing fee and declared his intention to be a candidate in the June 5, 2012 election. His Candidate Intention Statement was filed with the California Secretary of State on February 16, 2012.

"Also on February 13, 2012, Jim Sills posted an item on sdrostra.com announcing that Judge Kreep filed for Office 34. Mr. Sills was Judge Kreep's friend and was the person who suggested that Judge Kreep run for judicial office. Among other things, the posting said candidate Kreep 'heads the United States Justice Foundation in North County, a conservative law agency that specializes in Constitutional Law and protection of family rights.' The posting said Kreep's candidacy assured that voters would have

options. The posting purported to include a statement from then-candidate Kreep about why he sought a judicial position.

"Eleven days later, on February 24, 2012, Judge Kreep resigned his positions as chairman of the RMC and as president of JPAC and CALJPAC. RMC is a political action committee formed in 2008. Judge Kreep was the chairman of RMC. JPAC is a political action committee formed in 1982. Judge Kreep was the chairman of JPAC. CALJPAC is a political action committee that was never operational."

2. Conclusions of Law.

A judicial candidate shall not act as a leader or hold any office in a political organization. (Cal. Code Jud. Ethics, canon 5A(1).) An "office" "commonly suggests a position of . . . trust or authority." (Black's Law Dict. (6th ed. 1990) p. 1082, col. 2.) A political organization within the meaning of canon 5A(1) includes a political action committee. (Cal. Code Jud. Ethics, Terminology.)

A person becomes a judicial candidate as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. (Cal. Code Jud. Ethics, Terminology.) To become a candidate for judicial office, a person must file the declaration of intention required in Elections Code section 8023, and pay a filing fee. (Elec. Code, §§ 8023, subd. (b), 8105, subd. (b).) Prior to the solicitation or receipt of any contribution or loan, an individual who intends to be a judicial candidate must file with the Secretary of State an original statement, signed under penalty of perjury, of intention to be a candidate. (Gov. Code, § 85200; Cal. Code Regs., tit. 2, § 18520, subd. (b).)

Judge Kreep testified he intended to run for judicial office only if no one else ran against the sole candidate for Office 34, and he did not consider himself "an official candidate" until February 23, 2012, when he learned no one else would run for that office. We agree with the masters that "regardless of his private intentions, Judge Kreep became a candidate for judicial office on February 13, 2012, when he filed his Candidate Intention Statement, allowing him to begin soliciting and accepting contributions and

loans for his campaign, and when he made a public announcement of his candidacy on sdrostra.com."

We adopt the following legal conclusions of the masters.

"The prohibition [against acting as a leader or holding office in a political organization] under canon 5A(1) was effective immediately when Judge Kreep became a candidate for judicial office. (Cal. Code Jud. Ethics, canon 6F.) [¶] The RMC, JPAC, and CALJPAC are political action committees and thus they are political organizations. Judge Kreep held offices or positions of leadership in those political organizations when he became a candidate of judicial office on February 13, 2012, and he did not resign until 11 days later. He violated canon 5A(1) of the California Code of Judicial Ethics.

"Judge Kreep's violation constituted improper action. Because he resigned within 11 days, we conclude his violation did not rise to the level of prejudicial misconduct."

Neither party objected to these legal conclusions.

C. Misrepresentation on Statement of Economic Interests (FPPC Form 700).

Judge Kreep was charged with misrepresenting on his Fair Political Practices Commission (FPPC) Form 700 that he served as chairman of the Beat Obama Political Action Committee (Beat Obama PAC) when he never held that position.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"On March 5, 2012, then-candidate Kreep signed an FPPC Form 700 under penalty of perjury. He verified that he had reviewed the statement and that to the best of his knowledge, the information contained therein and in the attached schedules was true and complete. Candidate Kreep stated in an attached schedule that he received a salary of between $1,00[1] and $10,000 as chairman of the Beat Obama PAC. The statement was filed with the San Diego County Registrar of Voters on March 9, 2012.

"Candidate Kreep's representation that he was chairman of the Beat Obama PAC and received a salary from that organization was false. Judge Kreep was not chairman of the Beat Obama PAC; rather, he performed legal services for the Beat Obama PAC.

"On June 27, 2013, more than a year after filing the original, Judge Kreep signed an amended schedule stating he received income from the Beat Obama PAC in the form of attorney's fees. He included a comment that he erroneously listed himself as chairman of the Beat Obama PAC."

2. Conclusions of Law.

A candidate for judicial office must know and strictly adhere to all applicable election laws and shall not knowingly or with reckless disregard for the truth misrepresent any fact about himself or herself. (Cal. Code Jud. Ethics, canons 5, 5B(1)(b) [formerly 5B(2)]; *Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146, 163.)

Whether he was a chairman or only an attorney for the Beat Obama PAC should have been within Judge Kreep's knowledge. Judge Kreep does not claim that his relationship with the Beat Obama PAC was unclear to him. However, there is not clear and convincing evidence that Judge Kreep intentionally misrepresented his position with the Beat Obama PAC. The fact that he disclosed income from the Beat Obama PAC indicates he did not intend to conceal his relationship with that organization.

We agree with the masters' conclusion that Judge Kreep submitted the FPPC Form 700 with reckless disregard for the truth and violated former canon 5B(2) of the California Code of Judicial Ethics. However, we respectfully decline to adopt the masters' legal conclusion that this conduct constitutes improper action, and instead conclude that the judge committed prejudicial misconduct. We agree with the examiner that an objective person would find a judge's conduct in signing an official document under penalty of perjury with a reckless disregard for the truth to be prejudicial to public esteem for the judicial office.

D. Publicly opposing former President Barack Obama's reelection in 2012.

The Notice charged Judge Kreep with publicly opposing former President Barack Obama's reelection to the office of the President of the United States during Judge Kreep's candidacy for judicial office in 2012, in violation of canon 5A(2).

1. Findings of Fact.

We adopt the following factual findings of the masters.

"Judge Kreep signed fundraising letters for USJF during his 2012 candidacy for judicial office. ([S]ee above discussion about when Judge Kreep became a candidate for judicial office[.]) One letter is dated May 14, 2012, and appears to be on USJF's letterhead. The letterhead stated, 'United States Justice Foundation [¶] IMPEACH AND PROSECUTE OBAMA! [¶] A Special Project of the United States Justice Foundation.' The letter urged the recipient to sign a congressional investigation petition to, among other things, force the House of Representatives to investigate the validity of the long form birth certificate that President Obama released to the public; hold a House hearing on the validity of President Obama's eligibility to hold the office of President of the United States; and launch impeachment proceedings if it was proven that President Obama falsely claimed he was a natural born citizen of the United States. The letter said Congress needed to take action before the November elections. The letter continued, '[w]e also do not believe that Barack Obama can, or will, be beaten this November by any of the Republican challengers . . . [¶] . . . and that our effort may be all that stands between four more years of Barack Obama in the White House and catastrophe for our economy, our liberty, and our security.' The letter announced an intention to 'lead a massive election year public education campaign, to ensure that millions of Americans know, by this fall, exactly what' crimes President Obama may have committed. Then-candidate Kreep solicited an 'emergency donation' to the USJF. The letter was signed by 'Gary G. Kreep, Executive Director.'

"Judge Kreep also signed as 'Executive Director' a letter dated May 31, 2012, which also appears to be on USJF letterhead. The letter urged the recipient to send an emergency gift to USJF before June 29; the letter said that could be the day the Supreme Court ruled in favor of USJF's challenge to President Obama's eligibility to be on the 2012 presidential ballot. The letter added that even if the Supreme Court ruled in USJF's favor, USJF could not 'simply sit out the rest of this crucial election year on the sidelines.' The letter explained, 'we will STILL have a great deal of work to do between

now and Election Day.' It said the 2012 election may prove to be the most important election year since 1860, and USJF's grassroots and legal teams were working on projects that 'go right to the heart of this year's elections,' including USJF's efforts to counter, among other things, President Obama's suspicious campaign money machine. The letter stated that the stakes would only get higher as Election Day approached, and '[w]e sit back and hope that he is defeated in November *at our own peril!*' The letter declared that USJF was fighting to ensure President Obama could not and would not 'steal this year's elections.'

"The Examiner also presented evidence of a June 18, 2012 letter with the heading, 'From the Desk of GARY KREEP' and USJF's name at the bottom of the page. The letter was signed by 'Gary G. Kreep, Executive Director.' June 18, 2012 was after Judge Kreep won the June 5, 2012 election but before he was sworn in as a judge. The letter repeated the appeals from the May 31, 2012 letter and urged that 'we' cannot 'simply sit out the rest of this crucial election year on the sidelines.' The June 18 letter said there was a lot of work to do before Election Day. The letter repeated that USJF was working on projects that went to the heart of the 2012 elections, including efforts to expose and counter various misdeeds by President Obama. The letter added that USJF had plans for the weeks and months leading to November and the stakes would only get higher as Election Day approached. The letter then repeated, 'We sit back and hope that he is defeated in November *at our own peril*!' The letter assured that USJF had been fighting to ensure President Obama did not steal the election. Judge Kreep asked in the letter for a gift to USJF to help pay for its election year efforts.

"Judge Kreep did not know Rebecca Dorner, the recipient of the letters presented in evidence. He believed the letters were sent en masse to a list of people USJF obtained from vendors."

2. Conclusions of Law.

Canon 5 prohibits a judge or judicial candidate from engaging in "political activity that may create the appearance of political bias or impropriety." (Former canon 5, in effect at the time of his conduct, contained the same prohibition.) Also, judges and

candidates for judicial office shall not publicly oppose a candidate for nonjudicial office. (Cal. Code Jud. Ethics, canon 5A(2); *Zellerbach, supra*, at pp. 4-5.) The masters concluded Judge Kreep's solicitation letters violated canon 5A(2) and his conduct constituted prejudicial misconduct "in that it would appear to an objective observer to be unjudicial and harmful to the independence of the judicial office."

Judge Kreep objects to the masters' conclusion that his conduct constituted misconduct and argues that his letters did not oppose President Obama's reelection and that canon 5A does not restrict a judicial candidate from making public statements on behalf of a non-political organization. As did the masters, we reject these arguments as being unsupported by the facts and the law.

Judge Kreep asserts that the letters addressed a serious constitutional and public policy issue – the eligibility of a sitting president to serve as president as a matter of constitutional law. He states that the letters did not urge anyone to vote for or against a political candidate, but rather simply urged Congress to investigate whether President Obama was a "natural born citizen," and thus eligible to serve as president.

We agree with the masters that Judge Kreep's argument that his letters did not oppose former President Obama's reelection effort is disingenuous, and is belied by the plain language of the letters. For instance, the May 14 letter stated, "<u>our effort may be all that stands between four more years of Barack Obama in the White House</u> …"; the May 21 letter stated that USJF could not "simply sit out the rest of this crucial election year on the sidelines," "we <u>STILL</u> have a great deal of work to do between now and Election Day," and USJF was fighting to ensure that President Obama could not and would not "steal this year's elections"; and the June 18 letter stated "we cannot simply sit out the rest of this crucial election on the sidelines," and "[w]e sit back and hope that he is defeated in November *<u>at</u> <u>our</u> <u>own</u> <u>peril</u>!*" There can be only one reasonable interpretation of these and other similar statements in the letters – Judge Kreep was urging the recipients to oppose the reelection of President Obama.

Moreover, as the examiner contends, canon 5A(2) is broadly worded (shall not "publicly endorse or oppose") and applies whether the judge's public opposition to President Obama's reelection was made on constitutional, political, or other grounds.

Judge Kreep further argues that canon 5A(2) does not prohibit a judicial candidate from signing a letter that otherwise violates that canon if the candidate signs the letter on behalf of a group that is not a "political organization." The masters rejected this argument, noting the judge did not cite any authority for the proposition, and stating, "We reject that argument as unsupported by the language of canon 5A(2) and contrary to the goal of prohibiting political activity that may create the appearance of political bias or impropriety. (Cal. Code Jud. Ethics, former canon 5 [eff. Apr. 29, 2009].)" We agree.

Canon 5A provides:

> Judges and candidates for judicial office shall not
> **********
> (2) make speeches for a political organization or candidate for nonjudicial office, or publicly endorse or publicly oppose a candidate for nonjudicial office.

The clear intent of the canon is to prohibit political activity that may create an appearance of bias. Judge Kreep's position that a judicial candidate can publicly endorse or oppose a political candidate so long as it is done in the candidate's capacity as a leader of an organization is contrary to this purpose. A reasonable person reading these letters would attribute the views expressed as being those of Gary Kreep as well as those of USJF, particularly when he is identified as the executive director.

For these reasons, we determine that Judge Kreep violated canon 5A(2) and that his conduct constitutes prejudicial misconduct.

E. Failure to report accrued election campaign expenses.

Judge Kreep is charged with creating an appearance of impropriety and failing to adhere to election laws by violating provisions of the Political Reform Act in failing to disclose on his FPPC Recipient Committee Campaign Statement (FPPC Form 460) $6,135 in accrued campaign expenses for the period March 18 through May 19, 2012, and $2,700 in accrued campaign expenses for the period May 20 through June 30, 2012,

and by not filing amended statements to include the omitted accrued campaign expenses before he took the bench.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"Judge Kreep signed an FPPC Form 460 for the period March 18, 2012 through May 19, 2012, and the period May 20, 2012 through June 30, 2012. He verified, under penalty of perjury, that he used all reasonable diligence in preparing and reviewing those statements and that to the best of his knowledge the information contained therein and in the attached schedules was true and complete. But the schedules attached to the statement for the period March 18, 2012 through May 19, 2012 do not show $6,135 in accrued campaign expenses owed to four sub-vendors of Landslide Communications for slate mailers. And the schedules attached to the statement for the period May 20, 2012 through June 30, 2012 do not show $2,700 in accrued campaign expenses owed to Landslide Communications of Nevada for phone banking services. Judge Kreep's candidate-controlled campaign committee filed amended statements on June 28, 2013, listing the omitted accrued campaign expenses.

"Judge Kreep entered into a stipulation with the Enforcement Division of the FPPC on September 18, 2015, agreeing that he violated the Political Reform Act, in particular, Government Code section 84211, subdivision (k), by failing to timely disclose accrued campaign expenses totaling $8,835, the expenses owed to the sub-vendors of Landslide Communications and to Landslide Communications of Nevada."

2. Conclusions of Law.

We adopt the following legal conclusions of the masters.

"A candidate for judicial office must know and strictly adhere to all applicable election laws. (Cal. Code Jud. Ethics, canon 5; *Inquiry Concerning Hall, supra,* 49 Cal.4th CJP at p. 163.) A judge violates canons 1, 2A and 5 by failing to read the law governing his or her election and then contravening that law. (*Inquiry Concerning Hall, supra,* 49 Cal.4th CJP Supp. at pp. 162-163 [strict standard of liability applies].)

Ignorance of the law aggravates a violation in this context. (*Inquiry Concerning Hall, supra,* 49 Cal.4th CJP at p. 163.)

"The Political Reform Act of 1974 (Gov. Code, § 81000 et seq.) requires full and truthful disclosure of expenditures in election campaigns so 'the voters may be fully informed and improper practices may be inhibited.' (Gov. Code, § 81002, subd. (a).) 'Public confidence in the integrity of the judicial campaign process and the judiciary is harmed when the public is deprived of important information, such as sources of contributions and amounts of expenditures made by a campaign.' (*In the Matter Concerning Judge Charles R. Brehmer, supra*, at p. 4.)

"Each campaign statement[4] required by Government Code section 84200 et seq. must contain, among other things, the following for each person to whom an expenditure of one hundred dollars ($100) or more has been made during the period covered by the statement: the full name, street address, amount of each expenditure, and description of the consideration for which each expenditure was made. (Gov. Code, § 84211, subd. (k).) 'Expenditure' includes accrued expenses. (*Ibid*.)

"Judge Kreep violated Government Code section 84211, subdivision (k) by failing to disclose accrued expenses for his judicial election campaign. His violation was not an isolated incident, but involved two reporting periods. His conduct contravened the purposes of the Political Reform Act."

We concur with the masters that the forgoing conduct violated the California Code of Judicial Ethics, canons 1 [a judge shall uphold the integrity and independence of the judiciary], 2A [a judge shall respect and comply with the law], 3B(2) [a judge shall be faithful to the law regardless of partisan interests, public clamor or fear of criticism], and 5 [judges and candidates for judicial office shall comply with all applicable election, election campaign, and election fundraising laws] and constituted prejudicial misconduct because it would appear to an objective observer that his failure to comply with the

[4] "Campaign statement" means an itemized report which is prepared on a form prescribed by the FPPC and which provides the information required by Government Code section 84100 et seq. (Gov. Code, § 82006.)

Political Reform Act (hereafter, 'the Act') was unjudicial and harmful to the public esteem for the judicial office.

Judge Kreep objects to the masters' conclusion that his conduct constitutes prejudicial misconduct, and maintains that, although he violated the Act, his conduct constitutes, at most, improper action. He contends that because his violations of the Act were unintentional, they are not prejudicial to public esteem for the judiciary. We disagree.

Prejudicial misconduct does not require proof of intent to violate the law or the canons. The commission has previously found unintentional violations of the Act to constitute prejudicial misconduct. (*Brehmer, supra*, at pp. 2-4; *Flanagan, supra,* at pp. 3-4 [unintentional violations of the Act, including failure to report true source of campaign contribution and commingling personal, business and campaign funds].) Failure to comply with reporting requirements deprives the public of "important information that has the potential to affect how votes are cast," and can undermine public respect for the judiciary. (*Flanagan, supra*, at p. 3.)

For these reasons, we concur with and adopt the masters' conclusions.

F. Using a personal bank account and credit card to pay for campaign expenses.

Judge Kreep is charged with the appearance of impropriety in failing to comply with election laws by using his personal credit card or personal bank account rather than his campaign contribution account to make campaign expenditures totaling $41,796.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"During his 2012 judicial election campaign, Judge Kreep made 14 campaign expenditures totaling $41,796 using his personal credit card or personal bank account. He entered into a stipulation with the Enforcement Division of the FPPC on September 18, 2015, agreeing that he violated the Political Reform Act by making campaign expenditures totaling $41,796 from accounts other than his campaign bank account. He agreed his conduct violated Government Code section 85201, subdivision (e). The

expenditures from Judge Kreep's personal accounts were approximately 82 percent of his total campaign expenditures for the audit period."

2. Conclusions of Law.

Upon filing a statement of intention pursuant to Government Code section 85200, a candidate must establish a campaign contribution account at a financial institution located in the State. (Gov. Code, § 85201, subd. (a).) All campaign expenditures must be made from that account. (Gov. Code, § 85201, subd. (e).)

Judge Kreep violated these provisions of the Act by making campaign expenditures using his personal bank account and personal credit card. We concur with the masters that Judge Kreep's conduct violated canons 2A and 3B(2) of the California Code of Judicial Ethics (*Brehmer, supra*, at pp. 3-5; *Public Admonishment of Judge Stephen E. Benson* (2006) pp. 2-4), contravened the purposes of the Political Reform Act, and constituted prejudicial misconduct.

Judge Kreep maintains his conduct did not constitute prejudicial misconduct because the violations of the Act were unintentional. We disagree for the reasons discussed in response to the same objection to count one E.

G. Failing to take adequate steps to withdraw as counsel of record.

Judge Kreep is charged with remaining as counsel of record in a federal action captioned *Liberi v. Taitz* for approximately six weeks after he was sworn in as a judge.

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

Judge Kreep was designated in June 2011 as local counsel for Pennsylvania attorney Philip Berg in *Liberi v. Taitz*, a case in the United States District Court for the Central District of California. Mr. Berg represented three plaintiffs.

Judge Kreep testified he asked Mr. Berg to find a replacement as local counsel on a number of occasions after he was declared the winner of the judicial election on July 3, 2012. According to Judge Kreep, Mr. Berg promised he would do so.

On December 17, 2012, Presiding Judge Robert Trentacosta urged Judge Kreep to get his substitutions of counsel squared away before he was sworn in. By the end of December, Mr. Berg had still not filed a motion to substitute counsel.

Judge Kreep filed a motion to withdraw as counsel of record on January 4, 2013, three days before he was sworn in as a judge. On January 9, 2013, Mr. Berg filed a request for approval of substitution of attorney, but Judge Kreep did not sign the request indicating his consent to the substitution. The district court set a status hearing for January 14, 2013, because Judge Kreep's motion to withdraw did not set a hearing date and the court found it unclear. On January 22, 2013, the district court concluded Judge Kreep's motion to withdraw as counsel of record and Mr. Berg's request for approval of substitution of attorney were both deficient, noting that Mr. Berg represented he would file a corrected request that would address the deficiencies. Judge Kreep was not allowed to withdraw as counsel at that time.

On January 30, 2013, Judge Trentacosta again urged Judge Kreep to take care of substituting out of the federal case, and told Judge Kreep that to do so was a priority.

On February 7, 2013, Mr. Berg filed another request for approval of substitution of attorney, which was signed by Judge Kreep. Although the district court found there were continuing deficiencies that were "most troubling," the district court recognized that Judge Kreep's judicial duties prevented him from practicing law. The request for substitution was granted on February 14, 2013, over a month after Judge Kreep was sworn in as a judge.

2. Conclusions of Law.

"A judge shall not practice law." (Cal. Code Jud. Ethics, canon 4G.) An attorney elected or appointed to judicial office must ensure he or she is no longer counsel of record in any case and see that clients' cases are transferred to another attorney before taking the oath of judicial office. (Com. on Jud. Performance, Ann. Rep. (2012) Advisory Letter 29, p. 27; Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) §§ 8.10-8.11, pp. 393-394.)

Judge Kreep remained counsel of record in *Liberi v. Taitz* after he was sworn in as a judge. As noted by the masters, "[e]ven if Judge Kreep did not perform any legal work and did not make any appearance in *Liberi v. Taitz*, his status as local counsel allowed Mr. Berg to continue to appear as counsel pro hac vice in the case. (Cal. Rules of Court, rule 9.40(a).)"

We conclude, as did the masters, that Judge Kreep did not exercise reasonable diligence in seeking to withdraw as counsel of record. For almost six months after he was elected, he simply relied on Mr. Berg to take care of the matter and did not file his own motion until three days before he was sworn in as a judge. Any delay in the court's ruling on his motion was because Judge Kreep filed a deficient motion, and the deficiencies still had not been corrected more than a month later. Further, Presiding Judge Trentacosta twice urged Judge Kreep to take care of this matter promptly.

Judge Kreep violated the California Code of Judicial Ethics, canons 1, 2 [a judge shall avoid impropriety and the appearance of impropriety], 2A, and 4G [a judge shall not practice law]. We concur with the masters that his conduct constitutes improper action "[b]ecause he made some effort to seek a substitution but did not use reasonable diligence." Neither party objected to these legal conclusions.

H. Giving the impression of practicing law after taking the bench.

Judge Kreep was charged with giving the appearance of practicing law after taking the bench by issuing four checks between March and May 2014 which identified the account holder as "Gary G Kreep Sole Prop, DBA The Law Offices of Gary G Kreep."

1. Findings of Fact.

We adopt the following factual findings of the masters.

"On December 3, 2013, an arbitrator issued an award of $14,914.65 in favor of Robert E. Thompson, one of Judge Kreep's former clients, and against Judge Kreep in relation to an attorney fee dispute. Judge Kreep paid Mr. Thompson using a check from the Attorney Client Trust Account of the Law Office of Gary G. Kreep.

"Judge Kreep had been on the bench for over a year at the time the check was written. Judge Kreep said he made the payment out of his law office account in order to keep track of expenses or obligations incurred in connection with his law practice."

2. Conclusions of Law.

It is inappropriate for a judge to be connected in any way with his or her former law firm or to give the appearance that the judge is practicing law. (Rothman, *supra*, at § 8.14, p. 396.) "Since it is improper to practice law after taking the oath of judicial office, a judge should not use legal stationery to communicate with former clients or others concerning a former client's legal matters." (*Ibid*.) In addition, a judge must take steps to have his or her name immediately removed from the letterhead of his or her former law firm, as well as any other place where the name of the firm is displayed. (*Ibid.*)

We concur with the masters that "[t]he check sent by Judge Kreep to his former client gave the appearance that Judge Kreep still maintained a law practice." As such, his conduct violated canons 1, 2 and 2A of the California Code of Judicial Ethics and constituted improper action. Neither party objected to these legal conclusions.

COUNT TWO

In count two, Judge Kreep is charged with 15 incidents of engaging in conduct reflecting a lack of proper courtroom decorum, poor demeanor, bias, and/or a lack of impartiality while presiding in Department 3 in 2013. Department 3 was the in-custody misdemeanor arraignment department of the San Diego County Superior Court in 2013. Before turning to a discussion of each incident of charged misconduct, we address Judge Kreep's general responses to his misconduct while presiding in Department 3.

Judge Kreep suggests that much of his misconduct in this count, which occurred during his first year on the bench, was the result of insufficient guidance and training from the court. We agree with the masters' conclusion that "Judge Kreep, who had been an attorney for about 37 years and had appeared in different courts before becoming a judge, received substantial guidance and training when he became a judge, arguably more than most other California judges." As stated by the masters, Judge Kreep "received guidance, advice and instructions from other judges on many occasions, including more

guidance from the Presiding Judge, Assistant Presiding Judge and Supervising Judge than most judges usually receive."

After Judge Kreep was elected, and before he took the bench, the court provided him a copy of David Rothman's California Judicial Conduct Handbook, and arranged for him to observe commissioners and judges in various departments at the San Diego County Superior Court for about a week. Immediately following his assignment to Department 3, Judge Kreep sat with an experienced commissioner in Department 3 observing the proceedings in that department for three days. He attended monthly or bi-monthly judicial education courses offered by the San Diego County Superior Court.

Judge Kreep also completed his new primary assignment orientation presented by the California Center for Judicial Education and Research (CJER) in February or March 2013, attended a separate New Judge Orientation for a week in April 2013, and attended Judicial College, a two-week course, beginning on August 5, 2013. In addition, judicial scripts prepared by CJER and the San Diego County Superior Court, sentencing guidelines, benchbooks, online courses and other types of training were available to Judge Kreep.

Judge Kreep also contended during these proceedings that his misconduct in Department 3 was the result of the difficulty of that assignment. In response, the masters stated, "Department 3 may have been a difficult assignment for a new judge given its high volume, but perhaps no more difficult than new judges around the state are expected to handle." We adopt this finding, and further note that the inappropriate comments charged in count two had nothing to do with the difficulty of the assignment.

Judge Kreep testified that when he started as a judge, then-Presiding Judge Trentacosta told him to create a friendly courtroom environment. Creating an accessible and welcoming atmosphere does not include the type of inappropriate remarks made by Judge Kreep in Department 3. Judge Kreep explained that many of his remarks were misguided attempts at humor. The commission appreciates that each judge has his or her own style and that a certain level of levity or humor is not necessarily improper. "However, the cultivation of a particular judicial personality may not be used as an

excuse for unethical conduct. . . . [R]egardless of the judge's style, she or he must respect the litigants and attorneys who appear in her or his court." (*Inquiry of Judge Susanne S. Shaw* (2000) 48 Cal.4th CJP Supp. 125, pp. 142-143.) Moreover, judicial humor should never be used in a courtroom in "a manner that diminishes the dignity of the judicial process." (*Public Censure of Judge Deann M. Salcido* (2010) p. 21 (*Salcido*); see Rothman, *supra*, at § 3.42, p. 140.) "Judges are expected to administer justice and resolve serious issues, not to provide entertainment." (*Salcido*, *supra*, at p. 22.)

A. Comments to Deputy Public Defender Leticia Hernandez.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"Judge Kreep sat in Department 3, the in-custody misdemeanor arraignment department, from January 2013 to September 9, 2013. Deputy Public Defender Leticia Hernandez appeared before Judge Kreep in Department 3 to enter a change of plea in a criminal case on January 17, 2013. The following exchange occurred after Ms. Hernandez stated her appearance:

'THE COURT: I love her accent.

'[DEPUTY PUBLIC DEFENDER LETICIA] HERNANDEZ: I'm Mexican.

'THE COURT: Are you a citizen of the country of Mexico, Ms. Hernandez?

'[DEPUTY PUBLIC DEFENDER] HERNANDEZ: No.

'THE COURT: Okay. Okay. There is an attorney in town that I know that is actually a citizen of the - of Mexico who does immigration work here in California.

'[DEPUTY PUBLIC DEFENDER] HERNANDEZ: Oh no, your Honor. I am a U.S. citizen and proud of it.

'THE COURT: The -- I wasn't planning on having you deported.'

The exchange between Judge Kreep and Ms. Hernandez was reported in CityBeat magazine.

"Ms. Hernandez testified she was not offended by Judge Kreep's comments. But she reported the incident to Melvin Epley, a supervising attorney with the Public Defender's Office.

"Judge Kreep testified he did not intend to belittle Ms. Hernandez by commenting on her accent. He intended his comment as a compliment. Nevertheless, he acknowledges his reference to deportation was inappropriate. He says he was '[t]rying to get a laugh' and 'put people at ease.' Judge Kreep apologized to Ms. Hernandez for his statements."

2. Conclusions of Law.

Drawing attention to a person's ethnicity and questioning a person's citizenship when these are not issues in the matter before the judge, can reasonably be perceived as offensive and reflecting bias. Additionally, a judge should be sensitive to the possible impact of such comments on the attorney-client relationship when made in the presence of the attorney's client. Judge Kreep maintains that his comments were not meant to be offensive. However, as noted by the masters, regardless of his intent, "the comments were likely to offend members of the public and could be construed as discourteous, demeaning, or as suggesting bias based on ethnic or national origin." (See *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 376 (*Gonzalez)*; *Public Admonishment of Judge Nancy Pollard* (2011) pp. 1, 3; *Public Admonishment of Judge Harvey Giss* (2011) p. 1.)

We agree with the masters that Judge Kreep's comments to Ms. Hernandez about her accent, Mexican citizenship and deportation violated the following ethical standards set forth in the California Code of Judicial Ethics. "An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved." (Cal. Code Jud. Ethics, canon 1.) A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. (Cal. Code Jud. Ethics, canon 2.) "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that . . . that are inconsistent with the impartial performance of the adjudicative duties of judicial office." (Cal. Code Jud.

Ethics, canon 2A.) In addition, "[a] judge shall require order and decorum in proceedings before the judge." (Cal. Code Jud. Ethics, canon 3B(3).) "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . ." (Cal. Code Jud. Ethics, canon 3B(4).) "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, or (b) sexual harassment." (Cal. Code Jud. Ethics, canon 3B(5).) We also agree with the masters that the comments to Ms. Hernandez would appear to an objective observer to be prejudicial to public esteem for the judiciary, and thus, constitute prejudicial misconduct. Neither party objected to these legal conclusions.

B. Using nicknames to address attorneys appearing before him.

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

Terri Winbush, a Deputy City Attorney with the City Attorney's Office in San Diego in 2013, appeared in Judge Kreep's courtroom multiple times each week from January 2013 until August 2013. Judge Kreep referred to Ms. Winbush as "Star Parker" when she made appearances in his courtroom. There was dispute over how often the judge used the nickname. We adopt the masters' finding that "he used the nickname several times, enough that the repetition annoyed and upset Ms. Winbush."

Judge Kreep told Ms. Winbush she resembled Star Parker, who was a beautiful African American woman. Ms. Winbush was not flattered by the comparison, and it made her uncomfortable.

The judge told Judge Trentacosta that Star Parker was a friend and a beautiful woman and that Ms. Winbush looked like Star Parker.

Brianne McLaughlin, Thanh Ho and Nate Crowley made appearances in Department 3 before Judge Kreep while they were interns in the San Diego Public Defender's Office in 2013. While in Department 3, Judge Kreep referred to Ms. McLaughlin as "Bun Head," to Ms. Ho as "Ms. Dimples," and Mr. Crowley as "Shorty," all nicknames he came up with.

Ms. McLaughlin does not know how the judge came up with the nickname "Bun Head." She did not invite the judge to refer to her by that name, but did not take offense.

Judge Kreep frequently called Ms. Ho, "Ms. Dimples." Although the nickname "Ms. Dimples" did not bother Ms. Ho, she did not invite the judge to use that nickname and no other judge called her that name. She preferred that judges call her by her given name.

Judge Kreep called Mr. Crowley, who is six feet seven inches tall, "Shorty." Mr. Crowley recalled that Judge Kreep called him Shorty in open court about 10 to 15 times.

On August 1, 2013, Supervising Deputy City Attorney Mark Skeels complained to then-Supervising Judge Timothy Walsh about Judge Kreep's conduct toward Ms. Winbush and some other deputy city attorneys. That same day, Judge Kreep admitted to then-Assistant Presiding Judge David Danielsen that he referred to Ms. Winbush as Star Parker. The next day, Judge Kreep admitted to Judge Walsh that he used the nicknames Star Parker, Shorty, Bun Head, and Ms. Dimples.

Judge Trentacosta, Judge Danielsen and Judge Walsh met with Judge Kreep on August 2, 2013. Judge Trentacosta instructed Judge Kreep not to use nicknames. Judge Kreep stopped using nicknames after that meeting.

Judge Kreep admitted his use of nicknames was inappropriate.

2. Conclusions of Law.

We agree with the conclusion of the masters that Judge Kreep's "unilateral creation and use of nicknames for attorneys and interns appearing in his courtroom was discourteous and did not convey proper respect for them." Furthermore, his use of nicknames created an atmosphere in the courtroom that was too informal and lacked appropriate decorum. The nicknames used by the judge could suggest a lack of

impartiality or a sense of inappropriate familiarity, which could undermine public confidence in and respect for the judiciary. As noted by the masters, "[i]n particular, Judge Kreep's comments to Ms. Winbush could have reasonably been perceived as improper attention based on her gender, race and physical appearance."[5]

We adopt the masters' conclusion that Judge Kreep's conduct violated the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(3) and 3B(4) and constituted prejudicial misconduct. (See *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 324-325, disapproved on other grounds in *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 319-320 [45 Cal.Rptr.2d 254, 902 P.2d 272]; *Inquiry Concerning Willoughby* (2000) 48 Cal.4th CJP Supp. 145, 151, 155-156; *Public Admonishment of Judge John B. Gibson* (2010) p. 2 [judge's conduct in, among other things, referring to a tall, thin female attorney with short hair who appeared before him as a "Q-tip" violated canons 1, 2A and 3B(4)]; *Salcido, supra*, at pp. 11, 13, 15 [judge engaged in prejudicial misconduct and violated canons 1, 2A, 3B(3) and 3B(4) by, among other things, referring to an attorney as "Mr. Federal Case" and referring to court staff as "cucumbers"].) Neither party objected to these legal conclusions.

C and D. Commenting on the physical appearance of attorneys.

1. Findings of Fact.

We adopt the following findings of fact of the masters as summarized and paraphrased.

On July 12, 2013, Judge Kreep said to someone in the courtroom, "She's a pretty girl, you know you could smile." That same day, Judge Kreep said (apparently to Deputy

[5] In the proceedings before the masters, the examiner argued that the judge's comments about the physical appearance of Ms. Winbush and other attorneys (counts Two E and G) could be perceived as sexual harassment. The masters concluded that although Judge Kreep engaged in a pattern of inappropriate behavior, his conduct did not meet the legal standard for sexual harassment. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 609.) Neither party objected to this conclusion to which we defer.

City Attorney Caroline Song's friend who was observing the proceedings), "We've got all sorts of very attractive, young PD's around here, so."

Deputy Public Defender Hernandez testified that Judge Kreep commented on the physical appearance of female attorneys who appeared before him. As an example, she said Judge Kreep said to a defendant, "the lovely attorney next to you went over the form, correct?" Deputy City Attorney Winbush and Deputy City Attorney Song also testified that Judge Kreep commented on the attractiveness of female attorneys who appeared before him.

Deputy City Attorney Paige Hazard, who appeared in Department 3 before Judge Kreep in 2013, testified Judge Kreep referred to a deputy public defender as "the pretty brown one."

Judge Kreep conceded he may have said to a defendant, "The lovely woman next to you is your public defender." He believed the comment was descriptive, not demeaning. He also admitted that on a date prior to August 2, 2013, during an appearance by a female defendant charged with prostitution who was represented by a male deputy public defender, he made a comment about how attractive the male deputy public defender was to a defendant. Judge Kreep said "he was going for a laugh" but now agrees his comment was wrong and he has not made such a comment since then.

At a meeting on August 2, 2013, Judge Trentacosta instructed Judge Kreep not to make such comments about the physical appearance of persons in the courtroom.

2. Conclusions of Law.

The masters concluded, "Judge Kreep's comments about the physical appearance of persons appearing in his courtroom were not relevant to the court proceedings, made others in the courtroom uncomfortable, did not afford proper respect to the individuals, diminished the dignity of the judicial process, and may have created the appearance of bias or impartiality." (See Judicial Council of Cal., Advisory Com. Access and Fairness, et al., Guidelines for Judicial Officers: Avoiding the Appearance of Bias (Aug. 1996) p. 15 [judicial officers should think before commenting on the physical appearance of others].) We concur.

We also concur in the masters' conclusion that the pattern of behavior in counts Two C and D violated canons 1, 2A, 3B(3), 3B(4) and 3B(5) of the California Code of Judicial Ethics and constituted prejudicial misconduct. (*Inquiry Concerning Harris,* (2005) 49 Cal.4th CJP Supp. 61, 71-72; see also *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552, 556-558.) Neither party objected to these conclusions.

E. Comments referencing the pregnancy of Deputy City Attorney Danielle Stroud.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"Deputy City Attorney Danielle Stroud appeared before Judge Kreep in 2013 when she was pregnant. During one appearance, Judge Kreep said to defense counsel, 'Let's get on with this case' and then added something like 'We don't want Ms. Stroud to have her baby in the courtroom.' On other occasions Judge Kreep made comments to Ms. Stroud about her pregnancy such as 'It's getting closer, Ms. Stroud' and 'She wants to go home and have her baby. I'll pick on her today.' Judge Kreep made these comments in open court, sometimes on the record.

"Judge Kreep testified he asked Ms. Stroud how she was doing and when she was due, but that was the extent of his comments about her pregnancy. However, Ms. Stroud's testimony, which we find more credible, contradicts Judge Kreep's version, and it is corroborated by the testimony of Department 3's bailiff, Deputy Sheriff Piper Paulk. Deputy Paulk said Judge Kreep told Ms. Stroud, 'Ooh, I hope you don't have this baby in here.'

"Judge Kreep explains his conduct by stating that he regularly overheard conversations between Ms. Stroud and other attorneys regarding her pregnancy. But Ms. Stroud denied that her pregnancy was a matter of regular discussion in the courtroom. Deputy Paulk likewise did not recall Ms. Stroud talking to anyone about her pregnancy when she was in Department 3. We find that while Ms. Stroud may have talked with people in Department 3 about her pregnancy, she did not do so regularly nor invite

comments about her pregnancy from Judge Kreep. Judge Kreep's comments made Ms. Stroud uncomfortable."

2. Conclusions of Law.

"Unprofessional remarks made in the courtroom concerning an attorney's personal appearance, pregnancy, or sexuality, can have an impact on the credibility of women in court; and when addressed to a woman lawyer, such remarks make it difficult for her to effectively represent her clients." (Rothman, *supra*, at § 2.11, p. 52.)

We agree with the masters that "Judge Kreep's references to Ms. Stroud's pregnancy go beyond a show of concern or polite inquiry. His comments were indecorous, discourteous, and undignified and could reasonably be perceived as gender bias." As such, we adopt the masters' legal conclusion that the judge's comments to Ms. Stroud about her pregnancy violated canons 1, 2, 2A, 3B(3) and 3B(4) of the California Code of Judicial Ethics and constituted prejudicial misconduct. Neither party objected to these legal conclusions.

F. Comment regarding prostitution and Deputy City Attorney Karolyn Westfall.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"Deputy City Attorney Karolyn Westfall appeared in Judge Kreep's courtroom during the period January through June 2013. On one occasion, when Ms. Westfall entered the courtroom Judge Kreep said, 'Speaking of prostitution, here's Miss Westfall.' Judge Kreep was on the bench and court staff and other attorneys were present when Judge Kreep made the comment. Ms. Westfall understood the remark as Judge Kreep trying to be funny, but she found the remark to be 'ridiculous.'

"Judge Kreep does not remember making the remark but concedes he may have used that language in referring to Ms. Westfall. He explains that he may have been referring to the prostitution cases handled by the City Attorney's office.

"We find Ms. Westfall's testimony credible and reject the suggestion in the closing argument by Judge Kreep's attorney that Judge Kreep may have actually said

'prosecution' rather than 'prostitution' but Ms. Westfall misheard what Judge Kreep said. No evidence supports that version of the incident."

2. Conclusions of Law.

Although Judge Kreep's comment was made in jest, it was disrespectful and undignified for a judge to suggest or imply that an attorney appearing before the court was a prostitute. As previously noted, humor should never be used in the courtroom in a manner that demeans the dignity of the court. Thus, we agree with the masters that the comment violated the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(3) and 3B(4) and constituted prejudicial misconduct. Neither party objected to these conclusions.

G. Comments disclosing intimate personal facts.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"Judge Kreep told someone in his courtroom he took care of a friend with whom he traveled because the friend had seizures. Judge Kreep shared that he showered and slept with the friend but '[t]here was no sex involved. We were just -- we were just friends. It was purely platonic.' "

2. Conclusions of Law.

As stated by the masters, "While it is not necessarily improper for a judge to share personal anecdotes in the courtroom, Judge Kreep's disclosure was an example of sharing too much information." The judge should have realized that sharing a gratuitous personal anecdote about sleeping and showering with a friend, with a reference to sex, was likely to make people in the courtroom uncomfortable and diminish the dignity of the judicial office.

As such, we adopt the masters' conclusion that Judge Kreep's comments violated canons 3B(3) and 3B(4) of the California Code of Judicial Ethics and constituted prejudicial misconduct. Neither party objected to these legal conclusions.

H. Comments to a female defendant in a prostitution case.

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

During the taking of a plea on July 12, 2013, Judge Kreep asked a defendant charged with prostitution, "Ma'am, anything I can do to get you out of the life?" Later in the proceeding, Judge Kreep asked, "Is it you like the money? Or you just like the action?" When the defendant attempted to respond and discuss her plans for the future, Judge Kreep cut her off and asked, "Are you going to try to get a job at the Bunny Ranch in Nevada?" Judge Kreep subsequently told the defendant "I don't think it's a good lifestyle choice, but it's your lifestyle choice and it's your decision."

Judge Kreep testified he was trying to show support for the defendant but may also have been trying to shame her into changing her lifestyle. He was not trying to embarrass or demean the defendant.

2. Conclusions of Law.

We agree with and adopt the following conclusions of the masters.

"Judge Kreep's asserted goal may be laudable, but his questions -- 'you just like the action?' -- were insensitive, indecorous and discourteous to the defendant. Judge Kreep admitted he may have been attempting to shame her.

"Judge Kreep suggested his reference to the Bunny Ranch was in response to the defendant's statement that she was planning to go somewhere where prostitution was legal. But Judge Kreep's question about the Bunny Ranch followed the defendant's statement that she was 'certified for MT' and 'wanted to go to PT' and it was well after she discussed getting a passport and going somewhere where prostitution was allowed. We agree with the Examiner that Judge Kreep's questions created the appearance of embroilment. (Rothman, *supra*, at § 2.01, p. 37 [embroilment refers to the loss of "the necessary professional distance between" the judge and the attorneys, parties, or causes before the judge].)

"Judge Kreep's conduct violated canons 1, 2, 2A, 3B(3) and 3B(4) of the California Code of Judicial Ethics and constituted prejudicial misconduct."

Neither party objected to these legal conclusions.

I. Comment to Abraham William Tanoury.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"Abraham William Tanoury was a law student intern with the City Attorney's Office in 2013. He appeared in Judge Kreep's courtroom for an arraignment on one occasion, along with his Supervising Deputy City Attorney Caroline Song. Before he went on the record, Judge Kreep picked up a plastic container of animal crackers, gestured at Mr. Tanoury, and said in the presence of Ms. Song and court staff, 'If you're good during your argument, I'll give you some cookies, little boy.' Mr. Tanoury was in his early 20's at the time and was taken aback by Judge Kreep's comment. Mr. Tanoury felt that Judge Kreep's statement was unprofessional and demeaning.

"Judge Kreep testified he did not intend to demean or embarrass Mr. Tanoury."

2. Conclusions of Law.

We agree with the masters that "[r]egardless of his intent, Judge Kreep's statement to Mr. Tanoury was demeaning, indecorous, discourteous, undignified, and prejudicial to the public esteem for the judicial office." Judge Kreep's conduct violated the California Code of Judicial Ethics, canons 3B(3) and 3B(4) and constituted prejudicial misconduct. (*Public Admonishment of Judge Christine K. Moruza* (2008) p. 10 [judge's comment to deputy district attorney, "How old are you? Eighteen?" was demeaning, undignified and contrary to canon 3B(4)].) Neither party objected to these legal conclusions.

J. Comment to Deputy City Attorney Caroline Song.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"During a sidebar conference for a prostitution case in July or September 2013, Judge Kreep used the words 'Chinese prostitutes,' then turned to Deputy City Attorney Caroline Song and said, 'No offense to Chinese people.' Judge Kreep made the comment

to Ms. Song in the presence of one of Ms. Song's supervisors along with a City Attorney's Office intern and Deputy Public Defender Chelsea Kopp. Judge Kreep explains he said '[n]o offense to Chinese people' because Ms. Song gave him an angry look when he used the term 'Chinese prostitutes.' We believe that in this context, Judge Kreep was actively trying not to offend Ms. Song, and yet still managed to upset her.

"Caroline Song testified she was bothered by the '[n]o offense to Chinese people' comment because Judge Kreep constantly mentioned her ethnicity. By way of example she mentioned a time when Judge Kreep introduced visitors from Korea. Judge Kreep told the visitors Ms. Song was from China and spoke Mandarin. Ms. Song is not from China.

"Judge Kreep testified he would not have indicated Ms. Song was from China or that she spoke Mandarin because he had no personal knowledge of those things. But in an audio recording of Judge Kreep's courtroom, Judge Kreep told individuals apparently visiting from Korea that Ms. Song was 'of Chinese heritage' and spoke Mandarin."

2. Conclusions of Law.

Gratuitously singling a person out based on ethnicity or national origin can be offensive to that person and can also be perceived as indicating bias. Under the circumstances, Judge Kreep's comments violated canons 1, 2, 2A, 3B(4) and 3B(5) of the California Code of Judicial Ethics and constituted improper action. We adopt the masters' conclusion that the charged conduct did not rise to the level of prejudicial misconduct because an objective observer would have understood that Judge Kreep was attempting not to offend Ms. Song. Neither party objected to these legal conclusions.

K. The Gift of the Day.

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

When sentencing criminal defendants in Department 3, Judge Kreep on multiple occasions mentioned giving a defendant or defense counsel a "gift of the day," "gift for

the day," or "gift for today" during sentencing. The statement was made in the presence of other criminal defendants.

On July 26, 2013, Judge Kreep said, "Here's your gift for your new child" before he vacated a fine. On July 30, 2013, he said, "I already gave the gift of the day," (although he appeared to stay the requirement to pay the balance of a $286 fine pending the successful completion of probation). In another case, after indicating he would stay the payment of a fine pending the defendant's successful completion of probation, he said to the defendant, "That's a gift, ma'am. [Unintelligible] don't take it for granted, alright. If you come back before me on another case, you'll have to pay that fine plus whatever you got to do on the other one." On July 31, 2013, Judge Kreep said he was giving a "[s]econd gift of the day since we're going so long."

Judge Kreep testified that he used the term "gift of the day" to convey that he was giving the defendant "a break" and the defendant needed to "live the straight and narrow," but conceded it was a mistake.

2. Conclusions of Law.

We agree with the masters that Judge Kreep's characterization of discretionary rulings as a gift suggested unequal treatment and bias and "may have improperly suggested to court participants that Judge Kreep was ordering something that was not deserved under the law, that he was dispensing favored treatment to certain defendants or defense counsel and withholding that special treatment from others, and that such special treatment was only available once a day to a lucky recipient." Such conduct undermines public confidence in the dignity and impartiality of the court.

As such, we conclude, as did the masters, that Judge Kreep's conduct violated the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(3) and 3B(4) and constituted prejudicial misconduct. (*Gonzalez, supra,* 33 Cal.3d at p. 375; see also, *Inquiry Concerning Velasquez* (2007) 49 Cal.4th CJP Supp. 175, 213-215.) Neither party objected to these legal conclusions.

L. Advising defendants to say it was all a big mistake.

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

In Judge Kreep's courtroom, the prosecution and defense attorneys often entered into agreements allowing for the withdrawal of the defendant's plea to a misdemeanor and dismissal of the case upon completion of the terms and conditions of diversion. On multiple occasions, Judge Kreep advised defendants whose cases were being dismissed under these terms, that if asked about their cases, including by employers or prospective employers, they should say "it was all a big mistake." In each instance, the advice was unsolicited.

On July 18, 2013, after the prosecution dismissed a defendant's case, Judge Kreep advised the defendant, "This conviction, this case, may pop up on a database. And if it does and they ask you about it, you say here, it was all a big mistake, the case was dismissed. Uh. If they want to know the details, it's really none of their business -- so."

On July 22, 2013, Judge Kreep advised a defendant, "If somebody asks you about it, you say hey, it was all a big mistake. Case was dismissed, here's the proof. It's really none of their business. So. Ok?" Judge Kreep provided the same advice to another defendant on that same day, stating "So if, if it comes up that you were charged and pled guilty or whatever. Uh, or they say, what's this theft conviction? You just say, it's all a big mistake, and it was [chuckle] on your part, and that the case has been dismissed and it's really none of their business all the details. Okay, sir."

On July 29, 2013, Judge Kreep said to a defendant, "If this pops up on a database, they say hey, what about this? Say it's all a big mistake. Case is dismissed and if they want to know the details, it's really none of their business. Okay?"

On August 1, 2013, the judge said to a defendant, "And if they, you're asked about it, you just say, hey, it was all a big mistake, case got dismissed. And if they wanna know the details, it's really none of their business. Okay?"

Judge Kreep testified he meant to advise defendants to explain that the defendant had made a mistake in committing the offense, not that the prosecution had made a mistake in charging the defendant. We agree with the masters' finding that "[o]n only one occasion did he suggest he was referring to a mistake made by the defendant; all other times his comments could have been interpreted to mean that the legal proceedings were flawed or that it had been a mistake to file charges against the defendant." In fact, the cases were not dismissed due to a defect or mistake.

2. Conclusions of Law.

It was improper for Judge Kreep to render an opinion on the legal effect of a theft conviction and counsel defendants on what they should say to potential employers. (Cal. Code Jud. Ethics, canon 4G [a judge shall not practice law].) Moreover, the judge's comments could suggest that he was counseling defendants to mislead potential employers by implying that they were mistakenly prosecuted.

We adopt the masters' conclusions that Judge Kreep's conduct violated canons 1, 2, 2A and 4G of the California Code of Judicial Ethics and constituted improper action. Neither party objected to these legal conclusions.

M. Using crude language.

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

On July 22, 2013, Judge Kreep was discussing the date for a continued criminal case with defense counsel. When defense counsel indicated he would like to have the hearing completed by 9:30 a.m. on the continued date, Judge Kreep responded, "if Ms. Song isn't here, I'll kick her in the butt." Deputy City Attorney Song was present when Judge Kreep made the statement.

Judge Kreep explained he simply wanted Ms. Song, who was routinely late for the morning calendar, to be on time. The testimony of other witnesses corroborates Judge Kreep's testimony that Ms. Song was habitually tardy. Judge Kreep acknowledged he used inappropriate language in this instance.

In another case the same day, the defense attorney informed Judge Kreep that the defendant was in an abusive relationship. Judge Kreep said to the defendant: "Just so you know, ma'am, I grew up in a relationship where I used to get the crap beat out of me on a regular basis by a stepfather [unintelligible] my mother. So I have some understanding of what you're going through, okay? From a child's perspective." Judge Kreep testified he wanted to convey that a person does not turn to a life of crime just because they are being abused.

On July 23, 2013, when a defense attorney requested reinstatement of probation for a client, Judge Kreep said: "Yeah, your client's no virgin . . . as far as these cases are going."

On July 29, 2013, Judge Kreep was counseling a defendant whose case was dismissed upon successful completion of diversion to stay off drugs. When the defendant's mother identified herself, Judge Kreep said, "His mother, okay. Slap him upside the head a few times, make sure he stays off the drugs." The mother did not ask Judge Kreep for advice on how to keep her son out of jail. Judge Kreep explained he did not really intend for the mother to beat her son, but wanted her to take an active role in making sure the defendant stayed off drugs. He testified he did not intend to demean or embarrass anyone, and he no longer uses such language in court.

2. Conclusions of Law.

As to each of the above matters, Judge Kreep used language that was crude and undignified. Swearing is "unbecoming, injudicious and unsuited to the proper decorum of a courtroom." (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 535 (*McCartney*).) Crude comments from a judge "have no place in a courtroom." (*Salcido, supra*, at p. 20.)

We concur with the following conclusions of the masters. "The words 'butt' and 'crap' may be relatively tame examples of crude language, particularly when compared to the vulgar language rampant in culture, social media, and entertainment. But a higher standard of conduct is required in our courtrooms, and for good reason. The Code of Judicial Ethics requires that judges conduct themselves in a manner that maintains the

dignity of our courts and respect for our judicial institutions. (Cal. Code Jud. Ethics, canon 3B(4).) Casual conduct and crude language are inconsistent with those requirements. (*Salcido, supra*, at pp. 4, 6, 15 [judge violated canons 1, 2A, 3B(3) and 3B(4) by, among other things, using crude language during proceedings (the word 'screwed')].) Judge Kreep's statements were indecorous and undignified, and in some cases did not convey proper respect for the individuals appearing in his courtroom."

Accordingly, we conclude, as did the masters, that the judge's use of crude language in the courtroom violated canons 1, 2, 2A, 3B(3), 3B(4) and 3B(5) of the California Code of Judicial Ethics and constituted improper action. Neither party objected to these legal conclusions.

The Notice alleged that on July 30, 2013, Judge Kreep told a defendant, "If you violate your OR, I'll throw his butt in jail." The Examiner did not present evidence on that allegation. Thus, we conclude that allegation is not proven.

N. Speaking Spanish during courtroom proceedings.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"In January 2013, Presiding Judge Trentacosta received concerns about Judge Kreep using Spanish to address individuals with Hispanic surnames. In his January 30, 2013 meeting with Judge Kreep, Judge Trentacosta instructed Judge Kreep not to use Spanish when calling a case or communicating with a defendant.

"Nevertheless, Judge Kreep spoke Spanish during courtroom proceedings on July 22, 23, 24, 25, 26, 29, 30, and 31 and September 5, 2013. He addressed Ms. Hernandez and other defense attorneys as señor or señora and sometimes spoke in Spanish to ask how they were doing.

"Judge Kreep also addressed some defendants as señor, señora, or señorita. He also greeted some defendants and court interpreters with 'buenos dias,' 'buenos [*sic*] tardes,' or 'vaya con Dios.'

"Judge Kreep claims he merely used Spanish in greetings or to wish defendants well. But his characterization is incorrect. He asked one defendant with the last name

Ontiveros, 'Habla Ingles?' When Mr. Ontiveros indicated he did not speak English, Judge Kreep said, 'Señor, we'll explain it to you all in Español. Un momento por favor.' Judge Kreep then asked Mr. Ontiveros' counsel, 'Would you explain to his mama, por favor?'

"Moreover, in telling a defendant with the last name Sanchez that she should retain certain paperwork, Judge Kreep said, 'Keep your paperwork, okay? Muy importante.' There is no indication in the recorded proceeding that Ms. Sanchez spoke Spanish. Ms. Sanchez did not appear with an interpreter and she responded in English when Judge Kreep greeted her.

"In a different case, Judge Kreep spoke to a defendant in Spanish even though a court interpreter was present. He asked the defendant, 'Culpable o no culpable?' Judge Kreep also referred to 'papeles.'

"Judge Kreep again addressed another defendant in Spanish even though a court interpreter was present. Judge Kreep told the defendant, 'No cerveza. No tequila. No alcohol. Nada.'

"Deputy City Attorney Terri Winbush testified that Judge Kreep used Spanish when the defendant was 'Hispanic-appearing' and the judge was not always correct that the defendant spoke Spanish. She recalled that in some cases the defendant responded, 'I actually speak English" and Judge Kreep stopped using Spanish.

"Consistent with Ms. Winbush's testimony, in a July 26, 2013 proceeding, Judge Kreep greeted a defendant with the last name Torres in Spanish even after the defendant said she understood the terms and conditions of her probation in English. And in a case heard on July 31, 2013, involving a defendant whose last name was Silva, Judge Kreep spoke in Spanish to the defendant's mother and girlfriend, who were in the courtroom. Judge Kreep asked the two women, in Spanish, whether they spoke English. They responded that they spoke English, and Judge Kreep addressed them in English.

"During an August 2, 2013 meeting, Presiding Judge Trentacosta again urged Judge Kreep not to speak Spanish in court. During an August 19, 2013 meeting, Presiding Judge Trentacosta counseled Judge Kreep for a third time not to speak Spanish

in the courtroom. Judge Kreep testified that he stopped using Spanish in the courtroom after that instruction from Judge Trentacosta. But that is also incorrect. Judge Kreep referred to defendant Trujillo as señor on September 5, 2013. On the same date, Judge Kreep referred to defendant Arguenta as 'señor,' although he quickly apologized and called the defendant Mr. Arguenta.

"Deputy public defenders Katherine Tesch and Jose Orozco testified that Judge Kreep's use of Spanish did not upset their clients or make the clients feel uncomfortable. But according to Supervising Deputy Public Defender Melvin Epley, Deputy Public Defender Leticia Hernandez reported to him that although Judge Kreep's use of Spanish was not malicious, it 'could be naive and insensitive towards Hispanics.' "

2. Conclusions of Law.

Judicial proceedings must be conducted in English only. (Code Civ. Proc., § 185, subd. (a).) There is no express exception to that statutory mandate. While Judge Kreep may have thought he was simply being welcoming to litigants, he failed to recognize that speaking Spanish to people based on his perception that they were Hispanic could be perceived as offensive or suggest differential treatment. As stated by the masters, "[a]n assumption that a person with a Latino/Hispanic surname speaks Spanish can suggest stereotyping based on race, national origin, or ethnicity."

For these reasons, we concur with the masters' conclusion that "Judge Kreep's use of Spanish in the courtroom violated canons 1, 2, 2A and 3B(5) of the California Code of Judicial Ethics and, under the totality of the circumstances, including the January 2013 instruction from Presiding Judge Trentacosta not to use Spanish, constituted prejudicial misconduct. (Com. on Jud. Performance, Ann. Rep. (2011) Advisory Letter 24, p. 26; Com. on Jud. Performance, Ann. Rep. (2006) Advisory Letter 16, p. 33.)" Neither party objected to these legal conclusions.

O. Addressing insurance company representative as "Mr. Insurance Man."

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

On October 3, 2013, while assigned to hear traffic and small claims matters at the Kearny Mesa Branch Courthouse, Judge Kreep heard a small claims matter entitled *Liu v. Wood,* involving an automobile accident. Dominic Figuera, a representative of the defendant's insurance company, was not a party but announced his presence on behalf of the insurance company. Judge Kreep repeatedly referred to Mr. Figuera as "Mr. Insurance Man" during the proceedings.

Judge Kreep testified he referred to Mr. Figuera as "Mr. Insurance Man" because he did not remember Mr. Figuera stating his name on the record. The judge asserted he did not mean to disrespect Mr. Figuera, but was simply trying to get through the case quickly.

2. Conclusions of Law.

We agree with the masters that "repeatedly referring to the insurance company representative as 'Mr. Insurance Man' rather than by his name was discourteous and did not convey proper respect for the individual appearing in Judge Kreep's courtroom" and could also suggest a lack of impartiality. Judge Kreep suggested that use of the nickname was proper because small claims proceedings are informal. (Code Civ. Proc., § 116.510.) However, the degree of informality permitted in small claims proceedings does not include the gratuitous creation of undignified and discourteous nicknames. Nor does the judge's desire to get through the proceeding promptly justify his unjudicial conduct. As the masters observed, "if he did not hear Mr. Figuera state his name, Judge Kreep could have asked for the name."

Judge Kreep's conduct violated the California Code of Judicial Ethics, canons 1, 2, 2A, 3B(3) and 3B(4) and constituted improper action. (See *Inquiry Concerning Willoughby, supra,* 48 Cal.4th CJP Supp. at pp. 151, 155; *Public Admonishment of Judge*

*John B. Gibson, supra*, at p. 2; *Salcido, supra*, at pp. 11, 13, 15.) Neither party objected to these legal conclusions.

COUNT THREE

Judge Kreep was charged with engaging in misconduct by asking a deputy city attorney who was in the courtroom during a civil ex parte temporary restraining order (TRO) proceeding to contact the San Diego Police Department to inquire about the existence of a surveillance video referenced by the TRO applicant. It was alleged that the judge attempted to conduct an independent investigation of information outside the four corners of the TRO application in violation of canons 1, 2, 2A, 3B(7) [judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed], and 3C(2) [judge shall cooperate with other judges and court officials in the administration of justice]. The masters concluded that the charges were not proven by clear and convincing evidence based on the following findings of fact, as summarized and paraphrased.

On May 17, 2013, Judge Kreep issued a requested TRO because the applicant made a prima facie case in her application. The TRO applicant reported in court that a police officer told her there was a video of the subject occurrence. With the applicant present, and after he had granted the TRO, Judge Kreep asked a deputy city attorney how the applicant could get a copy of the police video.

The masters found that Judge Kreep did not make his request outside the presence of the parties and he did not make the request to help him decide the case. The applicant desired to obtain the video and Judge Kreep inquired how she might do that.

Based on these factual findings, which we adopt, we agree with the masters that that there is not clear and convincing evidence that the judge attempted to obtain information outside the record to help him decide a TRO application, and that the charge has not been proven.

COUNT FOUR

Judge Kreep was charged with improperly responding to a "blanket" challenge from the City Attorney's Office by telling deputy public defenders and public defender interns to "watch out" because if the City Attorney's Office was "coming for" Judge Kreep, they were also likely coming for Deputy Public Defender Katherine Tesch. He was also charged with engaging in improper ex parte communications in that same incident by discussing pending cases with the deputy public defenders and interns.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"On September 4 or 5, 2013, Supervising Deputy City Attorneys Marlea Dell'Anno and Mark Skeels informed Supervising Judge Walsh that, among other things, Judge Kreep had 'called out' deputy city attorneys who complained about him, and Judge Kreep's recent diversion case decisions appeared to be retaliatory. On September 5, 2013, the City Attorney informed Presiding Judge Trentacosta that his office would file 'blanket' challenges against Judge Kreep, i.e., Code of Civil Procedure section 170.6 challenges against Judge Kreep in each new Department 3 case.

"Upon learning that the City Attorney's Office planned to file blanket challenges against Judge Kreep, Judge Walsh informed Judge Kreep on September 9, 2013, that he was being reassigned to traffic court at the Kearny Mesa branch courthouse. Judge Walsh instructed Judge Kreep to report immediately to Commissioner Blair at the Kearney [*sic*] Mesa courthouse.

"Instead of proceeding immediately to the Kearny Mesa courthouse, Judge Kreep went to Department 1, a courtroom where he was not assigned, when he saw no attorneys in his courtroom. Although Department 1 was not in session at the time, it was fairly busy. Deputy city attorneys Eric Pooch and Taylor Garrot were in Department 1 discussing the morning calendar; deputy public defenders and public defender interns were also present in the courtroom. Judge Kreep approached the deputy public defenders and public defender interns and spoke with them; he did not speak with the deputy city attorneys.

"Judge Kreep told the deputy public defenders and public defender interns the City Attorney's Office had filed a blanket challenge against him. He said the challenge was because of a case in which he granted a request made by Deputy Public Defender Tesch to set a motion to enforce a plea agreement which the City Attorney's Office refused to honor. The motion referenced by Judge Kreep was pending in another courtroom when Judge Kreep made the statement. Judge Kreep also talked about how he would handle cases on his calendar for that afternoon. He mentioned specific cases during his conversation with the deputy public defenders and public defender interns.

"Judge Kreep asked the deputy public defenders and interns to tell Ms. Tesch something like the following: 'If they're coming for me, they are likely coming for you.' Judge Kreep then added something like, 'You know why I'm not talking to them,' gesturing toward Deputy City Attorneys Pooch and Garrot as he left Department 1. Mr. Pooch and Mr. Garrot found Judge Kreep's statements inappropriate. Mr. Garrot reported what he witnessed to his supervisors.

"According to Judge Kreep, he said 'they are likely coming for you' because it had become increasingly tense between Deputy City Attorney Caroline Song and Deputy Public Defender Katherine Tesch and he was concerned Ms. Song would attack Ms. Tesch's reputation. Judge Kreep said he simply went to Department 1 as a courtesy to tell the deputy public defenders another judge would hear their cases because he did not see any attorneys in Department 3 and he could not remember if any of his staff were present in Department 3 at the time. He said he could not have discussed any of the cases on the Department 3 calendar for that day because at that point he did not know what would be on the calendar.

"Judge Kreep's explanation is not credible. We find that he was angry and upset when he learned of the blanket challenge against him and he specifically went to Department 1 to discuss the challenge with the deputy public defenders in order to vent his anger and in contravention of his supervising judge's instruction. We further find that Judge Kreep talked about at least one case pending in another courtroom during his discussion with the deputy public defenders and public defender interns in Department 1:

the case in which he had granted the request made by Ms. Tesch to set a motion to enforce a plea agreement."

2. Conclusions of Law.

It is misconduct for a judge to display hostility toward an attorney who files a motion to disqualify the judge. (*In re Rasmussen* (1987) 43 Cal.3d 536; *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 786-787, 797; *McCartney, supra,* 12 Cal.3d at p. 529; *Inquiry Concerning Velasquez*, *supra*, 49 Cal.4th CJP Supp. at pp. 208-210; *Inquiry Concerning Hall, supra,* 49 Cal.4th CJP Supp. at pp. 165-167.) Further, it is improper for a judge to initiate, permit, or consider an ex parte communication, that is, any communication to or from the judge outside the presence of the parties concerning a pending proceeding (with limited exceptions not applicable here). (Cal. Code Jud. Ethics, canon 3B(7).)

The masters concluded that the judge's conduct violated canons 1, 2, 2A and 3B(7) of the California Code of Judicial Ethics and constituted willful misconduct. They concluded that the judge acted in bad faith, a requisite element of willful misconduct, because he acted for a purpose other than the faithful discharge of his judicial duties. The masters found that Judge Kreep had no legitimate reason to speak about the challenge, but went looking for deputy public defenders to vent his hostility about the challenge by the City Attorney's Office and discussed the motion to set aside a plea agreement, a matter that was still pending in another courtroom in the superior court.

Judge Kreep objects to the masters' conclusions that he acted in bad faith and engaged in willful misconduct. He agrees that it is misconduct for a judge to display hostility toward an attorney who files a challenge, but asserts that there is no evidence that he displayed hostility toward any city attorney. He maintains that he went to Department 1 as a courtesy to inform the deputy public defenders that he would not be hearing their cases and that he did not discuss pending cases. To the contrary, the masters found that Judge Kreep initiated the conversation to vent his anger at the City Attorney's Office for challenging him, mentioned specific cases, and discussed at least one case pending in another courtroom.

We give special weight to the masters' factual findings and credibility determinations and determine they are supported by clear and convincing evidence, including the testimony of two deputy city attorneys who overheard the conversation in Department 1. Moreover, the words the judge used ("If they are coming after me, they are likely coming after you") reflect hostility toward the City Attorney's Office. Significantly, there was no legitimate reason for the judge to go into Department 1 to inform the deputy public defenders of his disqualification since they would be notified by the court.

We concur with the masters' legal conclusion that Judge Kreep acted in bad faith and engaged in willful misconduct. A judge engages in bad faith when the judge performs a judicial act for a corrupt purpose, which is any purpose other than the faithful discharge of judicial duty. (*Broadman, supra,* 18 Cal.4th at p. 1092; *Geiler v. Commission on Judicial Qualifications* (1973)10 Cal.3d 270, 286 [judge acted in bad faith when he indulged in personal hostility]; *Inquiry Concerning Clarke* (2016) 1 Cal.5th CJP Supp. 1, 14 [judge acted in bad faith when he ordered prospective juror to wait in hallway out of pique and in retaliation for complaints against his clerk); *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257 at p. 275 [judge acted in bad faith by acting out of anger in suggesting that a prosecutor was misleading the jury].) Judge Kreep was not acting in the faithful discharge of judicial duty, but became embroiled and went to Department 1 to vent his hostility toward the City Attorney's Office. Although he did not lash out directly at the deputy city attorneys in the courtroom, he expressed his anger within clear earshot of them.

Additionally, Judge Kreep engaged in improper ex parte communications about at least one pending case with the deputy public defenders who were in Department 1.

For these reasons, we agree with the masters that Judge Kreep's conduct on September 9, 2013, violated canons 1, 2, 2A and 3B(7) of the California Code of Judicial Ethics and constituted willful misconduct.

COUNT FIVE

Judge Kreep was charged with telling an African-American superior court employee who had participated in a Halloween costume contest that she should not say she "didn't win due to racism" or words to that effect.

1. Findings of Fact.

The masters made the following factual findings.

"Maurisa Young worked in the small claims division of the San Diego County Superior Court in 2013. She participated in a Halloween costume contest for court employees in October 2013. Judge Kreep was one of the contest judges. Ms. Young won third place in one of the contest categories.

"Ms. Young was talking with coworker Maria Fujita about the contest when Judge Kreep joined their conversation and gave his opinion about some of the costumes. Ms. Young asked Judge Kreep why third place winners did not get prizes. Judge Kreep responded that he did not have control over the prizes. He said the contest was conducted fairly and he did not want anyone to say 'I didn't win due to race.' Ms. Young is African American. According to Ms. Fujita's recollection, Judge Kreep used the word 'black' or 'colored' and said something about racism. Judge Kreep's statement shocked and offended Ms. Young. She later complained to her supervisor about Judge Kreep's comment.

"Judge Kreep denies making any comment about race.

"We find Ms. Young's testimony to be credible and find no evidence or indication of a motive or incentive for her to present a false account. We credit her version of the incident."

Judge Kreep objects to the masters' finding that he made the statement about race, and contends that the examiner did not prove this charge by clear and convincing evidence because he denied making the statement and Ms. Young and Ms. Fujita differed in their recollection of what he said.

A charge can be proven by clear and convincing evidence based on the testimony of one witness if believed, even when there is conflicting or divergent testimony. (*People*

*v. Rincon-Pineda* (1975) 14 Cal.3d 864; California Jury Instructions Civil [CACI] 107 [the testimony of one witness if believed is sufficient to prove any fact].) With respect to discrepancies between witness testimony, California jurors are instructed: "Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony." (CACI 107.)

We conclude there is clear and convincing evidence to support the masters' finding that Judge Kreep told Ms. Young she should not say she "didn't win due to racism" or words to that effect. The fact that Ms. Fujita's recollection differed as to the exact words used does not discredit Ms. Young's testimony. Both witnesses remembered the judge referring to racism in relation to a conversation about why Ms. Young did not receive a prize, whether it be "black," "colored," "something about racism" or "due to racism." Ms. Fujita recalled Ms. Young appearing upset by the comment. Ms. Young's testimony is further corroborated by the fact that she emailed her supervisor with a complaint about the judge's comment when her supervisor returned from vacation. Finally, as noted by the masters, Ms. Young had no reason to present a false account.

Giving special weight to the credibility determinations of the masters who were in a position to observe the demeanor of the witnesses, we adopt the factual findings of the masters in their entirety.

2. Conclusions of Law.

The masters concluded the judge violated California Code of Judicial Ethics canons 1, 2, 2A and 4A [judge shall conduct extrajudicial activities so that they do not cast reasonable doubt on his capacity to act impartially or demean the judicial office] and engaged in prejudicial misconduct. We concur.

Judge Kreep injected race into the conversation about prizes for Halloween costume contest winners, without any prompting or suggestion by Ms. Young or Ms.

Fujita. The comment suggested unfairly that Ms. Young might question the results of the contest based on her race. Ms. Young was shocked and offended. We concur with the masters that the comment "was insensitive and demeaning and could reasonably have been perceived as racial or ethnic bias." "Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions that may do so include inappropriate use of humor or the use of demeaning remarks." (Cal. Code Jud. Ethics, canon 4A, Advisory Com. Commentary.)

We conclude that the remark would be found by an objective observer to be prejudicial to public esteem for the judiciary.

COUNT SIX

Judge Kreep was charged with giving the appearance of prejudging an unlawful detainer case by failing to offer the parties the opportunity to present evidence, cross-examine witnesses, or present argument, and with making comments reflecting prejudgment during the proceeding. The masters concluded that the examiner did not prove the charge by clear and convincing evidence.

The following is a summary of the masters' factual findings.

*Vismara v. Coplin* was before Judge Kreep for trial on September 26, 2014. Richard Hein, a representative of the plaintiff, was present at the trial with plaintiff's counsel Richard C. Alter. Defendants Ken Coplin, Alex Iatridis and Ed Kinney were also present.

After witnesses were sworn in, someone explained that defendants were no longer in possession of the premises. Judge Kreep asked the parties questions to determine who had personal property on the premises and what it was, so he could "figure . . . what's going on before we get too far into this case." Judge Kreep received and reviewed documents with the permission of the parties and questioned the parties about the lease and lease payments. When plaintiff's counsel clarified that the only issue for trial was possession of the premises because defendants' bankruptcy actions precluded a claim for damages against them, Judge Kreep responded, "I was trying to figure out what's going

on, so. You understand that gentlemen? They're not seeking any money from you [¶] . . . [¶] They just want the property back." During the proceeding, Mr. Coplin and Mr. Iatridis did not challenge plaintiff's right to possession of the premises, and Mr. Kinney was dismissed as a defendant.

Judge Kreep urged the parties to reach a compromise about how much time defendants would have to remove their personal property from the premises. Plaintiff's counsel welcomed Judge Kreep's help. Judge Kreep asked Mr. Coplin to talk with the plaintiff to "work out" a timeframe to remove his property from the premises. Judge Kreep said, "If you're not willing to do that then I will -- then we'll go through the trial and I'll make a formal finding and, depending on the evidence, I'm not saying I'm going to rule against you -- uh -- but I, you know, just what I know of this case, there's -- there's somewhat of a prima facie case made unless you start paying rent and they agree to accept the rent now." Judge Kreep indicated he would make an enforceable order if they agreed on a timeframe, but otherwise they would go "through the formalities," and the defendants would get the "standard time" to vacate the premises. Plaintiff agreed to give defendants 30 days to remove their belongings after the parties conferred. Judge Kreep entered an order awarding possession of the premises to plaintiff, with the lockout stayed until October 31, 2014.

The masters concluded that the only issue for trial was possession of the premises and that issue had already been resolved. (*Union Oil Co. v. Chandler* (1970) 4 Cal.App.3d 716, 721 [in general, the sole issue before the court in an unlawful detainer proceeding is the right to possession of real property], disapproved on another point in *Green v. Superior Court* (1974) 10 Cal.3d 616, 633, fn. 19.) They further concluded that it was not improper under these circumstances for Judge Kreep to try to help the parties negotiate the removal of defendants' personal property. Moreover, the judge elicited information from both the defendants and the plaintiff and did not appear to be partial to either side.

The masters concluded Judge Kreep should not have said, "[W]e'll go through the formalities and I'll issue an order" if the parties could not agree, because "[s]uch

comments can suggest prejudgment of the case." Nonetheless, the masters found that the evidence demonstrates that Judge Kreep's approach at the hearing was welcomed and appreciated by the parties and resolved their remaining issues. Thus, the masters concluded, "Although Judge Kreep should have been more cautious with some of his statements, his conduct was not coercive and did not constitute prejudgment of the case."

Based on the foregoing findings and conclusions of the masters, which we adopt, we conclude that this charge was not proven by clear and convincing evidence.

COUNT SEVEN

Judge Kreep is charged with stating during an unlawful detainer proceeding, "I had a Filipino teacher who always used to ask for a shit of paper." It was alleged that the comment was undignified and created an appearance of impropriety and bias.

1. Findings of Fact.

We adopt the following findings of fact of the masters as summarized and paraphrased.

On October 27, 2014, Judge Kreep presided over an unlawful detainer trial in a matter entitled *Pinewood Park, LP v. Anderson.* During the trial, defendant Paula Anderson was describing the circumstances ever since the owner had "filed" on her when the following colloquy ensued:

"THE COURT: Ever since she what on you?

"ANDERSON: Ever since she, um, gave me --

"THE COURT: Filed on you?

"ANDERSON: Yes, filed.

"THE COURT: I thought you said fouled on me. I'm sorry, filed on me.

"ANDERSON: Oh, sorry. We talk with, I got Texas, my parents are from Texas.

"THE COURT: Don't worry about it.

"ANDERSON: We might say y'all or something like that.

"THE COURT: Doesn't bother me a bit. I just misunderstood what you said.

"LANDLORD'S ATTY: My husband asks for a pin all the time, but it's a pen.

"THE COURT: That's okay I, I talk about doing the warsh [*sic*], so. Anyway, people look at me like, are you crazy? Anyway. And I had a Filipino teacher who always used to ask for a shit of paper."

Judge Kreep testified he made the "shit of paper" remark in response to Ms. Anderson's joke about her accent and the plaintiff's attorney's joke about her husband's accent. He said his remark was "made in an attempt to bring some levity and relaxation into the proceeding," but he admits it was inappropriate and he apologized for his comment.

2. Conclusions of Law.

Judge Kreep had been previously counseled by his presiding and supervising judges about commenting on accents and he was advised to filter what he said, share less with others and be more judicial. Thus, we agree with the masters that "he should have known not to make a comment about a Filipino teacher's accent and not to use the word 'shit' in the courtroom, even if it referred to a sheet of paper." (See *McCartney, supra*, 12 Cal.3d at p. 535; *Salcido, supra,* at p. 20.)

Judge Kreep's conduct violated canons 1, 2, 2A, 3B(3), 3B(4) and 3B(5) of the California Code of Judicial Ethics, and constituted improper action. The examiner contends that the comment was prejudicial to public esteem for the judiciary, and thus constituted prejudicial misconduct. We concur with the masters that given the context of the comment, in which other individuals initiated a discussion about how people with accents can be misunderstood, sometimes in a humorous way, the comment constituted improper action rather than prejudicial misconduct.

COUNT EIGHT

Judge Kreep was charged with improperly soliciting the legal opinion of attorneys who did not represent a party in the case before him.

1. Findings of Fact.

We adopt the following factual findings of the masters.

"In *Gelb Revocable 2010 Trust v. Chapman*, Judge Kreep held a hearing on October 2, 2014, regarding defendant Carlton Noble's ex parte application for an order

staying a lockout and for an order shortening the time to hear a motion to set aside a default judgment. The plaintiff and Mr. Noble were represented by counsel at the hearing. During argument about whether Mr. Noble received proper service of the summons and complaint, Judge Kreep turned to attorney Patricia Coyne, who was sitting in the courtroom but did not represent the plaintiff or Mr. Noble, and asked her, 'Does the 30-day notice require the abandonment of property wording?' Ms. Coyne responded in the affirmative and Judge Kreep told plaintiff's counsel, 'You might want to try to settle this matter.' Ms. Coyne had appeared before Judge Kreep numerous times and testified it was not odd for Judge Kreep to ask her a question about a case she was not handling; similar occurrences had happened in the more than 26 years she had been representing landlords.

"In another case, during a hearing on a demurrer, Judge Kreep asked attorney Mark Feinberg, who was in Judge Kreep's courtroom to oppose a demurrer in a different case, whether an order overruling a demurrer should state that the defendant had five days to 'respond' or five days to 'answer.' Mr. Feinberg opined that the order should give the defendant five days to answer. Judge Kreep adopted Mr. Feinberg's suggestion. Later, in Mr. Feinberg's case, Judge Kreep overruled a demurrer and gave the defendant five days to answer. Like Ms. Coyne, Mr. Feinberg had been practicing for decades and appeared before Judge Kreep many times. There had been another instance in which Judge Kreep asked Mr. Feinberg for his legal opinion in a case Mr. Feinberg was not handling. And on one or two other occasions, Mr. Feinberg saw Judge Kreep ask attorneys for their legal opinion in cases they were not handling. Mr. Feinberg testified he had occasionally seen other judges make similar inquiries of lawyers in their courtrooms even when the lawyer did not represent a party in the case. Mr. Feinberg said such inquiries were usually made by a judge who was new to the unlawful detainer department or was a visiting judge.

"Judge Kreep likewise testified he had seen other judges ask attorneys for their legal opinions regarding cases they were not handling. Judge Kreep said he only did that in unlawful detainer cases and only in his first year in the unlawful detainer department.

According to Judge Kreep, he discontinued the practice after he was counseled about it in January or February 2015."

2. Conclusions of Law.

Soliciting the advice of attorneys in the courtroom who are not involved in the case could convey an impression that those attorneys hold a special position of influence over the judge and create an appearance of impropriety and partiality. Counsel in the case might rightly be troubled by the judge's soliciting advice on how he should handle the matter from attorneys unfamiliar with the case. Further, as noted by the masters, parties on the opposing side of Ms. Coyne and Mr. Feinberg in matters waiting to be called might also be concerned. They could see that Judge Kreep thought so highly of Ms. Coyne's and Mr. Feinberg's advice that he called on them in cases they were not handling.

Witnesses testified that other judges called on attorneys in the courtroom audience for their opinions on legal issues in unlawful detainer cases. Nevertheless, we agree with the masters that "the fact that it may be a common practice does not necessarily excuse inappropriate conduct."

For the forgoing reasons, we conclude, as did the masters, that the judge's conduct violated canons 1, 2, 2A and 2B(1) of the California Code of Judicial Ethics [a judge shall not convey or permit others to convey the impression that any individual is in a special position to influence the judge] and constituted prejudicial misconduct. (See *McCartney, supra*, 12 Cal.3d at pp. 529, 532-533 [holding benchside sentencing conferences with bailiff].) Neither party objected to these legal conclusions.

COUNT NINE

Judge Kreep was charged with creating an appearance of lack of impartiality and failing to afford a full opportunity to be heard by giving the plaintiff in *Sleea v. Brown* the choice of either (1) dismissing his small claims case and filing it as a limited or unlimited civil case, or (2) having Judge Kreep decide the case based on evidence which Judge Kreep told the plaintiff was insufficient to support his claim for $10,000 in damages.

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

On January 8, 2015, Judge Kreep presided over *Sleea v. Brown*, a small claims action. Plaintiff Juhar Sleea sought $10,000 in damages for "stolen property, occasional hotel fees, food charges, clothing expenses, [and] hospital expenses." Mr. Sleea was present but the defendant did not appear.

Mr. Sleea was not sworn in. Upon questioning by Judge Kreep, Mr. Sleea said he rented a room from defendant but eventually defendant filed a restraining order against him and kept Mr. Sleea's belongings. He sought damages for the items kept by the defendant, including jewelry, cash, and a passport. Mr. Sleea said he also incurred hotel, food, and medical expenses as a result of the defendant's conduct.

Mr. Sleea presented Judge Kreep with receipts to support a portion of his damages claim. When Judge Kreep said Mr. Sleea had to present evidence of the cash left in the room and the value of the stolen jewelry, Mr. Sleea responded that he wrote down the amount of the cash and the value of the jewelry. Judge Kreep replied, "Just writing it down is meaningless. I could say you stole $10,000 from me. You have to give me some evidence, sir."

Judge Kreep pressed Mr. Sleea for some evidence that he had $10,000 in cash he claimed he had hidden in his room and for receipts for the allegedly stolen jewelry. Mr. Sleea said he got the jewelry "from the Holy Land" and the receipt "was in Arabic and it was [a] long time [ago.]" Judge Kreep responded, "I can only give you damages for what you can prove to me. And without some appraisal or estimate or receipt for the jewelry, you have no idea what it's worth, sir. I have no idea what it's worth, sir. I can't give you damages based on speculative values. That's the law."

Mr. Sleea said he knew the jewelry was worth $5,000 because he showed a photograph of the jewelry to a "jewelry owner" who told him so. Judge Kreep said Mr. Sleea's representation about the value of the jewelry was not admissible evidence.

Judge Kreep told Mr. Sleea that if the defendant had "taken all this stuff" from Mr. Sleea, Mr. Sleea should have brought a limited or unlimited civil action and not sued in small claims court. Mr. Sleea explained that even though his damages exceeded $10,000 he filed a small claims action because he did not have the money to file an unlimited civil action.[6]

Judge Kreep told Mr. Sleea: "Here's your options, sir, you can dismiss this case, uh, and file it in limited civil or unlimited civil. Or I can rule on the evidence you've given me. That's your choices. Which right now is looking -- from what you've -- all I've seen here in damages is two or three thousand dollars. It's what I've got [unintelligible], sir. If you have, if you have more receipts or something there, show them to me." Judge Kreep later repeated Mr. Sleea's options and added, "There are attorneys who may take it on a contingency basis. I don't know. If you have no income, you may be able to get a fee waiver. In fact, you got a fee waiver for this case. If you can get a fee waiver for this case, you can get a fee waiver for limited civil or unlimited civil."

When Mr. Sleea said he had no money to pay an attorney, Judge Kreep responded, "Sir, third time, here are your options, you dismiss this case and take it into limited civil or unlimited, or I rule on the evidence that you have given me so far, plus whatever other damage evidence. But doctors' bills, just because you could not pay them, unless this man physically attacked you and the doctors' bills are as a result, the doctors' bills are not relevant to this proceeding. So, what's your choice? You want me to rule on what you've given me? Or do you want to dismiss this and try to get more money in another court?" Mr. Sleea elected to dismiss his action but protested, "I don't think this is fair, Your Honor." Judge Kreep dismissed the action without prejudice.

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[6] Except in circumstances not shown to be applicable here, the jurisdictional limit for a small claims action brought by a natural person is ten thousand dollars ($10,000). (Code Civ. Proc., § 116.221.)

Judge Kreep testified he believed he had authority to give Mr. Sleea the option of having his case dismissed without prejudice because Mr. Sleea did not have "concrete" evidence to prove his alleged damages.

2. Conclusions of Law.

The masters concluded that Judge Kreep failed to afford Mr. Sleea a full opportunity to be heard by refusing to consider Mr. Sleea's offer to prove his damages through his own sworn testimony or through hearsay evidence in a small claims case in which the defendant had not appeared. The judge did not swear Mr. Sleea in as a witness and informed Mr. Sleea that his testimony about the amount of cash in the room and what a jeweler told him about the current value of the missing jewelry was not evidence.

"The hearing and disposition of . . . [a] small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively." (Code Civ. Proc., § 116.510.) "While there are obviously some limits beyond which the court should not go, the statutes are clearly designed to afford both the parties and the court considerable flexibility in presenting their cases and ascertaining the truth." (*Houghtaling v. Superior Court* (1993) 17 Cal.App.4th 1128, 1135 (*Houghtaling*).)

The rules of evidence, including the hearsay rule, do not apply to small claims court proceedings. (*Sanderson v. Niemann* (1941) 17 Cal.2d 563, 573.) In small claims matters, the trial court should "listen patiently, even if it is mentally classifying the evidence as improbable, incredible, or preposterous." (*Houghtaling*, *supra*, at pp. 1137; Cal. Judges Benchguides: Small Claims Court (rev. 2016) § 34.32, p. 34-27 ["In most instances, the judge should admit all of a party's evidence, including hearsay evidence and evidence offered through witnesses, and thereafter determine its weight and trustworthiness."].)

"The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law

and the canons, to enable the litigant to be heard." (Cal. Code Jud. Ethics, canon 3B(8), Advisory Com. Commentary.)

Judge Kreep repeatedly commented on the insufficiency of the plaintiff's evidence and then pushed Mr. Sleea to either dismiss the matter and refile it as a civil action or continue with the small claims action and have the judge rule based on the evidence presented. Mr. Sleea had already told the judge that he had not filed an unlimited civil action because it was something he could not afford. As stated by the masters, "[u]nder the circumstances, the 'choice' Judge Kreep offered the indigent plaintiff was not much of a choice at all."

The issue before the commission is not whether Judge Kreep's legal rulings were correct or whether there was or was not sufficient evidence to prove damages. Rather, the ethical issue is whether he provided the plaintiff with an opportunity to fairly adjudicate his small claims matter. We agree with the masters that he did not.

The masters stated, "A disinterested observer in the courtroom might think Judge Kreep was working hard to avoid making a decision. Judge Kreep may have been trying to help Mr. Sleea by giving him a way out of an adverse ruling, but Mr. Sleea thought it was unfair, and we agree." We also agree.

The masters concluded that Judge Kreep's conduct violated canons 2A and 3B(8) of the California Code of Judicial Ethics [a judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law] and constituted improper action. However, the masters also concluded that there was not clear and convincing evidence to prove the charge that Judge Kreep created an appearance of favoritism and bias toward Mr. Sleea in violation of canon 3B(5) by offering him the option of dismissing without prejudice and refiling in limited or unlimited jurisdiction civil court. We reach the same legal conclusions. Neither party objected to these legal conclusions.

## COUNT TEN

Judge Kreep was charged with creating an appearance of impropriety and lack of impartiality by repeatedly interjecting views based on his personal experience during a small claims hearing in *Clendenin v. Pacific West Home Mortgage, LLC*.

1. Findings of Fact.

We adopt the following factual findings of the masters as summarized and paraphrased.

Judge Kreep heard *Clendenin v. Pacific West Home Mortgage, LLC*, a small claims action, on February 11, 2015. Plaintiff William Clendenin was present at the hearing and Stephen Niednagel appeared as the representative for defendant.

Mr. Clendenin claimed damages for Pacific West's failure to disclose there was damage to the subfloors when they sold him the property. There was a dispute over whether the damage existed when the property was sold to Mr. Clendenin. Mr. Niednagel said Pacific West replaced the carpet before the property was sold and Mr. Niednagel would have known about damage to the subfloor when the carpet was replaced. As Mr. Niednagel was explaining that the carpet could not have been installed if the subfloor had been in the condition shown in Mr. Clendenin's photographs, Judge Kreep interjected that he had "bought and sold houses," was a landlord, and had "commercial and residential realty." Judge Kreep also stated that he had "replaced carpets" and had done a lot of construction and reconstruction to fix and sell property. He said, "So, although I don't claim to be a builder, I'm not a virgin when it comes to these types of matters."

Mr. Niednagel testified he had not seen the carpet being installed and that his testimony about the condition of the subfloor was based on what other people told him. Judge Kreep replied, "Alright. So, 'cause I've seen some pretty strange -- I was an attorney for over 37 years, sir, and I was involved in some lawsuits over houses that I don't ever even know how they got approved by code -- brand new houses that were sold that people walked in them and fell right through the floor. And they've been approved by code, okay. Just before selling, so, I mean strange things happen is the only point I'm making."

Judge Kreep prefaced his questions to Mr. Clendenin by stating, "I'm not an expert, I'm not a developer, I'm not a contractor, but I've been involved in real estate a little bit."

Mr. Niednagel presented a statement from the Vice President of Operations for Pacific West's carpet installation contractor, stating that Mr. Clendenin's photographs did not depict the condition of the subfloor when the carpet was installed in 2011. Judge Kreep commented that the statement was double hearsay. He continued, "[L]et's put it this way, I've been in enough lawsuits as an attorney, fortunately not as a party, to know that sometimes the truth gets left out when people are trying to cover their butts." Judge Kreep ultimately awarded Mr. Clendenin $2,500, plus costs.

2. Conclusions of Law.

We agree with the masters' conclusion that Judge Kreep's repeated comments about his prior experiences in real estate and as an attorney created an appearance that he was not impartial and that he based his rulings on his personal experiences rather than the evidence presented. Judge Kreep suggested he discredited Mr. Niednagel's testimony about the improbability of the subfloor being damaged when the carpet was installed because the judge had "seen some pretty strange" things happen with houses. He also suggested a letter from the Vice President of Operations for the carpet installation contractor stating that the floors were not damaged was not trustworthy because in Judge Kreep's experience as an attorney, "the truth gets left out when people are trying to cover their butts."

Judge Kreep testified he disclosed he was a landlord so the parties could file a Code of Civil Procedure section 170.6 challenge against him if they wished. However, the timing and nature of his comments suggest otherwise. He did not make the comments at the beginning of the proceeding, he made them after the proceeding had commenced and sprinkled them throughout the proceeding. Additionally, his comments went well beyond disclosing he was a commercial landlord so that the parties could disqualify him if they wished. Rather, his remarks about his personal experiences were in response to testimony on particular subjects.

We conclude, as did the masters, that Judge Kreep's conduct violated canons 2, 2A and 3B(5) of the California Code of Judicial Ethics and constituted improper action. (*Public Admonishment of Moruza, supra*, at pp. 7, 9; see also *Inquiry Concerning Velasquez, supra,* 49 Cal.4th CJP Supp. at pp. 201, 204.) Neither party objected to these legal conclusions.

COUNT ELEVEN

Judge Kreep was charged with violating canons 1, 2, 2A, 3B(7) and 3B(8) of the California Code of Judicial Ethics by engaging in an ex parte communication in *REO Group v. Newman*. The judge allegedly considered an ex parte letter from REO's counsel, Jennifer Freedman, requesting that a court date that had been continued from July 29, 2015 to August 5, 2015, be moved back to July 29. The judge granted the request and reset the date to July 29. Allegedly, the defendant George W. Newman was not given written notice of REO's request, and did not appear on July 29.

The masters found that Judge Kreep's courtroom clerk "did not accept Ms. Freedman's letter because it was hand-delivered to Department 7 without a proof of service showing service of the letter on Mr. Newman. A process server redelivered Ms. Freedman's letter later that day with a proof of service showing that a copy of Ms. Freedman's letter to the court was sent to Mr. Newman by mail on July 27, two days before the date Ms. Freedman sought for the hearing."

Based on this finding, the masters concluded that the charge was not proven by clear and convincing evidence. (*Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, 1013, fn. 2 [letter from real party in interest to the court was not ex parte communication where it was served on petitioner's counsel].) The masters reasoned, "Ms. Freedman's letter is not an ex parte communication. Mr. Newman may have been prejudiced by the timing of the communications to him, but that was a procedural issue for which he had legal remedies and it did not amount to misconduct."

We adopt the masters' conclusion that the charge was not proven by clear and convincing evidence.

## IV.

## DISCIPLINE

The purpose of a commission disciplinary proceeding " 'is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman, supra*, 18 Cal.4th at pp. 1111–1112, quoting *Adams*, *supra,* 10 Cal.4th at p. 912.)

In determining the appropriate level of discipline, we first consider the number of acts and the nature of the proven misconduct. Judge Kreep has engaged in one act of willful misconduct, 17 acts of prejudicial misconduct, and 11 acts of improper action. Under the California Constitution, improper action is not a basis for censure or removal. (Cal. Const., art. VI, § 18, subd. (d).) The proven acts of willful and prejudicial misconduct in this matter support our determination to severely censure Judge Kreep.

The number of acts of misconduct is relevant to discipline to the extent it shows isolated incidents, or a pattern which demonstrates that the judge lacks judicial temperament and the " ' "ability to perform judicial functions in an even-handed manner." ' " (*Fletcher*, *supra*, 19 Cal.4th at p. 918.) In addition to the number of acts of misconduct, the nature and seriousness of the misconduct is an important factor in the commission's consideration. (*Broadman*, *supra*, 18 Cal.4th at pp. 1112–1113; Policy Declarations of the Com. on Jud. Performance, policy 7.1(1)(b).)

Judge Kreep has engaged in a pattern of misconduct that demonstrates a lack of judicial temperament. During his campaign for judicial office he conducted himself in a manner that created an appearance of lack of impartiality and demonstrated a disregard for adhering to election laws and assuring the accuracy of his public representations. After taking office, he often ran his courtroom in a manner that was undignified and suggested bias or prejudgment. Further, he engaged in willful misconduct by acting out of hostility in discussing with deputy public defenders the City Attorney's blanket challenge to him.

Judge Kreep maintains that he never intended to demean or belittle anyone in his courtroom. While that may be the case, his failure to recognize that his comments could offend people or make them feel uncomfortable is troubling. Drawing attention to a person's ethnicity when not an issue in the case, questioning an attorney's citizenship, suggesting that a court employee might blame the results of a costume contest on racism, asking a defendant charged with prostitution if she did it for the money or the action, referring to attorneys by nickname, and commenting on the physical appearance and pregnancy of attorneys demonstrates an astonishing lack of sensitivity to how such comments could be perceived by others and a judicial style unbefitting the judicial office.

Judge Kreep's misconduct undermines public confidence in the dignity, integrity and impartiality of the judiciary. In addition, Judge Kreep's conduct has had a negative impact on the administration of the San Diego County Superior Court. His presiding and supervising judges were required to spend substantial time meeting and corresponding with Judge Kreep and preparing memoranda documenting repeated complaints about Judge Kreep's conduct, all at a time when the court was dealing with a budgetary crisis.

Other significant factors we take into consideration in determining the appropriate level of discipline are whether the judge acknowledges and appreciates the impropriety of his or her misconduct, and whether the judge has cooperated fully and honestly in the commission proceeding. (Policy Declarations of the Commission on Judicial Performance, policy 7.1(2)(a)(b).) "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248.)

In general, Judge Kreep admitted that he ran his courtroom too casually and that many of his comments could be perceived as improper and demonstrating a lack of decorum and bias. Specifically, he acknowledged wrongdoing in failing to report campaign expenses and use of his personal credit card and bank account for campaign expenses, commenting on an attorney's accent and citizenship, referring to attorneys by nickname, commenting on the attractiveness of a male public defender, referring to a

"gift for the day" during sentencing, making certain crude comments, and the Filipino accent comment.

However, Judge Kreep also failed to see the impropriety as to many instances of misconduct, such as commenting on an attorney's pregnancy and the physical attractiveness of female public defenders, sharing intimate personal facts about his caretaking of a friend, asking a prostitute whether she did it for the money or the action, calling an adult man "little boy," unnecessarily referencing a person's ethnicity and speaking Spanish to litigants based on their surname. Particularly troubling are the disingenuous and specious explanations Judge Kreep offered in response to some of the charged conduct. For instance, he denied opposing President Obama in the USJF fundraising letters he signed during his judicial campaign despite unambiguous language in the letters to the contrary, and he claimed to have gone to Department 1 simply to inform the public defenders of the blanket challenge when there was no reason for him to do so and when his words conveyed anger. While admitting that he commented on an attorney's pregnancy, he minimized the extent of the comments. Further, the masters credited Ms. Young's testimony that Judge Kreep made a statement about race in relation to the Halloween costume contest, despite the judge's denial.[7]

While the number of incidents of misconduct and Judge Kreep's failure to fully and honestly acknowledge the extent of his misconduct might warrant removal from office, other considerations have persuaded us that a severe public censure is the appropriate discipline. Those considerations include that all but five of the 29 incidents of proven misconduct occurred either during Judge Kreep's judicial campaign or during his first year on the bench and the evidence before us suggests that Judge Kreep has made efforts to reform his judicial style and behavior. (Policy Declaration of the Commission on

[7] Judge Kreep argued through his attorney that two witnesses may remember events differently, and that discrepancies between the testimony of witnesses does not necessarily mean that one witness is intentionally lying. While we think making a comment about race in this context is something a person is likely to remember, we cannot say based on this record that there is clear and convincing evidence that Judge Kreep intentionally lied in his testimony on this issue.

Judicial Performance, policy 7.1(c).)[8] There was a significant drop in incidents of misconduct after the judge's first year on the bench and after he was counseled by his supervising judges. For the most part, when specific improper conduct was brought to his attention, such as the use of nicknames, commenting on the physical appearance of attorneys and asking attorneys in the courtroom for advice, the conduct ceased.

However, Judge Kreep did not always heed the advice of his superiors. During a January 30, 2013 meeting with Judge Kreep, Presiding Judge Trentacosta counseled Judge Kreep about his statements to Ms. Hernandez and an article in CityBeat reporting those statements. Judge Trentacosta told Judge Kreep that statements singling out a person based on something that is not relevant to an issue before the judge, such as the person's accent or national origin could make the person uncomfortable. Judge Kreep apologized for his conduct and promised not to do it again. Yet, after that meeting, Judge Kreep made the "no offense to Chinese people" and Filipino accent comments. Also, the judge stopped speaking Spanish during court proceedings only after repeated admonishments from his presiding judge.

In mitigation, the masters noted the testimony of attorneys who appeared before Judge Kreep in the unlawful detainer department, and described him as fair and respectful of litigants. The masters also found in mitigation that Judge Kreep is hard working and has helped reduce the backlog on default matters at the superior court. Further, the judge has participated in continuing education, and extracurricular court and community activities and committees.

After careful consideration and balancing of the foregoing aggravating and mitigating factors, we have determined that imposition of a severe public censure, the highest level of discipline short of removal, best fulfills our mandate to protect the public and maintain public confidence in the integrity and impartiality of the judiciary.

[8] Although Judge Kreep has no prior discipline, we do not consider that to be a mitigating factor in his case because most of the misconduct occurred while he was a judicial candidate and during his first year on the bench.

## ORDER

Pursuant to the provisions of article VI, section 18 of the California Constitution, we hereby impose a severe public censure on Judge Gary G. Kreep.

Commission members Mr. Richard Simpson; Anthony P. Capozzi, Esq.; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Nanci E. Nishimura, Esq.; and Mr. Adam N. Torres voted in favor of all the findings and conclusions expressed herein and in this order imposing a severe public censure. Commission members Hon. Ignazio J. Ruvolo, Hon. Michael B. Harper, Dr. Michael A. Moodian, and Hon. Erica R. Yew concur as to the factual findings and legal conclusions expressed herein, but dissent as to the order of severe public censure and would have ordered the removal of Judge Kreep from office. Commission member Ms. Mary Lou Aranguren did not participate.

Date: August 17, 2017



Mr. Richard Simpson
Vice-Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING FORMER COMMISSIONER JOSEPH J. GIANQUINTO | DECISION AND ORDER IMPOSING PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 116.5) |

This disciplinary matter concerns Joseph J. Gianquinto, formerly a commissioner of the Kern County Superior Court. Mr. Gianquinto and his counsel Katy A. Cummings, of Miller Law Associates, have entered into a stipulation with Gregory Dresser, Director-Chief Counsel of the Commission on Judicial Performance, pursuant to commission rule 116.5 to resolve the pending preliminary investigation involving Mr. Gianquinto by imposition of a public censure with Mr. Gianquinto's agreement to not seek or hold judicial office in the future. The Stipulation for Discipline by Consent (Stipulation) was approved by the commission on August 8, 2018, pursuant to the following terms and conditions and stipulated facts and legal conclusions.

TERMS AND CONDITIONS

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving former commissioner Joseph J. Gianquinto.

2. The commission shall issue a public censure based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public censure may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Mr. Gianquinto waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. Mr. Gianquinto has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time in the future.

7. If Mr. Gianquinto attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the public censure and resume the preliminary investigation as to all of the matters in the preliminary investigation letter. Additionally, the commission may refer the matter to the State Bar of California.

STIPULATED FACTS AND LEGAL CONCLUSIONS

1. Mr. Gianquinto was a commissioner of the Kern County Superior Court from December 20, 2007 to March 30, 2018.

2. In 2016 and 2017, Commissioner Gianquinto maintained a public Facebook page that identified him as "Jj Gianquinto," stated that he "works at Kern County," and contained photos of him recognizable by the public. Commissioner Gianquinto's Facebook page did not identify him as a commissioner.

3. On May 8, 2017, Presiding Judge Charles Brehmer notified Commissioner Gianquinto in writing that a number of his Facebook posts (described below) were "of significant concern," and attached copies of the posts. Judge Brehmer's letter stated that there was a concern about the "content and impression a member of the public might have upon review of the posts."

4. Judge Brehmer's letter included copies of the following original statements that Commissioner Gianquinto posted on his public Facebook page in 2016 and 2017:

- "When he said he was going to 'fundamentally transform' this nation, he was gaining success. He was going to transform it from a primarily Judeo-Christian nation into Islam. Got it now? Thank God for Trump." (Posted February 10, 2017.)
- "What a pity it is to watch the RINOs [Republican in name only] run from the immigration order like roaches when the light comes on. They are more

interested in saving their positions, than in protecting the rest of us." (Posted January 31, 2017.)

- "For the Indian Rez that will not permit the wall built on 75 miles of border on their land -- how about building the wall around that rez, fencing them into Mexico? That should please them." (Posted January 30, 2017.)
- "What would cause anyone to be depressed or disappointed over the Clinton thing? If you paid any attention, you had to know from the outset that nothing was going to happen to her. So, I have lost respect for the federal justice system, but I am not surprised." (Posted July 6, 2016.)
- "I am asking myself 'Why am I reading all the crap about the FBI and Hillary? It only causes me grief when I know nothing will EVER happen?' /so, [*sic*] I guess I will sign off for a little while during the complete destruction of a magnificent republic. We are no longer a nation of laws." (Posted July 5, 2016.)
- "As I drove to the gym this morning, my route goes past several low income housing units recently built, and some apartment buildings that are also low income. I did not see a single light on at 6:00. That is when people going to work arise." (Posted April 17, [year illegible].)

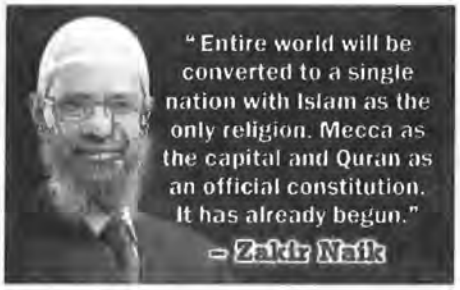
5. Judge Brehmer's letter also included copies of additional material that Commissioner Gianquinto posted on his public Facebook page during the same time period, for example:

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|  | Commissioner Gianquinto's original statement accompanying the post: "Democrats are consistent, and they proved that at President Trump's address in Congress!" |
| LIBERALS ARE AMERICA'S CANCER<br>Any doubt in your mind? | |
| [video]- SHOULD TRUMP ARREST THESE PROTESTORS? LIKE + SHARE = YES!<br><br>[The video shows protesters chanting "no border, no nation, fuck deportation" https://www.facebook.com/heyconservativepost/videos/713187405536217/?fallback=1] | |

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|---|---|
|  | Commissioner Gianquinto's original statement accompanying the post:<br><br>"Leftist values on full display. #WomensMarch" |
| It's time to stop messing around with people who cause chaos. Do you agree?<br><br> | |

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| **Obama Says Requiring Employees To Speak English IS DISCRIMINATION**<br><br>**SHARE If you think Obama is an ANTI-AMERICAN MORON!** | |
| Before the grand jury had a chance to interview witnesses and review the evidence of what happened in Ferguson, Barack. . .<br><br><br>Obama Created Open Hunting Season on Police Officers | |
| The Blacksphere<br><br>Let criminals out.<br>Let illegals in.<br>Let boys in girl's locker rooms.<br>Let women kill their offspring.<br>Prosecute innocent officers.<br>Persecute Christians.<br>Accept barbarity in the form of Islam.<br>Over tax the hard working.<br>Coddle the lazy.<br><br>This is what Democrats have created in America. | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |

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|  | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |
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| This is the dream and goal of most followers of terror religion ISLAM . . . Some show it openly and many hide their real face . . . [the text is cut off]<br><br> | |
| Absolutely agree!<br><br> | |
| Are you part of the 89%?<br><br> | |

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| Millions of illegal aliens are in the United States. We don't know who they are, where they're from or what their intentions are. If ...<br>[comment is cut off]<br><br><br> | |
| DAMN STRAIGHT<br>#NoAmnesty<br>[comment is cut off]<br><br><br> | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |

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| Motor voter laws did this!<br><br><br> | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |
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| VIDEO: Bachmann Calls Muslim Migration A "Planned Invasion" to Destroy Western Christendom<br>https://www.youtube.com/watch?v=Pa4qMBN0St0 | Commissioner Gianquinto's original post accompanying the post:<br>"I am glad SOMEONE is noticing and evaluating it correctly!" |
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| Attention, leftists: all people have natural rights, but only American citizens have constitutional rights.<br><br> | |
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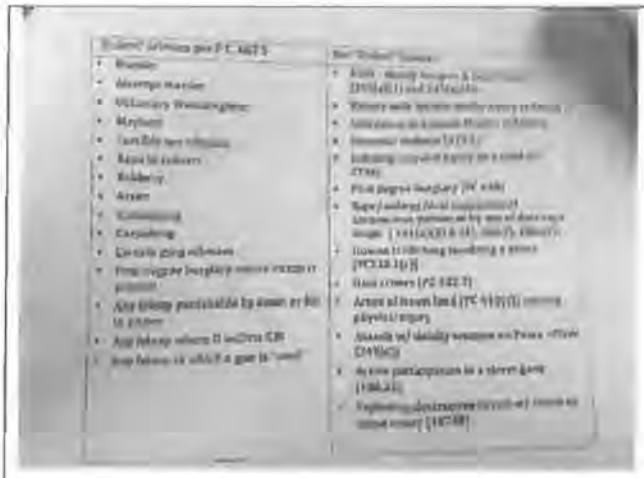




Amen ... Absolutely I do! Anyone who may disagree is free to take it up with God. #OneManOneWoman One Nation Under God



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|  | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |
| Ok Kiddies, listen up. This BS needs to be shared. YOU ALL need to see how your elected officials think. You all need to see what you have been voting for. Are you OK with this shit? If you are in my friends list, you better not be.<br><br>Prop 57 is going on the ballot as "Public Safety and Rehabilitation Act." Very similar to prop 47, which was School Safety Act (which reduced certain crimes to misdemeanors, including controlled substances offenses) The attached is a description of the "non violent" offenses that current state inmates can be released early for.<br><br>I love it. "Rape by using a drug" "battery with serious bodily injury" "domestic violence" "Assault with a deadly weapon, on a peace officer", non violent!<br><br>You tell me if you can get behind supporting this proposition and releasing "non violent" offenders early!!! You need to share (copy/paste/screenshot, you won't be able to share my post) this information and stop it in its tracks. | |



6. On May 15, 2017, Commissioner Gianquinto met with Presiding Judge Brehmer concerning the Facebook posts.

7. On June 20, 2017, Commissioner Gianquinto submitted a written response to Judge Brehmer, which stated: "After concerns about the posts were brought to my attention, I immediately deleted the posts and have refrained from sharing additional posts of this nature. I have also designated my Facebook account as 'private' which means only my friends can view any future posts."

8. On June 27, 2017, Commissioner Gianquinto self-reported to the commission that copies of his Facebook posts had been dropped off at the courthouse and delivered to Judge Brehmer. The commissioner's letter, which included copies of the referenced posts, stated: "Preliminarily, after Judge Brehmer brought this matter to my attention, I deleted the posts and have refrained from sharing additional posts of a political nature. I also designated my Facebook account as private."

9. On June 28, 2017, Judge Brehmer issued a private written reprimand to Commissioner Gianquinto, which stated in part:

> Your Facebook page contents, as of May 8, 2017, included content that was derogatory to certain members of our community and further was out of line with the Judicial Canons. At the very least, members of the public could get the impression that you were biased which impacts the trust of our judiciary and the belief of fairness and impartiality of the public appearing before you.

> You were advised to immediately remove the posts and restrict social media usage. You did comply with the advice, immediately removed the posts, acknowledged your errors in judgment and self-reported to the Commission on Judicial Performance.
>
> I am satisfied that you fully understand this significant issue and have appropriately addressed the errors in judgment and have taken corrective action.

10. Despite his written representations to Judge Brehmer on June 20, 2017, and to the commission on June 27, 2017, Commissioner Gianquinto did not immediately make his public Facebook page private or delete all of the posts included with Judge Brehmer's letter. The commissioner's Facebook page remained public, and six of the posts included with Judge Brehmer's letter were still on the page until at least August 2, 2017. Commissioner Gianquinto had intended to make his Facebook page private and delete the offending posts prior to his representations on June 20, 2017, and June 27, 2017; however, his unfamiliarity with the technology resulted in the changes not taking effect as intended. When alerted to the fact that the posts were still visible to the public, the commissioner immediately sought further assistance, deleted the offending posts, and increased the privacy settings on his Facebook profile.

11. In addition, Commissioner Gianquinto's public Facebook page contained posts of a similar nature that were not included in the presiding judge's investigation and that remained viewable by the public until at least August 2, 2017. These additional posts included the following:

- On August 21, 2016, the commissioner publicly shared a post with a photo of Hillary Clinton, with accompanying text stating, "The problem isn't that Hillary is an unethical, corrupt, lying criminal dirtbag -- Everyone knows that. The problem is that her supporters don't care. Are you people brain dead? Join us Facebook/Stop Hillary in 2016."
- On August 18, 2016, the commissioner publicly shared a post from Allen West stating, "The sad fact is NO previous Republican presidential candidate has had the guts to call ya'll out. We finally got one, and the left can't stand it.

Share this one folks." This text is followed by a photo of Hillary Clinton, captioned, "Yes, BIGOT. Trump is right."

- On August 17, 2016, the commissioner publicly posted the following original text: "When it comes to Democrats running for office, I have relatives who are not only willing and able, but WILL close their eyes to facts such as who has been disbarred, who was fired from the Nixon matter for lying and unethical conduct, and the rest of the unethical, dishonest conduct during the past thirty years. I do NOT know how they can do that."
- On August 16, 2016, the commissioner publicly shared a post stating, "When they asked him whether he thought Donald J. Trump was good for America [*sic*] What he said was the most HARDCORE response I've EVER heard! If this doesn't have you voting Trump, nothing will. Let's get 3,000 shares for a guy that knows that we don't need a politician, we need a LEADER! This Hispanic Billionaire UNLEASHED on Trump Haters, Says, 'Who Else Would You Have In A F**king Foxhole?'"
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- On August 12, 2016, the commissioner publicly shared a post stating, "IF EVERY GUN OWNER VOTED AGAINST HER, HILLARY WOULD NOT WIN."
- On August 6, 2016, the commissioner publicly shared a post stating "JUST REMEMBER THAT THE PARTY OF SLAVERY, SEGREGATION, THE KKK, AND GOVERNMENT DEPENDENCY IS THE DEMOCRAT PARTY."

- On August 6, 2016, the commissioner publicly shared a post with a photo of Hillary Clinton winking, overwritten with text stating, "We were dead broke after leaving the White House and today we are worth over 110 million." Under this is a photo of Harry Truman, with the caption, "'You can't get rich in politics unless you're a crook.' Harry S. Truman."
- On August 2, 2016, the commissioner publicly shared a post showing a cartoon rendition of Hillary Clinton with text stating, "If Hillary Wins WE ALL LOSE! Yes = Share."
- On July 26, 2016, the commissioner publicly posted an image showing photos of Hillary Clinton, Barack Obama, Nancy Pelosi, Harry Reid, and Dianne Feinstein, accompanied by text stating, "DEMOCRATS A bunch of rich people convincing poor people to vote for rich people by telling the poor people that other rich people are the reason they are poor."
- On July 5, 2016, the commissioner publicly shared a post showing pictures of Hillary Clinton and James Comey, overwritten with text stating, "IF YOU FEEL BETRAYED BY THE JUSTICE DEPARTMENT AND THE FBI PLEASE LIKE AND SHARE." This was originally posted by "Donald Trump for President."
- On July 5, 2016, the commissioner publicly shared a post with a photo of Hillary Clinton alongside text stating, "SHARE IF YOU ARE OUTRAGED HILLARY WON'T BE CHARGED BY THE FBI."
- On July 5, 2016, the commissioner publicly shared a post showing a photo of Hillary Clinton overwritten with text stating, "SILLY AMERICANS LAWS ARE FOR POOR PEOPLE."

Mr. Gianquinto was a subordinate judicial officer at the time of the conduct described herein. Canon 6A provides that a subordinate judicial officer is a judge within the meaning of the California Code of Judicial Ethics.

Mr. Gianquinto's conduct violated canon 1 (judge shall uphold the integrity and independence of the judiciary), canon 2 (judge shall avoid impropriety and the appearance of impropriety), canon 2A (judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), canon 4A (judge shall conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially or demean the judicial office), canon 5 (judge shall not engage in political activity that is inconsistent with the independence, integrity, or impartiality of the judiciary), canon 5A(2) (judge shall not publicly endorse or publicly oppose a candidate for nonjudicial office), and canon 5D (judge may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with the code).

Mr. Gianquinto's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute, as set forth in California Constitution, article VI, section 18, subdivision (d)(2).

Mr. Gianquinto admits that the foregoing facts are true and agrees with the stated legal conclusions.

## DISCIPLINE

In 2016 and 2017, while a court commissioner, Mr. Gianquinto engaged in dozens of instances of misconduct by posting and re-posting information on his public Facebook page that reflected, among other things, anti-Muslim sentiment, anti-immigration sentiment, anti-Native American sentiment, anti-gay marriage sentiment, a position on the controversial issue of shooting deaths by police officers, strong opposition to then-presidential candidate Hillary Clinton, contrasting praise for then-presidential candidate Donald Trump, an accusation that President Barack Obama was trying to transform the United States from a Judeo-Christian nation into Islam, a lack of respect for the federal justice system, and contempt for the poor. In addition, after being contacted about the offending Facebook posts, Mr. Gianquinto represented to both his presiding judge and the commission that he had taken the posts down, which was not true, although, at the time

he made these representations, he believed the posts were no longer publicly viewable. Mr. Gianquinto's conduct on Facebook was egregious, and is the type of conduct that inherently undermines public confidence in the judiciary and that brings the judicial office into disrepute.

Given that Mr. Gianquinto has retired from his position as a commissioner, the strongest discipline he could be subject to is a public censure and bar from receiving an assignment, appointment, or reference of work from any California state court. (Cal. Const., art. VI, §§ 18(d), 18.1.) The commission has determined that acceptance of the Stipulation is in the best interest of the public considering the extent and nature of Mr. Gianquinto's misconduct, and fulfills its mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and independence of the judiciary. Furthermore, acceptance of the Stipulation resolves the matter in a manner that protects the public, while avoiding the delay and expense of further proceedings. For these reasons, the commission imposes this public censure upon the terms and conditions in the attached Stipulation.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Dr. Michael A. Moodian; Mr. Adam N. Torres; and Hon. Erica R. Yew voted to accept the Stipulation and issue this public censure. Commission member Ms. Pattyl A. Kasparian did not participate.

Date: August 22, 2018

On behalf of the
Commission on Judicial Performance,

Nanci E. Nishimura
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| IN THE MATTER CONCERNING FORMER COMMISSIONER JOSEPH J. GIANQUINTO | STIPULATION FOR DISCIPLINE BY CONSENT (Rule 116.5) |

Pursuant to Rules of the Commission on Judicial Performance, rule 116.5, Joseph J. Gianquinto, formerly a commissioner of the Kern County Superior Court, represented by counsel Randall A. Miller, and commission trial counsel (the "parties") submit this proposed disposition of the matters set forth in the commission's preliminary investigation letter dated October 4, 2017. The parties request that the commission resolve this matter by imposition of a public censure. The parties believe that the settlement provided by this agreement is in the best interests of the commission and former Commissioner Gianquinto because, among other reasons, in light of the stipulated facts and legal conclusions, a public censure and the former commissioner's agreement not to serve as a judicial officer adequately protect the public and will avoid the delay and expense of further proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving former Commissioner Gianquinto.

2. The commission shall issue a public censure based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public censure may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Former Commissioner Gianquinto waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. Former Commissioner Gianquinto has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time in the future.

7. If former Commissioner Gianquinto attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the public censure and resume the preliminary investigation as to all of the matters in the preliminary investigation letter. Additionally, the commission may refer the matter to the State Bar of California.

8. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by former Commissioner Gianquinto.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public censure on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

## STIPULATED FACTS AND LEGAL CONCLUSIONS

1. Joseph J. Gianquinto was a commissioner of the Kern County Superior Court from December 20, 2007 to March 30, 2018.

2. In 2016 and 2017, Commissioner Gianquinto maintained a public Facebook page that identified him as "Jj Gianquinto," stated that he "works at Kern County," and

contained photos of him recognizable by the public. Commissioner Gianquinto's Facebook page did not identify him as a commissioner.

3. On May 8, 2017, Presiding Judge Charles Brehmer notified Commissioner Gianquinto in writing that a number of his Facebook posts (described below) were "of significant concern," and attached copies of the posts. Judge Brehmer's letter stated that there was a concern about the "content and impression a member of the public might have upon review of the posts."

4. Judge Brehmer's letter included copies of the following original statements that Commissioner Gianquinto posted on his public Facebook page in 2016 and 2017:

- "When he said he was going to 'fundamentally transform' this nation, he was gaining success. He was going to transform it from a primarily Judeo-Christian nation into Islam. Got it now? Thank God for Trump." (Posted February 10, 2017.)
- "What a pity it is to watch the RINOs [Republican in name only] run from the immigration order like roaches when the light comes on. They are more interested in saving their positions, than in protecting the rest of us." (Posted January 31, 2017.)
- "For the Indian Rez that will not permit the wall built on 75 miles of border on their land -- how about building the wall around that rez, fencing them into Mexico? That should please them." (Posted January 30, 2017.)
- "What would cause anyone to be depressed or disappointed over the Clinton thing? If you paid any attention, you had to know from the outset that nothing was going to happen to her. So, I have lost respect for the federal justice system, but I am not surprised." (Posted July 6, 2016.)
- "I am asking myself "Why am I reading all the crap about the FBI and Hillary? It only causes me grief when I know nothing will EVER happen? /so, [*sic*] I guess I will sign off for a little while during the complete destruction of a magnificent republic. We are no longer a nation of laws." (Posted July 5, 2016.)

- "As I drove to the gym this morning, my route goes past several low income housing units recently built, and some apartment buildings that are also low income. I did not see a single light on at 6:00. That is when people going to work arise." (Posted April 17, [year illegible].)

5. Judge Brehmer's letter also included copies of additional material that Commissioner Gianquinto posted on his public Facebook page during the same time period, for example:

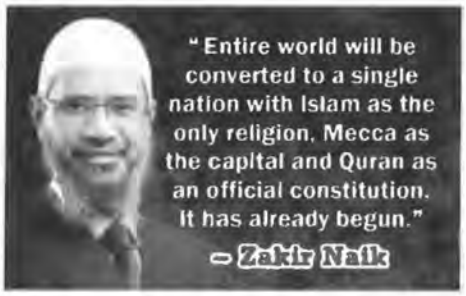
| | |
|---|---|
|  | Commissioner Gianquinto's original statement accompanying the post: "Democrats are consistent, and they proved that at President Trump's address in Congress!" |
| LIBERALS ARE AMERICA'S CANCER<br>Any doubt in your mind? | |

| | |
|---|---|
| [video]- SHOULD TRUMP ARREST THESE PROTESTORS? LIKE + SHARE = YES!<br><br>[The video shows protesters chanting "no border, no nation, fuck deportation" https://www.facebook.com/heyconservativepost/videos/713187405536217/?fallback=1] | |
|  | Commissioner Gianquinto's original statement accompanying the post:<br><br>"Leftist values on full display. #WomensMarch" |

| | |
|---|---|
| It's time to stop messing around with people who cause chaos. Do you agree?<br><br><br> | |
| **Obama Says Requiring Employees To Speak English IS DISCRIMINATION**<br><br><br>**SHARE If you think Obama is an ANTI-AMERICAN MORON!** | |

| | |
|---|---|
| Before the grand jury had a chance to interview witnesses and review the evidence of what happened in Ferguson, Barack. . .<br><br><br><br>Obama Created Open Hunting Season on Police Officers | |
| The Blacksphere<br><br>Let criminals out.<br>Let illegals in.<br>Let boys in girl's locker rooms.<br>Let women kill their offspring.<br>Prosecute innocent officers.<br>Persecute Christians.<br>Accept barbarity in the form of Islam.<br>Over tax the hard working.<br>Coddle the lazy.<br><br>This is what Democrats have created in America. | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |

| | |
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|  | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |
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|---|---|
| This is the dream and goal of most followers of terror religion ISLAM . . . Some show it openly and many hide their real face . . . [the text is cut off]<br><br> | |
| Absolutely agree!<br><br><br><br>**SHARE IF YOU AGREE** | |

| | |
|---|---|
| Are you part of the 89%?<br><br><br> | |
| Millions of illegal aliens are in the United States. We don't know who they are, where they're from or what their intentions are. If ...<br>[comment is cut off]<br><br><br> | |

| | |
|---|---|
| DAMN STRAIGHT<br>#NoAmnesty<br>[comment is cut off]<br><br><br> | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |
| Motor voter laws did this!<br><br><br> | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |

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| VIDEO: Bachmann Calls Muslim Migration A "Planned Invasion" to Destroy Western Christendom<br>https://www.youtube.com/watch?v=Pa4qMBN0St0 | Commissioner Gianquinto's original post accompanying the post:<br>"I am glad SOMEONE is noticing and evaluating it correctly!" |




Attention, leftists: all people have natural rights, but only American citizens have constitutional rights.




IF YOU ENTER THE U.S. ILLEGALLY, YOU ARE AN ILLEGAL ALIEN.
THAT'S NOT A RACIST STATEMENT. IT'S A FACTUALLY ACCURATE STATEMENT.
LIKE IF YOU AGREE


THEY CAME TO TAKE PART IN THE AMERICAN DREAM
EUROPEAN CHRISTIANS BUILT THIS NATION
THEY DIDN'T COME TO BITCH, COLLECT WELFARE, WAGE JIHAD, AND REPLACE THE AMERICAN CONSTITUTION WITH SHARIA LAW


IT TAKES A SPECIAL KIND OF LUNATIC TO THINK THAT IMPORTING WELFARE RECIPIENTS WHO WANT TO KILL US IS A GOOD IDEA.




Amen ... Absolutely I do! Anyone who may disagree is free to take it up with God. #OneManOneWoman One Nation Under God



| | |
|---|---|
|  | Post remained on the commissioner's public Facebook page at least until August 2, 2017. |

Ok Kiddies, listen up. This BS needs to be shared. YOU ALL need to see how your elected officials think. You all need to see what you have been voting for. Are you OK with this shit? If you are in my friends list, you better not be.

Prop 57 is going on the ballot as "Public Safety and Rehabilitation Act." Very similar to prop 47, which was School Safety Act (which reduced certain crimes to misdemeanors, including controlled substances offenses) The attached is a description of the "non violent" offenses that current state inmates can be released early for.

I love it. "Rape by using a drug" "battery with serious bodily injury" "domestic violence" "Assault with a deadly weapon, on a peace officer", non violent!

You tell me if you can get behind supporting this proposition and releasing "non violent" offenders early!!! You need to share (copy/paste/screenshot, you won't be able to share my post) this information and stop it in its tracks.



6. On May 15, 2017, Commissioner Gianquinto met with Presiding Judge Brehmer concerning the Facebook posts.

7. On June 20, 2017, Commissioner Gianquinto submitted a written response to Judge Brehmer, which stated: "After concerns about the posts were brought to my attention, I immediately deleted the posts and have refrained from sharing additional posts of this nature. I have also designated my Facebook account as 'private' which means only my friends can view any future posts."

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10. Despite his written representations to Judge Brehmer on June 20, 2017, and to the commission on June 27, 2017, Commissioner Gianquinto did not immediately make his public Facebook page private or delete all of the posts included with Judge Brehmer's letter. The commissioner's Facebook page remained public, and six of the posts included with Judge Brehmer's letter were still on the page until at least August 2, 2017. Commissioner Gianquinto had intended to make his Facebook page private and delete the offending posts prior to his representations on June 20, 2017, and June 27, 2017; however, his unfamiliarity with the technology resulted in the changes not taking effect as intended. When alerted to the fact that the posts were still visible to the public, the commissioner immediately sought further assistance, deleted the offending posts, and increased the privacy settings on his Facebook profile.

11. In addition, Commissioner Gianquinto's public Facebook page contained posts of a similar nature that were not included in the presiding judge's investigation and that remained viewable by the public until at least August 2, 2017. These additional posts included the following:

- On August 21, 2016, the commissioner publicly shared a post with a photo of Hillary Clinton, with accompanying text stating, "The problem isn't that Hillary is an unethical, corrupt, lying criminal dirtbag -- Everyone knows that. The problem is that her supporters don't care. Are you people brain dead? Join us Facebook/Stop Hillary in 2016."
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conduct, and the rest of the unethical, dishonest conduct during the past thirty years. I do NOT know how they can do that."

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- On July 5, 2016, the commissioner publicly shared a post showing a photo of Hillary Clinton overwritten with text stating, "SILLY AMERICANS LAWS ARE FOR POOR PEOPLE."

Commissioner Gianquinto was a subordinate judicial officer at the time of the conduct described herein. Canon 6A provides that a subordinate judicial officer is a judge within the meaning of the code.

Commissioner Gianquinto's conduct as described herein violated canon 1 (judge shall uphold the integrity and independence of the judiciary), canon 2 (judge shall avoid impropriety and the appearance of impropriety), canon 2A (judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), canon 4A (judge shall conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially or demean the

judicial office), canon 5 (judge shall not engage in political activity that is inconsistent with the independence, integrity, or impartiality of the judiciary), canon 5A(2) (judge shall not publicly endorse or publicly oppose a candidate for nonjudicial office), and canon 5D (judge may engage in activity in relation to measures concerning improvement of the law, the legal system, or the administration of justice, only if the conduct is consistent with the code).

Commissioner Gianquinto's conduct described herein constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute, as set forth in article VI, section 18, subdivision (d)(2) of the California Constitution.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, former Commissioner Gianquinto expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: 20 July, 2018

Joseph J. Gianquinto

Dated: 20 July 2018

~~Randall A. Miller~~ Katy Cummings
Attorney for former Commissioner Gianquinto

Dated: July 31, 2018

Gregory Dresser
Director-Chief Counsel

ACCEPTANCE OF STIPULATION FOR DISCIPLINE BY CONSENT IN THE MATTER CONCERNING COMMISSIONER JOSEPH J. GIANQUINTO (SJO 2425)

The foregoing Stipulation for Discipline by Consent is accepted by the Commission on Judicial Performance.

Dated: August 22, 2018

/s/ Nanci E. Nishimura

Nanci E. Nishimura
Chairperson
Commission on Judicial Performance

FILED
AUG 28 2018
COMMISSION ON
JUDICIAL PERFORMANCE

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING FORMER JUDGE BRUCE CLAYTON MILLS, No. 201** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BAR** |

## I.

## INTRODUCTION AND PROCEDURAL BACKGROUND

This disciplinary matter concerns Judge Bruce Clayton Mills, a former judge of the Contra Costa County Superior Court. Judge Mills was a judge of the Contra Costa County Municipal Court from 1995 to 1998, and a judge of the Contra Costa County Superior Court from 1998 until his retirement on May 30, 2018.

The commission commenced this inquiry with the filing of its Notice of Formal Proceedings (Notice) on October 13, 2017. The Notice charged Judge Mills with: (1) in the matter of *Evilsizor v. Sweeney* (hereafter *Sweeney*), modifying a contempt sentence to deny good time custody credits to the defendant, Joseph Sweeney, based on an ex parte communication and without providing notice or an opportunity to be heard; and then later granting good time credits, even though the judge did not believe it was necessarily required by law; and (2) in the matter of *People v. Jeffers* (hereafter *Jeffers*), engaging in an improper ex parte communication with the deputy district attorney while the jury was deliberating.

The Notice also charged Judge Mills with the following prior discipline:

- 2013 public admonishment for engaging in out-of-court communications about his son's infraction with a court clerk and the pro tempore (pro tem) judge handling the case;

- 2011 advisory letter for allowing his son to accompany a police officer in executing a search warrant the judge had signed, without going through the application process for going on a ride-along;
- 2008 advisory letter for improperly conditioning a defendant's release in a misdemeanor probation revocation proceeding on posting bail for the improper purpose of collecting restitution;
- 2006 public admonishment for engaging in a series of ex parte communications in a criminal case; assuming the role of the prosecutor in another criminal matter; and engaging in a pattern of making discourteous, demeaning, and belittling comments in criminal cases;
- 2001 private admonishment for remarks suggesting a lack of impartiality and for attempting to obtain a guilty plea from a defendant despite statements from the defendant indicating he wanted counsel.

Judge Mills filed an Answer to the Notice (Answer) on October 30, 2017, in which he denied engaging in misconduct as to either count.

On October 19, 2017, Judge Mills filed a letter demanding the dismissal of the Notice on the grounds that the entire commission, the commission's staff and the Director-Chief Counsel had conflicts of interest, were disqualified from undertaking an investigation of Judge Mills and filing charges, and were disqualified from future adjudication or involvement in these proceedings.[1] In a written order, dated November 13, 2017, the commission denied Judge Mills's demand for disqualification. On November 30, 2017, Judge Mills filed in the California Supreme Court a petition for writ of prohibition/mandate with request for stay of proceedings and disqualification of the commission and commission staff. On December 20, 2017, the Supreme Court denied the judge's petition for writ of mandate and application for stay of the proceedings.

[1] Judge Mills contended that disqualification was required because Joseph Sweeney was a public critic of the commission and was allegedly instrumental in convincing the California State Auditor to conduct an audit of the commission. The commission explained the reasons for denying the judge's demand in an eight-page public order issued November 13, 2017.

The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters are Hon. Victoria G. Chaney, Associate Justice of the Court of Appeal, Second Appellate District, Division One; Hon. Jennifer R.S. Detjen, Associate Justice of the Court of Appeal, Fifth Appellate District; and Hon. Paul A. Bacigalupo, Judge of the Los Angeles County Superior Court. Judge Mills is represented by James A. Murphy, Esq., Janet L. Everson, Esq., and Joseph S. Leveroni, Esq., of Murphy, Pearson, Bradley & Feeney in San Francisco, California. The examiners for the commission are Mark A. Lizarraga, Esq., and Bradford Battson, Esq.

A two-day evidentiary hearing was held before the special masters commencing January 17, 2018. The masters' report to the commission, containing their findings of fact and conclusions of law, was filed on March 13, 2018. Oral argument before the commission was heard on July 11, 2018.

The masters found that the charges in the Notice were proven by clear and convincing evidence and concluded that Judge Mills engaged in three instances of willful misconduct, the most serious level of judicial misconduct. The masters also found, in aggravation, that Judge Mills gave evolving and inconsistent statements in response to the charges in the *Sweeney* matter. Upon careful review of the record in this matter, the commission has reached the same conclusions.

Given the seriousness of the misconduct, the judge's extensive history of discipline, his failure to appreciate the impropriety of his conduct, and his lack of candor as evidenced by his shifting explanations for his conduct, we conclude that there is a strong likelihood that Judge Mills will engage in subsequent misconduct if he were to serve in a judicial capacity in the future. In order to protect the public and maintain public confidence in the integrity and impartiality of the judiciary, the commission has determined to censure and bar former Judge Bruce Clayton Mills from seeking or holding judicial office, or accepting a position or an assignment as judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accepting reference of work from any California state court, at any time in the future. This is the most severe level of discipline that may be imposed on a retired judge. (Cal. Const., art. VI, § 18(d).)

## II.

## LEGAL STANDARDS

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*) Factual findings of the masters are entitled to special weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Ibid*; *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232.) Legal conclusions of the masters are entitled to less deference because the commission has expertise with respect to the law of judicial misconduct. (See, e.g., *Broadman, supra*, 18 Cal.4th at p. 1090; *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 880 (*Adams*); *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878 (*Fletcher*).)

A violation of the California Code of Judicial Ethics constitutes one of three levels of judicial misconduct: willful misconduct, prejudicial misconduct, or improper action. (Cal. Const., art. VI, § 18, subd. (d).) Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his judicial capacity. Failure to comply with the canons of the judicial ethics is generally considered to constitute unjudicial conduct. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662.)

A judge acts in bad faith by "(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman, supra*, 18 Cal.4th at pp. 1091-1092.)

The second most serious level of misconduct is prejudicial misconduct, "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) The least serious level of misconduct, improper

action, occurs when the judge's conduct violates the canons, but the circumstances do not rise to the level of prejudicial misconduct and do not bring the judiciary into disrepute. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 82; *Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89 (*Ross*), citing *Adams, supra*, 10 Cal.4th at pp. 897-899.)

## III.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. COUNT ONE – *EVILSIZOR V. SWEENEY*

#### 1. Findings of Fact

*August 16 Order*

On August 12, 2016, Judge Mills presided over a hearing on an order to show cause regarding contempt stemming from Joseph Sweeney's (Sweeney) violation of a protective order entered in divorce proceedings between Sweeney and Keri Evilsizor (Evilsizor). After the judge found Sweeney in contempt for violating the protective order, Evilsizor's attorney, Michelene Insalaco (Insalaco), requested that the maximum sentence be imposed. In response, Judge Mills told Insalaco "he's also going to get good time[] credits. You don't do criminal. But he's also going to get one day good time for each day that he serves, probably. . . . [¶] . . . [¶] So the reality is he'll only serve half of it to begin with." A discussion ensued about whether Sweeney was entitled to good time credits on a civil contempt sentence. The judge did not resolve the issue, but continued the matter for sentencing to August 16, because he thought Sweeney was entitled to a 72-hour stay before sentencing.

At the sentencing hearing on August 16, Judge Mills sentenced Sweeney to 25 days in jail, and remanded him to the custody of the sheriff's department.[2] During that hearing, Evilsizor's attorney argued that Sweeney was not entitled to good time credits, and asked the judge to make an explicit finding in this regard. Sweeney's attorney,

[2] At his appearance before the commission, Judge Mills urged the commission to read the transcript of the sentencing hearing. The transcript of the hearing was admitted at the hearing before the special masters and carefully reviewed by the commission.

James Morrison (Morrison), responded that denial of good time credits would be illegal. Following a discussion of other unrelated legal issues, Judge Mills stated he was in concurrence with the order drafted by Insalaco. The order prepared by Insalaco did not address good time credits. The written order the judge signed outlining the sentence was silent regarding good time credits. Judge Mills did not rule on the issue of whether Sweeney was entitled to good time credits.

Later the same day, the sheriff's department returned the sentencing order to Judge Mills's court, questioning whether the sentence included good time credits. After consulting with Judge Mills, his clerk, Lori Bogdan (Bogdan), handwrote on the order, "No good time credits to be given," and Judge Mills initialed the notation. Bogdan sent the form back to the jail, but did not serve it on the parties.

*August 25 Order*

On August 25, 2016, Sweeney's mother contacted Morrison concerned about the release date. Morrison then investigated and learned of the revised order when he received a copy from the jail. Morrison sent a letter to Judge Mills, copied to Insalaco, requesting that the judge correct the order and notify the sheriff. Insalaco sent a letter to the judge urging Judge Mills to leave the "no good time credits" order intact.

Upon receiving the parties' letters, Judge Mills consulted with his supervising judge, Judge John Kennedy. In his March 16, 2017 written response to the commission's preliminary investigation, Judge Mills stated that he and Judge Kennedy concurred that Sweeney was not entitled to good time credits on a civil contempt, but decided to avoid a "'constitutional crisis' and afford [Sweeney] the credits which he may not have actually been entitled to receive," because of "Sweeney's past litigation history of filing appeals, motions, as well as complaints against the Commission ... and others." On August 25, Judge Mills issued another order, this time granting Sweeney good time credits. For reasons discussed below, we adopt the masters' finding that Judge Mills issued the order because of Sweeney's past litigation history and complaints against the commission and others, rather than for any lawful purpose.

*Findings on Disputed Facts and Credibility Determinations*

The masters found that Judge Mills gave conflicting accounts and explanations concerning the foregoing events to suit his evolving defense to the charges. We concur. Although the judge did not testify at the hearing before the special masters, he personally verified his Answer to the charges and submitted numerous written statements through his attorney during the course of the commission's preliminary investigation and formal proceedings. Pursuant to Rules of the Commission on Judicial Performance, rule 106, all statements made through counsel in a commission proceeding are deemed to be the statements of the judge.

The main issue of contention at the hearing before the special masters was whether Judge Mills's notation on the August 16 order denying good time credits, made after the sentencing hearing without notice to the parties, was an improper ex parte modification of his previous order, or a clarification of the order he had already made in the presence of the parties, which would not be improper. For the reasons discussed below, we find that Judge Mills modified, rather than clarified, his previous order, and that he knew he was modifying the order.

In his response to the preliminary investigation and in his Answer to the Notice, Judge Mills did not claim that he decided the issue of good time credits at the sentencing hearing. Rather, he stated that when he received the inquiry from the sheriff's department on August 16, he reviewed Penal Code section 4019 to determine whether Sweeney was entitled to good time credits and determined he was not.[3] If Judge Mills was merely clarifying an order he had made in court, there would be no need to research the law.

As noted by the masters, "[W]hen Judge Mills's objective was to curtail the Commission's supplemental investigation, he claimed that good time credits 'are usually available,' and that '[t]he sentencing minute order accompanying Mr. Sweeney to the jail is silent on the issue, as are all sentencing orders.'" The judge also stated in his written

[3] In fact, Penal Code section 4019, subdivision (a), subsection (3) specifically states that good time credits are applicable to civil contempt.

response to the preliminary investigation that it is up to the sheriff's department to determine the amount of credits allotted. If, as the judge explained, credits are usually available and the amount is determined by the sheriff's department, Judge Mills would have specified "no credits allowed" in the initial sentencing order if that had been his intent.

By the time Judge Mills filed his prehearing briefs to the special masters, his explanation for amending the August 16 order had changed. There, he claimed that he was clarifying "'the order by specifically writing what the [sentencing] order already provided – no good time credits applied.'" Apparently realizing that this defense was inconsistent with his earlier statements that he researched the law to determine if Sweeney was entitled to good time credits *after issuing his sentencing order*, Judge Mills's attorney argued before the masters that the judge's memory of having researched the law was "erroneous."

The masters found that the judge did not make an order concerning good time credits when he imposed sentence on August 16. Rather, the masters found, the judge denied good time credits without notice to the parties later that day, after the sheriff's department questioned whether good time credits were to be given. We adopt this finding, which we conclude is supported by clear and convincing evidence.

The best evidence of whether Judge Mills ruled on the issue of credits at the August 16 sentencing hearing is the transcript of that proceeding. The transcript reflects that Evilsizor's attorney argued a number of legal issues regarding sentencing, including her contention that Sweeney was not entitled to good time credits, citing Penal Code section 1191.3. Judge Mills never responded to that particular issue or addressed good time credits at the August 16 hearing or in his sentencing order. He sentenced Sweeney to 25 days in custody without reference to good time credits.

At his appearance before the commission, Judge Mills suggested that he ruled Sweeney was not entitled to good time credits at the August 16 sentencing hearing when he stated that he was "in concurrence with the order as drafted by Ms. Insalaco." That order did not address good time credits. The judge's comment about concurring with the

order followed a long discussion of other unrelated legal issues, which were expressly included in the order prepared by Insalaco. We find that the aforementioned comment cannot reasonably be interpreted to constitute an order that Sweeney was not entitled to good time credits.

The only on-the-record indication of whether Judge Mills intended to grant or deny good time credits is his statement in court on August 12 that Sweeney would be entitled to good time credits. That statement is inconsistent with his current position that his silence constituted a denial of good time credits.

Judge Mills objects to the masters' rejection of Bogdan's testimony that she recalled the judge making an order in court on August 16 denying good time credits. The masters made no general finding regarding Bogdan's credibility, but found that her memory that the judge issued a ruling on this issue was faulty and therefore not credible. We agree. Her testimony is not supported by the transcript of the proceeding, or the testimony of Morrison, Sweeney's attorney. Morrison recalled Judge Mills indicating on August 12 that Sweeney would get good time credits, but did not recall the judge saying anything about good time credits at the sentencing hearing on August 16.

Moreover, Bogdan's testimony on this issue was not definitive or consistent. She testified that she was "under the assumption" that they had discussed the issue of good time credits in court and that "no credits were to be given." Later, she testified that she recalled a discussion about whether Sweeney was entitled to good time credits but that she could not "tell you for sure which way it went."

The masters also concluded that the judge lacked candor in his shifting explanations about the circumstances of his August 25 order granting Sweeney good time credits. In his response to the preliminary investigation, Judge Mills claimed that when Sweeney's attorney objected to the handwritten order denying credits, he decided, in consultation with Judge Kennedy, to change the August 16 order and afford Sweeney good time credits because of Sweeney's litigation history and public complaints against the commission and to avoid a constitutional crisis, even though both judges were of the opinion that Sweeney was not entitled to good time credits in connection with a civil

contempt. By the time Judge Mills filed his Answer to the Notice, his explanations had changed. He stated that he conferred with Judge Kennedy who "also opined that the application of the criminal statute to a civil contempt incarceration wasn't clear." In his prehearing brief to the special masters, Judge Mills shifted even more responsibility onto Judge Kennedy. He stated that he "conferred with Judge John Kennedy, [who] *advised* that if there was ambiguity with respect to the application of the criminal statute to a civil contempt incarceration, he ought to allow for the credit." (Italics added.) Judge Mills stated that he followed Judge Kennedy's advice in issuing a new minute order allowing for good time credits to be applied.

As did the masters, we find that the version of the conversation with Judge Kennedy Judge Mills gave the commission in his March 16, 2017 response to the preliminary investigation contains indicia of reliability and is supported by clear and convincing evidence. In the same response, Judge Mills stated that, after receiving an inquiry from the sheriff's department, he reviewed Penal Code section 4019 and concluded that Sweeney was not entitled to good time credits. This, of course, is inconsistent with his later statements that he decided to grant Sweeney good time credits because the law on the issue was not clear.

We share the masters' particular concern "with Judge Mills's attempt to justify his own misconduct by reference to his consultation with Judge Kennedy and Judge Kennedy's advice."

As did the masters, we find that that the judge's evolving explanations and defenses concerning the *Sweeney* matter portrayed a lack of candor and honesty.

**2. Conclusions of Law**

*August 16 Order*

The masters concluded that by changing the August 16 order to reflect "no good time credits," Judge Mills modified an earlier order based on an ex parte communication with the sheriff's department in violation of canon 3B(7) of the California Code of Judicial Ethics (all references to a canon are to the California Code of Judicial Ethics)

["A judge shall not initiate, permit, or consider ex parte communications, that is, any communication to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications ..."] We concur. Judge Mills's modification of the August 16, 2016 order, which he transmitted to the sheriff's department through Bogdan, is a communication from the judge outside the presence of the parties and concerning a pending proceeding. While there is an exception to the prohibition on ex parte communications for consulting with court personnel, the sheriff's department is not court personnel. (Canon 3B(7)(a) [court personnel does not include employees of other governmental entities].)

Judge Mills took action based on the communication from the sheriff's department without promptly notifying the parties and offering them an opportunity to respond. The masters concluded that Judge Mills's failure to set the matter for hearing upon determining that the credits issue remained undecided was an independent violation of canon 3B(7), which requires a judge to accord to every person who has a legal interest in the proceeding, or that person's lawyer, the full opportunity to be heard according to law. We concur.

Judge Mills contends that he did not violate canon 3B(7), because he was simply correcting the written order to reflect the order he made in court in the presence of the parties on August 16, 2016. As previously discussed, the masters made a factual finding that the judge did not previously make an order concerning good time credits in court in the presence of the parties, and we adopt that finding.

In addition to a violation of canon 3B(7), we conclude that the same conduct violated canons 1 [judge shall uphold the integrity and independence of the judiciary], 2 [judge shall avoid impropriety and the appearance of impropriety], 2A [judge shall respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary], and 3B(8) [a judge shall dispose of all judicial matters fairly, promptly and efficiently and manage the courtroom in a manner that provides all litigants with the opportunity to have their matters fairly

adjudicated in accordance with the law], as charged in the Notice. Issuing an order affecting a litigant's liberty interest without providing notice and an opportunity to be heard creates an appearance of impropriety, undermines public confidence in the integrity of the judiciary, and denies the litigant an opportunity to have his matter fairly adjudicated in accordance with the law.[4]

The masters concluded that Judge Mills's ex parte modification of the sentencing order constituted willful misconduct because he engaged in unjudicial conduct in a judicial capacity that exceeded his lawful power and that significantly impacted Sweeney's liberty interest and did so with *at least* a conscious disregard for the limits of his authority. (See *Broadman, supra*, 18 Cal.4th at p. 1092.) We reach the same conclusion.

Once Judge Mills signed the contempt and sentencing order, he had no authority to modify it. (Code Civ. Proc., § 1222; *In re Baroldi* (1987) 189 Cal.App.3d 101, 111, disapproved on other grounds in *Boysaw v. Superior Court* (2000) 23 Cal.4th 215, 221; *County of Lake v. Superior Court* (1977) 67 Cal.App.3d 815, 817-818.) Judge Mills was an experienced judge and ex-prosecutor. He has not suggested that he did not know that he could not modify an order; rather, he asserted that he was only clarifying the order. As previously discussed, we find that he knew he was modifying the order, an act that was beyond his judicial authority.

Further, Judge Mills consciously disregarded the limits of his authority by issuing an order involving a deprivation of liberty based on an ex parte communication and without providing the parties with an opportunity to be heard. (See *Broadman, supra*, 18 Cal.4th at p. 1092.) Judge Mills has been disciplined more than once in the past for engaging in improper ex parte communications.

Judge Mills contends that his conduct constitutes improper action, at most, since he erroneously accepted the law as presented by Attorney Insalaco in determining that

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[4] We do not find clear and convincing evidence that the judge violated canon 3B(5) [judge shall perform judicial duties without bias or prejudice] in count one or count two, as charged in the Notice.

Sweeney was not entitled to good time credits.[5] Judge Mills misses the point. It is not his interpretation of the law or his legal ruling that is at issue, it is the fact that he issued an ex parte modification of an order involving a deprivation of liberty without providing the parties an opportunity to be heard.

*August 25 Order*

The masters concluded that by again changing the sentencing order on August 25, 2016, to grant good time credits because of Sweeney's litigation history, and not because he believed Sweeney was legally entitled to the credits, Judge Mills violated canons 1 [judge shall uphold integrity and independence of the judiciary], 2 [judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities], 2A [judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary], 3B(2) [judge shall be faithful to the law and maintain professional competence in the law] and 3B(8) [judge shall dispose of all judicial matters fairly, promptly, and efficiently and manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law]. The masters stated: "Deciding an issue for reasons unconnected to the merits displays no compliance with the law, undermines the integrity and independence of the judiciary, and deprives litigants the opportunity to have their matters adjudicated in accordance with the law. Moreover, Judge Mills's attempt to deflect his decision to Judge Kennedy indicates a readiness to abdicate his own responsibility to adjudicate the matters that come before him." We concur.

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[5] Judge Mills objects to the fact that the masters did not include Insalaco's testimony regarding Penal Code section 1191.3 in their findings of fact. Insalaco testified that section 1191.3, pertaining to the award of good time credits, applies to felonies, and was not applicable to Sweeney because he was sentenced on a civil contempt. In fact, that statute was not apposite to the issue before the masters. Section 1191.3 requires the court to make an oral statement at the time of sentencing in felony cases that statutory law permits the award of conduct and worktime credits. Penal Code section 4019 is the statute that governs when good time credits are available and that applies to Sweeney's sentence. (Pen. Code, § 4019(a)(3) [good time credits apply to persons confined to jail for "contempt pursuant to a proceeding other than a criminal action or proceeding"].)

The masters determined that Judge Mills engaged in willful misconduct by issuing the August 25, 2016 order even though he believed it was not a lawful order and thus was beyond his lawful judicial power. (See *Broadman, supra,* 18 Cal.4th at p. 1092.) We concur.

Judge Mills contends that he made the August 25, 2016 order because of the complexity of the law, and therefore, his conduct was, at most, improper action. Judge Mills ignores that he informed the commission of his reason for issuing the August 25 order in his response to the preliminary investigation, and his stated reason was not based on a legal analysis. He admitted that he concluded Sweeney was not entitled to good time credits, but decided to grant the credits because of Sweeney's litigation history and to avoid a constitutional challenge. This is the explanation the masters found to be true and that finding is supported by clear and convincing evidence. As discussed by the masters, the problem with the judge's August 25 ruling was not that it was legally erroneous, but that the judge decided "an issue for reasons unconnected to the merits . . . ." A judge who issues an order for a purpose other than the lawful discharge of judicial duties engages in willful misconduct. (*Broadman, supra,* 18 Cal.4th at p. 1092.)

For these reasons, we adopt the legal conclusions of the masters with regard to the August 25, 2016 order.

## B. COUNT TWO – *PEOPLE V. JEFFERS*

### 1. Findings of Fact

Judge Mills presided over a driving under the influence jury trial (DUI) in *People v. Jeffers*. At trial, the defense presented an expert witness who challenged the accuracy of the breath machine. On March 23, 2016, as the jury was deliberating and Deputy District Attorney (DDA) William Moser (Moser) was gathering his papers to leave the courtroom, Judge Mills engaged in a conversation with Moser outside the presence of the defendant and defense counsel.

Judge Mills asked Moser, in the context of the *Jeffers* trial, "[D]o you want to know what I would have done?" and talked to him about an argument that might have "defeat[ed] the defense theory," or words to that effect. Judge Mills then offered Moser advice about how he could have countered the expert presented by the defense.

The jury in *Jeffers* deadlocked, resulting in a mistrial.

The next day, Moser reported the conversation to his supervisor, Nancy Georgiou, who reported the conversation to Jeffers's defense attorney and to Judge Kennedy, supervising judge of criminal courts. Judge Kennedy explained that he understood "from Ms. Georgiou's description of the conversation it did include suggestions of things that Mr. Moser could have done to be more effective in his performance, such as eliciting particular evidence and so forth."

On March 29, 2016, Presiding Judge Steven Austin learned of the conversation and met with Judge Mills. Judge Austin told the Judge Mills that the matter was "potentially serious," and that he (Judge Austin) might have to report it the commission.

On April 1, 2016, Judge Mills disclosed the conversation on the record before both parties, and recused himself from any further involvement in the case.

As Judge Austin was seeking an ethics opinion on his obligation to report the matter to the commission, Judge Mills self-reported to the commission.

Judge Mills's position at the hearing before the special masters was that he was simply sharing a "war story." The masters rejected this defense and instead found that the judge offered Moser advice about how he should have handled a specific part of the case, while the case was still pending.

Moser testified he did not recall exactly what advice the judge gave him, but thought the judge was giving him a suggestion on what he could do in trying this type of case in the future. In reliance on this testimony, Judge Mills maintains there is no clear and convincing evidence that he offered Moser advice about how he would have handled the case. But, while Moser did not recollect many details of the conversation or the exact words used, he was certain that Judge Mills was inquiring whether Moser wanted to know what he would have done if he were the prosecutor in the case. This is

corroborated by the fact that Moser felt the need to report the conversation to his supervisor.[6]

Regardless of Moser's lack of recollection as to the specific advice he was given, Judge Mills's own disclosure statement in court supports the masters' finding that the judge offered Moser advice about how he could have responded to the defense expert. Judge Mills reported the conversation as follows:

> "After the jury went out, and here is the disclosure I want to make, Mr. Moser remained in court, as [*sic*] I am prone to do, I often work in court through inbox matters and whatnot . . . while I am awaiting the jury decision. I never ever discussed anything with Mr. Moser in chambers. Everything was out in open court. We discussed a number of matters, including innocuous things, such as where did he go to school, and what did he do before he came to the DA's office, and those types of things.
>
> "At one point – and this is where it may become an issue. I made the observation *in relation to the expert witness that was presented by Mr. Smith [defense counsel]* . . . [¶] . . . [¶] . . .that 29 years ago, when I last tried a DUI case that there had been an expert at the Contra Costa Crime Lab . . . named Grady Goldman, who actually tracked the accuracy of the breath machine.
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> "And what I disclosed to Mr. Moser was that Mr. Goldman over a protracted period of time actually monitored the limited numbers of cases where there was actually a breath sample and a blood sample taken in the same case, and what I advised him was that they were able to have a known blood result in a small number of cases because sometimes you get a breath sample taken and they take a reference blood sample, and that they monitored in those limited number of cases where the breath machine measured at or below the actual blood sample so that they can tell in the real world,

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[6] The masters found Moser's testimony credible. We adopt this finding in deference to the masters' ability to observe the demeanor of the witness, and because Moser's testimony is corroborated by the fact that he reported the conversation to his supervisor the day after it happened.

> back in the day, whether or not the machines were actually testing properly. [¶] . . . [¶]
>
> "*And I said, 'But if there really is a problem with these machines that the defense expert suggests, then in the future someone may have to look at that because if the theory is that – because our machines here in our county don't have a temperature regulator, and that causes inaccurately high results of some type being registered, then somebody may[]be ought to take a look at that issue.*' [¶] . . . [¶]
>
> "But in terms of what went on 29 years ago, and the fact that that used to be tracked – *and frankly, if you had that data, Mr. Smith, it could potentially counter the defense that you presented in this case*, but that data, to my knowledge, hasn't been monitored in 29 years, and it is not available." (Italics added.)

Based on our own independent review of the record, we adopt the masters' finding that Judge Mills's conversation with Moser was related to issues raised during the *Jeffers* trial, and that he offered Moser advice about how to handle a specific part of the case.

**2. Conclusions of Law**

The masters concluded that Judge Mills's conversation with Moser outside the presence of defense counsel constituted an improper ex parte communication in violation of canon 3B(7), and willful misconduct. As did the masters, we conclude that "Judge Mills's April 1, 2016 on-the-record disclosure version of the conversation *alone*" establishes a violation of canon 3B(7). That canon prohibits a judge from initiating, permitting, or considering ex parte communications, "that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding." The jury was deliberating in *Jeffers* when Judge Mills engaged in an ex parte communication with Moser. Further, a case remains pending through any period during which an appeal may be filed. (Cal. Code of Judicial Ethics, Terminology.) By his own admission, Judge Mills described to Moser, "in relation to the expert witness that was presented by" the defense in *Jeffers*, how when he last tried a DUI case 29 years ago

there was an expert witness who tracked the accuracy of a breath machine by looking at the cases in which both breath and blood samples had been taken to determine if the results matched. A reasonable person would interpret these comments as suggesting that the prosecution use an expert to track the accuracy of the Draeger machine (used in the *Jeffers* case) in the same manner.

Offering advice to an attorney in a case before the judge outside the presence of opposing counsel and while the matter is pending constitutes an improper ex parte communication. (*Public Admonishment of Judge Stuart Scott* (2016); see Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2.24, pp. 90-93; Cal. Judges Assn., Judicial Ethics Update (2000) p. 2 ["If a judge is asked by trial attorney to critique attorney's performance after trial, judge may do so only after the matter is finally resolved so as to avoid any appearance of impropriety"].)

Judge Mills contends that he was simply sharing a "war story" that had no relation to the *Jeffers* case. There is no "war story" exception to the prohibition against ex parte communications. Further, Judge Mills admitted in his April 1, 2016 disclosure that he made his "observation in relation to the expert witness that was presented by [Jeffers's defense attorney] . . . ."

In addition to violating the prohibition against ex parte communication, we conclude that Judge Mills's conduct created an appearance of impropriety and undermined public confidence in the integrity of the judiciary in violations of canons 1, 2, and 2A.

The masters concluded that Judge Mills committed willful misconduct by engaging in an ex parte communication with a prosecutor and giving him advice while the case was still pending. We concur. His conduct took place in his judicial capacity and was "unjudicial," the first two elements of willful misconduct. Judge Mills acted in bad faith, the third element of willful misconduct, by engaging in the conversation with a conscious disregard for the rules prohibiting ex parte communications and for a purpose other than the faithful discharge of judicial duties. (See *Broadman, supra,* 18 Cal.4th at pp. 1091-1092.) As stated by the masters:

> "Judge Mills has been disciplined in the past for ex parte communication. (Ex. 24.) The leading treatise on California judicial ethics repeatedly refers to Judge Mills's earlier public admonishment in its discussion of improper ex parte communications. (See, e.g., Rothman et al., Cal. Judicial Conduct Handbook, *supra*, § 5.3, pp. 264, fn. 62, 265, fn. 65.) Judge Mills *should* have been well versed about ex parte communications. *If* he was not, we can only conclude it is because he chose not to be, and we conclude that is conscious disregard for the limits of his authority."

We reach the same conclusion.

## IV.

## APPROPRIATE LEVEL OF DISCIPLINE

The commission has identified various factors that are relevant in determining the appropriate level of discipline, including (1) the number of acts of misconduct, (2) the existence of prior discipline, (3) whether the judge appreciates the inappropriateness of his or her conduct, (4) the judge's integrity, (5) the likelihood of future misconduct, and (6) the impact on the judicial system. (*Ross, supra*, 49 Cal.4th CJP Supp. at pp. 137–138; *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 295; see also Policy Declarations of Com. on Jud. Performance, policy 7.1[7] [nonexclusive factors relevant to sanctions].)

In this matter, Judge Mills has engaged in three acts of willful misconduct. (Policy declaration 7.1(1)(a) [number of acts of misconduct], (1)(b) [nature and seriousness of misconduct].) The Supreme Court has stated: "'The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing "lack of temperament and ability to perform judicial functions in an even-handed manner." [Citation.]'" (*Fletcher, supra,* 19 Cal.4th at p. 918, quoting *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653.) Especially when viewed in conjunction with Judge Mills's prior discipline, the

[7] Hereafter, Policy Declarations of the Commission on Judicial Performance are referred to simply as policy declaration.

misconduct reflects an inability or unwillingness to perform judicial functions in an even-handed manner that comports with the rigorous standards of conduct expected of the judiciary.

Judge Mills has been previously disciplined five times over the course of his 23-year judicial career. (Policy declaration 7.1(2)(e) [history of prior discipline].) Between 2001 and 2013, he received two public admonishments, one private admonishment, and two advisory letters. (See *ante* at pp. 1-2.) Particularly troubling is the similarity between some of his prior misconduct and the misconduct in this matter. He was publicly admonished in both 2006 and 2013 for engaging in improper ex parte communications, and yet, again engaged in improper ex parte communications in both the *Sweeney* and *Jeffers* matters. In his 2006 public admonishment, Judge Mills was disciplined for multiple incidents of misconduct, including ex parte communications. He spoke privately with a represented defendant about the no contest plea she had just entered and the possibility of diversion; discussed the case with defense counsel and then the probation officer and set aside the plea and granted diversion in the absence of any prosecutor; and he spoke to a supervising attorney from the district attorney's office about the case in the absence of defense counsel.

In 2013, he was again publicly admonished for engaging in out-of-courtroom communications about his son's infraction case with a court clerk and the pro tem judge handling the case. In an in-chambers meeting, he convinced the pro tem judge to give his son credit for time served in an out-of-state residential rehabilitation program in lieu of previously ordered volunteer work.

Further, his conduct in *Jeffers* bears similarity with other conduct resulting in his 2006 public admonishment. In multiple cases included in the 2006 public admonishment, Judge Mills crossed the line from a neutral judicial officer to an advocate. In one matter, he assumed the role of a prosecutor by criticizing the DDA in strong and disparaging language for charging the defendants with a misdemeanor and instructed the DDA to "go back to the drawing board, have this reviewed by somebody that can intelligently assess what ought to have been charged, and I would think that it would be more likely than not

that an amended pleading would come down the pike, charging, among other things, a violation of Section 182 of the California Penal Code, felony criminal conspiracy, between the two charged co-defendants." In another matter, he accused the deputy public defender of malpractice and incompetence because the defendant would not accept a plea bargain. The same public defender was accused of malpractice in another matter for filing a peremptory challenge against Judge Mills. In the *Jeffers* case, Judge Mills similarly blurred the boundaries between judge and advocate by counseling the prosecutor on how to try a DUI case.

Another important factor in our determination is the judge's lack of candor in these proceedings. (Policy declaration 7.1(2)(b) [whether the judge has cooperated fully and honestly in the commission proceedings].) As a factor in aggravation, the masters concluded that "Judge Mills's candor and honesty is placed in direct question" by his shifting explanations for his conduct in the *Sweeney* matter to suit his evolving defenses. (See *ante,* pp. 7-10, for discussion of conflicting defenses.) We concur.

While Judge Mills did not testify at the hearing before the special masters, he submitted numerous written communications to the commission and a personally verified Answer to the charges in the Notice. There were multiple inconsistencies and misrepresentations in these submissions and statements. Honesty is a "minimum qualification" that is expected of every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865.) Written communications of counsel are deemed to be the written communications of the judge. (Rules of Com. on Jud. Performance, rule 106.) As such, a judge must take care to ensure that written submissions during commission proceedings are accurate and truthful, even when submitted through counsel.

Judge Mills's shifting defenses not only portray a lack of candor, they also reflect a failure to accept responsibility and acknowledge the impropriety of his conduct. (Policy declaration 7.1(2)(a) [whether the judge acknowledged the acts occurred and has shown an appreciation for the impropriety of his acts].) As emphasized by the masters, with his lengthy years of judicial experience and history of discipline, Judge Mills should

recognize that he engaged in improper ex parte communications. (Policy declaration 7.1(2)(d) [length of service in judicial capacity].) Nonetheless, he continues to deny that any of his conduct was improper. Moreover, as were the masters, we are troubled by Judge Mills's attempt to justify his own misconduct by reference to the advice he received from Judge Kennedy.

"A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248; see Policy declaration 7.1(2)(a).) Judge Mills's failure to appreciate or acknowledge the impropriety of his conduct, his willingness to give disingenuous explanations and shift blame to a judicial colleague, and his lengthy history of discipline suggest a high probability that he would reoffend if he were to serve in a judicial capacity in the future.

Judge Mills's misconduct had a negative impact on others and undermined public respect for the judiciary. (Policy declaration 7.1(1)(f), (h) [whether the conduct is injurious to others or undermines respect for the integrity of the judiciary or administration of justice].) Although Sweeney ultimately received the good time credits to which he was entitled, the judge's changing and conflicting orders required his lawyer to expeditiously file papers to prevent the unlawful denial of conduct credit and most likely caused stress to Sweeney. In *Jeffers,* Judge Mills's initiation of an ex parte communication put DDA Moser in the uncomfortable position of having to report the communication to his superiors who in turn had to report the conduct to Judge Mills's superiors. Additionally, when a judge who has been disciplined five times by the commission engages in subsequent misconduct, public confidence in the integrity of the judiciary and the administration of justice is undermined.

The masters found no mitigating factors. Judge Mills urges the commission to consider his dedication and service to the Contra Costa community over the past three decades in "determining whether or not to impose discipline." Judge Mills, however, presented no evidence of his asserted service to the community.

Judge Mills retired during the pendency of these proceedings. Article VI, section 18(d) of the California Constitution provides that the commission may "censure a judge or former judge ... for action ... that constitutes willful misconduct in office, ... or conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . ." The commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court. (Cal. Const., art. VI, § 18(d).)

As stated by the Supreme Court, the purpose of judicial discipline "'is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.'" (*Broadman*, *supra*, 18 Cal.4th at pp. 1111-1112, quoting *Adams*, *supra*, 10 Cal.4th at p. 912.) For the reasons discussed above, the commission concludes that these purposes are best served by the imposition of a public censure and bar.

**ORDER**

Good cause appearing, the commission hereby censures former Judge Bruce Clayton Mills and bars him from seeking or holding judicial office, or accepting a position or an assignment as judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accepting reference of work from any California state court, at any time in the future.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Dr. Michael A. Moodian; Mr. Adam N. Torres; and Hon. Erica R. Yew voted to issue this decision and order imposing a public censure and bar.

Dated: August 28, 2018

Nanci E. Nishimura
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE ARIADNE J. SYMONS** | **DECISION AND ORDER IMPOSING SEVERE PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 116.5)** |

This disciplinary matter concerns Judge Ariadne J. Symons, a judge of the Santa Cruz County Superior Court. Judge Symons and her counsel, Kathleen M. Ewins of Long & Levit LLP, have entered into a stipulation with Gregory Dresser, Director-Chief Counsel of the Commission on Judicial Performance, pursuant to commission rule 116.5, to resolve the pending preliminary investigation involving Judge Symons by imposition of a severe public censure. The Stipulation for Discipline by Consent (Stipulation) was approved by the commission on May 8, 2019, pursuant to the following terms and conditions and stipulated facts and legal conclusions.

TERMS AND CONDITIONS

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Symons.

2. The commission shall issue a severe public censure based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing severe public censure may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Symons waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Ariadne J. Symons became a judge of the Santa Cruz County Superior Court in 2009, following election to that office. Her current term began in January 2015.

**1. The red light ticket**

On Tuesday, May 10, 2016, at 7:56 a.m., Judge Symons drove her 2007 Pontiac through a red light in violation of Vehicle Code section 21453(a). The violation was captured by a camera maintained by the City of Capitola Police Department. Judge Symons noticed a flash when she drove through the intersection and understood that she had triggered a red light camera. When Judge Symons arrived at the courthouse that morning, she told her colleague, Judge Jeffrey Almquist, that she had committed a red light violation that had been captured on camera. Judge Symons also told other people at court about the incident, and that she felt like a "scofflaw."

About a month later, a Notice of Violation (Notice) concerning the incident was sent to the judge's residence addressed to her husband. The Notice identified the registered owner of the vehicle as Judge Symons's husband, whose last name is different from Judge Symons's, "or Symoms [*sic*] Ariadne J." The Notice included color photos of the driver, the vehicle, and the license plate, and identified a website where the photos and a video of the incident could be viewed (www.violationinfo.com). The Notice did not set forth a bail amount.

The Notice included specific language on what to do if the recipient was not the driver:

> IF YOU WERE NOT THE DRIVER: If you were not the driver of the vehicle at the time of the violation, complete the "Affidavit of Non-Liability" below. By completing the Affidavit of Non-Liability, the citation issued to you will be cancelled after review and the approval of the court. The person named in the form will be cited and notified by mail.

The Affidavit of Non-Liability contained in the Notice included the following language:

> IF YOU DO NOT OWN OR WERE NOT DRIVING THE VEHICLE AT THE TIME OF THE VIOLATION, PLEASE COMPLETE THIS FORM WITH THE INFORMATION OF THE ACTUAL DRIVER.

(Emphasis in original.)

Judge Symons subsequently approached a court clerk in the staff-only area of the Watsonville Courthouse, of the Santa Cruz County Superior Court, concerning the Notice. The judge asked for assistance in determining the bail amount for the violation. The clerk looked into the matter and told the judge that the citation had not yet been processed in the system, and to check back later.

On or about June 24, 2016, the Santa Cruz County Superior Court sent Judge Symons's husband a "courtesy notice," which stated that he had been cited for violating Vehicle Code section 21453(a) on May 10, 2016, and that the amount due was $489.

Judge Symons and her husband discussed their options on how to handle the Notice. The judge's husband refused to provide information that the judge was the actual driver. The judge's husband prepared a Request for Trial by Written Declaration, which included a Statement of Facts wherein he denied responsibility for the citation, but did not identify the driver of the vehicle when the violation occurred. The Statement of Facts stated in full:

> I work at the Pebble Beach golf course in Pebble Beach (located next to Carmel). It is usually an hour drive from my home to work, each way. On May 10, 2016, I arrived at work at 6:17 a.m. My first break was at 10:50 a.m. The ticket was issued for a violation occurring at 7:59:09 a.m. in Capitola. I was not driving in the car ticketed at the time. There is no possibility I could have been in both places at the same time. [¶] The car is a family car and a number of people, family and friends, drive it. I looked at the photo attached to the citation. It is rather unflattering and unclear. It could perhaps be any slightly pudgy white guy, but it is not me. [¶] I am attaching a copy of my time card slips that document that I was in fact at work at the times stated.

The judge and her husband were unable to print out the completed Request for Trial by Written Declaration form at home. As a result, the next day, the judge either printed it, or re-typed and printed it, from her computer at the courthouse. The judge admits that she reviewed the document, including the Statement of Facts, before it was submitted for filing.

On July 14, 2016, the judge again approached the court clerk in the staff-only area of the courthouse and handed her the completed Request for Trial by Written Declaration form, signed by her husband under penalty of perjury, and a check for $489. The judge told the clerk that Commissioner Kim Baskett, who handled traffic matters, did not know her husband's last name, so there was no conflict. The clerk told the judge that a Waiver of Arraignment form was missing, and, using a court computer, showed her how to obtain the form online. The judge said her husband would need to sign the waiver form and that she would bring the signed form to the clerk the next day, which she did. The clerk then sent the Request for Trial by Written Declaration and the Waiver of Arraignment forms to the Santa Cruz Courthouse, where Commissioner Baskett sat, by interoffice mail. Judge Symons did not inform the presiding judge, or the court executive officer, of either the citation or the Request for Trial by Written Declaration filed on behalf of her husband.

When Commissioner Baskett received the Request for Trial by Written Declaration, she noted that it concerned the husband of a judicial officer. Commissioner Baskett reported the matter to then-Presiding Judge Denine Guy, who commenced an investigation.

On July 20, 2016, the Capitola Police Department served by mail a Notice of Correction dismissing the citation "in the interest of justice."

On July 20 and 21, 2016, Judge Symons met with Judge Guy about the citation. Judge Symons admitted that she had run the red light. Judge Symons told Judge Guy that her husband was refusing to complete the Affidavit of Non-Liability because he believed he had a right to a trial without implicating her. Judge Guy told Judge Symons that she

needed to accept responsibility for the ticket by contacting the court and the citation-processing company.

Judge Symons sent letters to the court and the Capitola Police Department advising that she was the person responsible for the citation, not her husband. A new citation was never issued to Judge Symons.

On or about August 23, 2016, the County of Santa Cruz sent Judge Symons's husband a check for $489, as refund of bail. He negotiated the check.

Judge Symons knowingly assisted her husband in filing the Request for Trial by Written Declaration with the court, which was designed to have the citation dismissed and which did not identify the judge as the actual driver. Prior to filing the document, the judge took no steps to notify the Capitola Police Department or the citation-processing company that she was the person responsible for the citation, despite language on the citation itself that set forth a procedure for identifying the responsible party. The judge also failed to notify the court that her husband had a matter pending before it that involved her. Additionally, the judge misused the prestige of her office by seeking information and assistance concerning the citation from a court clerk in the non-public areas of the courthouse, including giving the clerk the Request for Trial by Written Declaration for filing rather than filing the document herself at the filing window.

Judge Symons's conduct violated the Code of Judicial Ethics, canons 1 (a judge shall uphold the integrity and independence of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 2B(1) (a judge shall not allow family, social, or other relationships to influence the judge's judicial conduct), and 2B(2) (a judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others). The judge's conduct constitutes, at a minimum, prejudicial misconduct.

**2. *People v. Karl Peterson*. No. 18CR00369**

From April 30, 2018 through May 3, 2018, Judge Symons presided over the jury trial of *People v. Karl Peterson*, No. 18CR00369. The defendant was charged with

felony violations of a protective order and special allegations concerning prior convictions. The defendant was in custody and represented by public defender Micha Rinkus. The People were represented by Deputy District Attorney Xavier Mitchell.

On May 2, 2018, at 3:20 p.m., following closing arguments, the jury retired to the jury room to begin deliberations. At 3:40 p.m., while Ms. Rinkus and Mr. Mitchell were still in the courtroom, the bailiff in charge of the jury, Deputy Travis Rakes, returned from the jury room with written questions from the jury. (The questions are contained in the court file as court exhibits nos. 1 and 2.) Judge Symons discussed the questions with the attorneys in the courtroom, and, in their presence, prepared written responses to the questions on court forms maintained for that purpose. A separate form was used for each question. On each form, the judge handwrote the question and the court's response, and signed her name. The written responses were then given to Deputy Rakes, who took them to the jury room. (The responses are contained in the court file as court exhibits nos. 3, 4, and 5.) The process of responding to these questions took 20 minutes or less.

Later that afternoon, after Ms. Rinkus and Mr. Mitchell had left the courtroom, another written question from the jury was brought to the courtroom by Deputy Rakes. The question concerned the definition of the term "violence." Thereafter, at 4:20 p.m., the courtroom clerk, Georgina Robles, placed a call to Ms. Rinkus's cell phone. Ms. Rinkus did not answer and Ms. Robles left a voice message stating that the jury had a question, and asking that Ms. Rinkus come to court or call back. At 4:21 p.m., Ms. Robles placed a call to Mr. Mitchell's cell phone. Mr. Mitchell answered the call and Ms. Robles informed him that the jury had a question. During the call, Judge Symons got on the line and spoke with Mr. Mitchell about the jury's question. The judge told Mr. Mitchell that the jury had a question regarding the legal definition of violence, and that her inclination was to respond by referring them to the jury instructions and advising them that if the instructions did not contain a specific definition, they were to give the term its ordinary, everyday meaning. Mr. Mitchell responded, "O.K., sounds good." Mr. Mitchell was not asked to return to the courtroom. Judge Symons subsequently prepared a written response to the jury's question that directed the jury to refer to their previous

instructions. The written response was transmitted to the jury that afternoon by Deputy Rakes. Judge Symons took no steps to notify Ms. Rinkus of her telephone conversation with Mr. Mitchell, or of her written response to the jury's question.

At 4:40 p.m., Ms. Robles contacted both Ms. Rinkus and Mr. Mitchell by phone, and advised them that the jury was being excused for the day.

On May 3, 2018, at 2:45 p.m., the jury returned with a verdict finding the defendant guilty on all charges. After the jury was excused, some of the jurors discussed the case with the attorneys and raised the jury's question concerning the definition of violence and the court's response. Ms. Rinkus and Mr. Mitchell immediately went to see Judge Symons in chambers. Ms. Rinkus told the judge that it had just come to her attention that a question from the jury had been asked, and answered, without her knowledge. The judge told Ms. Rinkus that there was nothing she could do at that point, and that Ms. Rinkus's recourse was to file a motion for new trial.

On July 10, 2018, Ms. Rinkus filed a motion for new trial on behalf of the defendant. The motion alleged that the defendant's due process rights had been violated by the court answering the jury's question about the definition of violence while defense counsel was not present.

On or about August 14, 2018, Judge Symons called Ms. Rinkus and Mr. Mitchell to the bench for a sidebar conference. The judge told the attorneys the motion for new trial raised issues that she assumed each side recognized may possibly have merit, and that in such circumstances the parties frequently explore whether a negotiated resolution was possible. The judge proposed, as a potential compromise, that she give the defendant a suspended prison sentence, conditioned on successful completion of two years in the Delancey Street drug program, in exchange for a waiver of appellate rights and withdrawal of the motion for new trial.

On August 31, 2018, the case was on calendar for sentencing and the motion for new trial. Prior to the hearing, Mr. Mitchell informed Ms. Rinkus of a new offer; a four-year suspended prison sentence, conditioned on successful completion of two years in the

Delancey Street drug program. (Prior to trial, the offer was four years state prison.) The defendant accepted the offer and was sentenced accordingly that day.

Judge Symons's telephone conversation with Mr. Mitchell on May 2, 2018, and her written response to the jury's question constituted improper ex parte communications as they both occurred outside the presence of the defendant and Ms. Rinkus, and without their knowledge.

Judge Symons's conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(5) (a judge shall not engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice), 3B(7) (a judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications), and 3B(8) (a judge shall dispose of all judicial matters fairly, promptly, and efficiently, and shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law). The judge's conduct constitutes prejudicial misconduct.

**3. *Hernandez v. Lopez*, No. 16FL01113**

On August 28, 2016, Judge Symons presided over the matter of *Jeannette Hernandez v. Jesus Lopez*, No. 16FL01113. Ms. Hernandez had filed a request for a domestic violence restraining order against Mr. Lopez, who was the father of their three children. Ms. Hernandez alleged that Mr. Lopez would drink alcohol before visiting the children and engage in behavior that scared them. Mr. Lopez admitted that was true. During the hearing, Judge Symons ordered Mr. Lopez not to consume alcohol before visiting the children or while visiting them. The judge told Mr. Lopez, "You can't down a couple of 40s before you go pick them up before a visit because that's not good. Do you understand?" Mr. Lopez responded, "I don't drink 40s."

Judge Symons's conduct violated the Code of Judicial Ethics, canons 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the

judiciary), and 3B(4) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity). The judge's conduct constitutes improper action.

**4. *Kinda v. Carpenter*, No. CV171252**

In May 2013, Judge Symons presided over the civil jury trial of *Margaret Kinda v. Scott Carpenter*, No. CV171252, which involved a dispute between the owners of a rug cleaning business, Margaret Kinda and Aaron Kinda, and their landlord, Mr. Carpenter.

On May 21, 2013, while Margaret Kinda was testifying during the plaintiffs' case, Judge Symons questioned her about a matter in a manner that reflected disbelief in her testimony. The transcript reflects the following colloquy.

> THE COURT: All right. Now, Ms. Kinda, I have some questions. [¶] You made a reference to Exhibit Number 53, a notice of preservation of evidence.
>
> THE WITNESS [MS. KINDA]: I know what you're talking about. I'm flipping to it right now.
>
> THE COURT: All right. This is from the Baskin and Grant law firm, it's dated June 20th, and it puts you on notice to preserve documents and evidence which may be important or relevant to the litigation; right?
>
> THE WITNESS: Yes, among other things.
>
> **THE COURT: This is absolutely standard in every single civil case that's filed, is it not?**
>
> **THE WITNESS: I can't answer that.**
>
> **THE COURT: You're an attorney, Ms. Kinda.**
>
> **THE WITNESS: I am.**
>
> **THE COURT: Come on.**
>
> THE WITNESS: I have never done a civil case in my life.

> THE COURT: And you have absolutely no knowledge about this?
>
> THE WITNESS: I had no knowledge of what this was. They don't do this in divorce law. But the – my point was –

(R.T. 147:14-148:12, bold added.)

Plaintiffs rested their case on May 21, 2013.

On May 22, 2013, Mr. Carpenter was called as the first defense witness. At the conclusion of Mr. Carpenter's examination by counsel, Judge Symons allowed questions to be asked that the jurors had previously submitted in writing, and that the judge had reviewed and discussed with counsel. Before the jurors' questions were asked by counsel, the judge stated, and commented on, one of the questions, as follows:

> THE COURT: Ladies and gentlemen, there are a number of questions from our jurors. And [Counsel] will ask them on your behalf of Mr. Carpenter. [¶] I will share with you one question. "I'm unsure what the judgment award will or might be." That is a question indeed. We'll just have to keep listening carefully to the evidence to see if it's ever answered.

Judge Symons's comments created the appearance that the judge was conveying to the jury that she had not seen any evidence to support a damages award in plaintiffs' favor.

On December 10, 2013, Judge Symons presided over a hearing on Mr. Carpenter's post-trial motions for attorney fees and costs. Mr. Carpenter was represented by counsel at the hearing; Ms. Kinda appeared in pro per. During the hearing, the judge provided a lengthy explanation for why she found Mr. Carpenter to be the "prevailing party" in the case. In connection with her explanation, the judge read into the record some responses the jurors had given to a questionnaire sent to them by the court after the trial concluded. The responses the judge read focused on how the jurors viewed the case. Immediately after reading the last juror response, the judge made the following remark:

> So the Court has rarely received such strongly worded negative reactions, not merely to the case, but to the fact that the case was allowed to proceed at all; and I think the

> information's valuable. **I cannot avoid the observation that the party who represents himself has a fool for a client.** That is a well-known quote. It's too bad that someone did not perform the older and more gracious function, not simply of attorney, but counselor at law. Counselors at law used to advise people not to go to court, to let the matter go and resolve it outside of court. And that might have been a kindness in this situation.

(R.T. 34:16-35:2, bold added.)

The judge's statement, "the party who represents himself has a fool for a client," was directed at Ms. Kinda, who had filed the initial complaint in pro per and was self-represented at the hearing.

Judge Symons's conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(4), and 3B(5) (a judge shall not engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice). The judge's conduct constitutes prejudicial misconduct.

**5. Prior discipline**

In 2013, Judge Symons received an advisory letter for serving as an auctioneer at a fundraising event for CASA of Santa Cruz.

In 2015, Judge Symons received a private admonishment for (1) publicly discussing a factual scenario of a case pending before her for sentencing, (2) comments creating the appearance of bias against transients, and (3) creating the appearance of embroilment in connection with an Order to Show Cause against an attorney.

The matters for which Judge Symons received prior discipline serve as aggravating factors for the misconduct discussed herein.

**6. Mitigation**

By entering into this stipulation, Judge Symons has now admitted, accepted responsibility for, and expressed remorse for, her conduct as set forth herein.

A number of Judge Symons's colleagues, including her presiding and assistant presiding judges, submitted letters and declarations attesting to her work ethic, diligence, and her fair administration of justice.

Judge Symons has worked as a public servant, initially as an Assistant United States Attorney, then as a prosecutor in district attorney's offices, and then as a judge, since 1983.

Judge Symons's agreement to enter into this stipulation avoids the expenditure of time and resources that formal proceedings would entail.

Judge Symons admits that the foregoing facts are true and agrees with the stated legal conclusions.

DISCIPLINE

The commission has determined to accept the Stipulation and impose this severe public censure, which is the strongest sanction that may be imposed on a judge short of removal from the bench, because it fulfills the commission's mandate of protecting the public, enforcing rigorous standards of judicial conduct, and maintaining public confidence in the integrity of the judicial system, and it resolves this matter without the delay and expense of further proceedings. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112; Cal. Const., art. VI, § 18, subd. (d).)

Judge Symons's handling of the red light ticket, including her failure to accept responsibility for the ticket until instructed to do so by her presiding judge, her knowing participation in her husband's actions, which resulted in the citation being dismissed, and her misuse of court staff in connection with the ticket, reflect an egregious disregard for the dignity of the very court where Judge Symons serves as a judicial officer. When a judge does not respect the law or the processes of the court, public respect for the judiciary is seriously undermined. Judge Symons concedes that her actions in connection with the red light ticket constitute, at a minimum, prejudicial misconduct.

Judge Symons also engaged in several other acts of misconduct that erode public confidence in the integrity of the judiciary. She engaged in two instances of improper ex parte communication during a jury trial, which she concedes constitute prejudicial misconduct. In addition, Judge Symons made an inappropriate remark to a litigant in a restraining order proceeding, which she admits constitutes improper action. Further, she made several remarks that reflected poor demeanor and bias to a different litigant, who

was self-represented in a civil proceeding. Judge Symons acknowledges that those remarks constitute prejudicial misconduct.

In determining that a severe public censure is the appropriate sanction, the commission considered Judge Symons's history of prior discipline (an advisory letter and a private admonishment) as aggravating factors. The commission also considered as mitigating factors that Judge Symons acknowledges engaging in multiple acts of misconduct and has expressed remorse, as stated in the Stipulation.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Ms. Kay Cooperman Jue; Hon. Lisa B. Lench; Dr. Michael A. Moodian; Mr. Richard Simpson; and Mr. Adam N. Torres voted to accept the Stipulation and to issue this severe public censure. Commission member Anthony P. Capozzi, Esq. did not participate.

Date: May 20, 2019

On behalf of the
Commission on Judicial Performance,

Nanci E. Nishimura
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING<br>JUDGE ARIADNE J. SYMONS | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 116.5) |

Pursuant to Rules of the Commission on Judicial Performance, rule 116.5, Judge Ariadne J. Symons of the Santa Cruz County Superior Court, represented by counsel Kathleen M. Ewins, and commission trial counsel (the "parties") submit this proposed disposition of the matters set forth in the commission's preliminary investigation letters dated September 16, 2016, July 11, 2017, January 3, 2018, and January 2, 2019. The parties request that the commission resolve this matter by imposition of a severe public censure. The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Symons because, among other reasons, in light of the stipulated facts and legal conclusions, a severe public censure adequately protects the public and will avoid the delay and expense of further proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Symons.

2. The commission shall issue a severe public censure based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing severe public censure may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Symons waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Symons.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a severe public censure on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Ariadne J. Symons became a judge of the Santa Cruz County Superior Court in 2009, following election to that office. Her current term began in January 2015.

**1. The red light ticket**

On Tuesday, May 10, 2016, at 7:56 a.m., Judge Symons drove her 2007 Pontiac through a red light in violation of Vehicle Code section 21453(a). The violation was captured by a camera maintained by the City of Capitola Police Department. Judge Symons noticed a flash when she drove through the intersection and understood that she had triggered a red light camera. When Judge Symons arrived at the courthouse that morning, she told her colleague, Judge Jeffrey Almquist, that she had committed a red light violation that had been captured on camera. Judge Symons also told other people at court about the incident, and that she felt like a "scofflaw."

About a month later, a Notice of Violation (Notice) concerning the incident was sent to the judge's residence addressed to her husband. The Notice identified the registered owner of the vehicle as Judge Symons's husband, whose last name is different from Judge Symons's, "or Symoms [*sic*] Ariadne J." The Notice included color photos of the driver, the vehicle, and the license plate, and identified a website where the photos

and a video of the incident could be viewed (www.violationinfo.com). The Notice did not set forth a bail amount.

The Notice included specific language on what to do if the recipient was not the driver:

> IF YOU WERE NOT THE DRIVER: If you were not the driver of the vehicle at the time of the violation, complete the "Affidavit of Non-Liability" below. By completing the Affidavit of Non-Liability, the citation issued to you will be cancelled after review and the approval of the court. The person named in the form will be cited and notified by mail.

The Affidavit of Non-Liability contained in the Notice included the following language:

> IF YOU DO NOT OWN OR WERE NOT DRIVING THE VEHICLE AT THE TIME OF THE VIOLATION, PLEASE COMPLETE THIS FORM WITH THE INFORMATION OF THE ACTUAL DRIVER.

(Emphasis in original.)

Judge Symons subsequently approached a court clerk in the staff-only area of the Watsonville Courthouse, of the Santa Cruz County Superior Court, concerning the Notice. The judge asked for assistance in determining the bail amount for the violation. The clerk looked into the matter and told the judge that the citation had not yet been processed in the system, and to check back later.

On or about June 24, 2016, the Santa Cruz County Superior Court sent Judge Symons's husband a "courtesy notice," which stated that he had been cited for violating Vehicle Code section 21453(a) on May 10, 2016, and that the amount due was $489.

Judge Symons and her husband discussed their options on how to handle the Notice. The judge's husband refused to provide information that the judge was the actual driver. The judge's husband prepared a Request for Trial by Written Declaration, which included a Statement of Facts wherein he denied responsibility for the citation, but did

not identify the driver of the vehicle when the violation occurred. The Statement of Facts stated in full:

> I work at the Pebble Beach golf course in Pebble Beach (located next to Carmel). It is usually an hour drive from my home to work, each way. On May 10, 2016, I arrived at work at 6:17 a.m. My first break was at 10:50 a.m. The ticket was issued for a violation occurring at 7:59:09 a.m. in Capitola. I was not driving in the car ticketed at the time. There is no possibility I could have been in both places at the same time. [¶] The car is a family car and a number of people, family and friends, drive it. I looked at the photo attached to the citation. It is rather unflattering and unclear. It could perhaps be any slightly pudgy white guy, but it is not me. [¶] I am attaching a copy of my time card slips that document that I was in fact at work at the times stated.

The judge and her husband were unable to print out the completed Request for Trial by Written Declaration form at home. As a result, the next day, the judge either printed it, or re-typed and printed it, from her computer at the courthouse. The judge admits that she reviewed the document, including the Statement of Facts, before it was submitted for filing.

On July 14, 2016, the judge again approached the court clerk in the staff-only area of the courthouse and handed her the completed Request for Trial by Written Declaration form, signed by her husband under penalty of perjury; and a check for $489. The judge told the clerk that Commissioner Baskett, who handled traffic matters, did not know her husband's last name, so there was no conflict. The clerk told the judge that a Waiver of Arraignment form was missing, and, using a court computer, showed her how to obtain the form online. The judge said her husband would need to sign the waiver form and that she would bring the signed form to the clerk the next day, which she did. The clerk then sent the Request for Trial by Written Declaration and the Waiver of Arraignment forms

to the Santa Cruz Courthouse, where Commissioner Baskett sat, by interoffice mail. Judge Symons did not inform the presiding judge, or the court executive officer, of either the citation or the Request for Trial by Written Declaration filed on behalf of her husband.

When Commissioner Baskett received the Request for Trial by Written Declaration, she noted that it concerned the husband of a judicial officer. Commissioner Baskett reported the matter to then-Presiding Judge Denine Guy, who commenced an investigation.

On July 20, 2016, the Capitola Police Department served by mail a Notice of Correction dismissing the citation "in the interest of justice."

On July 20 and 21, 2016, Judge Symons met with Judge Guy about the citation. Judge Symons admitted that she had run the red light. Judge Symons told Judge Guy that her husband was refusing to complete the Affidavit of Non-Liability because he believed he had a right to a trial without implicating her. Judge Guy told Judge Symons that she needed to accept responsibility for the ticket by contacting the court and the citation-processing company.

Judge Symons sent letters to the court and the Capitola Police Department advising that she was the person responsible for the citation, not her husband. A new citation was never issued to Judge Symons.

On or about August 23, 2016, the County of Santa Cruz sent Judge Symons's husband a check for $489, as refund of bail. He negotiated the check.

Judge Symons knowingly assisted her husband in filing the Request for Trial by Written Declaration with the court, which was designed to have the citation dismissed and which did not identify the judge as the actual driver. Prior to filing the document, the judge took no steps to notify the Capitola Police Department or the citation-processing company that she was the person responsible for the citation, despite language on the citation itself that set forth a procedure for identifying the responsible party. The judge also failed to notify the court that her husband had a matter pending before it that involved her. Additionally, the judge misused the prestige of her office by seeking

information and assistance concerning the citation from a court clerk in the non-public areas of the courthouse, including giving the clerk the Request for Trial by Written Declaration for filing rather than filing the document herself at the filing window.

Judge Symons's conduct violated the Code of Judicial Ethics, canons 1 (a judge shall uphold the integrity and independence of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 2B(1) (a judge shall not allow family, social, or other relationships to influence the judge's judicial conduct), and 2B(2) (a judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others). The judge's conduct constitutes, at a minimum, prejudicial misconduct.

**2. *People v. Karl Peterson*, No. 18CR00369**

From April 30, 2018 through May 3, 2018, Judge Symons presided over the jury trial of *People v. Karl Peterson*, No. 18CR00369. The defendant was charged with felony violations of a protective order and special allegations concerning prior convictions. The defendant was in custody and represented by public defender Micha Rinkus. The People were represented by Deputy District Attorney (DDA) Xavier Mitchell.

On May 2, 2018, at 3:20 p.m., following closing arguments, the jury retired to the jury room to begin deliberations. At 3:40 p.m., while Ms. Rinkus and Mr. Mitchell were still in the courtroom, the bailiff in charge of the jury, Deputy Travis Rakes, returned from the jury room with written questions from the jury. (The questions are contained in the court file as court exhibits nos. 1 and 2.) Judge Symons discussed the questions with the attorneys in the courtroom, and, in their presence, prepared written responses to the questions on court forms maintained for that purpose. A separate form was used for each question. On each form, the judge handwrote the question and the court's response, and signed her name. The written responses were then given to Deputy Rakes, who took them to the jury room. (The responses are contained in the court file as court exhibits nos. 3, 4, and 5.) The process of responding to these questions took 20 minutes or less.

Later that afternoon, after Ms. Rinkus and Mr. Mitchell had left the courtroom, another written question from the jury was brought to the courtroom by Deputy Rakes. The question concerned the definition of the term "violence." Thereafter, at 4:20 p.m., the courtroom clerk, Georgina Robles, placed a call to Ms. Rinkus's cell phone. Ms. Rinkus did not answer and Ms. Robles left a voice message stating that the jury had a question, and asking that Ms. Rinkus come to court or call back. At 4:21 p.m., Ms. Robles placed a call to Mr. Mitchell's cell phone. Mr. Mitchell answered the call and Ms. Robles informed him that the jury had a question. During the call, Judge Symons got on the line and spoke with Mr. Mitchell about the jury's question. The judge told Mr. Mitchell that the jury had a question regarding the legal definition of violence, and that her inclination was to respond by referring them to the jury instructions and advising them that if the instructions did not contain a specific definition, they were to give the term its ordinary, everyday meaning. Mr. Mitchell responded, "O.K., sounds good." Mr. Mitchell was not asked to return to the courtroom. Judge Symons subsequently prepared a written response to the jury's question that directed the jury to refer to their previous instructions. The written response was transmitted to the jury that afternoon by Deputy Rakes. Judge Symons took no steps to notify Ms. Rinkus of her telephone conversation with Mr. Mitchell, or of her written response to the jury's question.

At 4:40 p.m., Ms. Robles contacted both Ms. Rinkus and Mr. Mitchell by phone, and advised them that the jury was being excused for the day.

On May 3, 2018, at 2:45 p.m., the jury returned with a verdict finding the defendant guilty on all charges. After the jury was excused, some of the jurors discussed the case with the attorneys and raised the jury's question concerning the definition of violence and the court's response. Ms. Rinkus and Mr. Mitchell immediately went to see Judge Symons in chambers. Ms. Rinkus told the judge that it had just come to her attention that a question from the jury had been asked, and answered, without her knowledge. The judge told Ms. Rinkus that there was nothing she could do at that point, and that Ms. Rinkus's recourse was to file a motion for new trial.

On July 10, 2018, Ms. Rinkus filed a motion for new trial on behalf of the defendant. The motion alleged that the defendant's due process rights had been violated by the court answering the jury's question about the definition of violence while defense counsel was not present.

On or about August 14, 2018, Judge Symons called Ms. Rinkus and Mr. Mitchell to the bench for a sidebar conference. The judge told the attorneys the motion for new trial raised issues that she assumed each side recognized may possibly have merit, and that in such circumstances the parties frequently explore whether a negotiated resolution was possible. The judge proposed, as a potential compromise, that she give the defendant a suspended prison sentence, conditioned on successful completion of two years in the Delancey Street drug program, in exchange for a waiver of appellate rights and withdrawal of the motion for new trial.

On August 31, 2018, the case was on calendar for sentencing and the motion for new trial. Prior to the hearing, Mr. Mitchell informed Ms. Rinkus of a new offer; a four-year suspended prison sentence, conditioned on successful completion of two years in the Delancey Street drug program. (Prior to trial, the offer was four years state prison.) The defendant accepted the offer and was sentenced accordingly that day.

Judge Symons's telephone conversation with DDA Mitchell on May 2, 2018, and her written response to the jury's question constituted improper ex parte communications as they both occurred outside the presence of the defendant and Ms. Rinkus, and without their knowledge.

Judge Symons's conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(5) (a judge shall not engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice), 3B(7) (a judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications), and 3B(8) (a judge shall dispose of all judicial matters fairly, promptly, and efficiently, and shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters

fairly adjudicated in accordance with the law). The judge's conduct constitutes prejudicial misconduct.

3. ***Hernandez v. Lopez*, No. 16FL01113**

On August 28, 2016, Judge Symons presided over the matter of *Jeannette Hernandez v. Jesus Lopez*, No. 16FL01113. Ms. Hernandez had filed a request for a domestic violence restraining order against Mr. Lopez, who was the father of their three children. Ms. Hernandez alleged that Mr. Lopez would drink alcohol before visiting the children and engage in behavior that scared them. Mr. Lopez admitted that was true. During the hearing, Judge Symons ordered Mr. Lopez not to consume alcohol before visiting the children or while visiting them. The judge told Mr. Lopez, "You can't down a couple of 40s before you go pick them up before a visit because that's not good. Do you understand?" Mr. Lopez responded, "I don't drink 40s."

Judge Symons's conduct violated the Code of Judicial Ethics, canons 2 (a judge shall avoid impropriety and the appearance of impropriety), 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), and 3B(4) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity). The judge's conduct constitutes improper action.

4. ***Kinda v. Carpenter*, No. CV171252**

In May 2013, Judge Symons presided over the civil jury trial of *Margaret Kinda v. Scott Carpenter*, No. CV171252, which involved a dispute between the owners of a rug cleaning business, Margaret Kinda and Aaron Kinda, and their landlord, Mr. Carpenter.

On May 21, 2013, while Margaret Kinda was testifying during the plaintiffs' case, Judge Symons questioned her about a matter in a manner that reflected disbelief in her testimony. The transcript reflects the following colloquy.

> THE COURT: All right. Now, Ms. Kinda, I have some questions. [¶] You made a reference to Exhibit Number 53, a notice of preservation of evidence.

THE WITNESS [MS. KINDA]: I know what you're talking about. I'm flipping to it right now.

THE COURT: All right. This is from the Baskin and Grant law firm, it's dated June 20th, and it puts you on notice to preserve documents and evidence which may be important or relevant to the litigation; right?

THE WITNESS: Yes, among other things.

**THE COURT: This is absolutely standard in every single civil case that's filed, is it not?**

**THE WITNESS: I can't answer that.**

**THE COURT: You're an attorney, Ms. Kinda.**

**THE WITNESS: I am.**

**THE COURT: Come on.**

THE WITNESS: I have never done a civil case in my life.

THE COURT: And you have absolutely no knowledge about this?

THE WITNESS: I had no knowledge of what this was. They don't do this in divorce law. But the – my point was –

(R.T. 147:14-148:12, bold added.)

Plaintiffs' rested their case on May 21, 2013.

On May 22, 2013, Mr. Carpenter was called as the first defense witness. At the conclusion of Mr. Carpenter's examination by counsel, Judge Symons allowed questions to be asked that the jurors had previously submitted in writing, and that the judge had reviewed and discussed with counsel. Before the jurors' questions were asked by counsel, the judge stated, and commented on, one of the questions, as follows:

THE COURT: Ladies and gentlemen, there are a number of questions from our jurors. And [Counsel] will ask them on your behalf of Mr. Carpenter. [¶] I will share with you one

> question. "I'm unsure what the judgment award will or might be." That is a question indeed. We'll just have to keep listening carefully to the evidence to see if it's ever answered.

Judge Symons's comments created the appearance that the judge was conveying to the jury that she had not seen any evidence to support a damages award in plaintiffs' favor.

On December 10, 2013, Judge Symons presided over a hearing on Mr. Carpenter's post-trial motions for attorney fees and costs. Mr. Carpenter was represented by counsel at the hearing; Ms. Kinda appeared in pro per. During the hearing, the judge provided a lengthy explanation for why she found Mr. Carpenter to be the "prevailing party" in the case. In connection with her explanation, the judge read into the record some responses the jurors had given to a questionnaire sent to them by the court after the trial concluded. The responses the judge read focused on how the jurors viewed the case. Immediately after reading the last juror response, the judge made the following remark:

> So the Court has rarely received such strongly worded negative reactions, not merely to the case, but to the fact that the case was allowed to proceed at all; and I think the information's valuable. **I cannot avoid the observation that the party who represents himself has a fool for a client.** That is a well-known quote. It's too bad that someone did not perform the older and more gracious function, not simply of attorney, but counselor at law. Counselors at law used to advise people not to go to court, to let the matter go and resolve it outside of court. And that might have been a kindness in this situation.

(R.T. 34:16-35:2, bold added.)

The judge's statement, "the party who represents himself has a fool for a client," was directed at Ms. Kinda, who had filed the initial complaint in pro per and was self-represented at the hearing.

Judge Symons's conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(4), and 3B(5) (a judge shall not engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice). The judge's conduct constitutes prejudicial misconduct.

**5. Prior discipline**

In 2013, Judge Symons received an advisory letter for serving as an auctioneer at a fundraising event for CASA of Santa Cruz.

In 2015, Judge Symons received a private admonishment for (1) publicly discussing a factual scenario of a case pending before her for sentencing, (2) comments creating the appearance of bias against transients, and (3) creating the appearance of embroilment in connection with an OSC against an attorney.

The matters for which Judge Symons received prior discipline serve as aggravating factors for the misconduct discussed herein.

**6. Mitigation**

By entering into this stipulation, Judge Symons has now admitted, accepted responsibility for, and expressed remorse for, her conduct as set forth herein.

A number of Judge Symons's colleagues, including her presiding and assistant presiding judges, submitted letters and declarations attesting to her work ethic, diligence, and her fair administration of justice.

Judge Symons has worked as a public servant, initially as an Assistant United States Attorney, then as a prosecutor in district attorney's offices, and then as a judge, since 1983.

Judge Symons's agreement to enter into this stipulation avoids the expenditure of time and resources that formal proceedings would entail.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Symons expressly admits that the foregoing facts are true and that she agrees with the stated legal conclusions.

Dated: 19 April, 2019

Ariadne J. Symons

Dated: April 22, 2019

Kathleen M. Ewins
Attorney for Judge Symons

Dated: April 23, 2019

Gregory Dresser
Director-Chief Counsel

FILED
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COMMISSION ON
JUDICIAL PERFORMANCE

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING FORMER JUDGE STEVEN C. BAILEY, No. 202** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE AND BAR** |

## I.

## INTRODUCTION AND PROCEDURAL BACKGROUND

This disciplinary matter concerns Judge Steven C. Bailey, a former judge of the El Dorado County Superior Court. Judge Bailey was elected to the bench in 2008, and retired on August 31, 2017.

The commission commenced this inquiry with the filing of its Notice of Formal Proceedings (Notice) on February 20, 2018. The Notice, as amended on May 7, 2018, charged Judge Bailey with: (1) improperly allowing a business to use his testimonial on its website, without assuring that it did not use his judicial title; (2) failing to disclose that his son worked on commission for CHI Monitoring, LLC (CHI) and made reports to the court, when, in five cases, the judge ordered criminal defendants to use CHI services; (3) ordering a defendant to pay restitution to CHI in violation of the law, based on a letter from his son; (4) failing to disclose that the owner of CHI, Charles Holland, was his friend and former client, and attended strategy meetings for the judge's judicial campaign; (5) appointing Attorney Bradley Clark as a special master in a matter pending before the judge, without disclosing that Clark was a personal friend; (6) improperly receiving gifts from Court Appointed Special Advocates (CASA), Attorney Clark, and Lincoln Law School; (7) failing to report and inaccurately reporting travel-related payments or reimbursements the judge received in connection with judicial education programs he attended; (8) commenting in the courthouse to a member of court staff and two judges that he knew his

shirt was nice because he bought it from a "gay guy" in Paris, and "gays only have nice clothes … gays really know how to dress"; (9) between August 2016 and August 2017, while a sitting judge, using his judicial title and lending the prestige of judicial office to raise funds for and promote his campaign, potential campaign, or exploratory committee to run as a candidate for California Attorney General, and engaging in political and campaign activity that is inconsistent with the independence, integrity, and impartiality of the judiciary; (10) failing to file a Candidate Intention Statement to run for Attorney General until after his campaign had received at least $17,749 in campaign contributions, in violation of the Political Reform Act; (11) while a sitting judge, authorizing or permitting his Southern California Campaign Coordinator, Martha Romero, to use his judicial title and the prestige of his judicial office to promote his candidacy by creating a "Judge Steven Bailey" Facebook page, with frequent references to his judicial title; and (12) while a sitting judge, allowing Romero to use her law firm's Facebook page to promote the judge's candidacy, with reference to his judicial title.

The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters are Hon. Kenneth R. Yegan, Associate Justice of the Court of Appeal, Second Appellate District, Division Six; Hon. Louis R. Hanoian, Judge of the San Diego County Superior Court; and Hon. William D. Lehman, Judge of the Imperial County Superior Court. Judge Bailey is represented by James A. Murphy, Esq., Janet L. Everson, Esq., and Joseph S. Leveroni, Esq., of Murphy, Pearson, Bradley & Feeney, in San Francisco, California. The examiners for the commission are Mark A. Lizarraga, Esq., and Sei Shimoguchi, Esq.

A six-day evidentiary hearing was held before the special masters commencing September 4, 2018. The masters' report to the commission, containing their findings of fact and conclusions of law, was filed on November 15, 2018. Oral argument before the commission was heard on January 30, 2019.

The masters found that Judge Bailey engaged in misconduct as to each of the charges in the Notice, with the exception of count three (appointing Attorney Clark as a special master). The masters also found, in aggravation, that Judge Bailey received a

strong advisory letter in 2013 for delaying 15 cases. The masters found no circumstances in mitigation.

The facts are largely undisputed. There is considerable disagreement between the parties, however, on the legal conclusions reached by the masters. As to many of the charges, Judge Bailey contends that his actions did not amount to misconduct or that he engaged in a lower level of misconduct than found by the masters. The examiner objects to the masters' conclusion that the judge did not engage in misconduct in appointing his friend as a special master without, at minimum, disclosing the relationship. As to a number of counts, the examiner objects to the masters' conclusion that the judge engaged in the lowest level of misconduct, improper action, rather than prejudicial conduct.

We adopt the factual findings of the masters, and, at times, include additional facts supported by clear and convincing evidence. For reasons we explain, we adopt the masters' legal conclusions in some instances, and reach our own independent legal conclusions in other instances. We respectfully disagree with the masters' determination that Judge Bailey did not engage in misconduct in appointing his friend as a special master without disclosure or disqualification. We conclude that Judge Bailey engaged in prejudicial conduct in seven of the counts charged in the Notice, which includes a course of prejudicial conduct over a period of a year while conducting an actual or exploratory campaign for nonjudicial office, and that he engaged in improper action in eight instances.

As the masters noted, Judge Bailey has his own views on appropriate conduct for a judge, and his views are misinformed and erroneous. Based on the breadth and nature of Judge Bailey's misconduct over the entire course of his judicial career, his prior discipline, and his failure to appreciate the impropriety of much of his misconduct, we conclude there is a strong likelihood that Judge Bailey would engage in subsequent misconduct if he were to serve in a judicial capacity in the future. In order to protect the public and maintain public confidence in the integrity and impartiality of the judiciary, the commission has determined to censure and bar former Judge Steven C. Bailey from seeking or holding judicial office, or accepting a position or an assignment as a judicial officer, subordinate judicial officer or judge pro tem with any court in the State of

California, or accepting reference of work from any California state court, at any time in the future. (Cal. Const., art. VI, § 18(d).)

## II.

## LEGAL STANDARDS

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*) Factual findings of the masters are entitled to special weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Ibid*; *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232.) Legal conclusions of the masters are entitled to less deference because the commission has expertise with respect to the law of judicial misconduct. (See, e.g., *Broadman, supra*, 18 Cal.4th at p. 1090*; Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 880 (*Adams*); *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878 (*Fletcher*).)

A violation of the California Code of Judicial Ethics constitutes one of three levels of judicial misconduct: willful misconduct, prejudicial misconduct, or improper action. (Cal. Const., art. VI, § 18, subd. (d).) Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his judicial capacity. The second most serious level of misconduct is prejudicial conduct, "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) Prejudicial conduct is either conduct that occurs in good faith but which nevertheless would appear to an objective observer to be " 'prejudicial to public esteem for the judicial office' [citation]," or willful misconduct out of office. (*Broadman, supra,* 18 Cal.4th at p. 1092.) The least serious level of misconduct, improper action, occurs when the judge's conduct violates the canons, but the circumstances do not rise to the level of prejudicial misconduct and do not bring the judiciary into disrepute. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1,

82; *Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89, citing *Adams, supra*, 10 Cal.4th at pp. 897-899.)

## III.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Count One

In April 2016, Judge Bailey retained the Redd Group to survey voters about a local attorney's judicial campaign. After the election, Judge Bailey called David Cooper, an employee of the Redd Group, to compliment him on the survey results. Cooper asked the judge if he could use the judge's comments as a testimonial for the Redd Group. Judge Bailey agreed. He did not ask Cooper how the comments would be used or where they would be published. Cooper testified that he told the judge that the testimonial would be published on the Redd Group's website; the judge testified he did not remember receiving this information. Judge Bailey did not authorize Cooper to use his judicial title, but did not tell him to avoid using the title. The judge was not compensated for the testimonial.

The testimonial, published on two separate pages of the Redd Group website, stated:

> I was helping a fellow attorney run for county judge. Our mail went out ahead of schedule and The Redd Group accommodated for our poll to be done accordingly with many more respondents than were promised. We got the detailed results in less than 24 hours. I recommend the Redd Group for all your polling needs. Excellent work!
>
> – Steven C. Bailey

One page of the website included a link to the judge's personal website, which identified him as a judge. Headings on the Redd Group website identified Steven Bailey as a superior court judge. The website also featured a photograph of Judge Bailey in his judicial robe. The judge did not provide the photograph or authorize its use. Cooper did not inform the judge that his photograph would be used.

The masters concluded that the judge engaged in improper action by allowing his name to be used on the website, without reviewing the final text of the testimonial or instructing the Redd Group to avoid using his judicial title and photograph in judicial robes. The masters concluded that the judge violated canons 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities), and 2B(2) (judges are prohibited from using the prestige of judicial office or judicial title to advance the personal or pecuniary interests of the judges or others). We reach the same legal conclusions.

Neither party objects to these factual findings or legal conclusions.

## B. Count Two A

### 1. Findings of Fact

In five cases, between October 2009 and April 2014,[1] Judge Bailey released a defendant charged with an alcohol-related crime on the defendant's own recognizance, on the condition that the defendant participate in the Secure Continuous Remote Alcohol Monitoring (SCRAM) program. SCRAM monitors alcohol consumption through a bracelet device provided to defendants. At the time the orders were made, CHI was the only local provider of alcohol monitoring services.

Judge Bailey's son, John Bailey, was employed by CHI as a case manager and worked on commission. He received a percentage of the payments CHI received from every SCRAM participant he monitored. John Bailey installed the SCRAM device, monitored for violations, wrote reports for the court, and set up payments. In each of the five cases, John Bailey or another CHI employee sent correspondences directly to Judge Bailey concerning the defendants' participation in SCRAM.

[1] The five cases and the dates of the orders are (1) *People v. Angelica Godinez,* April 16, 2014; (2) *People v. Julian Butler*, March 10, 2014; (3) *People v. Shawn Price*, Feburary 19, 2014; (4) *People v. Jason Jacobsen*, October 30, 2009; and (5) *People v. Camille DeSpain*, October 23, 2009.

The judge did not disclose that his son was employed by CHI and might correspond with the court concerning defendants' participation in, and compliance with, the program.

In April 2009, Judge Bailey sought an ethics opinion from the California Judges Association (CJA) hotline, because he was confused about his responsibilities when referring defendants to the company where his son was employed. CJA gave Judge Bailey an informal opinion, based on the facts provided by the judge.

CJA's informal opinion stated:

> Inquiry:
> Newly appointed J's adult son is a commissioned salesperson with a company that provides monitoring ankle bracelets for J's county jail. The defendants utilizing this company's services all reside out of county. Son's company comes in contact with defendants when they are referred by the county probation department. Company assesses whether or not defendant meets the financial criteria to obtain the monitoring bracelet and if so, provides the bracelet and performs the monitoring function. Son occasionally comes in personal contact with a defendant. Neither J nor son has an ownership interest in Company. J asks whether there is anything about this arrangement that requires J to disqualify, disclose, or take any other action.
>
> Informal Response:
> No. However, J should disclose if son were to testify in J's court on an issue of violation of the terms and conditions of use of the bracelet by a defendant.[2]

The masters found the CJA opinion assumed that CHI comes into contact with the defendants when they are "referred by the county probation department." Further, the masters found that the judge did not inform CJA that his son corresponded directly with

[2] Sometime after Judge Bailey received the informal opinion, the CJA ethics committee modified its opinion to state that Judge Bailey should disqualify himself if his son were to testify. The evidence does not establish whether Judge Bailey was made aware of this modification.

him concerning the defendants' enrollment and compliance in the program. We concur with these findings, which are supported by clear and convincing evidence.

Judge Bailey contacted the CJA hotline and spoke with Judge Robert Glusman. Judge Glusman testified that when he would receive a call from a judge, it was his practice to take notes and relay the facts back to the judge two or three times to make sure they were accurate. He further testified that Judge Bailey did not tell him that his son would provide written monitoring reports to the judge.

Judge Bailey asserts that he did not inform CJA that his son corresponded directly with him because, at the time he sought the opinion, he had not yet referred a defendant to SCRAM, and did not know he would be doing so. This is inconsistent with the judge's testimony and statement in his opening brief that he asked for an ethics opinion because he "was confused as to what his responsibilities were *when he made referrals to SCRAM* . . . ." (Italics added.) Further, the issue is whether the judge was justified in relying on the CJA informal opinion at the time the five cases were before him. By that time, he knew his son was reporting directly to him. He could have asked for another opinion once it became apparent that he would be making the referrals and his son would be reporting directly to him.

Judge Bailey objects to the masters' finding that, in each of the five cases, he personally ordered the defendant to participate in SCRAM monitoring, because there was no objection from the defendant or the district attorney in any of the cases. The evidence established through minute orders and transcripts admitted into evidence that the judge made a SCRAM order in each case. The fact that no one objected does not change the fact that the judge made the order.

**2. Conclusions of Law**

The masters concluded that the judge's conduct violated canon 3E(2), which requires a judge to disclose on the record all information relevant to disqualification. The masters further concluded that the judge engaged in improper action, rather than prejudicial conduct, because the failure to disclose was consistent with the advice he received from the ethics hotline. The examiner contends that the conduct constitutes

prejudicial conduct because the judge provided CJA with inaccurate and incomplete facts. Judge Bailey contends that he did not engage in any misconduct because he followed the advice he was given.

We conclude that the judge engaged in prejudicial conduct. Judge Bailey failed to provide CJA with important facts relevant to the question of whether he was required to disclose that his son worked at CHI – that he, rather than the probation department, would be making the referrals, and that his son would be reporting directly to him concerning monitoring and compliance. While judges should be encouraged to seek ethics opinions when uncertain about their ethical obligations, when doing so, the judge must provide complete and accurate facts relevant to the ethical question presented.

A judge has a duty to disclose on the record information that is reasonably relevant to disqualification, even if the judge believes there is no actual basis for recusal. (Canon 3E(2).) A judge is required to recuse when a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).)

We conclude that the fact that the judge's son worked on commission for CHI and reported directly to Judge Bailey concerning compliance with SCRAM was information reasonably relevant to disqualification and, thus, required disclosure before Judge Bailey ordered a defendant to participate in the program. Indeed, the CJA informal opinion specifically advised Judge Bailey that disclosure would be necessary if his son were providing testimony to the court. For these purposes, there is no meaningful distinction between written reports and testimony. They are merely different vehicles designed to provide relevant information to the court.

Further, we conclude that an objective person would find the judge's conduct in failing to disclose this information to be prejudicial to the public esteem for the judiciary. The fact that the judge relied on an ethics opinion that did not include pertinent facts would not, in our view, change the public's negative perception of the conduct. As such, we conclude that the judge violated canons 1 (a judge shall uphold the integrity and independence of the judiciary), 2, 2A (a judge shall respect and comply with the law and

act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), and 3E(2), and engaged in prejudicial conduct.

## C. Count Two B

Judge Bailey is charged in count two B with ordering a defendant to pay restitution to CHI in violation of the law, based on a letter from his son who worked for CHI, in violation of canons 1, 2, 2A, 2B(1) (a judge shall not allow family relationships to influence the judge's judicial conduct or convey or permit others to convey the impression that any individual is in a special position to influence the judge), and 3B(2) (a judge shall be faithful to the law and maintain professional competence in the law). The masters did not address this count. We reach our own factual findings and legal conclusions based on our independent review of the record.[3]

### 1. Findings of Fact

The following undisputed facts are established by clear and convincing evidence.

On November 25, 2009, in the matter of *People v. Jacobsen*, a letter signed by John Bailey, Judge Bailey's son, on CHI letterhead and addressed to Judge Bailey was faxed to the court. The letter indicated that the defendant had completed the SCRAM program, but still owed $140 and had agreed to a payment plan, with payments to be completed on December 11, 2009.

On December 10, 2009, John Bailey faxed a letter to his father seeking restitution of $140 from Jacobson, and stating that Jacobsen had verbally agreed to a payment plan but has since decided not to honor it.

Neither letter indicated that it was copied to the parties.

On December 18, 2009, Jacobsen appeared before Judge Bailey with counsel for further proceedings on a violation of probation. Judge Bailey ordered Jacobsen to pay "victim restitution" to CHI in the amount of $140.

[3] Our determination of the appropriate level of discipline would be the same without our findings of misconduct on counts two B and two C.

### 2. Conclusions of Law

Direct victims of crime are entitled to restitution. (Cal. Const., art. I, § 28, subds. (b)(13) & (e).) CHI was not the victim of Jacobsen's crime, and thus was not entitled to restitution.

Judge Bailey asserts that he made an error in word choice, and that he was appropriately requiring the defendant to take responsibility for all aspects of his life, including paying his debts. The judge has not, however, cited any authority authorizing a court to order restitution or payment of a debt to a program that provided court-ordered services to a defendant.

Judge Bailey maintains that, at most, he committed legal error, not misconduct.

The judge's unauthorized order constituted more than legal error. Judge Bailey ordered victim restitution to CHI, a business that was clearly not a victim of the defendant's crime, based on a letter from his son who worked on commission for CHI. This created the appearance of favoritism, bias, and lack of impartiality.

We conclude that the judge violated canons 1, 2, 2A, 2B(1), and 3B(2). In our view, an objective person would find the judge's conduct in making an unauthorized restitution order to a company where his son was employed, based on a letter from his son, to be prejudicial to public esteem for the judiciary. As such, we conclude that the judge engaged in prejudicial conduct.

## D. Count Two C

Judge Bailey is charged in count two C with failing to disclose his relationship with Charles Holland, the owner of CHI, when ordering defendants in the five cases identified in count two A to participate in SCRAM, in violation of canons 1, 2, 2A, 2B(1) and 3E(2). The masters did not address this count. We reach our own factual findings and legal conclusions based on our independent review of the record, and undisputed facts.

### 1. Findings of Fact

The record establishes the following facts by clear and convincing evidence.

Charles Holland is the owner of CHI and employed the judge's son John Bailey during the period of the five cases identified in count two A. In those cases, the judge

ordered defendants to participate in SCRAM (two orders were made in 2009 and three orders were made in 2014). At the time, CHI was the only local provider of SCRAM.

Holland has known Judge Bailey for approximately 20 years. Over 11 years ago, before the judge took the bench in 2009, Holland retained the judge's services as an attorney. As a defense attorney, the judge referred clients to Holland, who at the time was a bail bondsman. Two of the judge's referrals to CHI occurred during the judge's first year on the bench.

Holland considers the judge to be his friend. Judge Bailey describes his relationship with Holland as "more of a relationship professionally and within the community," than a social relationship.

Holland has been to the judge's house on at least two occasions, once for a campaign kickoff event and once to pick up a gun safe. He attended two strategy meetings for Judge Bailey's judicial campaign in 2008. Holland had lunch with the judge and Clark after the judge took the bench. Judge Bailey is Holland's Facebook "friend," one of hundreds of Holland's Facebook "friends."

**2. Conclusions of Law**

A judge has a duty to disclose on the record information that is reasonably relevant to disqualification, even if the judge believes there is no actual basis for recusal. (Canon 3E(2).) Here, the applicable disqualification standard is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).)

For purposes of our analysis, we accept Judge Bailey's characterization of his relationship with Holland as being more professional than social. That relationship, however, went further than being members of the same professional organization or having contacts at professional events. Prior to taking the bench, Judge Bailey had represented Holland, and Holland had referred clients to him. Further, Holland had been to the judge's home, had attended strategy meetings for the judge's judicial campaign, and included the judge as one of his Facebook friends. Even if each of these facts taken alone did not require disqualification, we conclude that the totality of these circumstances

was reasonably relevant to disqualification and required disclosure.[4] As such, we conclude that the judge violated canon 3E(2) by failing to disclose his prior contacts and relationship with Holland when he ordered defendants to participate in a CHI program.

In the commission's view, the conduct does not create an appearance of impropriety or diminish public respect for the judiciary in violation of canons 1, 2, and 2A, or convey the impression that any individual is in a special position to influence the judge in violation of canon 2B(1). We view the judge's failure to disclose his relationship with Holland differently than his failure to disclose that his son worked for CHI. The public is more likely to question a judge's integrity and impartiality when the judge fails to disclose a relationship with an immediate family member. Further, Holland was not monitoring SCRAM program participants or reporting to the court. As such, we conclude that the disclosure violation constitutes improper action.

**E. Count Three**

**1. Findings of Fact**

On June 28, 2011, in *Dorcich v. Tahoe Keys Property*, No. SC20090034, Judge Bailey appointed Attorney Bradley Clark as a special master, at the rate of $350 per hour in a matter concerning shared pier and access easements for the beneficial use of five lots located in the Tahoe Keys development in South Lake Tahoe. Judge Bailey had previously modified a preliminary injunction that had been in place for several months. Clark was appointed "to investigate violations of this order, review, approve and submit to the Court for approval all tentatively approved applications for docks, piers, and floating structures." Clark was not on a court-approved list of special masters, and was appointed without input from counsel.

[4] In this regard, we note that Holland was not a party or an attorney in these matters. (See Code Civ. Proc., § 170.1, subd. (a)(2)(B)(i) [Disqualification is required if *a party* in the proceeding was a former client of the judge within the past two years]; *Public Admonishment of Judge Jeff Ferguson* (2017) [a judge has a duty to disclose being Facebook "friends" with attorneys who have cases pending and who appear regularly before the judge].)

At the time of the appointment, Clark and the judge were friends and socialized together, many times with their spouses. The judge had stayed overnight at Clark's house on at least one occasion. Clark had given the judge gifts of tickets to charity events. Judge Bailey officiated at Clark's wedding. One of the judge's nephews was an associate attorney at Clark's law firm. Clark contributed to and consulted on the judge's campaign for judicial office. Judge Bailey did not disclose his personal relationship with Clark when he appointed him as a special master.

None of the parties in the litigation objected to Clark's appointment. At the time, Clark had a general civil practice in El Dorado County, and was also a real estate broker. The case settled shortly after Clark was appointed. He did not participate in the settlement discussions. On August 9, 2011, the judge approved Clark's fee of $1,715, to be paid by the defendant. Clark received payment of his fee.

**2. Conclusions of Law**

The masters concluded that the examiner did not prove that the appointment constitutes misconduct, because the judge had authority to appoint a special master and Clark was qualified. The masters were not convinced that the appointment of Clark was based on friendship, rather than competence. Based on this finding, to which we defer, we agree with the masters that Judge Bailey did not violate canon 2B(1), which prohibits a judge from allowing personal relationships to influence the judge's conduct. We respectfully disagree, however, with the masters' conclusion that the judge did not have a duty to, at minimum, disclose the nature of the relationship before making the appointment.

As previously noted, a judge has a duty to disclose on the record information that is reasonably relevant to disqualification, and disqualification is required when a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).) Clear and convincing evidence establishes that the judge and Clark were friends who socialized together, at times with their spouses; the judge received gifts from Clark; the judge's nephew was employed by Clark; and the judge officiated over Clark's wedding. We concluded that, at minimum, these facts required disclosure on the record before Judge Bailey appointed

Clark as special master. Knowing these facts, a party might have thought the judge would be more inclined to approve Clark's findings and recommendations because of their friendship.

In finding no misconduct, the masters relied on the absence of an objection to the appointment from the parties and the fact El Dorado County is a "small legal community," and that most of its members, "are likely to have known about the social relationship between the judge and Clark." The examiner contends that these factors are not relevant to the issue of disclosure. We agree.

In determining the need to disclose, the same standard applies regardless of the size of the community. In *Inquiry Concerning Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 46, the commission stated:

> By their terms, the canons impose uniform statewide standards. Whenever an assigned case involves a party the judge "knows," the judge must be particularly vigilant to ensure the appearance and reality of independence and impartiality. The situation may arise more frequently in a small town than a major metropolitan area, but the judge's ethical duties are the same irrespective of population statistics.

The risk of applying a different disclosure standard in a small community based on the assumption that the parties and the attorneys know the judge's relationships "is that there may be someone involved in the proceeding who, in fact, does not know about the relationships." (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:75, p. 500.) Moreover, the purpose of disclosure is not only to inform the attorneys and parties of information that may be relevant to disqualification but to uphold the integrity and impartiality of the judiciary. (See *Id.* § 7:73, p. 495.)

The fact that there was no objection from the attorneys in the *Dorcich* case did not relieve the judge of his obligation to disclose. There is no evidence that the attorneys and parties were aware of the extent of the judge's relationship with Clark at the time the judge made the appointment.

Thus, we conclude that the judge's failure to, at minimum, disclose his relationship with Clark constitutes a violation of canons 2, 2A, and 3E(2). In view of the masters finding that the appointment was not made on the basis of friendship, we conclude that the judge engaged in improper action, rather than prejudicial conduct.

## F. Count Four

### 1. Findings of Fact

Between 2009 and 2012, Judge Bailey reported on his Fair Political Practices Commission (FPPC) Statement of Economic Interests (Form 700) that he received gifts from CASA, Bradley Clark, and Lincoln Law School.

*CASA Gifts*

The gifts from CASA were: (1) tickets to the September 2009 CASAblanca event, valued at $35; (2) tickets to the December 2009 Snowball fundraising event valued at $50; and (3) in January 2011, tickets to another CASA fundraising event valued at $200.

Judge Bailey worked closely with CASA in his capacity as presiding juvenile court judge. CASA volunteers routinely appear on behalf of children in adversary proceedings before juvenile court judges. There is no evidence that the judge ever acted in a judicial capacity to favor the organization.

*Gifts from Bradley Clark*

Clark gave Judge Bailey the following gifts: (1) in January 2010, $50 tickets to a fundraiser for MORE (Mother Lode Rehabilitation Enterprises, Inc.); (2) in September 2010, $150 ticket to a CASA fundraiser; (3) in January 2011, $50 tickets to MORE charity event; (4) in September 2011, a round of golf at Clark's country club, valued at $42; and (5) in January 2012, $50 ticket to another MORE event. The judge attended these events as Clark's guest. Both Clark and the judge had long supported the charities at issue.

At the time, Clark and the judge were friends.

*Gift from Lincoln Law School*

In March 2011, Judge Bailey accepted tickets to the Barristers Ball at his alma mater, Lincoln Law School. He was an honored guest because he is an alumnus and a local judge.

**2. Conclusions of Law**

Judges are precluded from accepting gifts from anyone, except under limited circumstances, which we have determined are not applicable here. (Canon 4D(6).) Even when the gift falls within one of the specified exceptions, the judge may not accept the gift if it could create an appearance of impropriety. (Canons 2, 2A.)[5]

*Gifts from CASA*

The masters concluded that Judge Bailey violated canons 1, 2, 2A, and 4D(6),[6] and engaged in prejudicial misconduct in accepting gifts from CASA. The masters reasoned that because CASA volunteers are frequent participants in juvenile court proceedings, Judge Bailey's acceptance of gifts from the organization could cause an objective observer to doubt his impartiality in matters concerning those volunteers. We agree and reach the same legal conclusions.

Judge Bailey maintains that his acceptance of tickets to the 2009 Snowball Event was proper because he was invited to that CASA event by his brother-in-law, Supervisor Ron Briggs, the event speaker. As such, he contends the gift fell within the exception for gifts from a relative whose appearance or interest in a case would require the judge's disqualification (former canon 4D(6)(f)).[7] The judge, however, identified the gift to have

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[5] Canon 4D(6) was amended, effective 2013, to state that the exceptions to the gift prohibition apply only if acceptance of the gift "would neither influence nor reasonably be perceived as intended to influence the judge in the performance of judicial duties."

[6] The masters also concluded that the judge violated canon 4D(5), which prohibits judges from accepting gifts from a "party" whose interests have come or are reasonably likely to come before the judge. While CASA has an interest in matters that come before Judge Bailey, CASA is not a party. Therefore, we do not find a violation of canon 4D(5).

come from CASA on his Form 700, without any reference to Briggs. Further, even if the ticket came from Briggs, the judge's acceptance of the gift was improper because Briggs was a CASA director.

The judge contends that his acceptance of the other CASA tickets was proper because there is no evidence that he acted in a judicial capacity in favor of CASA. The gift was improper under canon 4D(6), regardless of whether there was favorable judicial action in return for the gift.

Moreover, accepting gifts, even nominal gifts, from entities with interests that are reasonably likely to come before the court creates an appearance of impropriety and lack of impartiality in violation of canons 1, 2, and 2A.[8] CASA volunteers frequently appear in court and advocate for children. They may be called to testify and they may take a position contrary to the position or interests of parties in the proceedings, such as the parents. The CJA Ethics Committee has issued ethics opinions stating that a judge who sits in a juvenile court may not accept a gift of attendance at a CASA fundraiser event. (CJA, 2011/2012 Jud. Ethics Update, p. 5 [juvenile court judge may not accept an invitation to attend CASA fundraiser as guest of CASA]; CJA, 2003/2004 Jud. Ethics Update, p. 5 [commissioner in dependency court may attend CASA fundraiser but may not accept luncheon as gift from CASA].)

Judge Bailey argues that, given the laudable service CASA provides, acceptance of the gifts did not prejudice public esteem for the judiciary and does not constitute prejudicial conduct. He contends that judges should be involved in organizations that

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[7] Former canon 4D(6)(f) was in effect at the time this gift was accepted. A similar exception is now in canon 4D(6)(a), which provides an exception for gifts from "a person whose preexisting relationship with the judge would prevent the judge under Canon 3E from hearing a case involving that person."

[8] In 2018, canon 4D(6) was amended to include subsection (i), which provides an exception to the gift prohibition for nominal gifts "provided the gift is not from a lawyer, law firm, or other person likely to appear before the court on which the judge serves." The commentary states a judge should carefully weigh acceptance of any nominal gift to avoid any appearance of impropriety or bias or any appearance that the judge is misusing the prestige of judicial office.

support at-risk children. The issue here is not the judge's involvement in a program for at-risk youth, but his acceptance of free attendance to CASA events as gifts.

We agree with the masters that acceptance of three gifts, even nominal gifts, from an organization that frequently appears in court proceedings before the judge could cause an objective observer to doubt the judge's impartiality in matters involving those volunteers.

*Gifts from Bradley Clark*

The masters concluded that acceptance of the gifts from Clark constitutes improper action. We agree, and also conclude that the judge violated canons 1, 2, 2A, and 4D(6).

Judge Bailey contends that he did not commit misconduct because the gifts from Bradley fell within the exception under former canon 4D(6)(f) for gifts from close personal friends whose appearance before the court would require the judge's disqualification. We disagree. Clark testified that he considers the judge a friend, but not a close friend. Moreover, Judge Bailey's position is inconsistent with the position he took concerning count three, in which he maintained that he was not disqualified from appointing Clark to be a special master in *Dorcich*.

Further, gift exceptions are not absolute; a judge may not accept a gift if to do so would create an appearance of impropriety (canons 2, 2A).[9] Judge Bailey accepted a round of golf from Clark a few months after he appointed Clark as a special master in *Dorcich* and a month after he approved his fees. The judge asserts that there is no evidence that the round of golf was a gift for appointing Clark. The question, however, is whether it could have created that appearance. In the commission's view, it could reasonably create that appearance.

The examiner urges the commission to conclude that the judge engaged in prejudicial misconduct. While accepting the gifts could have created an appearance of

[9] Canon 4D(6) currently states that the gift exceptions apply provided "that acceptance would not reasonably be perceived as intended to influence the judge in the performance of judicial duties."

impropriety, we agree with the masters that there is not clear and convincing evidence that the conduct would appear to an objective observer, knowing all the facts, to be "prejudicial to public esteem for the judicial office." (See *Broadman, supra,* 18 Cal.4th at p. 1092.) In this regard, we have considered that there is no evidence that Clark appeared before the judge as a party or an attorney representing a party, and that the judge reported the gifts on his Form 700, indicating that he was not attempting to conceal the gifts from the public.

*Gift from Lincoln Law School*

The masters concluded that Judge Bailey's acceptance of a ticket from Lincoln Law School violated canon 4D(6), and constitutes improper action. Neither party objects to this conclusion, which we adopt.[10]

**G. Count Five**

**1. Findings of Fact**

In November 2009, Judge Bailey attended a judicial education program at Northwestern University School of Law. The program paid for his travel, lodging, group meals, and related expenses. The judge did not report these payments on his 2009 Form 700.

In 2011, Judge Bailey attended a judicial education program at George Mason University School of Law (GMU) in Arlington, Virginia. The program paid for his lodging and group meals and reimbursed him for his travel expenses. The judge did not report the payments and reimbursements on his 2011 Form 700.

In his Answer to the Notice, the judge stated that he thought his attendance at the 2009 Northwestern program and 2011 GMU program did not have to be reported on his Form 700.

[10] As did the masters, we note that canon 4D(6)(h) provides an exception for invitations to events sponsored by educational institutions with which the judge is associated, if the same invitation is offered to persons who are not judges and are similarly situated. There is no evidence that other alumni were offered free tickets to this event.

The judge also attended two educational programs at GMU in March and October of 2014. The programs paid for his lodging and group meals and reimbursed him for his travel expenses.

In 2014, before he submitted his 2014 Form 700, Judge Bailey was informed by emails from both a court clerk and Presiding Judge Suzanne Kingsbury that any travel expenses associated with judicial education programs must be declared on the judge's Form 700.

On March 6, 2015, Judge Bailey filed his 2014 Form 700. On schedule E (Travel Payments, Advances and Reimbursements), he listed the two GMU programs he attended in 2014, and described the business activity of the source of income as "Judicial Education – tuition," but he did not fill in the amount of the payments received, or answer whether they were gifts or income. The programs did not charge tuition.

On March 11, 2015, the FPPC sent Judge Bailey a letter indicating that the judge had not reported the amount and type of payment. On April 1, 2015, the judge filed an amended Form 700 for 2014. On his amended Form 700, the judge inaccurately reported that he received $527.93 for the October GMU program. He actually received $1,348.51 for lodging and meals and $459.20 for travel.

The masters found that the judge inadvertently forgot to include some of his expenses. We defer to this finding.

**2. Conclusions of Law**

The masters concluded that Judge Bailey's incomplete and inaccurate reporting of payments on his Form 700 constitutes improper action, rather than prejudicial conduct, because his actions were inadvertent and negligent. Based on the masters' factual findings, to which we defer, we reach the same conclusion for the reasons discussed below.

The examiner contends that the judge engaged in prejudicial conduct in submitting inaccurate information on his amended 2014 Form 700, which was signed under penalty of perjury. In *Inquiry Concerning Kreep* (2017) 3 Cal.5th CJP Supp. 1, 10, the commission found that Judge Kreep engaged in prejudicial conduct in submitting a Form 700, which erroneously stated he was chairman of a political action committee and

received salary from that committee. More than a year later, the judge filed an amended Form 700 and stated that he erroneously listed himself as chairman, and that the money he received was for legal services. The masters found that the judge acted with reckless disregard for the truth. The commission concluded that the judge committed prejudicial conduct, because, "an objective person would find a judge's conduct in signing an official document under penalty of perjury with a reckless disregard for the truth to be prejudicial to public esteem for the judicial office." (*Id.* at pp. 14-16.)

We agree with the examiner that a judge should be expected to take exceptional care in filling out FPPC forms, particularly when signed under penalty of perjury. Here, however, unlike in *Kreep,* the masters did not find that the judge acted with a reckless disregard for the truth. Instead, they found that Judge Bailey inadvertently forgot to include some of the income he received relating to the October 2014 program. Based on this finding, we are not convinced that an objective observer would find the judge's conduct to be prejudicial to public esteem for the judiciary. This does not mean Judge Bailey did not engage in misconduct. He violated canons 2, 2A, and 3 (judge shall perform the duties of the judicial office competently and diligently [a judge is required to file a Form 700]), and engaged in improper action.

**H. Count Six**

**1. Findings of Fact**

In May 2015, Judge Bailey had a conversation with administrative analyst Suzanne Thurman, Judge Vicki Ashworth, and Judge Dylan Sullivan, while standing in Thurman's cubicle in the court's administration building. Judge Sullivan complimented the judge on the outfit he was wearing. Judge Bailey said he bought the outfit in France, and the salesperson who put it together for him was gay. He explained that he knew it looked good because gay men are "snappy" dressers. The conversation took place in an open office area where other county employees would have been able to overhear the conversation.

The tone of the conversation was lighthearted. Judge Ashworth and Thurman testified they were offended by the comments, but Judge Sullivan was not offended.

### 2. Conclusions of Law

The masters concluded that the judge violated canons 2, 2A, and 3C(1) (judge to behave impartially in the performance of administrative duties and shall not engage in speech that would reasonably be perceived as bias or prejudice), and engaged in improper action. We concur and reach the same conclusions.

Because his remarks did not perpetuate invidious or hateful stereotypes, we agree with the masters that an objective observer would not view the remarks as prejudicial to public esteem for the judiciary, and thus the remarks constitute improper action, rather than prejudicial misconduct. This does not mean that such remarks are proper. As observed by the masters, the judge's comments "reflect stereotypical attitudes about gay men." It is improper for a judge to make remarks that reflect stereotypes based on sexual orientation, whether negative or positive. We agree with the masters that "[s]uch remarks indicate that the speaker has preconceived ideas about a particular group, a characteristic that is contrary to the qualities of impartiality and propriety required of judges by our Code of Judicial Ethics."

## I. Counts Seven and Nine

### 1. Summary of Charges and Legal Issues

Count seven alleges in general terms that between August 2016 and August 2017, Judge Bailey used his judicial title and lent the prestige of judicial office to raise funds for his campaign, potential campaign, or exploratory committee to run for California Attorney General in 2018, personally solicited funds in support of his campaign for nonjudicial office, and accepted campaign contributions for a nonjudicial office without taking an unpaid leave of absence from his judicial office.

Count nine charges Judge Bailey with engaging in political and campaign activity that is inconsistent with the integrity, independence, and impartiality of the judiciary, and using his judicial title and prestige of his judicial office to promote his candidacy for Attorney General, including but not limited to 25 specific instances of campaign or potential campaign activity. In his Answer to the Notice, Judge Bailey admitted that he attended and participated in each of the events specified in count nine.

The California Code of Judicial Ethics prohibits an active judge from using the prestige of judicial office or the judicial title to advance the judge's own pecuniary and personal interests, and from personally soliciting funds for a nonjudicial candidate or engaging in political or campaign activity that creates an appearance of impropriety or lack of impartiality. (Canons 2B(2), 5, 5A(3).) A judge may, however, fundraise and campaign for nonjudicial office by taking an unpaid leave of absence. (Cal. Const., art. VI, § 17; canon 6H [a judge who is on leave while running for public office is exempt from complying with canons 2B(2), 4C(1) (appearance at public hearing) and 5].)

The masters concluded that the judge engaged in prejudicial conduct by raising funds and campaigning for a partisan, nonjudicial office while working as a judge, explicitly referring to his judicial title, and relying on the prestige of judicial office. This conduct, the masters concluded, is fundamentally inconsistent with the independence, impartiality and integrity of the judiciary. We agree.

Judge Bailey alleges that he did not engage in misconduct because he was conducting an exploratory, rather than actual, campaign. Further, he asserts that if the canons are interpreted to prevent him as a sitting judge from campaigning for nonjudicial office, without first taking an unpaid leave of absence, the canons violate his First Amendment rights. The masters rejected these arguments, as do we. Judge Bailey violated the Code of Judicial Ethics by soliciting contributions and conducting both an exploratory and actual campaign for nonjudicial office, and using the prestige of judicial office to do so. The applicable canons further a compelling state interest in preserving public confidence in the integrity and impartiality of the judiciary, and fostering the appearance that judicial decisions are not politically motivated.

**2. Findings of Fact**

On September 7, 2016, Judge Bailey personally signed and filed California Form 410, Statement of Organization Recipient Committee for Judge Steven Bailey – Attorney General 2018. He solicited campaign contributions beginning in October 2016. The Judge Steven Bailey – Attorney General 2018 committee filed three campaign statements (Form 460) with the Secretary of State. Each statement was signed by Judge

Bailey. The statements indicated that the judge received the following contributions: $8,224 for the period January 1, 2016 through December 31, 2016; $15,353 for the period January 1, 2017 through June 30, 2017; and $3,609 for the period July 1, 2017 through December 31, 2017.

Between August 2016 and August 30, 2017, the judge's exploratory and actual campaigns made frequent use of his judicial title and photographs of himself wearing his judicial robe. He used email addresses and maintained a campaign website that featured the user names "judgestevenc.bailey" and "judgestevenbailey.ag2018." He distributed campaign donation envelopes and "rack cards" that referred to him as a "sitting judge" and stated that his "judicial experience and his legal and legislative skills make him uniquely qualified to be California's Attorney General in 2018."

Prior to his judicial retirement, Judge Bailey spoke at numerous political events, including in Whittier, Long Beach, Torrance, and Santa Fe Springs. He also attended the Patriots Award Breakfast and Charity Banquet in Whittier in September 2016, and the Mexican American Bar Association Judges Night & Awards Dinner in Los Angeles in November 2016. At these events, he usually handed out donation envelopes that referred to him as a sitting judge. Announcements for these events referred to his judicial title, and some included a summary of his judicial background and stated that Judge Bailey would be introducing his candidacy for California Attorney General. At the Santa Fe Springs event on October 7, 2016, he handed out flyers, identifying him as "Judge Steven Bailey," with photographs of himself in his judicial robe and judge's gavels.

When introduced at these events, Judge Bailey was referred to as both a sitting judge and a candidate or prospective candidate for California Attorney General. The judge did not instruct campaign staff members or the hosts of these events to avoid using his judicial title. His stump speech, delivered on some of these occasions, also referred to his judicial office and experience as a sitting judge. His speeches often included comments about his opinion on criminal justice legislation.

Between August 2016 and August 2017, Judge Bailey met or communicated with community, church, and Republican Party leaders to solicit support and endorsement for

his candidacy or potential candidacy. Individuals associated with the Republican Party introduced the judge to supporters in Santa Clara County and San Mateo County. The judge held face-to-face meetings with a lobbyist for the California Building Industry Association and with the director of faith and public policy at a large evangelical church in Chino Hills in August 2016. The judge often arranged these meetings using his campaign email accounts that referenced his judicial title. During the meetings, he referred to himself as a judge.

In seeking a meeting with the lobbyist for the Building Industry Association, the judge sent an email with the signature line "Judge Steven Bailey," which stated, "While it might appear that the Office of the Attorney General has minimal impacts on the building industry, the Attorney General is the chief law officer for the people of this state. As such, the Attorney General is responsible for enforcing or not enforcing state air and water quality standards, CEQA and climate change. Having someone who has common sense is critical. The business community can no longer afford the selective enforcement of the law … I will be bringing my experience as a Judge to this office. As a Judge, I am committed to the fair application of the law using common sense."

In November 2016, Judge Bailey sought advice from Former Judge Julie Conger, a fellow director of the Alliance of California Judges (Alliance) and an expert on judicial ethics, about ethical prohibitions and standards he would be required to follow during his campaign. Judge Conger counseled Judge Bailey that he should not distribute flyers that included a photograph of him in his judicial robe, and urged him to remove his judicial title from emails related to his campaign and to avoid using the title in campaign literature until after he took a leave of absence from the bench. In May 2017, Judge Conger received a flyer from Judge Bailey's campaign that made numerous references to his judicial title and included a link for making monetary contributions. Judge Conger sent the judge an email stating that he had completely dismissed her advice and was using his judicial title inappropriately. She further suggested that he immediately take a leave of absence from his judicial office and resign his directorship with the Alliance. The judge resigned his directorship, but did not take a leave of absence from the bench and

continued to use his judicial title to solicit support and contributions to his campaign for Attorney General.

Judge Bailey filed his Candidate Intention Statement with the Secretary of State on April 27, 2017. (The failure of the judge to file this statement before accepting contributions is the basis of the charges in count eight.)

Judge Bailey retired on August 31, 2017.

Judge Bailey filed his declaration of candidacy on February 25, 2018.

The masters found the evidence clearly established that Judge Bailey engaged in an exploratory campaign and an actual campaign for California Attorney General while he was a sitting superior court judge. Judge Bailey objects to the finding that he engaged in an actual campaign. He contends that he only engaged in an exploratory campaign and did not become an actual candidate until he filed his declaration of candidacy on February 25, 2018.

Based on our own review of the record, we find that the masters' finding is supported by clear and convincing evidence. The record is replete with references by the judge or his campaign staff to Judge Bailey's "campaign" for Attorney General. For instance, the block signature on some emails from his Southern California Campaign Coordinator included "Candidate for California Attorney General." In August 2016, the judge sent an email to numerous individuals stating that he would be introducing his new Southern California coordinator for "the campaign" and that she would be a great addition to the "campaign." In September 2016, the judge sent an email to "Andrea," stating that he would "like the opportunity to sit down and discuss [his] campaign for California Attorney General with [her]." Invitations to the Patriot Awards dinner stated "Congratulations to the 2016 Patriot Awards Honorees - Judge Steven Bailey California Attorney General Candidate November 2018." In an email to Douglas Boyd, the treasurer of the Los Angeles County Lincoln Club, the judge stated in reference to his appearance at an upcoming event, "As a candidate for Attorney General, I would plan on discussing . . . ." As early as October 7, 2016, the judge and/or his Southern California

Campaign Coordinator sent out business cards with the inscription, "Judge Steven Bailey, Candidate FOR CALIFORNIA ATTORNEY GENERAL."

**3. Conclusions of Law**

*Canon Violations and Level of Misconduct*

The masters concluded that by using his judicial title and lending the prestige of his judicial office to raise campaign funds and to promote his exploratory campaign and actual campaign for Attorney General, Judge Bailey violated canons 2B(2), 4A (a judge shall conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on a judge's capacity to act impartially, demean the judicial office, interfere with the proper performance of judicial duties, or lead to frequent disqualification), 5 (a judge shall not engage in political activity that may create the appearance of political bias or impropriety), and 5A(3) (a judge shall not personally solicit funds for a nonjudicial candidate). We concur, and also conclude that the same conduct violated canons 2 and 2A.

A judge "considering running for nonjudicial office" may only engage in "private planning during time away from the courthouse" until the judge takes a leave of absence from the bench. (Rothman, *supra,* § 11:23, p. 747; see also Cal. Judges Assn., Judicial Ethics Update (2005), p. 2 [a judge "considering running for non-judicial office may not seek endorsements before taking [a] leave of absence."]) Further, canon 2B(2) prevents a sitting judge from using his or her judicial title to raise money in connection with a campaign for nonjudicial office. (*Public Admonishment of Former Judge Paul E. Zellerbach* (2011) [the judge took a leave of absence to campaign for nonjudicial office, but, when he returned to the bench, he allowed his judicial title to be used to solicit money to retire his campaign debt].) Judge Bailey went far beyond private planning. He actively solicited campaign contributions and endorsements, and spoke frequently at political and campaign events as a candidate or potential candidate for Attorney General.

Further, as the masters observed, Judge Bailey clearly used his judicial title and the prestige of his judicial office to promote his campaign:

> [Judge] Bailey's judicial title featured prominently in all of his campaign communications, from his Facebook page, email address and website names to his flyers, rack cards, and donation envelopes. He used his judicial title when seeking speaking engagements and introductions to potential supporters. [Judge] Bailey's campaign literature described him as a 'sitting judge' and stated his 'judicial experience' made him 'uniquely qualified' for the office of Attorney General. Even before he retired from the bench, [Judge] Bailey solicited and received thousands of dollars in campaign contributions.

We agree with the masters that Judge Bailey engaged in prejudicial conduct by raising funds and campaigning for a partisan, nonjudicial office while working as a judge, explicitly referring to his judicial title and relying on the prestige of his judicial office. This conduct is fundamentally inconsistent with the independence, impartiality and integrity of the judiciary, and is prejudicial to public esteem for the judicial office. (See, e.g., *Williams-Yulee v. Florida Bar* (2015)__ U.S.___ [135 S.Ct. 1656] (*Williams-Yulee*); *Broadman, supra,* 18 Cal.4th at p. 1103.)

The examiner requests that the commission find that Judge Bailey engaged in prejudicial conduct as to each of the 25 subcounts in count nine. The masters did not make specific factual findings or legal conclusions as to each subcount. We view the events and activities alleged in subcounts A through Y as evidence that the judge engaged in improper campaign and political activity on an ongoing basis for an extended period of time before he retired. As such, we conclude that between August 2016 and August 2017, the judge engaged in a course of prejudicial conduct by, without taking an unpaid leave of absence from judicial office, engaging in political and campaign activity that is inconsistent with the independence and integrity of the judiciary, and by using his judicial title and the prestige of his office to raise funds and promote his candidacy for Attorney General. The masters' factual findings, which we have adopted, support this conclusion.

*First Amendment Challenge*

Judge Bailey contends that enforcement of the prohibitions on political fundraising and campaigning in the California Code of Judicial Ethics, as applied to his campaign for

Attorney General, violates the First Amendment of the United States Constitution. The masters found this argument unpersuasive, as do we.

We agree with and adopt the following analysis by the masters.

> 'The right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech. "Public discussion about the qualifications of those who hold or who wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment." [Citation.]' (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548; see also *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 673.)
>
> But the Supreme Court has also long recognized that 'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' (*Pickering v. Board of Education* (1968) 391 U.S. 563, 568 (*Pickering*); see also *Broadman, supra,* 18 Cal.4th at pp. 1102-1103 [applying *Pickering* balancing test to claim that former Canon 3A(6) violated judge's First Amendment rights].)
>
> A government entity may not strike this balance to prohibit an employee from speaking on issues of public concern in a manner that does not interfere with the employee's performance of his or her duties. (*Pickering, supra,* 391 U.S. at pp. 572-573.) It may, however, prohibit employees from actively participating in political activities such as becoming a candidate for elective office, fundraising, campaigning for another partisan candidate or managing such a campaign. (*Civil Service Commission v. Letter Carriers* (1973) 413 U.S. 548, 556, 564.) A state may also forbid civil servants from soliciting contributions to partisan campaigns, taking part in political rallies or meetings, soliciting votes and distributing partisan campaign literature. (*Broadrick v. Oklahoma* (1973) 413 U.S. 601, 616-617.)

Even greater restrictions may be imposed on elected office holders and members of the judiciary. For example, *Clements v. Fashing* (1982) 457 U.S. 957 (*Clements*), upheld a Texas state constitutional provision that prohibited elected officials, including judges, from running for the state Legislature during the official's term of office, even if the official resigned before becoming a candidate. In rejecting an equal protection challenge to the provision, the Supreme Court characterized the candidacy ban as a 'de minimis burden on the political aspirations of a current officeholder.' (*Id.* at p. 967, italics omitted.) The Court noted the provision furthers Texas' legitimate interest in safeguarding the integrity of its elected judiciary because a judge campaigning for legislative office might neglect his or her duties or 'be tempted to render decisions and take actions that might serve more to further his [or her] political ambitions than the responsibilities of his [or her] office.' (*Id.* at p. 968.)

The Court rejected a First Amendment challenge to the provision for similar reasons. It concluded the provision imposed an 'insignificant' burden on judges' First Amendment interests in candidacy because it required only that they wait until the end of their term in judicial office to run for the legislature. (*Clements, supra,* 457 U.S. at p. 972.)

*Williams-Yulee, supra,*___U.S.___ [135 S.Ct. 1656] upheld against a First Amendment challenge a canon of judicial ethics that prohibited judges and judicial candidates from personally soliciting campaign funds. The Court acknowledged that a state, 'may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.' (*Id.* at p. 1665.) States with elected judges have a 'compelling interest in preserving public confidence in the integrity of the judiciary . . . .' (*Id.* at p. 1666; see also *Broadman, supra,* 18 Cal.4th at p. 1103 [finding 'a compelling public interest in maintaining a judicial system that both is in fact and is publicly perceived as being fair, impartial, and efficient.'].) A canon of judicial ethics that prohibits a judge or judicial candidate from personally soliciting campaign donations is narrowly tailored to serve that compelling interest. (*Williams-Yulee, supra,* at p. 1666.) 'The way the Canon advances those interests is intuitive: Judges, charged with exercising strict neutrality and

independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity.' (*Ibid.)*

By contrast, Minnesota violated the First Amendment when it adopted a canon of ethics stating that a ' "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." ' (*Republican Party of Minnesota v. White* (2002) 536 U.S. 765, 768.) Although the state has a compelling interest in preserving the impartiality of its judiciary and the appearance of judicial impartiality, the regulation was not narrowly tailored to serve that interest. (*Id.* at pp. 775, 788.) As Justice Kennedy explained in a concurring opinion, Minnesota may not 'censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.' (*Id.* at p. 794.)

The Canons of Ethics at issue here – Canons 2B(2), 4A, 5 and 5A(3) — are more like those at issue in *Clements, supra,* and *Williams-Yulee, supra,* than *Republican Party of Minnesota v. White, supra.* Unlike the regulation at issue in *Republican Party of Minnesota v. White, supra,* our Canons of Ethics do not prohibit a judge from expressing an opinion on an issue of public concern. Instead, our Canons of Ethics strive to preserve both the reality and the appearance of judicial impartiality, integrity and independence, particularly from partisan politics. To that end, they require a judge to avoid extrajudicial activities that 'cast reasonable doubt on the judge's capacity to act impartially[,]' or 'may create the appearance of political bias or impropriety.' (Canon 4A, 5.) A judge may not use his or her judicial title or the prestige of judicial office to 'advance the pecuniary or personal interests of the judge [,]' including a personal interest in holding nonjudicial office. (Canon 2B(2), 5.) A judge may not personally solicit funds for a nonjudicial candidate. (Canon 5A(3).) Each of these restrictions falls away when a judge, seeking election to nonjudicial office, takes a leave of absence without pay from his or her judicial office. (Cal. Const., art. VI, § 17; Canon 6H.)

> Like the candidacy ban at issue in *Clements, supra,* article VI, section 17 of the Constitution and the Canons of Ethics require a judge to take an unpaid leave of absence or complete his or her term in judicial office before embarking on a campaign for nonjudicial office. California's compelling interest in preserving the independence, impartiality and integrity of its judiciary (*Broadman, supra,* 18 Cal.4th at pp. 1102-1103), is 'sufficient to warrant the de minimis interference with [judges'] interests in candidacy.' (*Clements, supra,* 457 U.S. at pp. 971-972, italics omitted.)
>
> Second, the restriction on fundraising for nonjudicial campaigns passes First Amendment muster for the reasons stated in *Williams-Yulee, supra.* As the Court noted, 'A State may assure its people that judges will apply the law without fear or favor - and without having personally asked anyone for money.' (*Williams-Yulee, supra,* 135 S.Ct. at p. 1662.)"

Judge Bailey contends that the masters incorrectly concluded that the canons are narrowly tailored to serve a compelling state interest (the strict scrutiny test). The examiner contends that this First Amendment issue here should be analyzed under the *Pickering* balancing test, a more permissive test than the strict scrutiny test.

We conclude that the canons pass constitutional muster under either test. As the Supreme Court pointed out in *Williams-Yulee,* since the judiciary's authority "depends in large measure on the public's willingness to respect and follow its decisions," public perception of judicial integrity is '"a state interest of the highest order.'" (*Williams-Yulee, supra*, 135 S.Ct. at p. 1666, citation omitted.)

When an active judge runs for nonjudicial office, particularly an office that litigates in state courts, there can be an appearance that the judge will make judicial decisions in a manner that will help his or her campaign, rather than based on the rule of law. This concern is illustrated in Judge Bailey's comments to the lobbyist for the Building Industry Association. The judge informed the lobbyist that the Attorney General has impact on the building industry through "enforcing or not enforcing state air and water quality standards, CEQA and climate change." A reasonable person could interpret this comment as suggesting that the judge would apply these laws in a manner

favorable to the building industry while sitting as a judge running for Attorney General. Moreover, the concern may be even more pronounced when the judge is running for a position that includes criminal prosecution, such as the Attorney General, while presiding over criminal cases. This could lead to a perception that the judge will make rulings that appear to be "tough on crime" to promote the judge's candidacy.

In *Wolfson v. Concannon* (9th Cir. 2016) (en banc) 811 F.3d 1176, the Ninth Circuit Court of Appeals upheld an Arizona law prohibiting judges and judicial candidates from, among other things, personally endorsing or making speeches on behalf of other candidates for public office. The court concluded the law served a compelling state interest in preserving public confidence in the integrity of the judiciary, noting that "[w]hen a judicial candidate actively engages in political campaigns, a judge's impartiality can be put into question, and the public can lose faith in the judiciary's ability to abide by the law and not make decisions along political lines." (*Id.* at p. 1185.)

Judge Bailey also argues that even if there is a compelling state interest, the canons are not narrowly tailored to serve that interest. The *Williams-Yulee* Court stated that the First Amendment required that the canon be "narrowly tailored, not that it be 'perfectly tailored.'" (*Williams-Yulee*, *supra*, 135 S.Ct. at p. 1671, citation omitted.) "The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary . . . . [M]ost problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form." (*Ibid*., citation omitted.) By applying canons 2B(2), 4C(1), and 5 only to judges who have not taken a leave of absence, the canons have been narrowly tailored to achieve the goals of preserving public confidence in the fairness and integrity of the judiciary, and fostering the appearance that judges do not make decisions for political reasons.

Judge Bailey contends that the canons are unconstitutionally vague. "A rule is not void for vagueness if it provides fair notice to those to whom [it] is directed." (*Broadman*, *supra*, 18 Cal.4th at pp. 1103-1104, quoting *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1048, original brackets, interior quotation marks omitted.) The

applicable canons provide fair notice to judges of their ethical obligations while campaigning for nonjudicial office. Canon 6H makes clear when a judge can use his or her judicial title and the prestige of judicial office in a campaign for nonjudicial office – when the judge takes a leave of absence without pay pursuant to article VI, section 17 of the California Constitution. In addition, canon 6H defines "political activity" to include "soliciting and accepting campaign contributions for the other [nonjudicial] public office."

The judge further contends that the canons are underinclusive and applied unequally because a judge running for judicial office in California can personally solicit funds, whereas a judge running for nonjudicial office cannot, without taking a leave of absence. With respect to a law being underinclusive, the United States Supreme Court has stated: "Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding 'underinclusiveness limitation.' [Citation.] A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." (*Williams-Yulee*, *supra,* 135 S.Ct at p. 1668.)

Moreover, there are compelling interests in treating judges differently when they are involved in nonjudicial campaigns. Solicitation of campaign funds for nonjudicial office may encroach on separation of powers and the independence of the judiciary. When a judge solicits funds for a nonjudicial political campaign, there can be a heightened perception that the judge's decisions will be politically motivated. Campaigns for nonjudicial office are inherently more political in nature than judicial campaigns. Candidates for judicial office are running for an office in which they are expected to follow the law, regardless of public opinion. Candidates for nonjudicial office, however, are running for office with a political point of view and are expected to express their political opinion. As the *Williams-Yulee* Court stated, "Judges are not politicians, even when they come on the bench by way of the ballot." (*Williams-Yulee, supra,* 135 S.Ct. at p. 1662.)

There is another compelling, and practical, reason for treating judges running for judicial office differently than judges running for nonjudicial office. Given that

California judges are subject to periodic contested elections, requiring judges to take a leave of absence in order to campaign for and solicit funds for judicial office would be a significant burden on the administration of the judiciary, and could be subject to abuse. An attorney who is displeased with a judge's rulings could force the judge to take a leave of absence by running against the judge.

For these reasons, as did the masters, we reject Judge Bailey's First Amendment challenge to the Code of Judicial Ethics as applied to him.

## J. Count Eight

### 1. Findings of Fact

Judge Bailey filed a Candidate Intention Statement (Form 501) for the Office of Attorney General on April 27, 2017. Government Code section 85200, a provision of the Political Reform Act, provides that, "[p]rior to the solicitation or receipt of any contribution or loan, an individual who intends to be a candidate for an elective state office . . . shall file with the Secretary of State an original statement, signed under penalty of perjury, of intention to be a candidate for a specific office." Judge Bailey's campaign committee organized in September 2016, and accepted monetary contributions of $17,749 before April 27, 2017.

Judge Bailey acknowledges that the campaign committee for his Attorney General campaign solicited and accepted contributions before he filed the Form 501 for that campaign. He asserts that the untimely filing was inadvertent and caused by the then-treasurer of his campaign. When the campaign hired a new treasurer, she discovered the mistake and filed a Form 501 for the campaign. The masters found the judge's untimely filing was an oversight, and the result of Judge Bailey's failure to properly supervise his campaign staff and attend to the administrative requirements of his campaign. We adopt this finding.

### 2. Conclusions of Law

Judge Bailey violated Government Code section 85200 by soliciting and accepting campaign contributions before filing his Candidate Intention Statement. In so doing, he

violated canon 5, which requires judges to "comply with all applicable election, election campaign, and election campaign fundraising laws and regulations," and canon 2A.

The masters concluded that the judge's misconduct constitutes improper action. The examiner asks the commission to conclude that the judge engaged in prejudicial conduct.

A purpose of Political Reform Act is to ensure that receipts and expenditures in election campaigns are fully and truthfully disclosed in order that voters may be fully informed and improper practices inhibited. (Gov. Code, § 81002(a).) The commission has stated that even unintentional violations of campaign reporting laws can undermine public respect for the judiciary. (*Public Admonishment of Judge Tara M. Flanagan* (2017); *Public Admonishment of Judge Charles R. Brehmer* (2012).) In this case, however, the judge filed a campaign statement reporting contributions he received before he filed his Candidate Intention Statement. Thus, because the violation of the Political Reform Act was inadvertent and did not deprive the public of important information, we adopt the masters' conclusion that the judge engaged in improper action.

**K. Count Ten**

**1. Findings of Fact**

In 2016, Martha Romero, Judge Bailey's Southern California Campaign Coordinator, created the "Judge Steven Bailey" Facebook page for the judge's Attorney General campaign. Romero informed the judge that she had created the page by the end of 2016. In November and December 2016, she had made several posts on the page referring to Judge Bailey by his judicial title and promoting his campaign. Judge Bailey was informed of the Facebook page in a supplemental preliminary investigation letter from the commission dated December 16, 2016. He did not instruct Romero to stop using his judicial title in the posts.

Romero is a Los Angeles-area attorney who has known Judge Bailey since 2000. In August 2016, Judge Bailey told Romero that he was thinking of running for Attorney General and asked her to help with the exploratory campaign. The judge gave Romero

the title of Southern California Campaign Coordinator. On August 13, 2016, Judge Bailey sent an email to numerous individuals introducing Romero by this title.

As the Southern California Campaign Coordinator, Romero made arrangements for the judge to meet people in Southern California, attended events with him, and made contacts with people on the judge's behalf. In September 2016, Judge Bailey, by email, tried to set up meetings with Southern California Republicans. He included Romero on the emails and asked the recipients to work with her to schedule the meetings. Romero's responsibilities included arranging for Judge Bailey to attend the Patriots Award event in Whittier and for his campaign to buy an advertisement in the event program; setting up other meetings with Republican groups; corresponding with people who attended the events and expressed interest in the campaign; and arranging for Judge Bailey to attend the Mexican American Bar Association Judges' Night and Awards Dinner in Los Angeles.

**2. Conclusions of Law**

The masters concluded that Judge Bailey violated canon 2B(2) and engaged in prejudicial misconduct by failing to supervise Romero and take any measures to guard against the impermissible use of his title. The masters noted: "Even after he learned about the Facebook page, [Judge] Bailey took no action to cure the improper use of his judicial title. He did not ask Romero to delete the page, edit her posts or even to avoid using his title in the future." We concur and reach the same legal conclusions, and find that the judge violated canons 2 and 2A, in addition to 2B(2).

Judge Bailey asserts that he cannot restrict the First Amendment rights of others to free speech. The examiner acknowledges that if Romero had no connection to Judge Bailey, he could not be held responsible for anything she posted on her personal Facebook pages. As the masters point out, however, Romero was the judge's Southern California Campaign Coordinator, and very involved in the judge's campaign. As such, we concur with the masters that the judge had an obligation to take some action to prevent the improper use of his title in connection with campaign communications and events, even if it was just to instruct Romero to ensure that the Facebook page did not

refer to his judicial title and position. (Cal. Com. Jud. Ethics Opns., Opinion 2016-008, p. 21 ["[j]udges have an affirmative obligation to guard against impermissible uses of their judicial titles"].)

Judge Bailey further argues that he did not engage in prejudicial conduct because the public would have no way of knowing if he asked Romero not to use his title. The standard for prejudicial conduct, however, assumes that an objective observer is familiar with the facts. (*Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 266, citing *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 312.) In the commission's view, the judge's failure to supervise a campaign staffer and take any measures to guard against impermissible use of his judicial title would be considered prejudicial to public esteem for the judiciary in the eyes of an objective observer.

**L. Count Eleven**

**1. Findings of Fact**

Romero also maintained a Facebook page for her law firm, the Romero Law Firm. In a post on that page, dated October 29, 2016, Romero included photos of Judge Bailey and wrote, "My friend Judge Steven Bailey is running for California Attorney General 2018 [*sic*] He is not a politician. Please Help us!" and "Judge Steven Bailey. Candidate for Attorney General 2018. He will be the next Attorney General!!! Please repost. We need to win this!!"

Judge Bailey became aware of this post in December 2016, when he received a supplemental preliminary investigation letter from the commission. At that time, the judge asked Romero to remove any photographs she had posted of him in his judicial robes. He did not, however, ask her to make any other changes to her posts.

**2. Conclusions of Law**

For the reasons discussed with respect to count ten, the masters concluded that Judge Bailey engaged in prejudicial conduct in failing to take any measures to guard against the improper use by Romero of his judicial title. We reach the same conclusion and conclude that the conduct violated canons 2, 2A, and 2B(2).

As did the masters, we acknowledge that Judge Bailey could not force Romero to edit her posts about him or to avoid using his judicial title in future posts. He could, however, have asked her to modify her posts to be in compliance with his ethical obligations.

Judge Bailey suggests that by disciplining him for Romero's posts, the commission infringes on Romero's First Amendment rights. That is not the case. Romero's First Amendment rights are not implicated by requiring the judge to ask her to comply with a request to remove the Facebook posts.

## IV.

## DISCIPLINE

In determining the appropriate level of discipline, we first and foremost consider our mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and impartiality of the judiciary. (See *Broadman, supra,* 18 Cal.4th at pp. 1111-1112.) We have determined that this purpose is best served by imposition of a censure and bar based on the following considerations.[11]

The appropriate level of discipline depends to a large extent on the nature and number of incidents of misconduct. (*Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307, fn. 2.) We look to see whether the misconduct is an isolated incident or reflects a pattern of misconduct indicating that the judge lacks the integrity, impartiality, and temperament required of a judge. (See *Fletcher, supra,*19 Cal.4th at p. 918.) In this matter, Judge Bailey has engaged in numerous incidents of misconduct spanning the entire course of his judicial career, including a course of prejudicial conduct involving improper campaign activity over a period of a year. In

[11] Article VI, section 18(d) of the California Constitution provides that the commission may "censure a judge or former judge ... for action ... that constitutes willful misconduct in office, ... or conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . ." The commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court. (Cal. Const., art. VI, § 18(d).) The acts of prejudicial conduct in this matter support our determination to censure and bar Judge Bailey.

addition, in 2013, he received a strong advisory letter for delays in ruling on at least 15 matters.

The extent and nature of the judge's misconduct reflects an inability or unwillingness to comply with the standards of judicial conduct expected of every judge. Judge Bailey has violated the Code of Judicial Ethics both on the bench and off the bench. His misconduct involves a broad spectrum of ethical violations, including making judicial orders and an appointment without disclosing personal relationships reasonably related to disqualification, improper receipt of gifts, failing to make complete and accurate disclosures to the FPPC as required by law, making comments reflecting bias, and using the prestige of his judicial office to campaign for and solicit funds for his campaign for nonjudicial office, without taking a leave of absence from the bench. Judge Bailey demonstrated a conscious disregard of his ethical obligations by continuing to campaign for Attorney General without taking a leave of absence after being advised by a judicial ethics expert that he was in violation of the canons, and by failing to ask Romero to stop referring to him by his judicial title on Facebook posts after being alerted to the posts by the commission.

Significantly, the masters observed, "Judge Bailey has his own view on 1. being a judge, 2. acting with proper judicial demeanor, 3. Superior Court administration, and 4. appropriate conduct on the bench. We believe that his views are misinformed and erroneous." The masters also note that he is lacking in judicial temperament. Our own review of the record and observation of the judge at his appearance reveal a judge who plays by his own rules with little concern for whether his conduct comports with the rules applicable to all judges under the Code of Judicial Ethics.

Another important factor we consider is whether the judge has shown an appreciation for the impropriety of his conduct. "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248; see Policy declaration 7.1(2)(a).) Judge Bailey contends that much of his conduct was proper and in accordance

with his ethical obligations. In our view, he interprets the canons in an unreasonably liberal manner in order to justify his conduct.

Judge Bailey claims he has "suffered a continuous onslaught of allegations from the Commission and Presiding Judge Suzanne Kingsbury." He suggests that Judge Kingsbury and the "toxic environment in the El Dorado Superior Court" are to blame for the charges he faced. Judge Bailey fails to recognize it is his improper conduct that is the basis of this inquiry, regardless of the motivations of those who brought forth the allegations. There is no evidence that a toxic environment in the court or any animosity between Judge Bailey and Judge Kingsbury resulted in misinformation being provided to the commission or inaccuracies in the evidence presented against the judge.

Another aggravating factor is Judge Bailey's failure to cooperate fully with the commission's investigation on one issue. (Policy declaration 7.1(2)(b).) During the preliminary investigation, the judge denied that he created the "Judge Steven Bailey" Facebook page. In a supplemental preliminary investigation letter and a follow up email, the judge was asked for the identity of the person or persons who created or maintained the "Judge Steven Bailey" Facebook page. The judge did not provide the requested information in response to either inquiry, even though he knew Romero was the person who created and controlled the Facebook page.

Whether the misconduct undermines the integrity of and respect for the judiciary is another factor the commission considers in determining the appropriate discipline. "The maintenance of the integrity and impartiality of the judiciary is severely impaired" when a judge uses the title or prestige of judicial office to obtain a personal advantage. (Rothman, *supra,* § 8.40, pp. 530-531.) Here, Judge Bailey used the prestige of his judicial office extensively to promote his own candidacy for Attorney General. Further, the judge repeatedly failed to abide by the Code of Judicial Ethics and requirements of the Political Reform Act. Citizens are expected to comply with the rule of law. Public respect for the judiciary cannot help but be eroded when a judge fails to abide by laws and rules applicable to the judiciary.

We believe there is a very high probability that Judge Bailey will engage in future misconduct if he were to return to the bench. There is little likelihood of reform when a judge has engaged in multiple ethical violations on and off the bench during the entire course of his or her judicial career, fails to appreciate the impropriety of the misconduct, and continues to engage in the same conduct despite being advised of the ethical impropriety.

In order to fulfill our mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity of the judiciary, we have determined that Judge Bailey should be censured and barred from sitting in a judicial capacity in the future.

**ORDER**

Good cause appearing, the commission hereby censures former Judge Steven C. Bailey and bars him from seeking or holding judicial office, or accepting a position or an assignment as judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accepting reference of work from any California state court, at any time in the future.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Dr. Michael A. Moodian; Mr. Richard Simpson; and Hon. Erica R. Yew voted to issue this decision and order imposing a public censure and bar. Mr. Adam N. Torres did not participate in deliberations or vote in this matter.

Dated: February 27, 2019

Nanci E. Nishimura
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| | |
|---|---|
| **INQUIRY CONCERNING JUDGE JEFFREY G. BENNETT**<br><br>**No. 206** | **DECISION AND ORDER IMPOSING PUBLIC CENSURE PURSUANT TO STIPULATION (Commission Rule 127)** |

This disciplinary matter concerns Judge Jeffrey G. Bennett, a judge of the Ventura County Superior Court. On March 2, 2020, the commission filed its Notice of Formal Proceedings against Judge Bennett. Judge Bennett and his counsel, Heather L. Rosing, Esq. of Klinedinst PC, have entered into a stipulation with the examiner for the Commission on Judicial Performance, Mark A. Lizarraga, Esq., pursuant to commission rule 127, to resolve the pending formal proceedings involving Judge Bennett by imposition of a public censure. The Stipulation for Discipline by Consent (Stipulation) was approved by the commission on March 18, 2020, pursuant to the following terms and conditions and stipulated facts and legal conclusions. A copy of the Stipulation is attached.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the Inquiry Concerning Judge Jeffrey G. Bennett, No. 206.

2. The commission shall issue a public censure based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public censure may articulate the reasons for its

decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, the Stipulation, the judge's affidavit of consent, and the commission's decision and order shall be made public.

5. Judge Bennett waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. The commission may reject this proposed disposition and resume formal proceedings. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Bennett.

The parties stipulated and agreed that the commission shall issue a public censure on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Bennett became a judge of the Ventura County Superior Court in 2009. His current term began in January 2015.

Count One

On March 11, 2015, Judge Bennett was presiding in the master calendar department. An African-American defendant appeared before him who had an outstanding warrant on a felony. In determining whether to remand the defendant into custody, Judge Bennett asked the defendant a series of questions and the defendant provided what the judge believed to be evasive answers. Judge Bennett then asked the defendant to stop "shucking and jiving."

The conduct described above violated the Code of Judicial Ethics, canons 1 (a judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved), 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities), 2A

(a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 3B(4) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity), and 3B(5) (a judge shall not engage in speech, gestures, or other conduct that would reasonably be perceived as bias), and constitutes prejudicial misconduct.

Count Two

On May 17, 2016, Judge Bennett presided over the matter of *People v. Gilbert Regalado,* No. 2015027976. On that date, the People were represented by Deputy District Attorney (DDA) Marc Leventhal, and the defendant was represented by defense counsel Victor Salas. Judge Bennett met in chambers with the attorneys to discuss settlement. Salas entered chambers first and shook the judge's hand. Leventhal then greeted the judge and held out his hand. Judge Bennett looked at Leventhal's hand and stated, "I'm not sure I want to shake your hand," or words to that effect, but did shake his hand. Leventhal asked the judge if something was the matter. Judge Bennett replied with a statement to the effect of, "Do you know how much trouble you have caused me? Do you know how much money I have had to pay lawyers because of you?" Judge Bennett then spoke about the matter of *People v. Thomas Campi,* No. 2014032929, in which Leventhal had previously appeared before him, for about five minutes. The judge stated that someone had complained about him to the Commission on Judicial Performance, leading to a disciplinary hearing. The judge stated he had spent more than $10,000 on lawyers and had to obtain personal references and testimonials to "clear [his] name," or words to that effect.

Judge Bennett's comments and conduct toward DDA Leventhal created, at a minimum, the appearance of retaliation based on the belief that Leventhal had complained to the commission about the *Campi* matter, or had assisted or cooperated with an investigation that the commission had performed. The judge falsely stated that his name had been "clear[ed]" in the 2015 commission matter,

and falsely stated that he had to pay lawyers $10,000 in connection with his defense in that matter.

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(4), 3B(5), and 3D(5) (a judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge), and constitutes prejudicial misconduct.

Count Three

Judge Bennett engaged in undignified, discourteous, and offensive sexualized (or otherwise crude) conduct in the workplace, as follows.

A. Judge Bennett repeatedly stated, while in chambers and in the presence of DDA Elisabeth Main, that he was the "only one in the courthouse with the balls to make a ruling," or words to that effect. The last time the judge made such a statement in DDA Main's presence was in 2018.

B. On January 17, 2018, while seated on the bench and wearing his judicial robe, Judge Bennett engaged in conversation with others in the courtroom about recent mudslides in the area. Present in the courtroom were the judge's judicial assistant, a bailiff, and several attorneys. Judge Bennett told a personal story about living in a guest house in Montecito and being responsible for washing the homeowner's Rolls Royce automobile. The judge stated that he had driven the vehicle to a coffee shop. Judge Bennett made a statement to the effect of, "They're good cars, those Rolls Royces. They're sturdy cars, built like a tank." The judge further made a statement to the effect of, "Chicks really dug that car."

There is a factual dispute as to whether the judge stated that the Rolls Royce "had a big back seat, if you know what I mean," and then gestured "finger guns" with his bailiff. It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

C. In 2016, while in chambers with DDA Michael Kern and a male defense attorney, Judge Bennett stated that he had installed a telescope on the roof of his

home or an outbuilding. The judge stated that he would not spend so much time with his telescope if he had "a 20-year-old smoking hot blonde wife," or words to that effect.

There is a factual dispute as to whether the judge stated that his dental hygienist was "a smoking hot 10" and could "do whatever she wanted" to him. It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

D. In 2014, DDA Amber Lee and Deputy Public Defender (DPD) Heather Tomka appeared before Judge Bennett for a hearing on a motion to suppress evidence. After the hearing concluded, the judge had his clerk ask the attorneys to return to his courtroom. While standing in the hallway, Judge Bennett told the attorneys that he had "the balls" to admit when he got something wrong. The judge made a statement to the effect of, "I have the biggest balls in the courthouse. I'm probably the only judge who has the balls to admit when I've made the wrong decision." The last time the judge mentioned his "balls," he gestured with his hand over his genital area.

E. On January 24, 2014, Judge Bennett presided over the matter of *People* v. *Jesus Rangel,* No. 2013023726. The people were represented by DDA Amber Lee, and the defendant was represented by DPD Justine Avtjoglou. While in chambers with the attorneys, the judge discussed his preferred method of receiving a flu shot. Judge Bennett said that he goes with the other judges to get a flu shot at the employee health center. He then said, "The difference between me and them is I like to take my shot in the ass," or words to that effect. Judge Bennett laughed and then made a statement to the effect of, "I mean it, man. You should see their faces. They start to roll up their sleeves, and I just drop 'trou' and take my shot in the ass." The judge then stood up and repeated the statement while pretending to unfasten [his] belt.

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, 2A, and 3B(4), and constitutes prejudicial misconduct.

Count Four

Judge Bennett improperly commented about the filing of peremptory challenges, as follows.

A. On May 14, 2018, the matter of *People v. Dustin Beverford*, No. 2015038470, was before Judge Bennett for sentencing. The People were represented by DDA Amber Lee, and the defendant was represented by DPD Dusty Kawai. During the hearing, the judge heard argument from counsel concerning sentencing in case No. 2015038470, and in a separate case involving the defendant, ending in 7071, that had been tried before Commissioner Sabo. Judge Bennett determined to sentence the defendant in case No. 2015038470, and to send the other case back to Commissioner Sabo. The transcript reflects the following colloquy:

> THE COURT: Another thing I can do is I can just sentence him on the case that I have and I can send this other case back to the judge who did the trial and you can argue about it there. I can do that and that's exactly what I am going to do.
>
> MS. LEE: Fair enough.
>
> THE COURT: You can argue about it there. I think that's -- this all got fouled up, by the way, for purposes of [the] record because people are filing papers against judges all over the place, judges are recused. You know, it's a difficult problem for the same reasons that the courthouse is, quite frankly, a mess often around here because people have personal agendas.

Judge Bennett's comments referred to, or at a minimum, gave the appearance of referring to, peremptory challenges filed by the People. The People filed peremptory challenges against the judge in *People v. Dustin Beverford,* No. 2017042581, on April 16, 2018; *People v. Santos,* No. 2018003742, on May 7, 2018; *and People v. McGuire,* No. 2018004884, on May 11, 2018.

B. On a date between approximately November 2017 and April 2018, Judge Bennett was in chambers with DDA Brandon Ross and a defense attorney. Judge Bennett made a statement to DDA Ross to the effect of, "Why are you guys papering me?" or "I know who's papering me and I know why." The judge stated that a female prosecutor, who had moved to Orange County, told him that the Ventura County District Attorney's Office had a policy regarding filing peremptory challenges against him.

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, and 2A, and constitutes prejudicial misconduct.

Count Five

In the summer or fall of 2018, DDA Elisabeth Main appeared in Judge Bennett's courtroom to handle a case involving possession of controlled substances in the jail. Judge Bennett previously recused from cases involving the jail because of a family member who works there. DDA Main spoke to the bailiff and was told the case would be sent back to Department 13 (master calendar). Main told the bailiff she was hoping that that would be done while there were still courtrooms available. When the case was called, Main stated that the bailiff had said the case would probably be sent back to Department 13. Judge Bennett stated in open court and in the bailiff's presence, "He doesn't know what the hell he's talking about," or words to that effect.

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, 2A, and 3B(4), and constitutes, at a minimum, improper action.

Count Six

Judge Bennett engaged in a pattern of conduct that was undignified, discourteous, and offensive, and that conveyed, at a minimum, the appearance of bias against prosecutors, as follows.

A. On September 20, 2018, Judge Bennett met in chambers with DDA Amber Lee and defense counsel Anzac Jacobs regarding an expungement

motion in case No. 2012020853. During the chambers discussion, the judge stated that he was transferring to the civil division and needed a change because he had "done 20 murder trials," having just completed one with "special circs," and a bunch of "big sex cases." Judge Bennett then stated, "Honestly, I'm tired of being called names, mostly by my former office," or words to that effect. Judge Bennett stated that he was being called "untrue names," despite being a "fair and honest guy," or words to that effect. Judge Bennett stated that he had eight more years to go before he could retire, and that he considered running for district attorney (DA) because he had "a shit-ton of money," or words to that effect. Judge Bennett stated that he may still consider running for DA if the civil assignment does not work out, but that he could not stay in a criminal department when people were calling him names.

B. Judge Bennett presided over the first trial in *People v. Joseph William Allawos,* No. 2017027912, a misdemeanor elder abuse case. On June 6, 2018, during deliberations, the jury submitted a note to the court. DDA Brandon Yeaton appeared for the trial prosecutor, who was unavailable at the time. DPD Cerise Fritsch made a comment on the record about "rotating DA's." Judge Bennett responded, "Reaching way down the bench, huh?" After the jury was subsequently seated, the judge stated on the record, "There's a new DA here. Apparently, the other ones were too busy."

C. There is a factual dispute as to whether, on May 17, 2018, during a chambers conference with counsel in *People* v. *Carlos Lozano,* No. 2018016122, the judge stated that he wished he had three hands, including one to "wipe [his] ass." It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

D. On April 5, 2018, Judge Bennett presided over the jury trial in *People v. Anthony Ross,* No. 2017019548. The People were represented by DDA Brandon Ross, and the defendant was represented by DPD Monique Magar. In

the jury's presence, DDA Ross requested a recess. Judge Bennett called the attorneys to the bench, and told them he did not like to waste time. The judge gestured toward the jury and made a statement to the effect of, "I care about them. You know why I care about them? Because they're voters. I don't care about you. I care about them because they're voters, and I don't care about you, and you can quote me on that."

E. On March 2, 2018, in *People v. Antonio Herrera,* No. 2016004078, Judge Bennett presided over a hearing on the People's motion for a continuance, and on the People's motion to conduct a conditional examination of a material witness, which had both been filed on January 18, 2018. The People were represented by DDA Jillian Ewan, and the defendant was represented by DPD Jennifer Rosenthal. During the hearing, Judge Bennett ordered DDA David Barnes to appear and questioned him about a declaration he had submitted. Following Barnes's testimony, the following colloquy occurred:

> THE COURT: So essentially, the People's position is that the motion for a conditional exam was timely filed. Uh, it's just that a function of the court process, uh, it looks like both sides were unable to litigate that request, that's what it looks like.
>
> MS. EWAN: Yes, Your Honor.
>
> THE COURT: Yeah. That would have been a better way for you to state it.
>
> MS. EWAN: I'll note that for the future, Your Honor.
>
> THE COURT: You can note it for right now.

F. On February 7, 2018, in *People v. Antonio Viveros,* No. 2017031420, Judge Bennett presided over a hearing on the People's motion for continuance due to the unavailability of a law enforcement officer. The People were represented by DDA Hayley Moyer, and the defendant was represented by DPD

Cerise Fritsch. During the hearing, DDA Moyer stated that a prior motion to advance had been denied by Judge Ayers, and that, at the time that motion was heard, the officer was available. The following colloquy then ensued:

> THE COURT: So, it's Judge Ayers is what you're saying.
>
> MS. MOYER: I'm, I'm -- I don't know why Judge Ayers --
>
> THE COURT: Is that what you're saying?
>
> MS. MOYER: I'm not saying it's her fault.
>
> THE COURT: What are you saying then?

Later in the hearing, in discussing the People's motion, the following colloquy ensued:

> THE COURT: So, in between the 22nd and the 26th, is when the People discovered, they're telling me in this declaration signed by Ms. Hayley Moyer as an officer of the Court, that they figured out that the cop wasn't going to be here, and that he was an essential witness. And that seems to be the problem to me.
>
> MS. MOYER: That's correct, Your Honor.
>
> THE COURT: And, I don't need a cheering section okay? So, if I need something from you, I'll ask you, all right.
>
> MS. MOYER: Of course.

G. On February 1, 2018, Judge Bennett presided over a hearing in *People v. Jesus Lopez Cruz,* No. 2017025833. The People were represented by DDA Heather Sweatman, and the defendant was represented by DPD Cerise Fritsch. During the hearing, DDA Sweatman stated that the parties had been unable to resolve the case because the defense wanted a charge that did not include moral turpitude, which was not supported by the facts of the case. Judge Bennett asked Sweatman if the facts stated in her trial brief were true, which led

to the following colloquy:

> MS. SWEATMAN: Those are true. If I -
>
> THE COURT: Uh-huh.
>
> MS. SWEATMAN: -- may provide a little further detail.
>
> THE COURT: No, it's not necessary. I get it.
>
> MS. SWEATMAN: Well, your honor, if I may, the defendant --
>
> THE COURT: Uh, no - [Unintelligible] - you may not. I'm not finished talking yet. You interrupt me again, we're gonna have a problem. Do you understand that?

Later in the hearing, Judge Bennett told DDA Sweatman that she did not have enough evidence to "get past the [Penal Code section] 1118 motion." Sweatman responded that if that was the case, she would ask that the defense brief the issue and allow the People to respond in writing. Judge Bennett stated to Sweatman:

> THE COURT: ... I'm just being honest with you, I'm not trying to give you a hard time. I don't mind wasting the public's time on something like this, but I don't think it's the right thing to do if you can't prove it. It seems to me like you need to have the person here to prove those facts. But if you don't think you do, I mean, I'm not gonna dismiss the case. You can do what you want. You can embarrass the district attorney, if you like. That's fine.

H. In October 2017, Judge Bennett presided over the matter of *People v. Julia Parker and Emilia Borcena,* No. 2016010310. The People were represented by Deputy Attorney General (DAG) Melissa Zubi, defendant Parker was represented by defense attorney Donald Marks, and defendant Borcena was represented by defense attorney Arthur Khachatourians. During a chambers

conference with Zubi and defense counsel, Judge Bennett made several comments about how bad the Attorney General was at prosecuting cases. Judge Bennett stated that he had just finished an environmental case with the Attorney General, and "that was an important case, and they messed that one up, too," or words to that effect.

During the chambers conference, Judge Bennett discussed with counsel motions in limine the defense said it wanted to bring. The judge made preliminary rulings that excluded most of the prosecution's evidence. DAG Zubi noted that she had no case if most of her evidence was excluded. Judge Bennett stated in response, "You can tell [Attorney General Xavier] Becerra that's what he gets for going against my president," or words to that effect. Judge Bennett also stated to Zubi, "It's my job to give the government a bad time," or words to that effect.

I. On August 9, 2017, Judge Bennett presided over a hearing on a motion to suppress evidence (Penal Code section 1538.5) in *People v. Nicolas Macias-Hernandez*, No. 2016031450. The People were represented by DDA Brandon Yeaton, and the defendant was represented by DPD Julie Taylor. On August 9, Judge Bennett granted the motion. On August 10, 2017, the judge called the attorneys back to his courtroom and told them that he had changed his mind and had determined to deny the motion. After excusing the attorneys, Judge Bennett asked DDA Yeaton to approach the bench on an unrelated matter, in which Yeaton needed the judge's signature for an order of forfeiture. Judge Bennett signed the order and then began telling Yeaton about his time as a police officer, Chief DDA, and judge. While speaking of supervisors in the DA's office, Judge Bennett made a statement to the effect of, "Tell [DDA Brent] Nibecker he's an idiot. I've told him to his face, I don't care."

J. On December 9, 2016, Judge Bennett presided over a hearing in *People* v. *Dennis King*, No. 2016030427. The People were represented by DDA

Elisabeth Main, and the defendant was represented by DPD Damon Jenkins. The pending case, No. 2016030427, had previously been consolidated with another case involving the same defendant, No. 2016028553, which had been deconsolidated and tried separately. During the hearing, DDA Main requested the release of medical records she had subpoenaed while the cases were consolidated, but which were now contained in the file for case No. 2016028553. Judge Bennett told Main there were no records associated with the subpoena in the file for case No. 2016030427. Judge Bennett called a recess until later that afternoon, and, at Main's request, said he would have the file in case No. 2016028553 brought up at that time. Later that day, Main submitted a subpoena duces tecum to Judge Bennett for the medical records in case No. 2016028553. After the judge granted a defense motion to quash the subpoena, Main requested that the pending case be sent back to Department 13. The following colloquy occurred:

> THE COURT: Well, they sent it here for trial. That's the problem. So it's here for trial. I don't make those decisions anymore. You're here for trial.
>
> MS. MAIN: So for the People's information, where physically will those records that the Court has right now be kept so that the People can make the proper request?
>
> THE COURT: Yeah. We have the records in case ending 553. They're here and they're still sealed. As I said before, there's probably 200 pages in here. I haven't opened them. I can open them and look at them, I suppose. [¶] Is that what you want me to do?
>
> MS. MAIN: If the Court is able to respond to the subpoena that [the] People just served. It was my understanding 553 was going to be on calendar here at 1:30.

> THE COURT: Well, hang on. [¶] You handed me a subpoena. Who's it to; to the Court?
>
> MS. MAIN: To the Court, which is in possession of the records, and we're asking that---
>
> THE COURT: I'm not going to respond to a subpoena. Do you know why? Because I don't have to. It's a court record.

Judge Bennett leaned into the microphone and spoke in a raised voice when he stated, "Because I don't have to."

Following the above exchange, Judge Bennett reviewed the subpoenaed documents contained in the file for case No. 2016028553, and released one page to Main, which he said was relevant and not subject to the motion to quash. When Main subsequently asked for clarification regarding the ruling, the judge walked off the bench while she was addressing the court. The transcript reflects the following colloquy:

> MS. MAIN: If the Court would bear with me. I'm a bit confused. [¶] Is case ending 553 before the Court today?
>
> THE COURT: No.
>
> MS. MAIN: Were those records -- but is the Court saying those records were part of case ending 553?
>
> THE COURT: They're from the documents that you subpoenaed.
>
> MS. MAIN: Yes. Which motion to quash did the Court grant?
>
> THE COURT: The only one that's filed.
>
> MS. MAIN: In 427?
>
> THE COURT: Anything else?

MS. MAIN: Yes, your Honor. I'm just trying to understand it.

THE COURT: Good luck. See you Monday morning for jury trial, 8:30.

MS. MAIN: Your Honor, it's my understanding --

THE COURT: We're off the record.

MS. MAIN: Your Honor, I thought that the Court --

(Proceedings concluded for day.)

K. On November 28, 2016, Judge Bennett presided over the preliminary hearing in *People v. Jeffrey Dupont,* No. 2016006770. The People were represented by DDA Amber Lee, and the defendant was represented by DPD Cynthia Ellington. The defendant was charged with kidnapping (Penal Code section 207(a)), criminal threats (Penal Code section 422), dissuading a witness by force or threat (Penal Code section 136.1(c)(1)), infliction of corporal injury (Penal Code section 273.5(a)), and false imprisonment (Penal Code section 236). During the hearing, while a victim of domestic violence was testifying, Judge Bennett referred to her as a "meth head." The transcript reflects the following colloquy:

Q. Okay. Well, isn't it true that you had methamphetamine in that compartment?

MS. LEE: Objection; relevance.

THE COURT: Why would that be relevant? Sustained.

MS. ELLINGTON: Your Honor, it's relevant because my ambition is to show that she was high during this entire time, that she has access to methamphetamine, and that she had it in her glove box and she had been using it. She has a pipe in her purse, and that goes to her credibility, her reliability and her ability to –

> THE COURT: Well, I've allowed you to ask all those related questions. You know, sounds like she was using meth and she's a meth head. Whether there's some methamphetamine in the glove box really isn't relevant. It wasn't opened. Sustained.

The judge's reference to the victim as a "meth head" was inappropriate. There is a factual dispute, however, as to whether this remark also reflected bias against the prosecution. It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

L. In October 2016, Judge Bennett presided over the matter of *People v. Scott Miller,* No. 2016005977, which involved misdemeanor charges of elder abuse and battery. The People were represented by DAG Melissa Zubi and DAG Stephen Tokarz, and the defendant was represented by defense attorney Eric Luce. During a chambers conference with the attorneys, before any evidence was heard, Judge Bennett stated that he only did important cases – felonies and murders – and that he did not think the case should have been prosecuted.

While discussing the *Miller* case in chambers with counsel, Judge Bennett brought up a recent Ventura County case in which a mental patient had stabbed another person multiple times. (The defendant in *Miller* worked at a psychiatric ward and was charged with assaulting a resident.) Judge Bennett told the prosecutors to keep that case in mind if they wanted to go forward on the *Miller* case.

There is a factual dispute as to whether the judge also made reference to the recent Ventura County case in the presence of the prospective jurors. It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

M. In the summer of 2016, Judge Bennett presided over a hearing on a motion to suppress evidence in which the People were represented by DDA Taylor Carr. At the conclusion of the hearing, the judge asked Carr to approach

the bench and had an ex parte conversation with her. Judge Bennett stated to Carr, “You don’t have to act like a scared little girl in my courtroom,” or words to that effect. Carr responded that she was not scared of the judge, and disagreed that judicial notice had been required in the hearing. Judge Bennett then made a statement to Carr to the effect of, “You’re acting like a scared little girl out there. You don’t have to act like that.”

N. On January 20, 2015, Judge Bennett presided over the matter of *People* v. *Richard Evirs,* No. 2014035733, in which the defendant was charged with disturbing the peace, in violation of Penal Code section 415(2). The People were represented by DDA Marine Dermadzhyan, and the defendant was represented by defense attorney Jarrod Wilfert. During a chambers conference with counsel, Wilfert requested an infraction disposition. Judge Bennett asked DDA Dermadzhyan for her position on the matter. Dermadzhyan objected to an infraction disposition because the case had been referred to the DA’s office as a criminal threats offense (Penal Code section 422), and the People wanted a stay-away order for the victim. Judge Bennett stated that Dermadzhyan’s position was a “chicken shit position to have,” or words to that effect. The judge further stated that he had received emails regarding this “infamous 415,” and that things like this would not be tolerated when he became the judge in Department 13, the master calendar department.

O. On March 17, 2014, Judge Bennett presided over *People v. Joshua Chase,* No. 2013014492, a misdemeanor hit-and-run case that was assigned to him for trial. The People were represented by DDA Melissa Bohl, and the defendant was represented by DPD Anita Candelaria. Judge Bennett met with the attorneys in chambers prior to trial. During the chambers conference, Judge Bennett referred to the case as a “Mickey Mouse” case, or words to that effect. Judge Bennett pointed at DDA Bohl and stated, “I should make you pay for this,” or words to that effect.

P. On January 27 or 28, 2014, Judge Bennett presided over a probation violation hearing in *People* v. *Nella Olsen,* No. 2011028522. The People were represented at the hearing by a female DDA. During a recess, the judge asked to speak with DDA Amber Lee and DPD Heather Tomka, who were sitting in the courtroom and not involved in the *Olsen* hearing. While standing in a hallway, Judge Bennett told Lee and Tomka that the DDA handling the *Olsen* hearing was "dumb as shit," and that he wished Lee was conducting the hearing.

Q. On January 13 through 16, 2014, Judge Bennett presided over the jury trial of *People* v. *Sergio Ortiz,* No. 2012040964. The People were represented by DDA Melissa Bohl, and the defendant was represented by DPD Michele Castillo. On January 16 or 17, 2014, after the trial had concluded, Judge Bennett had his clerk ask DDA Bohl to return to the courtroom in order to share feedback regarding her performance during the trial. Judge Bennett met with Bohl in chambers for 20 to 30 minutes. The judge asked Bohl where she was from, and Bohl responded that she was from Temecula. Judge Bennett then made a statement to the effect of, "So your parents are farmers and you grew up with a silver spoon in your mouth?" Bohl responded that her parents were not farmers.

R. On October 17, 2011, while presiding over a misdemeanor hit-and-run case, Judge Bennett met in chambers with DDA Andrew Sullivant and DPD Randy Tucker to discuss a possible resolution. DPD Tucker asked for a case disposition of credit for time served, restitution, fines, and no probation. Judge Bennett asked DDA Sullivant if he was "going to make a big stink about that," or words to that effect. Sullivant stated that he was not going to make a "big stink," but would object to that disposition. In response, Judge Bennett became angry, raised his voice, and used profanity, including the words "fucking" and "shit." The judge stated that he had been waiting for an opportunity to address the issue of prosecutors "playing games like this," or words to that effect. The judge

admonished Sullivant about prosecutors "agreeing to deals in chambers, then objecting on the record," or words to that effect. Judge Bennett criticized other judges in the courthouse for "playing along with the prosecutors' games," or words to that effect. The judge said he was "sick" of being "bad mouthed" by attorneys in the district attorney's office, both in the newspapers and otherwise, or words to that effect. The judge told Sullivant that, if he was going to object on the record, then he (the judge) was "going to bring up a panel and put on a jury trial," or words to that effect. The judge stated that there appeared to be pressure in the district attorney's office to push cases to trial that should not be going to trial. The judge stated that he got to where he was by "not going along with the program." Judge Bennett stated that he knew all of the policies in the district attorney's office, and he asked Sullivant if he knew how he (the judge) knew about the policies. Judge Bennett then stated, in a raised voice, "Because I wrote the fucking book," or words to that effect, and he pointed his index finger at Sullivant.

S. On January 19, 2010, Judge Bennett presided over the trial in *People v. Ruben Cortez*, No. 2009037770. The People were represented by DDA Jessica Gigueri, and the defendant was represented by DPD Josephine Banuelos. During the redirect examination of an officer, DDA Gigueri asked for the legal basis for an objection made by defense counsel, which Judge Bennett had sustained, in order to rephrase a question. Judge Bennett called the attorneys to the bench for a sidebar. At the bench, the judge made a statement to Gigueri, in a voice loud enough for the jury to hear, to the effect of, "Are you questioning my authority? Counselor, this is misconduct and I could hold you in contempt. Have you read my court rules? Have you read the rules of court? You know what you need to do? You need to go home tonight and you need to study the rules of court. I know you are new but the next hearing I have is going to be about you. Your questions are not relevant. Move on."

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(4), 3B(5), and 3B(7) (a judge shall accord to every person's lawyer the full right to be heard according to law), and constitutes prejudicial misconduct.

In signing the Stipulation, in addition to consenting to discipline on the terms set forth, Judge Bennett expressly admitted that the foregoing facts are true and that he agrees with the stated legal conclusions.

In an affidavit of consent for discipline, Judge Bennett affirmed that his consent was freely and voluntarily rendered, and that he admits the truth of the charges as modified by the Stipulation.

## DISCIPLINE

Judge Bennett concedes that he committed five acts of prejudicial misconduct and one act of improper action, comprised of 28 allegations of conduct that violated the Code of Judicial Ethics. Judge Bennett's misconduct mostly involves saying things no judge should say—comments and remarks that are offensive, undignified, discourteous, dishonest, sexist, profane, and create the appearance of bias and retaliation.

Judge Bennett's remark to an African-American criminal defendant about "shucking and jiving" reflects a disregard for the racial overtones of such a remark and manifests insensitivity to individuals appearing in court before him. Judges are expected to treat everyone who appears in court, no matter who they may be, with dignity, courtesy, and respect.

Judges are also expected to display appropriate demeanor and decorum, and not to use crass or sexist words and imagery, as Judge Bennett has done. For example, Judge Bennett's references to his "balls" and his "ass" diminish the dignity of his office. His gratuitous comments about "chicks" liking a car, and to not spending so much time with his telescope if he had a "20-year-old smoking

hot wife," are sexist and unseemly. His use of profanity, such as "fucking" and "shit," degrades the decorum of the court and reflects negatively on the judiciary.

Judges are also expected to be honest. Judge Bennett's statements to an attorney, based on the judge's assumption that the attorney had complained about him to the commission, were improper because they appeared retaliatory and, even more troubling, because they were false. A judge's failure to be truthful significantly erodes public esteem for the judiciary, as well as for the individual judge.

Judge Bennett's comments and questions to attorneys about being the subject of peremptory challenges are improper because attorneys and litigants are entitled to file such challenges without being subjected to the judge's influence or interference. When a peremptory challenge is properly and timely filed, a judge must accept the disqualification without inquiry. (*Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146, 165, citing *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531–532.)

Finally, Judge Bennett's pattern of undignified, discourteous, and offensive remarks to and about prosecutors not only creates the appearance of bias against them, but also undermines public perception of the integrity and impartiality of the judiciary. Everyone appearing before Judge Bennett should feel that he will dispense justice fairly and respectfully. His remarks do not inspire confidence that he would do so.

Judge Bennett's prior discipline for discourteous and undignified remarks was an aggravating factor. In 2015, Judge Bennett received an advisory letter for making the following remarks about a criminal defendant during a sentencing hearing: "He's a dirtbag of the highest order . . . What's kind of burning me up right now is the fact that he was paid more than I'm paid, to sell cars, and then he stole money on top of it. How pathetic is that? You are really a piece of work."

The commission, nevertheless, considered Judge Bennett's acknowledgment of almost every charge in the Notice of Formal Proceedings to be a significant mitigating factor and determined to accept the Stipulation and impose this public censure, which is the strongest sanction that may be imposed on a judge short of removal from the bench, because it fulfills the commission's mandate of protecting the public, enforcing rigorous standards of judicial conduct, and maintaining public confidence in the integrity of the judicial system, while resolving this matter without the delay and expense of formal proceedings. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112; Cal. Const., art. VI, § 18, subd. (d).)

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Kay Cooperman Jue; Hon. Lisa B. Lench; Dr. Michael A. Moodian; Mr. Richard Simpson; and Mr. Adam N. Torres voted to accept the Stipulation and to issue this public censure. Commission member Ms. Sarah Kruer Jager did not participate.

Date: March 25, 2020

On behalf of the Commission on Judicial Performance,



Nanci E. Nishimura
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| INQUIRY CONCERNING<br>JUDGE JEFFREY G. BENNETT<br><br>No. 206 | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 127) |

Pursuant to Rules of the Commission on Judicial Performance, rule 127, Judge Jeffrey G. Bennett of the Ventura County Superior Court, represented by counsel Heather L. Rosing, Esq. of Klinedinst PC, and the examiner ("the parties") submit this proposed disposition of Inquiry No. 206. The parties request that the commission resolve this matter by imposition of a public censure. The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Bennett because, among other reasons, in light of the stipulated facts and legal conclusions, a public censure adequately protects the public and will avoid the delay and expense of further proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the Inquiry Concerning Judge Jeffrey G. Bennett, No. 206.

2. The commission shall issue a public censure based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public censure may articulate

the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation, the judge's affidavit of consent, and the commission's decision and order shall be made public.

5. Judge Bennett waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. The commission may reject this proposed disposition and resume formal proceedings. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Bennett.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public censure on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions:

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Bennett became a judge of the Ventura County Superior Court in 2009. His current term began in January 2015.

Count One

On March 11, 2015, Judge Bennett was presiding in the master calendar department. An African-American defendant appeared before him who had an outstanding warrant on a felony. In determining whether to remand the defendant into custody, Judge Bennett asked the defendant a series of questions and the defendant provided what the judge believed to be evasive answers. Judge Bennett then asked the defendant to stop "shucking and jiving."

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(4), and 3B(5), and constitutes prejudicial misconduct.

Count Two

On May 17, 2016, Judge Bennett presided over the matter of *People v. Gilbert Regalado*, No. 2015027976. On that date, the People were represented by Deputy District Attorney (DDA) Marc Leventhal, and the defendant was represented by defense counsel Victor Salas. Judge Bennett met in chambers with the attorneys to discuss settlement. Salas entered chambers first and shook the judge's hand. Leventhal then greeted the judge and held out his hand. Judge Bennett looked at Leventhal's hand and stated, "I'm not sure I want to shake your hand," or words to that effect, but did shake his hand. Leventhal asked the judge if something was the matter. Judge Bennett replied with a statement to the effect of, "Do you know how much trouble you have caused me? Do you know how much money I have had to pay lawyers because of you?" Judge Bennett then spoke about the matter of *People v. Thomas Campi*, No. 2014032929, in which Leventhal had previously appeared before him, for about five minutes. The judge stated that someone had complained about him to the Commission on Judicial Performance, leading to a disciplinary hearing. The judge stated he had spent more than $10,000 on lawyers and had to obtain personal references and testimonials to "clear [his] name," or words to that effect.

Judge Bennett's comments and conduct toward DDA Leventhal created, at a minimum, the appearance of retaliation based on the belief that Leventhal had complained to the commission about the *Campi* matter, or had assisted or cooperated with an investigation that the commission had performed. The judge falsely stated that his name had been "clear[ed]" in the 2015 commission matter, and falsely stated that he had to pay lawyers $10,000 in connection with his defense in that matter.

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(4), 3B(5), and 3D(5), and constitutes prejudicial misconduct.

Count Three

Judge Bennett engaged in undignified, discourteous, and offensive sexualized (or otherwise crude) conduct in the workplace, as follows.

A. Judge Bennett repeatedly stated, while in chambers and in the presence of DDA Elisabeth Main, that he was the "only one in the courthouse with the balls to make a ruling," or words to that effect. The last time the judge made such a statement in DDA Main's presence was in 2018.

B. On January 17, 2018, while seated on the bench and wearing his judicial robe, Judge Bennett engaged in conversation with others in the courtroom about recent mudslides in the area. Present in the courtroom were the judge's judicial assistant, a bailiff, and several attorneys. Judge Bennett told a personal story about living in a guest house in Montecito and being responsible for washing the homeowner's Rolls Royce automobile. The judge stated that he had driven the vehicle to a coffee shop. Judge Bennett made a statement to the effect of, "They're good cars, those Rolls Royces. They're sturdy cars, built like a tank." The judge further made a statement to the effect of, "Chicks really dug that car."

There is a factual dispute as to whether the judge stated that the Rolls Royce "had a big back seat, if you know what I mean," and then gestured "finger guns" with his bailiff. It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

C. In 2016, while in chambers with DDA Michael Kern and a male defense attorney, Judge Bennett stated that he had installed a telescope on the roof of his home or an outbuilding. The judge stated that he would not spend so much time with his telescope if he had "a 20-year-old smoking hot blonde wife," or words to that effect.

There is a factual dispute as to whether the judge stated that his dental hygienist was "a smoking hot 10" and could "do whatever she wanted" to him. It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

D. In 2014, DDA Amber Lee and Deputy Public Defender (DPD) Heather Tomka appeared before Judge Bennett for a hearing on a motion to suppress evidence. After the hearing concluded, the judge had his clerk ask the attorneys to return to his courtroom. While standing in the hallway, Judge Bennett told the attorneys that he had "the balls" to admit when he got something wrong. The judge made a statement to the effect of, "I have the biggest balls in the courthouse. I'm probably the only judge who has the balls to admit when I've made the wrong decision." The last time the judge mentioned his "balls," he gestured with his hand over his genital area.

E. On January 24, 2014, Judge Bennett presided over the matter of *People v. Jesus Rangel*, No. 2013023726. The people were represented by DDA Amber Lee, and the defendant was represented by DPD Justine Avtjoglou. While in chambers with the attorneys, the judge discussed his preferred method of receiving a flu shot. Judge Bennett said that he goes with the other judges to get a flu shot at the employee health center. He then said, "The difference between me and them is I like to take my shot in the ass," or words to that effect. Judge Bennett laughed and then made a statement to the effect of, "I mean it, man. You should see their faces. They start to roll up their sleeves, and I just drop 'trou' and take my shot in the ass." The judge then stood up and repeated the statement while pretending to unfasten your belt.

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, 2A, and 3B(4), and constitutes prejudicial misconduct.

Count Four

Judge Bennett improperly commented about the filing of peremptory challenges, as follows.

A. On May 14, 2018, the matter of *People v. Dustin Beverford*, No. 2015038470, was before Judge Bennett for sentencing. The People were represented by DDA Amber Lee, and the defendant was represented by DPD Dusty Kawai. During the hearing, the judge heard argument from counsel concerning sentencing in case No. 2015038470, and in a separate case involving the defendant, ending in 7071, that had been tried before Commissioner Sabo. Judge Bennett determined to sentence the defendant in case No. 2015038470, and to send the other case back to Commissioner Sabo. The transcript reflects the following colloquy:

> THE COURT: Another thing I can do is I can just sentence him on the case that I have and I can send this other case back to the judge who did the trial and you can argue about it there. I can do that and that's exactly what I am going to do.
>
> MS. LEE: Fair enough.
>
> THE COURT: You can argue about it there. I think that's -- this all got fouled up, by the way, for purposes of [the] record because people are filing papers against judges all over the place, judges are recused. You know, it's a difficult problem for the same reasons that the courthouse is, quite frankly, a mess often around here because people have personal agendas.

Judge Bennett's comments referred to, or at a minimum, gave the appearance of referring to, peremptory challenges filed by the People. The People filed peremptory challenges against the judge in *People v. Dustin Beverford*, No. 2017042581, on April 16, 2018; *People v. Santos*,

No. 2018003742, on May 7, 2018; and *People v. McGuire*, No. 2018004884, on May 11, 2018.

B. On a date between approximately November 2017 and April 2018, Judge Bennett was in chambers with DDA Brandon Ross and a defense attorney. Judge Bennett made a statement to DDA Ross to the effect of, "Why are you guys papering me?" or "I know who's papering me and I know why." The judge stated that a female prosecutor, who had moved to Orange County, told him that the Ventura County District Attorney's Office had a policy regarding filing peremptory challenges against him.

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, and 2A, and constitutes prejudicial misconduct.

Count Five

In the summer or fall of 2018, DDA Elisabeth Main appeared in Judge Bennett's courtroom to handle a case involving possession of controlled substances in the jail. Judge Bennett previously recused from cases involving the jail because of a family member who works there. DDA Main spoke to the bailiff and was told the case would be sent back to department 13 (master calendar). Main told the bailiff she was hoping that that would be done while there were still courtrooms available. When the case was called, Main stated that the bailiff had said the case would probably be sent back to department 13. Judge Bennett stated in open court and in the bailiff's presence, "He doesn't know what the hell he's talking about," or words to that effect.

The conduct described above violated the Code of Judicial Ethics, canons, 1, 2, 2A, and 3B(4), and constitutes, at a minimum, improper action.

Count Six

Judge Bennett engaged in a pattern of conduct that was undignified, discourteous, and offensive, and that conveyed, at a minimum, the appearance of bias against prosecutors, as follows.

A. On September 20, 2018, Judge Bennett met in chambers with DDA Amber Lee and defense counsel Anzac Jacobs regarding an expungement motion in case No. 2012020853. During the chambers discussion, the judge stated that he was transferring to the civil division and needed a change because he had "done 20 murder trials," having just completed one with "special circs," and a bunch of "big sex cases." Judge Bennett then stated, "Honestly, I'm tired of being called names, mostly by my former office," or words to that effect. Judge Bennett stated that he was being called "untrue names," despite being a "fair and honest guy," or words to that effect. Judge Bennett stated that he had eight more years to go before he could retire, and that he considered running for district attorney (DA) because he had "a shit-ton of money," or words to that effect. Judge Bennett stated that he may still consider running for DA if the civil assignment does not work out, but that he could not stay in a criminal department when people were calling him names.

B. Judge Bennett presided over the first trial in *People v. Joseph William Allawos*, No. 2017027912, a misdemeanor elder abuse case. On June 6, 2018, during deliberations, the jury submitted a note to the court. DDA Brandon Yeaton appeared for the trial prosecutor, who was unavailable at the time. DPD Cerise Fritsch made a comment on the record about "rotating DA's." Judge Bennett responded, "Reaching way down the bench, huh?" After the jury was subsequently seated, the judge stated on the record, "There's a new DA here. Apparently, the other ones were too busy."

C. There is a factual dispute as to whether, on May 17, 2018, during a chambers conference with counsel in *People v. Carlos Lozano*, No. 2018016122, the judge stated that he wished he had three hands, including one to "wipe [his] ass." It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

D. On April 5, 2018, Judge Bennett presided over the jury trial in *People v. Anthony Ross*, No. 2017019548. The People were represented by DDA Brandon Ross, and the defendant was represented by DPD Monique Magar. In the jury's presence, DDA Ross requested a recess. Judge Bennett called the attorneys to the bench, and told them he did not like to waste time. The judge gestured toward the jury and made a statement to the effect of, "I care about them. You know why I care about them? Because they're voters. I don't care about you. I care about them because they're voters, and I don't care about you, and you can quote me on that."

E. On March 2, 2018, in *People v. Antonio Herrera*, No. 2016004078, Judge Bennett presided over a hearing on the People's motion for a continuance, and on the People's motion to conduct a conditional examination of a material witness, which had both been filed on January 18, 2018. The People were represented by DDA Jillian Ewan, and the defendant was represented by DPD Jennifer Rosenthal. During the hearing, Judge Bennett ordered DDA David Barnes to appear and questioned him about a declaration he had submitted. Following Barnes's testimony, the following colloquy occurred:

> THE COURT: So essentially, the People's position is that the motion for a conditional exam was timely filed. Uh, it's just that a function of the court process, uh, it looks like both sides were unable to litigate that request, that's what it looks like.

MS. EWAN: Yes, Your Honor.

THE COURT: Yeah. That would have been a better way for you to state it.

MS. EWAN: I'll note that for the future, Your Honor.

THE COURT: You can note it for right now.

F. On February 7, 2018, in *People v. Antonio Viveros*, No. 2017031420, Judge Bennett presided over a hearing on the People's motion for continuance due to the unavailability of a law enforcement officer. The People were represented by DDA Hayley Moyer, and the defendant was represented by DPD Cerise Fritsch. During the hearing, DDA Moyer stated that a prior motion to advance had been denied by Judge Ayers, and that, at the time that motion was heard, the officer was available. The following colloquy then ensued:

THE COURT: So, it's Judge Ayers is what you're saying.

MS. MOYER: I'm, I'm -- I don't know why Judge Ayers –

THE COURT: Is that what you're saying?

MS. MOYER: I'm not saying it's her fault.

THE COURT: What are you saying then?

Later in the hearing, in discussing the People's motion, the following colloquy ensued:

THE COURT: So, in between the 22nd and the 26th, is when the People discovered, they're telling me in this declaration signed by Ms. Hayley Moyer as an officer of the Court, that they figured out that the cop wasn't going to be here, and that he was an essential witness. And that seems to be the problem to me.

MS. MOYER: That's correct, Your Honor.

> THE COURT: And, I don't need a cheering section okay? So, if I need something from you, I'll ask you, all right.
>
> MS. MOYER: Of course.

G. On February 1, 2018, Judge Bennett presided over a hearing in *People v. Jesus Lopez Cruz*, No. 2017025833. The People were represented by DDA Heather Sweatman, and the defendant was represented by DPD Cerise Fritsch. During the hearing, DDA Sweatman stated that the parties had been unable to resolve the case because the defense wanted a charge that did not include moral turpitude, which was not supported by the facts of the case. Judge Bennett asked Sweatman if the facts stated in her trial brief were true, which led to the following colloquy:

> MS. SWEATMAN: Those are true. If I –
>
> THE COURT: Uh-huh.
>
> MS. SWEATMAN: -- may provide a little further detail.
>
> THE COURT: No, it's not necessary. I get it.
>
> MS. SWEATMAN: Well, your honor, if I may, the defendant --
>
> THE COURT: Uh, no – [Unintelligible] – you may not. I'm not finished talking yet. You interrupt me again, we're gonna have a problem. Do you understand that?

Later in the hearing, Judge Bennett told DDA Sweatman that she did not have enough evidence to "get past the [Penal Code section] 1118 motion." Sweatman responded that if that was the case, she would ask that the defense brief the issue and allow the People to respond in writing. Judge Bennett stated to Sweatman:

> THE COURT: … I'm just being honest with you, I'm not trying to give you a hard time. I don't mind wasting the public's time on

> something like this, but I don't think it's the right thing to do if you can't prove it. It seems to me like you need to have the person here to prove those facts. But if you don't think you do, I mean, I'm not gonna dismiss the case. You can do what you want. You can embarrass the district attorney, if you like. That's fine.

H. In October 2017, Judge Bennett presided over the matter of *People v. Julia Parker and Emilia Borcena*, No. 2016010310. The People were represented by Deputy Attorney General (DAG) Melissa Zubi, defendant Parker was represented by defense attorney Donald Marks, and defendant Borcena was represented by defense attorney Arthur Khachatourians. During a chambers conference with Zubi and defense counsel, Judge Bennett made several comments about how bad the Attorney General was at prosecuting cases. Judge Bennett stated that he had just finished an environmental case with the Attorney General, and "that was an important case, and they messed that one up, too," or words to that effect.

During the chambers conference, Judge Bennett discussed with counsel motions in limine the defense said it wanted to bring. The judge made preliminary rulings that excluded most of the prosecution's evidence. DAG Zubi noted that she had no case if most of her evidence was excluded. Judge Bennett stated in response, "You can tell [Attorney General Xavier] Becerra that's what he gets for going against my president," or words to that effect. Judge Bennett also stated to Zubi, "It's my job to give the government a bad time," or words to that effect.

I. On August 9, 2017, Judge Bennett presided over a hearing on a motion to suppress evidence (Penal Code section 1538.5) in *People v. Nicolas Macias-Hernandez*, No. 2016031450. The People were represented by DDA Brandon Yeaton, and the defendant was represented by DPD Julie Taylor. On August 9, Judge Bennett granted the motion. On

August 10, 2017, the judge called the attorneys back to his courtroom and told them that he had changed his mind and had determined to deny the motion. After excusing the attorneys, Judge Bennett asked DDA Yeaton to approach the bench on an unrelated matter, in which Yeaton needed the judge's signature for an order of forfeiture. Judge Bennett signed the order and then began telling Yeaton about his time as a police officer, Chief DDA, and judge. While speaking of supervisors in the DA's office, Judge Bennett made a statement to the effect of, "Tell [DDA Brent] Nibecker he's an idiot. I've told him to his face, I don't care."

J. On December 9, 2016, Judge Bennett presided over a hearing in *People v. Dennis King*, No. 2016030427. The People were represented by DDA Elisabeth Main, and the defendant was represented by DPD Damon Jenkins. The pending case, No. 2016030427, had previously been consolidated with another case involving the same defendant, No. 2016028553, which had been deconsolidated and tried separately. During the hearing, DDA Main requested the release of medical records she had subpoenaed while the cases were consolidated, but which were now contained in the file for case No. 2016028553. Judge Bennett told Main there were no records associated with the subpoena in the file for case No. 2016030427. Judge Bennett called a recess until later that afternoon, and, at Main's request, said he would have the file in case No. 2016028553 brought up at that time. Later that day, Main submitted a subpoena duces tecum to Judge Bennett for the medical records in case No. 2016028553. After the judge granted a defense motion to quash the subpoena, Main requested that the pending case be sent back to department 13. The following colloquy occurred:

> THE COURT: Well, they sent it here for trial. That's the problem. So it's here for trial. I don't make those decisions anymore. You're here for trial.

> MS. MAIN: So for the People's information, where physically will those records that the Court has right now be kept so that the People can make the proper request?
>
> THE COURT: Yeah. We have the records in case ending 553. They're here and they're still sealed. As I said before, there's probably 200 pages in here. I haven't opened them. I can open them and look at them, I suppose. [¶] Is that what you want me to do?
>
> MS. MAIN: If the Court is able to respond to the subpoena that [the] People just served. It was my understanding 553 was going to be on calendar here at 1:30.
>
> THE COURT: Well, hang on. [¶] You handed me a subpoena. Who's it to; to the Court?
>
> MS. MAIN: To the Court, which is in possession of the records, and we're asking that --
>
> THE COURT: I'm not going to respond to a subpoena. Do you know why? Because I don't have to. It's a court record.

Judge Bennett leaned into the microphone and spoke in a raised voice when he stated, "Because I don't have to."

Following the above exchange, Judge Bennett reviewed the subpoenaed documents contained in the file for case No. 2016028553, and released one page to Main, which he said was relevant and not subject to the motion to quash. When Main subsequently asked for clarification regarding the ruling, the judge walked off the bench while she was addressing the court. The transcript reflects the following colloquy:

> MS. MAIN: If the Court would bear with me. I'm a bit confused. [¶] Is case ending 553 before the Court today?
>
> THE COURT: No.

MS. MAIN: Were those records -- but is the Court saying those records were part of case ending 553?

THE COURT: They're from the documents that you subpoenaed.

MS. MAIN: Yes. Which motion to quash did the Court grant?

THE COURT: The only one that's filed.

MS. MAIN: In 427?

THE COURT: Anything else?

MS. MAIN: Yes, your Honor. I'm just trying to understand it.

THE COURT: Good luck. See you Monday morning for jury trial, 8:30.

MS. MAIN: Your Honor, it's my understanding --

THE COURT: We're off the record.

MS. MAIN: Your Honor, I thought that the Court --

(Proceedings concluded for day.)

K. On November 28, 2016, Judge Bennett presided over the preliminary hearing in *People v. Jeffrey Dupont*, No. 2016006770. The People were represented by DDA Amber Lee, and the defendant was represented by DPD Cynthia Ellington. The defendant was charged with kidnapping (Penal Code section 207(a)), criminal threats (Penal Code section 422), dissuading a witness by force or threat (Penal Code section 136.1(c)(1)), infliction of corporal injury (Penal Code section 273.5(a)), and false imprisonment (Penal Code section 236). During the hearing, while a victim of domestic violence was testifying,

Judge Bennett referred to her as a "meth head." The transcript reflects the following colloquy:

> Q. Okay. Well, isn't it true that you had methamphetamine in that compartment?
>
> MS. LEE: Objection; relevance.
>
> THE COURT: Why would that be relevant? Sustained.
>
> MS. ELLINGTON: Your Honor, it's relevant because my ambition is to show that she was high during this entire time, that she has access to methamphetamine, and that she had it in her glove box and she had been using it. She has a pipe in her purse, and that goes to her credibility, her reliability and her ability to --
>
> THE COURT: Well, I've allowed you to ask all those related questions. You know, sounds like she was using meth and she's a meth head. Whether there's some methamphetamine in the glove box really isn't relevant. It wasn't opened. Sustained.

The judge's reference to the victim as a "meth head" was inappropriate. There is a factual dispute, however, as to whether this remark also reflected bias against the prosecution. It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

L. In October 2016, Judge Bennett presided over the matter of *People v. Scott Miller*, No. 2016005977, which involved misdemeanor charges of elder abuse and battery. The People were represented by DAG Melissa Zubi and DAG Stephen Tokarz, and the defendant was represented by defense attorney Eric Luce. During a chambers conference with the attorneys, before any evidence was heard, Judge Bennett stated that he only did important cases – felonies and murders – and that he did not think the case should have been prosecuted.

While discussing the *Miller* case in chambers with counsel, Judge Bennett brought up a recent Ventura County case in which a mental patient had stabbed another person multiple times. (The defendant in *Miller* worked at a psychiatric ward and was charged with assaulting a resident.) Judge Bennett told the prosecutors to keep that case in mind if they wanted to go forward on the *Miller* case.

There is a factual dispute as to whether the judge also made reference to the recent Ventura County case in the presence of the prospective jurors. It does not appear necessary to resolve this dispute, as the inclusion of this matter would not affect the proposed discipline.

M. In the summer of 2016, Judge Bennett presided over a hearing on a motion to suppress evidence in which the People were represented by DDA Taylor Carr. At the conclusion of the hearing, the judge asked Carr to approach the bench and had an ex parte conversation with her. Judge Bennett stated to Carr, "You don't have to act like a scared little girl in my courtroom," or words to that effect. Carr responded that she was not scared of the judge, and disagreed that judicial notice had been required in the hearing. Judge Bennett then made a statement to Carr to the effect of, "You're acting like a scared little girl out there. You don't have to act like that."

N. On January 20, 2015, Judge Bennett presided over the matter of *People v. Richard Evirs*, No. 2014035733, in which the defendant was charged with disturbing the peace, in violation of Penal Code section 415(2). The People were represented by DDA Marine Dermadzhyan, and the defendant was represented by defense attorney Jarrod Wilfert. During a chambers conference with counsel, Wilfert requested an infraction disposition. Judge Bennett asked DDA Dermadzhyan for her position on the matter. Dermadzhyan objected to an infraction disposition because the case had been referred to the DA's office

as a criminal threats offense (Penal Code section 422), and the People wanted a stay-away order for the victim. Judge Bennett stated that Dermadzhyan's position was a "chicken shit position to have," or words to that effect. The judge further stated that he had received emails regarding this "infamous 415," and that things like this would not be tolerated when he became the judge in department 13, the master calendar department.

O. On March 17, 2014, Judge Bennett presided over *People v. Joshua Chase*, No. 2013014492, a misdemeanor hit-and-run case that was assigned to him for trial. The People were represented by DDA Melissa Bohl, and the defendant was represented by DPD Anita Candelaria. Judge Bennett met with the attorneys in chambers prior to trial. During the chambers conference, Judge Bennett referred to the case as a "Mickey Mouse" case, or words to that effect. Judge Bennett pointed at DDA Bohl and stated, "I should make you pay for this," or words to that effect.

P. On January 27 or 28, 2014, Judge Bennett presided over a probation violation hearing in *People v. Nella Olsen*, No. 2011028522. The People were represented at the hearing by a female DDA. During a recess, the judge asked to speak with DDA Amber Lee and DPD Heather Tomka, who were sitting in the courtroom and not involved in the *Olsen* hearing. While standing in a hallway, Judge Bennett told Lee and Tomka that the DDA handling the *Olsen* hearing was "dumb as shit," and that he wished Lee was conducting the hearing.

Q. On January 13 through 16, 2014, Judge Bennett presided over the jury trial of *People v. Sergio Ortiz*, No. 2012040964. The People were represented by DDA Melissa Bohl, and the defendant was represented by DPD Michele Castillo. On January 16 or 17, 2014, after the trial had concluded, Judge Bennett had his clerk ask DDA Bohl to return to the courtroom in order to share feedback regarding her performance during the trial. Judge Bennett met with Bohl in chambers for 20 to 30 minutes. The

judge asked Bohl where she was from, and Bohl responded that she was from Temecula. Judge Bennett then made a statement to the effect of, "So your parents are farmers and you grew up with a silver spoon in your mouth?" Bohl responded that her parents were not farmers.

R. On October 17, 2011, while presiding over a misdemeanor hit-and-run case, Judge Bennett met in chambers with DDA Andrew Sullivant and DPD Randy Tucker to discuss a possible resolution. DPD Tucker asked for a case disposition of credit for time served, restitution, fines, and no probation. Judge Bennett asked DDA Sullivant if he was "going to make a big stink about that," or words to that effect. Sullivant stated that he was not going to make a "big stink," but would object to that disposition. In response, Judge Bennett became angry, raised his voice, and used profanity, including the words "fucking" and "shit." The judge stated that he had been waiting for an opportunity to address the issue of prosecutors "playing games like this," or words to that effect. The judge admonished Sullivant about prosecutors "agreeing to deals in chambers, then objecting on the record," or words to that effect. Judge Bennett criticized other judges in the courthouse for "playing along with the prosecutors' games," or words to that effect. The judge said he was "sick" of being "bad mouthed" by attorneys in the district attorney's office, both in the newspapers and otherwise, or words to that effect. The judge told Sullivant that, if he was going to object on the record, then he (the judge) was "going to bring up a panel and put on a jury trial," or words to that effect. The judge stated that there appeared to be pressure in the district attorney's office to push cases to trial that should not be going to trial. The judge stated that he got to where he was by "not going along with the program." Judge Bennett stated that he knew all of the policies in the district attorney's office, and he asked Sullivant if he knew how he (the judge) knew about the policies. Judge Bennett then stated, in a raised voice,

"Because I wrote the fucking book," or words to that effect, and he pointed his index finger at Sullivant.

S. On January 19, 2010, Judge Bennett presided over the trial in *People v. Ruben Cortez*, No. 2009037770. The People were represented by DDA Jessica Gigueri, and the defendant was represented by DPD Josephine Banuelos. During the redirect examination of an officer, DDA Gigueri asked for the legal basis for an objection made by defense counsel, which Judge Bennett had sustained, in order to rephrase a question. Judge Bennett called the attorneys to the bench for a sidebar. At the bench, the judge made a statement to Gigueri, in a voice loud enough for the jury to hear, to the effect of, "Are you questioning my authority? Counselor, this is misconduct and I could hold you in contempt. Have you read my court rules? Have you read the rules of court? You know what you need to do? You need to go home tonight and you need to study the rules of court. I know you are new but the next hearing I have is going to be about you. Your questions are not relevant. Move on."

The conduct described above violated the Code of Judicial Ethics, canons 1, 2, 2A, 3B(4), 3B(5), and 3B(7), and constitutes prejudicial misconduct.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Bennett expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: March 10, 2020.

Judge Jeffrey G. Bennett
Respondent

Dated: March 10, 2020.

Heather L. Rosing, Esq.
Attorney for Respondent

Dated: March 11, 2020.

Mark A. Lizarraga, Esq.
Examiner for the Commission

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| INQUIRY CONCERNING<br>JUDGE JEFFREY G. BENNETT<br><br>No. 206 | AFFIDAVIT OF CONSENT<br>FOR DISCIPLINE |

Pursuant to Rules of the Commission on Judicial Performance, rule 127(d), Judge Jeffrey G. Bennett submits the following affidavit of consent in Inquiry No. 206:

1. I consent to a public censure, as set forth in the Stipulation for Discipline by Consent.

2. My consent is freely and voluntarily rendered.

3. I admit the truth of the charges as modified by the Stipulation for Discipline by Consent.

4. I waive review by the Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10 day of March, 2020.

Judge Jeffrey G. Bennett
Respondent

COMMISSION ON JUDICIAL PERFORMANCE
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102

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Contact: Gregory Dresser
Director-Chief Counsel
(415) 557-1200

FOR RELEASE
March 25, 2020

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# JUDICIAL PERFORMANCE COMMISSION ISSUES DECISION AND ORDER IMPOSING PUBLIC CENSURE ON JUDGE JEFFREY G. BENNETT PURSUANT TO STIPULATION

The Commission on Judicial Performance has issued a decision and order imposing a public censure upon Judge Jeffrey G. Bennett of Ventura County Superior Court pursuant to stipulation (Commission Rule 127). Judge Bennett, through his counsel, and the examiner for the commission proposed a Stipulation for Discipline by Consent pursuant to Commission Rule 127(b). The Decision and Order Imposing Public Censure is issued pursuant to that Stipulation, which the commission approved.

The commission determined that it should issue a public censure of Judge Bennett for five acts of prejudicial misconduct and one act of improper action, comprised of 28 different acts of misconduct that violated the Code of Judicial Ethics.

Most of Judge Bennett's misconduct involved comments and remarks that are offensive, undignified, discourteous, dishonest, sexist, and profane, and that created the appearance of bias and retaliation.

Such comments included remarks to an African American criminal defendant about "shucking and jiving," making crude references to his anatomy, commenting about "chicks" liking a car and about not spending so much time with his telescope if he had a "20-year-old smoking hot wife," and using profanity in other remarks.

In another matter, Judge Bennett made statements to an attorney that were false and appeared retaliatory. Judge Bennett also improperly commented about being the subject of peremptory challenges.

Finally, Judge Bennett engaged in a pattern of undignified, discourteous and offensive comments to prosecutors that created an appearance of bias against them.

Judge Bennett's misconduct was aggravated by prior discipline for discourteous and undignified remarks he made to a criminal defendant. Judge Bennett's misconduct was mitigated by acknowledging almost all of the misconduct with which he was charged in, and stipulating to a resolution of, the current matter.

Judge Bennett stipulated to the truth of the facts that formed the basis for the public censure.

The public censure is available on the commission's website at http://cjp.ca.gov (under "Pending Cases - Press Releases & Documents" and "Public Discipline & Decisions") and at the commission's office. Judge Bennett is represented by Attorney Heather L. Rosing of San Diego.

* * *

The commission is composed of six public members, three judges and two lawyers. The chairperson is Nanci E. Nishimura, Esq.

For further information about the Commission on Judicial Performance, see the commission's website at http://cjp.ca.gov.

2 Cal.3d 617
471 P.2d 29, 87 Cal.Rptr. 709
**(Cite as: 2 Cal.3d 617)**

**In re GERALD S. CHARGIN, a Judge of the Superior Court, on Censure.**

**S.F. No. 22741.**

Supreme Court of California, In Bank.

June 10, 1970.

SUMMARY

The Commission on Judicial Qualifications made findings of fact and concluded, after review of proceedings before special masters, and a hearing, that the remarks of a superior court judge, made during the course of a juvenile bearing over which he presided constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The commission recommended that the judge be publicly censured.

The Supreme Court adopted the recommendation and by its order publicly censured the judge. (Opinion by the Court.)

THE COURT.

The Commission on Judicial Qualifications reviewed the report of the special masters appointed pursuant to rule 907 of California Rules of Court, documents filed by the examiner and Judge Chargin, and the record of the evidentiary hearing before the special masters at which it was established that Judge Chargin during the course of a juvenile court hearing over which be presided made certain improper and inflammatory remarks reflecting upon the juvenile's family and members of his ethnic group. Those remarks have been the subject of critical newspaper editorials and resolutions of public bodies.

At the evidentiary hearing the surrounding facts and circumstances were shown, and letters and testimony were received favorable to Judge Chargin, indicating that the remarks were foreign to his customary judicial attitude and conduct. ***618**

Following its review of the above matters and a hearing before it, the commission made certain findings of fact, concluded that the remarks of Judge Chargin constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (see art. VI, § 18, subd. (c), Cal. Const.), and recommended that Judge Chargin be publicly censured. The commission filed with this court the record and recommendation. This court, after reviewing the entire record and considering all the facts and circumstances, has concluded that the recommendation of the commission should be adopted. Accordingly, and by this order Judge Chargin is hereby publicly censured. ***619**

Cal.,1970.

In re Chargin

END OF DOCUMENT

**In re BERNARD B. GLICKFELD, Judge of the Superior Court, on Censure.**

**S.F. No. 22782.**

Supreme Court of California, In Bank.

Jan. 20, 1971.

SUMMARY

The Commission on Judicial Qualifications made findings of fact and concluded, after review of proceedings before special masters, and a hearing, that the remarks of a superior court judge, made during the course of a criminal prosecution and trial over which he presided, constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The commission recommended that the judge be publicly censured.

The Supreme Court adopted the recommendation and by its order publicly censured the judge. (Opinion by The Court.)

THE COURT.

The Commission on Judicial Qualifications reviewed the report of the special masters appointed pursuant to rule 907 of California Rules of Court, objections thereto filed on behalf of Judge Glickfeld, and the record of the evidentiary hearing before the special masters at which it was established that Judge Glickfeld, during a conversation in his chambers concerning the disposition of criminal charges pending in his court, referred to the victim of the alleged crimes in an insulting and inexcusable manner and on a later date made certain intemperate comments in open court in connection with the same case.

Following its review of the above matters and a hearing before it, the commission made certain findings of fact, concluded that Judge Glickfeld's conduct on each date constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (see art. VI, § 18, subd. (c), Cal. Const.), and recommended that Judge Glickfeld be censured. The commission filed with this court the record and recommendation. This court, after reviewing the entire record and considering ***892** all the facts and circumstances, has concluded that the recommendation should be adopted.

Accordingly, and by this order Judge Glickfeld is hereby censured.

Sullivan, J., did not participate. ***893**

Cal.,1971.

In re Glickfeld

END OF DOCUMENT

9 Cal.3d 844
512 P.2d 302, 109 Cal.Rptr. 78
**(Cite as: 9 Cal.3d 844)**

**In re LEOPOLDO SANCHEZ, a Judge of the Superior Court, on Censure**

**L.A. No. 30161.**

Supreme Court of California.

August 2, 1973.

SUMMARY

The Commission on Judicial Qualifications, following a hearing before it and review of a report of special masters, objections to that report, and the record of the hearing before the special masters, found that a superior court judge had regularly furnished to a bail bondsman orders for the release of prisoners on bail, which were blank except for the judge's signature; that the bondsman thereafter filled in the orders, fixed bail without judicial authority, and used the orders to secure the release of prisoners arrested for felonies; and that copies of the used orders were furnished to the judge. No evidence was presented that the judge received any tangible consideration for his actions, but he persisted in such conduct despite its being in contravention of a superior court rule, despite warnings to him by others, including the then presiding judge, and despite having promised to cease signing release orders. The commission concluded that the judge was guilty of wilful misconduct in office and recommended that he be severely and publicly censured.

The Supreme Court adopted the conclusion of the commission, and, by its order, severely censured the judge.

In Bank. (Opinion by The Court.)

THE COURT.

The Commission on Judicial Qualifications, following a hearing before it and review of a report of special masters appointed pursuant to rule 907, California Rules of Court, objections to that report, and the record of the hearings before the special masters found, inter alia: Between December 1969 and October 1972 Judge Leopoldo Sanchez regularly furnished to a bail bondsman orders for the release of prisoners on ***845** bail, which were blank except for the judge's signature. The bondsman thereafter filled in the orders, fixed bail without judicial authority, and used the orders to secure the release of prisoners arrested for felonies, and copies of the used orders were furnished Judge Sanchez. No evidence was presented that the judge received any tangible consideration for his actions. He persisted in the foregoing conduct despite its being in contravention of a superior court rule, despite warnings to him by others including the then Presiding Judge of the Los Angeles Superior Court, and despite having promised to cease signing release orders.

The commission concluded, inter alia, that Judge Sanchez was guilty of "wilful misconduct in office" (see Cal. Const., art. VI, § 18), and recommended that he be "severely and publicly censured."

Upon our review of the record we are satisfied that the foregoing conclusion of the commission is fully warranted and that the discipline recommended should be adopted. Accordingly, and by this order. Judge Sanchez is hereby severely censured. ***846**

Cal.,1973.

In re Sanchez

END OF DOCUMENT

9 Cal.3d 846
512 P.2d 303, 109 Cal.Rptr. 79
**(Cite as: 9 Cal.3d 846)**

**In re ANTONIO E. CHAVEZ, a Judge of the Municipal Court, on Censure**

**L.A. No. 30162.**

Supreme Court of California.

August 2, 1973.

SUMMARY

The Commission on Judicial Qualifications, following a hearing before it and review of a report of special masters, objections to that report, and the record of the hearings before the special masters, found that a municipal court judge had regularly furnished to a bail bondsman presigned orders for release of prisoners on bail and that the judge was aware that the bail bondsman subsequently filled in those orders, fixed bail without authority from a judicial officer, and used the orders to secure the release of prisoners arrested for felonies. There was no evidence that the judge received any consideration for the presigned orders. The commission concluded that the judge was guilty of wilful misconduct in office and recommended that he be censured.

The Supreme Court adopted the conclusion of the commission, and, by its order, censured the judge.

In Bank. (Opinion by The Court.)

THE COURT.

The Commission on Judicial Qualifications, following a hearing before it and review of a report of special masters appointed pursuant to rule 907, California Rules of Court, objections to that report, and the record of the hearings before the special masters, found, inter alia, that Judge Antonio E. Chavez regularly furnished to a bail bondsman presigned orders for release of prisoners on bail and that Judge Chavez was aware that the bail bondsman subsequently filled in those orders, fixed bail without authority from a judicial officer, and used the orders to secure the ***847** release of prisoners arrested for felonies. There is no evidence that the judge received any consideration for the presigned orders.

The commission concluded, inter alia, that Judge Chavez was guilty of "wilful misconduct in office" (see Cal. Const., art. VI, § 18) and recommended that he be censured.

Upon our review of the record we are satisfied that the foregoing conclusion of the commission is fully justified and that the commission's recommendation should be adopted. Accordingly, and by this order Judge Chavez is hereby censured. ***848**

Cal.,1973.

In re Chavez

END OF DOCUMENT

12 Cal.3d 512
526 P.2d 268, 116 Cal.Rptr. 260
**(Cite as: 12 Cal.3d 512)**
<RED FLAG>

JAMES J. McCARTNEY, a Judge of the Municipal Court, Petitioner,
v.
COMMISSION ON JUDICIAL QUALIFICATIONS, Respondent

L.A. No. 30217.

Supreme Court of California.

September 19, 1974.

SUMMARY

After lengthy hearings, special masters who had been appointed by the Supreme Court to take the evidence in proceedings before the Commission on Judicial Qualifications on charges constituting grounds for censure or removal of a judge from office, recommended censure, but on consideration of the masters' report, objections thereto, and oral argument, the commission recommended that the Supreme Court remove the judge from office.

The Supreme Court issued a writ of review on the judge's petition and concluded that censure, rather than removal, was the appropriate discipline. Accordingly, he was censured for injudicious conduct and admonished to desist from engaging in such misconduct. Clear and convincing evidence of conduct justifying censure or removal under Cal. Const., art. VI, § 18, was found with respect to the judge's angry criticism of public defenders for filing affidavits of prejudice against him, his failure, before taking the stand as a witness in several cases, to tell counsel of the substance of his intended testimony, and improprieties in his examination of witnesses. On the other hand, it was noted that the judge had been in office only about a year and a half when the charges were filed and, thus, had been without much judicial experience, and that his conduct had been salutary in many respects, as, for example, in his unusual care in attempting to do justice, in insuring that defendants in criminal cases understood the procedural protections accorded them, and in avoiding "assembly line justice" in minor traffic cases. In the light of these and other mitigating factors, the court held that censure was adequate discipline. (In Bank. Opinion by The Court.) ***513**

HEADNOTES

Classified to California Digest of Official Reports

(1) Judges § 19--Censure and Removal--Constitutional Requirements.

In affording a judge charged with conduct constituting grounds for censure or removal, "reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose," Cal. Rules of Court, rule 904(b), clearly affords him more procedural protection than is constitutionally required. At the stage of the proceedings to which this subdivision applies, the Commission on Judicial Qualifications has not yet commenced to perform any adjudicatory function. Accordingly, notice to him as to the nature of the complaints against him is not compelled as a matter of due process. Hence, relief from the deleterious effect, if any, of the commission's failure to follow this subdivision may be secured by him only on a showing of actual prejudice.

(2) Judges § 19--Censure and Removal--Effect of Procedural Defect.
In the absence of any evidentiary foundation for a judge's assertion that an admitted procedural irregularity in the Commission on Judicial Qualifications' notice to him of its investigation of charges against him had a shattering impact on its impartiality, the irregularity could not, of itself, impair the validity of the commission's subsequent recommendation that he be removed from office.

(3a, 3b) Judges § 19--Censure and Removal--Limitations on Discovery.
In proceedings against a judge, before the Commission on Judicial Qualifications, on charges of conduct constituting grounds for censure or removal, he was not denied due process by application of the commission's rule limiting discovery to items other than depositions, where he failed to make a minimal showing of good cause for depositions, and made his demand so general that witnesses sought to be deposed were not even specified.

(4) Judges § 19--Censure and Removal--Availability of Discovery.
Determination as to whether a discovery order shall issue in proceedings before the Commission on Judicial Qualifications is within the commission's sound discretion.

(5) Judges § 19--Censure and Removal--Confidentiality of Hearings.
There was no impropriety in the Commission on Judicial Qualifications' ***514** refusal to open hearings on charges constituting grounds for censure or removal of a judge to the public, in view of the facts that confidentiality of such hearings is authorized by Cal. Const., art. VI, § 18, subd. (e), is based on sound reason, and is imposed in proceedings which are neither criminal nor before a "court of justice."

(6) Judges § 19--Censure and Removal--Location of Hearings.
Selection of the place for the hearing of charges constituting grounds for censure or removal of a judge rests within the discretion of the Commission on Judicial Qualifications.

(7) Judges § 19--Censure and Removal--Proceedings--Review.
In proceedings to review the Commission on Judicial Qualifications' recommendation that a judge be removed from office, the Supreme Court would refuse to consider a contention, based on due process grounds, not raised before the commission or special masters appointed by that court, attacking Cal. Rules of Court, rule 911, relating to amendments to the commission's accusatory pleading.

(8) Judges § 19--Censure and Removal--Proceedings--Review.
In reviewing the Commission on Judicial Qualifications' recommendation made in proceedings on charges constituting grounds for censure or removal of a judge from office, the Supreme Court will independently evaluate the evidence adduced by special masters appointed by that court.

(9) Judges § 19--Censure and Removal--Constitutional Grounds.
As the expressions are used in Cal. Const., art. VI, § 18, authorizing censure or removal of a judge, "wilful misconduct in office" connotes something graver than "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The more serious charge should be reserved for injudicious conduct which a judge, acting in his judicial capacity, commits in bad faith, whereas the lesser charge should be applied to conduct which a judge undertakes in good faith but which would appear to an objective observer to be not only injudicious, but prejudicial to public esteem for the judicial office. In this connection, "bad faith" is intended to connote that a judge had intentionally committed acts which he knew or should have known were beyond his lawful power, engaging in a pervasive course of conduct of overreaching his authority. ***515**

(10) Judges § 46(3)--Disqualification--Grounds--Bias and Prejudice-- Statutory Provisions.
In enacting Code Civ. Proc., § 170.6, the Legislature guaranteed to litigants an extraordinary right to disqualify a judge. The right is automatic in the sense that a good faith belief in prejudice is sufficient without proof of any facts showing actual prejudice. Thus, once an affidavit of prejudice has been filed under that statute, the court has no jurisdiction to hold further proceedings in the matter except to inquire into the affidavit's timeliness or technical sufficiency under the statute. Where the affidavit is timely and properly made, immediate disqualification is mandatory.

[See Cal.Jur.2d, Judges, § 41; Am.Jur.2d, Judges, § 166.]

(11) Witnesses § 36--Competency--Judicial Officers.
Incident to his duty to conduct proceedings with a view toward the effective ascertainment of truth, a trial judge possesses inherent power to examine witnesses to elicit or clarify testimony. But in examining witnesses, he may not become an

advocate for either party or cast aspersions or ridicule on a witness.

(12) Witnesses § 3--Attendance--Right to Compel--Court's Power to Call Witness.
The trial court has inherent power to call witnesses where the interests of justice require, but the power is subject to a limitation that it be impartially exercised.

(13) Judges § 19--Censure and Removal--Grounds.
A judge's conduct and language which tended to embarrass the other judges in his district, although repugnant to the venerable tradition that judges share the bench as brethren in a spirit of mutual respect and courtesy, did not constitute prejudicial conduct within Cal. Const., art. VI, § 18, relating to censure and removal of judges, in the absence of any showing that public esteem for the judicial office was substantially impaired by what appeared to be an isolated incident.

(14) Judges § 19--Censure and Removal--Grounds.
A judge's muttered profanity and humming in court did not constitute prejudicial conduct, within Cal. Const., art. VI, § 18, relating to censure and removal of a judge from office, where it appeared that the conduct was unintentional and did not actually prejudice the administration of justice, in the sense of drawing the courts into public disesteem. ***516**

(15) Judges § 19--Censure and Removal--Grounds.
A judge's inefficiency in conducting court was no ground for discipline, where it appeared that, among other things, the inefficiency did not arise from any neglect of responsibility on his part, but stemmed from his effort to attain a degree of diligence and studiousness in the application of the law which was unrealistic and frequently unjustified.

(16) Contempt § 1--Purpose of Contempt Powers.
A judge must not place the defense of his own character above his obligation to promote respect for the law in adjudicating contempts of court.

(17a, 17b) Judges § 19--Censure and Removal--Mitigating Factors.
In view of a judge's inexperience, his unusual care in attempting to do justice and to provide a fundamental fairness in sentencing, in creating opportunities for rehabilitation of alcoholic defendants, his dedicated approach to even minor traffic cases, and other redeeming qualities, censure, rather than removal from office, was proper discipline despite evidence that he was guilty of wilful misconduct and prejudicial conduct, within Cal. Const., art. VI, § 18, in angrily criticising public defenders for filing affidavits of prejudice, ignoring proper limitations in his examination of witnesses, and failing, before taking the stand as a witness, to inform counsel of the substance of his impending testimony.

(18) Judges § 19--Censure and Removal--Proceedings--Review.
In the Supreme Court's review of the Commission on Judicial Qualifications' recommendation made in proceedings on charges constituting grounds for censure or removal of a judge from office, the recommendation made by the special masters appointed by that court to take the evidence is entitled to considerable weight.

COUNSEL

Kayashima & Tessier and Ben T. Kayashima for Petitioner.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, James H. Kline and Robert F. Katz, Deputy Attorneys General, for Respondent. ***517**

THE COURT.

We issued a writ of review in response to the petition of Judge James J. McCartney, filed pursuant to rule 920 of the California Rules of Court, [FN1] that we modify or reject the recommendation of the Commission on Judicial Qualifications (hereinafter the Commission) that he be removed from office. [FN2] Judge McCartney contends that the Commission has denied him procedural due process, that the charges of misconduct against him have not been sufficiently proven, and that any proven misconduct should be mitigated by his inexperience in office or as a justifiable response to an unprofessional effort by the local public defender to prevent him from hearing criminal cases. For the reasons stated below we conclude that the Commission's recommendation that Judge McCartney be removed from office be rejected but we further conclude that he be censured.

> FN1 All references herein to specific rules are to the California Rules of Court.
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> FN2 California Constitution, article VI, section 18, subdivision (c) provides: "(c) On recommendation of the Commission on Judicial Qualifications the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of his current term that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

Following service as a deputy district attorney petitioner was elected a Judge of the Municipal Court for the San Bernardino

Judicial District (Central Division) of San Bernardino County. He began his six-year term of office on January 4, 1971. As early as late March of that year the Commission began to receive letters from private citizens and attorneys alleging that petitioner had engaged in certain unbecoming conduct during a welfare fraud case. After consideration and examination of these complaints by informal letters of inquiry and a formal preliminary investigation (rule 904), the Commission charged petitioner with seven general counts (consisting of numerous subcounts) of wilful misconduct in office (hereinafter wilful misconduct) and conduct prejudicial to the administration of justice that brings the judicial office into disrepute (hereinafter prejudicial conduct). In accordance with the usual procedure (rules 905, 906, and 907) the Commission served its accusatory Notice of Formal Proceedings (hereinafter notice) containing these charges, petitioner filed a verified answer thereto, and this court appointed three special masters to take the extensive evidence in this matter. [FN3] After lengthy confidential hearings upon the ***518** original charges and some new allegations added after the proceedings had commenced, the special masters issued their report summarizing the evidence for the Commission. The masters found that petitioner had in five specific instances engaged in prejudicial misconduct, but had not committed any acts of wilful misconduct. Based on that finding, the master's report recommended censure.

> FN3 We appointed Thomas W. LeSage, Judge of the Superior Court of the County of Los Angeles (presiding master); William E. McGinley, Judge of the Superior Court of the County of Los Angeles; and Sam Cianchetti, Judge of the Municipal Court for the Citrus Judicial District of Los Angeles County.
> The hearings in this matter consumed 4 months during which the masters received the testimony of 175 witnesses and numerous exhibits. The record presented to us for review is comprised of 8,702 pages divided into 67 volumes.

Upon consideration of the masters' report, written objections thereto by both petitioner and the examiner, and oral arguments, the Commission thereafter filed with this court its own unanimous findings of fact and conclusions of law. Impliedly rejecting the contrary view of the masters, the Commission found that petitioner had engaged in both acts of wilful misconduct and prejudicial conduct. While the Commission dismissed 15 of the various subcounts against petitioner, it concluded that each of the general counts in the notice had been fully or partially sustained by the evidence. Consequently, the Commission recommended to this court that petitioner be removed from office. [FN4] (Cal. Const., art. VI, § 18.) Pursuant to the provisions of the California Constitution, petitioner was thereby automatically disqualified from acting as a judge for as long as the Commission's removal recommendation remained pending before this court. (Cal. Const., art. VI, § 18, subd. (a).)

FN4 The Commission's vote was five for removal and two for censure.

Disputing the Commission's recommendation, petitioner filed his petition for the instant review. Beyond challenging the Commission's removal recommendation on its merits, however, Judge McCartney also renews before this court certain objections which he repeatedly raised to the Commission's jurisdiction and procedures. Contending broadly that the entire proceedings leading up to the Commission's recommendation were violative of his constitutional rights, petitioner specifically asserts that the Commission denied him due process of law in (1) failing to accord proper notice of its preliminary investigation under rule 904(b), by (2) permitting amendment to the charges after the commencement of evidentiary hearings, in (3) denying his demands for public hearing, change of venue, and discovery by deposition, in (4) failing to accord him the right to disqualify Commission members, and (5) by neglecting to indicate what evidentiary standard it applied in reviewing the masters' report. ***519**

In our view, these assertions that procedural defects in the Commission's proceedings amount to a denial of due process are without merit. The Commission's failure, for instance, to accord Judge McCartney notice of the preliminary investigation into the various incidents at issue other than the welfare fraud case, as prescribed in rule 904(b), entailed no fundamental unfairness. (1) In affording a judge "reasonable opportunity in the course of the preliminary investigation to present such matters as he may choose," rule 904(b) clearly affords to the judge more procedural protection than is constitutionally required. At the stage of the proceedings to which rule 904(b) applies, the Commission clearly has not yet commenced to perform any adjudicatory function, but is merely attempting to examine citizen complaints in a purely investigatory manner. [FN5] Accordingly, notice to the judge under investigation as to the nature of the complaints against him is not compelled as a matter of due process. (See Hannah v. Larche (1960) 363 U.S. 420 [4 L.Ed.2d 1307, 80 S.Ct. 1502].) Hence, relief from the deleterious effect, if any, of the Commission's failure to follow rule 904(b) may be secured by petitioner only upon a showing of actual prejudice. (Cf. Light v. State Bar (1939) 14 Cal.2d 328, 331-332 [94 P.2d 35], wherein the State Bar failed to accord notice as provided by statute; McPheeters v. Board of Medical Examiners (1947) 82 Cal.App.2d 709 [187 P.2d 116], wherein the board failed to provide notice of a continuance of hearings.) No such prejudice appears here. The record is clear that service of the notice detailing all seven general counts of misconduct against him, over three months before the evidentiary hearings gave petitioner adequate notice of charges and reasonable time to prepare his defense.

FN5 After the fashion of the Federal Trade Commission, the instant Commission combines investigatory and adjudicatory functions, conducting a field investigation into the

citizen complaints it has received which may divulge information later used to initiate the formal adjudicatory hearings against the particular judge under scrutiny. Testimony by the executive officer of the Commission in this case conclusively establishes that the investigation is entirely separate from the Commission's adjudicative role. The sole purpose of the preliminary investigation is to determine whether there is any factual basis for considering the initiation of a formal hearing and the incident drafting of a formal accusatory pleading. Furthermore, the investigation is not conducted by the Commission itself or its staff, but by independent special investigators from the California Attorney General's office.

(2) Petitioner's related assertion that the Commission's periodic exposure to reports of the investigation, unchallenged by explanations he would have submitted had it complied completely with rule 904(b), had a shattering impact upon its impartiality is without any evidentiary foundation. ***520** Hence, the admitted procedural irregularity [FN6] in the Commission's notice of the investigation cannot of itself impair the validity of its subsequent recommendation of removal. (Accord, In re Robson (Alaska 1972) 500 P.2d 657.)

FN6 Before this court, the Commission candidly concedes that there was no formal compliance with rule 904(b), except with respect to the LaCroix incident.

(3a) Nor does there appear to be any substantial merit in the assertions that petitioner was denied due process when the Commission, pursuant to its own special rule, limited discovery to items other than depositions. In requesting the opportunity to take depositions of witnesses (or, in the alternative, to serve written interrogatories) in addition to the discovery permitted by the Commission, petitioner sought the discovery expressly authorized by statute (Gov. Code, § 68753 empowering the Commission to order depositions "[in] any pending investigation or formal proceeding"). (4) As matters of discovery are generally within the sound discretion of the initial trier of fact, however, we consider that the determination as to whether a discovery order shall issue is within the sound discretion of the Commission.

(3b) We cannot say that there has been such an abuse of that discretion here that petitioner was deprived of due process. Without deciding which discovery standard - the civil practice rule requiring a showing of relevance and materiality (Code Civ. Proc., § 2036) or the slightly more liberal criminal law requirement that the information sought be demonstrated necessary for a fair trial (Pitchess v. Superior Court (1974) 11 Cal.3d 531, 536 [113 Cal.Rptr. 897, 522 P.2d 305]) - should apply to the Commission's proceedings, we believe that it was incumbent upon petitioner to make some minimal showing of good cause for the

depositions. (See Shively v. Stewart (1966) 65 Cal.2d 475, 481-482 [55 Cal.Rptr. 217, 421 P.2d 65, 28 A.L.R.3d 1431]; Brotsky v. State Bar (1962) 57 Cal.2d 287, 303-304 [19 Cal.Rptr. 153, 368 P.2d 697, 94 A.L.R.2d 1310].) Petitioner made no showing of good cause whatsoever, entirely failing to support his demand with appropriate affidavits and making the demand itself so general that the particular witnesses to be deposed were not even specified. By reason of such lack of clarity in his demand, petitioner has no cause for complaint that the request was refused.

Equally unfounded is petitioner's complaint that he should have been accorded an open hearing. (5) This state has adopted a constitutional policy that proceedings before the Commission shall be confidential (Cal. Const., art. VI, § 18, subd. (e), authorizing the Judicial Council to "make rules ... providing for confidentiality of proceedings.") While such a ***521** policy undoubtedly was adopted in part to protect the particular judge charged with misconduct and might, therefore, arguably be waived by him, we recognize that the provision for confidentiality also protects witnesses and citizen complainants from intimidation. Inasmuch as confidentiality is constitutionally authorized, is based on sound reason, and is imposed in proceedings which are neither criminal nor before a "court of justice" we perceive no impropriety in the Commission's refusal to open the hearings before the special masters to the public. (See Swars v. Council of City of Vallejo (1949) 33 Cal.2d 867, 873- 874 [206 P.2d 355]; see generally, Woolley v. United States (9th Cir. 1938) 97 F.2d 258, 262.)

We are likewise unpersuaded that there was an abuse of discretion in the Commission's refusal to return the proceedings to San Bernardino County. While neither the state Constitution itself nor the usual statutory venue rules make any provision as to venue for the Commission's proceedings, the Judicial Council, in the exercise of its constitutional power to fashion rules of court, has given the Commission authority to set the time and place for hearings. (Rule 907). (6) Accordingly, we perceive the place of hearing to be discretionary with the Commission. Furthermore, we find no abuse of that discretion in the Commission's determination here. Pomona was the city where the courtroom of the presiding special master was located. It was the available courtroom nearest to the courthouse in the City of San Bernardino where a rather undesirable emotion-charged atmosphere prevailed. At the same time, the Pomona location imposed only minimal inconvenience for the majority of witnesses who resided no more than 24 miles away in San Bernardino. Under these circumstances, the holding of the proceedings in Pomona was proper (see Gov. Code, § 68751 restricting the Commission's process to within 150 miles of where witnesses reside).

As to the merit of the contention that the examiner's amendments to the Commission's accusatory pleading after evidentiary

hearings commenced was a denial of due process, we need not address ourselves. While there may be some force to petitioner's point that the provision for such amendment in rule 911 bears reconsideration in the light of the subsequent decision in In re Ruffalo (1968) 390 U.S. 544 [20 L.Ed.2d 117, 88 S.Ct. 1222] (finding a due process violation in somewhat similar amendment of the notice of charges in a state bar disciplinary matter), that issue is not properly before this court. (7) Petitioner's counsel expressly declined to challenge the validity of rule 911 before the special masters and proceeded to answer the new allegations. Such assertions of procedural defect will not be considered on review in the absence of a proper objection before the ***522** masters or the Commission itself. (Cf. Rosenthal v. Harris Motor Co. (1953) 118 Cal.App.2d 403, 409 [257 P.2d 1034].)

Also without merit are each of petitioner's remaining assertions of procedural defect which are summarily rejected. [FN7]

FN7 Contrary to the assertion of certain amici curiae that the Commission improperly considered hearsay evidence, we find the Commission to have been in substantial compliance with rule 909. That rule's requirement that the Commission must receive only "legal evidence" clearly applies to hearings, not to the preliminary investigation during which the particular hearsay statements of which amici complain were taken. The rule was fully observed here in that the only hearsay evidence received by the special masters was admitted into evidence pursuant to well-established exceptions to the hearsay rule.

We also reject the additional assertions that the Commission's failure to articulate standards, imprecision in findings, and rejection of petitioner's effort to disqualify Commission members rise to the dignity of a deprivation of due process. In connection with the action of administrative tribunals similar to the Commission, we have often recognized in the past a presumption that the administrative body concerned has found the necessary facts based on the evidentiary standards prescribed by applicable law (e.g., City & County of S. F. v. Superior Court (1959) 53 Cal.2d 236, 251 [1 Cal.Rptr. 158, 347 P.2d 294]). We adhere to that presumption here in declining to assume, in the absence of affirmative evidence to the contrary, that the Commission has ignored the "clear and convincing evidence" standard which we articulated in Geiler v. Commission on Judicial Qualifications ((1973) 10 Cal.3d 270 [110 Cal.Rptr. 201, 515 P.2d 1]) in making what we find upon examination to be sufficiently detailed findings of fact. We similarly decline to assume that the Commission members entertained a prejudice toward petitioner merely because, as he asserts, they considered the field reports of the Attorney General's special agents during the investigatory stages of the proceedings. No fundamental unfairness or constitutional infirmity is inherent in such a combination of investigative

and adjudicative functions.

Coming then to the merits of petitioner's case, we proceed to consider whether the allegations of misconduct against him have been proven "by clear and convincing evidence" sufficient to sustain them "to a reasonable certainty" ( Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d 270, 275.)

By way of the numerous subcounts which comprise the seven general counts in its notice, the Commission has charged that petitioner has engaged in a number of acts constituting wilful misconduct or prejudicial conduct. It is alleged that petitioner has engaged in a course of "intemperate language, displays of uncontrolled temper ..., and ... unreasonable verbal abuse" in criminal cases (count One) which has included the bullying and badgering of pro. per. defendants in an argumentative manner abusive to their rights and harmful to the reputation of the judiciary and the administration of justice (count Four). The Commission has further alleged that petitioner has committed similar "displays of anger, improper language, and bullying" in his relations with court personnel, to the detriment of a ***523** "proper working relationship" between the judges and personnel in his district and to the harm of the administration of justice (count Two). Petitioner is also charged with being no less disrespectful to his brothers on the bench, having allegedly "engaged in conduct and language unbecoming a member of the bench ... and tending to embarrass the members of the bench in [his] judicial district ..." (count Five). The Commission also alleges that petitioner has been "grossly incompetent" in his relations with counsel, engaging in "improper criticism of counsel, prolonged and unnecessary argument with counsel, improper colloquy with counsel regarding the filing of affidavits of prejudice ..., and badgering [of] ... counsel ..." (count Three). Furthermore, it is alleged that the foregoing mistreatment of defendants, personnel, and counsel has been coupled with "aggravated inefficiency and gross incompetence in conducting court" - including "long delays in issuing rulings from the bench" - which has resulted in the effective absence of any "competent judicial officer to perform the work normally" assigned to the judicial position which petitioner holds and which thereby materially impairs the administration of justice (count Six). Finally, it is alleged that petitioner has "not properly adhered to the judicial function," abdicating his judicial role on several occasions (count Seven).

(8) In accord with our duty to independently evaluate the evidence adduced by the special masters ( Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 276), we have examined in full detail the record of proceedings before the Commission with respect to each of the foregoing charges. On the basis of that examination, we find the majority of the Commission's findings accurate, adopt them as our own, and enter the pertinent portions of those which we adopt in the margin.

[FN8] As the ***524** remaining Commission findings are rejected, [FN9] we also enter several of our own independent findings of fact. [FN10] ***525**

FN8 The Commission's findings were as follows:

"Finding

"1. Respondent is, and since January 4, 1971 has been, a judge of the Municipal Court of the San Bernardino County Municipal Court District.

Finding (Count One C)

"2. In People v. Ornelas ..., Judge McCartney harassed the defendant by repetitious questioning and repetitious reference to certain words and conduct of the defendant. Judge McCartney engaged in unconscionable harassment of defense counsel through repetitious and uncalled for questioning of the legal position counsel was advancing. Judge McCartney used intemperate language and engaged in uncalled for and unreasonable verbal abuse of the defendant and counsel, and gave the impression of bias towards the defendant and her counsel, Lane Stuart.

"Judge McCartney, throughout the proceeding, acted as an advocate justifying the proceedings over which he had presided previously rather than as a judge hearing without bias and prejudice motions made in good faith by counsel for defendant.

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"Finding (Count Two A)

"3. While presiding during probation and sentence in People v. LaCroix ... on March 24, 1971, and after holding Mrs. LaCroix in contempt, Judge McCartney turned to his clerk, Mrs. Carol Perry, and stated in a loud voice, 'I heard that. You are in contempt. You are going to jail.' Mrs. Perry asked, 'What did I do? What did I do?' Judge McCartney shouted, repeatedly, 'Apologize! Apologize!' Mrs. Perry said, 'Well, I'm sorry.' She was not jailed. Mrs. Perry did not say anything prior to Judge McCartney's outburst. Judge McCartney then left the bench, stating that he was going to see her supervisor. When he returned to the courtroom he shouted, 'Leave my courtroom, you're no longer my courtroom clerk.' Judge McCartney was obviously angry when addressing Mrs. Perry, and his language was intemperate. Mrs. Carol Perry did cry in the courtroom and Judge McCartney did bully Mrs. Perry.

"

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Finding (Count Two B)

"4. Mrs. Nadine Waymire is the assistant clerk of the San Bernardino Municipal Court. Judge McCartney entered her office between 2:00 and 2:30 p.m., on March 24, 1971, and said, in a

loud voice, 'I want another clerk, right now,' emphasizing each word by pounding his fist loudly on Mrs. Waymire's desk. Judge McCartney was upset and angry. ...

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"Finding (Count Two D-1)

"5. Judge McCartney replaced Judge William Johnstone in the Victorville Division of the San Bernardino Municipal Court on July 28, 1971. Robert Atkinson, the regular court reporter, reported the morning proceedings for Judge McCartney. Mr. Atkinson telephoned Mrs. Frances Rea and requested that she report the afternoon proceedings beginning at 1:30 p.m. Judge McCartney ordered Mr. Atkinson to return to his court at 1:00 p.m. At 1:08 p.m. Mr. Atkinson advised Judge McCartney that he was leaving on vacation and would be replaced by another reporter. Judge McCartney expressed no concern. Mrs. Rea arrived in Judge McCartney's courtroom at 1:25 p.m. At approximately 1:30 p.m. Judge McCartney orally ordered Deputy Marshal Michael K. Friesen to 'find Mr. Atkinson, arrest him, and bring him back to the courthouse.' Judge McCartney was visibly upset.

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"Finding (Count Three B)

"8. On June 25, 1971, Judge McCartney spent the court day in a preliminary hearing involving several counts of bookmaking (People v. Birch and Jennings). During the hearing Judge McCartney took several unexplained and unannounced recesses and, on many occasions, took an inordinate amount of time ruling on objections. After the matter was submitted, and before the defendants were held to answer, Judge McCartney sat back in his chair for a period of thirty to forty-five minutes, during which he did not speak but occasionally turned his chair around and faced the ceiling. This conduct was unexplained and the proceedings in the courtroom came to an uncertain halt during this period.

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"Finding (Count Three D)

"10. On January 3, 1972, in the case of People v. Anderson, Deputy Public Defender Raymond Rager appearing on behalf of the defendant, Judge McCartney addressed the following remarks to Mr. Rager concerning the propriety of the filing of Affidavits of Prejudice by the Public Defender's Office:

'... If you think I'm going to take away the dignity of this Court and what the people elected me to do, then you're out of your mind.

'I'll you another thing: Unless I get fairness in this thing,

I might be running against other judges. I'm not going to sit up here and be the butt of abuse of the public defender.

'If I have to run again, I'm going to run again, I'm going to take this message to the people because it's unfair. I'm going to fight. I'm not about to put my tail between my legs. And if I have to run again for office, I'm going to do it. I'm not going to be pushed around by the Public Defender's Office and the abuse and the perversion that they have engaged themselves in emasculating an elected official of the people.

'And if you're ready to do it, I'll meet you anywhere, any time, any place, buddy, up to the United States Supreme Court, back down again to the court of public opinion and anywhere else where justice will stand up.

'I went to a conference in Monterey ...

'This thing is being abused badly, and I'm not about to stand for it, and I'll fight it every time, every place, every corner where justice will permit me to do it.

'You might as well make your mind up to that, mister.' "Judge McCartney made the above statement in a loud voice, with flushed face, and appeared to those present to be angry and excited.

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"Finding (Count Four C)

"13. Allan B. Cossentine on January 21, 1972, in the courtroom of Judge McCartney, attempted to file an Affidavit of Prejudice without knowledge of the appropriate statute. Judge McCartney asked Mr. Cossentine his reasons for requesting transfer to another department. Mr. Cossentine stated that he had experience in paramedicine, and that it was his opinion that Judge McCartney was under intense emotional and nervous pressure. When Deputy Public Defender Friedman attempted to assist the defendant, Judge McCartney stated that the Public Defender would first have to be appointed in the case, refusing his profferred assistance as inappropriate interference. Judge McCartney carried on an irrelevant, unnecessary, argumentative and undignified colloquy with Mr. Cossentine, a traffic case defendant appearing in propria persona, despite efforts of the latter not to become so engaged. Judge McCartney further bullied and badgered Mr. Cossentine and abused his rights, all harmful to the reputation of the judiciary and to the administration of justice.

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"Finding (Count Five A)

"14. The case of People v. Julia Campbell ... was called for arraignment and disposition of certain motions in the courtroom of Judge McCartney on August 25, 1971, at 1:30 p.m. The defendant, a clerk in the Superior Court of San Bernardino County, was charged with a violation of Penal Code Section 187

(Murder). Presiding Judge Roy E. Chapman, at approximately 1:30 p.m., through his bailiff, ordered Judge McCartney to transfer the Campbell case to Judge Chapman's courtroom. Judge McCartney was on the bench and had called the Campbell case when he received the order to transfer it. Judge McCartney ordered his bailiff, his court reporter, Mrs. Faith Hewitt, Clark Hansen, Deputy District Attorney, and Defense Attorneys Paul Steinman and Richard Beswick, to accompany him to Judge Chapman's chambers, where, in their presence, Judge McCartney had a discussion with Judge Chapman regarding the order for transfer which had been made. This discussion was reported by Mrs. Hewitt. Judge McCartney spoke in a high-pitched, excited voice and appeared to be angry. His voice was heard in the adjoining courtroom.

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"Finding (Count Six B)

"18. On March 17, 1972, during argument on a motion for new trial in People v. Worley, and on an issue totally irrelevant to the motion, Judge McCartney called both his bailiff and his clerk as witnesses and questioned them. Judge McCartney then left the bench, entered his chambers, removed his robe, returned to the courtroom in a suit coat, was sworn as a witness, took the stand and testified narratively at some length on the same irrelevant issue, during which time there was no judge on the bench.

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"Finding (Count Seven A)

"21. During the period from January to March, 1971, Judge McCartney conferred from time to time with his bailiff, Marshal John Fink, at the bench, on the subject of the propriety of his proposed sentencing, immediately prior to his pronouncement of judgment. At Mr. Fink's suggestion to make what they were doing less obvious, Judge McCartney later called his bailiff to the bench, on the pretext of the bailiff's running an errand, before the two would confer. This conduct occurred only with respect to defendants appearing in propria persona.

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"Finding (Counts Seven B-1 and Seven B-2)

"22. On December 10, 1971, Judge McCartney heard a motion by counsel to set aside a guilty plea in the case of People v. Lujan (...), which plea had previously been entered by the defendant in propria persona. Petitioner was called as a witness, was examined by his counsel, was cross-examined by the deputy district attorney, and was also cross-examined extensively by Judge McCartney. At Judge McCartney's direction a San Bernardino police officer was called as a witness for the People. Judge McCartney

conducted the examination of this witness during which he ruled on objections by defense counsel to questions propounded by the Court. Judge McCartney then stepped down from the bench, removed his robe, put on his suit jacket, and took the stand as a witness, testifying narratively and at length. At this time there was no judge presiding over the proceedings. Judge McCartney then removed his jacket, put on his robe and resumed the bench.

"Finding No. 18 (Count Six B) is incorporated herein by reference as though set forth in full.

"In both instances, Lujan and Worley, Judge McCartney became personally involved in the proceedings. His participation was strongly advocative in nature, was clearly directed in support of the prosecution's position, and constituted a partisan effort to defeat petitioner's position. By testifying in an adversary posture he created the impression that there was no impartial, truth-seeking judge in the courtroom."

In addition, we adopt with some modification the Commission's Finding 15: While at the bench, Judge McCartney whistled, hummed, and muttered profanities to himself during court sessions. These utterances were made in lower than conversational, but nevertheless audible, tones. The profanity was not directed at any individual or individuals but apparently was almost unwittingly uttered as a personal response to the proceedings. Yet, it was heard by numerous people and the practice continued after the judge had been informed that his comments were within hearing of persons in the courtroom.

FN9 The Commission's findings numbered 7, 11, 12, 16, 17, 19, 20, 23, and 26 are rejected for the reason that they are conclusory or duplicative of one of those which we have adopted. Commission findings numbered 6 and 9 are rejected as merely corroborative of finding number 10, involving the judge's heated reaction to the mass filing of affidavit of prejudice forms. Finding number 24 is similarly corroborative of the more explicit findings 18 and 22 as to petitioner's examination of witnesses. Also rejected is the Commission's finding 25, which concerns matters not charged in the accusatory notice and is by its terms merely corroborative of the central findings.

FN10 We independently find as follows:
Finding No. 1: During a probation and sentencing hearing in People v. LaCroix, a welfare fraud case, Judge McCartney's examination of the defendant LaCroix was repeatedly interrupted by Mrs. LaCroix' irate and boisterous outbursts. Without shouting, Judge McCartney allowed Mrs. LaCroix briefly to address the court and then firmly admonished her that she would be ordered from the courtroom if she continued to interrupt the proceedings. When Mrs. LaCroix thereafter persisted in her spontaneous outbursts, Judge McCartney - in a voice described by some witnesses as yelling and screaming - angrily told her to "shut up" or he would hold her in contempt. At Mrs. LaCroix' further

interruption, Judge McCartney ordered her from the courtroom. As she was leaving, however, Judge McCartney directed her to return to the bench where he found her in contempt of court and ordered her immediate arrest and incarceration in the county jail. In imposing the contempt sentence, Judge McCartney stated to Mrs. LaCroix that she should have proper respect for the court and refrain from "making faces."

After a brief recess during which he rescinded the contempt sentence, Judge McCartney resumed the questioning of the defendant. In the course of reviewing prior instances of his fraudulent conduct, Judge McCartney strongly criticized him for his "cheating attitude," referring to LaCroix as a "deadbeat." He also angrily reprimanded Mr. LaCroix for lying to the court, calling him a "liar" and a "cheat," and for bringing his children into the courtroom as a blatant play upon the court's sympathy. Throughout the resumed proceedings, Mr. LaCroix became progressively hostile to the court, loudly and boisterously interrupting the judge. Judge McCartney reacted by threatening to increase the jail time to 180 days if Mr. LaCroix kept interrupting. Judge McCartney ultimately entered a modified sentence of 30 days in the county jail.

Finding No. 2: In People v. Myers, a driving-while-under-the-influence-of- alcohol case, the defendant entered a guilty plea before Judge McCartney and was sentenced. Before the plea was accepted, Judge McCartney fully advised Myers of his constitutional rights, including his right to enter a plea of not guilty. After adjournment of court for the noon recess, Myers approached Judge McCartney in the courthouse hallway and casually inquired about the availability of a blood alcohol test. Judge McCartney thereupon directed Myers to, "get in this courtroom or I'll have you arrested." After Myers re-entered the courtroom, Judge McCartney severely reprimanded him for accosting the court in the hallway and continued his case until the afternoon because no reporter was immediately available. In the subsequent proceedings Judge McCartney vacated the plea of guilty over Myers' protests and granted a continuance for the arraignment so that Myers could secure counsel.

Finding No. 3: While hearing an offer of proof in chambers in the case of People v. Worley, Judge McCartney muttered "god damn son-of-a-bitch" under his breath. Although audible to counsel, these utterances were not directed toward any individual.

Finding No. 4: Throughout his harassment of the defendant in People v. Ornelas, Judge McCartney assumed the role of an advocate in attempting to establish that he had treated the defendant fairly when she had previously appeared before him in pro. per. Although counsel was present for both the People and the defendant, the judge extensively questioned the defendant from the bench. Rather than

directing inquiry to the material issue of the defendant's understanding of certain waivers she had signed previously in entering a plea, he examined her as to such irrelevant matters as her attitude toward him as a judge and her past conduct of bearing several illegitimate children. Judge McCartney thereby so seriously compromised his impartiality that he was subsequently restrained from proceeding further by the superior court.

Finding No. 5: Judge McCartney has engaged in delays in issuing rulings on numerous occasions. Indeed, he has been observed to routinely sit back in his chair, with his face tilted toward the ceiling and his eyes closed, to contemplate the most ordinary evidentiary objections. At these times, the judge meditated for 3 to 15 minutes at a time while the unrecessed courtroom remained in silence.

These adopted and independent findings may be briefly summarized, along with certain supplementary facts drawn from the record itself as ***526** follows: We perceive clear and convincing evidence that in one welfare fraud case petitioner angrily told a pro. per. defendant's wife to "shut up" or be held in contempt when she persisted in making a series of boisterous outbursts which interrupted the proceedings. In the same case, petitioner ***527** strongly criticized the pro. per. defendant, alleging that he had previously perpetrated frauds and stating that in an attempt to evoke the court's sympathy, he had brought his children to court. For an apparent misrepresentation ***528** to the court, petitioner called the defendant a "liar," "cheat," and "deadbeat." Petitioner also responded to the latter's boisterous interruptions at the sentencing by angrily threatening to triple the jail sentence.

There are three other similar instances. Petitioner told another pro. per. defendant, who had previously appeared before him to plead guilty to a drunk driving charge, to "get in [the] courtroom or I'll have you arrested" when the defendant approached him in the courthouse hallway during the noon recess to casually inquire about the availability of a blood-alcohol test. In hearing a motion for withdrawal of a prior guilty plea in another case, petitioner harassed a defendant and her counsel by extensively examining her as to several irrelevant matters in a furious argumentative "Perry Mason type of dialogue." In a fourth case, where a pro. per. defendant sought the transfer of his case to another court because Judge McCartney seemed emotionally upset, Judge McCartney engaged in a verbal attack upon the defendant with respect to his experience as a paramedic in a deliberate effort to embarrass the defendant or provoke him into a contemptuous response.

There is also clear and convincing evidence that, during the hearing of ***529** the previously mentioned welfare fraud case, petitioner for no apparent reason furiously threatened to hold his court clerk in contempt shouting at her to "Apologize!

Apologize!" He subsequently discharged her as his clerk in such a violent manner as to leave her crying at her desk in the courtroom. Following the incident, petitioner went to the office of the supervising assistant clerk of the court. Once there, he loudly demanded "another clerk, right now" while pounding the supervisor's desk with his fist. Petitioner was equally arbitrary with court personnel when sitting at nearby Victorville. There, in the courtroom, petitioner ordered the arrest of a court reporter after the reporter had arranged for a replacement for the afternoon session, had advised petitioner that he had done so, had departed for his annual vacation, and the replacement had arrived 25 minutes later than expected.

The record further includes clear and convincing evidence that almost immediately after petitioner took office the local public defender's office began to file "blanket" affidavits of prejudice against him for reasons that are not entirely apparent. In reaction, Judge McCartney engaged in angry and excited dialogues with deputy public defenders who filed the affidavits. In the course of these arguments, petitioner on one occasion threatened to "fight" the office. In doing so, the judge told one deputy: "I'll meet you anywhere, any time, any place, buddy, up to the United States Supreme Court .... You might as well make up your mind to that, mister." On another occasion, Judge McCartney displayed similar hostility to a private defense attorney who attempted to file an arguably untimely affidavit of prejudice.

We find, in addition, clear and convincing evidence that petitioner challenged the transfer of a preliminary hearing on a murder case that was about to commence in his courtroom by calling a recess, taking court personnel and counsel to the presiding judge's chambers and there, in the presence of court personnel and counsel, angrily demanding an explanation for the transfer from the presiding judge.

During an in-chambers offer of proof in a prostitution case, petitioner muttered profanities under his breath in what appeared to be a self-directed, personal emotional release. He has similarly whistled, hummed, and muttered profanities to himself on numerous occasions while at the bench when court has been in session.

The record also contains clear and convincing evidence that petitioner has held benchside conferences with one of his bailiffs in sentencing pro. per. defendants in traffic and misdemeanor cases. The record also discloses, and we deem it a fact, that the court actually imposed some of the sentences which the bailiff fashioned. ***530**

Moreover, the judge in several cases extensively examined witnesses - often over objection of counsel - in the manner of an advocate. In conducting such examinations he ruled on counsel's objections to questions which he himself propounded, thereby

assuming an adversary posture antithetical to the impartial conduct of court proceedings. These examinations also expended judicial time on matters collateral or entirely irrelevant to the cases before him. While the examination of witnesses by the court was sometimes necessitated by the unavailability of deputy district attorneys, [FN11] petitioner did not hesitate to engage in such examination even when counsel was present.

> FN11 It is unmistakable from the record that throughout 1971 and 1972 the San Bernardino District Attorney's office did not have sufficient personnel to handle all matters upon which the People required representation.

In addition, petitioner in at least two cases stepped down from the bench, removed his robe, and took the stand. As a witness he then testified at length in a narrative form, leaving the court without a presiding officer to rule upon objections.

Finally, we find clear and convincing evidence that petitioner, while on the bench, has taken frequent and excessively lengthy unexplained pauses during which he meditated with his eyes closed while the unrecessed courtroom waited in silence. This has occurred before the rulings on ordinary evidentiary objections and other relatively uncomplicated matters.

Viewing the facts as we have found them in their totality, we agree with the Commission that the factual allegations of each of the seven general counts have been sustained "to a reasonable certainty." ( Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 275.) We must, therefore, proceed to decide whether the conduct on petitioner's part which we have found to have occurred constituted "wilful misconduct in office" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" within the meaning of California Constitution, article VI, section 18. ( Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 276.) In approaching that question, we are mindful that the decisional law on this subject remains in its infancy. As we observed in Geiler v. Commission on Judicial Qualifications, supra, the judiciary in this state has fortunately been of such quality that we have been confronted with few censure or removal recommendations from the Commission.

In removing a judge from the bench in the recent decision of Geiler v. Commission on Judicial Qualifications, supra, this court attempted for the first time to fashion an operable definition of the offenses "wilful misconduct" ***531** and "conduct prejudicial to the administration of justice ...." We there stated that: "... the Commission in the instant matter concluded that the conduct proven in the previously discussed specifications constituted 'wilful misconduct in office' and 'conduct prejudicial to the administration of justice that brings the judicial office into desrepute.' As we have noted above, the

second ground for imposing discipline was added to the Constitution in 1966. (9) We believe this mandates our construing 'wilful misconduct in office' as connoting something graver than the 'lesser included offense' of 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute.' The more serious charge should be reserved for injudicious conduct which a judge acting in his judicial capacity commits in bad faith, while the lesser charge should be applied to conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only injudicious conduct but conduct prejudicial to public esteem for the judicial office." ( Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at pp. 283-284.) Moreover, we went on to hold that the term "bad faith" was intended to connote that a judge had "intentionally committed acts which he knew or should have known were beyond his lawful power," engaging in a "pervasive course of conduct of overreaching his authority." ( Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at p. 286.)

Applying those principles to the facts of the present case, we are of the opinion that petitioner's angry criticism of public defenders for filing affidavits of prejudice may reasonably be deemed to constitute "wilful misconduct" in office. His threat to "fight" the office was not the only invective hurled at the public defender's office. The judge also branded the affidavit filings a "libel" and "slander" on the court. His remarks were thus obviously volitional. The decisive issue, then, is whether such criticisms were acts which the judge should have known were beyond his lawful authority. We believe there is no question that petitioner overreached his authority and should have known that he was doing so.

(10) It is well recognized that in enacting Code of Civil Procedure section 170.6 the Legislature guaranteed to litigants an extraordinary right to disqualify a judge. The right is "automatic" in the sense that a good faith belief in prejudice is alone sufficient, proof of facts showing actual prejudice not being required. (E.g., Pappa v. Superior Court (1960) 54 Cal.2d 350, 353 [5 Cal.Rptr. 703, 353 P.2d 311]; Mayr v. Superior Court (1964) 228 Cal.App.2d 60, 63 [39 Cal.Rptr. 240].) Accordingly, the rule has developed that, once an affidavit of prejudice has been filed under section 170.6, the court has no jurisdiction to hold further proceedings in the matter except to inquire into the timeliness of the affidavit or its technical ***532** sufficiency under the statute. (See, e.g., Andrews v. Joint Clerks etc. Committee (1966) 239 Cal.App.2d 285, 293-299 [48 Cal.Rptr. 646], upholding court's power to inquire as to timeliness; Lewis v. Linn (1962) 209 Cal.App.2d 394, 399-400 [26 Cal.Rptr. 6], upholding court's power to inquire into sufficiency.) When the affidavit is timely and properly made, immediate disqualification is mandatory. (Jacobs v. Superior Court (1959) 53 Cal.2d 187, 190 [1 Cal.Rptr. 9, 347 P.2d 9].) Hence, petitioner was bound to

accept proper affidavits without further inquiry. A fortiori, his vehement criticism of public defenders for exercising such statutory power was clearly improper. (Cf. Calhoun v. Superior Court (1958) 51 Cal.2d 257 [331 P.2d 648], holding improper a trial court's striking of a Code Civ. Proc., § 170 statement as a "sham" and "frivolous.") Moreover, the highly personal hostility for the public defender's office which petitioner expressed in doing so was absolutely inappropriate. Precisely the same sort of abuse of position evident in a judge's arbitrary substitutions of counsel met with our condemnation as wilful misconduct in Geiler. As this court has noted in respect to the exercise of contempt powers, "[a] judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws ...." (People ex rel. Field v. Turner (1850) 1 Cal. 152, 153.)

Equally reprehensible are the repeated and flagrant abdications of judicial functions engaged in by petitioner. These we also deem to be "wilful misconduct" in office. For example, petitioner's benchside sentencing conferences with his bailiff were in clear disregard of the most fundamental concepts of our legal system. By the bailiff's own admissions it was established that he directly participated in the sentencing process by proposing sentences to the court which the court then immediately pronounced upon various pro. per. defendants, and in effect thereby delegated to a non- judicial officer a power to impose punishment constitutionally vested in the judiciary. He thus deprived the defendants involved of a proper trial in the sentencing stage of the proceedings. (See In re Lee (1918) 177 Cal. 690, 693 [171 P. 958].) Such delegations of judicial authority to another, even if for momentary intervals, are unconstitutional and directly run afoul of previous decisions of this court holding very similar delegations of judicial powers to bail bondsmen to be censurable "wilful misconduct." (In re Chavez (1973) 9 Cal.3d 846 [109 Cal.Rptr. 79, 512 P.2d 303] and In re Sanchez (1973) 9 Cal.3d 844 [109 Cal.Rptr. 78, 512 P.2d 302], both censuring judges for furnishing presigned release orders to local bondsmen.)

Even if the bailiff's suggestions to the judge did not ultimately find their way into the actual sentence imposed, the visual image of the bailiff's active ***533** presence at the bench immediately prior to sentencing undoubtedly carried the appearance that the bailiff had joined in the fashioning of the sentence (excepting, of course, those instances in which the court adopted the unconscionable subterfuge of ostensibly calling the bailiff to the bench to run errands). That appearance of impropriety should have been avoided in light of canons of judicial conduct with which petitioner was most certainly familiar.

As transparently injudicious as his sentencing conferences was Judge McCartney's periodic assumption of the role of an advocate.

His extended examinations of witnesses appear to have been particularly destructive of the image of the court as an impartial forum for the determination of truth. Although we appreciate the difficult position into which the San Bernardino judiciary was placed by a shortage of deputy district attorneys at the time, we are compelled by overwhelming evidence to conclude that petitioner's questioning went far beyond the bounds of judicial propriety.

(11) Incident to his duty to conduct proceedings with a view toward the effective ascertainment of truth (Pen. Code, § 1044), a trial judge possesses inherent power to examine witnesses to elicit or clarify testimony (e.g., People v. Rigney (1961) 55 Cal.2d 236, 241 [10 Cal.Rptr. 625, 359 P.2d 23, 98 A.L.R.2d 186]). Additionally, we have previously observed that "[t]he mere fact the judge examined ... at some length does not establish misconduct." (People v. Corrigan (1957) 48 Cal.2d 551 at p. 559 [310 P.2d 953].) A trial judge may not, however, in the course of examining witnesses become an advocate for either party or cast aspersions or ridicule upon a witness. ( People v. Rigney, supra, 55 Cal.2d at p. 241, and cases cited therein.) Moreover, he should properly undertake the examination of witnesses "only when it appears that relevant and material testimony will not be elicited by counsel." ( Id. at p. 243.) Clearly, these latter limitations have been persistently ignored by petitioner. Perhaps the most flagrant instance was his embarcation in one disturbing-the-peace case upon an argumentative dialogue devoted to a wholly irrelevant inquiry about the testifying defendant's illegitimate children and her attitude toward him as a judge.

Aside from raising such collateral matters in a manner approaching ridicule, the judge directed his inquiry in other cases clearly to support the prosecution's position. Petitioner's calling of witnesses sua sponte exhibits the same impropriety. (12) As with examination, a trial court has unquestioned inherent power to call witnesses (Evid. Code, § 775) where the interests of justice require. But that power is subject to a limitation that it be impartially exercised (accord, Law Revision Com. comment to Evid. Code, § 775 [Deering's 1966]) which was clearly exceeded here. ***534**

Similarly devoid of proper respect for limitations upon the exercise of judicial power are petitioner's assumptions of the stand as a witness in cases over which he presided. As there is no indication in the record that counsel in those cases objected to his testimony, we may assume that the judge had discretion to testify as provided in Evidence Code section 703, subdivision (d). The judge utterly neglected, however, to comply with the requirement of subdivision (a) of section 703 that he inform counsel of the substance of his impending testimony. Instead, petitioner removed his robe and impulsively stepped from the bench to commence an unexpected discourse. Furthermore, the self-serving and partisan nature of his testimony on each

occasion effectively rendered his decision to take the stand an abuse of discretion. As the record indicates, the evidentiary objections to his statements were ruled upon by the judge himself, his narrative form of speaking tended to discourage cross- examination, and his remarks clearly reflected a partisan attitude. These characteristics of judicial testimony are precisely those which Evidence Code section 703 was designed to discourage (see Legislative Committee comment to Evid. Code, § 703.) Additionally, though the subject of this testimony was invariably of marginal relevance, it bore on issues that were more than merely formal or undisputed and was also improper for that reason. (See Wigmore on Evidence, § 1909, at p. 592.)

Examining the remaining incidents which we have found to be established in light of the controlling Geiler principles, we further conclude that the conduct which has prejudiced the administration of justice and cast the judicial office into disrepute is petitioner's proven intemperance with court personnel, defendants in criminal cases, and attorneys. The judge's pertinent dialogues were clearly injudicious and undoubtedly damaging to the esteem for the judiciary held by members of the public who observed such conduct. The fact that these volatile outbursts lacked the extreme vulgarity apparent in the court's treatment of counsel and personnel in Geiler does not mean that they are any less deserving of our unhesitant reproach. (See, e.g., People v. Black (1957) 150 Cal.App.2d 494, 499-503 [310 P.2d 472], reversing conviction for judicial misconduct; Etzel v. Rosenbloom (1948) 83 Cal.App.2d 758, 762-765 [189 P.2d 848], civil judgment reversed for judicial misconduct; see also, the account of the Tenth Circuit Judicial Council's removal of Judge Stephen S. Chandler from the bench in Note, The Chandler Incident and Problems of Judicial Removal (1967) 19 Stan.L.Rev. 448 at p. 450, indicating that Judge Chandler (inter alia) singled out one defendant as a "son of a bitch" and others as "shady characters, pirates, and vultures.")

Although we thus conclude that the majority of the formal charges ***535** against petitioner are true and, in those instances we have indicated, are based on acts which constitute either wilful or prejudicial misconduct, we decline to further conclude that other conduct on his part which we have found proven by the evidence is of such character. These other actions we consider less than desirable judicial behavior, but not sufficiently reflective of "bad faith" or a diminution in public esteem to constitute cause for discipline by this court.

(13) The conduct and language engaged in by petitioner which tended to embarrass the other judges in his district is, in our view, repugnant to the venerable tradition that judges share the bench as brethren in a spirit of mutual respect and courtesy. That customary deference was unjustifiably shattered by petitioner's demand for an explanation regarding the transfer of a hearing in connection with a murder case in the presence of

lawyers and court attaches. The disrespectful confrontation with the presiding judge was surely an uncalled-for embarrassment to the latter, and most certainly appeared injudicious to observing court personnel and lawyers. Yet, there has been no showing that public esteem for the judicial office was substantially impaired by that apparently isolated incident. Hence, the incident could not comprise the lesser offense of prejudicial conduct.

(14) We entertain a similar view with respect to the muttered profanity and humming. We strongly deplore such whistling, humming and swearing as unbecoming, injudicious, and unsuited to the proper decorum of a courtroom. Nevertheless, we somewhat reluctantly find ourselves unable to say in view of all the circumstances that this misconduct was so serious as to rise to the level of an offense or acts warranting removal or censure. The record is unequivocal that petitioner engaged in such conduct unintentionally, indeed almost unconsciously, in low tones and apparently as a matter of emotional release. Unlike the vulgar and profane expletives which we declared a cause for removal in Geiler, the profanities uttered here were relatively isolated and were not directed as a reprimand to court personnel, attorneys or any other specific individuals. In essence, the "music" and expletives were apparently "self-utterances" unintended for anyone to hear but the judge himself. Accordingly, while petitioner's utterances might be characterized as erratic and are not to be condoned as proper judicial behavior, they cannot be said to have been "wilful" or to have actually prejudiced the administration of justice in the sense of drawing the courts into public disesteem. (Cf. Eaton v. City of Tulsa (1974) 415 U.S. 697 [39 L.Ed.2d 693, 94 S.Ct. 1228], holding the isolated usage of street vernacular during a defendant's testimony, not directed to the judge or any officer of the court and not presenting any impairment to the administration of justice, to be an insufficient basis for the imposition of a contempt sentence.) ***536**

Somewhat more difficult for us to resolve has been the question whether petitioner's inefficiency in conducting court qualifies as a ground for discipline. Beyond the languor found by the Commission to be attributable to petitioner's frequent silent meditations, the record is replete with clear evidence of chronic delay in his courtroom. As master calendar judge, for example, he habitually ran far behind the normal time schedule in assigning cases and thereby caused such losses of trial time that a backlog of cases for the whole district was increased. Likewise, in handling his own assignments petitioner routinely fell behind schedule: he often failed to complete small claims hearings and custody arraignments during the morning as required by the presiding judge; trials in his courtroom frequently ran into the evening, some as late as midnight; and law and motion matters which counsel expected to receive summary disposition at the bench became unduly involved proceedings requiring long and arguably unnecessary in-chambers consultations. Not only did this

absence of expeditiousness in the dispatch of judicial business place considerable strain on the municipal court calendar, but it also resulted in security, budgetary and manpower problems. Yet, the record is equally clear that this pattern of delay stemmed from no dereliction of duty. Indeed, petitioner has at all times made a conscientious and determined effort to conduct his share of the affairs before the court. (15) Rather than arising from any neglect of responsibility, his inefficiency appears to stem from an effort to attain a degree of diligence and studiousness in the application of the law which was unrealistic and frequently unjustified. Abundantly evident in the testimony of lawyers before the special masters is the opinion that undue caution and excessive attention to detail in all matters before him, even those of minor importance, is at the root of petitioner's inability to conduct court effectively.

On this state of the record, we believe petitioner's inefficiency has not been shown to be so serious as to warrant censure or removal on that ground. Here, the petitioner's shortcomings in the dispatch of judicial business involve no dereliction of responsibility and such shortcomings cannot be condemned as injudicious behavior. In a sense, the image conjured up by petitioner's handling of judicial tasks is somewhat reminiscent of the fog-mired "High Court of Chancery" in Dickens' Bleak House which was so dedicated to the intricacies of "Justice" that the estates probated before it were entirely depleted by court costs and legal fees. That infamous inefficiency, so well depicted by Dickens, was hardly cause for dispensing with the Lord Chancellor. Instead, it became the subject for reform in the Chancery's cumbersome procedures (e.g., Holdsworth, Bleak House and the Procedure of the Court of Chancery in Voices in Court (W. Davenport ***537** ed. 1958) at pp. 363-377). The inefficiency beclouding petitioner's court, we believe, should similarly be dealt with as one of several problems in local court administration. These are by tradition more properly committed for their solution to the sound judgment of the presiding judge of the district (see rule 532.5) rather than to this court in the exercise of its disciplinary powers. Such a result seems particularly appropriate in light of the testimony by his fellow judges, who were generally critical of his penchant for exhaustive detail, that petitioner's excessive care in accepting tendered guilty pleas might be preferred to the more "efficient" summary approval of plea bargains having unconscionable terms. [FN12]

> FN12 We are also impelled toward the conclusion that a judge should not be disciplined for inefficiency absent proof of dereliction of duty by reference to the impeachment trial of Judge James H. Hardy during the early history of this state. In that case, articles of impeachment charged Judge Hardy, the then "district judge" for Calaveras County, with "causing great delays in the transaction of judicial business" by (inter alia) granting unwarranted continuances

and in failing to rule expeditiously on various motions. These charges of inefficiency were dismissed by the state Senate for lack of evidence that the judge wilfully neglected to perform the duties of his office. (Appendix to Journals of Sen. & Assem., No. 36 (13th Sess. 1861-1862).)

Our foregoing conclusions of law, insofar as petitioner is deemed to have engaged in wilful misconduct and conduct prejudicial to the administration of justice, compel us to squarely face the question whether removal or censure is an appropriate sanction. While arguing for an outright dismissal of charges, petitioner also submits that "at worst, [he] should be censured, but not removed" from office. In that connection, he urges this court (inter alia) to excuse his misconduct as an understandable reaction to an improper campaign by public defenders to entirely preclude him from presiding over criminal trials.

We find this "defense" to be a slim reed at best. In the first place, the argument is simply no answer to petitioner's serious departures from a proper judicial role or his habitual intemperance toward defendants and court personnel. The benchside sentencing conferences with his bailiff, for example, usually took place when no counsel was present. Hence, they were entirely unrelated to any filing of affidavits of prejudice by public defenders.

More reason for rejection of the argument, however, is that it is utterly without exculpatory force even as to petitioner's outbursts at public defenders. It is true, as petitioner asserts, that the record contains some evidence suggesting that the public defender's deputies pursued the filing of affidavits with occasional disrespect to the court. In fact, the entire policy ***538** itself may have been an affront to the court's dignity if it stemmed from public defenders' dissatisfaction with petitioner's "hard line" performance as a district attorney rather than a good faith belief in prejudice. [FN13] But, even assuming arguendo that the evidence was clear and convincing, disrespect on the part of the public defender cannot serve to justify petitioner's injudicious response. As previously indicated, the Legislature clearly foresaw that the peremptory challenge procedure would be open to such abuses but intended that the affidavits be honored notwithstanding misuse. (See Johnson v. Superior Court (1958) 50 Cal.2d 693, 697 [329 P.2d 5]; Mayr v. Superior Court, supra, 228 Cal.App.2d 60, 64.)

FN13 Soon after petitioner began his term of office the local public defender established an inter-office policy of filing affidavits of prejudice against him. A written statement requiring affidavits to be filed "on all trials" assigned to petitioner was first circulated within the public defender's office on January 25, 1971. Thereafter, on May 26 and 27, 1971, the policy was expanded to require

that, "[an] Affidavit of Prejudice shall be used for all trials, preliminaries, arraignments, bail settings and any other appearances which require an act of judicial discretion." Pursuant to this policy, approximately 205 affidavits were filed by deputy public defenders against petitioner between July of 1971 and March of 1972.

While there is some evidence to suggest that this policy was adopted as part of a concerted effort on the part of public defenders to remove petitioner from the bench, there is an equally strong suggestion that it was rooted in legitimate concerns that the judge would be partial to the prosecution or would take an inordinate amount of time in trying their cases. Accordingly, we are unable to arrive at any definite conclusion about the precise basis for the policy.

The blanket nature of these filings, however, in itself reflects a measure of impropriety. As the objective of a verification is to insure good faith in the averments of a party (e.g., Hoffman v. City of Palm Springs (1959) 169 Cal.App.2d 645, 648 [337 P.2d 521]), the provision in Code of Civil Procedure section 170.6 for the showing of prejudice by affidavit requires a good faith belief in the judge's prejudice on the part of the individual party or counsel filing the affidavit in each particular case. (See Johnson v. Superior Court (1958) 50 Cal.2d 693, at p. 697 [329 P.2d 5], indicating the affidavit of prejudice must be a good faith declaration; accord Berger v. United States (1921) 255 U.S. 22, at pp. 33-35 [65 L.Ed. 481, at pp. 485-486, 45 S.Ct. 230], holding that substantially similar federal Judicial Code section 21 was satisfied by a good faith allegation of prejudice; see generally Austin v. Lambert (1938) 11 Cal.2d 73 [77 P.2d 849, 115 A.L.R. 849], holding invalid the predecessor section to current 170.6 and emphasizing the need of a provision that would require an averment of prejudice under oath, as required by federal law, in order to insure good faith.) The "blanket" nature of the written directive issued by the public defender arguably contravened this requirement of good faith by withdrawing from each deputy the individual decision whether or not to appear before petitioner. To phrase it another way, the office policy predetermined that prejudice would be claimed by each deputy without regard to the facts in each case handled by the office, thereby transforming the representations in each affidavit into bad faith claims of prejudice.

Moreover, even if the conduct of the public defenders was clearly contemptuous, petitioner's vehement expressions of personal hostility were ***539** absolutely improper. (16) A judge must not, as previously noted, place the defense of his own character above his obligation to promote respect for the law in adjudicating contempts of court (e.g., Taylor v. Hayes (1974) 418 U.S. 488 [41 L.Ed.2d 897, 94 S.Ct. 2697], strongly criticizing a district judge for trying a contempt when he exhibited "marked

personal feelings' of hostility toward the contemptuous lawyer). If petitioner thus could not vent his personal animosity in the face of contemptuous conduct, he certainly could not do so in the face of any disrespect attendant to the public defender's affidavit of prejudice policy. No matter how provocative are the personal attacks or innuendos by lawyers against a judge, the judge simply "should not himself give vent to personal spleen or respond to a personal grievance" because "justice must satisfy the appearance of justice. " (Mr. Justice Frankfurter writing for the court in Offutt v. United States (1954) 348 U.S. 11, 14 [99 L.Ed. 11, 16, 75 S.Ct. 11]; see also Cooke v. U.S. (1925) 267 U.S. 517, 539 [69 L.Ed. 767, 775, 45 S.Ct. 390], admonishing judges to "banish the slightest personal impulse to reprisal" in protecting the authority of the court.)

(17a) We find much more persuasive petitioner's additional argument that the court should be lenient in view of his inexperience on the bench. Unlike Judge Geiler who engaged in misconduct after almost a half-decade on the bench, petitioner had held his office for barely more than a year and a half before he was accused of misconduct. Notwithstanding his many years in the practice of law, he was undoubtedly unfamiliar with some modes of proper judicial behavior necessarily learned only by judicial experience. It is therefore conceivable that some of his prejudicial conduct may have been the product of such ignorance.

Even more salutary, however, was petitioner's unusual care in attempting to " do justice" in the cases before him. In advising criminal defendants of their constitutional rights at arraignment, he took extraordinary measures to insure that defendants understood the procedural protections accorded them. He prepared a detailed arraignment statement, had it translated into other languages when defendants did not speak English, and added a simple primer of trial procedure for defendants who appeared at trial in pro. per.

At the same time, petitioner strove for fundamental fairness in his sentencing. Where a jail sentence for a minor misdemeanor violation might result in defendant's loss of employment he imposed a weekend sentence. If a fine was to be imposed upon a defendant for whom payment in one sum would be unduly harsh, petitioner often permitted payment by installment deductions from the defendant's weekly salary over a period of time. He was liberal in assigning first-time vehicle offenders to traffic school. ***540** He has also showed unusual initiative in creating opportunities for rehabilitative treatment of alcoholic defendants. He personally established a system whereby the municipal court judges could routinely refer alcoholics to local Alcoholics Anonymous programs and monitored the defendants' participation in rehabilitation. This careful and dedicated approach to even the most minor traffic cases was an admirable contrast to the "assembly-line justice " dispensed by some trial courts which is now drawing increasing public criticism (see

Green, Judging the Judges, The Wall Street Journal (March 7, 1974)). Such obvious commitment to fairness and innovative procedural reform on the part of a judge is to be encouraged and may therefore properly be considered by this court in mitigation of proven misconduct when we are called upon by the Commission to fashion a disciplinary sanction.

In apparent deference to these mitigating factors, the masters recommended to the Commission that petitioner only be censured for his conduct prejudicial to the administration of justice in the five instances which they had specified. (18) Their recommendation, as we took care to point out in Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d at pages 275-276, is entitled to considerable weight in view of the masters' better position to judge the credibility of the testimony presented to them. We believe the masters' view is especially entitled to that consideration here because the record evinces constructive contributions by petitioner which tend to offset some of the deleterious effects of his misconduct.

(17b) We therefore conclude that the recommendation of the Commission should be rejected, and that censure is the appropriate result. We cannot stress too strongly that were it not for the redeeming qualities which we have mentioned we would be inclined to agree with the Commission's recommendation of removal. But upon our review of the record as a whole we are satisfied that censure is appropriate in this case. Accordingly, we hereby enter an order of censure of Judge James J. McCartney for his injudicious conduct and admonish him to desist from engaging in such misconduct. This order is final forthwith. ***541**

Cal.,1974.

McCartney v. Commission on Judicial Qualifications

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24 Cal.3d 72
593 P.2d 200, 154 Cal.Rptr. 503
**(Cite as: 24 Cal.3d 72)**

In re ARDEN T. JENSEN, a Judge of the Superior Court, on Censure

L.A. No. 31020.

Supreme Court of California.

November 24, 1978.

SUMMARY

The Supreme Court adopted the conclusion and recommendation of the Commission on Judicial Performance that a judge's conduct constituted persistent failure to perform his duties within the meaning of Cal. Const., art. VI, § 18, subd. (c), and that he be publicly censured. The commission found that despite an informal admonition by it, the judge, during a 6-year period, repeatedly failed to decide within 90 days cases that had been submitted to him for decision, and that he nevertheless regularly executed affidavits declaring that no cause remained pending and undetermined before him for 90 days after such submission, thus entitling him to his salary under Cal. Const., art. VI, § 19 and Gov. Code, § 68210. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Judges § 1--Public Censure.
The Supreme Court, in a proceeding to review the performance of a judge, adopted the conclusion and recommendation of the Commission on Judicial Performance that the judge's conduct constituted persistent failure to perform his duties within the meaning of Cal. Const., art. VI, § 18, subd. (c), and that he be publicly censured. The commission found that despite an informal admonition by it, the judge, during a 6-year period, repeatedly failed to decide within 90 days cases that had been submitted to him for decision, and that he nevertheless regularly executed affidavits declaring that no cause remained pending and undetermined before him for 90 days after such submission, thus ***73** entitling him to his salary under Cal. Const., art. VI, § 19 and Gov. Code, § 68210.

[See Cal.Jur.3d, Judges, § 62; Am.Jur.2d, Judges, § 50.]

COUNSEL

No counsel listed for this case.

THE COURT.

(1) The Commission on Judicial Performance, following a factual stipulation in lieu of hearing, receipt of documentary evidence in mitigation, and oral argument, found that despite an informal admonition by the commission, between 1971 and 1977 Judge Arden T. Jensen repeatedly failed to decide within 90 days cases that had been submitted to him for decision, and that he nevertheless regularly executed affidavits declaring that no cause remained pending and undetermined before him for 90 days after such submission, thus entitling him to his salary. (Cal. Const., art. VI, § 19; Gov. Code, § 68210.)

The commission found that Judge Jensen's failure to decide his cases on time was not caused by an intentional disregard of his duties, but that with proper application he could have decided each of the matters within 90 days of submission. The commission therefore concluded that Judge Jensen's conduct constituted persistent failure to perform his duties (Cal. Const., art. VI, § 18, subd. (c)), and recommended that he be publicly censured.

After reviewing the record we are satisfied that the conclusion of the commission is justified and that its recommendation should be adopted. Accordingly, for the reasons stated Judge Jensen is hereby censured. ***74**

Cal.,1978.

In re Jensen

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28 Cal.3d 873
625 P.2d 219, 172 Cal.Rptr. 676
**(Cite as: 28 Cal.3d 873)**

# In re ROBERT S. STEVENS, a Judge of the Superior Court, on Censure

L.A. No. 31304.

Supreme Court of California.

Feb 11, 1981.

SUMMARY

The Supreme Court entered an order publicly censuring a superior court judge based on findings of the Commission on Judicial Performance that for a period of over three years the judge repeatedly initiated conversations with a married couple employed by the Legislature in which he discussed his sexual experiences and fantasies and proposed that the couple engage in various kinds of sexual activity with him and with other persons, all in explicit, vulgar, and offensive language, which conversations were widely publicized in the press. The court concluded that such conduct constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, subd. (c)). (Opinion by The Court. Separate opinion by Richardson, J.)

THE COURT.

The Commission on Judicial Performance, following a hearing before it and review of a report of special masters, objections to that report, and related documents, found, inter alia: Judge Robert S. Stevens was a member of the California Legislature before he became a judge in 1977. From January 1975 until August 1979 Judge Stevens repeatedly initiated conversations with Mr. and Mrs. Edward Leon Murphy, employees of the Legislature, in which he discussed his sexual experiences and fantasies and proposed that the Murphys engage in various kinds of sexual activity with him and with other persons, all in explicit, vulgar, and offensive language. His purpose in doing so was to gratify his own sexual desires. The Murphys repeatedly objected to Judge Stevens about these conversations, but he persisted in conducting ***874** them although he knew they harassed and distressed the Murphys. A number of public officials and employees learned of these conversations when the Murphys sought help in persuading Judge Stevens to discontinue his conduct, and in August 1979 the conversations were widely publicized in the press. Judge Stevens knew or should have known there was a substantial likelihood that his conduct would become known to many persons and thereby bring the judicial office into

disrepute.

The commission concluded that Judge Stevens' conduct constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, subd. (c)), and recommended that he be censured.

Upon our review of the record we are satisfied that the foregoing conclusion of the commission is fully warranted and that the discipline recommended should be adopted. Accordingly, and by this order, Judge Stevens is hereby publicly censured.

RICHARDSON, J.

I would call for further briefing, set the matter for oral argument, and consider imposition of a more severe sanction. ***875**

Cal.,1981.

In re Stevens

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31 Cal.3d 919
647 P.2d 1075, 184 Cal.Rptr. 296
**(Cite as: 31 Cal.3d 919)**

In re HUGO FISHER, a Judge of the Superior Court, on Censure

L.A. No. 31504.

Supreme Court of California.

Jul 14, 1982.

SUMMARY

The Commission on Judicial Performance recommended that a judge of the superior court be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The judge did not request review of the recommendation.

The Supreme Court held that substantial evidence supported the conclusion that the judge had violated Cal. Code of Jud. Conduct, canon 3, part A(4), which states that "[a] judge should ..., except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding," and, by its order, publicly censured the judge. The court pointed out that under Cal. Rules of Court, rule 919, failure to request review "may be deemed a consent to a determination on the merits based upon the record filed by the commission." (Opinion by The Court.)

THE COURT. [FN*]

FN* Mosk, J., did not participate.

The Commission on Judicial Performance has recommended that we censure Hugo Fisher, a Judge of the Superior Court of San Diego County, for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." He has not requested review of the recommendation; and under California Rules of Court, rule 919, that failure "may be deemed a consent to a determination on the merits based upon the record filed by the Commission." ***920**

Substantial evidence supports the conclusion that Judge Fisher violated canon 3 of the California Code of Judicial Conduct, which states that "[a] judge should ..., except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." (Canon 3, part A(4).) Accordingly, by this order he is publicly censured. ***921**

Cal.,1982.

In re Fisher

END OF DOCUMENT

31 Cal.3d 403
645 P.2d 99, 183 Cal.Rptr. 48
**(Cite as: 31 Cal.3d 403)**

In re CHARLES S. STEVENS, a Judge of the Superior Court, on Censure

L.A. No. 31540.

Supreme Court of California.

May 20, 1982.

SUMMARY

The Commission on Judicial Performance, following a hearing before it and a review of a report of special masters, objections to that report, and related documents, concluded that the conduct of a superior court judge in repeatedly and persistently using racial and ethnic epithets, and making racially stereotypical remarks to counsel and court personnel, most of which occurred during in-chambers conferences rather than in open court, was "prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, subd. (c)) and recommended that he be censured.

The Supreme Court adopted the recommendation and by its order publicly censured the judge. (Opinion by The Court. Separate concurring opinion by Kaus, J., with Bird, C. J., Newman, Broussard and Reynoso, JJ., concurring. Separate dissenting opinion by Mosk, J.)

THE COURT.

The Commission on Judicial Performance, following a hearing before it and a review of a report of special masters, objections to that report, and related documents, found, inter alia: Judge Charles S. Stevens has served as judge of the Superior Court, County of Santa Barbara, since April 30, 1971. During his current term in office, and during the six years prior thereto, Judge Stevens repeatedly and persistently used racial and ethnic epithets, and made racially stereotypical remarks to counsel and court personnel. Most of these remarks occurred ***404** during in chambers conferences rather than in open court. The commission further recited that, according to most witnesses, Judge Stevens has at all times performed his judicial duties fairly and equitably, and free from actual bias against any person regardless of race, ethnicity or sex, and that his remarks were both inappropriate and in poor taste.

The commission concluded that Judge Stevens' conduct was "prejudicial to the administration of justice that brings the

judicial office into disrepute" (Cal. Const., art. VI, § 18, subd. (c)), and recommended that he be censured.

Upon our review of the record we are satisfied that the foregoing conclusion of the commission is fully warranted and that the discipline recommended should be adopted. Accordingly, and by this order, Judge Stevens is hereby publicly censured.

KAUS, J.

Concurring.

In view of the dissent, the majority opinion's lack of specificity fails to do justice to the commission's recommendation which we adopt. Therefore I feel compelled to detail some of the facts on which it is based.

During an in-chambers discussion regarding a criminal case involving two black defendants and a white victim, Judge Stevens remarked to counsel that black persons have to learn how to live in their own neighborhoods and that it was "typical" of black persons to fight unfairly.

Judge Stevens, during his term in office, referred to black persons as "Jig, dark boy, colored boy, nigger, coon, Amos and Andy, and jungle bunny." With one exception, Judge Stevens did not use these terms in open court or with reference to a party, witness or attorney in a case before him. In 1974, in a probate case involving a controversy between black litigants regarding burial of a loved one, Judge Stevens stated in the presence of court personnel only, "let's get on with this Amos and Andy show." On another occasion, he privately referred to his court clerk as being "lazier than a coon."

During another in-chambers discussion, Judge Stevens stated to a public defender that "Filipinos can be good, hard-working people and that they are clean, unlike some black animals who come into contact with the court." ***405**

In connection with a child abuse proceeding involving an Hispanic defendant with a Spanish surname, Judge Stevens observed from his prior experience that (in effect) Spanish persons live by different standards than we do; that wife abuse is common and more acceptable for them; and that such abuse might explain defendant's conduct toward her child.

In a civil settlement conference, Judge Stevens referred to Attorney Gonzales as "acting like a Mexican jumping bean" after he changed his position on settlement.

During his term in office, Stevens used such terms as "cute little tamales," "Taco Bell," "spic," and "bean" when referring to persons with Hispanic surnames in conversations with court

personnel.

It is beyond me how it can be argued that such behavior is not "conduct prejudicial to the administration of justice" simply because Judge Stevens otherwise performed his judicial duties "fairly and equitably." "[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done." (Rex v. Sussex Justices (1924) 1 K.B. 256, 259 (Lord Hewart).) The administration of justice is prejudiced by the public perception of racial bias, whether or not it is translated into the court's judgments and orders.

I am particularly puzzled by the dissent's reference to Cohen v. California (1971) 403 U.S. 15 [29 L.Ed.2d 284, 91 S.Ct. 1780]. The facts of that case are too well known to require repeating. Can it be seriously contended that Judge Stevens would not be subject to censure if - before performing his duties "fairly and equitably" - he took the bench wearing a robe on the back of which he proclaimed that as far as "coons" and "spics" are concerned, his feelings were precisely the same as Mr. Cohen's toward the draft.

Bird, C. J., Newman, J., Broussard, J., and Reynoso, J., concurred.

MOSK, J.

I dissent.

The Commission on Judicial Performance (Commission) found that Judge Stevens has at all times performed his judicial duties fairly and equitably, and free from actual bias against any person regardless of race, ethnicity or sex. That is where the matter should have ended. Despite ***406** that express finding, however, the Commission has elected to seek the judge's censure because of distaste for his colorful vocabulary. Thus while the Commission finds no fault with the judge's conduct, it proposes to have him disciplined because of his speech. In my view this is impermissible.

I must admit that I am morally offended by racial epithets, whether uttered in a courtroom or in a locker room. But under the constitutional prohibition against curbing freedom of expression, I am not permitted to allow my sensibilities to govern the speech, however uncouth, of any other person. Nor does the Commission have such power; it is authorized to discipline a judge for "conduct prejudicial to the administration of justice" (Italics added) (Cal. Const., art. VI, § 18, subd. (c)), not for its ipse dixit concept of the propriety of his speech.

It has often been said that the constitutional right of free expression is a powerful medicine in a society as diverse as ours. But, as Justice Harlan wrote in Cohen v. California (1971)

403 U.S. 15 [29 L.Ed.2d 284, 91 S.Ct. 1780], the right is "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

The majority, and particularly the gratuitously lurid concurring opinion, attempt to transmute off-the-bench speech into judicial conduct because of the offensive nature of the speech, which they understandably resent, as do I. The result reveals a lack of full appreciation of the First Amendment and of article I, section 2, subdivision (a) of the California Constitution. It is easy to protect the free speech rights of a Republican or a Democrat; the real test arises when a court must give the same constitutional guarantees to a communist, a Nazi, a Ku Klux Klansman, an anti-Semite or any other species of bigot, regardless of his station in life. One of the immutable prerogatives of American citizenship is the right to speak freely, including "the freedom to speak foolishly and without moderation" (Baumgartner v. United States (1944) 322 U.S. 665, 674 [88 L.Ed. 1525, 1531, 64 S.Ct. 1240]). ***407**

My colleagues have also forgotten the lessons of the civil rights tensions of the 1960s. During that period many a red-neck sheriff interpreted civil rights speeches - particularly in and around court houses - as impermissible conduct. The United States Supreme Court refused to dilute the First Amendment, regardless of how objectionable the expressions were to local authorities, and consistently maintained the distinction between speech and conduct. (See, e.g., Gregory v. Chicago (1969) 394 U.S. 111 [22 L.Ed.2d 134, 89 S.Ct. 946]; Cox v. Louisiana (1965) 379 U.S. 536 [13 L.Ed.2d 471, 85 S.Ct. 453]; Edwards v. South Carolina (1963) 372 U.S. 229 [9 L.Ed.2d 697, 83 S.Ct. 680].)

Yes, the freedom of expression often creates discord and tumult, and is not infrequently offensive to some, or many, or even a majority in our society. But, as Justice Douglas reminded us: "a medley of voices is essential. That is why the First Amendment is our most precious inheritance." (Douglas, Go East Young Man (1974) p. 470.) Justice Harlan noted again in Cohen that while the words used may be more distasteful than others of their genre, still "one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves the matters of taste and style so largely to the individual."

Nevertheless the Commission on Judicial Performance is seeking to impose on Judge Stevens its self-determined standard of appropriate taste and style in language. In so doing it reveals an imperious disregard for constitutional guarantees.

Unfortunately this is not the first time this agency has demonstrated disdain for constitutional limitations.

In 1979 the same Commission deliberately violated the state constitutional requirement of confidentiality in its proceedings (art. VI, § 18, subd. (f)) by holding public hearings of a mere investigative nature at a cost of more than a half million taxpayer dollars. (Mosk v. Superior Court (1979) 25 Cal.3d 474 [159 Cal.Rptr. 494, 601 P.2d 1030].) As recently as February of this year, the Commission considered material sent by a judge to a legislative committee, and while it found the "facts do not constitute grounds for proceeding," it issued a didactic press release on February 23, 1982, declaring that communications "although not improper or unethical in a disciplinary sense, when indulged in by judges, run the risk of appearing insensitive and lacking in discretion." ***408** There can be no more clear indication that the Commission deems itself clothed with magisterial power to criticize any speech or writings of members of the judiciary that it unilaterally deems insensitive or indiscreet.

If the choice of the people of California is between an independent judiciary and self-assumed censorship of judges by a bureaucratic agency, I have not the slightest doubt that the people would deem it in their best interest to opt for an independent judiciary.

If the day comes - and in view of the majority opinion it may be here - when judges at any level are to be disciplined for their manner of expression, however primitive, then we no longer have an independent judiciary in California. Judges will inevitably become timid and stifled, even though the Constitutions of the United States and of California apply to all persons; nothing in their text suggests that judges are excluded from protection.

If any discipline is indicated under the facts of this case, it is the Commission on Judicial Performance which should be censured for its overreaching assumption of authority, not the judge whose judicial conduct has been found to be free of bias.

I would dismiss the proceedings.

Cal.,1982.

In re Stevens

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33 Cal. 3d 788
662 P.2d 108, 191 Cal.Rptr. 171
**(Cite as: 33 Cal.3d 788)**

# In re BOBBY D. YOUNGBLOOD, a Judge of the Municipal Court, on Censure

L.A. No. 31727.

Supreme Court of California.

May 5, 1983.

SUMMARY

The Commission on Judicial Performance, following a hearing before it and review of the report of the special masters appointed pursuant to Cal. Rules of Court, rule 907, objections to that report, and the record of the hearing before the special masters, found a municipal court judge had on one occasion ordered persons to appear before him under false pretenses and had brought about the incarceration of one of them without legal cause or compliance with applicable procedure. On another occasion, the judge had presided in a case involving a telephone company at a time when he himself was involved in litigation with the same party, had thereafter altered the previously rendered judgment in that case, after an ex parte communication with the plaintiff and without notice to the telephone company, and had then contacted employees of the telephone company and threatened incarceration if the plaintiff's service was interrupted because of the case. The commission concluded that the judge was guilty of wilful misconduct in office (Cal. Const., art. VI, § 18) and recommended that he be "severely publicly censured."

The Supreme Court adopted the recommendation and by its order publicly censured the judge. (Opinion by The Court. Broussard, J., did not participate.)

THE COURT.

The Commission on Judicial Performance, following a hearing before it and review of the report of the special masters appointed pursuant to rule 907 of the California Rules of Court, objections to that report, and the record of the hearing before the special masters, found: Judge Youngblood on one occasion ordered persons to appear before him under false pretenses and brought about the incarceration of one of them without legal cause or compliance with applicable procedure. On another occasion Judge Youngblood ***789** presided in a case involving Pacific Telephone at a time when he himself was involved in litigation with Pacific Telephone. Judge Youngblood thereafter altered the previously rendered judgment in that case, after an

ex parte communication with the plaintiff and without notice to the defendant Pacific Telephone. Judge Youngblood then contacted employees of Pacific Telephone and threatened incarceration if the plaintiff's service was interrupted because of the case.

The commission concluded that Judge Youngblood was guilty of wilful misconduct in office (Cal. Const., art. VI, § 18) and recommended that he be "severely publicly censured."

After reviewing the record we are satisfied that the conclusion of the commission is fully warranted and that the discipline recommended should be adopted. Accordingly, Judge Youngblood is hereby censured.

Broussard, J., did not participate. ***790**

Cal.,1983.

In re Youngblood

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[S.F. No. 24436. Apr. 25, 1983.]

HARRY R. ROBERTS, a Judge of the Superior Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

**SUMMARY**

Following a hearing by the Commission on Judicial Performance subsequent to a report to it by three special masters, the commission recommended that a judge of the superior court be publicly censured. The commission found several instances of misconduct warranting censure, including impermissible personal involvement in litigation; rude, hostile, and intimidating treatment of litigants, witnesses and counsel; and a misdemeanor conviction for resisting, delaying, or obstructing public officers (Pen. Code, § 148) in the course of their investigation of a possible intoxicated driving offense of the judge's son, all of which constituted either wilful misconduct or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In addition, the commission found that the judge had improperly made an ex parte communication to an appellate court justice regarding an original writ proceeding arising from a suppression order by the judge in a criminal case.

The Supreme Court, after reviewing the record, determined the commission's recommendation was fully warranted and should be adopted. The court ordered the judge publicly censured. The court also concluded that the commission's public disclosure of its recommendation was authorized by law under the circumstances in the case. Cal. Rules of Court, rule 902(a), provides that all proceedings before the commission shall be confidential until the record is filed by the commission in the Supreme Court, and rule 902(b) permits the commission to issue short announcements concerning a hearing, under limited circumstances. The commission made its public announcement simultaneously with filing the record with the Supreme Court. Furthermore, the confidentiality requirement of Cal. Const., art. VI, § 18, subd. (f) does not preclude the commission from publicly announcing results of an investigation already known to the public, and the proceeding in issue was publicly reported prior to the filing of the commission's findings and recommendations. Therefore, the court held, the commission properly followed the applicable rules. (Opinion by The Court. Separate dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review by Supreme Court.**—In reviewing the findings and conclusions of the Commission on Judicial Performance, the Supreme Court undertakes an independent examination of the record to determine if the charges are supported by clear and convincing evidence, giving weight to the findings and conclusions of the commission and its masters, especially as to factual issues turning on the credibility of testimony.

(2a-2c) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Personal Involvement in Litigation—Ex Parte Communications—Threatening Behavior.**—The conduct of a superior court judge with respect to writ proceedings, arising from the judge's order suppressing certain evidence in a criminal case, demonstrated an impermissible personal involvement in the litigation, accompanied by overly aggressive or threatening behavior toward both the district attorney and the public defender and an inexcusable ex parte communication with an appellate court justice who participated in the writ proceeding. The superior court judge threatened the district attorney after being informed that a writ to review the judge's ruling was being filed, engaged in ex parte communications on the matter with the public defender, and contacted the justice, advising him the appellate court's decision was wrong. The judge's attempt to exert pressure upon these persons disclosed an unhealthy and wholly improper concern with the protection of his own rulings from appellate reversal and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute (Cal. Const., art. VI, § 18, subd. (c)). Thus, the recommendation of the Commission on Judicial Performance that the judge be publicly censured was warranted.

(3a, 3b) **Mandamus and Prohibition § 58—Mandamus—Parties—Judge of the Superior Court.**—Cal. Rules of Court, rule 56(b), which authorizes a respondent court to join the real party in opposing a writ reviewing an order of the court, does not authorize a trial judge to participate personally in ex parte communications with the real party regarding the writ proceedings. Although the trial court becomes a party respondent to the proceeding, the court is usually represented by its county counsel, and the individual judge whose order is being reviewed is not a proper party to the proceeding.

(4a, 4b) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Notice of Charges.**—In proceedings before the Commission

on Judicial Performance, the failure of the commission to include a judge's allegedly improper telephone communication with a justice of the appellate court regarding the court's review of the judge's suppression order in a criminal case among those counts of misconduct originally included in the notice of formal proceedings did not preclude the commission from considering the matter. The count was added by the special masters in an amended notice, as authorized by Cal. Rules of Court, rule 911, and the judge had an ample opportunity to rebut the amended charges.

(5) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Personal Involvement in Litigation—Hostility Toward Counsel, Litigants, and Witnesses.**—In a child neglect proceeding in the superior court, the judge's serious concern for the welfare of the minor and his firm conviction regarding the lack of credibility shown by the mother and her witnesses did not justify the judge's rude and intimidating treatment of witnesses, litigants, and counsel. The judge expressed his legitimate concern in an unacceptable, nonobjective, and nonneutral manner, demonstrating unwarranted impatience, disbelief, and hostility toward counsel, litigants, and witnesses. This conduct constituted conduct prejudicial to the administration of justice, casting the judicial office into disrepute and it warranted censure. Furthermore, the findings of the Commission on Judicial Performance that the judge threatened to report the mother's attorney to the State Bar if she advised her client to appeal his decision, and that the judge later requested the attorney's successor to discuss with the client the possibility of dismissing the appeal, was supported by clear and convincing testimony and reflected improper personal involvement and advocacy on the part of the judge.

(6) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Hostility Toward Counsel.**—In a hearing before the Commission on Judicial Performance, evidence of the actions of a judge of the superior court in calling an attorney for the defendant in a felony case into his chambers, accusing the attorney of being incompetent to represent the defendant, and quizzing her regarding her legal experience, reflected censurable impatience or hostility in the judge's professional relationship with others, in light of other instances of similar misconduct present in the record. Although the record indicated the judge had a good faith concern regarding the attorney's competence to litigate a felony case, it also indicated that the judge's interrogation was handled in a callous and abusive manner.

(7) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Conviction of Obstructing Public Officers.**—The conviction of a

superior court judge for resisting, delaying, or obstructing public officers (Pen. Code, § 148) in the course of their investigation of a possible intoxicated driving offense by the judge's son afforded the Supreme Court an independent and self-sufficient basis for sustaining the recommendation of the Commission on Judicial Performance that the judge be publicly censured. Such an offense is not akin to such other misdemeanors as fishing without a license or playing unauthorized bingo games. Furthermore, it was entirely appropriate for the special masters and the commission to examine the facts and circumstances underlying the offense, including evidence that supported the allegations of a dismissed count against the judge of improperly attempting to use his judicial office. The judge was not entitled to prevent the commission's review of the underlying facts merely by stipulating that a judgment of conviction had been entered. Furthermore, in the hearing before the special masters, the judge made no objection to the masters' dual use of the evidence; it was not until the masters filed their unfavorable report with the commission that he urged the commission's own decision should be confined to the face of the stipulated conviction. In any event, the conviction afforded a sound basis for censure, even without considering the surrounding circumstances.

(8) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Commission on Judicial Performance—Public Disclosure of Recommendation.**—In proceedings relating to the discipline of a superior court judge, the Commission on Judicial Performance properly followed the rules applicable to disclosure of the proceedings, when it simultaneously filed its record in the Supreme Court and publicly announced its recommendation of public censure. Cal. Rules of Court, rule 902(a), requires all proceedings before the commission to be confidential until the record is filed, and rule 902(b) permits the commission to issue short announcements concerning the hearing under limited circumstances. In addition, the confidentiality requirement of Cal. Const., art. VI, § 18, subd. (f), does not preclude the commission from publicly announcing the results of an investigation already known to the public, and the proceeding was publicly reported prior to the filing of the commission's findings and recommendations.

## COUNSEL

Arne Werchick, Justin A. Roberts and Werchick & Werchick for Petitioner.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Gregory W. Baugher and W. Scott Thorpe, Deputy Attorneys General, for Respondent.

OPINION

**THE COURT.**—We issued a writ of review in response to the petition of Harry R. Roberts, Judge of the Mono County Superior Court, which was filed pursuant to rule 919 of the California Rules of Court, requesting that we reject the recommendation of the Commission on Judicial Performance (the commission) that he be publicly censured. Judge Roberts contends that the commission's findings are unsupported by the evidence, and that his conduct does not warrant censure. He also complains of the commission's public disclosure of its censure recommendation prior to our consideration of his petition. We have concluded that the commission's recommendation is fully justified by the record and that petitioner should be publicly censured. We further conclude that the commission's public disclosure of its recommendation was authorized by law under the circumstances in this case.

The commission's findings were based upon the report to it of three special masters, who conducted extensive hearings. The findings concerned eight separate instances of misconduct. Because at least one of those matters (conviction under Pen. Code, § 148 for resisting, delaying or obstructing an officer) involves misconduct which clearly warrants censure, we only briefly summarize the testimony developed before the masters on the other counts.

1. *The Fish/District Attorney Matter*

After petitioner had granted a motion to suppress certain evidence in a criminal case (People v. Fish), Mono County District Attorney C. informed petitioner that he intended to file with the Court of Appeal a petition for mandate to review the ruling. According to C., petitioner became visibly angry, told C. that he was "chicken to take the case to trial," poked C. in the chest with his finger, and told C. "Buddy boy, you're not going to get away with this." Petitioner further stated "I'm going to see that you lose this case big." When C. protested the threat, petitioner replied "I'll threaten you anytime I feel like it."

In his defense, petitioner minimized the confrontation and testified that he was simply concerned about the impact of an anticipated delay upon his court calendar as a result of the writ proceeding. He denied referring to C. as "Buddy boy."

2. *The Fish/Public Defender Matter*

Following his conversation with C., petitioner met with Fish's counsel, Public Defender F., and had several ex parte conversations with him regarding the writ proceedings. During one such conversation, petitioner told the

defender that "You'd better win this or I won't grant another motion for you." The defender testified that he believed that petitioner's statement was serious.

Petitioner admitted that he was engaged in ex parte conversations with the defender, and that the merits of the writ proceeding were discussed. He also admitted making a remark regarding denial of the defender's further motions, but he stated that he was referring only to future similar search motions in the *Fish* case.

3. *The Fish/Puglia Matter*

Presiding Justice Robert Puglia of the Third Appellate District participated in the Fish writ proceeding which ultimately resulted in granting the People's petition for mandate. According to Justice Puglia, petitioner became angered at the decision and, before the rehearing time had expired, telephoned Justice Puglia advising him that the appellate decision was wrong, and asking him to "take a look at it and indicated . . . something to the effect that if we didn't change it, there would be a petition for hearing in the Supreme Court."

Petitioner testified that, at the time of this conversation, he assumed that the Court of Appeal opinion was final, and that he called Presiding Justice Puglia simply to inform him that a petition for hearing had been filed and that he had a new theory indicating the Court of Appeal opinion was incorrectly decided.

4. *The Jeremy C. Hearing Matter*

In this child neglect proceeding, the commission found that petitioner "improperly acted as an advocate, prejudged issues, abusively curtailed the presentation of evidence, and treated witnesses, litigants and an attorney in a rude, intimidating and demeaning manner." No purpose would be served in describing at length such misconduct; a few examples will suffice. In response to Attorney M.'s objection to petitioner's observation regarding her client's unfitness as a mother, petitioner replied "I don't care whether you object to it or not . . . . I will hear no further objections of this kind, do you understand, Miss [M.]?" After the minor's mother attempted to correct one of petitioner's statements, he admonished her, saying "If you have anything to offer you are going to be sworn. You have no credibility with this court. When you are sworn, let alone volunteer statements, . . . I don't believe a word you have testified to in this courtroom." Petitioner demonstrated similar impatience toward witness C., who supported the mother's fitness as a parent. Interrupting C.'s testimony in mid-sentence, petitioner stated "You may step down. I wouldn't believe you under oath. I don't want any more testimony like this. This witness doesn't know in one breath, and in the next breath it makes no difference. She would

have [the mother], who had abused her own child, babysit hers. Now, I don't have to listen to that kind of evidence."

5. *The Jeremy C./Attorney M. Matter*

Following the Jeremy C. hearing, according to Attorney M., petitioner approached her, told her that it would be a "disservice" to her client to appeal his decision, and threatened to report her to the State Bar if she advised her client to appeal. Petitioner denied making this threat, and claimed that he merely advised M. that if she brought a frivolous appeal she might find herself before the State Bar.

6. *The Jeremy C./Attorney F. Matter*

After the minor's mother retained Attorney F. in place of M., petitioner engaged F. in an ex parte conversation and asked him to discuss with his client the possibility of dismissing the appeal from petitioner's ruling. Petitioner denied making this request.

7. *The Attorney A. Matter*

Attorney F. assigned one of his newer associates, Attorney A., to try a felony case, People v. LaChuga. When she appeared before petitioner, he called a recess and, in unreported proceedings in his chambers, he accused her of being incompetent to represent the defendant, and rudely quizzed her regarding her legal experience. As a result of petitioner's loud and angry manner, Miss A. began to cry and left the conference to summon F.

Petitioner defended his actions on the basis of his earlier experience with A., a complaint filed regarding her competence, and her failure to cross-examine witnesses effectively.

8. *The Misdemeanor Conviction*

On February 3, 1981, following a jury trial, petitioner was convicted of violating section 148 of the Penal Code (resisting, delaying or obstructing a public officer). The conviction is now final. Although petitioner objected to the commission's consideration of the underlying facts, we briefly outline those facts based upon evidence which was introduced at the commission hearing. (See also *People* v. *Roberts* (1982) 131 Cal.App.3d Supp. 1 [182 Cal.Rptr. 757].)

On July 18, 1981, uniformed highway patrol officers stopped a car which was being driven erratically by petitioner's son in Marin County. The officers

commenced to administer to the son a field sobriety test. According to the officers' testimony, petitioner exited the car, told the officers that they "had no business stopping" the car, and in a loud voice directed obscenities at the officers. After being told to stop interfering and reenter the car, petitioner repeated his obscene language and advised the officers that they did not know who he was. Eventually, petitioner produced a card identifying himself as a judge and handed it to the officers, stating that he would not reenter the car, that the officers had no right to examine his son, and that he was going to watch everything that the officers did.

The officers continued to urge petitioner to return to the car, but he refused; petitioner's obscenities made it difficult for them to conduct their tests. After being threatened with arrest, petitioner walked quickly toward Officer Rogers, told him that "he [petitioner] was sick and tired of me [the officer] telling him what to do," and demanded his name and badge number. Petitioner stood next to the officer and struck him in the chest, grabbing the officer's shirt. The officer thereupon declared petitioner under arrest, but petitioner continued to struggle and eventually pulled the officer to the ground.

Petitioner, his son and daughter-in-law each denied that petitioner sought preferential treatment, and they blamed the officers' rude and discourteous conduct for escalating the confrontation. Petitioner denied that he struck Officer Rogers.

The commission found that petitioner's conduct with respect to each of the eight matters summarized above constituted either wilful misconduct in office or conduct prejudicial to the administration of justice which brings the judicial office into disrepute. (See Cal. Const., art. VI, § 18, subd. (c).) In addition, the commission found that petitioner's conduct in the Puglia matter (pt. 3, *ante*) violated both section 68070.5, subdivision (b), of the Government Code (forbidding communications between the judge hearing an original writ matter and the judge named as party respondent), and canon 3(A)(4) of the Code of Judicial Conduct (forbidding ex parte communications concerning pending matters).

By a vote of six to one, the commission recommended that petitioner be publicly censured. The dissenting commissioner favored petitioner's removal from office.

**(1)** In reviewing the commission's findings and conclusions, we undertake an independent examination of the record to determine which, if any, of the charges are supported by clear and convincing evidence. (*Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 622 [175 Cal.Rptr. 420, 630 P.2d 954].) We give weight to the findings and conclusions of the commis-

sion and its masters, especially as to factual issues turning on the credibility of testimony. (*Id.*, at pp. 622-623.)

Petitioner, refusing to acknowledge any misconduct deserving of censure, reargues the evidence supporting the commission's various findings and accuses the commission of "focusing on triviality" and exceeding its jurisdiction.

**(2a), (3a)** With respect to petitioner's apparent personal involvement with the Fish writ proceedings, petitioner argues that: (1) his discussion with the district attorney was "trivial in nature" and motivated by a legitimate concern over petitioner's court calendar; (2) his conversation with the public defender was permitted under rule 56(b) of the Rules of Court (authorizing the respondent "court" to join the real party in opposing the writ); and (3) his telephone conversation with Justice Puglia was made at a time when petitioner assumed the Court of Appeal had lost its jurisdiction over the *Fish* matter. **(4a)** Petitioner also argues that the commission failed to include the Puglia conversation among those counts of misconduct originally included in the notice of formal proceedings. Instead, the count was added by the special masters in an amended notice, pursuant to rule 911 of the Rules of Court.

**(2b)** Petitioner's course of conduct with respect to the *Fish* writ proceeding demonstrates an impermissible personal involvement in the litigation, accompanied by overly aggressive or threatening behavior toward both the district attorney and the public defender, and an inexcusable ex parte communication with Justice Puglia (see Gov. Code, § 68070.5, subd. (b)). Petitioner's attempt to exert pressure upon prosecutor, defense counsel and appellate court alike discloses an unhealthy and wholly improper concern with the protection of his own rulings from appellate reversal.

**(3b)** We reject petitioner's contention that rule 56(b) authorizes a trial judge to participate personally in ex parte communications with the real party regarding subsequent writ proceedings seeking review of the judge's order. Although the trial *court* becomes a party respondent to the proceeding, the court is usually represented (if at all) by its county counsel. (See *Elysium, Inc.* v. *Superior Court* (1968) 266 Cal.App.2d 763 [72 Cal.Rptr. 355].) The individual judge of the court whose order is being reviewed is not a proper party to the proceeding. (See *Matter of De Lucca* (1905) 146 Cal. 110, 113 [79 P. 853]; *Lawson* v. *Superior Court* (1957) 155 Cal.App.2d 755, 761 [318 P.2d 812]; *Neblett* v. *Superior Court* (1948) 86 Cal.App.2d 64, 66 [194 P.2d 22].)

**(4b)** We further reject petitioner's assertion that the commission was foreclosed from relying upon his telephone conversation with Justice Puglia by reason of its failure either to include that charge in the original notice of proceedings, or to amend that notice. Rule 911 of the Rules of Court authorizes the

commission *or* the masters, at any time prior to the conclusion of the hearing, to amend the notice to conform to proof *or set forth additional facts,* so long as the judge is given a reasonable time to respond and defend against the amended charges. We see no constitutional deficiency in this procedure. (See *McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 519 [116 Cal.Rptr. 260, 526 P.2d 268].) Petitioner had an ample opportunity to rebut the amended charges.

**(2c)** We conclude that petitioner's conduct with respect to the *Fish* writ proceeding constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c).) As explained in prior cases, the foregoing constitutional provision "do[es] not require notoriety, but only that the conduct be 'damaging to the esteem for the judiciary held by members of the public who observed such conduct.' [Citation.]" (*Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d at pp. 622-623, fn. 4.)

**(5)** Although the commission's censure recommendation could be sustained on the basis of the foregoing conduct alone, we review petitioner's contentions with respect to the remaining charges. As indicated above, petitioner's treatment of witnesses, litigants and counsel in the *Jeremy C.* matter was found to be rude and intimidating. In addition, petitioner threatened to report Attorney M. to the State Bar if she advised her client to appeal petitioner's adverse ruling. Finally, petitioner asked Attorney F. to discuss with his client the possibility of dismissing that appeal.

Petitioner attempts to excuse his abusive conduct at the child neglect hearing on the ground of his serious concern for the welfare of the minor and his firm conviction regarding the lack of credibility shown by the mother and her witnesses. The fact remains, however, that petitioner expressed his legitimate concern in an unacceptable, nonobjective and nonneutral manner, demonstrating unwarranted impatience, disbelief and hostility toward counsel, litigant and witnesses. Such conduct constitutes conduct prejudicial to the administration of justice, casting the judicial office into disrepute, and warranting our censure. (Cf. *McCartney* v. *Commission on Judicial Qualifications, supra,* 12 Cal.3d at pp. 530, 533-535.) As we stated in *McCartney,* "A trial judge may *not* . . . in the course of examining witnesses become an advocate for either party or cast aspersions or ridicule upon a witness. [Citations.]" (P. 533, italics in original.)

As for petitioner's threat to report Attorney M. to the State Bar for advising her client to appeal, and his request to successor Attorney F. to discuss with the client the possibility of dismissing that appeal, such conduct reflects the same improper personal involvement and advocacy exhibited by petitioner in the Fish

matter. Although petitioner denied both the threat and the request, the commission's contrary findings are supported by the clear and convincing testimony of both Attorneys M. and F.

(6) With respect to petitioner's treatment of Attorney A. in People v. LaChuga, the record reflects petitioner's good faith concern regarding the attorney's ability competently to litigate a felony case, and his surprise that Attorney F. had delegated the matter to A. Yet the record also indicates that petitioner's interrogation of her was handled in a callous and abusive manner. Petitioner offers no excuse for such conduct, merely observing that "Respondent made no critical or derogatory remarks *in open court* concerning Ms. [A.]." (Italics added.) As indicated above, the proceedings took place in chambers and were unreported (despite the presence and availability of a court reporter). Although petitioner's treatment of Attorney A., standing alone, might not warrant censure, nevertheless in the light of the entire record such conduct once again reflects a censurable impatience or hostility in his professional relationship with others, as previously discussed.

(7) Finally, petitioner's misdemeanor conviction affords an entirely independent and self-sufficient basis for sustaining the commission's censure recommendation. As previously noted, petitioner was convicted of violating Penal Code section 148 (resisting, delaying or obstructing a public officer). While admitting the conviction, petitioner objects to the consideration, by either the commission or this court, of the factual circumstances underlying the offense. According to petitioner, the commission's notice of proceedings "merely" alleged the fact of his conviction, and he subsequently stipulated to that conviction. Thereafter, at the evidentiary hearing before the special masters and citing his stipulation, petitioner objected to the admission of evidence regarding the offense. Accordingly, he asserts, the introduction of such evidence supposedly was limited to support the allegations of a *dismissed* count (improper attempt to use judicial office). Thus, petitioner argues, "the only question that can and must be answered by this Court is whether mere proof of a misdemeanor conviction, standing alone, can be the basis for judicial discipline by this Court." (Fn. omitted.)

The record shows, however, that at the conclusion of the hearing, one of the masters announced that although the underlying evidence relating to the misdemeanor conviction was elicited primarily with respect to the abuse-of-office count, it was also received, *and would be considered,* in connection with the conviction count. Petitioner made no objection at that time to the masters' dual use of the evidence. Once the unfavorable report was filed, however, petitioner thereupon urged that the commission's own decision should be confined to the face of the stipulated conviction, without consideration of any of the underlying facts.

Although we have found no authorities which discuss the issue, we have concluded it is entirely appropriate for the commission or its masters to examine the facts and circumstances underlying a misdemeanor conviction in determining whether the offense calls for discipline. Of course, the commission or masters in their discretion may limit the scope of such inquiry and thereby avoid a needless retrial of the criminal charges. But a judge may not be permitted to prevent the commission's review of the underlying facts merely by stipulating that a judgment of conviction had been entered. In the present case, therefore, petitioner's objection to the admission of evidence regarding his conviction should have been, and was, overruled. (As indicated above, petitioner failed to renew that objection when the masters announced their intent to rely upon such evidence in relation to *both* the conviction count and the abuse-of-office count.)

Petitioner suggests that he relied upon the masters' original ruling dealing with the fact of a conviction and failed to present additional exonerating testimony bearing upon the conviction count. He fails to specify, however, what additional evidence he would have submitted in this regard. In any event, it is uncontradicted that petitioner was convicted of resisting, delaying or obstructing public officers in the course of their investigation of a possible intoxicated driving offense by his son. That conviction is now final and affords an additional sound basis for censuring petitioner, even without considering the surrounding circumstances. We reject as frivolous his counsel's assertion that a "mere" offense of this kind is akin to such other misdemeanor offenses as fishing without a license or playing unauthorized bingo games.

**(8)** Petitioner's final contention challenges the apparent practice of the commission in making public its disciplinary recommendation when it is submitted to this court. Petitioner asserts that the release of advance publicity of this kind amounts to prejudgment of his case and a public censure improperly imposed before we have sanctioned such discipline.

The commission responds that the applicable rules appear to authorize such disclosure. Rule 902(a) of the Rules of Court states that "Except as provided in this rule, all papers filed with and proceedings before the Commission, or before the masters, . . . shall be confidential *until a record is filed by the Commission in the Supreme Court.*" (Italics added; see also rule 902(b), permitting the commission to issue "short announcements" concerning the hearing under limited circumstances.) Apparently, the record was filed with us simultaneously with the commission's public announcement. Moreover, the confidentiality requirement of article VI, section 18, subdivision (f), of the state Constitution would "not preclude either the Commission or a judge under investigation from publicly announcing the results of an investigation already known to the public." (*Mosk* v. *Superior Court* (1979) 25 Cal.3d 474, 502 [159 Cal.Rptr.

494, 601 P.2d 1030].) Petitioner acknowledges that the proceeding herein was publicly reported prior to the filing of the commission's findings and recommendation. We conclude that the commission properly followed the applicable rules, and that any changes in those rules should be initiated by the Judicial Council, not this court. In any event, any impropriety by the commission in this regard would neither excuse petitioner's misconduct nor require dismissal of the proceedings against him.

Our review of the record persuades us that the commission's recommendation of censure is fully warranted and should be adopted. Accordingly, and by this order, Judge Roberts is hereby publicly censured.

**MOSK, J.**—I dissent.

I do not propose to discuss the merits of the public censure of Judge Roberts ordered by the court in this case. It is my view that the action of my colleagues is redundant: in effect the judge has already been publicly censured by the Commission on Judicial Performance. In so doing, however, the commission has improperly assumed a function which the Constitution authorizes only this court to perform.

Article VI, section 18, subdivision (c), carefully delineates the responsibilities of the commission and the Supreme Court. Only the court may retire, censure or remove a judge. The commission, by contrast, is limited to the power to "*privately* admonish a judge found to have engaged in an improper action or a dereliction of duty" (italics added), and even that is subject to court review.

In this instance the commission made a public release of its recommendation for reproval. Once reported to the world, the commission action was not the private admonishment which the Constitution and rule 920(a) of the Rules of Court authorize, but itself became a public reproval which only the court may properly administer.

The commission apparently bases its justification for this invasion of the court's prerogative on rule 902. If rule 902 can be read to permit press releases by the commission, then it clearly violates article VI, section 18, subdivision (f), of the Constitution, which authorizes only rules "providing for confidentiality," not rules to evade confidentiality.

However, I do not read rule 902 to justify the public notoriety that the commission seems to seek. Rule 902(a) requires that all papers and proceedings of the commission "shall be confidential." Rule 902(b) provides in subsection (1) that a public statement may be made "at the request of the judge

involved"; in (2), a statement may be made "if there is no basis for further proceedings or recommendation of discipline"; in (3), when the administration of justice is threatened a statement may be made confirming the fact of a hearing and describing the "procedural aspects"; in (4), when a judge resigns a statement may be made "to a public entity"; and in (5), after investigation the commission may make certain disclosures "to the person complaining against the judge."

Nothing in rule 902 permits the commission, under the circumstances of this case, to violate the confidentiality which was always intended to be the hallmark of these proceedings. As stated above, if the commission persists in misinterpreting the rule to allow it to go public by announcing a recommendation of discipline then I would declare the rule invalid.

The majority refer to an unfortunate dictum in *Mosk* v. *Superior Court* (1977) 25 Cal.3d 474, 502 [159 Cal.Rptr. 494, 601 P.2d 1030], that arguably permits the commission to announce "the results of an investigation already known to the public." The dictum is inconsistent with the body of the opinion in that case, which discussed at considerable length the history and bases of the confidentiality concept and the public policy in support thereof. (*Id.*, pp. 488-499.) Any conflict between the text and rationale of an opinion and an incidental dictum therein must, of course, be resolved in favor of the former. In any event, there was no actual discipline ordered in that case, then or subsequently; the issue involved the required confidentiality of a mere preliminary investigation which the commission unconstitutionally sought to undertake in a circus atmosphere not only open to the public but replete with radio and television coverage.

It might be argued that even if the commission met its responsibility of confidentiality, the recommendation for discipline would become known when it was filed with this court. That is not necessarily so. The material filed with the court does not identify the judge involved; in this instance the case was entitled "Inquiry Concerning a Judge No. 49." Only when the judge files a petition for writ of review, seeking a hearing in open court, does his identity become general knowledge. Thus, going public remains the choice of the judge, not of the commission.

In the event a judge does not seek a writ of review, this court determines on the basis of the commission record and recommendation the nature of the discipline, if any, to impose. The court is not required to adopt the commission recommendation. Under some circumstances the court may see fit to administer mere private censure by minute order, using the anonymous case title. But if the commission has previously made the matter public, private censure becomes an impossibility. I insist the commission has no right to so restrict the options available to this court.

In the instant matter, the release of the commission's conclusion tarred Judge Roberts with a broad brush. Before the matter was argued in court, the public was informed that he should be censured. Thus the actual order by this court is not only anticlimactic, it doubles the reflection on the judge's judicial performance in the eyes of his constituents. Not even the most heinous conduct merits infliction of the same discipline twice. Excessive punishment is not the path to rectitude.

In view of the action by the commission, and to discourage its repetition in future cases, I would dismiss these proceedings.

[L.A. No. 31751. Oct. 1, 1984.]

MARION E. GUBLER, a Judge of the Municipal Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

SUMMARY

The Commission on Judicial Performance recommended that a municipal court judge be publicly censured for "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Most of the charges related to the judge's zealous efforts to obtain payment from criminal defendants to the county for the cost of the legal representation provided them by the public defender (Pen. Code, § 987.8). Other charges arose out of the judge's orders authorizing private sales of guns to peace officers by defendants whose convictions had subjected the guns to confiscation, destruction, or public auction by the police department.

The Supreme Court adopted the commission's recommendation and findings, although it concluded that some of the judge's acts that the commission deemed wilful misconduct amounted only to conduct prejudicial, and publicly censured the judge. The court held that the judge committed conduct prejudicial by ordering appearances by defendants for fee-collection purposes, causing fee orders to appear to be conditions of probation, ordering fees payable out of posted bail, even though part or all of a fine thereby remained unsatisfied, and making fees payable ahead of fines for the purposes of prolonging the availability of sanctions for nonpayment of the fine and creating the impression that such sanctions could also be used for nonpayment of fees. Because the court was not persuaded that the judge's wrongful fee-collecting practices were carried out in bad faith, it held he was not guilty of wilful misconduct in that regard. The court further held that the judge's act of doubling the public defender fees of one defendant because of irritation at the public defender's objections to his entering such order on a probation order was wilful misconduct. Also the judge committed conduct prejudicial by knowingly assessing unreasonable attorney fees. He committed wilful misconduct by giving unsolicited advice to a commissioner employed by the judge on a case from which the judge had been disqualified. While the judge's acts of approving the gun sales constituted a gross and negligent misuse of his judicial power, the court was not convinced his

motives in committing those acts were malicious or corrupt, and concluded the acts amounted only to conduct prejudicial.

The court also ruled on the propriety of the commission's public release of its report when filing its record with the court, and directed the clerk of the court henceforth in any case in which the commission has recommended censure but not removal or retirement of a judge to keep all filed and received documents and exhibits under seal, and to conceal the identity of the judge, until either the judge files a petition for review or the time for such filing has expired. (Opinion by The Court. Separate concurring and dissenting opinion by Kaus, J.)

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**HEADNOTES**

Classified to California Digest of Official Reports, 3d Series

(1) **Judges § 6.4—Removal, Censure, and Other Discipline—Review by Supreme Court.**—On review of a recommendation by the Commission on Judicial Performance that a judge be publicly censured, the Supreme Court is concerned only with the charges the commission sustained and with what discipline, if any, should be imposed. It must determine from an independent evaluation of the record whether the findings against the judge are supported by clear and convincing evidence and must make its own conclusions of law and determination as to discipline. Special weight is given to the masters' findings that reflect their evaluation of the credibility of witnesses who testified before them.

(2a-2d) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Attorney Fees Collection Practices—Public Defender.**—A municipal court judge's efforts under Pen. Code, § 987.8, to enforce orders for payment by criminal defendants for the cost of the public defender's legal services, by ordering appearances for fee collection purposes, causing fee orders to appear to be conditions of probation, ordering fees payable out of posted bail even though part or all of the fine thereby remained unsatisfied, making fees payable ahead of fines for the purpose of prolonging the availability of sanctions for nonpayment of the fine, and creating the impression that such sanctions could also be used for nonpayment of fees constituted conduct prejudicial to the administration of justice. The conduct was not wilful misconduct since it was not carried out in bad faith.

[See **Cal.Jur.3d,** Judges, § 62; **Am.Jur.2d,** Judges, § 51.]

(3) **Criminal Law § 86—Rights of Accused—Aid of Counsel—Appointment of Public Defender—Reimbursement—Enforcement.**—A municipal court judge's order for payment of public defender fees ahead of fines, purportedly authorized by Pen. Code, § 987.8, subd. (a), giving judges the authority to order payment of legal costs "in the manner in which the court believes reasonable and compatible with the defendant's financial ability," became an abuse of discretion when used to prolong the availability of sanctions for nonpayment of fines and to create the impression that such sanctions could also be imposed for nonpayment of fees.

(4) **Criminal Law § 86—Rights of Accused—Aid of Counsel—Appointment of Public Defender—Reimbursement—Enforcement.**—Pen. Code, § 987.8, providing for enforcement of orders for payments by defendants for the costs of public defender's services, did not authorize the issuance of orders in criminal proceedings to return defendant to court for purposes of collecting public defender's fees. The use of bench warrants to compel appearances for interrogation of why a defendant has not paid (as distinct from investigation of ability to pay) amounted to using the threat of incarceration for collection purposes.

(5) **Criminal Law § 86—Rights of Accused—Aid of Counsel—Appointment of Public Defender—Reimbursement—Bail Deposits.**—The provision in Pen. Code, § 1297, providing that if bail money remains on deposit at the time of a judgment for the payment of a fine, the clerk must, under the direction of the court, apply a defendant depositor's money in satisfaction thereof and after satisfying the fine and costs, must refund the surplus to defendant, enacted in 1878, was not intended to refer to costs of legal services, which first became reimbursable to the county under the initial enactment in 1971 of Pen. Code, § 987.8. However, if a judge relied on § 1297 in deducting attorney fees as well as the entire fine from bail deposited by a defendant, such reliance would not amount to misconduct.

(6) **Criminal Law § 86—Rights of Accused—Aid of Counsel—Appointment of Public Defender—Reimbursement—Collection—Bail Money.**—Orders made by a municipal court judge for application of bail deposits to pay for public defender's fees were clearly improper in the absence of consent by interested parties, where the bail money was applied to the entire amount of the attorney fee, but to only a part of a fine levied against defendant, leaving defendant with a balance of a fine enforceable by criminal sanctions, whereas use of the bail money to pay all the fine would have left simply an attorney fee balance, collectible only in the manner of a civil judgment.

(7) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Wilful Misconduct—Bad Faith.**—Bad faith is the touchstone for testing whether misconduct committed by a judge while acting in a judicial capacity constitutes wilful misconduct. Bad faith is quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly. When a judge has intentionally committed acts which he knew or should have known were beyond his lawful power, bad faith entails actual malice as the motivation for a judge's actions. The requisite intent must exceed mere volition; negligence alone, if not so gross as to call its genuineness into question, falls short of bad faith. Even when the acts in question were within the judge's lawful power, they may involve bad faith, and thus constitute wilful misconduct, if committed for a corrupt purpose, that is, for any purpose other than the faithful discharge of judicial duties. Bad faith requires a malicious or corrupt purpose beyond mere active or constructive knowledge of lack of power.

(8) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct.**—Conduct prejudicial to the administration of justice, when committed in the course of acting in a judicial capacity, lacks the element of bad faith necessary for wilful misconduct but must be prejudicial to the administration of justice and bring the judicial office into disrepute. Bringing the judicial office into disrepute does not require notoriety, but only that the conduct be damaging to the esteem for the judiciary held by members of the public who observe such conduct.

(9) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Legal Error.**—A judge should not be disciplined for mere erroneous determination of legal issues, including questions of limitations on the judicial power that are subject to reasonable differences of opinion.

(10) **Criminal Law § 86—Rights of Accused—Aid of Counsel—Appointment of Public Defender—Reimbursement—Collection—Before Payment of Fine.**—Under Pen. Code, § 987.8, providing for payments by defendants of the costs of public defender's services, ordering payment of such fees before payment of the remaining balance on a fine is not necessarily improper if defendant is not given the impression that payment of the fees may be enforced by criminal sanctions.

(11) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Fee Collection Practices.**—The actions of a municipal

court judge, acting under Pen. Code, § 987.8, providing for enforcement of orders for payments by criminal defendants of the costs of public defender's services, who threatened to increase another judge's order for such fees and also ordered the criminal defendant involved to return to court for the purpose of implementing collection of the fee, amounted to conduct prejudicial to the administration of justice.

(12a, 12b) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Increasing Public Defender Fees.**—A municipal court judge's conduct in doubling a defendant's public defender fees out of irritation at the public defender's objections to entering the fees on a probation order, thereby making it appear payment of the fee was a condition of probation, was wilful misconduct, where doubling the fee was not based on any change in the judge's information concerning defendant's ability to pay or the legal services received, but was motivated by a desire to get even with the public defender for objecting to the form of the initial order.

(13) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Wilful Misconduct—Isolated Incident.**—The fact that an act of misconduct by a judge is an isolated incident does not preclude a determination of wilful misconduct.

(14) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Unreasonable Public Defender Fees.**—The actions of a municipal court judge in assessing against defendants public defender's fees that were unreasonable in light of the evidence available to the judge as to defendants' ability to pay constituted conduct prejudicial to the administration of justice.

(15a, 15b) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Advice After Disqualification.**—A municipal court judge, disqualified in a criminal case on the filing by the public defender of a declaration of prejudice (Code Civ. Proc., § 170.6), who, after the criminal proceedings were terminated, wrote a note to the commissioner employed by the judge and serving at his pleasure, advising the commissioner that a Pen. Code, § 987.8, hearing on public defender fees to be collected from defendant should be held and suggesting an amount of such fees, was guilty of wilful misconduct in view of the judge's pattern of retaliatory conduct in other matters, plus the fact that the note dealt with the merits of a matter in which the judge was barred from acting in deference to a litigant's right to impartiality, and was addressed specifically to a subordinate judicial officer, which led to the conclusion that the writing of the note was for a corrupt purpose.

(16) **Judges § 9—Disqualification—Effect.**—A municipal court judge disqualified for prejudice in a criminal case under Code Civ. Proc., § 170.6, was barred from ordering public defender's fees against defendant under Pen. Code, § 987.8. The setting of an attorney fee under § 987.8 involves a contested issue of law or fact within the meaning of § 170.6, and the statute calls for the holding of the fee-setting hearing at the end of, and as a part of, the criminal action in which the legal services were rendered.

(17) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Authorizing Release of Confiscated Guns for Sale by Defendant.**—A municipal court judge who on four occasions ordered the police department to release to the purchaser a firearm that had been purchased from an owner after having been confiscated in connection with the owner's criminal conviction was guilty of conduct prejudicial to the administration of justice where the judge knew or reasonably should have known that the sales were illegal and that the circumstances of the sales, particularly the participation of the bailiff, a friend of the judge, created at least the appearance of impropriety. Because the judge's motives in committing the acts were not malicious or corrupt, they did not constitute wilful misconduct.

(18) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Commission on Judicial Performance—Public Disclosure of Recommendation.**—The dissemination by the Commission on Judicial Performance of a press release and copies of its findings, conclusions and recommendations on the filing with the Supreme Court of its record of disciplinary proceedings against a municipal court judge did not constitute a public admonishment in violation of Cal. Const., art. VI, § 18, subd. (c), authorizing the commission to issue only private admonishments, or violate Cal. Const., art. VI, § 18, subd. (f), requiring the Judicial Council to make rules providing for confidentiality of its proceedings. Cal. Rules of Court, rule 902, subd. (a), provides that commission proceedings shall be confidential until a record is filed by the commission in the Supreme Court, which is consistent with the constitutional requirement of confidentiality. The constitutional ban on public disclosure terminated after the filing of the record in the Supreme Court. The publicizing of the commission's findings and recommendations on the filing of its record was not equivalent to public censure by the Supreme Court and did not restrict the options available to the court.

(19) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Confidentiality—Record of Commission on Judicial Perform-**

**ance.**—The public interest in minimizing doubts about the judicial process arising from charges against judges that may not be upheld warrants a postponement of the release to the public of the report and record of proceedings by the Commission on Judicial Performance until either a petition for review by the Supreme Court has been filed or the time for filing such petition has expired. Accordingly, the clerk of the Supreme Court, in any case in which the commission has recommended censure but not removal or retirement of a judge, must keep all filed and received documents and exhibits under seal, and conceal the identity of the judge, until either the judge files a petition for review or the time for such filing has expired.

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COUNSEL

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John K. Van de Kamp, Attorney General, S. Clark Moore, Assistant Attorney General, Gary R. Hahn and Robert R. Anderson, Deputy Attorneys General, for Respondent.

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OPINION

**THE COURT.***—On petition of Judge Marion E. Gubler of the Municipal Court for the Burbank Judicial District of Los Angeles County, we review a recommendation of the Commission on Judicial Performance that he be publicly censured for "wilful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (hereinafter wilful misconduct and conduct prejudicial) (Const., art. VI, § 18, subd. (c) set out at fn. 8, *post*). We adopt the commission's

*Before Bird, C. J., Mosk, J., Kaus, J., Reynoso, J., Grodin, J., Sapunor, J.,† and Darrah, J.†

†Assigned by the Chairperson of the Judicial Council.

recommendation and findings, though we conclude that some of petitioner's acts that the commission deemed wilful misconduct amounted only to conduct prejudicial.

Most of the charges against petitioner relate to his zealous efforts to obtain payment from criminal defendants to the county for the cost of the legal representation provided them by the public defender. Other charges arise out of petitioner's orders authorizing private sales of guns to peace officers by defendants whose convictions had subjected the guns to confiscation, destruction, or public auction by the police department.

Hearings were held in November and December 1982 before three special masters, who made findings of fact and conclusions of law. (See Cal. Rules of Court, rule 907 et seq.) As to some charges, the masters concluded that no ground for discipline had been established, and as to others, they concluded that petitioner had engaged in conduct prejudicial.

The commission dismissed some of the charges that the masters had deemed unproved, but otherwise adopted substantially all the masters' findings adverse to petitioner and concluded that most of them established wilful misconduct while the rest showed conduct prejudicial. The commission voted six to three to recommend that petitioner be publicly censured; the three dissenters favored private admonishment.

**(1)** This court is concerned only with the charges the commission sustained and with what discipline, if any, should be imposed. (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 784, fn. 5 [119 Cal.Rptr. 841, 532 P.2d 1209].) We must determine from our independent evaluation of the record whether the findings against petitioner are supported by clear and convincing evidence and must make our own conclusions of law and determination as to discipline. (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275-276 [110 Cal.Rptr. 201, 515 P.2d 1].) The commission's findings are consistent with, and generally similar to, findings of the masters, who, however, made additional findings, mostly exculpatory in nature, that were neither adopted nor rejected by the commission. We give special weight to the masters' findings that reflect their evaluation of the credibility of witnesses who testified before them. (*Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 623 [175 Cal.Rptr. 420, 630 P.2d 954].)

## ATTORNEY FEES COLLECTION PRACTICES

**(2a)** Many of the commission's findings deal with improprieties in petitioner's efforts to enforce orders for payment by defendants to the county

for the costs of the public defender's legal services. Those orders were made pursuant to Penal Code section 987.8, which provides that if, at the conclusion of a criminal proceeding in a trial court, the court determines that a defendant who was represented by the public defender or a court-appointed attorney has the ability to pay all or part of the cost of counsel, the court shall "order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order . . . shall not be enforced by contempt."[1]

[1]All section references are to the Penal Code unless otherwise indicated. During the events described in the commission's findings, and at the time of the hearings before the masters, section 987.8 provided as follows (see Stats. 1978, ch. 1134, § 1):

"(a) In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided. At a hearing, the defendant shall be entitled to have, but shall not be limited to, the opportunity to be heard in person, to present witnesses and other documentary evidence, and to confront and cross-examine adverse witnesses; disclosure of the evidence against the defendant, and a written statement of the findings of the court. If the court determines that the defendant has the present ability to pay all or part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order to pay all or part of the costs shall not be enforced by contempt.

"(b) Prior to the furnishing of counsel or legal assistance by the court, the court shall give notice to the defendant that upon the conclusion of the criminal proceedings in the trial court, the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has such present ability, the court shall order him to pay all or part of such cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to execution.

"(c) Definitions: (1) The term 'legal assistance provided' means legal counsel and supportive services including, but not limited to, medical and psychiatric examinations, investigative services, expert testimony and any other form of services provided to assist the defendant in the preparation and presentation of the defendant's case.

"(2) The term 'ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided, and shall include, but not be limited to the defendant's: (i) Present financial position;

"(ii) Reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his defense;

"(iii) Likelihood that the defendant shall be able to obtain employment within a six month period from the date of the hearing;

"(iv) Any other factor or factors which may bear upon the defendant's financial capability

*Making Attorney Fees Payable Before Fines*

The commission found: In cases where both a fine was levied and an attorney fee order was imposed under section 987.8, and payment was postponed, petitioner's usual practice was to make the fee payable before the fine. The findings describe 29 cases between June 1979 and December 1980 in which petitioner made such orders. Most of the ordered fees were for $50 or $100; the fines were greater. The commission further found that the order of payment was not set at the request or with the consent of the defendant, that payments were routinely applied first to fees, leaving defendants subject to further proceedings with respect to fines, and that the order of payment might present an unreasonable obstacle to satisfaction of the fine where the defendant was unable to pay both fee and fine.

These findings are supported by clear and convincing evidence. The 29 described cases are documented by copies of court docket sheets, introduced as exhibits. A deputy public defender testified that between May and August 1979, petitioner ordinarily made the fee payable before the fine. Another deputy testified that from May 1979 to January 1980, petitioner would make the fee payable either at the same time as or before the fine; thereafter to February 1981 petitioner would require that the fee be paid first. A witness who had served as petitioner's courtroom clerk during 1979 and 1980 could recall cases in which petitioner ordered fees paid before fines but not vice versa; his "guess" was that it went both ways.

Deputy public defenders and the courtroom clerk testified that the proceedings by which petitioner set attorney fees were very short and that petitioner generally would tell the defendant little more than the amount of the fee and when it was payable. The exhibits include at least five cases in which, after payment of fees, the subsequently payable fines became delinquent, and sanctions (e.g., revocation of probation, issuance of bench warrant) were imposed for that and other delinquencies. The masters found, however, that there was no instance in evidence of incarceration for failure to pay a fine because of prior use of funds to pay fees ordered; this was due in part to a liberal continuance policy and a community service option with respect to fine obligations.

Petitioner testified it was not his general policy to require attorney fees to be paid before the fine and suggested, in testimony and in his briefs, that

to reimburse the county for the costs of the legal assistance provided.

"(d) At any time during the pendency of the judgment rendered according to the terms of this section, a defendant against whom a judgment has been rendered may petition the rendering court to modify or vacate its previous judgment on the grounds of a change in circumstances with regard to the defendant's ability to pay the judgment. The court shall advise the defendant of this right at the time of rendering the judgment."

the exhibits introduced against him selectively omitted cases in which he ordered the fines paid first. But he introduced no evidence of such cases. He also testified that he always consulted defendants about the due dates for fines and fees and followed their suggestions if within reason.

(3) Petitioner also argues that his orders for payment of fees ahead of fines were within the broad authority given him by section 987.8, subdivision (a), to order payment of legal costs "in the manner in which the court believes reasonable and compatible with the defendant's financial ability." The Attorney General (representing the commission) replies, and we agree, that orders which otherwise would have been within petitioner's statutory discretion became an abuse of that discretion when used to prolong the availability of sanctions for nonpayment of fines and create the impression that such sanctions could also be imposed for nonpayment of fees.

As will be explained, the practice of making fees payable ahead of fines was only one among several improper means employed by petitioner to enforce attorney fee orders. That pattern of conduct, together with the weight given the masters' resolution of credibility issues, reinforces our determination that petitioner in fact engaged in the practice in question.

*Ordering Appearances for Fee-Collecting Purposes*

The commission found that petitioner established a practice of "unlawfully ordering repeated appearances for the sole purpose of collection of fee orders."

Petitioner testified as follows: He felt "some obligation," though not the "exclusive duty," to collect attorney fees assessed under section 987.8, but he had few available means of collection other than "[continuing] the case until [the defendant] was able to pay" or "continuing it and asking him if he needed more time." The form provided by the county's bureau of resources and collections "had no place on the form that said that you are ordered to return. So, we had a little stamp that said that the defendant is ordered to return, that we would stamp on there, and that is the only way that we could continue any control over the situation at all was to just have him come back within a reasonable period of time and ask him if he had paid it." The defendant would be "ordered by the court to come back on a particular date because it's necessary in order to resolve the case to ask him some questions about his ability: Why haven't you paid this thing? Are you still unemployed? Do you need more time? Would you like to do it some different way? Would you like to do community service? Somewhere along the line you find out that you can't do some of these things, then you refer it to the Department of Collections, and let them take care of it." "And

there were occasions when people came back two or three times and didn't pay, or hadn't paid, when I do recall that we referred it to the Bureau of Resources and Collections at that time, and it hadn't been referred prior." If the defendant failed to appear as ordered, a bench warrant for his arrest would be issued, as in the case of a witness who disobeys an order to appear.

**(4)** This testimony is clear and convincing evidence that petitioner unlawfully ordered appearances for purposes of collection. Section 987.8 does not authorize issuance of orders in the criminal proceeding to return to court for that purpose. Even on the issue of ability to pay, a court that has initially determined that issue is limited to ordering one additional hearing before the court within six months plus an appearance before a designated county officer. Petitioner recognizes that the statute expressly forbids enforcement of fee orders by contempt, but his use of bench warrants to compel appearances for interrogation on why the defendant has not paid (as distinct from investigation of ability to pay) amounted to using the threat of incarceration for collection purposes.[2]

*Mervin Anderson Incident*

The commission found: On December 11, 1979, Judge Kaufman ordered defendant Mervin Anderson to pay a fine of $65 and an attorney fee of $25 by January 14, 1980. On January 15, the clerk refused to accept Anderson's check for $65 in payment of the fine only. Anderson consulted his assigned public defender, Edward Van Gelder, who advised Anderson to write "fine only" on the check and retender it to the clerk, and further advised the clerk that the check should be accepted. The clerk accepted the check, credited it to the fine, and reported the matter to petitioner the next day, January 16. On January 16, petitioner who was angry at what he believed was public defender interference with enforcement of attorney fee orders, had a conversation with Van Gelder on the subject. He told Van Gelder that Judge Kaufman's fee order was wholly insufficient, that Anderson was ordered to pay the $25 fee on or before a continued hearing date of February 6, 1980, and that if he neither paid nor appeared, a bench warrant would issue for his arrest and he would be assessed fees of $200 or $250. A written order was made on the docket: "Continued to 2-7-80 at 2:00 p.m. for payment

[2]In addition to petitioner, there was one other judge and a commissioner on the Burbank Municipal Court bench. Petitioner introduced testimony by the other judge, C. Bernard Kaufman, that he too would order defendants to appear in court if they did not comply with an order to pay attorney fees to the county (through the court clerk) by a prescribed date. A showing that other judges engaged in an improper practice does not make the practice proper though, as pointed out later, petitioner's knowledge of other judges' practices may be relevant to the issue of bad faith.

of Public Defender fees of $25.00. If fees not paid, then defendant to be cited back into court and new order made." Anderson did not pay or appear, and petitioner continued the matter several times. After petitioner told Van Gelder he was going to issue a bench warrant for Anderson's arrest, Van Gelder personally paid the $25 fee to the clerk on March 3.

Petitioner testified: He called in Van Gelder on January 15, 1980, and confronted Van Gelder with a report petitioner had just received from the clerk that Van Gelder had told the clerk and Anderson that Anderson did not have to pay the attorney fees. Van Gelder said he had told Anderson only that he need not pay the attorney fees at that time. Petitioner reiterated he would not tolerate public defenders telling their clients not to pay ordered fees. He also told Van Gelder: "Now look at what kind of situation you have created here for us at the court: We have an unpaid $25, and we don't have any continuance date. The man isn't ordered to return back." Van Gelder agreed to have Anderson come back to court, by calling or writing him, and petitioner made the docket order continuing the matter to February 6.[3] He did not threaten to raise the fees to $200 or $250.

The making of that threat, however, was convincingly testified to by Van Gelder, who described at length his conversations with petitioner in connection with the *Anderson* matter. We conclude that the commission's findings on the subject are supported by clear and convincing evidence.

Similarities between the *Anderson* incident and other incidents described in the findings illuminate patterns in petitioner's approach to the making and enforcement of fee orders. Thus, there are other instances (*Rueda, De Carolis*) in which petitioner appears to have reacted to unwelcome actions of the public defender by threatening or attempting to increase the amount of attorney fees ordered without regard to redetermination of ability to pay. Apart from threats to raise fees, the *Anderson* incident illustrates two of petitioner's collection practices established by other findings: (1) making sure that fees were paid before petitioner lost power to enforce payment of the fine and (2) using orders to appear in court as a means of enforcing payment of fees.

*Recording Fee Orders as Apparent Condition of Probation*

The commission found: Fee orders were frequently recorded on the form of probation order without notation that the order was not a condition of

[3]Petitioner testified that when Van Gelder agreed to ask Anderson to come back to court, petitioner said: "Fine. We'll put it over. You can represent your client." That statement seems inconsistent with the masters' finding that petitioner had "the belief that the Public Defender has no legitimate interest in participating in the civil function of setting or collecting fees."

probation, thus creating the impression that it *was* a condition. Only if a public defender objected did petitioner make exceptions, e.g., by writing "not a condition of probation" on the form.

The exhibits include 10 cases in which petitioner's fee order appears on the probation order under the "Terms of Probation" opposite the space for "Other." These orders were made between June 27, 1979, and July 1, 1980. Petitioner calls to our attention, and we have found, only one exhibit (*Orellana* containing an order dated June 9, 1980) in which petitioner added, "Not a condition of probation" (or its equivalent) after such an entry. On another order (*Rodriguez,* May 20, 1980) petitioner apparently had entered and crossed out the fee order on the probation form, and made an equivalent order on a separate printed form on which boxes could be checked for payment of the fee through the court clerk or, instead, through the county bureau of resources and collections. In that case, petitioner provided for payment through the clerk. In still another case (*Rueda*) it appears that on June 3, 1980, petitioner similarly deleted a fee order on the probation form and made the order on the separate form but checked the box for payment through the county bureau. Three deputy public defenders testified that when petitioner entered the fee order on the probation form, he did not advise the defendant that the fee order was not a condition of probation.

Petitioner conceded in his testimony that payment of attorney fees cannot be made a condition of probation under section 987.8.[4] He testified that he did not write on the probation forms that the fee orders were not conditions of probation because he had discussed the issue with the deputy public defenders and had an understanding with them that a fee order was never to

[4]In *In re Allen* (1969) 71 Cal.2d 388 [78 Cal.Rptr. 207, 455 P.2d 143], this court unanimously concluded that a condition of probation requiring that the defendant reimburse the county for the cost of appointed counsel was invalid as an impediment to the right to counsel guaranteed by the Sixth Amendment. But in *Fuller* v. *Oregon* (1974) 417 U.S. 40 [40 L.Ed.2d 642, 94 S.Ct. 2116], a six-member majority of the high court criticized our reasoning in *Allen* as "wide of the constitutional mark" and affirmed a judgment imposing probation conditioned on compliance with a statute requiring convicted defendants to reimburse the state for legal expenses when they are able to do so. Thereafter, in *People* v. *Amor* (1974) 12 Cal.3d 20 [114 Cal.Rptr. 765, 523 P.2d 1173], a decision upholding the validity of an early version of section 987.8, this court acknowledged *Fuller* v. *Oregon,* but instead of deeming *Allen* overruled, distinguished it on the ground, inter alia, that violation of a condition of probation would subject the defendant to imprisonment whereas a fee order under section 987.8 is enforceable only by execution as on a civil judgment. (*Id.*, at p. 25.) Finally, *In re Elizabeth S.* (1982) 138 Cal.App.3d 450, 454 [188 Cal.Rptr. 2] (no pet. for hg.) held that "*Allen* still stands for the proposition that imposing reimbursement as a condition of probation is absolutely prohibited in California courts." In light of *Fuller* v. *Oregon,* the Court of Appeal added: "Presumably the source of this prohibition is the right to counsel guaranteed by section 15 of article I of our state Constitution." (*Id.*, at p. 54, fn. 2 [40 L.Ed.2d at p. 655].) (See Witkin, Cal. Crimes (1983 Supp.) § 1074C; Witkin, Cal. Criminal Procedure (1983 Supp.) § 370C.)

be treated as such a condition. He conceded, however, that many or most defendants, on seeing the fee order entered on the probation form without explanation, would fail to realize that it was not a condition of probation. He testified, in justification, that "we had no other form . . . to hand him [a defendant]," even though, as already explained, the exhibits contain two instances where a separate form was in fact used. (The notation "11-75" at the bottom of that separate fee-order form, which appears designed for all municipal courts in Los Angeles County, seems to indicate that it came into use in November 1975.)

Petitioner presented testimony of two other judicial officers of the same court, Judge Kaufman and Commissioner Murphy, that they too wrote the fee orders opposite "Other" on the form for terms of probation, though Commissioner Murphy added that he crossed out the word "Other." Petitioner correctly points out in his brief that there was no direct evidence that any defendant was in fact misled into thinking that the fee order was a condition of probation. Petitioner also points to the masters' finding in *Rueda* that petitioner "to the knowledge of the Public Defender, had no intention of enforcing the fee order as a condition of probation." But the masters also found that "the unexplained presence of the fee order on the *Rueda* probation order had the potential of leading defendant Rueda to believe that payment of the fee order was a condition of probation."

The commission's finding as to petitioner's recording fee orders in a way that created the impression that they were conditions of probation thus is supported by evidence that is not only clear and convincing but also uncontradicted.

*Extraction of Attorney Fees from Bail Deposits*

The commission found that petitioner's "general practice was to extract from a defendant's posted bail the amount of money needed to satisfy the assessed attorney's fees" "whether or not the defendant requested or consented to same." The findings describe seven cases in which petitioner, between June 4, 1979, and September 22, 1980, ordered attorney fees paid from posted bail. Court records of those cases, confirming the findings, are in evidence.

A deputy public defender testified that petitioner ordered attorney fees taken from posted bail without giving defendants any choice in the matter. He recalled only one instance in which petitioner asked if there were objections to the order; there, the defendant responded by objecting to the amount of the fee. A defendant in one of the cases described in the findings (*Hock*) testified that he was not asked if he objected to application of his bail money

to attorney fees, and that if he had been asked, he would have objected. Petitioner testified that he never ordered bail money applied to attorney fees without the defendant's consent.[5] The masters' and commission's findings to the contrary are supported by clear and convincing evidence.

**(5)** Petitioner now contends, however, that the following sentence in section 1297 authorized him to order bail deposits applied to attorney fees even without the defendant's consent: "If the money [for bail] remains on deposit at the time of a judgment for the payment of a fine, the clerk must, *under the direction of the court,* if the defendant be the depositor, apply the money in satisfaction thereof, and after satisfying the fine *and costs,* must refund the surplus, if any, to the defendant." (Italics added.)[6] Petitioner argues that the "costs" which section 1297 authorizes the clerk to withhold from the refund of a bail deposit include the "cost" of legal assistance which section 987.8 (see fn. 1, *ante*) empowers the court to order the defendant to pay to the county. The provision for "satisfying the fine and costs" has been part of section 1297 since 1872, and we do not think it was intended to refer to costs of legal services, which first became reimbursable to the county a century later under the initial enactment, in 1971, of section 987.8. Nonetheless, petitioner's argument has enough plausibility that if in fact he had relied on it in deducting attorney fees as well as the entire fine from bail deposited by a defendant, the reliance would not have amounted to misconduct.

**(6)** In other respects, however, orders made by petitioner for application of bail deposits to attorney fees were clearly improper in the absence of consent by interested parties. In three cases (*Hock, Chavez, Stephens*) the bail money was applied to the entire amount of the attorney fee but only part of the fine. The defendant was thereby left with a balance of a fine enforceable by criminal sanctions, whereas use of the bail money to pay all the fine would have left simply an attorney fee balance, collectible only in the manner of a civil judgment. Such orders clearly violated section 1297's command that the clerk "must . . . apply the money in satisfaction thereof"

[5]Petitioner's reply brief denies he said "never," citing his testimony on direct examination concerning his "normal procedure." The "never" testimony was given in subsequent cross-examination.

[6]Before an amendment that took effect on January 1, 1981, section 1297 provided as follows: "When money has been deposited, a receipt shall be issued in the name of the depositor. If the money remains on deposit at the time of a judgment for the payment of a fine, the clerk must, under the direction of the court, if the defendant be the depositor, apply the money in satisfaction thereof, and after satisfying the fine and costs, must refund the surplus, if any, to the defendant. If the person to whom the receipt for the deposit was issued was not the defendant, the deposit after judgment shall be returned to him within 10 days after he claims it by submitting the receipt, and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the depositor of the exoneration of bail."

(necessarily referring to the fine); only then, after "satisfying the fine and costs," is the surplus to be refunded.

Another type of impropriety is seen in three cases (*Munden, Callaway, Garcia*) in which petitioner ordered attorney fees paid out of bail deposited by persons other than the defendant. Section 1297 provides that bail deposits must be returned to a nondefendant depositor on demand and authorizes no deductions. (See *Rodman* v. *Superior Court* (1939) 13 Cal.2d 262, 267 [89 P.2d 109].) Petitioner's testimony was that he would apply bail money furnished by a nondefendant depositor to attorney fees only with the depositor's consent. But the records of those three cases contain printed forms for "Assignment of Cash Bail Deposit," signed by the depositors, providing only for application of the deposit to a *fine*, not to attorney fees or any other costs.

Disputing the commission's finding that with respect to bail deposits he "usually ordered attorney fees to be paid before fines," petitioner cites two instances in which he imposed fines and ordered attorney fees but required that only the fines be taken out of bail. But even those cases are consistent with petitioner's apparent aim of avoiding, where possible, any situation that would leave a defendant with an obligation to pay attorney fees unaccompanied by any other obligation that could be enforced through criminal sanctions. In one of these cases (*Fernandez*) on January 28, 1980, petitioner ordered a fine and penalty assessment totaling $380 payable as follows: $300 forthwith from bail, with the balance of $80 due on March 10. An attorney's fee of $50, however, was made payable on February 29. In the other case (*Warner*), on Friday, January 11, 1980, petitioner ordered a $250 bail deposit applied to the fine and ordered immediate payment of $100 for legal fees; the latter was paid on Monday, January 14.

Finally, there is no evidence that petitioner relied on any particular legal theory when he made the orders to apply cash bail deposits to attorney fees without the defendant's consent or, where a third party had deposited the bail, the consent of that party. He testified that he always obtained that consent, but giving weight to the masters' resolution of testimonial conflicts and examining the pertinent exhibits, we conclude that during the period in question it was petitioner's practice not to obtain the consent, and that he engaged in that practice without regard to its legal justification.

*Presence and/or Degree of Misconduct in Petitioner's Attorney Fees Collection Practices*

**(2b)** The commission made a blanket finding that petitioner "engaged in a course of conduct concerning attorney's fees as set out above . . . which

constitutes wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The conclusion applies to all the findings discussed hereinabove under the headings, "Making Attorney Fees Payable Before Fines," "Ordering Appearances for Fee-Collecting Purposes," "Mervin Anderson Incident," "Recording Fee Orders as Apparent Condition of Probation," and "Extraction of Attorney Fees from Bail Deposits."

The masters, on the other hand, concluded that none of those acts constituted wilful misconduct but that the following acts were conduct prejudicial: "leading defendants to believe that payment of attorney's fees was required as a part of compliance with criminal sanctions imposed" and, in the *Mervin Anderson* case, "threatening to increase another judge's fee order." The masters further concluded that petitioner's "practice in ordering payment of fees first from bail without the consent of the defendant, while legally erroneous," was neither wilful misconduct nor conduct prejudicial.

The masters bolstered those conclusions with additional findings on petitioner's professional standing and activities; these findings may be summarized as follows: Petitioner is an able and experienced municipal court judge, highly respected by the judicial officers of his court. He has become widely known and well respected by the judges of other Los Angeles County Municipal Courts, and has contributed to the efficiency of those courts, through his extensive activities in the Municipal Court Judges' Association of Los Angeles County and in the Presiding Judges' Association, of which he is a founder and has served in all offices. He was particularly involved in a project of the latter association for implementation of section 987.8, and since the county bureau of resources and collections found it uneconomic to attempt collection of fee orders of less than $100, he developed a procedure of ordering smaller fees paid through the clerk of his court for remission to the county. He believes that assessment and collection of fees under section 987.8 is in the public interest and cannot be accomplished "without unremitting and zealous attention by municipal court judges themselves to attempt to collect smaller fee orders, believing that if judges did not see to collections, no one else would."

Petitioner denies any misconduct and contends that even if he made mistakes, they were merely legal errors subject to correction on appeal or in writ proceedings. We disagree.

Though some of the acts in question, such as setting a date for payment of an attorney fee in advance of the date set for payment of a fine in a particular case, would not necessarily constitute misconduct or even legal error when viewed in isolation, they became misconduct as part of petition-

er's larger scheme for using threats of criminal sanctions to collect attorney fees ordered paid to the county. That scheme violated the provisions of section 987.8 that provide for collection of attorney fee orders only by execution as on a judgment in a civil action and prohibit enforcement by contempt.

Central to the scheme was the practice of ordering defendants who failed to pay the fees by a set date to return to court, not because of any doubt about their ability to pay (which presumably had already been determined as a prerequisite to the § 987.8 order) but simply to coerce compliance by questioning them about why they had not yet paid, perhaps suggesting community service as an alternative to payment (a suggestion for which petitioner offers no legal justification), and then setting a new date on which the defendant was ordered either to have paid the fee or to reappear for a new round of interrogation. It was apparent concern over interference with this approach that provoked petitioner's anger at the deputy public defender who told Mervin Anderson that Anderson could pay a fine without simultaneously paying a fee that had been ordered paid on the same day.

The effectiveness of this periodic interrogation as a collection device was enhanced by petitioner's other practices. Making fee orders appear to defendants to be a condition of probation, regardless of petitioner's lack of intention to enforce them as such, necessarily suggested that failure to pay would jeopardize the defendant's probation status. Ordering the fine payable after the fee made sure that until and after the fee was paid, the defendant would remain subject to the court's jurisdiction for purposes of administering the criminal sanctions available to enforce payment of the fine. A similar result was achieved when, in violation of Penal Code section 1297, bail deposits were applied to ordered fees even though a balance remained due on a fine.

We accordingly concur in the commission's conclusion that petitioner's course of conduct described in the findings sustained hereinabove constituted misconduct subject to discipline. We next must decide whether it was wilful misconduct, as determined by the commission, or no more than conduct prejudicial, as determined by the masters.

(7) Bad faith is the touchstone for testing whether misconduct committed by a judge while acting in a judicial capacity constitutes wilful misconduct. (*Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d 270, 283-284.) " '[B]ad faith' is quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly." (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 796.) When the judge has " 'intentionally com-

mitted acts which he knew or should have known were beyond his lawful power,' [citation], . . . 'bad faith' entails actual malice as the motivation for a judge's acting ultra vires. The requisite intent must exceed mere volition; negligence alone, if not so gross as to call its genuineness into question, falls short of 'bad faith.'" (*Id.* at pp. 795-796.) Even when the acts in question were within the judge's lawful power, they may involve bad faith, and thus constitute wilful misconduct, if "committed for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties." (*Id.* at p. 796.)[7]

**(8)** Conduct prejudicial, when committed in the course of acting in a judicial capacity, lacks the element of bad faith but must be "prejudicial to the administration of justice" and "[bring] the judicial office into disrepute." (*Id.* at p. 796; Const., art VI, § 18, subd. (c).)[8] "Bring[ing] the judicial office into disrepute" does "not require notoriety, but only that the conduct be 'damaging to the esteem for the judiciary held by members of the public who observed such conduct.' (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 534 [116 Cal.Rptr. 260, 526 P.2d 268])." (*Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d 615, 622-623, fn. 4.)

**(2c)** We are not persuaded that petitioner's wrongful fee-collecting practices were carried out in bad faith. His interest in recovering county costs of legal representation appears to have originated in requests by Los Angeles County officials to the county's courts to find means of implementing

[7]Thus, we reject the argument in the commission's brief that "where a judge intentionally commits an act which he knew or reasonably should have known was beyond his judicial authority, the mere commission of the act under such circumstances constitutes bad faith and is sufficient in and of itself to constitute wilful misconduct." Bad faith requires a malicious or corrupt purpose beyond mere active or constructive knowledge of lack of power. The statements quoted in the brief from *Spruance, supra,* 13 Cal.3d at p. 796 ("'Bad faith' . . . encompasses acts which the judge knew or reasonably should have known were beyond his lawful power") and *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 369 [188 Cal.Rptr. 880, 657 P.2d 372] ("wilful misconduct . . . embraces intentional conduct that a judge *should have known* was beyond his judicial authority") establish only that acts committed with such active or constructive knowledge *may* be done in bad faith and thus constitute wilful misconduct; it does not follow that any such act, without more, is necessarily one of wilful misconduct.

[8]Article VI, section 18, subdivision (c) of the California Constitution provides: "On recommendation of the Commission on Judicial Performance the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission may privately admonish a judge found to have engaged in an improper action or a dereliction of duty, subject to review in the Supreme Court in the manner provided for review of causes decided by a court of appeal."

section 987.8. In seeking such means through his activities in the two judges' associations mentioned in the masters' findings and in his day-to-day handling of misdemeanor matters, we do not doubt that petitioner was endeavoring in good faith to serve the public interest as he saw it. Relevant to his good faith is his perception that other judges were engaged in similar practices.[9]

As already explained, good faith does not preclude a determination of conduct prejudicial. **(9)** It is true that a judge should not be disciplined

[9]Judge Kaufman, who sat on the same court with petitioner, testified that he too (1) ordered defendants either to comply with section 987.8 orders to pay attorney fees by a particular date or to appear in court and (2) entered fee orders opposite "Other" on the written order setting out terms of probation.

Attached to an amicus curiae brief filed by the 2 judges' associations in which petitioner was primarily active (as mentioned in the masters' findings) are declarations of some 55 judges and commissioners of Los Angeles County Municipal Courts, practically identical in substance. Besides deploring the present proceedings, these declarations include the following matter dealing with implementation of section 987.8 in the county's municipal courts:

"That subsequent to the passage of Proposition Number 13, the Los Angeles County Board of Supervisors began to request that the Municipal Court Judges in Los Angeles County make orders pursuant to California Penal Code Section 987.8.

"That the Presiding Judges' Association in approximately 1978 and thereafter took up the matter of P. C. 987.8 Orders at a number of its monthly meetings, and appointed a Committee to study the proper way to make and implement these orders.

"That there were no guidelines provided for implementation of P. C. 987.8, but it was discussed and decided by a majority of the Judges in Los Angeles County that the language of the Statute was sufficiently broad to permit Judges wide discretion in determining the costs of Public Defender services, and the amount, method and manner of payment by the defendants involved.

"That the Statute required the Court to make such an Order, and further stated that the attorney's fees shall be paid to the County: '. . . in the manner in which the *Court believes reasonable* and compatible with the defendant's financial ability. . . .' (Italics added.)

"That Financial statement forms were prepared for defendants to complete prior to requesting the services of the Public Defender.

"That as a result of the Board of Supervisor's request, and of the action by the Presiding Judges' Association, a *County-Wide practice* or method of operation developed which resulted in:

"(1) Attorney's fees being ordered paid in many cases prior to fines, since the fees were smaller than the fines, being $100 or less; and

"(2) Cash bail, if posted by the defendant, or assigned by another person, being ordered to be used to pay attorney's fees, fines and penalty assessments pursuant to P. C. 1297, and in many cases, fees paid before fines because the fees were smaller; and

"(3) A procedure whereby the Judge would make the Order for payment of attorney's fees based upon the costs and ability to pay, relying upon questions asked of each defendant, financial statements on file, if any, and any other factors which bore upon the defendant's financial capability to pay; and

"(4) A procedure for collecting most small fees and fines through the Clerk of the Court, since the Bureau of Resources and Collections would only accept Orders for collection of $100 or more; and

"(5) A general consensus of opinion by Municipal Court Judges in Los Angeles County, that since the Order concerning attorney's fees is civil in nature, that the Public Defender would not be part of said proceeding."

(In one declaration, signed by two judges, paragraph (2), concerning application of cash bail to the attorney's fees and fines, was deleted.)

for mere erroneous determination of legal issues, including questions of limitations on the judicial power, that are subject to reasonable differences of opinion. (See, e.g., *Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d 615, 646-647, fn. 13.) **(2d)** But, as explained, petitioner engaged in collection practices that were clearly improper or were carried out in order to implement improper collection methods. We accordingly conclude that petitioner committed conduct prejudicial by ordering appearances for fee-collection purposes, causing fee orders to appear to be conditions of probation, ordering fees payable out of posted bail even though part or all of a fine thereby remained unsatisfied, and making fees payable ahead of fines for the purposes of prolonging the availability of sanctions for nonpayment of the fine and creating the impression that such sanctions could also be used for nonpayment of fees.

**(10)** For the guidance of trial courts, we add that ordering payment of section 987.8 fees before payment of the remaining balance on a fine is not necessarily improper if the defendant is not given the impression, through any of the other practices engaged in by petitioner, that payment of the fees may be enforced by criminal sanctions. As previously explained, deduction of section 987.8 fees from cash bail deposits without the depositor's consent is improper under section 1297.

**(11)** There remains for consideration the *Mervin Anderson* incident. The commission included that incident in the course of conduct it concluded was wilful misconduct, while the masters concluded, with respect to the incident, that "threatening to increase another judge's fee order was conduct prejudicial." We conclude that not only the threat, but also the order that Anderson return to court, made for the purpose of implementing collection of the fee, amounted to conduct prejudicial. (See *Roberts* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 739, 748 [190 Cal.Rptr. 910, 661 P.2d 1064] (threats to counsel held conduct prejudicial).)

SETTING ATTORNEY FEES IN UNREASONABLE AMOUNTS

*Increasing Fee Because of Irritation at Counsel (Rueda)*

**(12a)** The commission found: On June 3, 1980, petitioner fixed an attorney fee of $50 for Alejandra Rueda and entered it on the probation order opposite "Other," so that it appeared to be a condition of probation. Though petitioner and Deputy Public Defender Racusin, who represented Rueda, knew that payment of the fee could not be made a condition of probation, Racusin objected to notation of the fee on the probation order because his client might thereby be misled into believing the contrary. Petitioner said he had no other place to write the order except on a separate form for

payment of fees through the county bureau of resources and collections, which did not then accept fee orders of less than $100 for collection. When Racusin maintained his objection, petitioner deleted the fee provision on the probation order and wrote an order for payment of a fee of $100 through the county bureau. The new order was $50 in excess of a reasonable fee. In changing the fee from $50 to $100, petitioner was motivated by irritation at what he believed was Racusin's improper participation in the fee-collecting process.

Petitioner testified: When he entered the $50 attorney fee on the probation order, Racusin (1) contended there should be no fee order at all and (2) requested that any fee order be on a separate form and made payable through the county bureau rather than through the court clerk. Petitioner told him that the bureau would not accept an order for less than $100, but Racusin insisted on a separate form, so petitioner made the new order for $100.

Racusin testified that when he objected to the fee order's being made an apparent condition of probation, petitioner appeared to cross something out and said "it will be $100 in attorney's fees payable through the county." When Racusin asked why the fee was being doubled, petitioner said that "the court never sends a collection to the county of less than $100."

Petitioner's briefs justify his doubling of the fee order as a response to Racusin's insistence that it be entered on a separate form, coupled with the minimum $100 collectible through the county bureau. Yet examination of the *Rueda* fee order reveals that the printed form was designed for making the fee payable either through the county bureau or through the clerk of the court. Indeed, the record includes an order made just two weeks earlier, on May 20, 1980, in another case (*Rodriguez*) in which petitioner used the same printed form to order that an attorney fee of $100 be paid through the court clerk on or before June 20, 1980.

With respect to the excessiveness of the $100 fee order, Rueda's financial statement, in evidence, indicates that she was employed as a maid at Safari Inn; her gross pay was $100 per week and her take-home pay $400 per month; she was single and had a three-year old daughter; her food, clothing and shelter came to $325 a month; her assets were $20 cash. Racusin testified that petitioner asked Rueda no questions about her financial condition before imposing the fee order, and that the financial statement was not filled out until after the order had already been made. In any event, it is clear that petitioner's doubling the fee was not based on any change in his information concerning the defendant's ability to pay or the legal services she had re-

ceived, but was motivated by a desire to get even with the public defender for objecting to the form of the initial order.

The commission concluded that "[t]he act of increasing fees in the *Rueda* case beyond a reasonable level was wilful misconduct in office." The masters concluded that "[t]he act of increasing fees in the *Rueda* case beyond a reasonable level from irritation at the actions of the Public Defender was conduct prejudicial." The masters declined to find wilful misconduct "[b]ecause the act appears to be an isolated incident."

**(13)** The fact that an act is an isolated incident does not preclude a determination of wilful misconduct. In fact the *Rueda* incident bears similarities to the *Mervin Anderson* incident and to other instances of overreaching, in petitioner's endeavors to enforce section 987.8 orders, that we have concluded were conduct prejudicial. The situation here is parallel to that in *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 371 [188 Cal.Rptr. 880, 657 P.2d 372], where we said: "The evidence suggests petitioner refused to hear the motion [for release on his own recognizance] because it was the public defender who had 'opened his mouth' during the judge's questioning of the defendant. Such hostile, arbitrary, and unreasonable conduct jeopardizes the liberty of an indigent defendant for reasons not related to the merits of the case and therefore constitutes wilful misconduct. [Citation.]" Though petitioner's conduct here jeopardized defendant Rueda's property rather than her liberty, his bad faith is exacerbated by his clinging to the excuse that the printed separate form of order could not be used for ordering payment of fees through the court clerk. The exhibits demonstrate the patent falsity of that excuse. **(12b)** We conclude that petitioner's act of doubling the fees in *Rueda* because of irritation at the deputy public defender's objections was wilful misconduct.

*Fee Orders in Unreasonable Amounts*

The commission found that in the *Hock, Nachtmann,* and *Liscano* cases, petitioner "assessed attorney's fees which were neither reasonable nor compatible with the available evidence as to the defendants' ability to pay." The masters found that in those cases petitioner did not question the defendants to obtain financial information beyond that submitted in the financial statements, or to ascertain the defendant's financial expectancies within the ensuing six months (see § 987.8, subd. (c)(2) [defining "ability to pay"], set out in fn. 1, *ante.*)

In *Hock,* the defendant submitted a financial statement on which "Not" was inserted after "present employment" but it was also indicated that the defendant worked on "commission" as a "memory expert" for the "Mem-

ory Masters Institute." It showed minimal assets. Hock testified he had borrowed the $440 for the cash bail. Petitioner ordered him to pay a total fine of $440, $340 forthwith out of cash bail, and the balance 49 days later. One hundred dollars in attorney fees was ordered paid forthwith out of the bail. Hock testified that at his hearing petitioner did not inquire about the meaning of "commission" or about any other information on his financial statement, did not inquire about the source of his bail deposit or whether he agreed to its being applied to attorney fees, and said nothing about any right to a hearing on the question of attorney fees. There is no merit in petitioner's argument that the ambiguous financial statement plus the fact Hock seemed able to afford bail was sufficient to support the fee order.

In *Nachtmann,* on August 8, 1979, the defendant was ordered to pay a fine of $130 by October 10, and an attorney fee of $50 by September 12. The court file contains no financial statement, though Nachtmann testified he gave the public defender a form dealing with finances. He testified that petitioner asked him no questions about his employment, income, expenses, or debts, or about his financial statement. He testified he was unemployed at the time. Petitioner testified he did not recall the *Nachtmann* hearing, but that he "would have had to have" asked *Nachtmann* about his employment.

The *Liscano* docket sheet shows that on January 21, 1980, Liscano was (1) fined $350, payable $175 by February 29 and $175 by April 14, and (2) ordered to pay an attorney fee of $100 by February 22. His financial statement indicates he was unemployed and had last worked in 1975. He was represented in the case by Deputy Public Defender Jason, who testified as follows: Jason told petitioner that the defendant was not only indigent but "borderline mentally retarded," and so "pretty much" unable to obtain employment. Petitioner inquired into the defendant's property and employment prospects; the defendant said he had no immediate prospects. The defendant also told petitioner he was doing volunteer work at the Center for Developmentally Disabled, as part of his rehabilitation therapy. Petitioner testified that at the hearing the defendant said he was unemployed and not seeking employment because he was doing "volunteer service"; that he was not disabled and was "expecting" to find employment; and that he was living with his parents. It seems clear from all this evidence that the defendant had no reasonable prospects of obtaining employment within the ensuing six months. (See § 987.8, subd. (c)(2)(ii), set out at fn. 1, *ante.*)

**(14)** We find that in *Hock, Nachtmann,* and *Liscano,* petitioner assessed attorney fees that were unreasonable in light of the evidence available to petitioner as to the defendants' ability to pay. We concur in the conclusions of the commission and the masters that those acts were conduct prejudicial.

GIVING UNSOLICITED ADVICE ON CASE FROM WHICH PETITIONER HAD BEEN DISQUALIFIED

**(15a)** The commission found: In *De Carolis,* on August 27, 1980, and while the defendant was incarcerated, the public defender filed a declaration of prejudice against petitioner under section 170.6 of the Code of Civil Procedure (hereafter section 170.6). On August 29, the superior court granted a writ of habeas corpus that effectively terminated criminal proceedings, leaving for determination only the amount of attorney fees, if any, to be awarded the county under section 987.8 for the public defender's services. Knowing those facts, petitioner on September 2 wrote the following note addressed to Commissioner Murphy, an employee of petitioner's court: "987.8 hearing should be held. Suggested order $500.00 for all PD's work including Petition and Order re Habeas Corpus payable thru Co. Bureau of Collections. PD to have no part in such hearings. MEG." The fee matter was heard not by Commissioner Murphy but by Judge Kaufman, of the same court, on September 5. The docket sheet indicates that he ordered fees of $400. The masters, who made the same findings as the commission in the matter, found that Judge Kaufman was not influenced by petitioner's note. The court file in evidence includes the order remanding the defendant to custody, dated August 26, and signed by petitioner.

Petitioner testified he did not remember having been disqualified before writing the note (which he acknowledged was his handwriting). But the note was on the case file, and the clerk who accepted the section 170.6 declaration for filing said it was his practice to put the original declaration with the case file and to inform the affected judge as soon as possible. The facts found are otherwise undisputed.

The commission and masters concluded that petitioner's writing the note was wrongful in three respects: (1) It created an impression that petitioner was trying to influence the decision of a commissioner who serves at the pleasure of the court. (2) The section 170.6 declaration should have deterred petitioner from advising other judicial officers on how to decide the matter. (3) Apart from the section 170.6 disqualification, a judge should not give unsolicited advice to another judicial officer on how to decide a matter within the latter's discretion; such advice is to be distinguished from communicating factual matters.

We do not agree that petitioner's writing of the note would have been so clearly wrongful as to warrant judicial discipline if there had been no section 170.6 disqualification and the addressee had been a fellow judge rather than

a subordinate judicial officer. Canon 3(A)(4) of the Code of Judicial Conduct states: "A judge should . . ., except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." The commentary to the canon states: "The proscription against communications concerning a proceeding . . . does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities." Though the word "consulting" was probably intended to refer only to discussion initiated by a judge in connection with his or her own adjudicative responsibilities, we are not aware of any limitation on communication among judges of the same court that is sufficiently clear to warrant labeling unsolicited advice to one judge from another judge who is not disqualified as misconduct.

The disqualification of petitioner under section 170.6, however, rendered the writing of the note an act that he knew or should have known was beyond his authority. **(16)** Preliminarily, it is clear that the disqualification barred petitioner from himself ordering attorney fees in the matter under section 987.8.

In argument to this court, petitioner disputes that premise, citing *Wenger* v. *Commission on Judicial Performance, supra,* 29 Cal.3d 615, 646. There, the petitioner had asserted in the trial court that despite a section 170.6 disqualification, "an arraignment hearing remained within his power because section 170.6 disqualifies a judge only from trying a case or hearing 'any matter therein which involves a contested issue of law or fact.' That view had at least enough merit to prevent the holding of it from constituting misconduct. (See *Mezzetti* v. *Superior Court* (1979) 94 Cal.App.3d 987 [156 Cal.Rptr. 802] (disqualified judge held authorized to hold settlement conference); *Fraijo* v. *Superior Court* (1973) 34 Cal.App.3d 222 [109 Cal.Rptr. 909] (plea bargain). But see *In re Byron B.* (1979) 98 Cal.App.3d 300 [330] [159 Cal.Rptr. 430] (acceptance of juvenile's admission of guilt); *Lyons* v. *Superior Court* (1977) 73 Cal.App.3d 625, 627 [140 Cal.Rptr. 826] (plea bargain).)" (*Id.*, at p. 647, fn. 13.)

Here, however, it is irrefutable that the setting of an attorney fee under section 987.8 "involves a contested issue of law or fact" within the meaning of section 170.6. Petitioner argues that the section 987.8 hearing was not the same action or proceeding from which he was disqualified because it was a separate civil matter that could be heard only "upon conclusion of the criminal proceedings in the trial court" (§ 987.8, subd. (a)). The con-

tention is meritless: section 987.8 clearly calls for the holding of the fee-setting hearing at the end of, but as part of, the criminal action in which the legal services were rendered, and that was the procedure followed in petitioner's court.

**(15b)** Since petitioner was disqualified under section 170.6 from hearing the fee-setting issue, it was highly improper for him to give unsolicited advice to another judicial officer on how to decide it. The right to disqualify a judge, guaranteed by section 170.6 (*McCartney* v. *Commission on Judicial Qualifications, supra,* 12 Cal.3d 512, 531; see *Solberg* v. *Superior Court* (1977) 19 Cal.3d 182, 193 [137 Cal.Rptr. 460, 561 P.2d 1148]), would be undermined and perhaps vitiated if the disqualified judge were permitted to circumvent the disqualification by initiating advice to another judicial officer on how to decide the matter.

There was additional impropriety, apart from petitioner's disqualification under section 170.6, arising from the fact that Commissioner Murphy was not a full-fledged judge but an officer appointed by petitioner's court to perform "subordinate judicial duties" (Const., art. VI, § 22) "under the direction of the judges" (Gov. Code, § 72190). As the judge senior in service of the court's two judges, petitioner alone had the ultimate say on whether to hire or fire the commissioner. (Gov. Code, § 72192.) On the other hand, the commissioner had all the judicial obligations imposed by the California Code of Judicial Conduct and thus was required to discharge his duties impartially and independently. (Cal. Code of Jud. Conduct, canons 1, 2(A), 3(A), "Compliance with the Code of Judicial Conduct" foll. canon 7.) For petitioner, as the judge to whom the commissioner owed his continued tenure in office, to thrust upon the latter unsolicited advice concerning a matter entrusted to the commissioner's impartial judicial determination was bound to create seemingly, if not actually, intolerable interference with the commissioner's impartiality.

The commission concluded that petitioner's writing of the note was wilful misconduct. We agree. The superior court's habeas corpus order, obtained by the deputy public defender who had filed the section 170.6 declaration of prejudice against petitioner, resulted in final termination of the criminal proceeding only three days after petitioner had ordered the defendant incarcerated. Petitioner's pattern of retaliatory conduct in other matters (*Anderson, Rueda*), plus the facts that the note (1) dealt with the merits of a matter in which petitioner was barred from acting in deference to a litigant's right to impartiality and (2) was addressed specifically to a subordinate judicial officer who held his office at petitioner's pleasure, leads us to conclude that petitioner's act of writing the note was "for a corrupt purpose, i.e., for [a] purpose other than the faithful discharge of judicial duties" and thus con-

stituted wilful misconduct. (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 796.)

### AUTHORIZING RELEASE OF CONFISCATED GUNS FOR SALE BY DEFENDANTS

**(17)** The commission found: On four occasions between April 1979 and August 1980, petitioner ordered the Burbank Police Department to release to the purchaser a revolver, pistol, or rifle (gun) that had been purchased from an owner after having been confiscated in connection with the owner's criminal conviction (or, in one case, conviction of the owner's son). Petitioner did not know the details of the negotiations for the sales and participated in the transactions only by signing the orders releasing the guns to the purchaser. Two of the guns were purchased by Gordon Mangel, petitioner's courtroom bailiff and close personal friend. The other two sales were negotiated by Mangel, one to a deputy sheriff and the other to a Burbank police officer, both of whose duties brought them to petitioner's courtroom from time to time. None of the purchasers was a licensed firearms dealer. The court file in each case contains not only the order of release but also the bill of sale.

Section 12028 provides that a firearm used in a crime is, upon conviction, a nuisance and shall be surrendered to the sheriff or chief of police. Subdivision (c) of that section provides that "[t]he officers to whom the weapons are surrendered, except upon the certificate of a judge . . ., or of the district attorney . . ., that the retention thereof is necessary or proper to the ends of justice, may annually, between the 1st and 10th days of July, . . . offer the weapons . . . [considered] to have value with respect to sporting, recreational, or collection purposes, for sale at public auction to [federally licensed gun dealers]." Subdivision (d) provides that if the "weapon is not of the type that can be sold to the public, generally, or is not sold pursuant to subdivision (c)," it shall "be destroyed." Subdivisions (c) and (f) contain provisions for the return of stolen weapons to innocent owners. Section 12030 provides that a law enforcement agency having custody of a firearm subject to destruction may retain it for official use, but the weapon must be destroyed when no longer needed.[10]

[10]Following are provisions of sections 12028 and 12030 as in effect during the gun sales in question, i.e., prior to January 1, 1981.

Section 12028 provided: [¶] (a) "The unlawful concealed carrying upon the person or within the vehicle of the carrier of any of the weapons mentioned in Section 653k, 12020, or 12025 is a nuisance.

"(b) A firearm of any nature used in the commission of any misdemeanor as provided in this code or any felony, or an attempt to commit any misdemeanor as provided in this code or any felony, is, upon a conviction of the defendant, a nuisance.

"(c) Any weapon described in subdivision (a), or, upon conviction of defendant, any

Section 1417 provides: "All exhibits which have been introduced or filed in any criminal action or proceeding may be disposed of as provided in this chapter [§§ 1417-1419]." Section 1419 provides that certain kinds of property, including weapons used in the crime, "filed as an exhibit shall be, by order of the trial court, destroyed or sold or otherwise disposed of under the conditions provided in such order."[11] Apparently in response to petitioner's claim that sections 1417 and 1419 authorized the orders in question, the commission found that "[e]ach firearm sold was then in the custody of

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weapon described in subdivision (b), shall be surrendered to the sheriff of a county or the chief of police or other head of a municipal police department of any city or city and county. The officers to whom the weapons are surrendered, except upon the certificate of a judge of a court of record, or of the district attorney of the county, that the retention thereof is necessary or proper to the ends of justice, may annually, between the 1st and 10th days of July, in each year, offer the weapons, which the officers in charge of them consider to have value with respect to sporting, recreational, or collection purposes, for sale at public auction to persons licensed under federal law to engage in businesses involving any weapon purchased. If any weapon has been stolen and is thereafter recovered from the thief or his transferee, or is used in such a manner as to constitute a nuisance pursuant to subdivision (a) or (b) without the prior knowledge of its lawful owner that it would be so used, it shall not be so offered for sale but shall be restored to the lawful owner, as soon as its use as evidence has been served, upon his identification of the weapon and proof of ownership.

"(d) If, under this section, a weapon is not of the type that can be sold to the public, generally, or is not sold pursuant to subdivision (c) the weapon shall, between the 1st and 10th days of July, next succeeding, be destroyed so that it can no longer be used as such weapon.

"(e) This section shall not apply to any firearm in the possession of the Department of Fish and Game or which was used in the violation of any provision of law, or regulation thereunder, in the Fish and Game Code.

"(f) No stolen weapon shall be sold or destroyed pursuant to subdivisions (c) or (d) unless reasonable notice is given to its lawful owner, if his identity and address can be reasonably ascertained."

The second and succeeding paragraphs of section 12030 provided: "Any law enforcement agency which has custody of any firearms or any parts of any firearms which are subject to destruction as required by this chapter may, in lieu of destroying such weapons, retain and use any of them as may be useful in carrying out the official duties of such agency, or may turn over to the criminalistics laboratory of the Department of Justice or the criminalistics laboratory of a police department, sheriff's office or district attorney's office any such weapons as may be useful in carrying out the official duties of their respective agencies.

"Any firearm or part of any firearm which, rather than being destroyed, is used for official purposes pursuant to this section shall be destroyed by the agency using such weapon when it is no longer needed by the agency for use in carrying out its official duties.

"Any law enforcement agency that retains custody of any firearm pursuant to this section or that destroys a firearm pursuant to Section 12028 shall notify the Department of Justice of such retention or destruction. This notification shall consist of a complete description of each firearm, including the name of the manufacturer or brand name, model, caliber, and serial number."

[11]Section 1419 provides: "The provisions of Section 1418 shall not apply to any dangerous or deadly weapons, narcotic or poison drugs, explosives, or any property of any kind or character whatsoever the possession of which is prohibited by law, used by a defendant in the commission of the crime of which he was convicted, or with which he was armed or which he had upon his person at the time of his arrest.

"Any such property filed as an exhibit shall be, by order of the trial court, destroyed or sold or otherwise disposed of under the conditions provided in such order."

the Burbank Police Department and none were exhibits filed with the court." In each case exhibits were not necessary since the defendant pleaded guilty. There is no merit to petitioner's argument that the guns plausibly could be regarded as "exhibits which have been introduced or filed in any criminal action or proceeding" (§ 1417) simply because the court record included the police report, in which the gun was described, and, in some cases, an order that the gun be confiscated. (*Harty* v. *Superior Court* (1981) 124 Cal.App.3d 745, 748 [177 Cal.Rptr. 477] [decided after the orders here in question; see fn. 13, *post*].) There is no indication that any of the guns left the possession of the police department during the criminal proceeding.

Petitioner testified that he signed firearm release orders of the sort in question six to eight times. The first time he was approached by private counsel who wanted a gun released so that the defendant could pay his fee.[12] Petitioner consulted a deputy city attorney (also a witness before the masters), who advised petitioner that it was proper to authorize the release. He told petitioner he based his advice on (1) having seen private attorneys obtain the release of guns from police departments to satisfy their fees, (2) the "inherent power" of the court, and (3) the provision in section 12028 for a certificate of a judge that "retention" of the gun "is necessary or proper to the ends of justice," from which he inferred that the power to authorize retention included power to authorize transfer to a private party.

Commissioner Murphy, who had served for a year and a half in petitioner's court, testified that although he had never ordered guns released, he believed that release was proper under section 12028. He reasoned that at least one purpose of section 12028 is to get the weapon out of the hands of someone who may be irresponsible, and that a purchase by a peace officer would accomplish that purpose. Municipal Court Judge Plotkin, who was active with petitioner in the Presiding Judges Association, testified that in his opinion the court had discretion to release a gun to the assignee of a defendant, or to return it to the defendant, or to order it destroyed, but he did not recall, during his testimony, the sections providing such discretion.

We perceive no arguable basis for thinking the petitioner's gun sale orders were authorized by section 12028. It declares the gun a nuisance and requires that the sheriff or police chief holding it either (1) sell it at public

[12]There is no evidence that the gun transfer orders found by the commission were motivated by any particular interest on the part of petitioner in implementing payment of attorney fees. In two of the cases, the defendants were represented by the public defender, but no order for fees was made under section 987.8. In the other two cases the defendant was represented by private counsel. In one of those cases counsel signed the bill of sale as his client's agent, and in the remaining case the bill of sale was signed by the defendant's father, who owned the gun and identified himself as an "M.D."

auction to a federally licensed gun dealer, unless a judge or the district attorney authorizes its *retention* or (2) destroy it. Section 12030 authorizes the law enforcement agency having custody of the gun to use it for official duties and requires that it be destroyed when not needed for such use. Thus, the gun is confiscated, and its only permissible dispositions are auction sale to a licensed dealer, retention for official use, or destruction. Petitioner's orders flagrantly violated these provisions in two respects: First, they authorized transfer of the gun to a private party for private use. (Though the purchasers were peace officers, no strings were attached to their use or resale of the weapon.) Second, the proceeds of the sales went to the defendants even though the statutes make clear that the gun is confiscated as a nuisance, becomes public property, and is no longer the defendant's to sell.

Petitioner contends that *Harty* v. *Superior Court, supra,* 124 Cal.App.3d 745, demonstrates that the validity of the gun transfer orders was debatable, and that his making them thus constituted legal error, correctable by a higher court, rather than judicial misconduct. *Harty* invalidated a municipal court's order for transfer of a convicted defendant's confiscated gun from the police department that had arrested him to the marshal of the court for use in his official duties; it was held that the marshal was not among the law enforcement officers entitled to possession of a confiscated weapon under sections 12028 and 12030.[13] But even a holding that the marshal's claim in *Harty* was valid would far from justify the present orders authorizing defendants from whom the guns had been supposedly confiscated to receive the proceeds of a private sale for unrestricted use or resale.

Sections 12028 and 12030 would have made petitioner's approval of private sales of confiscated guns highly improper regardless of the identity or relationship of the parties to the transactions. The involvement of courtroom personnel, particularly petitioner's courtroom bailiff and close personal friend, Gordon Mangel, additionally violated petitioner's obligations under canon 2(B) of the California Code of Judicial Conduct, which specifies particular ways in which "a judge should avoid impropriety and the appearance of impropriety in all his activities" (title of canon 2). Canon 2(B) states: "A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special

[13]*Harty* also held that section 1419 (fn. 11, *ante*), referring to "dangerous or deadly weapons," is superseded by section 12028 because the latter makes the more specific references to firearms or concealed weapons. It added: "In any event, section 1419 has no application here because the firearm in question was not 'filed as an exhibit' in the municipal court [where the defendant had pleaded guilty]." (124 Cal.App.3d at p. 748.)

position to influence him. . . ." By approving a series of confiscated-gun sales to, or negotiated by, his bailiff and friend, petitioner was bound to convey the impression that the bailiff had an "inside track" for obtaining the guns' release. Moreover, the bailiff's status as an arm of the court necessarily gave him an enormous bargaining advantage over the gun sellers, who were recently sentenced defendants or the father of such a defendant. (Two of those defendants had been put on probation; a third sentenced to jail; and the fourth sentenced to time already served.)

The commission concluded that petitioner's approval of the gun sales was wilful misconduct. Certainly he knew or reasonably should have known that the sales themselves were illegal under sections 12028 and 12030 and that the circumstances of the sales, particularly the participation of the bailiff, created at least the appearance of impropriety under canon 2(B). As already pointed out, the touchstone of wilful misconduct is bad faith, which requires a malicious or corrupt purpose beyond mere actual or constructive knowledge of lack of power. (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d 778, 795-796; *Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d 270, 283-284.) While petitioner's acts of approving the gun sales constituted a grossly negligent misuse of his judicial power, we are not persuaded by clear and convincing evidence that his motives in committing those acts were malicious or corrupt. Accordingly, we conclude that the acts amounted only to conduct prejudicial.

### PROPRIETY OF COMMISSION'S PUBLIC RELEASE OF ITS REPORT WHEN FILING RECORD WITH SUPREME COURT

Petitioner asserts, and the commission's brief tacitly concedes, that on filing the record of commission proceedings in this court, the commission disseminated a press release and copies of its findings, conclusions, and recommendation in this matter. **(18)** Petitioner contends that such dissemination (1) constituted a public admonishment even though the commission is authorized on its own to issue only *private* admonishments (Const., art. VI, § 18, subd. (c); fn. 8, *ante*) and (2) violated article VI, section 18, subdivision (f) of the Constitution ("The Judicial Council shall make rules . . . providing for confidentiality of proceedings"), which was construed in *Mosk* v. *Superior Court* (1979) 25 Cal.3d 474 [159 Cal.Rptr. 494, 601 P.2d 1030], to require that commission proceedings be confidential, at least while they are under way.

A similar contention was rejected in *Roberts* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 739, 750, primarily in reliance on rule 902(a) of the California Rules of Court, which provides that subject to certain exceptions, commission proceedings "shall be confidential until a

record is filed by the Commission in the Supreme Court."[14] That rule is consistent with the constitutional requirement that the Judicial Council make rules "providing for confidentiality" (art. VI, § 18, subd. (f).) Termination of the *constitutional* ban on public disclosure after the filing of the record in this court is demonstrated by the analysis in *Mosk,* where the court noted "the absence of any indication that the people of California intended to change the constitutional requirement of confidentiality by revision of article VI in 1966" (25 Cal.3d at p. 499) and examined the predecessor provisions of former article VI, section 10b (set out in fn. 14, p. 490 of 25 Cal.3d), which provided that commission proceedings shall be confidential "except that . . . the record filed by the commission in the Supreme Court . . . upon such filing loses its confidential character."

The question presented, therefore, is whether public disclosure should be restricted beyond the point—filing of the commission's record in this court—at which article VI, section 18, subdivision (f) of the Constitution and the applicable Judicial Council rules neither prohibit nor require such disclosure.

The United States Supreme Court has identified three public interests served by rules that require confidentiality in judicial disciplinary matters: (1) protecting complainants and witnesses against recrimination or retaliation, (2) protecting judges from publication of frivolous or unwarranted charges, and (3) maintaining confidence in the courts by avoiding premature disclosure of groundless claims of judicial misconduct. (*Landmark Communications, Inc.* v. *Virginia* (1979) 435 U.S. 829, 835 [56 L.Ed.2d 1, 8, 98 S.Ct. 1535].) Justice Mosk, dissenting in *Roberts* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 739, 751, urged that still another interest—protection of this court's right to decide for itself whether to administer public censure—would be protected by preventing the commission from publicizing its recommendation of censure, together with supporting findings, upon filing them with this court. Offsetting these interests in confidentiality is the policy of promoting knowledgeable discussion of governmental affairs by providing access to all relevant information in the absence of some overriding interest in confidentiality. (See, e.g., *Globe Newspaper Co.* v. *Superior Court* (1982) 457 U.S. 596, 606 [73 L.Ed.2d 248, 256-257, 102 S.Ct. 2613] ["Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process . . . [and]

[14]The court in *Roberts* also relied on a statement in *Mosk* v. *Superior Court, supra,* 25 Cal.3d 474, 502, that article VI, section 18, subdivision (f) of the Constitution does not preclude the commission "from publicly announcing the results of an investigation already known to the public." There are indications in the present record and in the judges' association amicus brief filed on petitioner's behalf that the pendency of the commission proceedings was generally known, at least among Los Angeles County municipal judges.

permits the public to participate in and serve as a check upon the judicial process"].)

Of these four factors favoring confidentiality, only one—maintenance of confidence in the courts—warrants even a postponement of public access to the record of commission proceedings once it is filed in this court. By that time all the evidence has been gathered, so that the identity of the witnesses and, probably, of the complainant, has been disclosed to the accused judge. Moreover, the commission has by then satisfied itself that the evidence before it warrants some form of discipline, rendering it highly unlikely that this court will deem the charges wholly unwarranted or frivolous. Protection of the judge's reputation in the event of ultimate exoneration no more necessitates confidentiality after the proceedings reach this court than does protection of the reputation of a lawyer or other professional, whose license to practice has been administratively placed in jeopardy, require confidentiality in judicial review proceedings. Finally, we do not agree that publicizing the commission's findings and recommendation upon the filing of its record here is equivalent to public censure by this court and thus "restrict[s] the options available" to us (*Roberts* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 739, 752 (dis. opn. of Mosk, J.)). If we decide that public censure is unwarranted, we have ample opportunity to provide appropriate exoneration in our explaining that conclusion.

There remains, however, the question whether the commission's publicizing of its findings and recommendation immediately upon filing the record here unnecessarily jeopardizes public confidence in the integrity of a sitting judge and thus in the judicial process. The question does not arise if the commission recommends the judge's removal or retirement. In that event, the judge is immediately "disqualified from acting as a judge" (Const., art. VI, § 18, subd. (a)), and there is a public need to know the reason for that disqualification. But if the recommendation is censure, the judge continues to sit.

The fact that the commission's report to the court is couched not in terms of charges or accusations but in the form of findings of fact and conclusions of law seems apt to create an impression on the public that the findings and conclusions are established fact—an acceptance that will not be dispelled until the proceedings in this court culminate in the filing of an opinion. The intermediate steps, such as the filing of a petition challenging the findings and the presentation of oral argument, are likely to receive considerably less public attention than the act—filing of the commission's report and record—that first brings the matter to full-blown public attention.

When the commission's report and record are filed, the judge has 30 days within which to file a petition seeking rejection or modification by this court

of the commission's recommendation. (Cal. Rules of Court, rule 919(b).) If the commission's report and record were to remain confidential until the filing of a petition, and the contents of the recommendation and findings released to the public simultaneously with release of the petition, there would appear far less probability of the public's accepting as final those findings that were contested in the petition. To that extent there would be more public willingness to suspend judgment concerning the contested findings during the pendency of proceedings in this court and until the filing of our opinion. Erosion of confidence in the judge that was unnecessary and improper because based on findings ultimately rejected by us would be far less likely.

**(19)** We think that the public interest in minimizing doubts about the judicial process arising from charges that may not be upheld warrants a postponement of the release to the public of the commission's report and of the record of its proceedings until either a petition for review by this court has been filed or the time for filing such petition has expired. The short additional period of secrecy beyond that mandated by article VI, section 18, subdivision (f) of the Constitution is well worth the offsetting public benefit.

Accordingly, we direct the clerk of this court henceforth, in any case in which the commission has recommended censure but not removal or retirement of a judge, to keep all filed and received documents and exhibits under seal, and to conceal the identity of the judge, until either the judge files a petition for review or the time for such filing has expired. We further recommend to the Judicial Council that it provide by rule (1) that the commission refrain from making its proceedings or recommendation in such a case public during a similar period and (2) that any press release or other publicity calling initial attention to the filing of the report and record make appropriate reference to the petition for review, if any, to the end that the public will perceive that the commission's recommendation and findings are wholly or partly contested by the judge. Finally, pending action by the Judicial Council on that recommendation, we urge the commission to comply with the substance of the recommendation voluntarily. We are aware of nothing in the present Rules of Court, statutes or the Constitution that prevents it from doing so.

## CONCLUSION

Finally, we must decide whether to accept the commission's recommendation of public censure. It is suggested that censure in this case will deter enforcement of section 987.8. In our view, enforcement of section 987.8 *according to its terms* is not only proper but laudable. Petitioner's misconduct arose primarily out of his failure to observe clear guidelines laid down

by the Legislature for the assessment and collection of fees for the public defender's legal services and for the disposition of guns confiscated in connection with crimes. His culpability transcends mere legal error. All of the misconduct established in the foregoing opinion constituted at least conduct prejudicial; some was committed with gross negligence; and some amounted to wilful misconduct. The commission's recommendation of public censure is clearly correct.

Accordingly, and by this order, Judge Gubler is publicly censured.

**KAUS, J.**—I agree wholeheartedly with the court's disposition of this case. I respectfully dissent, however from that portion of the court's opinion which seeks to regulate the period, after filing of the record in this court, during which commission proceedings recommending public censure shall remain confidential.

Justice Mosk's criticism of current procedures as expressed in *Roberts* was primarily based on the fact that they undermine the availability of private admonishment as a realistic option. Once the proceedings are made public, private admonishment—though deemed by us to be adequate—becomes a farce. I thought Justice Mosk was dead right on that point when I read his dissent in *Roberts* and I still think so. The reason why I did not join him then was threefold: (a) Article VI, section 18, subdivision (f) of the Constitution directs the Judicial Council, not us or the commission, to make rules implementing confidentiality. (b) The basic Judicial Council rule was rule 902(a), of the California Rules of Court which, in effect, provided that confidentiality ceased when the record was filed with us. (For that reason I thought Justice Mosk's criticism of the commission's press release was somewhat unfair: the exceptions to confidentiality set forth in rule 902(b) clearly relate only to releases before the filing of the record: once the record is filed, the proceedings are simply a public document as any other filed with this court.) (c) Even if we were to write the rules, I saw no practical way of "keeping the lid" on commission proceedings, short of maintaining confidentiality at least until we filed our opinion. Today's holding proves my point: assuming, as we must, the possibility of eventual vindication—or private admonishment—it seems naive to believe that the filing of a petition for review by the judge will remove the sting of what may prove to be an unjust accusation or an unjustifiably harsh recommendation for public censure. In the event of complete vindication or private admonishment, nothing but permanent confidentiality will suffice.

I continue to believe that since the Constitution has entrusted the rule-making power to the Judicial Council, we should let it rest there, at least unless we can say that its rules simply do not provide for confidentiality.

(E.g., *Mosk* v. *Superior Court* (1979) 25 Cal.3d 474, 488-499 [159 Cal.Rptr. 494, 601 P.2d 1030].) This does not mean that I do not believe that present rules cannot be improved upon. I do not, however, believe that this decision is an improvement, since it does not go far enough to accomplish its purpose.

[S.F. No. 24815. Dec. 5, 1985.]

ROBERT Z. MARDIKIAN, a Judge of the Superior Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

SUMMARY

A superior court judge petitioned for review of a recommendation by the Commission on Judicial Performance that he be publicly censured for conduct which the commission found to constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c).) The basis for the commission recommendation was the prolonged, even extraordinary, delay by the judge in the decision of 14 cases which he had under submission, and his execution of salary affidavits and receipt of salary during periods in which those cases had been under submission in excess of 90 days.

The Supreme Court, subject to reservations, adopted the commission's recommendation of public censure. The court held that the resubmission orders which the judge made in 14 cases were made "without good cause," and that the judge was guilty of "conduct prejudicial to the administration of justice which brings the judicial office into disrepute," with the reservations that, while a judge can be expected to be diligent, hardworking, and even self-sacrificing when necessary, he cannot be expected on pain of official discipline to accomplish tasks which are beyond his capacity and resources. It held that when delay is the product of an overburdened and underfunded court the trial judges must not be forced to assume responsibility for a situation which is not of their making or within their control. However, the court held the record did not contain evidence that the judge gave any consideration to the interests of those litigants whose cases had been under submission for the longest periods, or that he made any effort to establish a schedule of priorities that would give precedence to the submitted cases over cases tried subsequent to the original submission of those long delayed cases. It also held that, although physical and emotional difficulties the judge experienced during a portion of the period in question merited sympathy and could serve in mitigation of the sanction, they could

not be accepted as justification per se. (Opinion by The Court. Separate dissenting opinion by Kaus, J.,* with Reynoso, J., concurring.)

## HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review.**—On review of a disciplinary recommendation of the Commission on Judicial Performance, the Supreme Court makes an independent evaluation of the evidence taken in proceedings before the commission to determine whether the commission findings are supported by clear and convincing evidence, after which the court must determine whether the conduct that is the subject of the proceeding constitutes a basis for a censure or removal, and, if so, the appropriate action.

(2) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Delay and Submission—What Constitutes Submission.**—Under rules requiring trial judges to decide cases within 90 days after submission, in a nonjury matter a case is submitted for a decision by the judge when all the evidence has been received and all briefs or memoranda authorized to be filed after trial have been received.

(3a-3c) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Delay in Decision After Submission.**—A trial judge was guilty of "conduct prejudicial to the administration of justice which brings the judicial office into disrepute," (Cal. Const., art. VI, § 18, subd. (c)), and public censure was the appropriate sanction, based on findings of prolonged, even extraordinary, delay by the judge in the decision of 14 cases which he had under submission in excess of 90 days (Gov. Code, § 68210), and the making of resubmission orders without good cause. Even though the delays were partly the product of an overburdened and underfunded court, a trial judge confronted with a workload which prevents him from deciding all cases promptly can at least minimize the impact of delay by assigning priorities, but the judge failed to do so. Although physical and emotional difficulties the judge experienced during a portion of the period in question mer-

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

ited sympathy and might serve in mitigation, they could not be accepted as justification per se.

[See **Cal.Jur.3d,** Judges, § 62; **Am.Jur.2d,** Judges, § 19.]

(4a, 4b) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Delay in Deciding Cases.**—When, with proper application, a judge would be able to decide matters pending before him within 90 days of their submission for a decision (Gov. Code, § 68210), but does not do so, the failure to perform is a basis for a censure or removal under Cal. Const., art. VI, § 18, subd. (c), as a persistent failure to perform judicial duties even if the failure is not an intentional disregard of duties. Censure under the "conduct prejudicial to the administration of justice" standard is not appropriate, however, for delays that are neither "persistent" nor avoidable. While delay in deciding cases may well cause criticism and bring the judicial office into disrepute, when that delay is the product of an overburdened and underfunded court the trial judges must not be forced to assume responsibility for a situation which is not of their making or within their control. To the extent that an intolerably burdensome workload makes prompt decision impossible even for the most conscientious judge, the answer to the problem must lie elsewhere than in judicial discipline.

(5) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct.**—Conduct prejudicial to the administration of justice is an appropriate basis for a censure under Cal. Const., art. VI, § 18, subd. (c), as a lesser charge when the conduct is not wilful misconduct, but is undertaken in good faith, if the conduct would appear to an objective observer to be unjudicial and prejudicial to the public esteem. Regardless of the appearance to the public, however, this constitutional authority may not be appropriately be invoked as an alternative to a charge of persistent failure or inability to perform, and asserted as a basis for a censure, when the failure to perform is due to causes beyond the control of the judge, such as temporary disability or an unmanageable caseload.

(6) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Burden of Proof.**—On review of a proceeding to discipline a judge, the examiners bear the burden of proving by clear and convincing evidence sufficient to sustain the charge to a reasonable certainty the commission of conduct warranting censure or removal of the judge from office; the accused, however, has the burden of coming forth with evidence to explain or justify the conduct if he claims that it does not warrant discipline.

## COUNSEL

Miles, Sears & Eanni, Carmen A. Eanni and William J. Seiler for Petitioner.

John K. Van de Kamp, Attorney General, Eddie T. Keller and Gary A. Binkerd, Deputy Attorneys General, for Respondent.

## OPINION

**THE COURT.***—Judge Robert Z. Mardikian of the Fresno County Superior Court has petitioned for review of a recommendation by the Commission on Judicial Performance (Commission) that he be publicly censured for conduct which the Commission has found to constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c) [hereafter section 18(c)];[1] Cal. Rules of Court, rule 919(b).) The bases for the Commission recommendation are the prolonged, even extraordinary, delay by petitioner in the decision of 14 cases which he had under submission, and his execution of salary affidavits and receipt of salary during periods in which these cases had been under submission in excess of 90 days.

**(1)** In this review the court makes an independent evaluation of the evidence taken in proceedings before the Commission to determine whether the Commission findings are supported by clear and convincing evidence, after which we must determine whether the conduct that is the subject of the proceeding constitutes a basis for censure or removal, and, if so, the

*Before Grodin, Acting C. J., Mosk, J., Reynoso, J., Lucas, J., Kaus, J.,† Woods, J.,‡ and Lillie, J.‡

[1]Section 18(c) provides: "On recommendation of the Commission on Judicial Performance the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission may privately admonish a judge found to have engaged in an improper action or a dereliction of duty, subject to review in the Supreme Court in the manner provided for review of causes decided by a court of appeal."

†Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

‡Assigned by the Acting Chairperson of the Judicial Council.

appropriate action. (*Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 35 [207 Cal.Rptr. 171, 688 P.2d 551]; *Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 784, fn. 5 [119 Cal.Rptr. 841, 532 P.2d 1209]; *Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275-276 [110 Cal.Rptr. 201, 515 P.2d 1].)

I.

As to the facts underlying the Commission's recommendation there is little dispute. The Commission adopted, with minor modifications, the report of the Special Masters appointed by this court pursuant to California Rules of Court, rule 907. (2) (See fn. 2.) After a hearing which commenced on August 6, 1984, and concluded on August 13, 1984, the masters found that between December 1980 and November 1983 Judge Mardikian had failed to decide 14 cases within 90 days of their submission,[2] and that 7 of these cases had remained undecided for periods in excess of the statutory[3] and constitutional[4] time notwithstanding prior investigation by

[2]Although rule 22.5 defines submission of a cause pending in a Court of Appeal, no comparable rule has been adopted for trial courts. Rule 22.5 provides: "(a) A cause pending in a Court of Appeal is submitted when the court has heard oral argument, or has approved a waiver of oral argument, and the time has passed for filing all briefs and papers, including any supplementary brief permitted by the court. [¶] (b) Submission may be vacated only by an order stating the reasons therefor. The order shall provide for resubmission of the cause."

It is generally understood, however, that in a nonjury matter a case is submitted for decision by the judge when all of the evidence has been received and all briefs or memoranda authorized to be filed after trial have been received. (See Code Civ. Proc., §§ 632, 669; *Leavitt* v. *Gibson* (1935) 3 Cal.2d 90 [43 P.2d 1091]; *Estate of Pillsbury* (1917) 175 Cal. 454 [166 P. 11, 3 A.L.R. 1396].) Petitioner and the Commission appear to share this understanding of the meaning of the term.

[3]Government Code section 68210: "No judge of a court of record shall receive his salary unless he shall make and subscribe before an officer entitled to administer oaths, an affidavit stating that no cause before him remains pending and undetermined for 90 days after it has been submitted for decision."

[4]California Constitution, article VI, section 19: "The Legislature shall prescribe compensation for judges of courts of record. [¶] A judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision."

Petitioner observes that neither this constitutional provision nor Government Code section 68210 mandates that cases be decided within 90 days of their submission. Nonetheless, the 90-day provision which has been a part of the Constitution since its adoption in 1879, and section 68210 which replaced the affidavit requirement formerly in the Constitution (art. VI, former § 24) and became operative on November 9, 1966, with the passage of Assembly Constitutional Amendment No. 13, 1966 First Extraordinary Session, at the November 8, 1966, General Election, reflect the judgment of the Legislature and the electorate that this period affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases. (See now Code Civ. Proc., § 170.)

and communication from the Commission regarding the delays in deciding the first 7 of the 14 cases under investigation.[5]

During the period in which the cases submitted to him for decision remained undecided in excess of 90 days Judge Mardikian made orders "resubmitting" some or all of the 14 cases[6] executed salary affidavits in conformity with the requirement of Government Code section 68210 attesting to the fact that no causes pending before him had remained undecided for 90 days, and received his judicial salary.

There is a background to these cold statistics which is also reflected in the Commission's report. As noted above, the period of decisional delay which is the subject of the Commission's inquiry began in December 1980. The record establishes that during the period in question petitioner suffered from health and family problems. His marriage of 23 years ended in a sometimes acrimonious dissolution proceeding commenced in 1981. He suffered severe depression and emotional upset during those events. At the time of the hearings he was grossly overweight, and had experienced difficulty in breathing, fatigue, and inability to work efficiently. It was discovered during this time that he suffered from diabetes and cardiomyopathy. Medical treatment, weight reduction, and the implantation of a pacemaker have since assisted petitioner in regaining some of his former vigor and productivity. His personal life has stabilized and he has remarried.

Moreover, apart from the delays which are the focus of the present proceeding, the record shows petitioner to be a hard-working and diligent judge

[5]The 14 cases, identified here by number and initials only, and the relevant dates on which action was taken, are:

| CASE | DATE OF SUBMISSION | DATE OF DECISION | TOTAL DAYS |
|---|---|---|---|
| No. 1 L v. L | 12/15/80 | 2/18/82 | 430 |
| No. 2 G v. G | 1/30/81 | 2/9/82 | 375 |
| No. 3 H v. F | 3/24/81 | 3/2/82 | 343 |
| No. 4 J v. R | 7/10/81 | 2/10/82 | 215 |
| No. 5 P v. J | 7/30/81 | 6/23/82 | 328 |
| No. 6 B v. B | 8/17/81 | 2/12/82 | 179 |
| No. 7 S v. C | 9/15/81 | 4/13/82 | 210 |
| No. 8 G v. G | 9/17/82 | 11/5/83 | 414 |
| No. 9 F v. F | 9/22/82 | 10/5/83 | 378 |
| No. 10 G v. B | 2/9/83 | 11/10/83 | 274 |
| No. 11 P v. A | 2/18/83 | 10/14/83 | 238 |
| No. 12 O v. O | 3/16/83 | 10/7/83 | 205 |
| No. 13 K v. K | 4/22/83 | 10/12/83 | 173 |
| No. 14 I v. I | 6/24/83 | 11/2/83 | 131 |

[6]Although some of the resubmission orders could not be located in relevant files, on the court's computer, or on its microfilmed records, the masters assumed that the orders had been made as testified to by petitioner and his clerk.

in an over-burdened court. Appointed to the municipal court in June 1974, and elevated to the superior court in July 1977, he has sat as presiding judge of the criminal department, and since July 1, 1983, has served as presiding judge of the 14-judge Fresno County Superior Court. It is uncontradicted that he frequently worked nights and weekends, and between January 1981 and the end of 1983 took only 34 days of vacation, devoting the balance of his vacation time to work on submitted cases. Some of the flavor of the situation which he confronted was presented in the following testimony before the Commission.

Judge Frank J. Creede, Jr., who had been presiding judge of the Fresno County Superior Court from July 1, 1982, to June 30, 1983, was called as a witness by the examiners. He testified on cross-examination that during his tenure as presiding judge both the civil and criminal calendars of the court were heavily impacted. A 13th department of the court had been authorized, but was not filled until December 1982. During that year trials in three or four capital cases were held. Judges assigned to civil matters had to be reassigned to criminal cases in which defendants had asserted their statutory and constitutional rights to speedy trial. Pro tem. judges were obtained and judges were assigned from other counties. Fresno County then had the highest volume of criminal cases per judge in the state, and ranked number one in the state in number of jury trials. The 250 jury trials during the 1982-1983 fiscal year averaged 16.7 per judicial position, an average which included judges who were not actually presiding over jury trials, including juvenile court judges and referees, family law judges, and the presiding judge and criminal master calendar judge.

During the 1982-1983 fiscal year petitioner served as assistant presiding judge, and, in the words of Judge Creede, tried one case after another. New criminal trials were assigned and commenced as soon as the prior matter went to the jury. In addition to this workload petitioner assumed the duties of the presiding judge if Judge Creede was not available. Petitioner was among the judges disqualified the least often by litigants pursuant to section 170.6 of the Code of Civil Procedure.

During this same period the support staff for the judges of the Fresno County Superior Court was woefully inadequate. The thirteen judges were assisted by four staff attorneys and four secretaries. Judge Creede also testified that during his year as presiding judge he was very reluctant to give any judge chambers time because of the heavy trial calendar. Although he had no specific recollection he "wouldn't doubt that" he had on one occasion when he found petitioner in chambers working on cases during vacation assigned cases to him during vacation.

Judge Hollis G. Best of the Fresno County Superior Court had been presiding judge from July 1, 1979, through June 30, 1980. During that time petitioner had acted as presiding judge of the criminal courts. In the opinion of Judge Best petitioner had served extremely well in that position.

The executive officer and jury commissioner of the Fresno County Superior Court, Julian Johnson, retired from that position at the end of July 1982. One of his reasons for retiring was his belief that the workload of the superior court judges was unconscionable. In the year and one-half prior to his retirement one judge had died and another retired after suffering a heart attack.[7] The court had more criminal cases than it could handle and tried to get some civil cases out. On one occasion Johnson suggested to petitioner that he take vacation and then come in to work on his backlog of cases. This was suggested because as long as a judge was present he was considered to be available for purposes of trial assignments, and there were always cases that had to be tried. Petitioner was having a problem resolving his cases "just because he didn't have the time." He did request chambers time through Johnson, who relayed the request to the presiding judge, but the presiding judge was having "serious problems of his own," so Johnson suggested that petitioner take vacation in order to have time to work on his cases.

Petitioner's clerk testified that she knew, from her own knowledge, that petitioner worked on cases under submission whenever he had time at court, took files home to work on them, and was at the court working on his submitted cases on weekends, during the week when she left at 5 p.m., and while he was on vacation.

Justice Charles Hamlin, who at the time of the hearing had become an associate justice of the Fifth District Court of Appeal, had been a judge of the Fresno County Superior Court until late December 1982. As such he had been presiding judge of the latter court from July 1, 1981, through June 30, 1982. He recalled that counsel for the parties in two of the submitted cases had contacted him regarding the lengthy submissions. At that time

[7]Judge Wilbur Kessler, who had served on the Fresno County Superior Court until retiring after suffering a heart attack in September 1981, corroborated this view of the workload of the superior court judges in that county. He, himself, had no time to work on submitted cases during his normal working hours which were from 7:30 a.m. to 6 p.m. He often observed petitioner already at work when he arrived at 7 a.m. and still at work when he left at 6 p.m. He also confirmed the practice of assigning jury trials back to back with a new one assigned as soon as the jury went out on one just completed. At the time he suffered a heart attack he, too, had been working holidays and weekends to prepare decisions in submitted cases in which there had been court trials. He was forced by his illness to order some of these cases resubmitted.

petitioner was assistant presiding judge and was taking a regular calendar assignment. Petitioner rarely attended the monthly judges meeting because he was on the criminal court which, according to Justice Hamlin, was a "nightmare." Petitioner could not get away to attend. When Justice Hamlin received a copy of the initial inquiry from the Commission he discussed the matter with petitioner to find out "how bad a position he was in so I could know how much time I was going to have to take him off the regular trial assignment. There was nothing else to do . . . . Unless it meant letting a criminal case go beyond the time limit, I was going to give him some time. I knew he hadn't had any and so I was going to give him some one way or another." It was agreed at that time that petitioner would be given two weeks off the regular trial assignment, if no criminal case had to be assigned out for trial. However, Justice Hamlin testified "[e]ven though I declared my intention to give him two weeks, I had to interrupt him" because of the criminal calendar. Justice Hamlin appeared before the county board of supervisors three times during this period to ask for more help and "really couldn't emphasize enough that I felt we were in real trouble, that our judges were working harder than just anybody could be asked to work."

Justice Robert Martin of the Fifth District Court of Appeal had been a judge of the Fresno County Superior Court until December 27, 1982. He had served as presiding judge of the superior court from July 1, 1980, through June 30, 1981. During that time there was little, if any, time that could be given to judges of that court to work on their caseload in chambers. Petitioner used his lunch hour for medical appointments. Justice Martin suggested that since this was the only time petitioner could have any rest or relief from his trial schedule, he should instead recess early. On one or two occasions while he was presiding judge Justice Martin had found some chambers time for petitioner, but not as much time as Justice Martin knew petitioner needed. He made "the best possible effort every time I had such a request. But it usually was very difficult because of the trial calendar. In Fresno the practice was to keep every judge in trial five days a week as much as possible."

II.

On the basis of this record the Commission made certain factual findings that are not in dispute: that delays occurred in the decision of 14 cases as detailed above, and that the resubmission orders were made "without request by or consent of the parties or their counsel involved." The Commission rejected proposed findings that the delays were the product of "an intentional disregard of and refusal of and refusal to perform judicial duties"; that many of the salary affidavits which petitioner executed were

"false and knowingly believed to be false"; and that petitioner "deliberately and intentionally attempted to evade constitutional and statutory requirements by resubmitting undecided cases." The Commission concluded, in part, that petitioner was *not* guilty of "persistent failure or inability to perform his judicial duties," nor was he guilty of "willful misconduct in office." Naturally, petitioner does not challenge these favorable findings and conclusions.

**(3a)** The focus of our present inquiry is upon the Commission's further finding that the resubmission orders which petitioner made in the 14 cases were made "without good cause," and its conclusion overall that petitioner was guilty of "conduct prejudicial to the administration of justice which brings the judicial office into disrepute." Viewing the totality of petitioner's conduct in the context in which it occurred we are constrained, with reservations, to agree.

Our reservations stem from the obvious proposition that while a judge can be expected to be diligent, hardworking, and even self-sacrificing when necessary, he cannot be expected upon pain of official discipline to accomplish tasks which are beyond his capacity and resources. **(4a)** When, with "proper application," a judge would be able to decide matters pending before him within 90 days of their submission for decision, but does not do so, the failure to perform is a basis for censure or removal under section 18(c), as a persistent failure to perform judicial duties even if the failure is not an intentional disregard of duties. (*In re Jensen* (1978) 24 Cal.3d 72, 73 [154 Cal.Rptr. 503, 593 P.2d 200].) Censure under the "conduct prejudicial to the administration of justice" clause of subdivision (c) is not appropriate, however, for delays that are neither "persistent" nor avoidable. It would be manifestly unreasonable, and outside the contemplation of article VI, section 18, to censure or remove a competent judge whose workload and/or temporary disability made prompt decision of all matters submitted to him impossible. **(5)** **(See fn. 8.)**, **(4b)** While delay in deciding cases may well cause criticism and bring the judicial office into disrepute, when that delay is the product of an overburdened and underfunded court the trial judges who are the backbone of the judicial system must not be forced to assume responsibility for a situation which is not of their making or within their control.[8] To the extent that an intolerably burdensome work-

[8]Conduct prejudicial to the administration of justice office is an appropriate basis for censure under section 18(c), as a lesser charge when the conduct is not wilful misconduct because undertaken in good faith, if the conduct would appear to an objective observer to be unjudicial and prejudicial to public esteem. (*Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d 270, 283-284.) Regardless of the appearance to the public, however, this constitutional authority may not appropriately be invoked as an alternative to a

load makes prompt decision impossible even for the most conscientious judge, the answer to the problem must lie elsewhere than in judicial discipline.

**(3b)** In this case, however, there are factors present which support the Commission's conclusion. A trial judge confronted with a workload which prevents him from deciding all cases promptly can at least minimize the impact of delay so far as possible, by assigning priorities which take into account the time necessary to decide, and the effect of delay upon the parties in, particular matters. This petitioner apparently did not do. As the Special Masters observed in their report to the Commission, eight of the fourteen cases in which decision was delayed involved the dissolution of a marriage with attendant questions, such as child custody, particularly demanding of prompt resolution.[9]

The evidence also supports a conclusion that many of the cases were not complex and might have been decided with relative ease and little expenditure of time shortly after submission.[10] **(6)** The examiners bear the bur-

charge of persistent failure or inability to perform, and asserted as a basis for censure, when the failure to perform is due to causes beyond the control of the judge such as temporary disability or an unmanageable caseload.

[9]The record contains evidence that some of the litigants suffered prejudice from the delay. The evidence does not establish that petitioner was aware of any specific prejudice, although had his decision in case No. 11 been to order specific performance of the agreement in issue, the habeas corpus petitioner might have been released from custody. Delay in resolution of the dissolution proceedings necessarily prejudices the parties who are unable to remarry, utilize assets, or establish stable homes for the children of the marriage.

[10]I.e., case No. 12, O v. O, is described as a dissolution matter in which a single issue remained after stipulation by the parties. It was tried as a short cause matter in 3 hours, but was not decided for 205 days after submission. The issue to be decided involved joint custody of a child. Other cases among the 14 were described by counsel for the parties as involving many complex issues.

Counsel for one of the parties in case No. 8, G v. G, a dissolution matter, had been in practice for 18 years. At the time that matter was submitted about 25 percent of his practice involved family law matters. Of the approximately 500 dissolution matters he had handled, he considered G v. G to be among the most difficult 25 to 50 cases. In addition to the legal issues it presented problems of tracing assets. Although there was a two-day trial, written argument was submitted over a subsequent five-month period after which it was taken under submission. In this case, therefore, not only were there complex issues, but additional matters had been assigned which would have to be deferred at the time petitioner again took up G v. G for study and disposition. Counsel brought the delay in decision to the attention of the presiding judge, "[b]ut I felt that Judge Mardikian was under an unholy case load. I was under the impression because I'd had occasion to know what the calendar was like around the court that since he's one of the persons who's able to try difficult cases and willing to and so forth, that it had all come down that he kept getting one trial after another after another. So that it was very hard for him to turn his attention to any reflective activity for long enough to get out decisions on them."

Counsel for one of the parties in case No. 9, another dissolution proceeding, described the case as the most complex he had handled, involving apparent fraud in the depletion of

den of proving by "clear and convincing evidence sufficient to sustain [the] charge to a reasonable certainty" the commission of conduct warranting censure or removal of a judge from office. (*Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d 270, 275.) The accused, however, has the burden of coming forth with evidence to explain or justify the conduct if he claims that it does not warrant discipline. (Cal. Rules for Censure, etc. of Judges, rule 908(b).) (3c) Yet, the record does not contain evidence that petitioner gave any consideration to the interests of those litigants whose cases had been under submission for the longest periods, or that he made any effort to establish a schedule of priorities that would give precedence to resubmitted cases over cases tried subsequent to the original submission of those long delayed cases. There is simply no explanation why these cases were not decided before other cases that were tried in the 18-month period during which the resubmissions occurred.

Under these circumstances, petitioner's practice of routinely resubmitting matters which have been long delayed cannot be condoned. We assume, as does the Commission in its findings, that there may be extraordinary circumstances which will justify resubmission of particular cases that have been pending for longer than 90 days.[11] To permit routine utilization of

assets of a business after the parties had separated, valuation of the business, disputes over the characterization of assets as separate or community, and disagreement exacerbated by deeply held religious beliefs as to the custody of the children. Among the exhibits submitted for review by petitioner were the books of the business. The statement of decision when issued addressed all issues other than a right to the reimbursement question, and in the view of counsel was a well thought-out decision in light of all the evidence.

Case No. 11, P v. A, was a criminal habeas corpus matter in which the prisoner petitioner sought specific enforcement of an agreement under which he was to be permitted to plead guilty as an accessory, rather than being prosecuted for murder with special circumstances. Exhibits in that case included two or three volumes of reporter's transcripts, each of which was several hundred pages in length. The legal issue was novel and complicated in the view of the deputy district attorney who represented the People in that matter.

[11]In the case of the Court of Appeal, rule 22.5(b) provides that a submission may be vacated and resubmitted by an order "stating the reasons therefor." No comparable rule exists for trial courts. There is a difference, obviously, between the collegial context of an appellate tribunal, in which the concurrence of more than one justice is required for the decision of a cause, and a trial court in which the decisional process is normally within the control of an individual judge. Nonetheless, the Commission concedes, and we agree, that a superior court has inherent power to order vacation of submission given a proper demonstration of cause.

The Commission suggests that proper cause would exist if the parties stipulate to vacation of the order, on the basis of a change of circumstances, or if there exist "extraordinary circumstances" such as sudden illness which prevents the judge from attending to his duties for a protracted period of time, and where reassignment of the matter would cause a delay of equal or greater length. It would be unwise, we think, for this court to attempt an exhaustive definition of good cause absent preliminary guidance from the Judicial Council. Conformity with rule 22.5 by trial court judges in the interim, by stating the reasons for any order vacating and resubmitting a cause, with notice of the order to the parties, should avoid the abuse which the Commission seeks to prevent.

resubmission orders, however, would make a mockery of the constitutional mandate.

Finally, the physical and emotional difficulties that petitioner experienced during a portion of the period in question, while they certainly merit sympathy and may serve in mitigation of the sanction, cannot be accepted as justification per se. A judge who is disabled from performing his duties in timely fashion has an obligation to seek relief, even to the extent of withdrawing temporarily or permanently from the functions of his office if the circumstances require it. His conduct as a judge must be evaluated on the basis of objective criteria applicable to all judges similarly situated within the system.

We conclude, therefore, that the extraordinary delay in the decision of these submitted cases, and petitioner's practice of routinely ordering these cases resubmitted beyond the 90-day period, warrants censure as being "prejudicial to the administration of justice that brings the judicial office into disrepute."

III.

Finally, we consider the propriety of the sanction which the Commission imposed. Public censure was adopted as the Commission recommendation by a five-member majority of the eight-person panel, with the minority favoring private admonishment. The protracted delay in the decision of the cases under review here persuades us that public censure is proper in this case. Subject to the reservations we have expressed, we adopt the Commission's recommendation. This opinion will serve as the appropriate sanction.

**KAUS, J.***—I respectfully dissent. Petitioner is being made the scapegoat for the twin plagues of judicial overload and backlog—evils that were apparently well entrenched when Shakespeare had Hamlet deplore "the law's delay."

The situation which prevailed in Fresno at the relevant times is dramatically described by the majority. Its opinion also recognizes that it would be unreasonable to discipline a competent judge whose workload or temporary disability made prompt decision of all matters submitted to him impossible. It further notes, correctly, that while delay may well bring the judicial office into disrepute, individual judges must not be held responsible "when that

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

delay is the product of an overburdened and underfunded court." Finally—with one possible caveat—the majority goes out of its way to note that petitioner worked as hard as he could, which, it seems, was a good deal harder than the public had a right to expect of even the most conscientious public servant.

Why then is petitioner being disciplined?[1]

The majority chides petitioner for not assigning priorities to the submitted cases—a practice which, it surmises, would have minimized the impact of delay. Having apparently reviewed all 14 cases, the majority is able to cite only one—No. 12, O. v. O.—as a simple case which a system of priorities would have promoted to the head of the line. The fact is that O. v. O. was third from last to be submitted and was decided ahead of three cases which had been submitted earlier. (See majority opn., fn. 4.) Apparently it *was* considered on a priority basis.[2] Nowhere is there any suggestion that all 14 cases would have been disposed of sooner had petitioner used a different set of priorities.

The only other criticism voiced by the majority is that petitioner, in spite of physical and emotional difficulties, did not seek relief, "even to the extent of withdrawing temporarily or permanently from the functions of his office." (*Ante*, p. 485.) Applied to this case, it is difficult to take this reprimand seriously. The record fairly reeks with petitioner's efforts to seek relief. As far as "withdrawing" from the functions of his office is concerned, there is nothing in the record to suggest that such drastic action would have done anything for the 14 cases under consideration except to cause further delay. In any event, is a judge who does the best he can under trying personal conditions to be disciplined for not choosing the perfect moment to grant himself a leave of absence or to retire?

As the majority recognizes, unlike justices of the Court of Appeal who can look to rule 22.5 of the California Rules of Court for guidance in

[1]I am particularly shocked that the majority has opted for public censure rather than private admonishment. I realize that in spite of the procedures adopted by us in *Gubler* v. *Commission on Judicial Performance* (1985) 37 Cal.3d 27, 62 [207 Cal.Rptr. 171, 688 P.2d 551], private admonishment is private in name only. Nevertheless, its imposition obviously implies a lesser degree of culpability than public censure.

[2]In criticizing petitioner for not giving "precedence to resubmitted cases over cases tried subsequent to the original submission" of the older cases (*ante*, p. 484), the majority loses sight of the fact that petitioner did request "chambers time" to work on the earlier submitted cases, but that because of the court's criminal caseload deadlines the presiding judge was not able to afford petitioner the time that was needed but instead assigned him to hear more current cases.

applying the "90 day rule," trial court judges currently have no rule to consult in determining how to deal with the problems resulting from an understaffed bench and an overcrowded docket. Although the adoption of an explicit schedule of priorities—which the majority suggests—may well be a sensible approach, before today's decision no authority made it clear that the failure to establish such a schedule would itself be grounds for discipline. Trial judges—no less than other mortals—need to know what rules apply and should not be disciplined for failing to follow rules before they are promulgated.

I dissent.

Reynoso, J., concurred.

C42 Cal.3d 1098
729 P.2d 79, 233 Cal.Rptr. 1
**(Cite as: 42 Cal.3d 1098)**

# In re FRANK J. CREEDE, JR., a Judge of the Superior Court, on Censure

S.F. No. 24985.

Supreme Court of California.

Oct 3, 1986.

SUMMARY

The Commission on Judicial Performance recommended public censure of a judge for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c)(2).) The judge did not request review of the recommendation.

While noting that the judge was diligent, hard working and highly respected, the Supreme Court held clear and convincing evidence supported the conclusion that he violated Cal. Code Jud. Conduct, canon 3A(5), requiring a judge to dispose promptly of the business of the court, by repeatedly and unjustifiably delaying filing decisions in cases submitted to his court during a five-year period. Even though there was no credible evidence of actual prejudice from the delays, which were partially attributable to an excessive work load and inadequate support staff, the court noted the judge could have taken steps to monitor his cases and to dispose more promptly of submitted matters, and held the protracted delays served to damage the esteem of the public for the judiciary, which conduct was "... prejudicial to the administration of justice...." The court also held the judge foreclosed, as a practical matter, the sanction of a private admonishment by waiving the confidentiality provisions. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Judges § 6--Censure--Grounds--Delay in Filing Decisions.
A diligent, hard working and highly respected judge was nevertheless subject to censure for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, subd. (c)(2)) for his repeated and unjustifiable delays in filing decisions in cases submitted to his court during a five-year period, in ***1099** violation of Cal. Code Jud. Conduct, canon 3A(5), since the protracted delays served to damage the esteem of the public for

the judiciary, even though there was no credible evidence of actual prejudice from the delays, which were partially attributable to an excessive work load and inadequate support staff. The judge could have taken steps to monitor his cases and to dispose more promptly of submitted matters.

[See Cal.Jur.3d, Judges, § 62; Am.Jur.2d, Judges, § 18.]

COUNSEL

No counsel listed for this case.

THE COURT. [FN*]

FN* Bird, C. J., did not participate.

The Commission on Judicial Performance has recommended that we publicly censure Frank J. Creede, Jr., a Judge of the Superior Court of Fresno County, for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c)(2).) He has not requested review of the recommendation. Under California Rules of Court, rule 919(c), that failure "may be deemed a consent to a determination on the merits based upon the record filed by the Commission."

(1) The record reveals that Judge Creede is a diligent, hardworking and highly respected judge. Nonetheless, clear and convincing evidence supports the conclusion that he violated canon 3A(5) of the California Code of Judicial Conduct, which states that "A judge should dispose promptly of the business of the court." During a five-year period, between March 1979 and April 1985, Judge Creede repeatedly and unjustifiably delayed filing decisions in cases submitted to his court. During this time, he continued to execute erroneous salary affidavits and to collect his salary even though submitted cases remained pending and undecided in his court for periods in excess of 90 days. (See Cal. Const., art. VI, § 19; Gov. Code, § 68210; Mardikian v. Commission on Judicial Performance (1985) 40 Cal.3d 473 [220 Cal.Rptr. 833, 709 P.2d 852].) He did not, however, knowingly falsify the salary affidavits, and did not intentionally or maliciously disregard his adjudicative responsibilities. There was no credible evidence of actual prejudice from the delays, which were partially attributable to an excessive workload and inadequate support staff. Yet he could have taken steps to monitor his cases and to dispose more promptly of submitted matters. Since the protracted delays served to damage the esteem of the public for the judiciary, his conduct was "... prejudicial to the administration of justice ...." ***1100**

While some members of this court would prefer a private admonishment, Judge Creede has foreclosed this sanction as a practical matter by waiving the confidentiality provisions. After

reviewing the record, we are satisfied that the conclusion of the commission is justified, and that its recommendation should be adopted. This order will serve as the appropriate sanction. ***1101**

Cal.,1986.

In re Creede

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[No. S007641. July 31, 1989.]

BERNARD P. McCULLOUGH, Petitioner, v.
COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

SUMMARY

The Supreme Court ordered that a justice court judge be removed from office based on findings that he had committed four acts of willful misconduct and one act of persistent failure to perform his judicial duties. There was substantial evidence that the judge had directed a guilty verdict against one criminal defendant, and had conducted a trial of two other defendants in one defendant's absence and in the absence of their attorneys. He had also used his office to benefit a personal friend by improperly dismissing a criminal charge against the friend. He had also failed to sign a judgment form for over six years after the motion for the judgment had been granted, and even after he had been publicly censured by the Supreme Court for such failure. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review.**—When disciplining a member of the judiciary, the Supreme Court undertakes an independent evaluation of the record in order to determine whether clear and convincing evidence supports the recommendation of the Commission on Judicial Performance. In so doing the court gives special weight both to the factual findings of the special masters, because of their ability to evaluate the credibility of the witnesses at the hearing, and to the conclusion of the commission, because of its expertise in matters of judicial conduct.

(2) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds.**—A judge may be censured or removed for engaging in willful misconduct in office, persistent failure or inability to perform his duties, habitual intemperance in the use of intoxicants or drugs, or conduct

prejudicial to the administration of justice that brings the judicial office into disrepute (Cal. Const., art. VI, § 18, subd. (c)). Willful misconduct, the most serious charge, occurs when a judge commits acts which he knows, or should know, are beyond his authority for reasons other than the faithful discharge of his duties. Though a judge must act in bad faith in order to commit willful misconduct, he need not necessarily seek to harm a particular litigant or attorney; disregard for the legal system in general will suffice. Unlike willful misconduct, the charge of prejudicial conduct does not require the presence of bad faith. It occurs when a judge, though acting in good faith, engages in conduct which adversely affects public opinion of the judiciary. Though "less grave" than willful misconduct, prejudicial misconduct may nevertheless, by itself, justify removal. Persistent failure, also an independent ground for removal, focuses on a judge's legal and administrative competence and omissions.

[See **Cal.Jur.3d**, Judges, § 62; **Am.Jur.2d**, Judges, § 19.]

(3) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Directing Guilty Verdict.**—A justice court judge who directed a jury to find guilty a defendant charged with a Vehicle Code violation was guilty of willful misconduct and abridgement of defendant's right to trial by an impartial jury. The judge clearly should have known that attempting to direct a jury to return a guilty verdict in a criminal action was beyond his judicial authority. The fact that the conviction was reversed on appeal did not justify or excuse the judge's action, which deprived defendant of his fundamental right to be tried by a jury and manifested disrespect for the constitutional protections of the legal system.

(4) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Using Power to Benefit Friend.**—It was willful misconduct for a justice court judge to use his judicial office to advance the private interests of a personal friend by continuing the friend's criminal case for over two years and then dismissing it without explanation, in violation of Pen. Code, § 1385, subd. (a). In addition, the judge failed to disqualify and recuse himself from the case. It was not a defense that the judge was waiting for some action by the district attorney's office and the action was dismissed because the office never took any action, since the responsibility for the arraignment rested with the judge, as the presiding judge, not with the district attorney's office. Using the power of the bench to benefit a friend is a casebook example of willful misconduct and the judge should have known that failing to arraign the friend, continuing the case several

times, and then dismissing it was improper. The evidence supported the conclusion that the judge's reason for taking those actions was not the faithful discharge of his judicial duties.

(5) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Ordering Trial in Absence of Defendant and Attorney.**—A justice court judge who violated two criminal defendants' right to representation by ordering their trials to proceed despite the absence of their attorneys was guilty of willful misconduct as to each case. Although the granting of continuances and the imposition of sanctions are discretionary, a judge must hold a hearing to determine whether a request for a continuance that did not comply with the court's rules was made in good faith, and the judge had failed to hold such a hearing. To enforce continuance rules, the judge should have given greater consideration to the statutory option of sanctioning defense counsel, rather than penalizing defendants by ordering their trials to proceed in the absence of their attorneys. Also, one defendant had been absent, too. Conducting judicial proceedings in the absence of the defendant and counsel seriously interferes with the defendant's right to representation under U.S. Const., 6th Amend.

(6) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Persistent Failure to Perform Duties.**—A justice court judge who failed to sign a judgment form for over six years after the motion for judgment had been granted, and after he had been censured for his failure, was guilty of persistent failure to perform his judicial duties.

(7) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Prejudicial Publicity.**—The presence of a prosecutor in the courtroom when the Commission on Judicial Performance served a justice court judge with its notice of formal proceedings, and the appearance of a newspaper article about the proceedings on the following day, did not, by themselves, show that the commission violated the rules of confidentiality relating to discipline of members of the judiciary.

(8) **Judges § 6—Removal.**—It was appropriate that the Supreme Court adopt the recommendation of the Commission on Judicial Performance that a justice court judge be removed from office where he had committed four acts of willful misconduct and one act of persistent failure to perform his judicial duties. The judge deprived criminal defendants of their constitutional rights by directing a guilty verdict against one defendant and conducting a trial of two others in one defendant's absence and in the absence of their attorneys, used his office to benefit a personal friend, and failed to perform the most basic of judicial duties. The judge's 10 years' experience as a district attor-

ney certainly acquainted him with the rules of court and criminal procedure. Moreover, the judge had failed to respond to a previous public censure, evidencing a lack of regard for the commission, the Supreme Court, and his obligations as a judge. Removal would best serve the purpose of the proceedings, which is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield.

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COUNSEL

David E. Pipal and Rusconi, Foster, Thomas & Pipal for Petitioner.

John R. Coughlin, Frank P. Borelli, Steven R. Sanders, Harry J. Tobias, James M. Paxton and John H. O'Brien as Amici Curiae on behalf of Petitioner.

John K. Van de Kamp, Attorney General, Aileen Bunney, Michael D. O'Reilley and Mark S. Howell, Deputy Attorneys General, for Respondent.

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OPINION

**THE COURT.**—The Commission on Judicial Performance (hereafter the Commission) unanimously recommends that we remove Bernard P. McCullough from his office as judge of the Justice Court of the San Benito Judicial District, San Benito County. Judge McCullough asks us to reject the Commission's recommendation, alleging that it is not supported by the evidence. The San Benito County Bar Association filed an amicus curiae brief in support of Judge McCullough's position. After reviewing the record and the judge's objections, we adopt the Commission's recommendation.

BACKGROUND

Judge McCullough was born and raised in Hollister, California. After practicing law in San Francisco for almost 10 years, he returned to Hollister in 1967 to serve as District Attorney of San Benito County. In 1977, he was appointed to the Justice Court, and has since been elected and reelected.

In April 1987, we publicly censured Judge McCullough for failing to decide a case for almost four years and for continuing to execute salary affidavits even though cases remained pending in his court for more than 90

days. (See discussion of count 6, *infra*, p. 197.) At that time, we noted that he had ignored three private admonishments from the Commission to act promptly on the cases before him. (*In re McCullough* (1987) 43 Cal.3d 534, 535 [236 Cal.Rptr. 151, 734 P.2d 987].)

In the instant matter, the Commission served Judge McCullough with a notice of formal proceedings on September 24, 1987, alleging six counts of misconduct. (Cal. Rules of Court, rule 905; all subsequent rule references are to the California Rules of Court.) Count 1 alleges that Judge McCullough abridged a defendant's right to trial by an impartial jury when he directed the jurors to find the defendant guilty. Count 2 alleges that he used his judicial office to advance the private interests of a personal friend by continuing the friend's case for over two years, and then dismissing it without explanation in violation of Penal Code section 1385, subdivision (a). The third and fourth counts allege that the judge violated defendants' rights to representation when he ordered their trials to proceed in the absence of their attorneys. Count 5 involved the judge's failure to advise convicted misdemeanants of their rights on appeal under rule 535. The sixth count alleges that he failed to perform his judicial duties by not disposing of a matter pending before him for over six years.

We appointed the Honorable Robert K. Barber, retired judge of the Alameda County Superior Court, the Honorable George H. Barnett, retired judge of the Santa Clara County Superior Court, and the Honorable Jane A. York, judge of the Fresno County Justice Court, to serve as special masters, to take evidence on the alleged counts of misconduct, and then to report their findings to the Commission. (Rule 907.) The hearing spanned four days in May 1988. (Rules 908, 909.) The special masters concluded that counts 1, 2, 3 and 4 constituted wilful misconduct in office, that count 5 did not constitute misconduct at all, and that count 6 constituted persistent failure by the judge to perform his judicial duty. (Rule 912.)

In October 1988, the Commission accepted the special masters' characterization of counts 1, 2, 4, and 6, dismissed count 5, but concluded that count 3 constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute rather than wilful misconduct. By a vote of eight to zero, it recommended removal of Judge McCullough. (Rule 917.) The judge then petitioned this court for review of the recommendation. (Rule 919(b).)

## STANDARD OF REVIEW

**(1)** When disciplining a member of the judiciary, we undertake an independent evaluation of the record in order to determine whether clear and

convincing evidence supports the Commission's recommendation. (*Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 530 [247 Cal.Rptr. 378, 754 P.2d 724].) In so doing, we give special weight both to the factual findings of the special masters, because of the masters' ability to evaluate the credibility of the witnesses at the hearing, and to the conclusions of the Commission, because of its expertise in matters of judicial conduct. (*Ibid.*)

(2) We may censure or remove a judge for engaging in "wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c).)[1] Wilful misconduct, the most serious charge, occurs when a judge commits acts (1) which he knows, or should know, are beyond his authority (2) for reasons other than the faithful discharge of his duties. (*Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1305 [240 Cal.Rptr. 859, 743 P.2d 919].) Though a judge must act in bad faith (*id.*, at p. 1304) in order to commit wilful misconduct, he need not necessarily seek to harm a particular litigant or attorney; disregard for the legal system in general will suffice. (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 286 [110 Cal.Rptr. 201, 515 P.2d 1].) Unlike wilful misconduct, the charge of prejudicial conduct does not require the presence of bad faith. (*Furey, supra,* 43 Cal.3d at p. 1304.) It occurs when a judge, though acting in good faith, engages in conduct which adversely affects public opinion of the judiciary. (*Geiler, supra,* 10 Cal.3d at p. 284.) Though "less grave" than wilful misconduct (*id.*, at p. 283), prejudicial conduct may nevertheless, by itself, justify removal. (*id.*, at p. 284, fn. 11.) Persistent failure, also an independent ground for removal, focuses on a judge's legal and administrative competence and omissions.

## COUNT 1—THE SUMAYA MATTER

(3) Count 1 alleges that Judge McCullough abridged Richard Sumaya's right to trial by an impartial jury by directing the jurors sitting on his case to find him guilty. Sumaya plead not guilty to a charge of riding a bicycle while under the influence of alcohol. (Veh. Code, § 21200.5.) The matter proceeded to trial. During the prosecution's closing argument to the jury, Judge McCullough interrupted the prosecutor, told him to "sit down," and then said to the jurors: "Ladies and gentlemen, I want you to go in that

[1] We will refer to "wilful misconduct in office" as "wilful misconduct," "persistent failure or inability to perform the judge's duties" as "persistent failure," and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" as "prejudicial conduct." "Habitual intemperance in the use of intoxicants or drugs" is not at issue in this case.

room and find the defendant guilty." Five minutes later, when the jurors returned with a guilty verdict, the judge commented that, "For a while there, ladies and gentlemen, I thought you were not going to follow my instructions." After conviction, the district attorney's office contacted Sumaya's counsel, advising him to appeal; following Sumaya's appeal, the appellate department of the superior court eventually reversed the conviction.

In response to this charge, Judge McCullough claims that he directed the jury to bring in a guilty verdict because Sumaya had admitted all elements of the offense on the witness stand. The record supports a finding, however, that Sumaya never actually testified at trial. He also asserts that, at the time of Sumaya's trial, he believed that federal law allowed a judge to direct a guilty verdict when the defendant's guilt is, in the view of the judge, undisputed. He now acknowledges that neither federal nor state law authorizes such an instruction, regardless of the judge's opinion of the defendant's guilt. Moreover, he clearly *should* have known that attempting to direct a jury to return a guilty verdict in a criminal action was beyond his judicial authority. (*Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 369 [188 Cal.Rptr. 880, 657 P.2d 372] ["Petitioner's patent misunderstanding of the nature of his judicial responsibility serves not to mitigate but to aggravate the severity of his misconduct."].)

The judge further argues that witnesses at the hearing before the special masters gave contradictory testimony regarding the number of witnesses who actually testified at Sumaya's trial and whether the police had subjected Sumaya to a blood-alcohol test. Resolution of these testimonial contradictions is irrelevant to the issue before us, however, because the Commission's charge of wilful misconduct did not rest on proof of those facts. Judge McCullough admits that he committed the act which formed the basis of the Commission's charge, i.e., that he directed the jury to find Sumaya guilty. Finally, the fact that Sumaya's conviction was reversed does not justify or excuse the judge's action. Depriving a criminal defendant of his fundamental right to be tried by a jury manifests disrespect for the constitutional protections of our legal system. We conclude that Judge McCullough's instruction to the jury directing a guilty verdict constituted wilful misconduct.

## COUNT 2—THE CERRATO MATTER

**(4)** Count 2 alleges that Judge McCullough used his judicial office to advance the private interests of Frank Cerrato, a personal friend of his, by continuing Cerrato's criminal case for over two years and then dismissing it without explanation, in violation of Penal Code section 1385, subdivision

(a). The criminal action against Cerrato arose out of a domestic dispute between Cerrato and his wife. The police went to the Cerrato home in response to a call; when Mrs. Cerrato refused to file a criminal complaint against her husband, the district attorney's office charged him with obstructing a police officer in the performance of his duties. (Pen. Code, § 148.)

Frank Cerrato and his twin brother Harold are lifelong friends of Judge McCullough; Harold was a member of the board of supervisors when the board first appointed the judge to the bench. The day before Frank's arraignment, the Cerratos went to the judge's home, where Frank told the judge the story of his arrest and asked the judge to excuse him from appearing on the next day. (The Cerratos owned an apricot orchard and Frank's arrest occurred in the midst of the harvest season.) Frank testified at the hearing before the special masters that Judge McCullough told him that the arresting officer had apparently "overreacted" and that he "should go home and pick his apricots." Frank did not appear in court on either the next day or any later date, and testified that he "presumed" the district attorney had dismissed the case when the court returned the bail money to his brother two years later.

The judge admits that he committed the acts that form the basis of the Commission's charge—that he had an improper ex parte conversation with Frank,[2] never arraigned him on the obstructing charge, continued the case approximately 20 times over a 2-year period, later took the case off calendar, and eventually dismissed the case, without ever explaining his actions or advising the district attorney's office.[3] In addition, he failed to disqualify and recuse himself from the case even though he stated that he planned to do so.

In his defense, the judge alleges that he continued the case 20 times because he was waiting for some action by the district attorney's office, and that he dismissed the case because the office never took any action.[4] How-

[2]During the Commission's investigation, the judge admitted in correspondence with the Commission that he had spoken about the case with Harold but failed to disclose his conversation with Frank.

[3]Under the calendaring system in use at the time, the district attorney's office did not attend arraignment calendars and did not track a case until the court completed arraignment and set the matter for pretrial hearing or trial. The court provided the district attorney's office with an advance copy of the arraignment calendar and, following completion of the calendar, would send another copy reflecting what action was taken on the matters on calendar for that day. A clerk in the district attorney's office notified the deputy assigned to the case only when a completed calendar showed that the court had arraigned the defendant and scheduled either a pretrial hearing or trial. By failing to arraign Cerrato, Judge McCullough effectively kept the case from being monitored by the district attorney's office.

[4]After he spoke to Frank at his home, Judge McCullough informally asked a prosecutor to "take a look at" the Cerrato case. The prosecutor told the judge he would review the com-

ever, the responsibility for the arraignment rested with Judge McCullough, as the presiding judge, not with the district attorney's office.[5]

Using the power of the bench to benefit a friend is a casebook example of wilful misconduct. (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 798 [119 Cal.Rptr. 841, 532 P.2d 1209]; see also Cal. Code Jud. Conduct, canon 2B ["Judges should not allow their families, social, or other relationships to influence their judicial conduct or judgment. Judges should not lend the prestige of their office to advance the private interests of others . . . ."].) Judge McCullough certainly should have known that failing to arraign Cerrato, continuing the case several times, and then dismissing it was improper. The evidence supports the conclusion that his reason for taking these actions was not the faithful discharge of his judicial duties. (*Gonzalez, supra,* 33 Cal.3d 359, 369.) Moreover, in view of his extrajudicial discussion with the Cerrato brothers about Frank's arrest and his long-term friendship with them, he should have promptly disqualified himself from the case. (Cal. Code Jud. Conduct, canon 3C(1) ["Judges should disqualify themselves in a proceeding in which . . . their impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party . . . ."].) We conclude that the judge's handling of the Cerrato case constituted wilful misconduct.

## COUNT 3—THE O'BRIEN MATTER

**(5)** Count 3 alleges that the judge violated Amelia O'Brien's right to representation when he ordered her trial to proceed despite the absence of herself and her attorney. O'Brien was charged with driving while under the influence of alcohol. (Veh. Code, § 23152, subd. (a).) On the day before her scheduled trial in San Benito County, a court in another county had ordered O'Brien's attorney to appear before it on the following day. Due to the trial conflict, O'Brien's attorney had his secretary telephone Judge McCullough's chambers to request a continuance of the O'Brien trial. A court clerk advised the secretary to contact the district attorney's office. The district attorney had no objection to the continuance but informed the attorney that the court normally required 48 hours' written notice of requests for continuances. Since he did not have sufficient time to prepare a

plaint, and decided to do so when the case appeared on the pretrial calendar. Since Judge McCullough kept the case off the pretrial calendar, the prosecutor never took any action on the case and testified that he had forgotten about it until it came up in the proceedings before the Commission.

[5]The actual dismissal of the case stemmed from the chief clerk's comment that she was "getting sick and tired of having to account for that $150 [bail money] each month." When she asked the judge how to handle the case, he told her to "Get rid of it" and she entered the dismissal on the docket.

written motion for a continuance, O'Brien's attorney arranged for a local attorney to make a special appearance at the trial to make the request. The local attorney, however, did not appear personally at the court on the following day, but instead telephoned the court with the request for a continuance.

Judge McCullough denied the request and ordered the trial to proceed—despite the absence of the defendant, her counsel of record, or the local attorney.[6] Moreover, the prosecutor on the case informed the judge that he did not object to a continuance, and suggested that the judge impose sanctions on O'Brien's attorney for failing to comply with the court's 48-hour rule instead of ordering the trial to proceed.[7] Later that day, O'Brien's counsel learned that the trial had proceeded without him or his client and made a motion for a new trial, which the judge granted.

Judge McCullough correctly asserts that the power to grant a continuance, along with the power to impose sanctions on parties who do not comply with the requirements for requesting a continuance, are discretionary under section 1050 of the Penal Code. Although section 1050 does make the granting of continuances and the imposition of sanctions discretionary, a judge *must* hold a hearing to determine whether the noncomplying request was made in good faith. Judge McCullough failed to hold such a hearing. The hearing would have been the proper forum for determining whether the court had already granted an excessive number of continuances in the case and whether the court could have reasonably expected defense counsel to appear on the scheduled date. Moreover, Judge McCullough should have given greater consideration to the statutory option of sanctioning defense counsel, rather than penalizing the defendant by ordering the trial to proceed in the absence of both her and her attorney. His stated goal of expediting the adjudication of cases in his court, though laudable, should not blind him to the fundamental elements of a fair criminal proceeding.

The special masters found that the allegations of count 3 constituted wilful misconduct; the Commission disagreed and concluded that count 3 constituted only prejudicial conduct. We agree with the special masters. Conducting judicial proceedings in the absence of the defendant and her counsel seriously interferes with the defendant's Sixth Amendment right to

[6]The judge does not argue, nor does the record reveal, that O'Brien waived her right to be present pursuant to Penal Code sections 977 and 1043.

[7]Subdivision (b) of section 1050 of the Penal Code requires a party to make a request for a continuance in writing two days before trial; subdivision (c) allows a party to request a continuance without complying with the requirements of subdivision (b), but also allows the court to impose sanctions for noncompliance. Subdivision (d) requires the court to hold a hearing to determine whether there was good cause for the party's noncompliance with subdivision (b).

representation. Though Judge McCullough may have intended to punish only O'Brien's attorney and not O'Brien, he acted intentionally and in bad faith. (*Gonzalez, supra,* 33 Cal.3d at p. 372 [attorneys on three occasions entered judge's courtroom and found proceedings had begun without them; court found judge's action constituted wilful misconduct].) We thus conclude that the judge's action in the O'Brien case constituted wilful misconduct.

### COUNT 4—THE ROBERTS MATTER

Count 4 alleges that the judge violated Rose Roberts's right to representation by ordering her trial to proceed even though her attorney of record was not present. Roberts was charged with driving while under the influence of alcohol. (Veh. Code, § 23152, subd. (a).) On the day before her scheduled trial in San Benito County, her attorney was involved in a trial in another county; when he realized that the trial would not end that day, he telephoned Judge McCullough's chambers to request a continuance of Roberts's case. A clerk informed him of the court's 48-hour written notice requirement. The attorney then contacted the district attorney, who told him that he did not object to the trial being continued. He thus arranged for a local attorney to make a special appearance at Roberts's trial and request a continuance.

The local attorney personally appeared in court along with Roberts and made the request. Judge McCullough denied the request and ordered the trial to proceed—even after the local attorney indicated that he would not represent Roberts at trial. Roberts broke into tears in response to the judge's insistence on proceeding to trial without her attorney of record, as she was unprepared to represent herself. She understandably did not call witnesses, cross-examine the prosecution's witnesses, or herself take the stand. She was convicted of the charge. When her attorney learned that the trial had proceeded without him, he moved for a new trial, which Judge McCullough denied.

Again, Judge McCullough claims that he simply followed the 48-hour requirement of section 1050, subdivision (b) of the Penal Code. He again ignores the hearing requirement of subdivision (d) and the availability of sanctions for noncompliance under subdivision (c). As occurred in the O'Brien matter, Judge McCullough allowed his impatience with a defendant's attorney to outweigh a defendant's right to a fair trial and representation of her choice. Moreover, we are concerned that the judge's rulings in the O'Brien and Roberts matters may have been the product of the friction he alleged existed between him and the district attorney's office rather than from his desire to maintain the court's calendar. (See *infra,* p. 198.) We

conclude that his actions in the Roberts case also constituted wilful misconduct.

COUNT 5

We do not consider charges of misconduct that the Commission has dismissed. (*Spruance, supra,* 13 Cal.3d at pp. 784-785, fn. 5.)

COUNT 6—THE BRASHEAR MATTER

(6) Count 6 alleges that the judge failed to perform his judicial duties by not disposing of a matter pending before him for over six years. Kathy Brashear was the codefendant and cross-complainant in the case of Oakley v. Cheadle. On February 2, 1982, Judge McCullough granted her motions for judgment against plaintiffs and cross-defendants.[8] A week later, Brashear's attorney sent the court a proposed judgment and request for costs and attorney's fees. Despite numerous telephone calls, written requests and trips to the court by Brashear's attorney over the next three years, Judge McCullough neither signed the judgment nor ruled on the request for costs and fees. The Commission eventually brought charges against the judge for his delay in this and other cases, and we publicly censured him in April 1987, finding that he had committed persistent failure and prejudicial conduct. (*In re McCullough, supra,* 43 Cal.3d at p. 535.)

We are especially concerned with the judge's failure to act on the Brashear matter even after public censure. Instead of signing the judgment after his censure, the judge cavalierly told his clerk that he wanted nothing more to do with the case. Not until March 1988, after the Commission had instituted the present proceedings and more than six years after he actually granted the motions, did he sign the judgment.

Judge McCullough offers the same argument in his defense that he made before us two years ago: Section 71610 of the Government Code, which compels a judge to act on a matter within 90 days of it submission, did not require him to sign the proposed judgment or rule on costs and fees because the motion was made and decided "in court." A judge must issue a written judgment, however, to give his oral decision legal force. (Code Civ. Proc., § 632; rule 520.) We conclude that Judge McCullough's failure to sign the judgment form constituted persistent failure.

[8]The case proceeded as to the remaining parties; they submitted posttrial briefs on February 16, 1982. Judge McCullough finally entered a decision in the underlying dispute in October 1985.

## SPECIAL DEFENSES

Judge McCullough asserts that the Commission violated his right to confidentiality by improperly disclosing information regarding the charges against him. (Rule 902.) (7) He claims that the presence of a prosecutor in the courtroom when the Commission served him with its notice of formal proceedings, and the appearance of a newspaper article about the proceedings on the following day, support his contention that the Commission improperly disclosed confidential information to the district attorney's office and the local media. The mere presence of a prosecutor and appearance of a news article, however, do not, by themselves, support an argument that the Commission violated the rules of confidentiality. Moreover, the Commission is authorized to issue announcements "confirming the hearing, clarifying the procedural aspects, and defending the right of a judge to a fair hearing" whenever it has instituted formal proceedings in a matter "in which the subject matter is generally known to the public and in which there is broad public interest, and in which confidence in the administration of justice is threatened due to lack of information concerning the status of the proceeding and requirements of due process . . . ." (Rule 902(b)(3); *Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 61 [207 Cal.Rptr. 171, 688 P.2d 551].)[9]

Also, the judge alludes throughout his petition to animosity toward him on the part of the district attorney's office.[10] Judge McCullough suggests that the district attorney's office was out to "get him." The Commission noted that the relationship between the district attorney and Judge McCullough was "far from harmonious." We agree with the Commission's conclusion, however, that the only relevance to the current proceedings of any acrimony in their relationship is its effect on the credibility of the witnesses at the hearing. In this regard, the special masters stood in the best position to judge the credibility of the witnesses at the hearing; we thus assume that they considered the trustworthiness of the testimony in formulating their factual findings.

## MITIGATING CIRCUMSTANCES

The Commission found that Judge McCullough is a hardworking judge who has critics but also friends in the community. Several parties testified to the judge's good character, and the San Benito County Bar Association filed

[9] We emphasize, however, that we have no evidence before us that the Commission actually submitted any material to the local media.

[10] We consider this contention here even though the judge does not specifically label it a "Special Defense."

an amicus curiae brief on his behalf. In addition, we take notice that the voters of San Benito County have twice elected him to judicial office.

## DISPOSITION

**(8)** We conclude that Judge McCullough has committed four acts of wilful misconduct and one act of persistent failure. He deprived criminal defendants of their constitutional rights, used his office to benefit a personal friend, and failed to perform the most basic of judicial duties. Ten years' experience as the District Attorney of San Benito County certainly acquainted him with the rules of court and criminal procedure. (*Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 653-654 [175 Cal.Rptr. 420, 630 P.2d 954].) Moreover, his failure to respond to our public censure evidences a lack of regard for the Commission, this court and his obligations as a judge.

"The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield." (*Furey, supra,* 43 Cal.3d at p. 1320.) We conclude that that purpose is best served by adopting the recommendation of the Commission that Judge McCullough be removed from office.

We order that Judge Bernard P. McCullough, justice court judge of the San Benito Judicial District, San Benito County, be removed from office. He shall, however, if otherwise qualified, be permitted to resume the practice of law (Cal. Const., art. VI, § 18, subd. (d)) on the condition that he pass the Professional Responsibility Examination. He had a long career in private and public practice before coming onto the bench, and several parties have testified to his good character. Moreover, as an attorney, he will not have access to the power that he abused as a judge. (*Spruance, supra,* 13 Cal.3d at p. 803.) This order is effective upon the finality of this decision in this court.

43 Cal.3d 536
734 P.2d 988, 236 Cal.Rptr. 152
**(Cite as: 43 Cal.3d 536)**

# In re L. EUGENE RASMUSSEN, a Judge of the Justice Court, on Censure

S.F. No. 25115.

Supreme Court of California.

Apr 23, 1987.

SUMMARY

The Commission on Judicial Performance recommended that the Supreme Court publicly censure a justice court judge, for willful misconduct in office and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute (Cal. Const., art. VI, § 18, subd. (c)(2)). The judge did not challenge the findings or recommendation; under Cal. Rules of Court, rule 919(c), his decision not to make such a challenge properly could be deemed a consent to a determination on the merits based upon the record filed by the commission. The charges were numerous, and involved misconduct occurring in the judge's courtroom, in chambers, and in public.

The Supreme Court ordered the judge publicly censured. The court held that the record revealed that the judge violated Cal. Code Jud. Conduct, canon 2 (stating that a judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence and the integrity and impartiality of the judiciary), canon 3A(3) (stating that a judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity), and canon 3C(1) (stating that a judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned). The court held that such misconduct represented a disturbing, intolerable affront to the legal profession, and to the public; the court's order of severe public censure was deemed to be adequate admonishment. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Judges § 6.2--Public Censure--Grounds--Willful Misconduct in Office-- Conduct Prejudicial to Administration of Justice That Brings Office ***537** into Disrepute.
Numerous instances of misconduct by a justice court judge represented a disturbing, intolerable affront to the legal

profession and to the public, and supported an order of public censure. The record before the Commission on Judicial Performance revealed that the judge violated Cal. Code Jud. Conduct, canon 2 (stating that a judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), canon 3A(3) (stating that a judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity), and canon 3C(1) (stating that a judge should disqualify himself in a proceeding in which his disqualification is required by law, or his impartiality might reasonably be questioned). The sanction of severe public censure constituted adequate admonishment in view of the judge's recent success in conforming his behavior to the Code of Judicial Conduct.

[See Cal.Jur.3d, Judges, § 62 et seq.; Am.Jur.2d, Judges, § 18 et seq.]

COUNSEL

No counsel listed for this case.

THE COURT.

The Commission on Judicial Performance has recommended that we publicly censure L. Eugene Rasmussen, a Judge of the Justice Court, Lake Valley Judicial District, El Dorado County, for "wilful misconduct in office," and for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c)(2).) Judge Rasmussen has not challenged the findings or recommendation. Under rule 919(c) of the California Rules of Court, his decision not to make such a challenge "may be deemed a consent to a determination on the merits based upon the record filed by the Commission."

The record reveals that during the period 1981-1984, Judge Rasmussen violated canon 2 of the California Code of Judicial Conduct, which states that "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The record further reveals that Judge Rasmussen violated canon 3A(3), which states that "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity ...," and canon 3C(1), which states that "A judge should disqualify himself in a proceeding in which his disqualification is required by law, or his impartiality might reasonably be questioned. ..."

Judge Rasmussen's violations of canon 2 include the following incidents: publicly branding a coach at a youth sports event as a

"pervert" based on ***538** Judge Rasmussen's knowledge that the coach had once been convicted of violating section 647a of the Penal Code (child molestation); initiating probation revocation proceedings on a probationer based on personal reasons other than the faithful discharge of his duties; communicating to a criminal defendant his likely sentence in the absence of counsel; engaging in intemperate, open-court criticism of a fellow judge; improperly suggesting that the State Bar investigate an attorney who had asserted the attorney-client privilege in response to overly inquisitive questioning in chambers; displaying a lack of impartiality to, and petty harassment of attorneys who filed affidavits of prejudice against him.

Judge Rasmussen's violations of canon 3 include the following incidents: discouraging the exercise of peremptory disqualification rights by inappropriate means, including the making of intemperate remarks to counsel, and attempting to inconvenience counsel by withholding judgments in unrelated cases; refusing to disqualify himself from sentencing proceedings after having substantively communicated to the defendant his likely sentence in the absence of counsel; initiating probation revocation proceedings based on patently insufficient evidence; displaying an intolerant, and persistently abusive and sarcastic demeanor toward litigants, attorneys, and others in his courtroom.

(1) We hold that the foregoing misconduct represents a disturbing, intolerable affront to the legal profession, and to the public. Were it not for the persuasive testimony from numerous other members of the bar that Judge Rasmussen has engaged in continuing, commendable efforts since 1984 to temper his courtroom behavior, a more severe sanction might be warranted. We are confident, however, that in light of the totality of the evidence presented, and giving particular attention to Judge Rasmussen's recent success in conforming his behavior to the Code of Judicial Conduct, this severe public censure shall suffice as adequate admonishment. This order will serve as the appropriate sanction. ***539**

Cal.,1987.

In re Rasmussen

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[No. S041217. Feb. 9, 1995.]

JOHN FITCH, a Judge of the Superior Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

**SUMMARY**

In an original proceeding, a judge of the superior court petitioned for review of a unanimous recommendation by the Commission on Judicial Performance that he be publicly censured for conduct which the commission found to constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, subd. (c)). The Supreme Court held that the findings of the commission and special masters that the judge had engaged in a pattern of misconduct involving inappropriate and offensive remarks to court staff and court attaches or attorneys, and nonconsensual touchings of women working under his supervision, were supported by clear and convincing evidence. Thus, the commission properly concluded that the judge's misconduct was such as to bring the judicial office into disrepute within the meaning of Cal. Const., art. VI, § 18, subd. (c), since it was conduct damaging to the esteem for the judiciary held by members of the public who observed such conduct. Even though some court employees testified that no inappropriate remarks or touchings were made in their presence, such testimony would not necessarily have rebutted the extensive evidence from numerous complaining witnesses that misconduct deserving of censure indeed occurred. Moreover, any question as to whether the complaining witnesses should have been disbelieved was more properly addressed to the special masters in the course of their assessment of the credibility of those witnesses. Although the commission heard no testimony, its own expertise and unanimity suggested that deference be accorded to its inferences and conclusions. (Opinion by The Court.)

**HEADNOTES**

Classified to California Digest of Official Reports

**(1a, 1b) Judges § 6.4—Censure—Proceedings—Review by Supreme Court—Independent Evaluation.**—On review of disciplinary recommendations of the Commission on Judicial Performance, the Supreme

Court makes an independent evaluation of the evidence before the commission to determine whether the charges against the petitioner are supported by clear and convincing evidence. Thereafter, the court must determine whether the conduct that is the subject of the proceeding constitutes a basis for censure or removal, and, if so, the appropriate action. Nevertheless, although the court must make an independent evaluation of the record, it gives special weight to the masters' findings that reflect their evaluation of the credibility of the witnesses who testified before them.

[See 2 **Witkin,** Cal. Procedure (3d ed. 1985) Courts, § 43.]

(2) **Judges § 6.2—Censure—Grounds—Prejudicial Conduct Bringing Office Into Disrepute.**—The provision that conduct prejudicial to the administration of justice under Cal. Const., art. VI, § 18, subd. (c) (censure of judge), must be that which brings the judicial office into disrepute does not require notoriety, but only that the conduct be damaging to the esteem for the judiciary held by members of the public who observed such conduct.

(3) **Judges § 6.2—Censure—Grounds—Prejudicial Conduct Bringing Office Into Disrepute—Inappropriate and Offensive Remarks and Nonconsensual Touchings—Sufficiency of Evidence.**—In a proceeding for discipline of a superior court judge, the findings of the Commission on Judicial Performance and special masters that the judge had engaged in a pattern of misconduct involving inappropriate and offensive remarks to court staff and court attaches or attorneys, and nonconsensual touchings of women working under his supervision, were supported by clear and convincing evidence. Thus, the commission properly concluded that the judge's misconduct was such as to bring the judicial office into disrepute within the meaning of Cal. Const., art. VI, § 18, subd. (c), since it was conduct damaging to the esteem for the judiciary held by members of the public who observed such conduct. Even though some court employees testified that no inappropriate remarks or touchings were made in their presence, such testimony would not necessarily have rebutted the extensive evidence from numerous complaining witnesses that misconduct deserving of censure indeed occurred. Moreover, any question as to whether the complaining witnesses should have been disbelieved was more properly addressed to the special masters in the course of their assessment of the credibility of those witnesses. Although the commission heard no testimony, its own expertise and unanimity suggested that deference be accorded to its inferences and conclusions.

[See 2 **Witkin,** Cal. Procedure (3d ed. 1985) Courts, § 32 et seq.]

## COUNSEL

John Fitch, in pro. per., and William A. Smith for Petitioner.

Daniel E. Lungren, Attorney General, Karen Ziskind and Raymond L. Brosterhous, Deputy Attorneys General, for Respondent.

## OPINION

**THE COURT.***—Judge John Fitch of the Fresno County Superior Court, acting in propria persona, has petitioned for review of a unanimous recommendation by the Commission on Judicial Performance (Commission) that he be publicly censured for conduct which the Commission has found to constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (See Cal. Const., art. VI, § 18, subd. (c) [hereafter section 18(c)]; Cal. Rules of Court, rule 919(b).)

The bases for the Commission's censure recommendation are that, between 1988 and 1992, petitioner engaged in a pattern of misconduct involving (1) inappropriate and offensive comments concerning the physical attributes and clothing of female members of the court staff; (2) inappropriate and offensive remarks concerning the intimate relationships of court attachés or attorneys with their spouses; and (3) other inappropriate and offensive remarks in the presence of court staff. In addition, the Commission found that (4) petitioner singled out women working under his supervision for inappropriate and nonconsensual touching, or attempted touching, although such conduct was "unusual and episodic," occurred over a lengthy period, was relatively infrequent, and did not constitute a pattern of misconduct.

The Commission's report itemizes 18 separate acts of misconduct, involving 9 complaining witnesses. It further found, however, that since 1992 petitioner appears to have ceased this misconduct, that he is a skilled, able, and hardworking judge whose courtroom conduct is beyond reproach, that he has contributed extensively to the legal community, and that he has donated substantial time and effort to the local community as well. Nonetheless, as indicated, the Commission concluded that petitioner's prior conduct constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," for which he should be publicly

*Before Lucas, C. J., Mosk, J., Kennard, J., Arabian, J., George, J., Werdegar, J., and Lillie, J.†

†Presiding Justice, Court of Appeal, Second Appellate District, Division Seven, assigned by the Acting Chairperson of the Judicial Council.

censured. As will appear, we agree with the Commission's findings and conclusions.

Section 18(c) provides in pertinent part that, "On recommendation of the Commission on Judicial Performance the Supreme Court may . . . censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. . . ."

**(1a)** In this review proceeding, we make an independent evaluation of the evidence before the Commission to determine whether the charges against petitioner are supported by clear and convincing evidence. Thereafter, we must determine whether the conduct that is the subject of the proceeding constitutes a basis for censure or removal, and, if so, the appropriate action. (See *Mardikian* v. *Commission on Judicial Performance* (1985) 40 Cal.3d 473, 476-477 [220 Cal.Rptr. 833, 709 P.2d 852]; *Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 35 [207 Cal.Rptr. 171, 688 P.2d 551]; *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 622 [175 Cal.Rptr. 420, 630 P.2d 954]; *Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 784, fn. 5 [119 Cal.Rptr. 841, 532 P.2d 1209]; *Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275-276 [110 Cal.Rptr. 201, 515 P.2d 1].)

**(2)** As we recently observed, "The provision that prejudicial conduct [under § 18(c)] must be that which 'brings the judicial office into disrepute' . . . does 'not require notoriety, but only that the conduct be "damaging to the esteem for the judiciary held by members of the public who observed such conduct." [Citation.]' " (*Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314 [267 Cal.Rptr. 293, 787 P.2d 591, 87 A.L.R.4th 679].)

Petitioner acknowledges that his conduct has damaged public esteem for the judiciary, for his petition for review recites that he "deeply regrets the dishonor brought to the bench by this matter." Petitioner nonetheless contests the Commission's findings. Although he readily admits that his conduct "warrants appropriate discipline," he contends that "censure should not be imposed for acts he did not do . . . ."

Rather than file a brief specifically addressing the Commission's findings and conclusions, petitioner has simply incorporated his earlier objections to

the similar (but not identical) findings of the special masters appointed by this court pursuant to California Rules of Court, rule 907. As a result, many of petitioner's objections are not pertinent to the Commission's actual findings, and will not be discussed here. For example, although the petition complains of material in a footnote to the special masters' report, the Commission's own "Findings and Conclusions" expressly recite that the Commission did not consider the foregoing material in reaching its conclusions and recommended censure.

As will appear, rather than assert errors of law or other irregularities in the proceedings below, petitioner's objections are directed almost exclusively to the credibility of the various witnesses against him, and accordingly raise matters difficult to reevaluate on the basis of a cold record. **(1b)** As we have often stated, although we must make an independent evaluation of the record, we nonetheless give special weight to the masters' findings that reflect their evaluation of the credibility of the witnesses who testified before them. (*Kennick* v. *Commission on Judicial Performance*, *supra*, 50 Cal.3d at pp. 314-315; *Gubler* v. *Commission on Judicial Performance*, *supra*, 37 Cal.3d at p. 34, and cases cited.)

The Commission adopted, with only minor modifications, the report of the special masters appointed by this court. Because this case involves public censure rather than outright removal of a judge, we need not explore in detail the extensive factual matrix underlying each of the Commission's findings. Instead, we only summarize the gist of petitioner's misconduct in the four areas specified by the Commission.

1. *Remarks Concerning Physical Attributes*

The Commission found that, on several occasions, petitioner made offensive remarks to female court reporters or clerks concerning their buttocks, breasts, or legs. (E.g., petitioner told a court reporter, "Your butt looks good in that dress.")

2. *Remarks Concerning Intimate Relationships*

The Commission found that, on several occasions, petitioner made offensive remarks to female court attachés or attorneys regarding their intimate relationships with their spouses. (E.g., petitioner told another court reporter, after she turned away from his attempt to console her, "I certainly hope you're not that frigid at home with your husband.")

3. *Other Remarks in Presence of Court Staff*

The Commission found that, on several occasions, petitioner made other offensive and crude remarks in the presence of court staff. (E.g., petitioner,

in discussing a janitor, jokingly told a female court reporter that, "The only thing he's ever done to me is go down on me a couple of times.")

4. *Inappropriate, Nonconsensual Touchings*

The Commission found that, on a few isolated occasions, petitioner singled out women working under his supervision for inappropriate and nonconsensual touching, or attempted touching. (E.g., he slapped or patted a court reporter and a court trainee on their buttocks.)

(3) Petitioner's objections to the Commission's findings in the foregoing four separate areas of misconduct relate to the asserted lack of credibility of the complaining witnesses. Petitioner cites at length the testimony of other court employees stating that no inappropriate remarks or touchings were made in *their* presence. But such testimony obviously would not necessarily rebut the extensive evidence from numerous complaining witnesses that misconduct deserving of censure indeed occurred.

Petitioner cites further testimony suggesting that the complaining witnesses should be disbelieved because they either (1) had motives to fabricate their testimony, (2) misinterpreted petitioner's innocent words or deeds, or (3) unduly delayed reporting their complaints about petitioner's conduct. Again, all such matters were more properly addressed to the special masters in the course of their assessment of the credibility of the complaining witnesses.

"Generally we give weight to the findings and conclusions of both commission and master. [Citation.]" (*Wenger* v. *Commission on Judicial Performance*, *supra*, 29 Cal.3d at p. 622.) Because of the difficulties inherent in attempting to pass on the credibility of testimony when only the written record is before us, we give special weight to the special masters' resolution of fact issues that turn on the credibility of testimony taken in their presence. (See *id.* at p. 623; *Kennick* v. *Commission on Judicial Performance*, *supra*, 50 Cal.3d at pp. 314-315; *Geiler* v. *Commission on Judicial Qualifications*, *supra*, 10 Cal.3d at pp. 275-276.) Additionally, although the Commission heard no testimony, "its own expertise and unanimity . . . suggest that deference be accorded to its inferences and conclusions." (*Wenger* v. *Commission on Judicial Performance*, *supra*, 29 Cal.3d at p. 623.)

Our own independent review of the record, coupled with the due deference and special weight we give, respectively, to the findings of the Commission and special masters, affords ample bases for concluding that the Commission's findings are supported by clear and convincing evidence, and

that petitioner's conduct is the proper basis for public censure. Petitioner's misconduct was such as to "bring[] the judicial office into disrepute" (§ 18(c)), being conduct " ' "damaging to the esteem for the judiciary held by members of the public who observed such conduct." ' " (*Kennick* v. *Commission on Judicial Performance*, *supra* 50 Cal.3d at p. 314.)

This opinion will serve as an appropriate censure.

On March 2, 1995, the opinion was modified to read as printed above.

13 Cal.4th 472
917 P.2d 627, 53 Cal.Rptr.2d 788, 96 Cal. Daily Op. Serv. 4463,
96 Daily Journal D.A.R. 7243
**(Cite as: 13 Cal.4th 472)**

In re NORMAN W. GORDON, a Judge of the Superior Court, on Censure.

No. S052965.

Supreme Court of California

Jun 20, 1996.

SUMMARY

The Commission on Judicial Performance recommended that the California Supreme Court publicly censure a superior court judge for engaging in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const., art. VI, § 18, subd. (c)(2)). The commission found that the judge had on several occasions made sexually suggestive remarks to and asked sexually explicit questions of female staff members, referred to a staff member using crude and demeaning names and descriptions and an ethnic slur, referred to a fellow jurist's physical attributes in a demeaning manner, and mailed a sexually suggestive postcard to a staff member addressed to her at the courthouse. None of the conduct occurred while court was in session or while the judge was on the bench conducting the business of the court.

The Supreme Court adopted the commission's recommendation. The court held that the judge's actions constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute. While the actions were taken in an ostensibly joking manner, and there was no evidence of intent to cause embarrassment or injury, to coerce, to vent anger, or to inflict shame, the result was an overall courtroom environment where discussion of sex and improper ethnic and racial comments were customary. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Judges § 6.2--Discipline--Public Censure--Grounds--Creating Courtroom Environment Where Discussion of Sex and Race Was Customary.
Public censure was warranted for a superior court judge who had on several occasions made sexually suggestive remarks to and asked sexually explicit questions of female staff members, referred to a ***473** staff member using crude and demeaning names

and descriptions and an ethnic slur, referred to a fellow jurist's physical attributes in a demeaning manner, and mailed a sexually suggestive postcard to a staff member addressed to her at the courthouse. The judge's actions constituted conduct prejudicial to the administration of justice that brought the judicial office into disrepute (Cal. Const., art. VI, § 18, subd. (c)(2)). While the actions were taken in an ostensibly joking manner, and there was no evidence of intent to cause embarrassment or injury, to coerce, to vent anger, or to inflict shame, the result was an overall courtroom environment where discussion of sex and improper ethnic and racial comments were customary.

[See 2 Witkin, Cal. Procedure (3d ed. 1985) Courts, §§ 32, 56A.]

COUNSEL

Susan D. Martynec and Kenneth C. Byrne, Deputy Attorneys General, and Roland W. Selman for Commission on Judicial Performance.

Baker, Silberberg & Keener, Robert C. Baker and Melissa S. Fink for Respondent.

THE COURT.

(1) The Commission on Judicial Performance has recommended that we publicly censure Norman W. Gordon, a judge of the Los Angeles County Superior Court, for engaging in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (c)(2).) Judge Gordon has not challenged the commission's findings or recommendation.

Following the appointment of special masters, hearings were held, evidence taken, and upon completion of the hearings, the special masters prepared a formal report setting forth their findings of fact and conclusions of law. After consideration of written statements of objections to the masters' report, the matter was argued before the commission which, with minor changes, adopted the findings of fact and conclusions of law of the special masters.

The commission found that between April of 1990 and October 27, 1992, Judge Gordon on several occasions made sexually suggestive remarks to and ***474** asked sexually explicit questions of female staff members; referred to a staff member using crude and demeaning names and descriptions and an ethnic slur; referred to a fellow jurist's physical attributes in a demeaning manner; and mailed a sexually suggestive postcard to a staff member addressed to her at the courthouse. None of the conduct occurred while court was in session or while the judge was on the bench conducting the business of the court.

The commission concluded that these actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (See Fitch v. Commission on Judicial Performance (1995) 9 Cal.4th 552 [37 Cal.Rptr.2d 581, 887 P.2d 937].) While the actions were taken in an ostensibly joking manner and there was no evidence of intent to cause embarrassment or injury, or to coerce, to vent anger, or to inflict shame, the result was an overall courtroom environment where discussion of sex and improper ethnic and racial comments were customary.

After reviewing the record, we are satisfied that the conclusions of the commission are justified, and that its recommendation should be adopted. This order will serve as the appropriate sanction. ***475**

Cal. 1996.

In re Gordon

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14 Cal.4th 1
922 P.2d 868, 56 Cal.Rptr.2d 705, 96 Cal. Daily Op. Serv. 7411,
96 Daily Journal D.A.R. 12,139
**(Cite as: 14 Cal.4th 1)**

In re CLAUDE WHITNEY, a Judge of the Municipal Court, on Censure.

No. S050615.

Supreme Court of California

Oct 3, 1996.

SUMMARY

The Commission on Judicial Performance recommended that the Supreme Court publicly censure a municipal court judge for engaging in "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const, art. VI, § 18, former subd. (c)(2)). The commission found that the judge, while conducting the municipal court's in-custody misdemeanor arraignment calendar, abdicated his responsibility to protect the statutory and constitutional rights of defendants in certain respects. The commission also concluded that the judge's refusal to appoint counsel to assist indigent defendants at the arraignment stage constituted willful misconduct in office, but concluded that the remaining acts constituted, at most, conduct prejudicial to the administration of justice.

The Supreme Court adopted the commission's recommendation of public censure. The court held that the evidence supported the commission's findings. The record showed that the judge, as a matter of routine practice in the conduct of the in-custody misdemeanor arraignment calendar, failed to exercise his judicial discretion to consider releasing defendants on their own recognizance, or to consider grants of probation or concurrent sentencing for defendants pleading guilty or no contest at arraignment. He further refused to appoint counsel to assist defendants at the arraignment itself, and failed to inform defendants pleading guilty or no contest of the negative consequences a conviction could have on a noncitizen with regard to immigration, as required by law. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Judges § 6.2--Discipline--Public Censure--Grounds--Engaging in Willful Misconduct in Office--Engaging in Conduct Prejudicial to Administration of Justice That Brings Judicial Office Into Disrepute.

Public censure was warranted for a municipal court judge who, ***2** while conducting the municipal court's in-custody misdemeanor arraignment calendar, abdicated his responsibility to protect the statutory and constitutional rights of defendants in certain respects, thereby engaging in "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (Cal. Const, art. VI, § 18, former subd. (c)(2)). The record showed that the judge, as a matter of routine practice in the conduct of the in-custody misdemeanor arraignment calendar, failed to exercise his judicial discretion to consider releasing defendants on their own recognizance, or to consider grants of probation or concurrent sentencing for defendants pleading guilty or no contest at arraignment. He further refused to appoint counsel to assist defendants at the arraignment itself, and failed to inform defendants pleading guilty or no contest of the negative consequences a conviction could have on a noncitizen with regard to immigration, as required by law.

[See 2 Witkin, Cal. Procedure (3d ed. 1985) Courts, § 32 et seq.]

THE COURT.

(1) The Commission on Judicial Performance has recommended that we publicly censure Claude Whitney, a judge of the Municipal Court for the Central Orange County Judicial District, for engaging in "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const, art. VI, § 18, former subd. (c)(2).) [FN1] Judge Whitney has not challenged the commission's findings or recommendation. Under rule 919(c) of the California Rules of Court, his decision not to make such a challenge "may be deemed a consent to a determination on the merits based upon the record filed by the Commission."

> FN1 These proceedings were commenced prior to March 1, 1995, the operative date of amendments to article VI, section 18, of the California Constitution.

Following the appointment of special masters, hearings were held, evidence taken, and upon completion of the hearing the special masters prepared a formal report setting forth their findings of fact and conclusions of law. After consideration of written statements of objections to the master's report, the matter was argued before the commission, which adopted certain of the masters' findings of fact and conclusions of law.

The commission found that Judge Whitney, while conducting the Central Orange Municipal Court's in-custody misdemeanor arraignment calendar ***3** during 1992, abdicated his responsibility to protect the statutory and constitutional rights of defendants in certain respects. After reviewing the record, we are satisfied

these findings are supported by the evidence. The record shows Judge Whitney, as a matter of routine practice in the conduct of the in-custody misdemeanor arraignment calendar, failed to exercise his judicial discretion to consider release of defendants on their own recognizance, or to consider grants of probation or concurrent sentencing for defendants pleading guilty or no contest at arraignment. He further refused to appoint counsel to assist defendants at the arraignment itself, and failed, as required by law, to inform defendants pleading guilty or no contest of the negative consequences a conviction could have on a noncitizen with regard to immigration.

We also accept the commission's conclusion that Judge Whitney's refusal to appoint counsel to assist indigent defendants at the arraignment constituted willful misconduct in office, but conclude the remaining acts constituted, at most, conduct prejudicial to the administration of justice (See Adams v. Commission on Judicial Performance (1995) 10 Cal.4th 866, 877-878 [42 Cal.Rptr.2d 606, 897 P.2d 544]; Gubler v. Commission on Judicial Performance (1984) 37 Cal.3d 27, 46-47, 59 [207 Cal.Rptr. 171, 688 P.2d 551].)

The record also shows Judge Whitney is considered diligent and hard working, has a reputation of thoughtfulness on legal issues, is generally well regarded among the bench and bar, and has good relationships with court staff. Judge Whitney has since improved his conduct and has acknowledged he erred in several respects. The misconduct charged ended in 1992, well before these proceedings were commenced, and Judge Whitney responded honestly and appropriately to the commission's inquiry and disciplinary proceedings.

We adopt the commission's recommendation of public censure. This order will serve as the appropriate sanction. ***4**

Cal. 1996.

In re Whitney

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[No. S055684. Aug. 10, 1998.]

HOWARD R. BROADMAN, a Judge of the Superior Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

## SUMMARY

The Commission on Judicial Performance found that a superior court judge had engaged in prejudicial conduct by inducing a criminal defendant and his counsel into waiving time for sentencing without disclosing the purpose, publicly commenting on two pending cases, and attempting to influence the outcome of a civil action against an attorney while it was pending before another superior court judge. The commission recommended public censure.

The Supreme Court ordered that the judge be publicly censured. The court held that there was clear and convincing evidence that the judge engaged in willful misconduct in inducing a criminal defendant and his counsel into waiving time for sentencing without disclosing the purpose. The court also held that the judge's violation of Cal. Code Jud. Conduct, former canon 3A(6), by publicly commenting on two criminal cases that were pending either in his court or in the Court of Appeal, constituted prejudicial conduct, that is, conduct that a judge undertakes in good faith but that nevertheless appears to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office. The court further held that Cal. Code Jud. Conduct, former canon 3A(6), was not invalid as an unconstitutional restriction on public speech, nor was it void for vagueness. The court held that the judge committed prejudicial misconduct when he tried to affect the outcome of a legal malpractice case in another court, which involved an attorney against whom the judge bore personal animosity. The court also held that the proceedings before the Commission on Judicial Performance did not violate the judge's right to due process under U.S. Const., 14th Amend. Finally, the court held that in light of the judge's lack of candor and integrity, public censure was appropriate. (Opinion by The Court.)

## HEADNOTES

Classified to California Digest of Official Reports

(1) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review by Supreme Court.**—Because the Supreme Court's power to discipline a judge is contingent on a recommendation of the Commission on Judicial Performance, the court may not impose judicial discipline on its own initiative, and it may consider only those charges of willful misconduct or prejudicial conduct that the commission has sustained. The Supreme Court's review of the record is independent, however. The court makes findings of fact, it decides as a question of law whether the conduct warrants sanctioning the judge, and it makes the ultimate decision whether to dismiss the proceeding or to admonish, censure, or remove the judge. Accordingly, the court can conclude that a judge engaged in willful misconduct, even if the commission has found that the judge's actions were not willful misconduct, but only prejudicial conduct. The ultimate disposition rests with the court. Therefore, the court can, after an independent review, increase or decrease the discipline that the commission has recommended.

(2) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review by Supreme Court—Standard of Proof.**—In judicial discipline proceedings, the Supreme Court reviews the record and determines whether there is clear and convincing evidence to sustain the charges to a reasonable certainty. Evidence of a charge is clear and convincing so long as there is a high probability that the charge is true. The evidence need not establish the fact beyond a reasonable doubt. The court gives special weight to the factual determinations of special masters because they had the advantage of observing the demeanor of the witnesses. Similarly, because of the expertise of the Commission on Judicial Performance in evaluating judicial misconduct, the court gives great weight to its conclusions of law. The court is particularly deferential to the commission when it speaks with one voice, that is, unanimously. Lack of unanimity, however, does not render the commission's conclusions inherently suspect. Although the court will carefully consider any diverse views expressed by the commission, the ultimate decision the court has to make is whether there is clear and convincing evidence to sustain the charges.

(3) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Willful Misconduct—Elements—Bad Faith.**—To commit

willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity. A judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith. Accordingly, the court's references in past decisions to bad faith as including judicial acts that a judge "should have known" to be beyond the judge's lawful judicial power are properly understood as referring to the state of mind in which a judge lacks actual knowledge of the limits on his or her judicial authority, is fully aware of this lack of knowledge, and fails or refuses to take reasonably available steps or to make a good faith effort to determine the extent of his or her judicial authority before undertaking to exercise it. Mere negligence cannot satisfy the bad faith element of willful misconduct in office by a judge, and the phrase "should have known," because of its association in other contexts with a negligence standard, is potentially misleading and should be avoided. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

(4) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Misconduct—Definition.**—Prejudicial conduct of a judge is distinguishable from willful misconduct in that the judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is either conduct that a judge undertakes in good faith but that nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office, or willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring the judicial office into disrepute, that is, the conduct would appear to an objective observer to be prejudicial to public esteem for the judicial office.

(5) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Acts in Excess of Judicial Power—Inducing Criminal Defendant to Waive Time for Sentencing Without Disclosing Purpose.**—In

proceedings concerning alleged misconduct by a superior court judge, there was clear and convincing evidence that the judge engaged in willful misconduct in inducing a criminal defendant and his counsel to waive time for sentencing without disclosing the purpose. It was only after obtaining a two-month time waiver from both defense counsel and the defendant, after asking defense counsel to "trust" him, that the judge disclosed that he wanted the attorneys to research whether he could order prison authorities to withhold from an HIV-positive inmate, such as the defendant, any medical treatment for that condition. It was clear from defense counsel's vigorous disagreement with the time waiver immediately after the judge revealed the real reason for the continuance that the judge had tricked counsel into agreeing to the waiver. Judges have a special responsibility to deal honestly and forthrightly with all who appear before them, and when a judge displays a lack of integrity, confidence in the entire judiciary is weakened. A judge's attempt to take an attorney unawares by concealing material information is an abuse of the judicial process constituting willful misconduct.

[See 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, § 70 et seq.]

(6) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Constitutionality of Canon Proscribing Public Comment on Pending Cases—First Amendment: Constitutional Law § 55—Public Speech.**—Cal. Code Jud. Conduct, former canon 3A(6), which prohibited judges from publicly commenting on pending cases, was not invalid under U.S. Const., 1st Amend., as an impermissible restriction on public speech. The burden imposed on judges was outweighed by the benefits the canon achieved in furthering the state's compelling interest in maintaining a judicial system that is fair, impartial, and efficient, both in fact and as perceived by the public. Judges must be, and must be perceived to be, neutral arbiters of both fact and law who apply the law uniformly and consistently. A judge's public comment on a pending case threatens the state's interest in maintaining public confidence in the judiciary whether or not the case is pending before the commenting judge. Former canon 3A(6)'s restrictions were narrowly drawn to apply only to proceedings that were pending or impending, not those that had become final, and it did not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Constitutionality of Canon Proscribing Public Comment on**

**Pending Cases—Vagueness: Constitutional Law § 115—Substantive Due Process.**—In proceedings concerning alleged misconduct by a superior court judge, arising after the judge violated Cal. Code Jud. Conduct, former canon 3A(6), by publicly commenting on two criminal cases that were pending either in his court or in the Court of Appeal, the former canon's prohibition against public comment on pending cases by judges was not void for vagueness. A rule is not void for vagueness if it provides fair notice to those to whom it is directed. Although the judge had recused himself from any further participation in one of the cases while the decision was pending on appeal, the former canon clearly included matters pending on appeal, expressly referring to a proceeding pending "in any court." Nor was the judge left to guess as to how "public" a public comment had to be to violate the former canon. A matter is public if it is open or available to all, that is, accessible to everybody. The words "public comment" in the former canon gave the judge fair notice that it referred to comments disseminated to the community.

(8) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Judicial Misconduct—Prejudicial Conduct—Public Comment on Pending Cases.**—A superior court judge committed judicial misconduct when he violated Cal. Code Jud. Conduct, former canon 3A(6), by publicly commenting on two criminal cases that were pending either in his court or in the Court of Appeal. A finding of willful misconduct in office requires that the misconduct occur while the judge is acting in a judicial capacity. A judge acts in a judicial capacity while performing a function associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose. Since the judge's public comments were made during interviews with the press, they did not constitute willful misconduct in office. However, his actions constituted prejudicial conduct, that is, conduct that a judge undertakes in good faith but that nevertheless appears to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office. The judge engaged in unjudicial conduct by violating Cal. Code Jud. Conduct, former canon 3A(6), with knowledge of its restrictions, when he made public comments in an attempt to justify and defend his decisions while those decisions were pending on appeal. In doing so, he adopted the role of an advocate, and such actions would appear to an objective observer to be prejudicial to public esteem for the judicial office.

(9) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Judicial Misconduct—Prejudicial Conduct—Attempts**

**to Affect Outcome of Case in Other Court.**—A superior court judge committed judicial misconduct when he tried to affect the outcome of a legal malpractice case in another court, which involved an attorney against whom the judge bore personal animosity. The judge's acts did not constitute willful misconduct, since they were not acts committed while he was acting in his judicial capacity. However, the acts constituted prejudicial conduct, that is, conduct that would appear to an objective observer to be prejudicial to public esteem for the judicial office. The judge expressed his intense dislike of the attorney to the plaintiff's counsel and offered assistance in strengthening the malpractice action against the attorney. Later, during the attorney's testimony, the judge briefly attended the trial, and the jurors noted and discussed his visit. Taken together, the judge's actions, which were motivated by personal animosity, would have appeared to an objective observer to be prejudicial to the public esteem for the judicial office. Although the judge asserted that he came to the courtroom because he thought the attorney might perjure himself, this was speculation on the judge's part, and he had no duty to take action to prevent speculative misconduct. Nor were the judge's actions protected by U.S. Const., 1st & 14th Amends. While a judge's position does not divest him or her of constitutional rights, such rights are not the same as those of a private citizen. The state's interest in regulating conduct increases with the authority and accountability of the public position at issue.

(10) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Due Process—Appointment of Special Masters—Delay in Interviewing Witnesses.**—In proceedings concerning alleged misconduct by a superior court judge, the role of the Commission on Judicial Performance in selecting the special masters to hear the case did not violate the judge's right to due process. Cal. Rules of Court, former rule 907, provided: "In place of or in addition to a hearing before the commission, the commission may request the Supreme Court to appoint three special masters to hear and take evidence in the matter, and to report to the Commission." Although the Supreme Court's order stated that the three special masters in this case were "selected by the commission," the list from which the commission selected the special masters was provided by the Supreme Court and the special masters were actually appointed by the court. Nothing in former rule 907 prohibited the Supreme Court from accepting or rejecting a recommendation of the commission for the appointment of special masters whose names the commission drew from a list provided by the court. Nor did the judge show that his due process rights were violated. Although the commission's staff and examiners waited almost two years after the

first notice of formal proceedings to start interviewing witnesses, the judge failed to demonstrate he was prejudiced by the delay. The judge did not identify the testimony of any material witnesses whose memory was impaired by the passage of time, and several of the charges concerned matters the commission could adequately investigate without questioning witnesses.

(11) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Due Process—Inaccurate and Omitted Allegations—Delayed Hearing.**—In proceedings concerning alleged misconduct by a superior court judge, the Commission on Judicial Performance did not deny the judge his right to due process by including unfounded and inflammatory allegations in the notice of formal proceedings. Although one count alleged that in an interview the judge gave to a magazine, he quoted an African-American criminal defendant while "mimicking a black accent," the commission's counsel moved to strike this allegation on the first day of the hearing after learning that the defendant was White. The special masters granted the motion. Since this error was corrected before any evidence was presented, the judge suffered no prejudice. Moreover, while it was true that the judge had to defend against allegations not included in the pleadings, he failed to show that he was surprised, disadvantaged, or otherwise legally prejudiced by the allegations. Nor was the judge able to show that he suffered prejudice from a "delay" by the commission in bringing the proceedings to a hearing. A claim of undue delay requires a showing of actual prejudice, and the judge failed to make such a showing. Although the judge asserted that he was disadvantaged by lapses in his memory in two instances, both pertained to counts that were dismissed; thus, he suffered no prejudice.

(12) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Due Process—Discovery—Notes of Conversation With Potentially Adverse Witness.**—In proceedings concerning alleged misconduct by a superior court judge, the Commission on Judicial Performance did not deny the judge his right to due process at the hearing before the special masters by not timely providing his counsel with notes of a discussion between one of the commission's attorneys and a witness. Although the attorney did not make his notes pertaining to his conversation with the witness immediately available, the attorney did provide them to the judge's counsel before the witness testified as a mitigation witness for the judge. After reviewing the notes, the judge's counsel did not seek a continuance; in calling the witness as a mitigation witness, the judge's counsel was under the mistaken belief

that the witness's unfavorable character evidence would not be admissible on cross-examination. There was nothing improper in the conduct of the examiners, nor anything in this incident to suggest bias on their part. Moreover, the commission's recommendation of public censure and its stated decision to "limit" the value of mitigation evidence was not an impermissible reaction to the judge's assertedly vigorous legal defense in the proceedings. Rather, the commission's comment indicated that the commission based its recommendation of public censure in part on the judge's lack of remorse, as shown by his unwillingness to accept responsibility for clearly established misconduct. Lack of remorse is a relevant consideration in judicial discipline and in criminal sentencing.

(13) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Purpose.**—In making its independent determination of the appropriate disciplinary sanction, the Supreme Court considers the purpose of a Commission on Judicial Performance disciplinary proceeding —which is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

(14) **Judges § 6—Removal, Censure, and Other Discipline—Public Censure—Propriety.**—In proceedings concerning misconduct by a superior court judge, in which the evidence showed that the judge engaged in willful misconduct in office by inducing a criminal defendant and his counsel into waiving time for sentencing without disclosing the purpose, and that the judge engaged in prejudicial misconduct by attempting to influence the outcome of a civil action involving an attorney against whom the judge bore personal animosity, and by publicly commenting on two pending cases, the appropriate discipline was public censure. While the judge presented mitigating evidence, and such evidence may be taken into account in considering the totality of the circumstances, it does not mitigate or excuse willful or prejudicial conduct. The commission considered the evidence in mitigation, but it concluded that the seriousness of the misconduct warranted public censure, especially in light of the judge's refusal to accept any responsibility for his conduct. Proportionality review based on discipline imposed in other cases was neither required nor determinative; choosing the proper sanction turns on the facts of the case at bar. Also, a level of discipline may be warranted either by the existence of a pattern of misconduct or by the seriousness of a single incident. In light of the judge's lack of candor and integrity, public censure was appropriate.

## COUNSEL

Lewis, D'Amato, Brisbois & Bisgaard, James E. Friedhofer, McCormick, Barstow, Sheppard, Wayte & Carruth, Stephen R. Cornwell and Gregroy S. Mason for Petitioner.

Stephen R. Barnett and J. Clark Kelso for California Judges Association as Amicus Curiae on behalf of Petitioner.

John Shepard Wiley, Jr., and Dennis F. Coupe for Respondent.

## OPINION

**THE COURT.**—A judge may be disciplined for (1) willful misconduct in office, (2) persistent failure or inability to perform judicial duties, (3) habitual intemperance in the use of intoxicants or drugs, or (4) conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (Cal. Const., art. VI, § 18, subd. (d) [former subd. (c)].) The discipline can be private or public admonishment, censure, or removal from office. (*Ibid.*)

Based on evidence presented at a public hearing before three special masters appointed by this court, the Commission on Judicial Performance (hereafter the Commission) determined that Judge Howard R. Broadman of the Tulare County Superior Court had engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute (hereafter prejudicial conduct). The Commission's recommended discipline is public censure. Judge Broadman has petitioned this court to modify or reject the Commission's recommendation.

We conclude that Judge Broadman (hereafter petitioner) engaged in willful misconduct in office and in prejudicial conduct. We adopt the Commission's recommendation of public censure.

### I. PROCEDURAL BACKGROUND

The Commission's third amended notice of formal proceedings, the operative pleading in this matter, charged petitioner with both willful misconduct in office and prejudicial conduct. It contained three counts. Count 1 alleged that petitioner abdicated his "duty to respect and comply with the law by taking judicial actions in knowing or reckless disregard of constitutional and other mandates." Count 2 charged that petitioner publicly commented on pending cases in violation of the Code of Judicial Conduct and

used the news media as a forum to defend his judicial actions. Count 3 alleged that in matters involving Attorney Arthur Kralowec petitioner failed to conduct himself "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

On June 14, 1995, at the request of the Commission, this court appointed three special masters whom the Commission had selected from a list provided by this court. (Cal. Rules of Court, former rule 907.)[1] The special masters were Superior Court Judges Spurgeon Avakian (retired) and Jay Pfotenhauer (retired), and Municipal Court Judge Jane York. After 27 days of evidentiary hearings, Special Masters Avakian and Pfotenhauer filed a majority report with the Commission, while Special Master York filed a concurring and dissenting report. As to the charges relevant here, Special Masters Avakian and Pfotenhauer concluded that petitioner had engaged in willful misconduct and prejudicial conduct by the manner in which he induced a criminal defendant and his counsel to waive time for sentencing, in prejudicial conduct by publicly commenting on pending cases, and in willful misconduct and prejudicial conduct in matters involving Attorney Arthur Kralowec. Special Master York, on the other hand, concluded that petitioner's actions were prejudicial conduct as to all of the charges relevant here. The special masters made no recommendation as to the appropriate discipline.

The Commission, after hearing oral argument, determined that the record established by clear and convincing evidence that petitioner had engaged in prejudicial conduct by: (1) inducing a criminal defendant and his counsel to waive time for sentencing without disclosing the purpose, (2) publicly commenting on two pending cases, and (3) attempting to influence the outcome of a civil action against Attorney Arthur Kralowec while it was pending before another superior court judge. The Commission recommends public censure.

## II. THRESHOLD ISSUES

Petitioner raises several issues concerning the scope of this court's authority to review the Commission's recommendations, the standard of proof the Commission must satisfy to sustain its charges, and, together with his amicus curiae, the California Judges Association (hereafter the CJA), the perceived ambiguity in this court's definition of willful misconduct in office. We address these threshold questions before discussing the facts underlying the charges and the issues related to them.

[1]Effective December 1, 1996, a number of the California Rules of Court relating to judicial discipline were repealed. Unless otherwise indicated, citations to the rules are to the version of the rules applicable at the time of the relevant events or proceedings.

A. *This Court's Authority*

Petitioner argues that the state Constitution limits the scope of this court's role in reviewing Commission recommendations in two related respects. First, he asserts that when the Commission finds that a judge committed an improper act, and that the act was prejudicial conduct but not willful misconduct, our task is simply to determine whether the judge committed the act in question and whether the act amounted to prejudicial conduct. We may not, he claims, find that the act constituted willful misconduct. Second, he contends that when the Commission has recommended that this court impose a particular type of discipline, in this case public censure, we may either adopt the recommendation or we may absolve the judge, but we may not impose a discipline more severe than that recommended. We reject both contentions.

Former subdivision (c) of article VI, section 18, of the California Constitution provided that on "recommendation of the Commission," this court has jurisdiction to "censure or remove a judge for action . . . that constitutes willful misconduct in office . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (As amended Nov. 9, 1988.)[2] **(1)** Because our power to discipline a judge is contingent on a recommendation of the Commission, we may not impose judicial discipline on our own initiative (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 784, fn. 5 [119 Cal.Rptr. 841, 532 P.2d 1209]), and we may consider only those charges of willful misconduct or prejudicial conduct that the Commission sustained (*ibid.; Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 168). Our review of the record is independent, however. We make findings of fact; we decide as a question of law whether the conduct warrants sanctioning the judge; and we make the ultimate decision whether to dismiss the proceeding or to admonish, censure, or remove the judge. (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 276 [110 Cal.Rptr. 201, 515 P.2d 1].) Accordingly, this court can conclude that a judge engaged in willful misconduct, even if the Commission found that the judge's actions were not willful misconduct, but prejudicial conduct. (See, e.g., *McCullough* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 186, 195-196 [260 Cal.Rptr. 557, 776 P.2d 259]; *Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 535 [247 Cal.Rptr. 378, 754 P.2d 724, 76 A.L.R.4th 951].) As we have observed

[2]Article VI, section 18, of the California Constitution governs the disciplining of judges. On November 8, 1994, the voters approved Proposition 190, which significantly changed the procedure for this court's review of Commission decisions but not the grounds for judicial discipline. Because the facts here occurred before the March 1, 1995, effective date of the amendments, we apply the former version of article VI, section 18. (*Dodds* v. *Commission on Judicial Performance* (1995) 12 Cal.4th 163, 168, fn. 1 [48 Cal.Rptr.2d 106, 906 P.2d 1260].)

in the past, "the ultimate disposition rests with this court." (*Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1317 [240 Cal.Rptr. 859, 743 P.2d 919], citing *Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d at pp. 799-800 & fn. 18.) Therefore, this court can, after an independent review, increase or decrease the discipline that the Commission has recommended. (See *Geiler* v. *Commission on Judicial Qualifications, supra,* 10 Cal.3d at p. 276.)

B. *Standard of Proof*

(2) In judicial discipline proceedings, this court reviews the record and determines whether there is "clear and convincing evidence" to sustain the charges to a reasonable certainty. (See, e.g., *Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 168; *Ryan* v. *Commission on Judicial Performance, supra,* 45 Cal.3d at p. 530.) In *In re Angelia P.* (1981) 28 Cal.3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198], we described "clear and convincing" evidence as " ' "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." ' " Petitioner quotes that statement to support his assertion that if the "evidence is consistent with a hypothesis urged by the judge, this court is bound to accept that hypothesis."

Petitioner in essence equates the "clear and convincing" evidentiary standard with proof beyond a reasonable doubt. Thus, he argues, any reasonable doubt must be resolved in his favor, and any fact favorable to his interests is established if it is reasonably supported by the evidence. Petitioner is wrong. Evidence of a charge is clear and convincing so long as there is a "high probability" that the charge is true. (See, e.g., *In re Angelia P., supra,* 28 Cal.3d at p. 919; BAJI No. 2.62 (8th ed. 1994); 1 Witkin, Cal. Evidence (3d ed. 1986) Burden of Proof and Presumptions, § 160, p. 137.) The evidence need not establish the fact beyond a reasonable doubt.

Equally meritless is petitioner's contention that less-than-unanimous decisions by the 11-member Commission are "inherently suspect." We give "special weight" to the factual determinations of the special masters because they had the advantage of observing the demeanor of the witnesses. (*Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 168.) Similarly, because of the Commission's expertise in evaluating judicial misconduct, we give "great weight" to its conclusions of law. (See *ibid.*; *Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314 [267 Cal.Rptr. 293, 787 P.2d 591, 87 A.L.R.4th 679].) We are "particularly deferential" to the Commission when it speaks with one voice, that is, unanimously. (*Dodds* v. *Commission on Judicial Performance, supra,* at p.

168.) Lack of unanimity, however, does not render the Commission's conclusions "inherently suspect," as petitioner claims. Although we will carefully consider any diverse views expressed by the Commission, the ultimate decision we will have to make is whether there is clear and convincing evidence to sustain the charges.

C. *Willful Misconduct and Prejudicial Conduct*

1. *Willful Misconduct*

**(3)** To commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity. (See, e.g., *Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 172; *Doan* v. *Commission on Judicial Performance* (1995) 11 Cal.4th 294, 311 [45 Cal.Rptr.2d 254, 902 P.2d 272].) Both petitioner and the CJA urge us to clarify the second of these elements. In past decisions, they note, this court has stated that judges act in bad faith when they engage in conduct they "should have known" to be beyond their lawful judicial powers. Petitioner and the CJA argue that this definition of bad faith threatens judicial independence because it allows judges to be disciplined for honest mistakes, and because the power to discipline for such mistakes may be used against judges whose decisions have generated public controversy.

This court has said that bad faith, as an element of willful misconduct in office, means "that the judge 'intentionally committed acts which he knew *or should have known* were beyond his lawful power' [citation] or 'acts within the lawful power of a judge which nevertheless [were] committed . . . for any purpose other than the faithful discharge of judicial duties' [citations]." (*Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 172, original bracket and ellipsis, italics added.) Although in other contexts this court has equated the phrase "should have known" with a negligence standard (see, e.g., *Carlin* v. *Superior Court* (1996) 13 Cal.4th 1104, 1112, fn. 2 [56 Cal.Rptr.2d 162, 920 P.2d 1347]), it does not have this meaning when used to define the bad faith element of willful misconduct in office. Indeed, we have *rejected* the argument that a judge's intentional commission of an act that the judge "should have known" was beyond the judge's lawful authority "is sufficient in and of itself" to demonstrate the bad faith required for willful misconduct in office. (*Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 46, fn. 7 [207 Cal.Rptr. 171, 688 P.2d 551].) And we have said that "negligence alone, if not so gross as to call its genuineness into question, falls short of 'bad faith.' " (*Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d at p. 796.)

In the context of defining willful misconduct in office, we have equated bad faith with "actual malice," and we have contrasted it with a conscientious purpose to faithfully discharge judicial duties. (See, e.g., *Doan* v. *Commission on Judicial Performance, supra,* 11 Cal.4th at p. 311; *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 365 [188 Cal.Rptr. 880, 657 P.2d 372]; *Spruance* v. *Commission on Judicial Qualifications, supra,* 13 Cal.3d at p. 796.) Because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith. Accordingly, our references in past decisions to bad faith as including judicial acts that a judge "should have known" to be beyond the judge's lawful judicial power are properly understood as referring to the state of mind in which a judge lacks actual knowledge of the limits on his or her judicial authority, is fully aware of this lack of knowledge, and fails or refuses to take reasonably available steps or to make a good faith effort to determine the extent of his or her judicial authority before undertaking to exercise it.

To summarize, we agree with petitioner and the CJA that mere negligence cannot satisfy the bad faith element of willful misconduct in office by a judge and that the phrase "should have known," because of its association in other contexts with a negligence standard, is potentially misleading and should be avoided. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

2. *Prejudicial Conduct*

**(4)** Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is "*either* 'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office' [citation] *or* 'willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a

judicial capacity' [citation]." (*Doan* v. *Commission on Judicial Performance, supra,* 11 Cal.4th at p. 312, original italics.) In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem. In sum, to constitute prejudicial conduct, a judge's actions must bring "the judicial office into disrepute," that is, the conduct would appear to an objective observer to be prejudicial to " 'public esteem for the judicial office.' " (*Kennick* v. *Commission on Judicial Performance, supra,* 50 Cal.3d at p. 314.)

## III. REVIEW OF COMMISSION FINDINGS AND CONCLUSIONS

We now address the issues relating to the facts in this case.

### A. *Acts in Excess of Judicial Power*

The Commission agreed with the finding by a majority of the special masters that petitioner used deception in procuring a waiver of time for sentencing from criminal defendant Levert Hooks. Petitioner contends there is no clear and convincing evidence to support this finding. We disagree.

#### 1. *Facts*

Defendant Hooks, who had tested positively for human immunodeficiency virus (HIV), was convicted of five counts of raping a fifteen-year-old girl. On Thursday, January 5, 1995, when Hooks and his attorney, Charles Rothbaum, appeared before petitioner for sentencing, petitioner announced at the outset: "This is the case of People versus Levert Hooks. I would like a time waiver on this case because I would like to present some questions to you folks before we impose sentence in this case for you to think about and to do some research on."[3] When petitioner responded "yes" to Attorney Rothbaum's inquiry whether the court wanted to set the sentencing hearing for a later date, Rothbaum said, "That's fine." The prosecution likewise agreed. Petitioner continued the sentencing hearing to March 7, 1995. The following colloquy between defense counsel and petitioner then took place:

"MR. ROTHBAUM: Can I inquire as to what you plan on doing between now and then in this case? It's a long delay. We don't mind. I'm just wondering what you're up to.

"THE COURT: I'm going to be asking you some questions to do some research on.

[3]Because a criminal defendant has a statutory right to be sentenced within 20 judicial days of the verdict of guilty (Pen. Code, § 1191), the imposition of sentence beyond that period requires the defendant's waiver of the time for sentencing.

"MR. ROTHBAUM: Three months worth of research?

"THE COURT: Well, isn't that two months?

"MR. ROTHBAUM: Two months. Well, all right, two months worth of research.

"THE COURT: *Trust me.*

"MR. ROTHBAUM: All right. That's fine.

"THE COURT: Is that okay with you, Mr. Hooks?

"THE DEFENDANT: Yeah." (Italics added.)

Petitioner then mentioned that he had heard over the radio that it cost the state $100,000 a year to provide medical treatment for an incarcerated HIV-positive inmate. After noting the probation report's recommended sentence of 40 years in prison, petitioner explained what he had in mind: "What I have thought of is a potential order that once the conviction is final that the government doctors shall not be required to provide prophylactic medicine or medicine to treat the incurable disease, but rather shall be required to provide him with food, hydration, and pain medication."[4]

Defense counsel Rothbaum immediately moved to withdraw his client's waiver of the time for sentencing. When petitioner denied the motion, defense counsel stated: "[W]hat you've basically done today is to extract from Mr. Hooks, without him knowing it, a waiver of time in order for you to be able to divest him, if you can, of what he at the present time is entitled to, which is medical care while he is in custody of the California Correctional System. [¶] There is no way that he is going to assist the court in divesting him of medical treatment if, in fact, he needs it and he's entitled to it. That's what you are asking us to do. [¶] You're asking him to let you have two months to see if you can screw him basically. That's not right. That's not right. And I didn't understand it. [¶] I certainly had no understanding of what was going on here when you made the request for the time waiver because you didn't tell me what it was about. And I certainly can't join in the entry of a waiver once I know the reason for it. [¶] It wasn't a knowing—it wasn't a knowing waiver."

[4]While this proceeding was pending before this court, the United States Supreme Court held, in *Bragdon* v. *Abbott* (1998) __ U.S. __ [118 S.Ct. 2196, 141 L.Ed.2d 540], that HIV is a disability within the meaning of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.) even when the infection has not progressed to the symptomatic stage. The high court also held the ADA applies to inmates in state prisons (*Pennsylvania Department of Corrections* v. *Yeskey* (1998) __ U.S. __ [118 S.Ct. 1952, 141 L.Ed.2d 215]).

Petitioner responded: "He may not have known why, but he knew he was waiving time."

Later that day, after the hearing had been concluded, petitioner asked his clerk to notify both the prosecution and the defense attorney that the Hooks case had been placed on the court's calendar for the following Monday, January 9, at 8:30 a.m.

On Friday, January 6, the day after the sentencing hearing involving the waiver, a local newspaper, the Visalia Times-Delta, reported the statements petitioner had made at the hearing regarding his concern about the high cost of providing medical care to HIV-positive inmates. The article also mentioned the prosecution's view that the matter should be left to the correctional system. And it quoted defense attorney Rothbaum, who described petitioner's proposal to order the prison to withhold medical treatment from defendant Hooks as cruel and unusual punishment, and a "barbaric" attempt to impose a death sentence.

At the Monday, January 9, 1995, hearing, petitioner told the parties that he had placed the Hooks matter back on the court's calendar to clarify that his concern was with the allocation of resources within the prison system, not with HIV. He added: "A review of the transcript indicates that I misspoke. I told Mr. Rothbaum to trust me. And what I meant to say was, 'Mr. Rothbaum, trust me, you'll need all this time for the research.' And I didn't indicate that, and I think that that may have been misleading to Mr. Rothbaum." Rothbaum responded that he was misled by petitioner's failure to disclose his real purpose for requesting a time waiver, not by the "trust me" remark. Petitioner sentenced Hooks to a total of 50 years in prison on the 5 counts of rape. The sentence made no mention of medical treatment.

2. *Commission's Findings and Conclusions*

The Commission, by a vote of nine to two, found that petitioner's conduct in obtaining the time waiver in the Hooks case was improper. Although the Commission observed that petitioner's conduct "could plainly be willful misconduct," it nevertheless found petitioner's actions to be prejudicial conduct rather than willful misconduct because petitioner had, by putting the matter back on the court's calendar, acted promptly to correct his actions. The two dissenting commissioners voted to dismiss the charge.

3. *Our Review of the Commission's Decision*

**(5)** After an independent review of the record (*Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 168), we conclude there is clear

and convincing evidence that petitioner engaged in willful misconduct in office in obtaining the waiver of the time for sentencing in People v. Hooks.

As we noted before, a judge engages in willful misconduct when, while acting in a judicial capacity, the judge acts in a manner that is unjudicial and in bad faith (that is, for a purpose other than the faithful discharge of judicial duties, or with knowledge that the act is beyond the judicial power, or with a conscious disregard for the limits of the judge's authority). As described in detail earlier, petitioner began the sentencing hearing by asking defense counsel and defendant Hooks to waive time for sentencing because he had "some questions" that he wanted the attorneys for both parties to research. When neither attorney indicated a problem in continuing the sentencing hearing to some future date, petitioner set the hearing for March 7, 1995. At that point, defense counsel expressed concern about the two-month delay: "Can I inquire as to what you plan on doing between now and then in this case? It is a long delay. We don't mind. I'm just wondering what you're up to." Petitioner reiterated his desire to have the attorneys do research on "some questions." When defense counsel inquired as to the need for "two months of research," petitioner replied: "Trust me."

Only after obtaining a time waiver from both defense counsel and defendant Hooks did petitioner disclose that he wanted the attorneys to research whether he could order prison authorities to withhold from an HIV-positive inmate, such as defendant Hooks, any medical treatment for that condition. Defense counsel then strenuously objected, stating that his client was entitled to medical treatment, adding: "That's not right. That's not right. And I didn't understand it. [¶] I certainly had no understanding of what was going on here when you made the request for the time waiver because you didn't tell me what it was about. And I certainly can't join in the entry of a waiver once I know the reason for it. [¶] It wasn't a knowing—it wasn't a knowing waiver."

As this exchange demonstrates, petitioner did not reveal the real reason for his request for a time waiver until he, after asking defense counsel to "trust" him, received a time waiver from defendant and his counsel.

According to petitioner and his amicus curiae, the CJA, petitioner's "trust me" response referred to the substantial time (two months) that the attorneys would need to research the issue of withholding medical treatment from defendant Hooks during his incarceration in prison, and it had no bearing on the waiver issue. Even if we were to agree with this interpretation of the record, it is clear from defense counsel's vigorous disagreement with the continuance immediately after petitioner revealed the real reason for the

continuance that petitioner had indeed "tricked" counsel into agreeing to the continuance. As the Commission in this case pointed out: "Judges have a special responsibility to deal honestly and forthrightly with all who appear before them, and when a judge displays a lack of integrity, as did [petitioner] in *Hooks,* confidence in the entire judiciary is weakened." A judge's attempt to "take [an attorney] unawares" by concealing material information, as petitioner did here, is "an abuse of the judicial process" constituting willful misconduct. (*Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 631 [175 Cal.Rptr. 420, 630 P.2d 954].)

B. *Public Comment on Pending Cases*

At the time relevant here, canon 3A(6) of the former California Code of Judicial Conduct prohibited judges from making "public comment about a pending or impending proceeding in any court . . . ."[5]

Count 2 charged petitioner with violating former canon 3A(6) by publicly commenting on two criminal cases that were pending either in his court or in the Court of Appeal, *People* v. *Zaring* and *People* v. *Johnson*, and by continuing to do so after the Commission had advised him of the impropriety of his conduct. A discussion of the pertinent facts in these two cases follows.

1. *People v. Zaring*

Defendant Linda Zaring pleaded guilty to possessing and being under the influence of a controlled substance. Petitioner placed her on probation for five years on the condition, among others, that she "not get pregnant" during this period. Petitioner told Zaring: "You're thirty years old. None of your children are in your custody or control. Two of them on AFDC. And I'm afraid that if you get pregnant we're going to get a cocaine or heroin addicted baby." At a later proceeding, when Zaring was 22 minutes late for a court appearance, petitioner immediately revoked her probation and remanded her to the custody of the sheriff. On appeal, the court affirmed the conviction but held that the "no pregnancy" probation condition was overbroad, and thus invalid, because it impinged upon the exercise of the fundamental right to privacy. As to petitioner's order revoking probation, the Court of Appeal found that to be an abuse of discretion. (*People* v. *Zaring* (1992) 8 Cal.App.4th 362, 370-373, 379 [10 Cal.Rptr.2d 263].)

[5]The California Code of Judicial Conduct was replaced by the California Code of Judicial Ethics, effective January 15, 1996. The substance of former canon 3A(6) now appears in canon 3B(9) of the 1996 California Code of Judicial Ethics. Canon 3B(9), like former canon 3A(6), prohibits judges from making "public comment about a pending or impending proceeding in any court . . . ."

2. *People v. Johnson*

Defendant Darlene Johnson pleaded guilty to three felony counts of corporal injury to two of her children. Petitioner granted probation to Johnson, who was then seven months' pregnant, and, after Johnson told him that she did not want to get pregnant again, imposed a probation condition that she be implanted with "Norplant," a birth control device then newly approved by the federal Food and Drug Administration. At a later hearing, petitioner denied Johnson's request to delete the Norplant birth control condition. But he granted Johnson's motion to stay imposition of that condition pending appeal, and he disqualified himself from further proceedings in the case. Following revocation of Johnson's probation by another judge, the Court of Appeal dismissed Johnson's appeal as moot.

On March 18, 1991, the Commission notified petitioner in writing that it had ordered a preliminary investigation to determine whether he had violated former canon 3A(6) of the California Code of Judicial Conduct by publicly commenting on the *Johnson* case, first while it was pending in his court and later while it was on appeal. The letter went on to state that when the Norplant probation condition attracted national media attention, petitioner publicly explained his reasons for imposing the condition. The Commission noted that petitioner's public comments *before* the date of the hearing at which he considered defendant Johnson's motion to reconsider the Norplant probation condition created the appearance that he had prejudged the motion, and that his comments *after* that date gave the appearance that he was trying to influence the decision on appeal, thereby undermining public confidence in the judiciary's objectivity and impartiality.

Also in March 1991, apparently before the Commission's letter to petitioner just described, petitioner gave an interview to West Magazine explaining his reasons for the probation conditions in both the *Zaring* and *Johnson* cases. An article reporting this interview was published on July 9, 1991.

On April 4, 1991, petitioner responded in writing to the Commission's letter of March 18 pertaining to the Norplant condition in the *Johnson* case. He said that since becoming a judge he had been fully aware of former canon 3A(6)'s prohibition against publicly commenting on pending cases. He admitted giving interviews to several newspapers and television shows regarding the *Johnson* case, but stated that he had not sought media attention and had declined to appear on a number of television shows. Through his comments, he said, he had sought to explain both the Norplant probation condition and court procedures; and, when first interviewed, he did not know that defendant Johnson would file a motion to have him reconsider the Norplant condition.

On May 16, 1991, the Commission notified petitioner by letter that it had rejected his claim that his comments were confined to procedural matters, concluding that he had violated former canon 3A(6). The Commission found petitioner's comments to detract from the appearance of judicial impartiality, and it directed his attention to former canon 2, which prohibited judicial conduct creating the appearance of impropriety. Nevertheless, while expressing "strong reservations," the letter informed petitioner that "the facts do not constitute grounds for proceeding further and [the Commission] determined to close its preliminary investigation of your statements to the media and issue this advisory letter."

In November 1991, petitioner gave an interview to Time magazine at his home. He again publicly commented on the *Johnson* case and defended himself against criticism of the Norplant probation condition. The article reporting this interview was published on March 9, 1992.

3. *Commission's Findings and Conclusions*

The Commission found as follows: When, in interviews he gave to West Magazine and Time, petitioner publicly commented on the "no pregnancy" probation conditions in the *Johnson* and *Zaring* cases, those cases were pending on appeal. Petitioner knew of former canon 3A(6)'s prohibition against publicly commenting on pending cases. He gave an interview to Time magazine and commented on the then-pending *Johnson* case *after* the Commission's letter to him stating that public comment on pending cases was improper. Petitioner conceded to the special masters that his public comments to Time and West Magazine violated the canon in question.

The Commission unanimously concluded that petitioner's actions constituted prejudicial conduct. It dismissed the charges concerning petitioner's public comments in interviews given to other publications "in view of the Commission's findings of conduct prejudicial as to [the West Magazine and Time interviews], and in view of the potential for overlapping sanctions . . . ."

4. *Our Review of the Commission's Decision*

**(6)** Petitioner concedes that he violated former canon 3A(6) when he publicly commented on the "no pregnancy" probation conditions he had imposed in the *Johnson* and *Zaring* cases. He insists, however, that no discipline can be imposed because as a judge he has a right under the First Amendment to the federal Constitution to make public comments on pending cases unless those comments pose a "substantial likelihood of material

prejudice" to a fair trial. In support he cites the United States Supreme Court's decision in *Gentile* v. *State Bar of Nevada* (1991) 501 U.S. 1030 [111 S.Ct. 2720, 115 L.Ed.2d 888], upholding a Nevada Supreme Court rule prohibiting lawyers from making public comments on pending cases that would pose a "substantial likelihood of materially prejudicing" a legal proceeding. We are not persuaded that the same standard applies to judges.

When a regulation implicates First Amendment rights, the constitutional validity of the restriction is determined by balancing the First Amendment interest against the state's legitimate interest in regulating the activity in issue. (See, e.g., *Gentile* v. *State Bar of Nevada, supra,* 501 U.S. at p. 1075 [111 S.Ct. at p. 2745]; *Seattle Times Co.* v. *Rhinehart* (1984) 467 U.S. 20, 32 [104 S.Ct. 2199, 2207, 81 L.Ed.2d 17].) Lawyers' "extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative." (*Gentile* v. *State Bar of Nevada, supra,* at p. 1074 [111 S.Ct. at p. 2745].) For this reason, regulation of public commentary by lawyers in pending cases serves the state's interest in ensuring fair trials. (*Id.* at p. 1075 [111 S.Ct. at p. 2745].) The state has a greater interest, however, in regulating the public commentary by a *judge* during the pendency of a proceeding, as explained below.

Because judges and attorneys play different roles in the judicial process, their public comments on pending judicial proceedings threaten the fairness of those proceedings in different ways and to different degrees. The public understands that in judicial proceedings lawyers, although also officers of the court, are advocates for the interests of their clients (see, e.g., *Gentile* v. *State Bar of Nevada, supra,* 501 U.S. at p. 1051 [111 S.Ct. at pp. 2732-2733] [professional mission of criminal defense bar is to challenge actions of the state]); therefore, the public does not expect a high degree of neutrality or objectivity when lawyers comment on pending cases, nor does the public expect all attorneys to assess the merits of pending cases in the same way. Judges, by contrast, cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law (see Preamble, Cal. Code Jud. Ethics) who apply the law uniformly and consistently. Because judges are both "highly visible member[s] of government" (*ibid.*) and neutral decision makers in all court proceedings, their public comments will be received by the public as more authoritative than those of lawyers. And because judges have this greater influence over public opinion, inappropriate public comment by judges poses a much greater threat to the fairness of judicial proceedings than improper public comment by lawyers.

A judge's public comment on a pending case threatens the state's interest in maintaining public confidence in the judiciary whether or not the case to

which the comment is directed is pending before the commenting judge. When the case is pending before the commenting judge, the public may perceive the comment as indicating that the judge has prejudged the merits of the controversy or is biased against or in favor of one of the parties. (Rothman, Cal. Judicial Conduct Handbook (1990) § 160.550, p. I-39.) When the case is pending before a judge other than the commenting judge, the public may perceive the comment as an attempt to influence the judge who is charged with deciding the case. (*Ibid.*) Such comments may also create the public impression that the judge has abandoned the judicial role to become an advocate for the judge's own ruling or for the position advanced by one of the parties.

The United States Supreme Court has not yet considered what limits the First Amendment to the federal Constitution imposes on a state's authority to restrict judges from publicly commenting on pending cases. The court has, however, addressed First Amendment limitations on a state's authority generally to regulate public speech by public employees. In *Pickering* v. *Board of Education* (1968) 391 U.S. 563 [88 S.Ct. 1731, 20 L.Ed.2d 811] (*Pickering*), the high court held that the validity of a regulation limiting public employee speech is to be determined by balancing the interests of the employee "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (*Id.* at p. 568 [88 S.Ct. at pp. 1734-1735].) Because the state's interests in protecting the integrity of the judiciary and in maintaining public confidence in the judiciary are at least as strong as its interest in promoting the efficiency of public services generally, we conclude that the First Amendment protection for public comment on pending cases by judges is no more protective of judges, who are also public employees, than the standard articulated by the United States Supreme Court for evaluating the regulation of public employee speech generally. (Accord, *In re Schenck* (1994) 318 Or. 402, 433 [870 P.2d 185, 204], cert. den. 513 U.S. 871 [115 S.Ct. 195, 130 L.Ed.2d 127] [adopting the *Pickering* standard for judicial comment on pending cases]; see Gross, *Judicial Speech: Discipline and the First Amendment* (1986) 36 Syracuse L.Rev. 1181, 1184-1190; see generally, Annot., First Amendment Protection for Judges or Government Attorneys Subjected to Discharge, Transfer, or Discipline Because of Speech (1992) 108 A.L.R.Fed. 117, 126-127.) And we reject petitioner's proposed standard permitting judges to comment publicly on any pending case unless the particular comment poses a "substantial likelihood of material prejudice," for it affords insufficient protection to the state's interest in both the fact and the appearance of judicial impartiality and integrity.

To better understand how the *Pickering* test works, we consider those decisions in which the United States Supreme Court has applied it. In

*Pickering, supra,* 391 U.S. 563, a board of education had dismissed a high school teacher for publicly criticizing the board's allocation of school funds between athletics and education and the board's method of informing the public regarding the need for additional revenue. To determine whether this restriction on a public employee's speech was permissible under the First Amendment, the United States Supreme Court balanced the teacher's interest in commenting upon these matters of public concern against the school district's interest in promoting the efficiency of public schools. (391 U.S. at p. 568 [88 S.Ct. at pp. 1734-1735].) The court concluded that the school board had violated the First Amendment because the teacher's interest outweighed the district's interest. (391 U.S. at pp. 571-573 [88 S.Ct. at pp. 1736-1737].) The court has since used this same analysis in other cases involving restrictions on public employee speech. (See, e.g., *Perry* v. *Sindermann* (1972) 408 U.S. 593 [92 S.Ct. 2694, 33 L.Ed.2d 570] [refusal to rehire teacher who had testified before state legislature]; *Mt. Healthy City Board of Ed.* v. *Doyle* (1977) 429 U.S. 274 [97 S.Ct. 568, 50 L.Ed.2d 471] [refusal to rehire teacher for relaying substance of teacher dress and appearance memorandum to radio station]; *Givnan* v. *Western Line Consolidated School Dist.* (1979) 439 U.S. 410 [99 S.Ct. 693, 58 L.Ed.2d 619] [termination of teacher based on private communications alleging racially discriminatory policies of school district].) In *Connick* v. *Myers* (1983) 461 U.S. 138, 146 [103 S.Ct. 1684, 1689-1690, 75 L.Ed.2d 708], the high court held that the First Amendment protection for public employee speech on a subject of no public concern is less than for speech addressed to matters of significant public interest.

The United States Supreme Court has applied this balancing test not only to determine the validity of the discipline imposed on particular public employees for particular public speech, but also to determine the facial validity of broadly worded speech regulations similar to former canon 3A(6). For example, the court used the *Pickering* balancing test to strike down a statute that prohibited federal employees from accepting compensation for giving speeches or writing articles regardless of whether the subject of the speech or the article, or the sponsoring group, had any connection to the employee's official duties. (*United States* v. *Treasury Employees* (1995) 513 U.S. 454, 466-467 [115 S.Ct. 1003, 1012-1013, 130 L.Ed.2d 964].) In another case, the high court applied the *Pickering* test to uphold, as constitutional on its face, a federal statute prohibiting federal employees from taking an active part in political management or in political campaigns. (*CSC* v. *Letter Carriers* (1973) 413 U.S. 548, 564 [93 S.Ct. 2880, 2889-2890, 37 L.Ed.2d 796]; see *United States* v. *Treasury Employees, supra,* at p. 467 [115 S.Ct. at p. 1013], reaffirming *United Public Workers* v. *Mitchell* (1947) 330 U.S. 75 [67 S.Ct. 556, 91 L.Ed. 754].) Accordingly, the *Pickering* balancing

test may properly be used to determine the facial validity, against a First Amendment challenge, of regulations such as former canon 3A(6).

Generally speaking, court proceedings are matters of public concern and, again generally speaking, judges have as great an interest as other individuals in commenting publicly on these proceedings. Under the *Pickering* test described above, we determine the validity of former canon 3A(6) under the First Amendment by balancing this general interest of judges in making public comments on court proceedings against the state's interest in the soundness of the judicial system. In doing so, we note that former canon 3A(6)'s restrictions on public comment by judges are narrowly drawn to apply only to proceedings that are pending or impending, not those that have become final, and that the former canon "does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court" (Cal. Code Jud. Conduct, former canon 3A(6)).

As we have explained, there is a compelling public interest in maintaining a judicial system that both is in fact and is publicly perceived as being fair, impartial, and efficient. As we have also explained, former canon 3A(6) effectively promotes this interest because public comments by judges on matters pending before them may give the appearance that the judge has prejudged the merits of the controversy, has become an advocate for the interests of one of the parties, or has resorted to extrajudicial means to defend the judge's own rulings. As applied to comments on matters pending before another judge, the former canon prevents a judge from exerting, or appearing to exert, pressure on another judge to decide a matter a particular way. Accordingly, we conclude that the burden that former canon 3A(6) imposes on the general interest of judges in making public comments on court proceedings is outweighed by the benefits it achieves in furthering the state's interest in the soundness of the judicial system; therefore, former canon 3A(6) is not invalid under the First Amendment as an impermissible restriction on public speech.[6]

(7) We also reject as meritless petitioner's assertion that former canon 3A(6) is void for vagueness. A rule is not void for vagueness if it provides " ' "fair notice to those to whom [it] is directed." ' " (*Gentile* v. *State Bar of*

[6]Although we reach this conclusion by applying the test that the high court articulated in *Pickering, supra,* 391 U.S. 563, the same conclusion would likely follow from application of the *Gentile* standard that petitioner urges us to adopt. (See, e.g., *In re Inquiry of Broadbelt* (1996) 146 N.J. 501, 519 [683 A.2d 543, 552] [applying *Gentile* standard upholding canon restricting judges' public comments on pending cases].)

*Nevada, supra,* 501 U.S. at p. 1048 [111 S.Ct. at p. 2731], original brackets.) We find unconvincing petitioner's assertion that he had "difficulties in determining if public comment was prohibited" in a case, such as *People* v. *Johnson,* in which he had recused himself from any further participation while the decision was pending on appeal. The former canon clearly included matters pending on appeal. It expressly referred to a proceeding pending "in any court." We also find unpersuasive petitioner's claim that he was left to guess how "public" a public comment had to be to violate the former canon. A matter is public if it is open or available to all, that is, accessible to everybody. (Webster's New Internat. Dict. (2d ed. 1941) p. 2005, col 1.) The words "public comment" in the former canon gave petitioner fair notice that it referred to comments disseminated to the community.

**(8)** Having decided that former canon 3A(6)'s prohibition against public comment on pending cases by judges is permissible under the First Amendment to the federal Constitution, we now determine whether petitioner's acts constituted judicial misconduct.

A finding of *willful misconduct in office* requires that the misconduct occur while the judge is acting in a judicial capacity. A judge is acting in a judicial capacity while performing one of the functions, whether adjudicative or administrative in nature, that are associated with the position of a judge or when the judge uses or attempts to use the authority of the judicial office for an improper purpose. (*Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th at p. 172; see *Kennick* v. *Commission on Judicial Performance, supra,* 50 Cal.3d at p. 319.) Petitioner's public comments were made in the course of interviews with the press, not while he was acting in a judicial capacity. They therefore cannot constitute willful misconduct in office. As the Commission correctly concluded, however, petitioner's actions constituted *prejudicial conduct*, that is, " 'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office . . . .' " (*Doan* v. *Commission on Judicial Performance, supra,* 11 Cal.4th at p. 312.) Petitioner engaged in unjudicial conduct by violating a canon of judicial conduct, former canon 3(A)(6), with knowledge of its restrictions. By making public comments in an attempt to justify and defend his decisions while those decisions were pending on appeal, petitioner adopted the role of an advocate. Such actions would appear to an objective observer to be " 'prejudicial to public esteem for the judicial office.' " (*Kennick* v. *Commission on Judicial Performance, supra,* 50 Cal.3d at p. 314.)

C. *Abuse of the Judicial Office*

The Commission's final charge was that petitioner failed, in matters involving Attorney Arthur Kralowec, to conduct himself "in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

1. *Facts*

In 1983, *before* petitioner became a judge, he represented a party in a case in which Attorney Kralowec was the opposing counsel. The relationship between petitioner and Kralowec developed into one of intense antagonism.

In 1994, *after* petitioner became a judge, Attorney Kralowec represented one of petitioner's former clients, Darlene Woods, in Woods v. Broadman, a legal malpractice action against petitioner. While the case was pending, Kralowec himself was the defendant in another legal malpractice action, Metzger v. Kralowec. Attorney Thomas Anton represented plaintiff Metzger, who faulted Kralowec for not disqualifying petitioner from ruling in the underlying action on a motion for summary judgment and ordering arbitration of the matter. At the trial in Metzger v. Kralowec, which was tried before another judge of the Tulare Superior Court in 1995, petitioner's name was mentioned by participants in the trial 150 to 200 times.

At one point in the malpractice action against Kralowec, the court reporter told plaintiff Metzger's attorney, Thomas Anton, that petitioner would like to see him. When Anton made no effort to see petitioner, the court reporter again told Anton that petitioner wanted to see him, a communication that Anton at that point considered an order. Later, during the lunch break in that day's proceedings in the Metzger case, Anton met with petitioner in petitioner's chambers.

At this meeting, petitioner offered to testify on behalf of Attorney Anton's client. When Anton expressed interest in learning when Attorney Kralowec started representing plaintiff Woods in the malpractice action against petitioner, the latter telephoned the court clerk's office, identified himself as "Judge Broadman," and requested that the file in Woods v. Broadman be made available to Anton. When the conversation turned to the subject of a State Bar investigation of Attorney Kralowec, petitioner telephoned the State Bar, identified himself as "Judge Broadman," and asked about the status of the investigation. Turning to Attorney Anton's representation of the plaintiff

in the malpractice action against Kralowec, petitioner mentioned that in the past Kralowec had hidden his assets and it would be difficult to collect on a judgment against Kralowec. At a later point, when petitioner and Anton met in the court hallway, petitioner told Anton not to mention the meeting to anyone.

Thereafter, during the punitive damages portion of the trial in Metzger v. Kralowec, petitioner entered the courtroom and briefly sat in the audience while Attorney Kralowec was testifying. The jurors, some of whom knew petitioner was a judge, noted and discussed his visit. When a court employee asked petitioner why he had come to Kralowec's trial, petitioner replied that he was "just being an asshole."

2. *Commission's Findings and Conclusions*

The Commission, by a vote of six to five (five voting to dismiss), found petitioner's actions in the Kralowec matter to be *prejudicial conduct.* It agreed with the special masters that petitioner's acts had been motivated by a desire "to harm his old adversary," Attorney Kralowec, and it determined that petitioner had acted more as a "vigilante" than as a judge. The Commission concluded that those actions were not willful misconduct because they occurred while petitioner was acting in a nonjudicial capacity.

3. *Our Review of the Commission's Decision*

**(9)** We agree with the Commission's determination that petitioner's acts in Metzger v. Kralowec were not willful misconduct. As we discussed earlier, one of the elements of willful misconduct is that the judge must have acted in a judicial capacity. Here, neither petitioner's meeting in his chambers with Attorney Anton nor his brief appearance in the courtroom where the case of Metzger v. Kralowec was being tried was an act within his judicial capacity: Neither instance involved any adjudicative or administrative functions of petitioner's judicial office.

But, as the Commission determined, petitioner's acts did constitute prejudicial conduct, that is, conduct that would appear to an objective observer to be prejudicial to " 'public esteem for the judicial office.' " (*Kennick* v. *Commission on Judicial Performance, supra,* 50 Cal.3d at p. 314.)

Through his actions, as described in detail at the beginning of this section, petitioner tried to affect the outcome in the legal malpractice case involving

Attorney Kralowec, against whom he bore personal animosity. While the case was being tried before another judge, petitioner summoned Attorney Anton, who represented plaintiff Metzger, to his chambers. There, petitioner expressed his intense dislike of Kralowec and offered assistance in strengthening the plaintiff's malpractice action against Kralowec. In petitioner's words, he hoped that Anton would "kick the son of a bitch's ass." He offered to testify against Kralowec, he telephoned for delivery of a court file in a different malpractice action, and he checked with the State Bar to find out the status of a complaint against Kralowec, all in an effort to assist Attorney Anton in the malpractice case against Kralowec. Later, during Kralowec's testimony, petitioner briefly attended the trial; the jurors, some of whom knew petitioner to be a judge, noted and discussed his visit. When a court employee asked why petitioner had come to Kralowec's trial, petitioner replied he was "just being an asshole." We agree with the Commission that taken together petitioner's actions, which were motivated by "a desire to bring about a result harmful to Kralowec because of personal animosity between them," would appear to an objective observer to be prejudicial to the public esteem for the judicial office.

We reject petitioner's contention that he had a duty, under this court's decision in *Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th 163, to visit the courtroom in which Attorney Kralowec was testifying in Metzger v. Kralowec to take "active steps to prevent or discourage perjury." *Dodds* is distinguishable. Judge Dodds saw another judge letting the air out of the tires of a van belonging to a disabled person who had parked in the judge's parking space. We held that Judge Dodds engaged in prejudicial conduct by, among other things, failing to report the incident as required by former canon 3D and for initially refusing to give a statement to a detective investigating the matter. (12 Cal.4th at pp. 170-171.) Here, petitioner came to the courtroom because, as he explained, he thought Kralowec might perjure himself. That was pure speculation on petitioner's part. *Dodds* does not impose a duty on a judge to take action to prevent any speculative misconduct.

We also reject petitioner's argument that his actions in Metzger v. Kralowec are protected by the First and Fourteenth Amendments to the United States Constitution because he was acting as a private person in a private dispute. As petitioner notes, his position as a judge does not divest him of constitutional rights. (See *Pickering, supra,* 391 U.S. at p. 568 [88 S.Ct. at pp. 1734-1735].) But that does not mean that his rights are therefore the same as those of a private citizen. The state's interest in regulating conduct increases correspondingly with the authority and accountability of the public position at issue. (*Rankin* v. *McPherson* (1987) 483 U.S. 378, 390-391 [107

S.Ct. 2891, 2900-2901, 97 L.Ed.2d 315].) As a judge, petitioner's rights do not extend to protecting conduct that would appear to an objective observer to be prejudicial to the public esteem for the judiciary.

## IV. DUE PROCESS

**(10)** Petitioner contends he cannot be disciplined because the Commission's proceedings violated his right to due process under the Fourteenth Amendment to the federal Constitution.

Petitioner first complains about the Commission's role in this court's appointment of the special masters. Our order appointing the special masters in this matter states that "the following judges, selected by the commission from a list submitted by the Supreme Court, are hereby appointed Special Masters . . . ." Petitioner argues that this method of selecting the special masters violates due process because, under former rule 907 of the California Rules of Court, the Commission cannot have any role in the selection of special masters beyond requesting this court to make the appointments. We disagree. Former rule 907 provided in relevant part: "In place of or in addition to a hearing before the Commission, the Commission may request the Supreme Court to appoint three special masters to hear and take evidence in the matter, and to report to the Commission." Although our order stated that the three special masters in this case were "selected by the commission," the list from which the Commission selected the special masters was provided by this court and the special masters were actually appointed by this court. Nothing in former rule 907 prohibits this court from considering, that is, accepting or rejecting, a recommendation of the Commission for the appointment of special masters whose names the Commission drew from a list provided by this court.

Petitioner next complains that the Commission's staff and examiners violated his due process rights because they did not start interviewing witnesses until almost two years after the first notice of formal proceedings in May 1993. This delay, petitioner argues, violated his right to due process because it impaired the ability of witnesses to remember events. Petitioner, however, has failed to demonstrate prejudice by the delay. He does not identify the testimony of any material witness whose memory was impaired by the passage of time. In addition, several of the charges against petitioner concerned matters the Commission could adequately investigate without questioning witnesses. For example, pertinent information on the charges pertaining to petitioner's actions in court could be obtained from court transcripts. Likewise, information on the charges relating to petitioner's

public comment on pending cases could be found in publications containing petitioner's interviews. (See *Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 837 [264 Cal.Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235].)

**(11)** Petitioner also accuses the Commission of including unfounded and inflammatory allegations in the third amended notice of formal proceedings, as a result of which, petitioner asserts, he "suffered an injustice." Count 2 alleged that in an interview petitioner gave to West Magazine he "quoted defendant Linda Zaring (who is African-American) while 'mimicking a black accent.' " On the first day of the hearing before the special masters, the Commission's counsel moved to strike this allegation after learning that Zaring was White. The special masters granted the motion. Because this error was corrected before any evidence was presented, petitioner suffered no prejudice.

Petitioner next argues that he had to defend against allegations not included in the pleadings, specifically allegations that he had through deception obtained defendant Johnson's consent to the Norplant condition of probation, and that he improperly resorted to the use of court personnel in Metzger v. Kralowec, a case not assigned to him. It is true that neither allegation appeared in the pleadings. Petitioner, however, has not shown that he was surprised, disadvantaged, or otherwise legally prejudiced by these allegations.

Petitioner further contends he suffered prejudice from a "delay" by the Commission in bringing the proceedings to a hearing. A claim of undue delay requires a showing of actual prejudice. (See *Kloepfer* v. *Commission on Judicial Performance, supra,* 49 Cal.3d at p. 837.) Petitioner has failed to make such a showing. As to petitioner's claim that he was disadvantaged by lapses in his memory in two instances, both pertain to counts that were dismissed; thus, petitioner suffered no prejudice.

**(12)** Additionally, petitioner contends that at the hearing before the special masters, the Commission's attorneys "ambushed" him by not timely providing his counsel with notes of a discussion between one of the Commission's attorneys and witness Thomas Richey. Attorney Richey had witnessed an incident that led to a charge (later dismissed) that petitioner "showed a lack of judicial temperament and impartiality" by ordering Attorney Kralowec out of his courtroom. While discussing this matter with Commission examiner Dennis Coupe, Richey mentioned that a client of his wanted to file a complaint with the Commission about petitioner. Coupe sent

notes of this conversation to his cocounsel in Los Angeles. Cocounsel, for unknown reasons, never received the notes. At the time Coupe made his notes and sent them to his coexaminer, he did not consider the information about the incident described by Richey discoverable. As Coupe stated in his declaration: "The new incident was not relevant to any pending charge, and I did not see how any Richey testimony on it could come in as rebuttal to any existing charge." The notes were not provided to petitioner's counsel before the hearing.

The Commission's examiners decided to call Richey as a witness to the incident in which petitioner ordered Attorney Kralowec out of his courtroom. One day before he testified, Richey told Rene Sample, an associate of petitioner's counsel, that petitioner had "brutalized" one of his clients and suggested that petitioner's counsel not question him regarding any character issues. Sample told Richey not to worry because any unfavorable character evidence pertaining to petitioner would not be admissible. Sample's notes of the conversation included Richey's comment that 90 percent of petitioner's conduct was "a cut above that of other judges," but they did not mention the "brutalizing" incident involving Richey's client.

Before putting Richey on the witness stand, the examiners called Mary Rogers, a law partner of Richey's, as a witness to the incident in which petitioner had ordered Attorney Kralowec out of the courtroom. After Rogers's testimony, petitioner made her his own witness to present mitigation testimony. When Commission examiner Coupe realized that petitioner might also call Richey, who had not yet testified, as his own witness to present mitigation testimony, Coupe gave Stephen Cornwell, petitioner's counsel, a copy of the notes of his conversation with Richey. After the examiners had concluded their questioning of Richey, petitioner's attorneys did indeed call Richey as a witness for petitioner for the purpose of presenting mitigation evidence. Richey testified that 90 percent of petitioner's conduct was "a cut above" that of other judges. On cross-examination, when one of the examiners asked Richey about the remaining 10 percent, Richey mentioned that petitioner had "brutalized" a client of his. Petitioner's counsel did not object to the cross-examination, but he later moved to strike the testimony. The special masters denied the motion on a two-to-one vote.

Although Commission examiner Coupe did not make his notes pertaining to his conversation with Richey immediately available to petitioner's counsel, Coupe did provide them to petitioner's counsel before Richey testified as a mitigation witness for petitioner. After reviewing those notes, petitioner's counsel did not seek a continuance; in calling Richey as a mitigation witness

petitioner's counsel was under the mistaken belief that the unfavorable character evidence would not be admissible on cross-examination. We agree with the special masters' finding that there was "nothing improper in the conduct of the Examiners, nor anything in this incident to suggest bias on their part." As the special masters explained: "If there is any risk that the incident described by Richey might affect [petitioner] adversely, that risk was created by [petitioner's counsel's] decision to put Richey on as a character witness despite the concern he had expressed to [petitioner's] counsel that his direct examination might lead to the disclosure of the bad experience on cross-examination." Accordingly, we reject petitioner's contention that the Commission's attorneys "ambushed" him by not providing Coupe's notes of his conversation with Richey before the start of the hearing before the special masters.

Finally, petitioner argues that "the Commission's recommendation of public censure and its stated decision to 'limit' the value of mitigation evidence was an impermissible reaction to [his] vigorous legal defense in these proceedings." In support of his contention, petitioner cites the Commission's comment that he refused "to accept any responsibility for his conduct."[7] We reject petitioner's claim. Petitioner has not shown that the Commission penalized him for presenting a vigorous defense. Rather, the Commission's comment indicates that the Commission based its recommendation of public censure in part on petitioner's lack of remorse, as shown by his unwillingness to accept responsibility for clearly established misconduct such as "tricking" the defendant in People v. Hooks into waiving time for sentencing. (See *In re Lewallen* (1979) 23 Cal.3d 274, 281 [152 Cal.Rptr. 528, 590 P.2d 383, 100 A.L.R.3d 823] [trial court may not increase sentence in criminal case because the defendant refused a plea bargain but may consider information that came to court's attention during or after trial].) Lack of remorse is a relevant consideration in judicial discipline (see, e.g., *Gonzalez* v. *Commission on Judicial Performance, supra,* 33 Cal.3d 359, 377), in attorney discipline (see, e.g., *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 197 [242 Cal.Rptr. 196, 745 P.2d 917]), and in criminal sentencing (see, e.g., Cal. Rules of Court, rules 414(b)(7), 423(b)(3)).

## V. DISCIPLINE

**(13)** "In making our independent determination of the appropriate disciplinary sanction, we consider the purpose of a Commission disciplinary

[7]Petitioner further asserts that the Commission's statement that he refuses to accept any responsibility for his conduct is factually inaccurate because he did admit violating former canon 3A(6), prohibiting public comment on pending cases. Although he admits violating the canon, he does so in the context of his contention that the canon has no force because it is unconstitutional, a claim we rejected in part III.B.4., *ante*.

proceeding—which is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].)

**(14)** For the reasons given above, we conclude that in "tricking" defendant Hooks and his counsel into waiving time for sentencing, petitioner engaged in *willful misconduct in office*,[8] and that he engaged in *prejudicial conduct* when he attempted to influence the outcome of the civil action against Attorney Arthur Kralowec and when he publicly commented on the *Johnson* and *Zaring* cases while they were pending. We agree with the Commission that the appropriate discipline is public censure.

Petitioner insists that public censure is inappropriate because there were "abundant mitigating factors" presented through the testimony of 20 witnesses who described petitioner as industrious and innovative. Although such evidence may be taken "into account in considering the totality of the circumstances" (*Adams* v. *Commission on Judicial Performance, supra,* 10 Cal.4th at p. 912), it does not mitigate or excuse willful or prejudicial conduct (*ibid.*). The Commission did consider the evidence in mitigation, but it concluded that the seriousness of petitioner's misconduct warranted public censure, especially in light of his "refusal to accept any responsibility for his conduct."

According to petitioner, public censure in his case is improper because his misconduct is less egregious than that of judges publicly censured in previous cases. Proportionality review based on discipline imposed in other cases, however, is neither required nor determinative. The factual variations from case to case are simply too great to permit a meaningful comparison in many instances. "Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar." (*Furey* v. *Commission on Judicial Performance, supra,* 43 Cal.3d at p. 1318.)

In support of petitioner, the CJA argues against public censure because petitioner did not engage in repeated acts of misconduct. We disagree with the CJA that public censure is inappropriate in the absence of a pattern of repeated acts of misconduct. A level of discipline may be warranted either by the existence of a pattern of misconduct or by the seriousness of a single

[8]As discussed earlier, the Commission found petitioner's actions in the Hooks case to be prejudicial conduct rather than willful misconduct.

incident. (*Gubler* v. *Commission on Judicial Performance, supra,* 37 Cal.3d at p. 50 ["The fact that an act is an isolated incident does not preclude a determination of willful misconduct."]; see *Gonzalez* v. *Commission on Judicial Performance, supra,* 33 Cal.3d at p. 371.)

After careful consideration of the arguments by the Commission and by petitioner, we agree with the Commission's recommendation of public censure. In light of petitioner's lack of candor and integrity in obtaining the waiver in the Hooks case, his public comments on pending cases—in one instance *after* a written warning by the Commission that public comment on pending cases would violate former canon 3A(6)—and his attempt to influence the outcome of the civil proceeding against Attorney Arthur Kralowec, public censure is appropriate.

Accordingly, and by this order, Judge Broadman is publicly censured.

On September 2, 1998, the opinion was modified to read as printed above.

# PUBLIC ADMONISHMENT OF JUDGE B. J. BJORK

The Commission on Judicial Performance has ordered Judge B.J. Bjork publicly admonished for improper conduct within the meaning of Article VI, section 18(d), of the California Constitution, as set forth in the following statement of facts and reasons found by the Commission:

On March 25, 1994, Judge Bjork was contacted by the clerk of another judge. On behalf of the other judge, the clerk asked that a family member of the other judge, who had received a traffic citation, be permitted to attend traffic school. Judge Bjork rejected the clerk's request, believing she was asking him to dismiss the citation. The other judge then approached Judge Bjork personally and explained that the family member had previously failed to complete traffic school on the citation. He asked Judge Bjork to allow his relative to attend traffic school again and Judge Bjork did so. This appeared to be lenient and favorable toward the other judge's relative.

Judge Bjork's act of granting the other judge's family member traffic school a second time was done in the absence of any appearance or personal request by the family member, and was based on a request by a judicial colleague.

On March 30, 1994, Judge Bjork was approached by the same judge regarding another citation received by the same relative charging him with an inadequate muffler, driving while not in possession of a valid driver 's license and a failure to appear. The other judge indicated that he owned the car driven by his relative at the time the citation was received, and that he was responsible for the inadequate muffler and the relative's failure to appear. Based upon the other judge's statements and his representation that he would take care of the other counts charged in the citation, and without any proof of correction, Judge Bjork then dismissed the failure to appear charge, a misdemeanor. This action appeared to be lenient and favorable toward the other judge's relative.

Judge Bjork's conduct in these two cases was contrary to Canon 2A of the California Code of Judicial Conduct, which provides that a judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and Canon 2B, which provides that a judge should not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment, and that a judge should not convey or permit others to convey the impression that they are in a special position to influence them

Judge Bjork consented to public admonishment.

**PUBLIC ADMONISHMENT OF JUDGE RICHARD S. FLIER**

The Commission on Judicial Performance has ordered Judge Richard S. Flier publicly admonished for improper conduct within the meaning of Article VI, section 18(d) of the California Constitution, as set forth in the following statement of facts and reasons found by the Commission:

On October 21, 1993, Lindell Abercrombie, an African-American adult, appeared before Judge Flier at a hearing in People v. Abercrombie. The following occurred:

> PROSECUTOR [addressing Abercrombie]: Sir, you have a right to trial by court or jury on the charges and enhancements and probation ineligibility clauses charged against you. You understand that right?
> ABERCROMBIE: Yes.
> PROSECUTOR: Do you waive that right?
> ABERCROMBIE: Yes, I waive all of that. I waive all –
> COURT: Mr. Abercrombie, we will have to do this in an organized fashion. When he asks you a question, I want you to answer only that question. Got it? Okay. Good boy. Go ahead, please.

Following this incident, another African-American defendant sought to disqualify Judge Flier based on his remark to Mr. Abercrombie (People v. Perkins). The motion was granted. The First District Court of Appeal reversed on the ground that Mr. Abercrombie himself did not challenge Judge Flier. The court did not rule on the propriety of the judge's remark to Mr. Abercrombie:

> "Whether Judge Flier's use of the words 'good boy' in addressing an adult male of African-American descent was unseemly, rude, racially insensitive, or simply thoughtless, no objection or other comment was raised by Mr. Abercrombie or his counsel [at the time of the incident or later during the proceeding] . . . . In the context of the entire proceeding, the words 'good boy' would not lead a person to reasonably entertain a doubt about Judge Flier's ability to be impartial toward Mr. Abercrombie because of race or for any other reason."

23 Cal.App.4th 165, 171-72. The court noted that if anyone "believes that Judge Flier's comment warrants discipline, they may file a complaint with the Commission on Judicial Performance." 23 Cal.App.4th 165, 170 n. 4.

The Commission found that, based on the content of the remark and the reported tone used by Judge Flier, his reference to the in-custody adult defendant as a "good boy" manifested racial insensitivity.

The Commission also found that Judge Flier's remark damaged the respect for the judiciary held by members of the public who were present and, as such, was "conduct

prejudicial to the administration of justice that brings the judicial office into disrepute." Cal. Const., Art. VI, § 18(d). While notoriety is not required for "conduct prejudicial," Judge Flier's remark led to substantial adverse publicity that further diminished public confidence in the judiciary and brought the judiciary into disrepute. (See Wenger v. Commission on Judicial Performance (1981) 29 Cal.3d 615, 622 n. 4, quoting McCartney v. Commission on Judicial Qualifications (1974) 12 Cal.3d 512, 534.)

Judge Flier's conduct was contrary to these provisions of the California Code of Judicial Conduct: Canon 3 (avoiding the appearance of bias or prejudice), Canon 2 (preserving public confidence in the judiciary), and Canon 1 (maintaining high standards of conduct).

Judge Flier consented to public admonishment.

**PUBLIC ADMONISHMENT OF JUDGE JUDITH C. CHIRLIN**

The Commission on Judicial Performance has ordered Judge Judith C. Chirlin publicly admonished for improper conduct within the meaning of Article VI, Section 18 (d) of the California Constitution, as set forth in the following statement of facts and reasons found by the Commission:

In 1993, a jury trial in the case of Main Line Pictures, Inc. v. Kim Basinger,, et al. was conducted before Judge Chirlin.. The case involved an action for breach of contract based on defendant Basinger's alleged withdrawal from the making of Main Line's movie "Boxing Helena," which was completed and released with a different female lead. The case attracted significant media attention due to the subject matter and the celebrity of the defendant.

There was a verdict for plaintiff Main Line Pictures, Inc. on March 23, 1993. A notice of appeal was filed by defendants Kim Basinger,, et al. on July 16, 1993.

In August 1993, Judge Chirlin attended the premiere of the movie Boxing Helena at the invitation of the movie's producer, the plaintiff in Main Line Pictures, Inc. v. Kim Basinger,, et al. The premiere consisted of the showing of the movie followed by a reception at a Los Angeles restaurant. Judge Chirlin's attendance at the event was noted in the media.

The commission found that Judge Chirlin's attendance at the premiere was improper in that it contributed to an appearance of bias: due to Judge Chirlin's role in the trial of the lawsuit, the judge was seen as joining in the plaintiff's celebration of the movie's release and the plaintiff's celebration of its legal victory.

An appearance of bias or partiality erodes public confidence in and respect for the judiciary. Canon 2 of the Code of Judicial Conduct requires judges to avoid impropriety and the appearance of impropriety in all of the judge's activities; Canon 3 of the Code of Judicial Conduct requires that judges perform judicial duties without bias; Canon 4 requires that judges conduct even extrajudicial activities so the activities do not cast reasonable doubt on the judge's capacity to act impartially as a judge.

On January 2, 1994, while the appeal of judgment in Main Line Pictures! Inc. v. Kim Basinger,, et al. was still pending, an article appeared in the Los Angeles Times Sunday magazine about the case. Judge Chirlin was interviewed for the article and asked about allegations that her rulings during the trial exhibited bias against defendant Basinger. Judge Chirlin was quoted as saying, "The fact of the matter is that throughout the trial, a significant portion of my rulings were in favor of Kim."

The commission found that Judge Chirlin's comments to the reporter about the Main Line Pictures. Inc. v. Kim Basinger,, et al. case were in conflict with the provisions of Canon 3 of the Code of Judicial Conduct, which states in part:

"A judge should not make any public comment about a pending or impending proceeding in any court . . . "
At the time of the remarks, an appeal of the judgment was pending. The requirement that judges refrain from commenting about cases continues during any appellate process until final disposition.

In arriving at this disposition, the commission noted that the judge recognized and acknowledged the impropriety of her attendance at the premiere and of her public comments regarding the case.

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FOR RELEASE
June 3, 1996

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# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE CHARLES W. STOLL

The Commission on Judicial Performance has publicly admonished Judge Charles W. Stoll of the Los Angeles County Superior Court, North Central District. The admonishment is attached.

The Commission is composed of six public members, three judges, and two lawyers. The Chairperson is the Honorable William A. Masterson of the Court of Appeal, Second Appellate District in Los Angeles.

# PUBLIC ADMONISHMENT OF JUDGE CHARLES W. STOLL

The Commission on Judicial Performance has ordered Judge Charles W. Stoll publicly admonished for improper conduct within the meaning of Article VI, Section 18 (d) of the California Constitution, as set forth in the following statement of facts and reasons found by the Commission:

1. Judge Stoll has failed to disqualify himself in cases in which the Walt Disney Company was a litigant although his disqualification was required, based upon his ownership of 1000 shares of Disney stock valued at approximately $45,000. Code of Civil Procedure section 170.1(a)(3) provides that a judge shall be disqualified if the judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding, and section 170.5(b) provides in pertinent part that "'financial interest' means ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of one thousand five hundred dollars ($1,500)." At the time of the judge's conduct, Canon 3E of the California Code of Judicial Conduct provided that a judge "should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned or in a proceeding in which disqualification is required by law."

In Boettcher v. Disney, et al., No. EC 01461, Judge Stoll in 1995 heard and granted a summary judgment motion in favor of defendant Disney. Judge Stoll heard and orally granted the motion on January 27, 1995. On February 1, 1995, after being advised that the plaintiff had filed for bankruptcy protection on January 31, 1995, Judge Stoll signed a written order granting the summary judgment motion and awarding costs to defendant Disney. Judge Stoll dated the order January 27, 1995; the January 27, 1995 date was also file-stamped upon the order.

In Wethington-Everist v. Cuaron, et al., No. EC 009570, on March 5, 1993, Judge Stoll granted defendant Disney's motion to compel discovery and defendant Disney's request for sanctions of $750 against the plaintiff. On May 7, 1993, Judge Stoll granted defendant Disney's motion to dismiss the plaintiff's case based upon the plaintiff's failure to comply with prior orders.

In Gonzales v. Disney, No. EC 001852, on July 20, 1992, Judge Stoll ordered plaintiff's counsel to pay $250 in sanctions for failure to appear at a status conference and scheduled a hearing on an order to show cause re dismissal for September 1, 1992. On December 1, 1992, after the plaintiff and plaintiff's counsel had failed to appear for the hearing on the order to show cause, Judge Stoll entered judgment dismissing the plaintiff's complaint with prejudice.

In Tripp v. Disney, No. EC 00496, on December 14, 1992, Judge Stoll dismissed the plaintiff's complaint when the plaintiff and plaintiff's counsel failed to appear for a status conference. On January 22, 1993, Judge Stoll heard and granted a motion to vacate the dismissal. On April 27, 1993, Judge Stoll ordered the case transferred to the Burbank Municipal Court on the basis of his determination that the amount in controversy was below the jurisdictional limit for superior court.

The commission found that Judge Stoll's explanation that he had failed to familiarize himself with the provisions of Code of Civil Procedure Section 170.5(b) served to aggravate, rather than mitigate, his misconduct in failing to disqualify.

2. On January 17, 1995, and February 3, 1995, Judge Stoll wrote two letters on court letterhead to a collection service regarding a claim against a member of the judge's family which became the subject of litigation, in an effort to influence the recipient. Judge Stoll's conduct was contrary to Canon 2B of the Code of Judicial Conduct, which at the time of the judge's conduct provided that a judge "should not lend the prestige of judicial office to advance the private or personal interests of the judge or others...."

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FOR RELEASE
July 29, 1996

# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE STEPHEN DREW

The Commission on Judicial Performance has publicly admonished Judge Stephen Drew of the Tulare County Municipal Court, Dinuba Division. The admonishment is attached.

The Commission is composed of six public members, three judges and two lawyers. The Chairperson is the Honorable William A. Masterson of the Court of Appeal, Second Appellate District in Los Angeles.

# PUBLIC ADMONISHMENT OF JUDGE STEPHEN DREW

The Commission on Judicial Performance has ordered Judge Stephen Drew publicly admonished for improper action pursuant to Article VI, Section 18(d) of the California Constitution. In determining that public admonishment and not a more severe sanction is the appropriate disposition in this matter, the commission has taken into account reports from individuals whose recent experiences with Judge Drew have led them to the view that there has been substantial improvement in his judicial performance, as well as Judge Drew's assurance that he will refrain from improper conduct in the future.

The facts and reasons giving rise to this public admonishment are as follows:

1. In 1992 Judge Drew denied a defendant his right to appointed counsel after using improper criteria for determining whether he was indigent. In November of 1992, in *People* v. *Lewis*, Judge Drew refused to appoint counsel for an unemployed construction worker who indicated that he was not working and was living with another person who was supporting him, on the ground that the defendant was potentially employable. Rather than appoint counsel, Judge Drew ordered Mr. Lewis to apply for work so that he might be able to retain private counsel. When Mr. Lewis later failed to appear in court for a scheduled pretrial conference, Judge Drew issued a bench warrant, and Mr. Lewis was remanded to custody. After Mr. Lewis was taken into custody, Judge Drew again improperly refused to appoint counsel for him.

Although judges have considerable discretion in the determination of a defendant's ability to hire private counsel, Judge Drew should have known that denying defendants appointed counsel based upon the ability of others to pay for their counsel, or upon the possibility of future employment, was improper. The constitutional right to counsel at all stages of criminal proceedings is fundamental and not subject to reasonable differences of opinion. Moreover, once a defendant is in custody, the ability to find employment ceases. (See *In re Smiley* (1967) 66 Cal.App.2d 606.)

Judge Drew's conduct was inconsistent with Canon 2A of the Code of Judicial Conduct, which at the time of the judge's conduct provided that a judge "should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

2. In 1992, Judge Drew acted unjudicially in handling peremptory challenges under Code of Civil Procedure Section 170.6.

For example, in December of 1992, in the *Lewis* case referred to above, the public defender appeared for Mr. Lewis after he was taken into custody; the public defender filed a peremptory challenge of Judge Drew under Code of Civil Procedure Section 170.6. Judge Drew refused to honor this disqualification and ordered it "unfiled" because he had not allowed appointment of the public defender, despite the public defender's authority to represent the in-custody defendant.

In *People* v. *Williams*, Judge Drew cited a private defense attorney for contempt based on failure to appear for confirmation of a misdemeanor jury trial, even though the attorney had another attorney appear on his behalf. The cited attorney filed a peremptory challenge under Code of Civil Procedure section 170.6 against Judge Drew to disqualify him from hearing the underlying criminal case. Judge Drew subsequently denied the challenge as untimely and dismissed the contempt charge, but ordered a hearing on sanctions against the attorney. The following day, the attorney obtained a stay order against Judge Drew proceeding with the underlying jury trial. While the stay was under review, Judge Drew had court staff attempt to contact the Superior Court judge who issued the stay regarding legal support for his actions. The same attorney subsequently filed a challenge for cause against Judge Drew pursuant to Code of Civil Procedure section 170.1. After a denial by Judge Drew, another judge granted the challenge and disqualified Judge Drew from hearing the case. Judge Drew, although he had no standing to do so, then improperly sought to disqualify the judge who had been assigned to hear the sanctions matter, thereby heightening the impression that he had become personally embroiled in the proceeding.

In *People* v. *Contreras*, after a peremptory challenge under Code of Civil Procedure Section 170.6 was filed against Judge Drew, the judge continued to handle the arraignment of the four defendants in the case over their objection. Judge Drew entered not guilty pleas before assigning the matter to another judge. Judge Drew's actions in the *Contreras* case interfered with the defendants' rights to seek a continuance and to file a demurrer to the complaint, and was subsequently vacated by a reviewing judge.

Judge Drew's actions as described above were contrary to Canon 3E of the California Code of Judicial Conduct, which at the time of the judge's conduct provided: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, or in a proceeding in which disqualification is required by law." (See also *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 797: "... it goes without saying that as a judge, petitioner should have known the proper method for handling a motion for disqualification."). In addition, Judge Drew's actions were contrary to Canon 2A of the California Code of Judicial Conduct, which at the time of the judge's conduct provided that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

3. In certain matters involving the filing of peremptory challenges, Judge Drew has departed from his usual practice of calling cases handled by private counsel at the beginning of the calendar, thus deliberately causing delays for attorneys who have filed challenges. For example, in *People* v. *Haupt*, Judge Drew accepted the filing of a peremptory challenge and thereafter presided in proceedings to set later hearings in the case. In handling these subsequent proceedings, Judge Drew delayed calling the case, contrary to the usual practice in his court, thus giving the impression that he was willfully retaliating for the filing of the challenge.

Judge Drew's actions, as described above, were contrary to Canon 2A, above, and Canon 3, which at the time of the judge's conduct provided that a judge "should perform the duties of judicial office impartially...." See also, California Judicial Conduct Handbook, 120.900 (citing 1989 Report of Commission on Judicial Performance, p.21, #H).

4. Judge Drew has displayed bias against attorneys who have filed peremptory challenges against him, and has appeared to retaliate against those attorneys, by barring them from areas of the courthouse near his chambers open to other attorneys. For example, in a case in which attorney Tom McGuire requested a continuance, Judge Drew indicated in an informal discussion with the attorney that he did not feel that the request was adequately supported and would not grant it. After the attorney filed a peremptory challenge against Judge Drew, which resulted in a new date being set for proceedings in the case, Judge Drew denied the attorney equal access to the area near chambers for several weeks when he appeared on other matters. Judge Drew's actions displayed bias and appeared to be retaliatory.

Judge Drew's conduct in this regard was contrary to Canon 2A, quoted above.

In mitigation, Judge Drew appears to have ceased any retaliatory practices and has assured the commission of his commitment to refrain from impropriety in handling and reacting to challenges.

5. Judge Drew has appeared to exhibit animosity toward the public defender's office and certain attorneys in that office.

Judge Drew, while not acting in a judicial capacity, has made improper, derogatory comments about the public defender's office and attorneys in that office. For example, in December of 1992, Judge Drew made disparaging remarks about a deputy public defender to another attorney, while watching the deputy public defender present argument to another judge in the *Lewis* case referred to above. In the same case, Judge Drew appeared to display personal embroilment and animosity toward the public defender's office by writing to the public defender and accusing his office of taking the case for improper reasons.

Judge Drew's conduct as described above constituted an improper display of personal animosity toward the public defender's office and embroilment in matters handled by that office. This conduct was contrary to Canon 2A of the California Code of Judicial Conduct.

6. In one matter involving the imposition of sanctions, Judge Drew acted in excess of his judicial authority, contrary to Canon 2A of the Code of Judicial Conduct.

This public admonishment is being issued with Judge Drew's consent.

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FOR RELEASE
November 25, 1996

# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE THOMAS A. SMITH

The Commission on Judicial Performance has publicly admonished Judge Thomas A. Smith of the El Dorado County Municipal Court, Cameron Park Division. The admonishment is attached.

The commission is composed of six public members, three judges and two lawyers. The Chairperson is the Honorable William A. Masterson of the Court of Appeal, Second Appellate District in Los Angeles.

**PUBLIC ADMONISHMENT OF JUDGE THOMAS A. SMITH**

The Commission on Judicial Performance has ordered Judge Thomas A. Smith publicly admonished for improper actions within the meaning of Article VI, section 18 of the California Constitution, as set forth in the following statement of facts and reasons found by the commission:

Judge Smith abused his judicial office in 1995 when he utilized the court's computer to obtain and disclose confidential information from computerized records of the Department of Motor Vehicles for a friend.

The California Vehicle Code provides penalties (a fine not exceeding $5,000 or imprisonment in the county jail not exceeding one year, or both and civil penalties up to $100,000) for improper disclosure of this information.

The judge's actions on behalf of his friend were improper and unlawful, and constituted disregard of the Code of Judicial Conduct in effect in 1995: Canon 2 required that "A judge should avoid impropriety and the appearance of impropriety in all of the judge's activities." Canon 2A provided: "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B provided: "A judge should not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. ..."

The Supreme Court in McCullough v. Commission on Judicial Performance (1989) 49 Cal.3d 186 stated, "Using the power of the bench to benefit a friend is a casebook example of wilful misconduct" (at p. 193).

In arriving at this disposition, the commission took into consideration that the judge's conduct was limited to a single instance, the judge candidly admitted wrongdoing and expressed recognition that his action demonstrated "a lapse of good judgment" and he said he has "vowed" to never again access Department of Motor Vehicles information for an unofficial purpose.

The vote of the commission on issuance of the public admonishment was 9 ayes and 1 no (one member was absent).

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FOR RELEASE
January 22, 1997

# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE ALEXANDER H. WILLIAMS, III

The Commission on Judicial Performance has publicly admonished Judge Alexander H. Williams, III of the Los Angeles County Superior Court. The admonishment is attached.

The Commission is composed of six public members, three judges and two lawyers. The Chairperson is the Honorable William A. Masterson of the Court of Appeal, Second Appellate District in Los Angeles.

**PUBLIC ADMONISHMENT OF JUDGE ALEXANDER H. WILLIAMS, III**

The Commission on Judicial Performance has ordered Judge Alexander H. Williams, III publicly admonished for improper action within the meaning of Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission.

On November 17, 1995, Judge Alexander H. Williams used profanity, made a vulgar gesture and threatened retaliation toward counsel in a case pending before the judge. In the case of *Rico v. Nunez*, during a break in a pretrial settlement conference, Judge Williams left the courtroom and approached attorney Gilberto Moreno, representing cross-complainant and cross-defendant Los Angeles County Chicano Employees Association, in the hallway outside the entrance to the courtroom, where others were present and observed Judge Williams' conduct. Using a loud and angry voice, Judge Williams stated words to the effect of: "Your demand for money is bullshit…If you keep making this demand, you can stick it right here," while gesturing toward his buttocks with rolled up paper. Some of the plaintiffs were seated behind attorney Moreno when the judge made his remarks and gesture. The attorney for plaintiffs, Rees Lloyd, then arrived and Judge Williams repeated to him that the demand for money was "bullshit." Judge Williams returned to the courtroom, followed by attorneys Moreno and Lloyd. Entering the bar area, Judge Williams turned, pointed to Mr. Lloyd, who was in the gallery with others present in the courtroom, and said in an angry voice: "If you think you are going to get money out of this case, you've got shit for brains. If you want war, you'll get war. And if you still think you're going to get money, I've got a Brooklyn Bridge I can sell you." Judge Williams went into chambers, then emerged, apologized to the attorneys for his language, and stated words to the effect of: "No jury I know of is going to give you money for this case. I'll set it for 1999 and make sure it goes nowhere. You did not want to settle, so now you are my enemy." Judge Williams then indicated an intent to sanction plaintiffs' counsel if the plaintiffs lost at trial and told Mr. Lloyd that he had no respect for him. Others were present in the courtroom during these remarks.

On the next business day, November 20, attorneys Lloyd and Moreno appeared in Judge Williams' court and filed motions to disqualify him. Judge Williams suggested that the motions be withdrawn. After the attorneys declined to do so, Judge Williams recused himself and stated words to the effect of: "Well, now I don't have anything to do with your case and you can leave. I just told the truth. This case is worth nothing and now you'll get a judge who's been disqualified three times from other cases and I hope you enjoy that environment. You will not find another judge who will show the patience and give you the time that I did." When Mr. Lloyd attempted to speak, Judge Williams responded to the effect: "This is my courtroom and you have nothing to say here. Get out." Mr. Lloyd then stated: "You said, 'This case is not about money and you've got shit for brains.' We weren't asking for money." Judge Williams responded, "Well, I was half right."

Judge Williams' conduct, as described above, involved vulgar, abusive and demeaning language toward attorneys and constituted an improper display of personal hostility and embroilment. (See, e.g., *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 789, 797 [giving the "finger" to a defendant as constituting conduct prejudicial to the administration of justice that brings the judicial office into disrepute; making a "raspberry" sound, during witness testimony, as willful misconduct].)

Judge Williams' abusive and hostile actions toward counsel reflected adversely on his judicial office. In accordance with the California Code of Judicial Conduct in effect at the time of Judge Williams' conduct, judges are expected to be impartial, patient, dignified and courteous when dealing with litigants and lawyers on matters pending before them (canon 3B). Even quasi-judicial activities must be conducted in a manner that does not demean the judicial office or interfere with the proper performance of judicial duty (canon 4A).

In determining that public admonishment is the appropriate disposition in this matter, the commission has taken into account representations from individuals whose recent experiences with Judge Williams have led them to the view that there has been substantial improvement in his judicial demeanor and temperament, as well as Judge Williams' own assurances that he has taken corrective measures to ensure that he will refrain from improper conduct in the future.

The vote of the commission on issuance of the public admonishment was 7 ayes and 0 noes (three members were absent and one did not participate).

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FOR RELEASE
January 22, 1997

# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE SIDNEY P. CHAPIN

The Commission on Judicial Performance has publicly admonished Judge Sidney P. Chapin of the Kern County Superior Court. The admonishment is attached.

The Commission is composed of six public members, three judges and two lawyers. The Chairperson is the Honorable William A. Masterson of the Court of Appeal, Second Appellate District in Los Angeles.

**PUBLIC ADMONISHMENT OF JUDGE SIDNEY P. CHAPIN**

The Commission on Judicial Performance has ordered Judge Sidney P. Chapin publicly admonished for improper action within the meaning of Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission.

On September 17, 1993, Judge Sidney P. Chapin presided over a one-day bench trial in *Aggen* v. *City of San Buenaventura*, which consolidated three petitions for mandamus by over 100 Ventura residents. The case, involving the residents' challenge to the validity of a tax assessment district, was a matter of considerable local interest. To accommodate the large audience for the bench trial, that proceeding was moved to the Board of Supervisors' meeting room. At the conclusion of the trial, the matter was taken under submission. Judge Chapin issued a tentative decision on December 13, 1993. By January 13, 1994, he had received from the parties a proposed statement of decision and judgment, and objections thereto.

For more than one year, from January 13, 1994 until April 24, 1995, Judge Chapin took no action in the case. On April 24, 1995, Judge Chapin issued an order setting a hearing for June 9, 1995 on the objections to the proposed decision. The hearing took place on June 9 as scheduled. Like the bench trial, it was heavily attended. On June 9, Judge Chapin told counsel for the parties that his decision would issue in 30 days. Shortly before the thirtieth day, under the headline "Judge Chapin Decision Expected Next Week," a local newspaper reported that "Keys waterfront property owners are eagerly anticipating a legal decision" by Judge Chapin, who had "announced that he would make his decision within 30 days" of the June 9 hearing.

No further proceedings were held after the hearing on June 9, 1995. Beginning in the fall of 1995, a paralegal who was assisting petitioners' counsel periodically inquired of court staff about the status of the case. A letter of April 18, 1996, from the Commission on Judicial Performance to Judge Chapin, advised him of a report that no decision had issued in *Aggen* and requested his comment. On April 30, 1996, over ten months after Judge Chapin announced that his decision would issue in 30 days, he issued his final decision and judgment.

In addition to *Aggen* v. *City of San Buenaventura*, Judge Chapin also was assigned to *Adams* v. *City of San Buenaventura*, an action for damages by some Ventura residents which involved some of the issues raised in *Aggen*. Since the outcome in *Aggen* would affect the *Adams* case, that case was stayed, pursuant to counsel's stipulation, pending a final decision in *Aggen*. Judge Chapin's delay in issuing his decision in *Aggen* thereby also delayed the *Adams* litigation.

Canon 3B(8) of the Code of Judicial Conduct requires judges to "dispose of all judicial matters fairly, promptly and efficiently." The Commentary to that canon states, in part:

> A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. . . . Prompt disposition of the court's business requires a

> judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to require that court officials, litigants, and their lawyers cooperate with the judge to that end.

(Emphasis added.)

The delays by Judge Chapin, from January 13, 1994 to April 24, 1995 and from June 9, 1995 to April 30, 1996, exceeded two years. As of January 13, 1994, Judge Chapin was in possession of his tentative decision, a proposed statement of decision and judgment, and written objections. His delays in scheduling the hearing on the objections and in issuing his decision after that hearing were inordinate. In determining that public admonishment is the appropriate disposition in this matter, the commission took into account the length of the delays and the fact that the decision in question would affect the rights of numerous individuals in two cases.

The vote of the commission on issuance of the public admonishment was 6 ayes and 2 noes (three members were absent).

FILED

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Commission on
Judicial Performance

BEFORE THE STATE OF CALIFORNIA

COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| Inquiry Concerning Judge Elvira S. Austin,<br><br>No. 140 | DECISION AND ORDER OF PUBLIC ADMONISHMENT |

This is a disciplinary matter concerning Elvira S. Austin, Judge of the Los Angeles County Municipal Court. The Commission has concluded that a public admonishment is appropriate.

Formal proceedings in this matter were commenced with the filing of the Notice of Formal Proceedings dated December 11, 1996, and Judge Austin filed a verified answer. Special masters were appointed pursuant to Rule 121(b) of the Commission's Rules of Procedure.[1] Pre-trial proceedings were completed and the matter was set for hearing to commence on September 23, 1997.

Prior to the commencement of the hearing, counsel advised the Commission that Judge Austin had agreed to disposition on the following terms:[2]

"Pursuant to Rules of the Commission on Judicial Performance, rule 127, Respondent and Trial Counsel submit the following stipulation in Inquiry Concerning Judge Elvira S. Austin, No. 140:

[1] The special masters are Justice Rodney Davis of the Court of Appeal, Third Appellate District, Judge Doris L. Shockley of the Yolo County Superior Court, and Judge Sandra Butler Smith of the San Joaquin County Municipal Court in Stockton.

[2] Judge Austin is represented by Arthur Close, Esq., and Trial Counsel for the Commission is Jack Coyle, Esq.

Served: 10/1/97 FAX

"During the evening hours of May 16, 1995, and the early morning hours of May 17, 1995, Judge Austin attempted to obtain the release from custody of a personal friend in a series of telephone calls to law enforcement agencies.

"In the calls, Judge Austin initially denied she was attempting to use her office, but then repeatedly invoked her judicial position and appeared to order her friend's release on her friend's own recognizance so that her friend would not have to post funds for bail. The judge's statements during the conversations which created this appearance included the following:

> ...I want to know what order I need to give to release her...I want to order her released...
>
> Why is that? ...Why is it that we cannot order a release over the telephone?
>
> Well, who, who is on staff right now that is higher than you that will take a judicial order?
>
> If I give you a judicial order right now, you are disobeying it.
>
> ...what does it take [for you] to obey a judicial order...?
>
> ...a judge is giving you an order....
>
> I am the proper authority.
>
> So, what you're saying is you are disobeying a court order. That's what you're saying...
>
> Well, who is your supervisor? Where else can I call?
>
> ...well, who is the authority that will take my order?...Knowing that you're talking to a judge, now what do we do next?...

"Judge Austin's conduct was contrary to canon 2A of the California Code of Judicial Conduct, which provides that a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and canon 2B, which provides that a judge should not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment, and should not lend the prestige of judicial office to advance the private or personal interests of the judge or others.

"'Using the power of the bench to benefit a friend is a casebook example of willful misconduct.' *McCullough* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 186.

"In mitigation, this was an isolated incident and the judge recognizes the impropriety of her actions.

"The parties agree that based upon the foregoing, Judge Austin shall be publicly admonished."

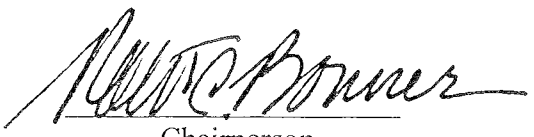
The foregoing stipulation was signed by Judge Austin and her counsel, and by Trial Counsel.

DISCIPLINE

The Commission accepts the forgoing stipulation and concurs that, in the circumstances of this case, disposition by an order of public admonishment is appropriate. The Commission's vote was 11 to 0.

This decision and order shall constitute the order of public admonishment.

Dated: September 23, 1997



Chairperson

Commission members Robert C. Bonner, Esq., Mr. Alan W. Barcelona, Ms. Ophelia Basgal, Hon. Lois Haight, Hon. Daniel M. Hanlon, Ms. Eleanor Johns, Patrick M. Kelly, Esq., Hon. Vincent J. McGraw, Ms. Harriet Salarno, Donald E. Vinson, Ph.D., and Ms. Pearl West voted for the public admonishment.

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FOR RELEASE
December 1, 1997

# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE RONALD MACIEL

The Commission on Judicial Performance has publicly admonished Judge Ronald Maciel of the Kings County Municipal Court, Lemoore Division. The admonishment is attached.

The commission is composed of six public members, three judges and two lawyers. The Chairperson is Robert C. Bonner, Esq. of Los Angeles, California.

**PUBLIC ADMONISHMENT OF JUDGE RONALD MACIEL**

The Commission on Judicial Performance has ordered Judge Ronald Maciel publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

On March 28, 1996, Judge Maciel presided over the arraignment of defendant Kevin Galik in the capital murder case of *People* v. *Galik*, case number L965205. On this date, Judge Maciel appointed contract attorney Marianne Brock to represent Galik and continued the arraignment to May 17, 1996. Following the March 28, 1996 hearing, Judge Maciel, who was then the presiding judge, assigned the *Galik* case to Municipal Court Judge John O'Rourke.

On April 1, 1996, Judge Maciel initiated a telephone conversation with Ms. Brock. Judge Maciel advised Ms. Brock that he had assigned the *Galik* case to Judge O'Rourke and discussed with her the option of filing a peremptory challenge against Judge O'Rourke. In this conversation, Judge Maciel also suggested to Ms. Brock that she prepare an order for investigator funds and consider a polygraph test. During the discussion of the peremptory challenge, Judge Maciel erroneously told Ms. Brock that the statutory period for filing the challenge was thirty days.

On April 2, 1996, Judge Maciel attempted to reach Ms. Brock by telephone after he realized that he had erroneously advised her concerning the statutory period for filing a peremptory challenge. Judge Maciel was unable to reach Ms. Brock directly and instead left the court's telephone number on her pager. Judge Maciel instructed a clerk to tell Ms. Brock when she called: "It's ten days, not thirty." When Ms. Brock returned the page that day, she was advised of this message by a clerk.

On April 4, 1996, Judge Maciel initiated another telephone conversation with Ms. Brock. Judge Maciel engaged Ms. Brock in a discussion concerning a hearing in the *Galik* case that Ms. Brock had calendared for April 5, 1996. Judge Maciel also asked Ms. Brock if she had applied for investigator expenses and made suggestions to her relating to defense strategies.

Judge Maciel did not disclose any of the above communications with Ms. Brock to the district attorney's office.

On April 5, 1996, the *Galik* case was reassigned to Judge Maciel after Judge O'Rourke was disqualified pursuant to a peremptory challenge filed by Ms. Brock.

On May 6, 1996, the district attorney's office filed a Code of Civil Procedure section 170.1 motion to disqualify Judge Maciel for cause after learning of the undisclosed ex parte communications with Ms. Brock. On May 9, 1996, Judge Maciel filed a response to the motion in which he consented to the case being assigned to another judge. The *Galik* case was subsequently assigned to another judge.

Judge Maciel's conduct and the challenge for cause filed against him received substantial publicity.

The commission found that Judge Maciel's communications to Ms. Brock on April 1, 2, and 4 were improper. Canon 3B(7) prohibits a judge from initiating, permitting, or considering ex parte communications concerning a pending or impending proceeding. The California Supreme Court has found ex parte communications between a judge and an attorney to constitute conduct prejudicial to the administration of justice. See *Kennick* v. *Commission on Judicial Performance* (1990) 50 C.3d 297, 331-332; *Roberts* v. *Commission on Judicial Performance* (1983) 33 C.3d 739, 743-748. The Supreme Court has also found prejudicial conduct where a judge communicated with and provided legal assistance to attorneys concerning matters pending before other judges. See *Adams* v. *Commission on Judicial Performance* (1995) 10 C.4th 866, 906-908. The commission also found that Judge Maciel's conduct created, at a minimum, the appearance of a lack of impartiality and damaged public confidence in the judiciary. Canon 2A requires a judge to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The vote of the commission on issuance of the Public Admonishment was 7 ayes and 2 noes. The two commission members who voted against issuance of the public admonishment believed a more severe sanction was warranted.

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Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| INQUIRY CONCERNING JUDGE JAMES L. STEVENS, JR., NO. 143 | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |

This is a disciplinary matter concerning Judge James L. Stevens, Jr., of the Yolo County Superior Court. Formal Proceedings having been instituted, this matter is now before the Commission on Judicial Performance pursuant to Rule 127 of the Commission's Rules of Practice (discipline by consent).

## APPEARANCES

Trial counsel for the Commission on Judicial Performance are Jack Coyle and Valerie Marchant (San Francisco). Counsel for Judge Stevens are Mark S. Tratten and Ericksen, Arbuthnot, Kilduff, Day & Lindstrom (Sacramento).

## PROCEDURAL HISTORY

Formal proceedings were instituted in this matter by a Notice of Formal Proceedings dated October 30, 1997. The Notice sets forth three counts of misconduct pursuant to article VI, section 18 of the California Constitution.

After the Notice of Formal Proceedings had been executed, but before Judge Stevens formally appeared in this matter, counsel for the parties proposed a resolution of this matter whereby discipline no more severe than a public admonishment would be imposed as to certain charges, and private discipline would be imposed as to the remaining charge.

## FINDINGS OF FACT

In a verified statement, submitted in conjunction with the stipulation proposing resolution of this matter, Judge Stevens admits the truth of the charges set forth in the Notice, waives

:rved: 2/20/98 PM

review by the Supreme Court, states that he is not acting under duress, and consents to the sanction proposed. The parties' stipulation provides:

> Pursuant to Rules of the Commission on Judicial Performance, rule 127, Respondent and Trial Counsel submit the following stipulation in Inquiry Concerning Judge James L. Stevens, Jr., No. 143:
>
> 1. On June 14, 1996, regarding a pending case involving two female juveniles charged with battery on two teachers, Judge Stevens held an in-chambers conference with counsel prior to a disposition hearing for one of the juvenile defendants. During that in-chambers conference, Judge Stevens referred to the two female juveniles as "bitches." The juveniles were not present.
>
> The comment was in violation of the Code of Judicial Ethics, canon 3B(4), which requires a judge to be patient, dignified, and courteous to litigants and others with whom a judge deals in an official capacity, and canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> The remaining allegations in Count One of the Notice of Formal Proceedings will be dismissed.
>
> 2. On May 16, 1996, during a hearing in court, a male juvenile defendant became physically disruptive, overturned a table, and appeared to charge toward Judge Stevens. The juvenile was forcibly restrained by a bailiff. During a recess after the hearing, Judge Stevens commented that the juvenile did not have a "Chinaman's chance" of reaching him.
>
> The comment was in violation of the Code of Judicial Ethics, canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> The allegation in Count Two of the Notice of Formal Proceedings that Judge Stevens violated canon 3B(5) is dismissed.
>
> In 1994, Judge Stevens was publicly reproved by the Commission for improper and offensive remarks in court. In mitigation, Judge Stevens has acknowledged that the use of the term "bitches" was improper, and that he is now aware that "Chinaman's chance" may be considered offensive and has agreed to refrain from use of such terms. Judge Stevens intends to retire from the bench in May 1998.
>
> The parties agree that based upon the foregoing, Judge Stevens shall be publicly admonished.

The Commission acknowledges Judge Stevens' admission that the forgoing facts are true, and it therefore adopts the forgoing as setting forth its findings of fact.

In determining the level of discipline, the Commission notes that Judge Stevens was the subject of a prior public reproval by the Commission for inappropriate, abusive, and demeaning comment and actions towards litigants and court personnel.

## CONCLUSIONS OF LAW

The Commission therefore concludes that in the matter presently before the Commission Judge Stevens committed conduct prejudicial to the administration of justice in Counts One and Two, and that such inappropriate and demeaning remarks by a judge constitute violations of Canons 2A and 3B(4), as set forth above.

## DISCIPLINE

In submitting this matter pursuant to Rule 127, the parties have agreed that, if approved, the Commission will impose discipline no more serious than public admonishment.[1] If the Commission were to reject the proposed disposition, the formal proceedings already instituted would continue for further hearings and findings of fact. Once the special masters have made initial findings and submitted their report, the matter would return to the Commission for further deliberations. At that time, the Commission would be free to impose any sanction that it concluded was appropriate, including removal from office.

The Commission has determined that further proceedings are not warranted on the facts of this case. Judge Stevens is retiring and will leave the bench before formal proceedings could be concluded. It appears to the Commission that the timely imposition of a public admonishment, and private discipline as to the remaining count, would best serve the public interest.

The Commission's vote was 7 to 1, with one Commissioner recused.

This decision and order shall constitute the order of public admonishment.

Dated: January 30th, 1998



Chairperson

[1] Other than removal, the alternatives available to the Commission in a disciplinary proceeding include dismissal (with or without an advisory letter), issuance of a private admonishment, issuance of a public admonishment, issuance of a public censure, and removal from office.

Commission members Robert C. Bonner, Esq., Ms. Ophelia Basgal, Hon. Lois Haight, Hon. Daniel M. Hanlon, Patrick M. Kelly, Esq., Hon. Vincent J. McGraw, and Donald E. Vinson, Ph.D., voted for the public admonishment. Commission member Ms. Pearl West voted against public admonishment. Commission member Ms. Harriet Salarno was recused and Commission members Mr. Alan W. Barcelona and Ms. Eleanor Johns did not participate.

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FOR RELEASE
June 16, 1998

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# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE ROBERT H. OLIVER

The Commission on Judicial Performance has issued a public admonishment to Judge Robert H. Oliver of the Fresno County Municipal Court. The admonishment is attached.

The commission is composed of six public members, three judges and two lawyers. The Chairperson is Robert C. Bonner, Esq. of Los Angeles, California.

**PUBLIC ADMONISHMENT OF JUDGE ROBERT H. OLIVER**

The Commission on Judicial Performance has ordered Judge Robert H. Oliver publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

1. On October 4, 1996, Judge Robert Oliver took under submission certain motions pertaining to discovery in the misdemeanor criminal case of *People* v. *Wigand*. These motions were not decided until May 14, 1997, seven months later. During this time, Judge Oliver received letters dated October 25, 1996, December 18, 1996, January 6, 1997, and March 3, 1997 reminding him that the motions remained undecided. Judge Oliver also received verbal reminders that the motions remained undecided. Judge Oliver's delay was later determined to have resulted in a violation of the defendant's right to a speedy trial, which necessitated dismissal of the criminal charges against her.

2. On April 19, 1996, Judge Oliver took under submission demurrers in two misdemeanor criminal cases entitled *People* v. *Judy Wooldridge*. Judge Oliver did not rule on the demurrers until May 12, 1997, a delay of thirteen months.

3. While the *Wigand* and *Wooldridge* cases remained pending and undecided for longer than 90 days, Judge Oliver executed salary declarations under penalty of perjury stating that there were no cases before him which had remained pending and undecided for longer than 90 days, and continued to receive his judicial salary. (See California Constitution, Article VI, section 19 and Government Code section 68210.) Judge Oliver had received reminders that the *Wigand* case had been under submission in excess of 90 days when he executed some of these salary declarations.

Judge Oliver's failure to decide the *Wigand* and *Wooldridge* cases was contrary to Canon 3B(8) of the Code of Judicial Ethics, which requires that judges dispose of all judicial matters fairly, promptly and efficiently. While inordinate delay in decision-making is unacceptable in all cases, Judge Oliver's failure to promptly decide criminal cases pending before him was particularly egregious in light of the potential for harm to the parties and the public inherent in such delay. Judge Oliver's delay in the *Wigand* case was determined to have violated the defendant's right to a speedy trial, which necessitated dismissal of the case; that dismissal deprived the People, the defendant, and the public of an adjudication of criminal charges.

In mitigation, it was noted that Judge Oliver reported his delay in the *Wigand* matter to the commission.

The vote of the commission on issuance of the Public Admonishment was 6 ayes and 2 noes, and one recusal. (The two "no" votes favored private discipline.)

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FOR RELEASE
July 6, 1998

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# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE GREGORY M. CASKEY

The Commission on Judicial Performance has issued a public admonishment to Judge Gregory M. Caskey of the Shasta County Superior Court. The admonishment is attached.

The commission is composed of six public members, three judges and two lawyers. The Chairperson is Robert C. Bonner, Esq. of Los Angeles, California. Presently, one public member position on the commission is vacant.

**PUBLIC ADMONISHMENT OF JUDGE GREGORY M. CASKEY**

The Commission on Judicial Performance has ordered Judge Gregory M. Caskey publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

In November 1997, Judge Gregory M. Caskey was regularly assigned to handle juvenile dependency matters. On the morning of November 6, 1997, Judge Caskey sent a message by electronic mail to an attorney who regularly appeared before him on those matters. The e-mail message concerned a case then pending before the judge, in which the attorney was appearing. The message read in part:

> I am considering summarily rejecting [the father's attorney's] requests. Do you want me to let [the father's attorney] have a hearing on this, or do we cut [the attorney] off summarily and run the risk the third DCA reverses? . . . . I say screw [the father] and let's cut [the attorney] off without a hearing. O.K.? By the way, this message will self-destruct in five seconds…

Later that morning, the attorney sent the following e-mail reply:

> Your honor, I don't feel comfortable responding ex-parte on how you should rule on a pending case.

Two hours later, the judge sent an e-mail response which read: "chicken."

On November 12, 1997, Judge Caskey sent the attorney another e-mail message. In this message, he solicited the attorney's views on the advisability of having children in court. He offered the attorney the opportunity to give an "unofficial" view. The judge continued:

> On the other ex parte matter, I have decided to allow a hearing to be set on the 388 motion and not summarily deny it at this point. I think there is enough being raised in the psychiatrists [sic] declaration to support a hearing and that I would risk more problems if I summarily denied it. I'll set the hearing as soon as possible of course so we can move forward.

Later that day, the attorney provided a lengthy response, giving the attorney's views on the positive and negative aspects of having children in court, such as the obvious benefit of having children in court so that their attorney could talk to them there, if the attorney had not done so before the hearing. The attorney continued:

> As you know, [the attorney regularly appearing for children] doesn't even try to talk to the kids until after dispo, which in my mind is too late. The attorney should talk to them prior to juris to be sure the allegations are true and that the dispo orders are appropriate. Also, the kids themselves often have ideas about possible relative placements. Since [the attorney] doesn't speak to his clients, perhaps bringing the kids in to court would ensure he talks to them. Of course it would be a lot easier to just insist he talk to the kids before every hearing rather than dragging the kids in. If we were going to bring kids to court, I think the detention hearing would be a logical hearing, since there's no time to interview the kids before hand [sic] and [the attorney] could get input from the kids then. My druthers would be that [the attorney] do his job better, and avoid bringing in the kids unless they're testifying.

Judge Caskey's ex parte communications with an attorney about a case then pending before him, in which the attorney was appearing, was contrary to Canon 3B(7) of the Code of Judicial Ethics, which generally prohibits ex parte communications, and was contrary to Canon 2A, which provides that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The content of the judge's first message, in particular, suggested prejudgment of a matter before him; Judge Caskey's use of the words "we" and "let's" and his solicitation of the attorney's advice on how to handle the matter procedurally also suggested that he had aligned himself with one side in the proceeding. The language used in reference to the father gave the appearance of bias and animus, and was entirely inconsistent with a judge's obligations to be impartial and to maintain the dignity of the court. In his one-word response ("chicken") to the attorney's refusal to communicate about a pending case, the judge displayed a joking attitude toward the attorney's ethical concerns.

Judge Caskey's ex parte communications with the attorney about the perceived shortcomings of other attorneys appearing before the judge on dependency cases and about procedural aspects of other cases were also problematic. Such communications contributed to an impression that the judge was aligned with one side in matters before him.

In mitigation, the commission noted that Judge Caskey has a long record of distinguished judicial service and service in judicial education, that the judge has expressed remorse, and that the judge has no record of prior discipline.

The vote of the commission on issuance of the Public Admonishment was 8 ayes and 0 noes.

[No. 142. Oct. 23, 1998.]

# INQUIRY CONCERNING JUDGE CHRISTOPHER J. SHELDON

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance publicly admonished the judge. The commission concluded that the judge committed prejudicial misconduct by abandoning his judicial duties. The judge decided that it would not be necessary for him to be on the bench to handle each case during the misdemeanor pretrial calendar. The judge asked the attorneys to handle routine things and to let him know if they needed him. The large majority of cases on the pretrial calendar were adjudicated in the judge's absence and without his participation. The judge also allowed his clerk to routinely stamp his signature on plea forms indicating that defendant had been advised of and waived his or her constitutional rights when the judge had not reviewed the form, questioned the defendant, or made the purported findings. The judge's conduct in managing his pretrial calendar was unjudicial and violated Cal. Code Jud. Ethics, canons 1, 2A, and 3B(1). In addition, the judge's occasional jogging on the stairs next to his chambers during the pretrial calendar was misconduct in and of itself and violated Cal. Code Jud. Ethics, canons 2A, 3A, and 4A(3). The judge's conduct gave the appearance that he was not interested in the courtroom proceedings and that he was using court time for personal matters. The integrity and independence of the judicial system did not permit the judge to delegate fundamental judicial responsibilities such as taking guilty pleas and imposing sentence. (Opinion by Robert C. Bonner, Chairperson.)

## HEADNOTES

(1) **Judges § 6—Discipline—Prejudicial Misconduct—Abandonment of Judicial Duties—Plea Forms.**—The judge engaged in prejudicial misconduct by allowing his clerk to routinely stamp his signature on plea forms indicating that defendant had been advised of and waived his or her constitutional rights when the judge had not reviewed the form, questioned the defendant, or made the purported findings.

(2) **Judges § 6—Discipline—Prejudicial Misconduct—Jogging on Stairs During Court Calendar.**—The judge engaged in prejudicial misconduct by occasionally jogging on the courthouse stairs during his court calendar, and by his departure from the courthouse on one occasion with his pretrial calendar ongoing. The conduct gave the appearance that the judge was not interested in courtroom proceedings and that he was using court time for personal matters.

(3) **Judges § 6—Discipline—Willful Misconduct.**—To commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity.

(4) **Judges § 6—Discipline—Prejudicial Misconduct—Abandonment of Judicial Duties.**—Conduct that a judge undertakes in good faith but that nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office constitutes prejudicial conduct. Thus, a judge committed prejudicial misconduct when he abandoned his judicial duties. The large majority of cases on the judge's pretrial misdemeanor calendar were adjudicated in the judge's absence and without his participation. The judge's conduct in managing his pretrial calendar was unjudicial and violated Cal. Code Jud. Ethics, canons 1, 2A, and 3B(1).

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 57, 58, 72.]

(5) **Judges § 6—Discipline—Purpose of Proceedings.**—The purpose of a judicial performance commission disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.

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## OPINION

**BONNER, Chairperson.**—This disciplinary matter concerns Judge Christopher J. Sheldon, a judge of the Riverside County Superior Court. The commission issues this public admonishment based on its conclusion that Judge Sheldon committed conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

## APPEARANCES

Trial counsel for the Commission on Judicial Performance is Jack Coyle. Counsel for Judge Sheldon are James E. Friedhofer, Douglas R. Reynolds, and Eric D. Weitz of Lewis, D'Amato, Brisbois & Bisgaard (San Diego).

## PROCEDURAL HISTORY

Judge Sheldon became a municipal court judge in 1989 and was appointed to the superior court in 1992. In 1995, the Superior and Municipal Courts of Riverside County were consolidated and Judge Sheldon volunteered to handle the afternoon misdemeanor pretrial calendar in addition to his superior court duties. These proceedings concern Judge Sheldon's method of handling the misdemeanor pretrial calendar from July 1995 until March 8, 1996.

The commission's investigation of these proceedings led to the filing, on October 7, 1997, of a notice of formal proceedings. Judge Sheldon filed a verified answer denying that he had conducted court business in violation of proper judicial procedures.

As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report. The evidentiary hearing was held on May 18 and 19, 1998, before Judge Mark R. Forcum, presiding, of the San Mateo County Superior Court and Judge Robert A. O'Farrell of the Monterey County Superior Court.[1] On August 5, 1998, the special masters filed their final report.

On August 19, 1998, Judge Sheldon filed objections to the special masters' report, and after further briefing, the matter was set for oral argument before the commission on October 8, 1998. Eight members of the commission participated, two were absent, and there is one vacancy.

## THE CHARGES

The notice of formal proceedings charged Judge Sheldon with "willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute and improper action" all within the meaning of article VI, section 18 of the California Constitution which also provides for removal, censure, public admonishment or private admonishment of a judge. The notice advanced the following specific allegations against Judge Sheldon: "You conducted business in violation of proper judicial procedures. From approximately July 1995 through February 1996, you frequently failed to take the bench, or you left the bench during portions of your misdemeanor calendar. In your absence from the courtroom, you allowed clerks to enter pleas and execute court documents imposing sentences, enter continuances agreed to by the attorneys and set hearing dates.

[1] Judge Janet I. Kintner of the San Diego County Municipal Court was also appointed as a special master by the Supreme Court but withdrew from the proceedings prior to the evidentiary hearing. Judge Sheldon agreed to a hearing before only two special masters.

For some pleas entered in your absence, you allowed clerks to stamp your signature on constitutional rights waiver forms. For some pleas entered in your absence, you signed rights waiver forms after the pretrial calendar was concluded. In other cases, rights waiver forms were neither signed by you nor stamped with your signature. On some occasions while your pretrial calendar was ongoing, you left the courthouse. You abandoned your role in the adjudicative process and demonstrated a disregard for your obligation to diligently perform the duties of judicial office."

## FINDINGS[2]

Judge Sheldon's misdemeanor pretrial calendar was conducted Monday through Thursday. It was scheduled to begin at 1:30 p.m. and usually lasted until 4:00 p.m., although it occasionally ran as late as 6:00 p.m. The number of cases on each calendar was frequently more than 100.

Judge Sheldon decided that it would not be necessary for him to be on the bench to handle each case during the misdemeanor pretrial calendar. He met with deputy public defenders and the deputy district attorney assigned to his pretrial calendar and with one courtroom clerk to explain to them his new procedure. He asked the attorneys to handle routine things and to let him know if they needed him. He did not personally explain to the courtroom clerks how to handle the cases in his absence.

Judge Sheldon, starting in July 1995, took the bench only to handle the in-custody defendants at the beginning of the calendar, some private attorney cases, cases in which the attorneys could not agree upon a disposition, and driving under the influence cases reduced to alcohol-related reckless driving charges. He also took the bench to issue bench warrants at the end of calendars. The large majority of cases on the pretrial calendar were adjudicated in Judge Sheldon's absence and without his participation.

On the vast majority of cases on the pretrial calendar, the defendants' attorneys and the prosecutor agreed on a disposition. For those cases, respondent did not take the bench. Most of the cases on Judge Sheldon's calendar had out of custody defendants. Judge Sheldon had no involvement in approximately 90 percent to 95 percent of the out of custody cases.

The sentences were determined by the deputy district attorney who sat at counsel table in court and talked to defense counsel who lined up to talk to him. The deputy district attorney would extend offers of sentences and further

[2] Neither party disputed the special masters' findings of fact and they are adopted by reference.

negotiate with defendants' counsel. When the deputy district attorney and defense counsel agreed upon a plea and sentence, the defendant and his attorney would fill out a "*Tahl*" change of plea form (indicating that the defendant understood and waived his constitutional rights regarding trial)[3] and a terms and conditions of probation form. Although all defendants at issue were sentenced to probation, some defendants were sentenced to jail as a condition of probation. The deputy district attorney would review the forms and defense counsel would submit the forms to the clerks who would put the forms in the file, enter the plea and sentence into the computer, and generate a minute order.

Initially, the clerks would bring the files to Judge Sheldon for his signature on the *Tahl* forms, but Judge Sheldon then gave them the option of stamping his name on the forms. The courtroom clerks thereafter routinely stamped Judge Sheldon's name on the *Tahl* forms and Judge Sheldon did not review the court files.

A judge's signature on a *Tahl* form indicates that the judge has reviewed the completed form and that the defendant has been apprised of his constitutional rights, has waived these constitutional rights, has entered into the plea freely and knowingly, and that the court accepts the plea.[4] When Judge Sheldon signed these *Tahl* forms, he had not questioned the defendant to determine if the plea in question was knowing, voluntary and intelligent. When the clerks stamped the *Tahl* forms with his signature, Judge Sheldon had not reviewed the forms, questioned the defendant, nor made any of the purported findings.

Judge Sheldon did not impose sentence in open court in these out of custody cases. He acknowledged before the special masters that he did not know when exactly a sentence was imposed under his procedure.

Defense counsel and the prosecutor liked Judge Sheldon's method of handling the pretrial calendar and believed that the pleas entered under the

[3] The forms take their name from the Supreme Court's opinion in *In re Tahl* (1969) 1 Cal.3d 122 [81 Cal.Rptr. 577, 460 P.2d 449], which undertook an extensive analysis of *Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274, 89 S.Ct. 1709]. The *Tahl* opinion sets forth certain standards for the trial record of a plea of guilty.

[4] The following language appears above the line for the judge's signature on the *Tahl* form: "The Court, having reviewed this form and having questioned the defendant concerning the defendant's Constitutional rights and the defendant's admission of prior conviction(s) and probation violation(s), if any, finds that the defendant has expressly, knowingly, understandingly and intelligently waived his or her constitutional rights. The Court finds that the defendant's plea(s) and admission(s) are freely and voluntarily made with an understanding of the nature and consequences thereof, and that there is a factual basis for the plea(s). The Court accepts the defendant's plea(s), the defendant's admission of the other conviction(s) and probation violation(s), if any, and the defendant is convicted on his or her plea(s)."

system were valid. Apparently, no legal challenge has been made to a plea entered under Judge Sheldon's procedures.

Ultimately other judges complained about Judge Sheldon's pretrial calendar procedure to Riverside County Presiding Judge Edward Webster. Judge Webster thought it was "bad practice" for Judge Sheldon to not be on the bench when pleas were entered. He testified that the great majority of judges in Riverside County did not like the practice. Judge Webster discussed the matter with Judge Sheldon's immediate supervising judge, Judge Robert Taylor, who met with Judge Sheldon on March 7, 1996. The next day, Judge Sheldon announced in court that he was discontinuing his procedure of being absent from the bench. Since then, Judge Sheldon has been on the bench taking guilty pleas and imposing sentences during the misdemeanor pretrial calendar, and he now personally signs all *Tahl* forms.

On occasion, Judge Sheldon left the courthouse while the misdemeanor pretrial calendar was still pending. He testified that he would schedule personal matters outside of the courthouse for as early as 3:00 p.m., but that when he left early he would arrange for another judicial officer to cover for him. Sometimes Judge Sheldon personally asked another judicial officer to cover for him and sometimes he asked his bailiff to arrange "cover." Judge Sheldon did not know whether the other judicial officer would actually take the bench or would just be available, and he did not always inform the attorneys or clerks that he was no longer available to help them, or that a commissioner rather than a judge was covering. Judge Sheldon admitted that on one occasion (Feb. 29, 1996) he left the courthouse before the calendar was concluded when he had been told that there was no coverage by another judicial officer.

In response to the allegation that during his afternoon pretrial calendar he was absent from the bench "exercising in or about the courthouse," Judge Sheldon, through counsel, admitted by letter: "Judge Sheldon did upon occasion exercise by running the stairs next to his chambers during the pretrial calendar. He has since stopped this practice. He understands that exercising during the day, other than at the lunch break, could give the appearance of disinterest [*sic*] in the proceedings in his court and misuse of time. He was merely trying to use his time efficiently, and regrets any appearance of disinterest [*sic*] or misuse of time. He has no backlog of cases, so his occasional exercising outside of the lunch hour did not slow his case flow. He understands that judges must endeavor to do nothing that would undermine confidence in the judicial system."

## CONCLUSIONS

The commission, having considered Judge Sheldon's objections to the special masters' conclusions of law, adopts the special masters' conclusions of law and they are incorporated herein by reference.

In particular, the commission agrees with the special masters' conclusions that Judge Sheldon committed prejudicial misconduct by abandoning his duties "to be on the bench to preside over cases when they are adjudicated in his court," "to determine that a defendant entering a plea has done so freely and voluntarily and that the defendant has made a knowing, intelligent, and voluntary waiver of his constitutional rights," "to approve a sentence agreed upon by the attorneys," and "to impose sentence."

The special masters noted that there "is an appropriate expectation that it is the judge who makes an independent evaluation of all issues presented to the court." The commission concurs that the fact that Judge Sheldon in many cases allowed the district attorney to determine the sentence, combined with the fact that he never appeared in court to impose sentence, undermined the public's confidence in an independent judiciary.

**(1)** The commission also agrees with the special masters' conclusion that by allowing clerks to stamp his name to forms attesting that he had reviewed the forms and had made various findings regarding the entry of a plea, when in fact he had not done so, Judge Sheldon "knowingly allowed inaccurate and misleading court records to be created."

Judge Sheldon's conduct in managing his pretrial calendar was unjudicial and violated California Code of Judicial Ethics canon 1 (judge shall uphold integrity of judiciary), canon 2A (judge shall act at all times in a manner which promotes public confidence in the judiciary), and canon 3B(1) (judge shall hear and decide all matters assigned to the judge except when disqualified).

**(2)** The commission also accepts the special masters' conclusions that (1) Judge Sheldon's admitted occasional jogging on the stairs during his afternoon pretrial calendar is misconduct in and of itself (violating Cal. Code Jud. Ethics, canon 4A(3) (a judge shall conduct his extrajudicial activities so that they do not interfere with the proper performance of his judicial duties), canon 3A (judicial duties take precedence over all other activities) and canon 2A (a judge must avoid the appearance of impropriety and must act to promote public confidence in the judiciary)); and (2) Judge Sheldon engaged in prejudicial conduct when on one occasion he left the courthouse with his pretrial calendar ongoing (violating canons 4A(3), 3A & 2A), but that on

other occasions when Judge Sheldon left the courthouse prior to the conclusion of his calendar, he arranged to have another judicial officer "cover" the end of his calendar.

**(3)** The special masters concluded, and the commission agrees, that Judge Sheldon's actions do not amount to willful misconduct. As most recently reiterated by the Supreme Court in *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*), "[t]o commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity." Judge Sheldon maintained that he did not think that the procedures violated the law and that he was motivated by a desire to make the pretrial calendar run more efficiently. The commission concurs in the special masters' conclusion that the element of bad faith is lacking.

**(4)** Judge Sheldon's behavior, however, does constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In *Broadman,* the Supreme Court explained that "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" constitutes prejudicial conduct.[5] The special masters concluded, and the commission concurs, that Judge Sheldon's behavior constituted prejudicial conduct as he "should have known that his method of conducting his calendar was improper, and that his conduct in this regard would be viewed by the public (correctly) as an abdication of judicial duties," and that the charge of prejudicial conduct was proved by clear and convincing evidence.

These conclusions are reinforced by the special masters' conclusions that Judge Sheldon's occasional jogging on the stairs during the afternoon calendar and his departure from the courthouse on February 29, 1998, with his pretrial calendar ongoing and not covered by another judicial officer, are each in and of themselves sanctionable misconduct. We agree with the special masters that this conduct gave the appearance that Judge Sheldon was not interested in the courtroom proceedings and that he was using court time for personal matters.

[5] Citing *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314 [267 Cal.Rptr. 293, 787 P.2d 591], the Supreme Court reiterated "In sum, to constitute prejudicial conduct, a judge's actions must bring 'the judicial office into disrepute,' that is, the conduct would appear to an objective observer to be prejudicial to ' "public esteem for the judicial office." ' " (*Broadman, supra,* 18 Cal.4th at p. 1093.)

DISCIPLINE

**(5)** The Supreme Court recently reiterated that the purpose of a commission disciplinary proceeding is not punishment, " 'but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman, supra*, at pp. 1111–1112, quoting *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].)

The commission appreciates Judge Sheldon's willingness to take on the misdemeanor pretrial calendar in addition to his other duties. The commission also recognizes that Judge Sheldon's motivation in adopting the procedure in issue was a desire to make the pretrial calendar run more efficiently, and that he promptly changed his procedure after being counseled by the supervising judge.

Several aspects of this case, however, lead the commission to conclude that the public will be best served through the issuance of a public admonishment. First, a public admonishment is required because Judge Sheldon abandoned his fundamental responsibilities to be on the bench to preside over cases when they are adjudicated in his court, to determine that a defendant entering a plea does so freely and voluntarily and has made a knowing and intelligent waiver of his constitutional rights, and to approve and impose the sentence. For six months, the public observed sentences being imposed without the participation of a judge. Furthermore, Judge Sheldon has maintained, both before the special masters and before the commission, that there was nothing wrong with his procedure. Judge Sheldon's confidence in the district attorneys, public defenders and private attorneys who appear in his court may be well taken, but the integrity and independence of the judicial system does not permit the delegation of such fundamental judicial responsibilities as taking guilty pleas and imposing sentence.[6]

Second, Judge Sheldon's practice of allowing his courtroom clerks to stamp his signature on *Tahl* forms when he never saw the files created

[6] Judge Sheldon's citation to provisions allowing defendants to sign *Tahl* forms and excusing defendants from appearing in court, suggest a failure to differentiate between an attorney's responsibility to his or her client and a judge's responsibilities to independently assure the protection of the defendant's rights. The importance of this difference may be gleaned from the Supreme Court's opinion in *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 305 [110 Cal.Rptr. 329, 515 P.2d 273], where the court, in discussing a misdemeanor, states that "defendant's written change of plea form, supplemented by the in-court colloquy with defendant's counsel, constitutes, when incorporated in the record, a fully adequate 'on the record' showing that defendant was both aware of all his relevant constitutional rights and knowingly, voluntarily and personally waived them."

inaccurate and misleading court records. The commission notes that appellate courts (and appellate divisions) are particularly dependent on the accuracy of the printed record created in the trial court. Judge Sheldon's suggestion that other judges on occasion allow their courtroom clerks to stamp their signatures on *Tahl* forms militates in favor of the issuance of a public admonishment in order to discourage such practices.

Finally, a public admonishment is an appropriate response to Judge Sheldon having left the courthouse on February 29, 1996, prior to the completion of the pretrial calendar when no other judicial officer was available to cover the calendar and his occasional running of the stairs next to his chambers during his pretrial calendar.

This decision shall constitute the order of public admonishment of Judge Sheldon.

The commission's vote was 8 to 0, two were absent, and there is one vacancy.

Commission members Robert C. Bonner, Esq., Ms. Ophelia Basgal, Mr. Mike Farrell, Hon. Daniel M. Hanlon, Patrick M. Kelly, Esq., Mr. Luke Leung, Ms. Ramona Ripston, and Donald E. Vinson, Ph.D., voted for the public admonishment. Commission members Hon. Lois Haight and Ms. Harriet Salarno did not participate. There was one vacant position on the commission.

# PUBLIC ADMONISHMENT OF JUDGE HARVEY H. HIBER

The Commission on Judicial Performance has ordered Judge Harvey H. Hiber publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and rules 115 and 116 of the Rules of the Commission on Judicial Performance.

## PROCEDURAL HISTORY

On August 28, 1998, the Commission on Judicial Performance issued a Notice of Intended Public Admonishment pursuant to rule 115 of the Rules of the Commission on Judicial Performance. Judge Hiber, through counsel, sought an appearance before the commission pursuant to rule 116(b) of the Rules of Commission on Judicial Performance, and waived his right to formal proceedings under rule 118.

On October 7, 1998, Judge Hiber, through counsel James R. Rogers, appeared before the commission.

## STATEMENT OF FACTS AND REASONS

1. In mid-1994, Judge Hiber asked a female court employee to become his permanent courtroom clerk. She became Judge Hiber's clerk in September 1994. From approximately September 1994 through May 1995, as described below, Judge Hiber engaged in a pattern of inappropriate conduct towards his courtroom clerk.

In August 1994, while he was on vacation and before the clerk started working for him, Judge Hiber wrote to her four times during a one-week period. In that correspondence, he made personal comments about her and referred to his preparation of a "sexual harassment waiver" that would be ready for her signature before she started working for him. The clerk and the judge had had a platonic social relationship in 1994, and the clerk was concerned by the insistent tone of the judge's letters. When the judge returned from vacation, she told him that she wanted to keep their relationship on a professional level. Judge Hiber assured her that it would be.

In September 1994, Judge Hiber presented the clerk with a large two page scroll written in calligraphy, which he had authored, entitled, "Absolute, Unconditional and Total Waiver of Harassment." The scroll measured approximately 30 inches by 40 inches. The scroll, which contained sexual innuendoes, included sections that (1) sought to have the clerk waive any and all objections to whatever verbal or physical advances the judge might make, and (2) cast the judge as the clerk's protector against anyone else making any advances toward the clerk. The scroll had signature lines at the bottom for the clerk and the judge. The clerk refused to sign the scroll.

During the following months, Judge Hiber continued the pattern of insistent and unwelcome behavior. He repeatedly asked the clerk to spend time with him outside of court hours. On one occasion, he called her at home on a weekend. On another occasion,

he kissed her on the mouth after taking her to her car near the courthouse, for which he apologized. On two occasions, he passed her notes from the bench which contained jokes of a sexual nature. On at least one occasion, he brought flowers to her home when she was ill. The judge mailed or gave the clerk numerous letters, notes and greeting cards. The judge frequently interrupted her while she was working to discuss non-work-related matters.

During the time period in question, the clerk did not write to the judge, telephone him at home or invite him to spend time with her outside of courtroom hours. She sometimes accepted the judge's lunch invitations. When she refused or attempted to refuse the judge's offers to go to lunch, he argued with her at some length, and persisted in inviting her to lunch and asking her to spend time with him outside of court hours. In a letter from the judge to the clerk dated November 1994, the judge acknowledged that she "had rejected everything I've suggested for doing something or spending time together for Thursday, Friday and or Saturday - with no feedback or alternatives suggested by you."

Judge Hiber also gave the clerk gifts, including clothing, an expensive pen, a lamp, a computer keyboard, and in May of 1995, an exercise machine. In a letter from the judge to the clerk dated September 1994, the judge referred to a gift of clothing and admitted that he knew that his gift was "contrary to our understanding regarding our professional relationship and our friendship," and stated that in "retrospect neither the gift nor the timing was proper. . . . It won't happen again!" The judge gave the clerk a number of gifts after he wrote and delivered the September 1994 letter. The only gift the clerk gave to the judge was a Christmas gift from her and other court staff.

The judge's pattern of conduct towards the clerk was unjudicial and contrary to the following canons of the former Code of Judicial Conduct, which was in effect during the relevant time period: canon 1, which provides that a judge shall uphold the integrity of the judiciary; canon 2, which provides that a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities; and canon 3B(5), which provides that a judge shall not manifest bias in the performance of his judicial duties by words or conduct, the commentary to which provides that a judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment.

2. In late September 1994, Judge Hiber gave his clerk $250 in cash and asked her to donate the money in her name to the campaign of a candidate for nonjudicial of fice. The clerk did as the judge requested. The judge's conduct created the appearance that the judge was attempting to conceal that he was the source of a political contribution, in violation of canon 2 of the former Code of Judicial Conduct.

The judge's conduct constituted, at a minimum, improper action, within the meaning of Article VI, section 1 8(d) of the California Constitution.

In mitigation, the commission notes that Judge Hiber cooperated with the commission and has acknowledged that his actions towards his clerk were inappropriate.

The vote of the commission on issuance of the Public Admonishment was 10 ayes and 0 noes. There is currently one vacancy.

This decision and order shall constitute the order of public admonishment.

Dated: October 23, 1998

Robert C. Bonner
Chairperson

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Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
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| Inquiry Concerning Judge John P. Shook<br><br>No. 148 | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |

This is a disciplinary matter concerning Judge John P. Shook of the Los Angeles County Superior Court. Formal proceedings having been instituted, this matter is now before the Commission on Judicial Performance pursuant to Rule 127 of the Rules of the Commission on Judicial Performance (discipline by consent).

## APPEARANCES

Trial counsel for the Commission on Judicial Performance is William Smith. Counsel for Judge Shook is Jeffrey Gray.

## PROCEDURAL HISTORY

Formal proceedings were instituted in this matter by a Notice of Formal Proceedings dated June 25, 1998. The Notice set forth four counts of misconduct pursuant to article VI, section 18 of the California Constitution.

After the Notice of Formal Proceedings had been executed, but before Judge Shook formally appeared in this matter, counsel for the parties proposed a resolution of this matter whereby discipline no more severe than a public admonishment would be imposed.

## CONSENT AGREEMENT

In an affidavit submitted in conjunction with the stipulation proposing resolution of this matter, Judge Shook admits to the truth of the charges set forth in the Notice, freely and voluntarily consents to the sanction of public admonishment and waives review by the Supreme Court. The parties' stipulation provides:

COUNT ONE

From approximately January 1989 through February 1996, when Judge Shook was assigned to the Torrance courthouse in the Southwest District of the Los Angeles Superior Court, Judge Shook appointed attorney Ben Sadler to

represent criminal defendants in approximately 50 cases. During that time, Judge Shook had a financial relationship with Mr. Sadler. Mr. Sadler was renting office space in a building owned by Judge Shook and Judge Shook's wife.

From 1989 through May 1993, Judge Shook appointed Mr. Sadler to approximately 28 cases that were paid through a countywide system called PACE (Professional Appointee Court Expenditure). When Mr. Sadler appeared before Judge Shook on cases, Judge Shook did not disclose the landlord-tenant relationship or disqualify himself because of that relationship. Judge Shook approved Mr. Sadler's attorney fees on PACE cases.

In mid-1993, Judge Shook recommended Mr. Sadler's membership in an attorney appointment panel called SWIDP (Southwest Indigent Defense Panel) to SWIDP administrators. From approximately November 1993 through September 1995, Judge Shook appointed Mr. Sadler to approximately 22 cases in which attorney fees were paid through SWIDP. Approximately 15 of the SWIDP appointments Judge Shook made to Mr. Sadler were appointments that were not made according to the SWIDP attorney rotation list (called "collars"). Mr. Sadler received more "collar" appointments from all judges combined than did any other SWIDP attorney; and all but one of Mr. Sadler's "collar" appointments were made by Judge Shook. Judge Shook made more "collar" appointments to Mr. Sadler than Judge Shook did to any other attorney.

Judge Shook's conduct violated the former Code of Judicial Conduct (effective until October 5, 1992), canons 1, 2A, 2B, 3B(4), and 5C(1), and the former Code of Judicial Conduct (effective beginning October 5, 1992), canons 1, 2A, 2B, 3C(4), and 4D(1).

Canon 1 provides that a judge should uphold the independence and integrity of the judiciary.

Canon 2 provides that a judge should avoid impropriety and the appearance of impropriety in all of the judge's activities. Canon 2A provides that a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 2B provides that a judge should not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment, and should not lend the prestige of judicial office to advance the private or personal interests of the judge or others, and should not convey or permit others to convey the impression that they are in a special position to influence the judge.

Canon 3B(4) (before October 5, 1992), and canon 3C(4) (after October 5, 1992) require a judge to use the power of appointment impartially and on the basis of merit, avoiding favoritism.

Canons 5C(1) (before October 5, 1992), and canon 4 D(1) (after October 5, 1992) provide that a judge should not engage in financial and business dealings that might be reasonably perceived to exploit the judge's judicial position, or involve the judge in frequent transactions or continuing business relationships with lawyers likely to appear before the court on which the judge serves.

COUNT TWO

From approximately 1989 through February 1996, Judge Shook appointed attorney Robert Welbourn to represent criminal defendants in over 30 cases. During that time, Judge Shook had a social relationship with Mr. Welbourn. They had gone on group cruises together, and the judge attended several small group dinners with Mr. Welbourn. Judge Shook also allowed Mr. Welbourn to pay for two lunches for Judge Shook and Judge Shook's court staff. When Mr. Welbourn appeared before Judge Shook, the judge did not disclose his social relationship with Mr. Welbourn or disqualify himself because of that relationship.

In some PACE cases, Judge Shook allowed Mr. Welbourn to bring his bills for attorney fees directly to Judge Shook in chambers for Judge Shook's approval, in disregard of the PACE policy that before approval by a judge, attorney fees were to be submitted to PACE for review and evaluation.

Judge Shook's conduct violated the former Code of Judicial Conduct (effective until October 5, 1992), canons 1, 2A, 2B, and 3B(4), and the former Code of Judicial Conduct (effective beginning October 5, 1992), canons 1, 2A, 2B, and 3C(4).

The judge's conduct also violated canon 3C (before October 5, 1992), and canon 3E (after October 5, 1992), which provide that a judge disqualify himself in a proceeding in which disqualification is required by law, or the judge's impartiality might reasonably be questioned.

COUNT THREE

In approximately mid-April, 1994, attorney Joel Oiknine was a prospective tenant in the office building owned by Judge Shook and Judge Shook's wife. Mr. Oiknine at that time had a telephone conversation with Judge Shook in which Mr. Oiknine expressed doubt that he could afford the rent. Judge Shook ascertained that Mr. Oiknine's application to become a member of SWIDP had been denied. Judge Shook told Mr. Oiknine that if he rented office space in the Shook building, Judge Shook would recommend Mr. Oiknine to SWIPD. Mr. Oiknine would then receive criminal appointments from Judge Shook, which would cover the rent.

Judge Shook's conduct violated the former Code of Judicial Conduct, canons 1, 2A, 2B, 3C(4), and 4D(1).

COUNT FOUR

From approximately mid-1985 through 1988, when Judge Shook was assigned to the Compton courthouse in the South Central District of the Los Angeles Superior Court, attorney Stanley Granville was appointed by Judge Shook to represent criminal defendants in cases before Judge Shook. On two occasions relevant to this time period, Judge Shook allowed Mr. Granville to pay for lunch for Judge Shook and Judge Shook's court staff. On one of those occasions, Mr. Granville used a limousine in which champagne was available to transport Judge Shook and Judge Shook's staff to lunch.

Judge Shook's conduct in count four violated the former Code of Judicial Conduct, canons 1, 2A, 2B, and 3B(4).

MITIGATION

The stipulation notes in mitigation that Judge Shook recognizes the impropriety of his actions. Judge Shook also requests that the commission note his cooperation in the investigation.

DISCIPLINE

The commission adopts the findings of facts and conclusions of law set forth in the consent agreement. The commission agrees that despite the reprehensible nature of Judge Shook's conduct, in the circumstances of this case, the public interest is served by the issuance of a public admonishment. The commission's vote was 10 to 0. There is one vacancy.

This decision and order shall constitute the order of public admonishment.

Dated: October 26, 1998

Robert C. Bonner
Chairperson

Commission members Robert C. Bonner, Esq., Ms. Ophelia Basgal, Mr. Mike Farrell, Hon. Lois Haight, Hon. Daniel M. Hanlon, Patrick M. Kelly, Esq., Mr. Luke Leung, Ms. Ramona Ripston, Ms. Harriet Salarno, and Donald E. Vinson, Ph.D., voted for the public admonishment. There was one vacant position on the Commission.

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Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| Inquiry Concerning Judge Pamela R. Rogers<br><br>No. 144 | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |

This is a disciplinary matter concerning Judge Pamela R. Rogers of the Los Angeles County Municipal Court. Formal proceedings having been instituted, this matter is now before the Commission on Judicial Performance pursuant to Rule 127 of the Rules of the Commission on Judicial Performance (discipline by consent).

## APPEARANCES

Trial counsel for the Commission on Judicial Performance is Jack Coyle. Counsel for Judge Rogers is Ephraim Margolin.

## PROCEDURAL HISTORY

Formal proceedings were instituted in this matter by a Notice of Formal Proceedings dated January 7, 1998. The Notice sets forth three counts of misconduct pursuant to article VI, section 18 of the California Constitution. Respondent filed a verified answer. As provided for by Rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report.[1]

## CONSENT AGREEMENT

After a prehearing status meeting, but prior to the commencement of the hearing, the parties advised the commission that Judge Rogers had agreed to disposition on the following terms:

> Regarding Count One and Count Two of the Notice of Formal Proceedings, respondent and examiner stipulate to the following:
>
> 1. The charges in Count One and Count Two will be dismissed upon the following conditions: Every other month through July 1, 2000, beginning on the month following approval of

[1] The special masters are Justice Marcel Poché of the Court of Appeal, First Appellate District (presiding), Justice Arthur G. Scotland of the Court of Appeal, Third Appellate District, and Justice Rebecca Wiseman of the Court of Appeal, Fifth Appellate District.

this stipulation by the commission, respondent shall provide to the commission: (1) medical reports regarding her medical condition and treatment, indicating all medications prescribed, which reports shall be sent directly to the commission by respondent's doctors; (2) an affidavit executed by respondent stating that the medical reports submitted reflect all of the doctors she has consulted and all of the medications prescribed for her in the period covered by the reports; and (3) respondent's judicial attendance records.

2. Failure to comply with the conditions set forth in this stipulation will result in reinstatement of the conditionally dismissed charges.

3. Commission staff may monitor respondent by court observation. If, during the monitoring period, respondent appears impaired in the performance of her judicial duties by her use of medications, the conditionally dismissed charges may be reinstated, and new charges may be filed.

4. Upon compliance with these conditions, the charges in Counts One and Two will be dismissed with prejudice on July 1, 2000.

The parties submit that the proposed conditional dismissal and monitoring of respondent's medical condition and judicial performance is an appropriate disposition of the charges concerning respondent's use of medications.

The allegations before the commission do not concern the use of illicit drugs. All drugs taken by respondent were medications prescribed for her by doctors for serious medical conditions, principally migraine headaches. Respondent acknowledges that she has used medications prescribed by her doctors which, prior to April 1997, included narcotics. There is a risk of dependency in using some of these medications, even upon prescription. Such dependency could be inconsistent with the responsibility of a judge.

Respondent, however, has sought and received expert medical assistance in order to manage her condition without narcotics. As a result, at least since April 1997, all medications prescribed for and used by respondent have been non-narcotic, and her medical condition now appears to be under control with the help of exclusively non-narcotic medication. See declaration of Dr. Arulanantham, para. 22, Exhibit A to Answer to Notice of Formal Proceedings.

The examiner consulted with medical expert Dr. Richard Sandor. After review of the medical records, it was Dr. Sandor's opinion that the medications respondent is currently taking are not incompatible with performing as a judge.

There has been no reported occasion of respondent appearing to be under the influence of medication at work since April 1997. It appears that respondent has remedied the underlying medical problem that gave rise to the present allegations involving her use of medication.

Respondent acknowledges that if the commission accepts this stipulated disposition, the conditions to the dismissal will be made public as will the commission's reasons for accepting this disposition. The contents of the reports submitted to the commission by respondent, however, will not be made public, provided respondent complies with the stipulated conditions.

Regarding Count Three of the Notice of Formal Proceedings, respondent and examiner stipulate to the following:

> Respondent shall be publicly admonished for failing to rule on several matters within 90 days, as required by law.
>
> In seven cases, matters were submitted to respondent for decision and remained undecided in excess of 90 days.
>
> In *Fox* v. *Palmdale*, case no. MS1342, a superior court law and motion matter was submitted to respondent for decision on or about January 17, 1997, and remained undecided until late May 1997;
>
> In *Antelope Valley Newspapers, Inc. dba Antelope Valley Press* v. *Desert Mailer News*, case no. NOC10714, a superior court law and motion matter was submitted to respondent for decision on or about January 17, 1997, and remained undecided by respondent until she recused herself in late May 1997;
>
> In *Bakken* v. *Berry*, case no. MC7928, a superior court law and motion matter was submitted to respondent for decision on or about January 31, 1997, and remained undecided until late May 1997;
>
> In *Miller* v. *Sitarek*, case no. 95C00982, a municipal court trial was submitted to respondent on or about October 29, 1996, and remained undecided until approximately February 24, 1997;
>
> *Gangwish* v. *Ryan*, case no. 93C02158, a municipal court trial, was submitted to respondent on or about December 4, 1996, and remained undecided until approximately April 29, 1997;

*Chemical Bank* v. *Winkelstein*, case no. 96C00126, a municipal court trial, was submitted to respondent on or about November 1, 1996, and remained undecided until approximately February 20, 1997;

In *Johnson* v. *McMahan*, case no. MS 001725, a superior court law and motion matter was submitted to respondent in or about early February 1997, and remained undecided until approximately late May 1997.

California Constitution, article VI, section 19, provides that a judge may not receive a judicial salary if any cause remains pending and undetermined for 90 days after submission. Government Code section 68210 provides that a judge may not receive a judicial salary without executing an affidavit stating that no cause remains pending and undetermined for 90 days after submission. In *Mardikian* v. *Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4, the Supreme Court held that it was "the judgment of the Legislature and the electorate that this [90 day] period affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases."

The Code of Judicial Ethics, canon 3B(8), requires a judge to dispose of matters promptly and efficiently. While the seven matters listed above remained pending and undetermined for 90 days after submission for decision, respondent received a judicial salary. She did not, however, execute false affidavits stating that she had no cases pending for 90 days. Neither did respondent execute any salary affidavit, as required by Government Code section 68210, before receiving her judicial salary. However, during the time in question, court administration was not having any of the municipal court judges execute salary affidavits. Additionally, during the period these cases were pending, respondent was voluntarily handling a superior court law and motion calendar, in addition to a full time municipal court calendar.

Regarding Count Three, respondent and examiner agree that based upon the foregoing, respondent shall be publicly admonished for inordinate delay in deciding seven submitted matters within 90 days constituting improper action.

The foregoing stipulation is signed by Judge Rogers and her counsel, and by Trial Counsel. It is accompanied by an affidavit by Judge Rogers stating that she freely and voluntarily consents to the sanction of public admonishment, admitting to the charges as alleged in Count Three of the Notice of Formal Proceedings, and waiving review by the Supreme Court.

## DISCIPLINE

The commission adopts the forgoing stipulation and concurs that, in the circumstances of this case, disposition by suspending Counts One and Two, pending their dismissal with prejudice

upon Judge Rogers successful completion of the monitoring period and issuing a public admonishment on Count Three is appropriate. The Supreme Court has noted that the purposes of a commission disciplinary proceeding are "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." *Broadman* v. *Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112, quoting *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912. The commission finds that these purposes are well served by the stipulation, particularly its provisions for monitoring. The commission's vote was 10 to 0. There is one vacancy.

This decision and order shall constitute the order of public admonishment.

Dated: October 29, 1998

Robert C. Bonner
Chairperson

Commission members Robert C. Bonner, Esq., Ms. Ophelia Basgal, Mr. Mike Farrell, Hon. Lois Haight, Hon. Daniel M. Hanlon, Patrick M. Kelly, Esq., Mr. Luke Leung, Ms. Ramona Ripston, Ms. Harriet Salarno, and Donald E. Vinson, Ph.D., voted for the public admonishment. There was one vacant position on the Commission.

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Commission on
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STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| Inquiry Concerning Judge Walter L. Blackwell III<br><br>No. 150 | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |

This is a disciplinary matter concerning Judge Walter L. Blackwell III of the San Bernardino County Superior Court. Formal proceedings having been instituted, this matter is before the Commission on Judicial Performance pursuant to rule 127 of the Rules of the Commission on Judicial Performance (discipline by consent).

## APPEARANCES

Trial Counsel for the Commission on Judicial Performance is Jack Coyle. Counsel for Judge Blackwell is Thomas C. Brayton of Jones, Mahoney, Brayton & Soll.

## PROCEDURAL HISTORY

Formal proceedings were instituted in this matter by a Notice of Formal Proceedings dated July 14, 1998. The Notice set forth one count of misconduct pursuant to article VI, section 18 of the California Constitution. On August 31, 1998, Judge Blackwell filed a response to the Notice of Formal Proceedings. As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report.[1]

## CONSENT AGREEMENT

Following the submission of status reports, but prior to the holding of a prehearing conference, Judge Blackwell and Trial Counsel submitted the following Joint Statement of Basis for Public Admonishment.

> Pursuant to Rules of the Commission on Judicial Performance, rule 127, respondent and examiner submit the following stipulation in Inquiry Concerning Judge Walter L. Blackwell III, No 150:

[1] The special masters are Justice Paul Turner of the Court of Appeal, Second Appellate District, Division Five (presiding), Judge Aviva K. Bobb of the Superior Court of Los Angeles County and Judge Barbara Zuniga of the Superior Court of Contra Costa County.

Respondent was an active member of the State Bar of California from January 1970 until he took judicial office on January 1, 1995. The conduct described herein occurred while respondent was a practicing attorney. However, because respondent now holds judicial office, the State Bar is at present without jurisdiction to impose discipline. (See *State Bar* v. *Superior Court* (1929) 207 Cal.323.)

Respondent was employed by Fidelity Federal Bank ("Fidelity") from approximately 1974 until July 1988 holding the positions of general counsel and executive vice president. Upon the termination of respondent's employment, he entered into a separation, consulting, and settlement agreement with Fidelity. Pursuant to the agreement, respondent was to receive severance and consulting payments from Fidelity from July 1988 through October 22, 1989. Respondent received these payments as agreed.

Fidelity inadvertently sent respondent eight checks after October 22, 1989. Respondent cashed the eight checks, as follows: on November 2, 1989, a check dated October 31, 1989, in the amount of $3,030.36; on November 17, 1989, a check dated November 15, 1989, in the amount of $3,030.36; on December 4, 1989, a check dated November 30, 1989, in the amount of $3,030.36; on December 18, 1989, a check dated December 15, 1989, in the amount of $3,030.36; on January 4, 1990, a check dated December 29, 1989, in the amount of $3,030.36; on January 16, 1990, a check dated January 15, 1990, in the amount of $2,714.81; on February 2, 1990, a check dated January 31, 1990, in the amount of $2,714.81; on February 16, 1990, a check dated February 15, 1990, in the amount of $2,714.81. Respondent did not notify Fidelity that he had received and cashed these checks.

In approximately October 1989, former Fidelity President, CEO and Chairman of the Board, James Taylor, became involved in litigation involving Fidelity. Fidelity agreed, in writing, to pay Taylor's attorney fees, and Taylor retained respondent to represent him in a lengthy deposition. However, a dispute arose which resulted in Fidelity refusing to pay the attorney fees for respondent's representation of Taylor. On November 19, 1989, respondent filed suit against Fidelity for approximately $15,000.00 in attorney fees and one million dollars in punitive damages, under Walter L. Blackwell III v. Citadel Holding Corporation, et al. Los Angeles Superior Court, East District, case no. EAC 077585. (The "Blackwell action.")

Negotiations ensued between respondent and attorneys for Fidelity. Fidelity eventually agreed to settle the Blackwell action by paying respondent approximately $15,000.00. Respondent dismissed his claim for punitive damages. Respondent told Fidelity that he would agree to accept a settlement for that amount only upon the condition that Fidelity agree to a general release of all claims against him, known and unknown. During settlement negotiations, respondent was asked if he knew of any claims Fidelity might have against him. Despite knowing that Fidelity had a potential claim against him for cashing the

inadvertently issued checks, respondent did not disclose such information. Attorneys negotiating on behalf of Fidelity were unaware of the inadvertently issued checks.

Fidelity agreed to the general release. During the course of the negotiations, Fidelity had sent respondent a check in the amount of $10,162.00 and another check in the amount of $4,910.00 ("settlement checks"), which respondent had been holding. The total of the two settlement checks was agreed upon as the monetary settlement. Respondent executed the settlement agreement in the Blackwell action on January 23, 1990. On January 26, 1990, Respondent negotiated the settlement checks.

In approximately February 1992, Fidelity discovered that they had inadvertently issued the eight checks to Respondent and requested that respondent return the money. Respondent refused to return all of the money. In approximately October 1992, Fidelity sued respondent under Fidelity Federal Bank v. Walter L. Blackwell, III, San Bernardino Superior Court, case no. SCV 00718. Respondent raised the settlement agreement in the Blackwell action as a defense to the repayment of the overpayments. On March 1, 1994, the case proceeded to a nonjury trial. On June 3, 1994, the court filed a Statement of Decision. A judgment was entered against respondent (the "defendant" in that action) in the amount of $32,000.00, plus interest and costs.

The trial court found that respondent's failure to disclose, during settlement negotiations in the Blackwell action, that he had cashed inadvertently issued checks was "an intentional concealment of a material fact, unknown to the plaintiff, which the defendant was under a duty to disclose, when specifically asked. To make matters worse the defendant even refused to return the money from two checks which were issued and cashed after the execution of the settlement agreement. ¶ The only missing element to constitute outright fraud is detrimental reliance by plaintiff." The court further found that respondent's "acts of receiving, cashing and steadfastly refusing to return the amount of the checks when demanded constitutes malice and fraud."

In an unpublished opinion filed May 14, 1997, in case no. E01499, the Court of Appeal Fourth District, Division Two, upheld the judgment of the trial court, except that it reversed the trial court's award of punitive damages against respondent. Promptly upon the judgment becoming final, respondent paid the judgment in full.

Respondent and examiner agree that the foregoing constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of article VI, section 18 of the California Constitution. Respondent and examiner further agree that based upon the foregoing respondent shall be publicly admonished.

The Joint Statement of Basis for Public Admonishment is signed by Judge Blackwell, his attorney, and by Trial Counsel. It is accompanied by an affidavit by Judge Blackwell admitting the truth of the charges as alleged in the Notice of Formal Proceedings, stating that he freely and voluntarily consents to the sanction of public admonishment, and waiving review by the Supreme Court.

## DISCIPLINE

The Commission adopts the Joint Statement of Basis for Public Admonishment. The Commission finds that Judge Blackwell's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of article VI, section 18 of the California Constitution and that a public admonishment is the appropriate sanction for that conduct.

This decision and order shall constitute the order of public admonishment.

Dated: February 23, 1999

Robert C. Bonner
Chairperson

Commission members Robert C. Bonner, Esq., Mr. Mike Farrell, Hon. Lois Haight, Hon. Daniel M. Hanlon, Patrick M. Kelly, Esq., Mr. Luke Leung, Ms. Ramona Ripston, Ms. Harriet Salarno, and Donald E. Vinson, Ph.D., voted for the public admonishment. Commission member Ms. Ophelia Basgal did not participate. There was one vacant position on the Commission.

[No. 145. Feb. 26, 1999.]

INQUIRY CONCERNING JUDGE HOWARD R. BROADMAN

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance publicly admonished the judge. The commission concluded that the judge committed one incident of willful misconduct and two incidents of prejudicial misconduct. The judge decided a quiet title action assigned to him for trial by informally questioning the litigants who were not under oath and examining certain documents, without giving the parties an opportunity to present evidence or confront and cross-examine witnesses. The commission concluded that the judge's conduct violated Cal. Code Jud. Ethics, canons 2A and 3B(7), and amounted to willful misconduct, not mere legal error. The judge's conduct focused on his vision of efficiency with little regard for due process. The judge's questioning of a minor witness violated Cal. Code Jud. Ethics, canons 1, 2 and 3B(4), and constituted prejudicial misconduct. The judge's questions were argumentative and objectionable on their face. He appeared to be bent on posing unanswerable questions to intimidate the witness. The judge's questioning of the witness constituted prejudicial misconduct. The judge's summary statement in open court that an attorney was unethical and dishonest was unjudicial conduct in violation of Cal. Code Jud. Ethics, canons 2 and 3B(4), and constituted prejudicial misconduct. (Opinion by Robert C. Bonner, Chairperson.)

## HEADNOTES

(1) **Judges § 6—Discipline—Willful Misconduct—Legal Error—Denial of Due Process.**—The judge's management of a trial denied the parties due process and constituted willful misconduct, not mere legal error. The judge decided a quiet title action assigned to him for trial by informally questioning the litigants who were not under oath and examining certain documents, without giving the parties an opportunity to present evidence or confront and cross-examine witnesses. The judge's conduct violated Cal. Code Jud. Ethics, canons 2A and 3B(7).

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 57, 72.]

(2) **Judges § 6—Prejudicial Misconduct—Demeanor—Disrespectful and Intimidating Questioning of Minor.**—The judge violated Cal. Code Jud. Ethics, canons 1, 2, and 3B(4), and engaged in prejudicial misconduct when he questioned a minor in a disrespectful and argumentative manner. The judge's questions appeared to be bent on posing unanswerable questions to intimidate the minor.

(3) **Judges § 6—Discipline—Willful Misconduct—Bad Faith.**—Willful misconduct by a judge requires a finding of bad faith. The Supreme Court has defined bad faith as (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

(4) **Judges § 6—Discipline—Prejudicial Misconduct—Definition.**—Prejudicial misconduct by a judge is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct if committed in a judicial capacity, but not committed in bad faith. Prejudicial conduct can be conduct that a judge undertakes in good faith but that nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.

(5) **Judges § 1—Conduct—Opinion of Attorney's Character.**—Every attorney who appears in court is entitled to the judicial conduct prescribed by Cal. Code Jud. Ethics, canon 3B(4), regardless of the judge's opinion of his or her character.

(6) **Judges § 6—Prejudicial Misconduct—Demeanor—Accusing Attorney of Unethical Conduct.**—The judge's summary statement in open court that an attorney was unethical and dishonest violated Cal. Code Jud. Ethics, canons 2 and 3B(4), and constituted prejudicial misconduct.

(7) **Judges § 6—Disciplinary Proceeding—Purpose.**—The purpose of a disciplinary proceeding before the Commission on Judicial Performance is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity of the judicial system.

## OPINION

**BONNER, Chairperson.**—This disciplinary matter concerns Judge Howard R. Broadman, a judge of the Tulare County Superior Court.

### APPEARANCES

Trial Counsel for the Commission on Judicial Performance are Jack Coyle, William E. Smith and Valerie Marchant. Counsel for Judge Broadman are James E. Friedhofer, Douglas R. Reynolds and Eric D. Weitz of Lewis, D'Amato, Brisbois & Bisgaard.

### PROCEDURAL HISTORY

Judge Broadman became a municipal court judge in 1986 and was appointed to the superior court in 1988. The events which are the subject of this matter took place between August 1996 and July 1997.

Formal proceedings in this matter were commenced with the filing on January 22, 1998, of a notice of formal proceedings which set forth four counts. On February 4, 1998, Judge Broadman filed a verified answer denying the allegations in the notice of formal proceedings.

As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance (Commission), the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report. The evidentiary hearing was held on September 28, 29, and 30, 1998, before Justice Rodney Davis, presiding, of the Court of Appeal, Third Appellate District, Judge Paul H. Alvarado of the San Francisco County Superior Court, and Judge Irma J. Brown of the Compton Municipal Court, Los Angeles County. On December 14, 1998, the special masters filed their report.

On December 29, 1998, the office of trial counsel filed an opening brief to the Commission and on December 30, 1998, Judge Broadman filed a brief of objections to the report of the special masters. Following further briefing the matter was orally argued before the Commission on February 10, 1999. Ten members of the Commission participated.[1]

### FINDINGS AND CONCLUSIONS

The notice of formal proceedings set forth four counts of alleged misconduct. The first count alleged that on June 24, 1997, Judge Broadman, during a meeting with the presiding and assistant presiding judges, threatened to report

[1] The Commission normally consists of 11 members. There is one vacancy.

the presiding judge to the Commission. The special masters found that this allegation was not supported by clear and convincing evidence. Trial counsel have not filed any objections. The Commission, having reviewed the record, concurs with the special masters' conclusion and dismisses the first count.

Judge Broadman has filed objections to the special masters' findings and conclusions on count two and trial counsel has filed objections to the special masters' findings and conclusions on counts three and four.

1. *Count Two—The Court Trial in* King v. Wood

As noted by the special masters, with the exception of the question of whether Judge Broadman interfered with King's right to appeal, the facts are undisputed.

On January 29, 1996, Genice King filed a complaint to quiet title in a house. She alleged that the owner had agreed to convey the property to her. On April 16, 1996, Ms. King was sworn, presented copies of a proof of service and secured a default judgment quieting title. On May 7, 1996, Judge Broadman signed a default judgment prepared by Ms. King.

On May 31, 1996, Judge Broadman granted a motion to set aside the default order based, in part, upon a showing that the proof of service on the owner of the house purported to show service two days after his death.

On November 21, 1996, the case was assigned to Judge Broadman for trial. The masters summarized the evidence of what happened as follows:

"When Broadman took the bench to preside over the trial, attorney Jim Johnson was at the counsel table with his client, defendant Sandra Wood. The plaintiff, Genice King, was also seated at counsel table with her daughter. This was Johnson's first trial.

"Broadman had before him a trial brief prepared by attorney Johnson. That brief alleged the evidence would show that Genice King has no legal interest in the property; that she has no equitable interest grounded in an investment of either her time and/or $10,000 in improvements; and that the alleged contract for sale violates the statute of frauds.

"Broadman called the case for trial and asked the parties to tell him what the case was about. After King spoke, Johnson gave a version of what he had prepared as an opening statement and then his client made a statement. Broadman then alternated asking the parties questions about the case. No one was placed under oath. Genice King and Wood both recall Broadman telling

them he was proceeding 'off the record.' King testified Broadman was referring to the receipt of documents. Wood did not clarify what she believed Broadman was referring to when he told them that.

"During Broadman's questioning of King, she handed him some documents which he examined. After questioning King and Johnson's client, Broadman asked if either of them had anything else to add. He then told them that he was taking the case under submission and asked Johnson to prepare a statement of decision and judgment.

"At the time of trial, Johnson expected to participate in a traditional trial. He was prepared to cross-examine King, call his client to the stand, and call rebuttal witnesses. Broadman did not state that he was going to follow an alternative procedure; nor did he state that the parties could have a traditional trial if they wanted one. Johnson was not sure what Broadman did. He assumed it was some form of judgment without the standard trial procedures. [¶] . . . [¶]

"On December 3, 1996, Broadman signed a statement of decision and judgment prepared by attorney Johnson. This document asserts, in pertinent part, that the matter came on for trial on November 21; that Broadman reviewed and considered the documents submitted and arguments of both parties; and that Genice King had no legal or equitable interest in the property."

The masters found clear and convincing evidence that Judge Broadman engaged in misconduct in denying the parties their right to procedural due process.[2] They noted that the fundamental due process right to a hearing generally embraces the right to present evidence and to confront and cross-examine adverse witnesses. They determined that "on his own initiative, Judge Broadman elected to adjudicate the lawsuit through a procedure that did not afford the parties the opportunity to present evidence or confront and cross-examine witnesses," and that in doing so Judge Broadman "chose to consciously deny the parties procedural due process for what we infer to be a misplaced effort to conserve judicial resources."

In support of their conclusion that Judge Broadman engaged in misconduct, the masters explain: "Broadman did not inform the parties that trial would proceed in an alternative order. He informally questioned each party, examined documents Genice King brought with her, and then summarily

[2] The special masters found that there was not clear and convincing evidence to support the allegations that Judge Broadman interfered with the parties' right to have the trial reported or recorded or the parties' right to appeal his decision. The Commission, having reviewed the record, concurs in the special masters' determination and dismisses these charges.

concluded the hearing without giving the parties an opportunity to present evidence or confront and cross-examine witnesses. Inquiring at the conclusion of the proceeding as to whether the parties had anything to add is not the equivalent of an opportunity to present evidence."[3] The masters note that although it appears that Genice King should not have prevailed in her lawsuit, "Broadman's decision to deny the parties the opportunity to present witnesses and other evidence prevents us from so concluding with the certainty that arises when lawful procedures are adhered to."

The Commission agrees with the special masters' conclusion that Judge Broadman's actions amounted to willful misconduct because "he performed a judicial act that exceeded his lawful power with a conscious disregard for the limits of his authority." (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1092 [77 Cal.Rptr.2d 408, 959 P.2d 715].) They note that "no judge, much less a judge with Broadman's experience and intelligence, would reasonably believe that in proceeding in this truncated way that he was affording the parties the trial they were entitled to."

Judge Broadman concedes that he now recognizes that it was wrong to conduct the trial the way he did in *King v. Wood*, but, through counsel, argues that this was merely legal error, not ethical misconduct, and thus not a ground for discipline.

**(1)** We, as did the special masters, find that Judge Broadman's actions constituted willful misconduct, not mere legal error. No legal question was presented to the parties or briefed. Rather, Judge Broadman proceeded as he was wont, apparently focused on his vision of efficiency with little regard for the values that underlie the usual procedures for presenting evidence and cross-examining witnesses. This conduct is conceptually similar to the activities found to be unethical by the Supreme Court in cases such as *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1310–1311 [240 Cal.Rptr. 859, 743 P.2d 919] and *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, 43–48 [207 Cal.Rptr. 171, 688 P.2d 551].

We conclude that Judge Broadman's management of the trial in *King v. Wood* denied the parties due process and constituted willful misconduct. His

[3] Counsel for Judge Broadman suggested that Judge Broadman, in essence, granted the equivalent of a judgment on the pleadings or nonsuit. The Commission agrees with the special masters response to this argument. They wrote: "Simply put, this is not what Broadman did. The testimony of Johnson, King, and the declaration of Wood, coupled with the written judgment Broadman signed, clearly and convincingly establish that Broadman did not grant a judgment on the pleadings or nonsuit. Such a suggestion has no evidentiary support; it merely places Broadman in the untenable position of granting such a dispositive motion on his own initiative without affording plaintiff notice of what he was doing and an opportunity to be heard."

conduct violated California Code of Judicial Ethics canons 3B(7) (a judge shall accord to every person who has a legal interest in a proceeding the right to be heard according to law), 2A (a judge shall respect and comply with the law and shall act in a manner that promotes public confidence in the integrity of the judiciary) and 1 (a judge shall uphold the integrity of the judiciary). The Commission's vote on willful misconduct was nine to one.[4]

2. *Count Three—Questioning a Teenage Witness in* Smith v. Smith

Count three alleges that Judge Broadman's questioning of a minor witness on August 28, 1996, violated canons 1, 2A and 3B(4) of the California Code of Judicial Ethics. The questioning took place on the third day of a contempt proceeding. The father had charged the mother with contempt for not requiring the three minor children to reside with him as ordered by Judge Broadman. The contempt charges also alleged that the daughter, Gretchen, had told the father that the mother had made certain statements to Gretchen which the father alleged violated Judge Broadman's order.

After considerable discussion and over the mother's attorney's objection, Judge Broadman had admitted the father's testimony of what the daughter had allegedly said the mother had said. This "double hearsay" was admitted by Judge Broadman not as proof of its truth, but for the limited purpose of establishing the children's state of mind.

The mother's attorney decided, in light of the admission of the father's testimony, to call the 15-year-old daughter, Gretchen, as a witness. Gretchen had denied a couple of the allegations against her mother and indicated that she would not live with her father when Judge Broadman intervened. The transcript, as indicated in the notice of formal proceedings, reads:

"The Court: I need to do something. I need to ask a couple of questions. Do you understand what I mean when I say do you believe in the rule of law?

"The Witness: Yes.

"The Court: What do you understand that to mean?

"The Witness: That you're the judge and you decide for people what should happen.

"The Court: Can you tell me why I should believe a single word you say since you clearly do not act like you believe in the rule of law?

[4] One Commission member would have voted for a lesser level of misconduct.

"Attorney for mother: Your Honor, I apologize, Your Honor, and I mean this with the—

"The Court: You can object.

"Attorney for mother: I mean, with the greatest of respect to the Court, I would not allow that to be done to my child, and I think it's an inappropriate question. I think it's abusive to this child. I have said that. My objection is on the record.

"The Court: Do you understand my question?

"The Witness: Yes, I do.

"The Court: Are you going to help me? I'm not yelling or I have a calm voice, you'll readily agree to that, I presume. I'm asking in a calm manner. I don't want there to be any kind of implication that I'm screaming at this lady or doing anything like that.

"Attorney for mother: It is not the volume of the question, Your Honor, it is the nature of the question and the age of the child that I am concerned about.

"The Court: You're fifteen, right?

"The Witness: Yes.

"The Court: Can you help me in that because I'm sitting here, and I know this is abusive to you, but I have a problem because you're telling me important things, seemingly, but you're someone who's acted in direct contradiction to all of the evidence I've heard so far in the rule of law. See, I'm having a little bit of difficulty in my own mind giving a little bit of credibility in your own behalf?

"The Witness: No. I understand.

"The Court: Can you help me?

"The Witness: With what?

"The Court: How can I reconcile those two things?

"The Witness: I don't understand what you mean, 'help you.'

"The Court: Well, I have to decide what the right thing to do here is. One of the things is I have to decide when the people are telling the truth or are not telling the truth. Do you understand that?

"The Witness: Yes.

"The Court: Some of the people have testified truthfully. Some people I don't think have testified as truthfully as others, but when I have somebody who flaunts [*sic*] the rule of law, do you understand what that means, flaunts [*sic*] the rule of law?

"The Witness: Breaks it.

"The Court: Does it with more than just breaking the law but throws it in your face, kind of thing to a police—if you walked by and threw a beer bottle at a policeman that would be more flaunting [*sic*] the law, than if you threw a beer bottle a mile away from the policeman. Do you understand?

"The Witness: Yes.

"The Court: I know this is abusive for you, and I know I've brought you in here—I didn't bring you in here. Your mother and father brought you in here, but I still have to do my job. My job is to try and find the truth here, and I have problems believing a witness who does not believe in the rule of law because if you don't believe in the rule of law then why should I believe your testimony? Do you understand?

"The Witness: I didn't say I did not believe in the law.

"The Court: Well, the evidence has been thus far that you haven't acted as if you believe in the law.

"Attorney for mother: Your Honor, just for the record, again, there is obviously no way to answer that question, and I would object to the question as being argumentative. Again, I am not trying to interfere and I'm not trying to be disrespective.

"The Court: I understand I have this problem, and I've never had this problem. I've never had this situation. I've been a judge for ten years. I've never had this situation before, and I'm asking for—you're part of the problem, and I'm asking you to help me and figure out the answer. I wouldn't ask it if somebody wasn't smart enough to answer, but you appear to be a bright young woman. If you can't answer it, just say, I can't answer it.

"The Witness: What's your question?

"The Court: Can you help me to resolve that dilemma?

"The Witness: How could I help you? What do you want me to do? Do you want me to go with my dad because I said I wasn't going to and I'm not going to.

"The Court: Continue—young lady that is probably a direct contempt of this Court. Do you know what the ramifications for that are?

"The Witness: No.

"The Court: We'll be in recess. Call the public defender's office."

**(2)** We find that the transcript itself is evidence of a lack of patience, dignity and courtesy (canon 3B(4)) and a lack of impartiality (canon 2). Judge Broadman's questions are argumentative and objectionable on their face. He appeared to be bent on posing unanswerable questions to intimidate the 15-year-old witness. We reject any suggestion that Judge Broadman could have been reasonably surprised at the witness's testimony. If he had not been aware of the witness's aversion to living with her father when he altered the custody order in June, he was alerted to this by the father's declaration in support of an order to show cause and the two days of hearing that preceded the minor's testimony, which concerned, in large part, the daughter's refusal to reside with her father.

Rather than allow the attorney to complete his questioning, Judge Broadman interrupted asking the girl why he should believe her testimony in light of her failure to abide by the court order that she reside with her father. Judge Broadman ignored the mother's counsel's objection, stated that he knew "this is abusive for you," and when the girl finally stated that she would not live with her father, he recessed court and directed that the public defender advise her.

This questioning was inappropriate and the contemporaneous evidence strongly indicates that Judge Broadman knew that it was. Immediately after counsel objected that the questioning was "abusive to this child," Judge Broadman asked the witness if she will "readily agree" that he is not yelling. A little later he said: "I know this is abusive for you, and I know I've brought you in here—I didn't bring you in here. Your mother and father brought you in here, but I still have to do my job." Judge Broadman then admitted that he had a problem, that he had never had this type of problem before, that the girl was part of the problem and he wanted her to help him figure out the answer.

When the 15-year-old then reiterated that she did not want to "go with my dad," Judge Broadman warned her "that is probably a direct contempt of [this] Court," directed that a public defender be appointed for the witness, and recessed court.

All the witnesses, including Judge Broadman, indicated that his questioning upset the witness. Judge Broadman testified before the special masters that initially the girl's testimony was fine, but that later "the situation was rapidly deteriorating and I was afraid it was going to deteriorate to such an extent I was going to be stuck with an out of control teenager." The intervening event was Judge Broadman's interrogation. The father's attorney testified that initially the girl "didn't have much of a demeanor at all" and that she "seemed relatively nonemotional," but when Judge Broadman questioned her, the girl became "more and more defiant, more and more belligerent." The girl's grandmother testified that the girl was very frustrated and in shock. The mother's attorney testified that she was "terrorized and traumatized." The public defender who was called to advise the girl testified that when she spoke to the girl she was "angry and upset at the judge," "she was misty-eyed," and "she was angry, she was out of control, and probably at that point in the game would not have demonstrated any respect for the court if she were to resume taking the stand."

All the witnesses, including Judge Broadman, also indicated that when he questioned the girl he changed his demeanor. Judge Broadman testified that he is a "sloucher," but that he "may have sat up and put my hands on my thing like this and looked past the computer to talk on to her, and the grandmother may have thought since I sat up I got in her face." The father's attorney testified that when the girl started to testify, Judge Broadman "sat up more straight in his chair and leaned over to ask her questions more directly." The grandmother stated that he "would lean forward and challenge her in a cruel way." The mother's attorney's paralegal testified Judge Broadman's tone at first was a monotone, but that it subsequently got stronger and intimidating.

The father's attorney testified that when Judge Broadman said that "this is abusive for you" he was referring to the mother's attorney's decision to call the girl as a witness. Such an interpretation is not supported by the record. Furthermore, the impropriety of the questioning lies in Judge Broadman's statements and questions, not in the meaning of any particular word. An objective observer on August 28, 1996, could not have felt that the proceedings had been handled with patience, dignity and courtesy.[5]

[5] The Advisory Committee Commentary to canon 2 notes that: "The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality and competence." (Italics omitted.)

Much of the testimony before the masters concerned various interpretations as to Judge Broadman's intent.[6] This is germane to an evaluation of the nature of the misconduct, but does not affect our conclusion that clear and convincing evidence shows that the questioning when it took place lacked patience, dignity and courtesy.[7]

**(3)** Judge Broadman's explanation of his intent and the masters' evaluation of the witnesses' motivations, however, do weigh in our determination that Judge Broadman's questioning of the witness was conduct prejudicial to the administration of justice that brings the judicial office into disrepute, but not willful misconduct. Willful misconduct requires a finding of "bad faith." The Supreme Court has defined bad faith as "(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at p. 1092.)

**(4)** Prejudicial conduct, however, is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct if committed in a judicial capacity, but not committed in bad faith. (*Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at p. 1092.) The Supreme Court noted that prejudicial conduct can be " ' "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." ' " (*Broadman v. Commission on Judicial Performance, supra*, at p. 1092.)

We find that the transcript and the testimony of the witnesses clearly show that Judge Broadman's questioning of the 15-year-old witness was unjudicial conduct in violation of canons 3B(4), 2 and 1 and that it brought the judicial

[6] At the hearing before the Commission, Judge Broadman's counsel suggested that he had been trying to impress upon Gretchen the need to tell the truth. The record, however, shows that Gretchen's problem was not a tendency to mislead the court, but that she was too open about her refusal to live with her father.

[7] The only arguably objective evidence that the questioning was not improper was the testimony of the two attorneys, who were called to represent the children after Judge Broadman had recessed the hearing, that they had read the transcript and did not think the questioning unusual. Neither of these attorneys witnessed the questioning. One attorney indicated that her evaluation was based on watching judges take over the questioning of minors in juvenile matters and that this was the first time she had seen it in connection with contempt proceedings in a divorce case. The second attorney testified that his evaluation was based on a reading of the transcript and his "knowledge of having appeared in front of Judge Broadman on many occasions." He further testified that when judges asked questions of his minor clients, he usually objects and that one should be gentle and kind when questioning a young witness.

office into disrepute. We also find, that while Judge Broadman should have known better, he did not act in "bad faith" as that term has been defined as an element of willful misconduct. As Judge Broadman himself stated, he had "never had this situation before." Accordingly, we find that Judge Broadman's questioning constitutes prejudicial misconduct and not willful misconduct. The Commission's vote on this determination was six to four.[8]

3. *Count Four—Statement of Disqualification*

The facts on which count four is based are not in dispute. The day after his questioning of the minor witness (see count three), Judge Broadman found the mother guilty of 13 counts of contempt of court, sentenced her to 65 days in jail and ordered her to pay substantial fines. Her attorney, with the assistance of a second counsel, filed a petition for writ of habeas corpus with the Court of Appeal. The petition raised four contentions of error, including an allegation that the contempt proceedings were permeated by judicial misconduct.

On September 13, 1996, after receiving a copy of the petition, Judge Broadman caused a minute order to be filed in that case disqualifying himself pursuant to Code of Civil Procedure section 170.6, subdivision (1). The order stated:

"Pursuant to CCP Sec. 170.6(1) this Court hereby disqualifies itself from hearing any matter which involves . . . ."[9]

"After reading the Petition for Writ of Habeas Corpus in the above captioned matter, I have determined that I am now bias [*sic*] against Mr. . . . I cannot and do not trust Mr. . . . . He has overstepped the bounds of advocacy and has wrongly charged me with judicial misconduct and personally attacked me."

On February 4, 1997, the Court of Appeal filed an opinion finding that the mother had been denied due process of law in that she was given insufficient notice of the purported acts of contempt she was ultimately found to have committed, and vacating the contempt order. The court did not address the other contentions of error, but it did indicate that the trial court's fines were in excess of those provided for by statute, and questioned the court's alleged reduction of plaintiff's support.

[8] The four in the minority would have dismissed the count.

[9] The attorney's name has been deleted throughout this decision and order.

In March 1997, a dissolution action concerning prominent citizens of Tulare County was ready for trial. Many of the judges on the superior court had recused themselves from hearing the case. Mr. ___ was the attorney for one of the parties.

On March 28, 1997, counsel appeared at the courthouse expecting to proceed to trial before a certain judge. The case was unexpectedly reassigned to Judge Broadman. Upon learning that Mr. ___ was representing one of the parties, Judge Broadman took the bench and made the following statement in open court for the record:

"This case was sent down to me because there have been disqualifications by other judges. Pursuant to Rule 226, I'm directing that the clerk get a copy of the transcript of these proceedings and forward them to the presiding judge.

"I cannot be—I'm afraid I cannot be fair in this case with Mr. . . . representing the party. And I do not want to be accused of taking anyone unawares or of shirking my obligations to hear matters. Therefore, I'm stating my reasons why.

"It is my opinion that Mr. . . . is unethical and dishonest. And my feelings are so strong that I'm afraid that I cannot be fair in this matter, so long as he's representing one of the parties.

"Therefore, pursuant to the previously cited Rule of Court and section 170.3, I'm transferring this matter to the presiding judge." The transcript shows that Judge Broadman did not inquire from counsel how they happened to be assigned to his courtroom and that he did not offer them any opportunity to comment.

These are the facts. Absent some mitigating factors, they give the appearance that the judge was not patient, dignified and courteous, as required by California Code of Judicial Ethics, canon 3B(4). It appears that when an attorney, whose presence in another case had already resulted in Judge Broadman disqualifying himself, was inadvertently or mistakenly directed to his court, Judge Broadman went beyond any explanation necessary to disqualify himself in this case and evidently could not resist the temptation to publicly label the attorney as unethical and dishonest.

The record does not contain any persuasive mitigating factors. In his testimony before the masters, Judge Broadman stated that he did not know how Mr. ___ came to be in his courtroom, that he did not ask him to respond, and that he thought that he was "looking for a fight." Judge Broadman did

not explain the basis for his opinion. He did not ask counsel how they came to be in his courtroom and there is no indication that he made any inquiry to the presiding judge. He stated that he thought that he had to have a written statement of his reasons and that it was less work to have the court reporter do it than to write it out.[10]

It has been suggested that Judge Broadman's actions may be justified because (1) he could not rely on his initial disqualification order, (2) he was required to give reasons for his disqualification, (3) it was traditionally permissible for a judge to state his or her reasons in open court, (4) the parties were entitled to know Judge Broadman's reasons for disqualification, and (5) the accuracy of Judge Broadman's opinion of Mr. ___ had not been placed in issue.

We find that none of these points justifies Judge Broadman's unjudicial conduct. The California Code of Judicial Ethics is not limited to prescribing what a judge may legally do. It is also concerned with the manner in which a judge performs his or her duties. The conclusions that Judge Broadman could not rely on his initial disqualification order and was required to give reasons for his disqualification simply do not address the question of whether the way he chose to perform his legal duty was appropriate. Similarly, a finding that Judge Broadman chose a traditionally permissible way of proceeding does not necessarily mean that the way was judicious in this instance.

We do not suggest that a judge cannot give his or her reasons for disqualifying himself or herself from a matter, although it is not always done.[11] It is by no means clear that the parties are entitled to know a judge's reasons, but it may be the better practice for a judge to tell them. The local Tulare County rule requiring a statement of reasons appears to be designed to give the presiding judge some assurance that a judge is not shirking his duty to hear all cases assigned to him or her unless he or she is disqualified under Code of Civil Procedure section 170.1. Judge Broadman could have easily satisfied that requirement without branding the attorney as unethical and dishonest.

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[10] Although Judge Broadman testified before the special masters that his action was not in retaliation for Mr. ___ taking a writ, the appearance of retaliation remains. Despite Judge Broadman's initial statement to the masters that he did not know what attorney took the writ, he subsequently admitted that he entered the initial disqualification after reading the writ and offered no explanation for the disqualification other than Mr. ___'s actions in the *Smith* case.

[11] Code of Civil Procedure sections 170.1 and 170.3 did not require that Judge Broadman state his reasons for disqualifying himself. Former section 170, which required such a statement, was repealed in 1984. Section 170.3, subdivision (a) only requires that a judge who determines himself or herself to be disqualified notify the presiding judge of the court of his or her recusal.

**(5)** The suggestion that trial counsel's failure to tender Mr. ___'s character somehow justifies Judge Broadman's blanket statement raises concerns. First, Judge Broadman's statement of reasons, although terse, is as damning as possible—an unqualified statement that the attorney is "unethical and dishonest." This is much broader than Judge Broadman's initial disqualification and is far more defamatory than necessary. Second, every attorney who appears in court is entitled to the conduct prescribed by California Code of Judicial Ethics canon 3B(4) regardless of the judge's opinion of his or her character. Of course, an attorney must also treat the court with respect, but in this instance, all that Mr. ___ did was walk into Judge Broadman's courtroom as directed by the presiding judge or court administrator.

**(6)** We conclude that Judge Broadman's summary statement in open court that Mr. ___ was "unethical and dishonest" was unjudicial conduct in violation of California Code of Judicial Ethics canons 3B(4) and 2. Although the actual disqualification, as well as some of the surrounding circumstances, give rise to an inference that Judge Broadman proceeded in bad faith (with the intent to punish Mr. ___), we conclude that the evidence of such intent is not clear and convincing. Therefore we conclude that Judge Broadman did not act in bad faith. The Commission's vote that Judge Broadman's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute was nine to one.[12]

## DISCIPLINE

**(7)** The Supreme Court recently reiterated that the purpose of a Commission disciplinary proceeding is not punishment, " 'but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity . . . of the judicial system.' " (*Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at p. 1112, quoting *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].)

The Commission's findings of one incident of willful misconduct and two incidents of prejudicial misconduct come on the heels of Judge Broadman's public censure by the Supreme Court. (*Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th 1079.) In fairness, it is noted that the incidents here in issue occurred before the Supreme Court's public censure. Two of the incidents, however, the "trial" in *King v. Wood* and more notably the characterization of Mr. ___ as unethical and dishonest, occurred after the issuance of the Commission's opinion recommending public censure. The Commission found the similarities between Judge Broadman's treatment of

[12] One Commission member would have dismissed the count.

Mr. Kralowec, noted in the Supreme Court's opinion, and Judge Broadman's open court vilification of Mr. ___ particularly troubling.

We determine that public admonishment is the appropriate discipline. Each of Judge Broadman's three acts of misconduct—denying due process in a civil trial, argumentative questioning of a minor in a contempt proceeding, and labeling a lawyer as "unethical and dishonest" took place in open court. Accordingly, a public reprimand is appropriate to assure the public that such actions are not condoned. The Commission's vote on public admonishment was six to four with two of the dissenters voting for a greater sanction (public censure or removal) and two voting for a lesser sanction.

This decision shall constitute the order of public admonishment of Judge Broadman.

Commission members Ms. Ophelia Basgal, Mr. Mike Farrell, Hon. Daniel M. Hanlon, Patrick M. Kelly, Esq., Mr. Luke Leung, and Ms. Ramona Ripston voted for the public admonishment. Commission members Robert C. Bonner, Esq., and Donald E. Vinson, Ph.D., voted against a public admonishment, favoring a greater sanction. Commission members Hon. Lois Haight and Ms. Harriet Salarno voted against a public admonishment, favoring a lesser sanction. There was one vacant position on the Commission.

[No. 149. Sept. 1, 1999.]

INQUIRY CONCERNING JUDGE NANCY BROWN

**SUMMARY**

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance publicly admonished the judge. The commission concluded that the judge violated Cal. Code Jud. Ethics, canon 3C(1), when she banned the criminal courts coordinator from her courtroom and prohibited him from communicating with her staff. The judge's treatment of the coordinator constituted willful misconduct. The judge admitted that she had no authority to ban the coordinator from the public hallway or the courtroom, that she did this as her "quiet protest" to punish him, and that she did not tell any judge or the coordinator the reason for the ban for three and a half years. The judge was clearly acting in bad faith, both because she had a corrupt purpose—punishing the coordinator—which was not part of the faithful discharge of her judicial duties, and because she either knew or did not care that her actions exceeded her lawful powers. Public admonishment was appropriate because the judge's conduct interfered with the administration of the court. Furthermore, by failing to tell either the coordinator or the supervising judges the reason for her action, the judge in essence denied them any opportunity to appreciate her position, seek accommodations, or even to apologize. (Opinion by Hon. Daniel M. Hanlon, Chairperson.)

**HEADNOTES**

(1) **Judges § 6—Willful Misconduct—Court Official—Banishment from Courtroom.**—A superior judge violated Cal. Code Jud. Ethics, canon 3C(1), when she banned a court official from her courtroom and prohibited him from communicating with her staff. The judge's treatment of the court official constituted willful misconduct.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 57, 72.]

(2) **Judges § 6—Willful Misconduct—Elements.**—To commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial

and (2) committed in bad faith, (3) while acting in a judicial capacity. A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

(3) **Judges § 6—Discipline—Misconduct—Clear and Convincing Evidence.**—For the Commission on Judicial Performance to impose discipline there must be clear and convincing evidence of misconduct on the part of a judge.

(4) **Judges § 6—Misconduct—Decorum.**—The judge's display of an artificial marijuana plant in her courtroom and chambers did not constitute misconduct when the judge used the plant as a teaching tool and removed the plant at the request of the prosecutor before a narcotics trial began.

(5) **Judges § 6—Disciplinary Proceedings—Purpose.**—The purpose of judicial disciplinary proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield.

(6) **Judges § 6—Cooperation—Administration of Court Business.**—Cal. Code Jud. Ethics, canon 3C(1), provides that a judge shall cooperate with other judges and court officials in the administration of court business.

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**OPINION**

**HANLON, Chairperson.**—This disciplinary matter concerns Judge Nancy Brown, a judge of the Los Angeles County Superior Court.

PROCEDURAL HISTORY

Judge Brown was appointed a judge of the Los Angeles County Municipal Court in November 1976, and was elevated to the Los Angeles County Superior Court in December 1984. The events which are the subject of this matter took place between November 1991 and April 1998.

Formal proceedings in this matter commenced with the filing on May 28, 1998, of a notice of formal proceedings. The notice of formal proceedings sets forth four counts. On June 15, 1998, Judge Brown filed a verified answer denying that her conduct violated the California Code of Judicial Ethics, or its predecessor, the California Code of Judicial Conduct.

As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report. The evidentiary hearing was held in Los Angeles on February 22 and 23, 1999, before Justice Gilbert Nares, presiding, of the Court of Appeal, Fourth Appellate District, Judge James H. Chang of the Santa Clara County Superior Court, and Judge William L. Gordon of the Santa Barbara County Superior Court. The special masters filed their report to the commission on May 11, 1999.

Following the receipt of objections and briefs from Judge Brown and the office of trial counsel, the matter was orally argued before the commission on August 18, 1999. Mr. William Smith presented argument on behalf of trial counsel and Mr. Ephraim Margolin represented Judge Brown.

## FINDINGS AND CONCLUSIONS

1. *Count One (banning the criminal courts coordinator)*

The masters found that beginning in late 1994, the length and number of criminal trials dramatically increased. As a result, each day there were between five and 30 "last day" felony cases that faced dismissal if trial did not begin. Increasingly, these cases had to be sent to civil departments, to the chagrin of the civil bar and with substantial security risks.

The presiding judge instructed the supervising judges of the criminal courts to remedy the problem. They decided to move Judge Brown from department 107 to department 126, which had a regular calendar and was on the 15th floor. They also decided to move Judge Ringer, another judge with substantial seniority, to a courthouse closer to his home due to failing health. The reasons for moving Judge Brown are somewhat ambiguous. The supervising judges recognized that the transfers of Judge Brown and Judge Ringer were "very sensitive matters," as it was anticipated they would be unhappy with the reassignments.

In November 1994, the presiding judge told Judge Brown of the forthcoming move. On December 2, 1994, Judge Brown wrote to the presiding judge

objecting to the move. She characterized the forced move as "cruel, sadistic, humiliating and inexcusable" and lacking in any appreciation for her loyal service.

Mr. John Iverson, the criminal courts coordinator, worked under the direction of the supervising judge to ensure defendants received timely trials and to avoid dismissals due to delay. The supervising judge, who also maintained a calendar, had insufficient time to track the availability of courtrooms. Iverson was thus his "eyes and ears." It was critical that Iverson had very accurate and up-to-the-minute information about the status of each courtroom. Iverson visited each courtroom every afternoon. If it appeared a case was nearing completion, he would speak to the judge and counsel in an effort to determine the day and the time the courtroom would be available.

On December 24, 1994, Iverson was visiting department 108, next to Judge Brown's department. Judge Brown entered and appeared to be upset with Iverson's presence. She loudly told him, "You shouldn't be here. Stay away from here." Iverson had previously had a good relationship with Judge Brown and was puzzled by her conduct. Judge Brown gave no explanation.

On January 6, 1995, respondent wrote to the supervising judge again objecting to the move. After expressing the negative impact the move would have on her and her concerns with the security on the 15th floor, Judge Brown wrote, without further explanation: "In the meantime, please advise John Iverson that I will not permit nor tolerate him in my courtroom; I will not permit or tolerate his presence in my chambers; I will not permit or tolerate his presence in my back hall; my clerk, bailiff, court reporter, and I will not speak to him on the telephone. If he comes within 25 yards of me or my courtroom or my chambers or the back hallway, he is likely to be a very unhappy boy. If my department is open, I will personally notify you and Margaret in the Coordinator's office as I have always done." Judge Brown moved to department 126 around the end of January 1995.

When Iverson was shown the letter, he could not understand it. Shortly after Judge Brown moved, Iverson tried to reach her by telephone to discuss the ban. Her clerk told him that Judge Brown would not speak to him and he was not to call. A few days later, Iverson went into the back hallway of department 126 to see Judge Brown. From her chambers she said, "You don't belong here. Get away from here." On February 3, 1995, Iverson encountered respondent at an elevator. She loudly shouted, "You're not allowed here. Stay

away from me." On some occasion, Iverson asked respondent why she imposed the ban, and she responded "Think about it." Iverson, however, had no idea why respondent imposed the ban.

On February 6, 1995, Judge Brown sent the presiding judge a memorandum stating:

"When I returned from lunch last Friday, [February 3], I found John Iverson skulking around my chambers, my back hall, my elevator and my courtroom.

"Would you please communicate to John Iverson that I will not have him skulking around my chambers, my back hall, my courtroom talking with my staff or having anything to do with Department 126.

"I thought I had made that abundantly clear, but, apparently, John Iverson did not get the message.

"So I am asking you once again to communicate with him personally or Jim Bascue or whoever you want to communicate with, but John Iverson is not not not not not not to be in my back hallway, my chambers, my courtroom, nor is he to communicate with my staff by telephone.

"If I am open for trial, I will notify Margaret in the Coordinator's Office as I have always done."

Iverson told the supervising judges about his difficulties with Judge Brown. They were concerned and the assistant supervising judge attempted to speak to Judge Brown, but she responded that her clerk would call when they were available to take another case. She did not divulge the source of her displeasure with Iverson.

Iverson avoided department 126 and generally could not provide the supervising judge information on its availability. But for the ban, he would have visited the courtroom each day. The other departments cooperated fully with Iverson. On rare occasion, a deputy district attorney or a public defender would tell Iverson that Judge Brown's courtroom was open, or the supervising judge would order him to contact department 126 for the status of a specific case. The masters found that sometime in 1998, Iverson's office began receiving telephonic communications from department 126 that it was open.

Judge Brown testified before the masters that despite the ban, she did everything she could to continue the smooth running of department 126. She indicated that although she initially instructed her clerk not to speak to Iverson, within a year she softened her position and instructed the clerk to alert the master calendar courtroom and the coordinator's office each morning of their status.

There was conflicting evidence as to communications before 1998. Judge Brown's clerks testified that she did not order them not to talk to Iverson or any members of his office and that they would respond to inquiries and inform department 100 when the court was open. Iverson testified that he had no idea what Judge Brown told her clerks, but that he would not have telephoned department 126 for information because of the ban and his office did not begin to get information from department 126 until 1998.

The masters resolved the conflicting evidence against Judge Brown. They noted that the supervising judge testified "that after he became supervising judge on January 1, 1997, he was required by respondent's ban to telephone respondent's courtroom 15 or 20 times to obtain information regarding the status of trials heard there and availability," and that on other occasions, he asked deputy district attorneys assigned to his courtroom to check with the calendar deputy for department 126 to find out the status of the court. The masters observed that these measures would have been unnecessary if Iverson's office was regularly receiving information from department 126.

The masters further noted that the information received from department 126 in 1998 was not particularly helpful because it was usually received after the day's assignments had been made. They found that Judge Brown's ban of Iverson made it difficult to "place last day cases in her court in a timely fashion rather than having to probably send them around the county or possibly the civil courthouse where they shouldn't be."

Before the masters, Judge Brown testified that her motivation for imposing the ban was anger at Iverson. She stated that on December 15, 1994, he had come to her chambers and said, "You're moving to 126 tomorrow." Later that day Judge Ringer had called her in tears and told her that Iverson had told him he had to move from his courtroom the next day. Judge Brown told Judge Ringer that she was not anxious to move and that he should take his time. Iverson denied telling Judge Ringer that he had to move immediately.

Judge Brown testified that she banned Iverson because she does not "permit rudeness or insensitivity" or the mistreatment of others. She thought

Iverson had treated Judge Ringer "abysmally, inexcusably, without any sensitivity, just cruelly." She said to herself, "Nobody else is going to do anything else about it, so this is my protest, my quiet protest." She wanted Iverson "to experience the same kind of pain he caused Judge Ringer."

Judge Brown admitted she did not tell Iverson the reason for the ban until it had been in effect for three and a half years. She also admitted she never gave the supervising judges any explanation. Judge Brown conceded that she had no authority to ban Iverson from the public hallway or the courtroom, but maintained that the ban was an appropriate response to his treatment of Judge Ringer.

The masters concluded that in banning Iverson from her courtroom and prohibiting him from communicating with her staff, Judge Brown acted in her judicial capacity and violated California Code of Judicial Ethics, canon 3C(1), which requires a judge to cooperate with other judges and court personnel.

They noted that a centralized method of getting criminal cases to trial in a timely manner was crucial and that all the judges but Judge Brown cooperated. Judge Brown imposed an unnecessary administrative burden on the supervising judges.

The masters also found that Judge Brown acted in bad faith. She admitted that the ban was imposed solely to punish Iverson for his ostensible treatment of Judge Ringer, and that it was beyond her lawful power. The Supreme Court in *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1092 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*), held that bad faith includes conduct performed for any purpose other than the faithful discharge of judicial duties, or performed with knowledge the act is beyond lawful judicial power. The masters note that Judge Brown failed to tell the supervising judges why she imposed the ban, and only told Iverson after it had been in place for three and a half years. Judge Brown "never rectified the untenable situation she created," and at the hearing, "remained convinced her conduct was appropriate even though unlawful."

The masters concluded that as all the criteria are met, Judge Brown's ban of Iverson constituted willful misconduct.[1] They note in mitigation the lack

[1] Judge Gordon filed a minority report finding that although Judge Brown violated California Code of Judicial Ethics, canon 3C(1), she was not directed to reconsider the ban and did not have knowledge of the actual impact of the ban and accordingly was only guilty of improper conduct.

of evidence that Judge Brown ever refused an assignment or that department 126 was ever without a trial or other business due to the ban.

**(1)** The commission agrees with the masters that Judge Brown's ban of Iverson constituted willful misconduct. **(2)** In *Broadman*, the Supreme Court explained that "[t]o commit willful misconduct in office, a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity." (*Broadman, supra*, 18 Cal.4th at p. 1091.) The court went on to state that a "judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (18 Cal.4th at p. 1092.)

As the majority of the masters found, Judge Brown's treatment of Iverson meets the Supreme Court's definition of willful misconduct. Judge Brown's memoranda to the supervising judges unequivocally ban Iverson from her courtroom, her chambers and the back hallway and prohibit him from communicating with her or her staff. Judge Brown admits that she had no authority to ban Iverson from the public hallway or the courtroom, that she did this as her "quiet protest" to punish Iverson, and that she did not tell any judge or Iverson the reason for the ban for three and a half years. Thus her conduct was unjudicial and committed while acting in a judicial capacity. She was clearly acting in bad faith, both because she had a corrupt purpose—punishing Iverson—which is not part of the faithful discharge of her judicial duties, and because she either knew or did not care that her actions exceeded her lawful powers. The latter conclusion is suggested by her insistence before the masters that despite exceeding her powers, the ban was an appropriate response to Iverson's treatment of Judge Ringer.

The argument that Judge Brown was not advised of the administrative problems caused by the ban is problematic for several reasons. First, the record clearly shows that Judge Brown was aware that the ban was disruptive. She testified as to her understanding of Iverson's responsibilities, the need to keep the master calendar courtroom informed, and her efforts to keep the supervising judge informed without talking to Iverson. The masters, however, found that despite her testimony to the contrary, she did not keep the coordinator's office informed. Judge Brown also testified that although she refused to rescind the ban, she allowed her staff to talk to Iverson.

Second, the record shows that the supervising judges made efforts to discuss the ban with Judge Brown but felt that her anger rendered such efforts futile. As Judge Brown never told them her real reason for banning Iverson, the supervising judges may have reasonably believed that Judge Brown remained angry with them over being moved, as implied in her written memoranda. Even four years after the ban, when Judge Brown spoke with the new presiding judge, she declined to lift the ban. There is little to suggest that Judge Brown would have changed her position if she had been more fully informed of the administrative problems occasioned by her ban.

Finally, the extent of Judge Brown's knowledge of the actual administrative problems is more relevant to an evaluation of the harm caused by her misconduct, than the determination that the ban constitutes misconduct. The ban was in excess of her legal authority; it was issued in her judicial capacity and was in bad faith. Even if respondent had subsequently lifted the ban, the initial ban would still constitute willful misconduct. In addition to making it difficult to assign last-minute criminal cases to Judge Brown's court, the ban "punished" Iverson, to the knowledge of the court personnel, without informing him, the judges, or other court staff of the reason for his punishment.

2. *Count Two (ordering transportation of the Menendez brothers to courtroom for marriage and commenting on the vacation of transportation order)*

The second count alleged that on June 11, 1996, Judge Brown issued an order for Lyle and Erik Menendez, who were awaiting sentencing on a conviction of murder, to be transported to her courtroom or chambers on July 1, 1996, in order that Judge Brown could perform a marriage ceremony for Lyle during lunch recess. The count states that shortly before July 1, 1996, Judge Brown learned that her transport order had been rescinded by the acting criminal courts supervising judge, but, nonetheless, she addressed matters involving the Menendez brothers on the record. The count alleged that Judge Brown improperly used her judicial power, improperly authorized the use of public resources, publicly commented on a pending case, and publicly disparaged a fellow judge, and that this conduct violated canons 1, 2A and 3B(9) of the California Code of Judicial Ethics.

The masters found that no evidence was introduced of the cost of transporting the Menendez brothers and that it was permissible and appropriate for judges to perform wedding ceremonies. They also found that on July 1, 1996, Judge Brown did not talk about the substance of the charges against the brothers, and that her comments were not intended and could not reasonably be perceived as commenting on the case. As to Judge Brown's comments concerning the acting supervising judge, the masters found that

although Judge Brown was angry and her comments were inadvisable and gratuitous, nonetheless, "her brief remarks were not sufficiently caustic to undermine public confidence in the integrity and impartiality of the judiciary."

**(3)** For the commission to impose discipline there must be clear and convincing evidence of misconduct or improper action on the part of a judge. (*Broadman, supra,* 18 Cal.4th at p. 1090; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 168 [48 Cal.Rptr.2d 106, 906 P.2d 1260].) The commission, having considered the record, the masters' report, and the presentations by Judge Brown's attorney and trial counsel, concludes that there is insufficient evidence to sustain the charge and hereby dismisses count two.

3. *Count Three (the marijuana plant in the courtroom)*

The third count alleged that from 1991 to the present, Judge Brown displayed an artificial marijuana plant in her courtroom and chambers while she conducted judicial business, including presiding over drug-related criminal cases. The count alleged that the display of the plant was inconsistent with her judicial obligation to maintain appropriate decorum and gave the appearance that she might not be fair and impartial in, or might not take seriously, matters that involved the subject of drugs. This conduct allegedly violated California Code of Judicial Ethics, canons 1 and 2A.

**(4)** The masters noted that (a) the plastic marijuana plant was a gift from another judge, (b) the plant was only in the courtroom for a short while, (c) Judge Brown testified that she used the plant as a teaching tool, and (d) when a deputy district attorney requested that Judge Brown remove the plant before a narcotics trial began, it was removed from the courtroom. They conclude that while displaying the plant in the courtroom, or chambers, may have been ill-advised, there was no evidence that it impeded the administration of justice, and its display did not constitute willful misconduct or prejudicial misconduct.

Trial counsel raised no objections to the masters' treatment of count three.

The commission, having considered the record and the masters' report concludes that there is insufficient evidence to sustain the charge and hereby dismisses count three.

4. *Count Four (smoking in chambers)*

Count four alleged that from at least 1994, Judge Brown smoked tobacco products in chambers and allowed others to smoke in her chambers in

violation of the California Rules of Court and the Labor Code. It further alleged that when she received a letter from the commission, rather than give assurance that she would comply with the smoking laws, she implied that she would continue to smoke in her chambers, albeit with the door closed. This conduct was alleged to violate California Code of Judicial Ethics, canons 1 and 2A.

Judge Brown admitted before the masters that prior to April 1998, she, and others, smoked cigarettes in her chambers, and the masters found that smoking in chambers was unlawful and constituted improper conduct.

The commission notes that Judge Brown testified before the masters that she has stopped smoking and that she acknowledged that smoking in chambers is prohibited. These facts and Judge Brown's lengthy service as a judge, prompt the commission, without in any way accepting any of the arguments offered to justify Judge Brown's past practice, to decline to consider whether her actions constitute anything other than improper conduct.

## DISCIPLINE

**(5)** The Supreme Court noted in *Dodds v. Commission on Judicial Performance, supra,* 12 Cal.4th at page 179, that the purpose of judicial disciplinary proceedings " 'is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield.' "

The commission appreciates Judge Brown's lengthy service as a judge and the fact that there is no evidence that Judge Brown ever refused an assignment or that her department was ever without a trial or other business due to the ban.

**(6)** Nonetheless, the commission concludes that a public admonishment is appropriate for Judge Brown's ban of the criminal courts coordinator from her courtroom. Judge Brown's actions violated canon 3C(1) of the California Code of Judicial Ethics, which provides that a judge "shall cooperate with other judges and court officials in the administration of court business." Judge Brown's "quiet protest" interfered, as was foreseeable, with the administration of the court. Furthermore, by failing to tell either the coordinator or the supervising judges the reason for her action, Judge Brown in essence denied them any opportunity to appreciate her position, seek accommodations, or even to apologize. When a judge so wields her "awesome power," the commission's responsibilities to the public, the court staff and the judges constrain the commission to publicly identify such as willful misconduct.

This decision shall constitute the order of public admonishment of Judge Brown.

Commission members Justice Hanlon, Ms. Bergthold, Mr. Farrell, Mr. Kahn, Mr. Kelly, Ms. Lui, Judge Pichon, Ms. Ripston and Ms. Sommars voted in favor of the disposition of each count and the imposition of discipline. Judge Flier recused herself from participating in this proceeding. Dr. Vinson did not participate in this proceeding.

COMMISSION ON JUDICIAL PERFORMANCE
455 Golden Gate Avenue, Suite 14400
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FOR RELEASE
October 14, 1999

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# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE LISA GUY-SCHALL

The Commission on Judicial Performance has publicly admonished Judge Lisa Guy-Schall of the San Diego County Unified Superior Court. The admonishment is attached.

The commission is composed of six public members, three judges and two lawyers. One of the public member positions is currently vacant. The Chairperson is the Honorable Daniel M. Hanlon of the Court of Appeal, First Appellate District in San Francisco.

**PUBLIC ADMONISHMENT OF JUDGE LISA GUY-SCHALL**

The Commission on Judicial Performance has ordered Judge Lisa Guy-Schall publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

On December 18, 1995, Joanna Slivka appeared before Judge Guy-Schall for a hearing on a petition for a restraining order against Ms. Slivka. During the hearing, Ms. Slivka began yelling and acting aggressively, and Judge Guy-Schall ordered her out of the courtroom. While Ms. Slivka was outside the courtroom, Judge Guy-Schall had her bailiff ask Ms. Slivka if she would be willing to reappear in court and keep herself under control; the bailiff reported to the judge that Ms. Slivka had responded that if the judge would not allow her to tell her story, she would probably "go off" again. In Ms. Slivka's absence, without citing her for contempt or having her returned to the courtroom, Judge Guy-Schall found her in contempt and sentenced her to five days in jail. The order issued by Judge Guy-Schall stated that Ms. Slivka was in direct contempt and was to serve five actual days in jail. With respect to the facts underlying the finding of contempt, the order stated, "full order and findings are set forth in the reporter's transcript that is order [sic] this date." Ms. Slivka was taken into custody outside the courtroom and remained in custody for five days.

Judge Guy-Schall's actions constituted an abuse of the contempt power. By failing to return Ms. Slivka to court to inform her that she was in contempt, failing to give her a chance to respond to the contempt order, and finding her in contempt in her absence, Judge Guy-Schall failed to follow the required procedures for holding an individual in contempt of court. (See, *Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533, in which the commission and the California Supreme Court found that a judge committed willful misconduct by holding a litigant in contempt in her absence and incarcerating her, for a remark uttered as she left the courtroom.) The contempt order entered by Judge Guy-Schall failed to state on its face facts sufficient to constitute a contempt, as also required by law. (See, *In re Baroldi* (1987) 189 Cal.App.3d 101, 110; *Cannon* v. *Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 694.) Judge Guy-Schall, who had been a judge for ten years at the time of the incident, was obligated to know or research proper contempt procedures. (See, *Cannon*, *supra*, 14 Cal.3d at p. 694; *Ryan*, *supra*, 45 Cal.3d at p. 533.)

The contempt power, which permits a single official to deprive a citizen of his fundamental liberty interest without all of the procedural safeguards normally accompanying such a deprivation, must be used with great prudence and caution. It is essential that judges know and follow proper procedures in exercising this power. (See, *Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1314; *Ryan* v. *Commission on Judicial Performance*, *supra*, 45 Cal.3d at p. 533; *Cannon* v. *Commission on Judicial Qualifications*, *supra*, 14 Cal.3d at p. 694.)

Judge Guy-Schall has informed the commission that this is the only instance in which she has found an individual in contempt. However, she has acknowledged no problems in her handling of this matter.

Commission members Justice Daniel M. Hanlon, Ms. Lara Bergthold, Mr. Mike Farrell, Mr. Michael A. Kahn, Mr. Patrick M. Kelly, Mrs. Crystal Lui, Judge Rise Jones Pichon, Ms. Ramona Ripston, and Ms. Julie Sommars voted to impose a public admonishment. Judge Madeleine I. Flier voted against public admonishment and would have imposed a less severe sanction. Dr. Donald E. Vinson did not participate.

[No. 152. Jan. 27, 2000.]

# INQUIRY CONCERNING JUDGE JOHN B. GIBSON

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance publicly admonished the judge. The commission concluded that the judge engaged in a pattern of inappropriate conduct in the workplace toward female court employees, in violation of former Cal. Code Jud. Conduct, canons 1, 2A, and 3B(5). Eight separate acts of inappropriate conduct were identified. Six of the acts related to a municipal court supervisor who worked closely with the judge on administrative matters and two related to other court employees. Public admonishment was the appropriate sanction despite the number of incidents because the judge's actions occurred during his first years on the bench, and, for the most part, concerned a single court employee, the municipal court supervisor, with whom he had a unique joking relationship. The judge recognized his responsibility for his mistakes and apologized for his actions. The events in question all occurred over six years before the disciplinary proceedings and no subsequent similar conduct had been reported in the interim. In addition, the commission had before it considerable character evidence attesting to the judge's exemplary behavior over the last six years. (Opinion by Michael A. Kahn, Vice-chairperson.)

## HEADNOTES

(1) **Judges § 6—Discipline—Willful Misconduct—Conduct Prejudicial—Ex Parte Communication.**—The judge's ex parte communication with the supervising deputy district attorney, initiated by the attorney, was improper but, under all of the relevant circumstances, did not rise to the level of "willful misconduct" or "conduct prejudicial." The supervising district attorney had expressed concern that the judge had dismissed a case vindictively. The judge denied acting vindictively and discussed the procedural facts of the case.

(2) **Judges § 6—Disciplinary Proceedings—Purpose.**—The purpose of a disciplinary proceeding before the Commission on Judicial Performance

is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity of the judicial system.

(3) **Judges § 6—Discipline—Censure—Public Admonishment—Mitigating Factors.**—The Commission on Judicial Performance may censure a judge for action that constitutes willful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and may publicly admonish a judge found to have engaged in an improper action or dereliction of duty (Cal. Const., art. VI, § 18, subd. (d)). However, censure should not be imposed for every instance of prejudicial conduct. Public admonishment was introduced as a form of discipline by Proposition 190, which took effect in 1995. Although the California Supreme Court has not yet directly addressed the question of conduct that warrants public admonishment, it has stated that mitigating factors can properly lead to the imposition of a lesser sanction than censure, even when the requirements for censure are otherwise met.

(4) **Judges § 6—Discipline—Censure—Public Admonishment—Mitigating Factors.**—In determining whether to impose censure or public admonishment, the Commission on Judicial Performance has generally considered the nature and impact of the misconduct at issue. A review of the commission's public admonishments since 1995 makes clear that the existence of mitigating factors weighs heavily in the commission's decisions to impose public admonishment rather than censure.

(5) **Judges § 6—Discipline—Public Admonishment—Inappropriate Workplace Conduct—Recognition of Responsibility.**—Where a superior court judge engaged in a pattern of inappropriate conduct toward female court employees, public admonishment, rather than public censure, was the appropriate sanction, despite the number of incidents, because the judge's actions occurred during his first years on the bench, and for the most part, concerned a single court employee, a municipal court supervisor with whom the judge had a unique joking relationship, and the judge recognized his responsibility for his mistakes and apologized for his actions.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 56, 57, 72.]

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**OPINION**

**KAHN, Vice-chairperson.**—This disciplinary matter concerns Judge John B. Gibson, a judge of the San Bernardino County Superior Court.

Judge Gibson was appointed a judge of the Municipal Court of San Bernardino County, Victorville Division, in September 1990. As a result of consolidation of the San Bernardino trial courts in August 1998, he is now a judge of the superior court.

Formal proceedings in this matter commenced with the filing on December 10, 1998, of a notice of formal proceedings setting forth two counts. On January 29, 1999, Judge Gibson filed his verified answer.

As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report. The evidentiary hearing was held in Santa Ana commencing June 1 and concluding June 7, 1999, before Justice J. Gary Hastings, presiding, of the Court of Appeal, Second Appellate District, Judge Michael Duffy of the Superior Court of San Luis Obispo County, and Judge Lillian Kwok Sing of the Superior Court of the City and County of San Francisco. The special masters filed their report to the commission on August 2, 1999.

Following the receipt of objections and briefs from Judge Gibson and the office of trial counsel, the matter was orally argued before the commission on December 7, 1999. Mr. Jack Coyle presented argument on behalf of trial counsel and Mr. Jerome Sapiro presented argument on behalf of Judge Gibson.

## FINDINGS AND CONCLUSIONS

### A. *Count One*

Count one charged Judge Gibson with three separate acts in connection with *People v. Valenzuela and Payan,* case No. FVI04899 (hereinafter *Valenzuela*).

The first charge was that on September 26, 1996, Judge Gibson dismissed *Valenzuela* out of animosity toward the district attorney's office and that this violated the California Code of Judicial Ethics, canons 1 and 2A. Canon 1 states, "A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Canon 2A states, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The masters found that it was not proved by clear and convincing evidence that *Valenzuela* was dismissed by Judge Gibson out of animosity towards the

district attorney's office. The masters found that Judge Gibson dismissed *Valenzuela* on September 26, 1996, when no one from the district attorney's office appeared to prosecute the matter; however, the masters concluded that the dismissal was *not* in accordance with Judge Gibson's normal custom and practice of having counsel present and placing the dismissal on the record.

(1) The second charge was that on October 4, 1996, Judge Gibson had an ex parte communication with the supervising district attorney in which the attorney expressed his concern that *Valenzuela* had been dismissed vindictively. During this conversation, Judge Gibson allegedly denied acting vindictively and discussed the procedural facts of the case. This incident was charged as a violation of California Code of Judicial Ethics, canon 3B(7). Canon 3B(7) states that, except under specific circumstances, "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."

The masters found that Judge Gibson did have an ex parte communication with the supervising district attorney, and they also found that the attorney initiated the communication. The masters concluded that the communication was improper, but under all of the relevant circumstances, the communication did not rise to the level of "willful misconduct" or "prejudicial conduct."

The third charge was that at a hearing before Judge Robert Law on February 21, 1997, Judge Gibson testified untruthfully under oath regarding the dismissal of the *Valenzuela* case, in that he testified that he had not dismissed the *Valenzuela* case on September 26, 1996. This conduct was alleged to have violated California Code of Judicial Ethics, canons 1 and 2. As noted above, canon 1 states, "A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." The several provisions of canon 2 are directed toward the need for a judge to avoid impropriety and the appearance of impropriety in all of the judge's activities. In particular, canon 2A (as also noted above) states, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The masters found that the commission failed to prove by clear and convincing evidence that Judge Gibson had testified that he had not dismissed the *Valenzuela* case on September 26, 1996, as alleged, and therefore concluded that the commission had not sustained its burden of proof that Judge Gibson testified untruthfully or committed perjury at the February 21, 1997 hearing.

After carefully reviewing the record, the briefs and the arguments of counsel, the commission adopts the masters' findings on count one. The commission concludes that these findings do not warrant the imposition of discipline.

B. *Count Two*

Count two alleged that between December 1990 and September 1993, Judge Gibson engaged in a pattern of inappropriate conduct in the workplace toward female court employees, in violation of the former Code of Judicial Conduct, canons 1, 2A and 3B(5). Former canon 1 stated, "A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Former canon 2A stated, "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Former canon 3B(5) stated, "A judge should perform judicial duties without bias or prejudice. A judge should not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status." The commentary to canon 3B(5) stated, "A judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment."

Eight separate acts of inappropriate conduct were identified. Six of the acts relate to Joan Huntsman, a supervisor in the Victorville Municipal Court who worked closely on a daily basis with Judge Gibson on administrative matters, and two relate to other court employees.

The masters found that Judge Gibson and Ms. Huntsman met each other when Judge Gibson worked as a deputy in the San Bernardino District Attorney's Office and Ms. Huntsman was a clerk in the Victorville branch of the municipal court. Ms. Huntsman had a good sense of humor and a casual, "joking" relationship developed between Ms. Huntsman and then Deputy District Attorney Gibson. Unfortunately, this relationship continued after Judge Gibson took the bench, and led to several of the following incidents.

(1) In response to a memo from Ms. Huntsman suggesting that they meet to discuss administrative matters, Judge Gibson wrote a memo that reads as follows:

"I have received your memo of September 4, 1991. I can't imagine anything that would please me more than implementing new procedures with you. Naturally I would consider it a great personal honor to implement you,

old or new. However, as you point out, my schedule is tight and I would attempt to squeeze you in, but we can forget about Mondays. Mondays are my meetings with the Royal Pelican Society and, as everyone knows, Monday Night Football must take priority over everything else. Tuesdays and Thursdays aren't any good as anybody can tell you. That leaves us with Wednesdays and Fridays. Fridays would be good. Oh, I'm sorry, I forgot we were implementing new procedures. Fridays wouldn't be a good day for that. Maybe we could work something out on Wednesday. No, can't do Wednesday. That's lunch with Judge Ashworth and Hodge. Its important I attend these lunches with them for often they discuss all of the new procedures they have been implementing with Francine, due to their close contact with her. Oh, well.

"In all seriousness, I would cancel all of the appointments to reverse my vasectomy to have a meeting with you to implement new procedures. Tell me when and where. Should you actually desire to eat lunch I will have solid substance as opposed to mere coke.

"Love and Kisses,

"Buggs

"cc: Judge Anthony J. Piazza, Supervising Judge"

Ms. Huntsman testified that the memo was an unnecessary response to her memo for a meeting and that the suggestive sexual references were offensive to her. Judge Gibson testified that he did not intend any sexual innuendo in the memo. The masters found that Judge Gibson's testimony on this issue was not credible. They found that the memo was an attempt at a joke within the context of the relationship Judge Gibson had developed with Ms. Huntsman and that a reasonable and objective person would consider the memo sexually suggestive. Judge Gibson, in hindsight, recognizes that he made a mistake in writing the memo.

(2) The masters found that Judge Gibson made the following comments in the presence of Ms. Huntsman and a friend of his: "Isn't that the best looking pair of legs and ass you've ever seen?" The comment caused Ms. Huntsman to become embarrassed. The friend then said to Judge Gibson: "John, you're a judge now. You shouldn't be saying things like that." Judge Gibson responded by saying, "I can say whatever I want to her." In his testimony before the masters, Judge Gibson did not deny the initial statement or his response. Judge Gibson admitted that his statement went beyond his prior relationship with Ms. Huntsman and was improper.

(3) Ms. Huntsman testified that Judge Gibson on occasion made comments to Ms. Huntsman such as "Those are nice shoes you have on, and they—your

legs look very nice in them . . . ," "That's a beautiful blouse you have on. Do you have a slip on or a camisole?," and "That's nice material. I wish I could be that close to your skin." Ms. Huntsman did not attribute any sexual innuendo or intent to these remarks; however, she testified that she was offended by these comments because she did not think that Judge Gibson was being sincere.

Judge Gibson admitted that on occasion he would compliment Ms. Huntsman on her clothing but denied any of the sexual innuendoes attributed to him.

The masters credited the testimony of Ms. Huntsman and not that of Judge Gibson. They found that the comments were consistent with the relationship that had developed before Judge Gibson became a judge and continued afterwards. The masters found that Judge Gibson had no intent to harass Ms. Huntsman and that she did not understand the remarks as sexual advances or as sexual harassment. Nevertheless, the masters found that the remarks were insensitive and inappropriate.

(4) In early 1992, Judge Gibson remarked to Ms. Huntsman that another female court employee's nipples were showing through her sweater. The masters found that the clerk in question "was a fairly large woman who wore tight fitting clothing, oftentimes sweaters which would show her nipples." Ms. Huntsman, the employee's supervisor, testified that on one occasion Judge Gibson remarked to her that "he really enjoyed seeing [the employee] walk in the door with her light-colored sweater on and her 46DD bra and her nipples showing . . . I really get excited when I see that."

Judge Gibson denied that he made these statements. He testified that after seeing the employee earlier that morning, he spoke to Ms. Huntsman about the employee's attire being not appropriate for the court.

The masters found that the comments attributed to Judge Gibson did occur, and that they were consistent with the nature of the relationship between Judge Gibson and Ms. Huntsman.

(5) Ms. Huntsman testified that on several occasions in 1991 and 1992 Judge Gibson tugged on Ms. Huntsman's bra strap and on one occasion said words to the effect of "I'm an expert at undoing these." Judge Gibson denied doing so and denied making any such statement.

The masters found that the incidents occurred, that they fell within the "joking" relationship between Judge Gibson and Ms. Huntsman, and that they were inappropriate.

(6) Ms. Huntsman testified to the effect that on several occasions in 1991 and 1992, as Judge Gibson was in chambers, putting on his robe, he wiggled his fingers through his robe in the area of his groin and said to Ms. Huntsman, "Say hello to Mr. Bobo."[1]

Judge Gibson's testimony is quoted in the masters' report as follows:

"Q. Who is Mr. Bobo?

"A. Thanks to the fact that you have too many people working for you, I can now answer that question.

"Q. Who is Mr. Bobo?

"A. I'm told by my attorney who had his paralegals go on the Internet, Mr. Bobo is one of those plastic blow-up clowns that has sand at the bottom of it. And if you strike it, it will rock back and then come to an upright position again. Until you told me that, I did not know.

"Q. Did you ever know that Bobo has a Spanish origin?

"A. You have too many people working for you. No I did not.

"Q. It means a boob, doesn't it?

"A. So I'm told.

"Q. Do you use the word or the phrase 'Mr. Bobo' in reference to yourself?

"A. Yes.

"Q. What do you mean when you use 'Mr. Bobo' in reference to yourself?

"A. It's a name that implies a comedic small, diminutive figure.

"Q. Round?

"A. I hadn't thought of that. I suppose.

[1] At oral argument on December 7, 1999, a joint request to consider additional evidence was granted. One of the items of additional evidence was a declaration from a former court employee who stated that one afternoon in 1991 she saw Judge Gibson in his robe in the hallway stick his finger out of the opening in front of his robe, below waist level, and say, "Say hello to Mr. Bobo."

"Q. Something that somebody beats on once in a while?

"A. No. I never gave it that punching bag analogy.

"Q. Did you ever say to Mrs. Huntsman in words or substance, 'Say hello to Mr. Bobo'?

"A. Not in the context she's put it. If I did something that stupid, I would refer to myself by that name. Like, 'Mr. Bobo really blew that one.'

"Q. So you'd use it as a way of putting yourself down?

"A. Yes.

"Q. Did you ever stick your finger out of your robe when you were putting on your robe and say, 'Say hello to Mr. Bobo'?

"A. No.

"Q. Did you ever do that in substance?

"A. I don't follow you.

"Q. Did you ever say words to that effect and make such a gesture?

"A. No."

The masters found that the incidents occurred and were totally within the character of the relationship between Ms. Huntsman and Judge Gibson. They found that Judge Gibson's testimony on this issue was not credible and that the act was inappropriate.

(7) On January 30, 1992, Judge Gibson wrote a memo addressed to "Municipal Court Staff Victorville Division" entitled "Death of Joan Huntsman." The memo included a reference to a court employee, indicated here as "Ms. ___."[2] The body of the memo reads:

"I want to thank you for the unanimous vote to have Joan Huntsman put to death. I realize a question of this magnitude takes a great deal of time and thought. I am therefore very appreciate [*sic*] that the matter was decided within 15 seconds of its submission to you.

[2] "Ms. ___" is identified in the masters' report. Her identity is irrelevant to our decision, as are the identities of certain other individuals who are mentioned herein. We have omitted their names in order to spare them further embarrassment.

"I want to especially thank those, who after the vote, came up with ways that Ms. Huntsman should be put to death. It appears there are two schools of thought. One requesting immediate and swift execution. Their thought seems to be the sooner she is gone the better. However, the second school of thought seems to favor a slow lingering death. Although I realize there may be an initial emotional gain from the latter course of conduct, it does mean she would be with us longer.

"Lastly, a special tip of the hat to the unique manner of execution that [Ms. ___] devised for Ms. Huntsman. And to think we all thought they worked together."

The masters found that Ms. ___ discovered a copy of the memo on her desk on January 30, 1992, and had no idea where it had come from. She was offended and embarrassed that the memo mentioned her, especially because Ms. Huntsman was her supervisor. She confronted Judge Gibson and asked what he knew about the memo. In response, Judge Gibson appended a handwritten note to the memo which states: "I deny all responsibility for this memo—its all [Ms. ___'s] fault." This further embarrassed Ms. ___ and she thereafter tried to avoid Judge Gibson.

At that time Ms. Huntsman had no knowledge of the memo or of the exchange between Ms. ___ and Judge Gibson. There was no evidence that anyone else saw the memo or learned of the exchange between Judge Gibson and Ms. ___ until years later. Judge Gibson testified that he had no recollection of writing the memo but that it was the type of memo he would have written as a joke.

The masters found that Judge Gibson did write the memo and that although it most likely was meant as a joke, it was inappropriate.

(8) In September 1993, a county probation officer who had worked in Judge Gibson's courtroom decided to resign shortly after the birth of her son. She went around the courthouse saying farewell to her friends. She was visiting in Judge Gibson's courtroom and sitting in the chair next to the bailiff when Judge Gibson came out of his chambers. He inquired whether it was true that she was resigning. When she said yes, he noted that she was no longer going to be a county employee. Judge Gibson then said, "So it doesn't matter if I do this," and he leaned over, grabbed the employee on both sides of her face and gave her a full kiss on the lips. He then returned to his chambers. Judge Gibson admitted this incident.

* * *

The masters concluded that all six incidents alleged in connection with Ms. Huntsman did occur and that they constitute "conduct prejudicial to the

administration of justice that brings the judicial office into disrepute." The masters note in mitigation that there was no evidence that Judge Gibson acted this way with anyone other than Ms. Huntsman and that she encouraged "a less than professional relationship." They also note that Judge Gibson recognizes that he should not have continued the relationship as before after he became a judge.

The masters also concluded that the "Death to Joan Huntsman" memo although most likely intended as a joke, was a poor joke made at the expense of court employees that caused offense and embarrassment. Judge Gibson's actions constituted "prejudicial conduct" for which the masters found no mitigating factors.

Finally, the masters found that Judge Gibson's unconsented-to kissing of the probation officer constituted prejudicial conduct. They note in mitigation that he admitted that the incident occurred, apologized to the probation officer (after she returned and demanded an apology), and admitted to the masters that his action was inappropriate.

The commission adopts the masters' findings and conclusions on count two.

## DISCIPLINE

**(2)** The Supreme Court has indicated that the purpose of a commission disciplinary proceeding is not punishment, " 'but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112 [77 Cal.Rptr.2d 408, 959 P.2d 715], citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].)

**(3)** There is no doubt that discipline is warranted for Judge Gibson's completely unacceptable conduct. The California Constitution states that the commission may "censure a judge . . . for action . . . that constitutes willful misconduct in office . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute," and may "publicly . . . admonish a judge . . . found to have engaged in an improper action or dereliction of duty." (Cal. Const., art. VI, § 18, subd. (d).) The California Supreme Court has made it clear, however, that censure should not be imposed for every instance of prejudicial conduct. (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 178–179 [48 Cal.Rptr.2d 106, 906 P.2d 1260].) Public admonishment was introduced as a form of discipline by

Proposition 190, which took effect in 1995. Although the court has not yet directly addressed the question of conduct that warrants public admonishment, the court has stated that mitigating factors can properly lead to the imposition of a lesser sanction than censure, even when the requirements for censure are otherwise met. (*Broadman, supra*, 18 Cal.4th at p. 1112.)

**(4)** In determining whether to impose censure or public admonishment, the commission has generally considered the nature and impact of the misconduct at issue. A review of the commission's public admonishments since 1995 makes clear that the existence of mitigating factors weighs heavily in the commission's decisions to impose public admonishment rather than censure.

**(5)** The commission concludes that under all the circumstances in this matter, a public admonishment is appropriate for Judge Gibson's prejudicial conduct with regards to Ms. Huntsman, another court employee, and a county probation officer. Public admonishment, rather than public censure, is appropriate despite the number of incidents because Judge Gibson's actions occurred in the early '90's during his first years on the bench, and for the most part, concerned a single court employee, Ms. Huntsman, with whom he had a unique "joking" relationship. Judge Gibson recognizes that it was his responsibility to establish a professional relationship with Ms. Huntsman once he became a judge and that he failed to do so.

The commission believes that several circumstances mitigate the risk of further violations by Judge Gibson of the sort proved in this matter. First, the vast majority of the incidents involved Ms. Huntsman, with whom Judge Gibson had an unusual relationship. Second, Judge Gibson has recognized his responsibility for his mistakes and has apologized for his actions. Third, the events in question all occurred over six years ago, when Judge Gibson was new to the bench; no subsequent similar conduct has been reported in the interim. Fourth, the commission has before it considerable character evidence attesting to Judge Gibson's exemplary behavior over the last six years. Furthermore, Judge Gibson has already suffered (to use his counsel's words) the "public humiliation" of the widespread publicity of these embarrassing incidents.

In addressing charges such as those brought against Judge Gibson by Ms. Huntsman, the commission would ordinarily be concerned that an aggrieved party might face continuing unacceptable conduct or would lack access to remedies other than those provided by the commission. Because Ms. Huntsman had no professional contact with Judge Gibson after 1993, and

because Ms. Huntsman was availing herself of civil remedies, these concerns did not arise in connection with this matter.[3]

This decision shall constitute the order of public admonishment of Judge Gibson.

Commission members Michael A. Kahn, Esq., Judge Madeleine I. Flier, Ms. Crystal Lui, Judge Risë Jones Pichon, Ms. Ramona Ripston, and Ms. Julie Sommars voted in favor of public admonishment. Commission members Justice Daniel M. Hanlon, Ms. Lara Bergthold, Mr. Mike Farrell and Patrick M. Kelly, Esq. favored a public censure for Judge Gibson's lack of candor.

[3] The commission believes that it should explain the staleness of the count two allegations, which deal with events that occurred between December 1990 and September 1993, long before charges were brought before the commission. The masters found that by 1992 Ms. Huntsman was aware of her option to report her complaints about Judge Gibson to the commission. In fact, however, charges were not brought until 1995; when they were brought, it was under the following circumstances: The masters found that in 1993, Ms. Huntsman was transferred from the Victorville branch by her supervisors, and that no evidence suggested any further professional contact between Judge Gibson and Ms. Huntsman after her transfer. By 1995, Ms. Huntsman had been terminated from her position and was approached by an employee of the clerk's office who asked Ms. Huntsman to speak with her attorney. The employee was contemplating litigation at that time. After speaking with Ms. Huntsman, the attorney sent a complaint to the commission on behalf of Ms. Huntsman with regard to Judge Gibson's conduct during 1991 and 1992. Furthermore, in 1996 Ms. Huntsman filed a civil suit against Judge Gibson and others.

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FOR RELEASE
April 12, 2000

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# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE ROBERT C. COATES

The Commission on Judicial Performance has publicly admonished Judge Robert C. Coates of the San Diego County Superior Court. The admonishment is attached.

The commission is composed of six public members, three judges and two lawyers. One of the public member positions is currently vacant. The Chairperson is the Honorable Daniel M. Hanlon of the Court of Appeal, First Appellate District in San Francisco.

**PUBLIC ADMONISHMENT OF JUDGE ROBERT C. COATES**

The Commission on Judicial Performance has ordered Judge Robert C. Coates publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

**I.** During the years 1993-1998, Judge Coates engaged in a pattern of abuse of the prestige of judicial office and misuse of court resources in connection with personal matters, as follows:

A. Lending the prestige of judicial office to advance the judge's private interests

Judge Coates sent numerous documents that were, or appeared to have been, designed to lend the prestige of judicial office to advance the judge's personal interests. Examples of these documents include, but are not limited to, the following:

- A letter dated December 16, 1993, to a Wells Fargo Bank vice-president regarding a "special request" to "secure [the judge's] line of credit." The letter references an account number and requests that the bank convert the status of an existing line of credit from "unsecured" to "secured" in connection with the refinancing of the judge's home. The letter was prepared on official court letterhead and the designation "Judge of the Municipal Court" was printed beneath the signature line.
- A letter dated April 1, 1994, to the San Diego City Treasurer complaining about a parking ticket Judge Coates had received. The letter was prepared on official court letterhead and the designation "Judge" was printed beneath the signature line.
- A letter dated July 17, 1995, to the service manager of a local automobile dealership complaining about an undelivered brush guard Judge Coates had ordered for his 1995 Ford Explorer. The letter was not prepared on official court letterhead; however, the court's address and telephone number were printed at the top of the letter and the designation "Judge" was printed beneath the signature line.
- A letter dated October 23, 1995, to the "Arm Loan Coordinator" of a mortgage company protesting an increase in the judge's loan interest rate. The letter references a loan number. The letter was not prepared on official court letterhead; however, the court's address and telephone number were printed at the top of the letter and the designation "Judge" was printed beneath the signature line.
- A letter dated December 6, 1995, to Judy Lind at the San Diego Book Awards Association, attaching an entry form entering the judge's book, *A Street is Not a Home*, in the awards competition. The letter was prepared on official court letterhead and the designation "Judge of the Municipal Court" was printed beneath the signature line.

All of the foregoing correspondence involved the personal interests of Judge Coates. The judge's use of official court letterhead, the court's address and telephone number, and/or his judicial title fostered an appearance that the judge was using the prestige of his office to advance his private interests. Accordingly, the foregoing conduct was inconsistent with canon 2B(2),

which states that a judge "shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others," and canon 2B(4), which states that a judge "shall not use the judicial title in any written communication intended to advance the personal or pecuniary interest of the judge." Judge Coates' conduct also was inconsistent with canon 2A, which states that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

B. Misuse of court resources to prepare personal documents

The documents described above not only were or appeared to have been designed to use the prestige of judicial office, but also were prepared at the judge's direction by court secretaries during court hours and using court resources. In addition to those documents, Judge Coates also used court secretaries and other court resources to prepare and in many instances send numerous other documents which, although apparently not designed to lend the prestige of judicial office, involved the judge's personal business or interests entirely unrelated to the judge's judicial duties. These included, for example, letters to a radio network criticizing or commending its reporters; personal lists; poems; a letter to a local high school concerning its varsity/alumni baseball game; and letters to President Clinton concerning matters such as the federal job economy and the state of the United States Park Service.

The commission found that Judge Coates' extensive use of court secretaries and other court resources to generate personal correspondence and documents, which exceeded 100 in number, was inconsistent with canon 2A, which requires that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (See *In re Judge D. Ronald Hyde, Inquiry #138* (1996), commission decision and order of public censure (judge censured, in part, for using court staff and resources in connection with personal business).)

**II.** Between 1997-1999, Judge Coates engaged in a pattern of conduct toward court staff and persons appearing before him that was inconsistent with canon 3B(4), which requires a judge to be patient, dignified, and courteous with persons with whom the judge deals in an official capacity. This conduct is exemplified by the following:

A. On March 9, 1998, Judge Coates telephoned a court administrative analyst to ascertain why information which the judge had asked to have forwarded to a state assemblyman had not been sent. The analyst explained that the information had not been forwarded because he understood that this was not to be done until after there had been a meeting concerning the matter with the presiding judge and the chair of the court's legislation committee. Judge Coates yelled at the analyst for not forwarding the information and made statements to the effect of:

> "Goddamnit. You were supposed to get that legislation introduced. I gave you a direct order. I'm a judge."
>
> "Judge [name omitted] and I are going to campaign against you, to bring you down to size. You disregarded the order of a judge. How dare you."

"You haven't done a goddamned thing for this court and cannot analyze legislation. I'm going to get this in your personnel file."

"[I am] a committee member and a judge and you've just destroyed my credibility and the court's credibility. Let me tell you what another judge said to me about you. You are a piece of shit."

B. In August 1997, Judge Coates presided over jury selection proceedings in *People* v. *Lamar Alexander*, case number M727742. During voir dire on August 20, 1997, a prospective juror, who was a school teacher, advised the judge that she might be unable to serve as a juror due to the anticipated length of the trial. The following colloquy then occurred:

THE COURT: You should have said that in the other department. They were supposed to have asked you that.
PROSPECTIVE JUROR: They did not.
THE COURT: All right. So what's the problem?
PROSPECTIVE JUROR: A commitment that I can't break and school's starting.
THE COURT: So are you - - What does school - - You're a teacher?
PROSPECTIVE JUROR: Yes.
THE COURT: All right. Well, ma'am, that is something that they certainly should have asked you over there. And that, with great respect, is something you should have raised with them over there. I mean, we've extended, we've lavished expense on you now here. And now after we've gone through all this then, you tell us that there might be a problem.
[Pause]
THE COURT: Do we really want you teaching our children?
[Audible laughter]
THE COURT: If you're not planning ahead like that when?

In addition to violating canon 3B(4), Judge Coates' conduct was also inconsistent with canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

C. In November 1998, Judge Coates presided over the jury trial of *People* v. *Daniel Paul Nelson*, case number T184286, which involved a charge of driving under the influence of alcohol. On November 10, 1998, an expert witness testified for the defense. During direct examination by defense counsel Michael Fremont concerning his qualifications as a forensic expert, witness John Woodward stated that he was a "Department of Health licensed clinical laboratory scientist with a specialty in the field of clinical and forensic toxicology" or words to that effect. Shortly thereafter, Judge Coates interrupted defense counsel's direct examination and questioned the witness about his statement - which the judge was mistaken about - of having a "specialty in the field of alcohol toxicology." As the following colloquy from the November 10, 1998 proceeding shows, Judge Coates continued to question the witness about this issue over the objections of defense counsel and stated that the witness had lied to the jury:

THE COURT: Mr. Woodward, you said a moment ago that you have a -- the quote was: specialty in the field of alcohol toxicology. From what agency is that specialty issued?
THE WITNESS: There is no specialty license; it's encompassed in my general license.
THE COURT: So you made that up?
THE WITNESS: I didn't make it up.
MR. FREMONT: Your Honor, I have to object to the court's inquiry.
THE COURT: Well, in the law, Mr. Woodward. An attorney can, by dint of ten years experience and following certain patterns of knowledge and that sort of thing, obtain the legal right to use the word specialty entitled family law, workers compensation, other areas; and that's issued by the State of California. And it would be unlawful for any attorney to use that word, specialty, without that certification from the State of California. Do you have such a certification from any government agency?
MR. FREMONT: Your Honor, it is irrelevant. I have to object; he is not an attorney and he is an expert witness and he's qualified as an expert witness.
THE COURT: I'm just asking the question about an answer that you got from him. So I'll overrule your objection. Please answer the question.
THE WITNESS: There is no specialty license from any agency and they're not attorneys and --
THE COURT: So why do you use the word specialty?
THE WITNESS: Because that is what I have specialized in and by virtue of being a specialist, that's how I gained membership to the California Association of Toxicologists. I had to submit the fact that I have limited my practice to clinical and forensic toxicology and then the Board votes on whether or not the experience and education that I have had over the last 54 years qualifies me as a, for membership into the California Association of Toxicologists. And my license specifically says the field of toxicology.
THE COURT: That's right. And then within that field you claim that you have a specialty in alcohol. Right?
THE WITNESS: No.
THE COURT: That's what you said. Specialty in the field of alcohol toxicology.
THE WITNESS: No, I didn't say alcohol. I said --
THE COURT: I'm quoting you: specialty in the field of alcohol toxicology. That was the phrase that came out of your mouth a moment ago.
THE WITNESS: I beg to differ; I did not -- I always say --
THE COURT: You say you didn't say that?
MR. FREMONT: Your Honor, I have to object. It's --
THE WITNESS: Yes. I do not --
THE COURT: Overruled.
MR. FREMONT: The bench is badgering this witness and I'm objecting; I'm asking for --
THE COURT: The witness is lying to this jury.
MR. FREMONT: I object. That's a comment on the evidence. I'm asking for a mistrial immediately.

THE WITNESS: I am not lying.
THE COURT: Let's recess for a moment, ladies and gentlemen. We'll call this a 15-minute recess.

After the defendant was convicted, he moved for a new trial based on Judge Coates' remarks as noted. On or about December 22, 1998, at the hearing on the motion, Judge Coates conceded that his conduct had been improper, granted the motion, and recused himself from the case.

It is not improper for a judge to question a witness. In this instance, however, based upon a misunderstanding, and without seeking clarification of the witness' prior testimony by having testimony read back or a tape-recording replayed, the judge engaged in accusatory questioning of the witness and, in fact, accused him of lying in front of the jury. In addition to violating canon 3B(4), Judge Coates' conduct was also inconsistent with canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

D. In November 1997, court staff removed a water fountain from the fourth floor of the courthouse in connection with the move of the human resources department. The water fountain was located in a hallway behind Judge Coates' courtroom. Judge Coates telephoned a deputy court administrator concerning the removal of the water fountain. During the ensuing conversation, the judge cursed at the deputy court administrator and berated him for removing the water fountain. Among other remarks, the judge made a statement to the effect of, "I don't give a goddamn who you are. You don't move the goddamn water fountain."

E**.** On Tuesday, January 19, 1999, Judge Coates telephoned the presiding judge's clerk and advised that he had a medical appointment scheduled for Thursday morning, January 21, 1999. However, on that Thursday morning, the presiding judge assigned a trial to Judge Coates after a clerk mistakenly advised that Judge Coates' courtroom was "open." The attorneys, parties, and witnesses involved in the trial proceeded to Judge Coates' courtroom where they awaited the return of Judge Coates, who was absent because of his medical appointment.

On Thursday afternoon, January 21, Judge Coates telephoned the presiding judge's judicial secretary about that morning's apparent scheduling "mix-up." During the discussion, Judge Coates became angry and demanded to know how the incident occurred. The judge accused the secretary of not doing her job properly. The secretary responded that she was sorry, but denied that the incident had been her fault. Judge Coates did not further inquire into the matter to determine whether or not the secretary was at fault. Instead, he made a statement to the effect that he was a superior court judge and was "ordering" the secretary to take procedural steps to make sure her "mistake" was not repeated.

**III**. In May 1997, Judge Coates presided over the jury trial of *People* v. *Esquivel*, case number T171767, which involved misdemeanor hit and run charges. On May 21, 1997, during deliberation, the jury sent a note to the court requesting to be furnished with copies of transcripts of all witness testimony. Without notifying the parties' attorneys of the jury's request, Judge Coates entered the jury room and denied the request. Judge Coates did not notify the attorneys

because he had a "pressing appointment" and believed the parties would agree with his decision. The judge's remarks to the jury were not transcribed or tape-recorded.

Judge Coates' ex parte communication with the jury concerning the request for transcripts of witness testimony was contrary to canon 3B(7), which generally prohibits ex parte communications. Judge Coates' conduct as described above was also inconsistent with canon 2A, which provides that a judge "shall respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, the Supreme Court found that Judge Gonzalez's visits to the jury room during deliberations constituted willful misconduct. (See also, *People* v. *Hogan* (1982) 31 Cal.3d 815, 848 (the trial court should not answer questions from the jury without first communicating with counsel); *People* v. *Thompson* (1990) 50 Cal.3d 134, 173 (it is improper for a judge to enter the jury room without counsel and communicate with jurors).)

Commission members Justice Daniel M. Hanlon, Ms. Lara Bergthold, Mr. Mike Farrell, Mr. Michael A. Kahn, Mr. Patrick M. Kelly, Mrs. Crystal Lui, Judge Rise Jones Pichon, Ms. Ramona Ripston, and Ms. Julie Sommars voted to impose a public admonishment. Judge Madeleine I. Flier voted against public admonishment. Judge Flier agreed in principle that a public admonishment was warranted, but favored a lesser sanction regarding certain incidents involving court staff.

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FOR RELEASE
June 20, 2000

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# JUDICIAL PERFORMANCE COMMISSION ISSUES PUBLIC ADMONISHMENT OF JUDGE GARY P. RYAN

The Commission on Judicial Performance has publicly admonished Judge Gary P. Ryan of the Orange County Superior Court. The admonishment is attached.

The commission is composed of six public members, three judges and two lawyers. One of the public member positions is currently vacant. The Chairperson is the Honorable Daniel M. Hanlon of the Court of Appeal, First Appellate District in San Francisco.

**PUBLIC ADMONISHMENT OF JUDGE GARY P. RYAN**

The Commission on Judicial Performance has ordered Judge Gary P. Ryan publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Ryan is a judge of the Orange County Superior Court; his term commenced in January 1995. He was previously a judge of the Orange County Municipal Court from January 1979 to December 1994.

On September 3, 1999, at approximately 10:30 p.m., a Jeep Grand Cherokee being driven by Judge Ryan rear-ended a Ford Expedition that was stopped at a red light at an intersection in Newport Beach. The impact resulted in some minor damage to the vehicles. No injuries were sustained by Judge Ryan or his passenger, or by the driver of the Ford or her 10-month-old daughter.

Judge Ryan was arrested on September 3, 1999, and was later charged with driving under the influence of alcohol (California Vehicle Code section 23152(a)) and driving with a blood alcohol level of 0.08 percent or more (California Vehicle Code section 23152(b)). Judge Ryan's blood alcohol level was measured at 0.17 percent.

On February 4, 2000, Judge Ryan pled guilty to both driving under the influence of alcohol charges. He was placed on three years informal probation and ordered to attend a first offender's alcohol program, perform 20 hours of community service, pay a mandatory fine, and comply with other conditions of probation. His driver's license was restricted for the first 90 days of the probation period to use for work and attending the alcohol program.

Judge Ryan's arrest and subsequent plea were the subject of numerous news articles, including in the *Los Angeles Times*, the *Orange County Register*, and the *Los Angeles Daily Journal*.

Judge Ryan's unlawful action described above evidenced a gross disregard of the principles of personal and official conduct embodied in the California Code of Judicial Ethics, including failure to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved (canon 1), and failure to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2).

Judge Ryan's unlawful action described above also constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (California Constitution, Article VI, section 18(d).)

Judge Ryan also violated the Code of Judicial Ethics by failing to report the filing of the charges and his convictions to the Commission on Judicial Performance. A judge who is charged or convicted of a misdemeanor involving the personal use of alcohol is required to report that fact to the commission promptly and in writing (canon 3D(3)).

Commission members Justice Daniel M. Hanlon, Ms. Lara Bergthold, Mr. Mike Farrell, Ms. Gayle Gutierrez, Mr. Michael A. Kahn, Mr. Patrick M. Kelly, and Ms. Ramona Ripston voted to impose a public admonishment. Commission members Judge Madeleine I. Flier, Ms. Crystal Lui, and Judge Rise Jones Pichon voted against public admonishment and would have imposed a less severe sanction.

[No. 156. June 26, 2000.]

# INQUIRY CONCERNING JUDGE SUSANNE S. SHAW

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance publicly admonished the judge. The Commission found that the judge's ex parte comment to two deputy district attorneys about a case violated the proscription in Cal. Code Jud. Ethics, canon 3B(7), against ex parte communications and gave the appearance of embroilment in the case in violation of canon 2A, and was conduct prejudicial to the administration of justice. The judge's statement that implied a defendant might be vulnerable to sexual assault in jail was contrary to the requirement of canon 3B(4) that a judge shall be patient, dignified, and courteous to litigants and attorneys, and was conduct prejudicial. The judge's comments suggesting that a deputy district attorney had engaged in excessive drinking also violated canon 3B(4), but constituted only improper action. An admonishment was appropriate to advise the judge and the community that such actions were not acceptable. (Opinion by Daniel M. Hanlon, Chairperson.)

## HEADNOTES

(1) **Judges § 6.2—Discipline—Legal Error—Exceptions.**—A judge who commits legal error which, in addition, clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty, is subject to investigation. Mere legal error, without more, however, is insufficient to support a finding that a judge has violated the California Code of Judicial Ethics and thus should be disciplined. The judge's interrupting a witness's testimony and reading the Penal Code section for perjury to the witness in front of the jury was only legal error.

(2) **Judges § 6.4—Discipline—Proceedings—Determining Appropriate Sanction.**—The purpose of a Commission on Judicial Performance

disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar.

(3) **Judges § 6.4—Discipline—Proceedings—Determining Appropriate Sanction—Character Evidence.**—A judge's good reputation does not necessarily weigh against disciplining the judge. Honesty and a good reputation do not mitigate conduct prejudicial to the administration of justice. It is questionable how much weight should be given to the opinions of persons who were not present, and thus cannot assess the serious nature of the incidents of misconduct, but nonetheless believe the judge to be a fair and patient person. Indeed, the public has as great a need for protection from unethical conduct by popular judges as from unpopular judges. An outpouring of support for a judge from prosecutors, defense counsel, judges, peace officers and administrative personnel may inhibit some witnesses from coming forward and testifying.

(4) **Judges § 6.2—Discipline—Grounds—Public Admonishment—Inappropriate Comments.**—A public admonishment was the appropriate discipline for the judge's two acts of conduct prejudicial to the administration of justice and one incident of improper action, assuring all those who were concerned with the judge's inappropriate comments that these comments were not acceptable judicial behavior. The public admonishment would help educate the bench and the public as to when a judge's comments may violate the California Code of Judicial Ethics.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 55, 57, 52.]

(5) **Judges § 6.2—Discipline—Grounds—Disrespectful Conduct.**—Judicial personality is important to the fabric of the judicial system, and it would be dangerous to that system were the judiciary to become a group of faceless bureaucrats who attempt to fit into a mold in order to stay out of trouble. However, the cultivation of a particular judicial personality may not be used as an excuse for unethical conduct. Cal. Code Jud. Ethics, canon 3B(4), provides that a judge shall be patient, dignified, and courteous. A judge has considerable latitude to develop her own or his own judicial style, but regardless of the judge's style, she or he must respect the litigants and attorneys who appear in her or his court. When a judge fails to do so, it is the responsibility of the Commission on Judicial Performance to bring such failures to the judge's attention.

## OPINION

**HANLON, Chairperson.**—This disciplinary matter concerns Judge Susanne S. Shaw, a judge of the Orange County Unified Superior Court. Judge Shaw was elected to the Orange County Municipal Court in 1984 and took her oath of office on January 7, 1985. As a result of the unification of the courts, Judge Shaw became a judge of the Orange County Unified Superior Court on August 10, 1998.

## SUMMARY

The Commission on Judicial Performance concludes that Judge Shaw committed two acts of conduct prejudicial to the administration of justice in making an ex parte comment to two deputy district attorneys (count 2) and making a statement to a thin white defendant she had ordered into custody that was reasonably understood to infer that he might be vulnerable to sexual assault in jail (count 8). In addition, the commission concludes that Judge Shaw's comments to a deputy district attorney concerning her alleged drinking habits and those of her future father-in-law constituted improper action (count 1). This conduct violated the California Code of Judicial Ethics, canon 1 (a judge shall uphold the integrity and independence of the judiciary) and canon 2A ("[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"). Judge Shaw's ex parte comment also violated the proscription in canon 3B(7) against ex parte communications, and her comments to the thin white defendant and the deputy district attorney violated canon 3B(4) which provides that a judge should be patient, dignified and courteous to litigants and attorneys. The commission determines that a public admonishment is the appropriate sanction for the two acts of prejudicial conduct and one count of improper action.

The commission continues to have concerns with some of the types of behavior alleged in the other counts, particularly the allegation of singing in the courtroom (count 11). The commission, however, accepts the masters' findings that none of the allegations were sustained by clear and convincing evidence and accordingly counts 3, 4, 5, 6, 7, 9, 10, 11 and 12 are dismissed.

## PROCEDURAL HISTORY

Formal proceedings in this matter commenced with the filing on May 3, 1999, of a notice of formal proceedings setting forth 12 counts. On May 27, 1999, Judge Shaw filed her verified answer. A first amended notice of formal proceedings was filed on October 26, 1999.

As provided for by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report: Justice Reuben A. Ortega, presiding, of the Court of Appeal, Second Appellate District, Division One; Justice Douglas E. Swager of the Court of Appeal, First Appellate District, Division One; and Judge Steven Z. Perren (now justice[1]) of the Superior Court of Ventura County. A status conference was held in Los Angeles on September 16, 1999. The evidentiary hearing was held in Santa Ana before the special masters commencing November 15, 1999, and concluding November 18, 1999. The special masters filed their report to the commission on February 15, 2000.

Following the receipt of objections and briefs from Judge Shaw and the office of trial counsel, the matter was orally argued before the commission on May 2, 2000. Mr. William E. Smith presented argument on behalf of trial counsel and Mr. Thomas M. Goethals presented argument on behalf of Judge Shaw. Judge Shaw also spoke on her own behalf.

## FINDINGS AND CONCLUSIONS ON SUSTAINED COUNTS

### A. *Count One*

The notice of formal proceedings charges that in December 1993, in a particular case, Judge Shaw became angry at a deputy district attorney who would not offer a DUI[2] defendant a reduced charge and stated that the prosecutor lacked discretion and human kindness and would regret her decision when she was twenty years older. It further alleges that Judge Shaw called the prosecutor a hypocrite for prosecuting the same type of conduct that the prosecutor engaged in on the weekends, and also referred to the drinking habits of the prosecutor's future father-in-law, a former judge. Judge Shaw's comments are alleged to have been intimidating, demeaning, undignified and discourteous, and appeared to reflect bias and embroilment, in violation of the former California Code of Judicial Conduct canons 1, 2A and 3B(4).

The masters found that in December 1993, a DUI case involving a military pilot was sent to Judge Shaw for trial. Ms. S___ was the prosecutor. Prior to the commencement of trial, Judge Shaw conducted settlement discussions.

[1] During the course of these proceedings, Judge Perren was elevated to the Court of Appeal, Second Appellate District, Division Six.

[2] "DUI" is a commonly used abbreviation for driving under the influence of alcohol and usually refers to arrests and convictions under Vehicle Code section 23152.

During the discussions, Judge Shaw became persuaded that a proper disposition would be a plea to the reduced charge of "wet reckless,"[3] thus saving the defendant's military career. The district attorney's office refused to accept such a proposal and Judge Shaw summoned Ms. S___'s supervisor.

The masters found that Judge Shaw in her official capacity and in a judicial setting commented that several members of the district attorney's office had in the past been "major alcoholics" and had "suffered more than one DUI" without losing their jobs. She remarked to Ms. S___ that if she did not believe this, she could ask her future father-in-law, Judge L___, about it. The masters believed that Judge Shaw did not mean to imply that Judge L___ was an intemperate drinker, but found that the remark did just that. Judge Shaw also made a remark that implied that Ms. S___ and her fiancé drank on the weekends. Again, the masters found that although Judge Shaw did not intend to imply that Ms. S___ and her fiancé drank intemperately, the comment was so perceived by Ms. S___. The masters also found that Judge Shaw told Ms. S___ that she lacked discretion and would, twenty years later, regret her refusal to accept a plea to the lesser offense.

The masters opined that the proper exercise of the judicial function contemplates that a judge can and should make diligent efforts to settle a case, and, if unsuccessful, conduct a fair and impartial trial. They concluded that, accordingly, Judge Shaw's conduct did not necessarily appear to reflect bias or embroilment and did not interfere in the district attorney's authority.

The masters, however, found that Judge Shaw's comments to Ms. S___ were demeaning and discourteous, and thus necessarily undignified, in violation of California Code of Judicial Conduct canon 3B(4). They explained: "The comments personalized the situation at the expense of one of the advocates and thus went beyond what was acceptable in trying to settle the case. We recognize that the atmosphere of a misdemeanor arraignment/trial court is quite different from the more staid environs of other institutions and that this difference is often manifested in a 'rough and tumble' way of handling cases. This, however, does not justify personalizing negotiations by references to a lawyer, her home and her family."

The masters concluded that Judge Shaw's conduct constituted improper action, rather than prejudicial conduct as urged by the examiners. The masters recognized that in the cases cited by the examiners,[4] the Supreme Court had

[3] "Wet reckless" or "reckless driving with alcohol" refers to Vehicle Code section 23103.5—acceptance of guilty or nolo contendere plea to violation of section 23103 in place of charge for violation of section 23152.

[4] In *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 914–916 [81 Cal.Rptr.2d 58, 968 P.2d 958], the Supreme Court found prejudicial misconduct when a judge

held that a judge's upbraiding of counsel could amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The masters, however, concluded that an "objective observer would not magnify one strenuous effort to settle a case into conduct that is prejudicial to public esteem for the judicial office." They noted that Judge Shaw did not impugn the attorney's overall competence, but only questioned the attorney's assessment of a particular case in an effort to achieve what Judge Shaw believed to be a fair resolution of the case.

The commission unanimously agreed with the masters that Judge Shaw's personalized comments went beyond what was acceptable in trying to settle a case and were demeaning, discourteous and undignified in violation of California Code of Judicial Conduct canon 3B(4). The commission also unanimously agrees that Judge Shaw's comments constituted improper action and did not amount to prejudicial conduct.

B. *Count Two*

The notice charges that in May 1996, following the arraignment of codefendants on a misdemeanor case concerning protesters in support of animal rights, Judge Shaw spoke about the case to two deputy district attorneys who happened to be in court on unrelated matters. She told them that she had just arraigned the defendants and had offered them a thirty-day sentence if they pled guilty, and that she did not want the district attorney's office to undercut her offer. No one was present on behalf of the defendants when Judge Shaw made those comments. This conduct is alleged to have constituted improper ex parte communication and to have given the appearance of bias and embroilment, in violation of California Code of Judicial Ethics canons 1, 2A and 3B(7).

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in open court expressed shock and embarrassment over the prosecutors' conduct, and accused them of playing games with the rights of the defendants. In *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 841–842 [264 Cal.Rptr. 100, 782 P.2d 239], the court found prejudicial misconduct when the judge told the prosecutor in open court, "you are an embarrassment to the People of the State of California and it is frightening to think that you represent their interests." In *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739, 745, 749 [190 Cal.Rptr. 910, 661 P.2d 1064], the court found prejudicial misconduct when a judge, in unreported proceedings in chambers, accused a new attorney of being incompetent to represent the defendant and rudely quizzed her regarding her legal experience. The court noted that the judge's treatment of the attorney, standing alone, might not warrant censure, but "in the light of the entire record such conduct once again reflects a censurable impatience or hostility in his professional relationship with others." In *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 703 and footnote 4 at pages 683–684 [122 Cal.Rptr. 778, 537 P.2d 898], the court found prejudicial misconduct when a judge deliberately ridiculed attorneys without cause, including requiring a public defender to swear under oath that he had read the arrest report, inquiring into his legal training and experience, and commenting: " 'Six weeks and you are telling me you know everything there is to know about the law?' "

The masters found that in May 1996, Judge Shaw presided over the arraignment of several defendants in an animal rights case. The district attorney usually did not have a deputy present during Judge Shaw's arraignment calendars and no assigned deputy was present for that morning calendar.[5] The audience, supportive of the defendants, became disruptive. During the proceedings, Judge Shaw gave an indicated sentence, which the defendants laughingly declined. Because the defendants refused to stay away from the university campus where they had been arrested, Judge Shaw declined to release them on their own recognizance and instead set bail. The defendants were taken into custody.

As the arraignment ended and Judge Shaw left the bench, she noticed two deputy district attorneys in the courtroom. She gestured for the two to come over to her and they complied. The masters found that Judge Shaw told the deputies, who were not involved in the matter, that she did not want the district attorney's office to "undercut" her on the case. Counsel for the defendants were not present at the time.

The masters found that Judge Shaw's ex parte comment violated California Code of Judicial Ethics canon 3B(7), which provides, in part, that a "judge shall not initiate . . . ex parte communications." The masters felt that, although the comment did not reflect any general bias, it gave the appearance of embroilment in the case. They noted that Judge Shaw knew she would probably never see the case again and the comment gave the appearance that she was nevertheless trying to have some degree of influence over the future course of the matter.

The masters concluded that the comment constituted prejudicial misconduct, as an objective observer, seeing a judge communicate with representatives of one side of a case, especially when it involved unruly defendants, would feel that the judge was trying to influence the case without interference from the other side. The masters were of the opinion that Judge Shaw did not intend to take unfair advantage, but that her remark gave that appearance. They noted that the judiciary must rigorously protect its image of neutrality, and that this type of comment can only inflict damage to that image and lessen the regard in which the judiciary is held.

The masters further stated that the comment could not be excused on the basis of the "culture" of Harbor Justice Center or on the ground that it was necessary for administrative or other proper purpose. Although they appreciated the necessity of innovative techniques when high caseloads and insufficient staffing threaten to overwhelm the court and that "a certain degree of

[5] If a deputy district attorney or a deputy public defender was needed, the judge or a member of the court staff would call for one.

informality may evolve in order to keep the ship afloat," they concluded, "ex parte communications of this sort cannot be part of that informality."

The commission unanimously agrees that Judge Shaw's ex parte communication violated California Code of Judicial Ethics canon 3B(7) and gave the appearance of embroilment in the case in violation of canon 2A. The commission also unanimously agrees that the comment constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

C. *Count Eight*

The notice alleges that on January 15, 1997, during the arraignment calendar, after Judge Shaw remanded a particular defendant as a result of an increase in bail, she made a comment that referred to the defendant's physical appearance in connection with the prospect of incarceration that was understood to suggest that the defendant might be subject to unwanted sexual activity in jail. Judge Shaw's comment is alleged to have been intimidating, undignified and discourteous, in violation of the California Code of Judicial Ethics canons 1, 2A and 3B(4).

The masters found this to be "the most troubling of the allegations." Although Judge Shaw denied that she made the comment, the masters found that Judge Shaw, while incarcerating a slightly built white male, made a comment that was reasonably understood by several different observers as inferring that thin or skinny white males in prison were particularly vulnerable to sexual assault.

Judge Shaw contends that there is not clear and convincing evidence to support the masters' findings and that she cannot be held accountable for what a particular listener may infer from her actual words.

Although there was no transcript of the proceeding, the witnesses before the masters were consistent in their testimony as to what they had heard at the arraignment hearing two and a half years earlier. The defendant testified: "She looked right at me and asked me if I knew what they do to skinny little white boys in jail." The defendant's father, who was also in court, testified: "She made reference to little white boys, what they do to little white boys in jail." On cross-examination he reiterated that Judge Shaw said, "little white boys" and stated on redirect examination that he wrote, "little white boys" in the notes he had made in connection with the case. Another person who was in the courtroom was sufficiently upset by the comment that he wrote to the commission. He testified before the masters that Judge Shaw said, "You know what they do to skinny white boys in prison." Another defendant who was present on January 15, 1997, corroborated the testimony of the other witnesses.

In addition, the defendant's attorney reluctantly corroborated the allegations. The masters noted that it "was plain throughout his testimony that he would rather have been anywhere but in a courtroom testifying in this matter. Even though he made no effort to mislead, it was plain he would rather have walked through fire than say anything to harm Judge Shaw. At times, his testimony had to be pulled from him. Ironically, it is this reluctance that makes him very convincing and turns his concession that Judge Shaw 'may' have made such a comment into a most powerful bit of evidence."

The masters concluded that the comment constituted prejudicial misconduct in violation of California Code of Judicial Ethics canon 3B(4). They noted that it "personalized the situation to [the defendant's] race, gender, and physique." Even if Judge Shaw meant no sexual reference, "such a comment could only be taken as intimidating by any reasonable observer. It was discourteous and undignified. The criminal justice system is designed to impose appropriate penalties for criminal behavior, not raise the specter of possible consequences disproportionate to the defendant's malfeasance. We fail to see how the comment would not have intimidated [the defendant]."

The masters were impressed with Judge Shaw as a judge and reluctant to make any findings against her. They were critical of many of the witnesses against Judge Shaw and often found her testimony more persuasive. They were persuaded, however, that Judge Shaw made the statement, although they found that she intended no insult, and they did not believe that malice or ill will motivated the comment. The masters opined that the comment "surely came from a tendency to be flip on occasion." The masters noted that "this tendency can be dangerous and inappropriate. Such a comment can be easily misconstrued by people whose sensitivities are understandably heightened by their involuntary appearance in what is already an intimidating setting. Gratuitously piling intimidation on top of an already unpleasant situation brings the judicial system into disrepute."

The commission unanimously adopts the masters' findings of fact that the allegations in count eight are supported by clear and convincing evidence and their conclusion that the comment constituted conduct prejudicial to the administration of justice that brings the judiciary into disrepute. The record contains clear and convincing evidence that Judge Shaw made a statement that was reasonably understood to infer that skinny white males in prison were particularly vulnerable to sexual assault. Each of the five witnesses agreed that the comment was made and to the essence of the comment.

## FINDINGS AND CONCLUSIONS ON DISMISSED COUNTS

### A. *Count Three*

The notice alleges that in 1996 and 1997, Judge Shaw frequently began her arraignment calendars with a speech regarding the use of alcohol, using a shot glass and a placemat with a picture of an eagle on it as props. Judge Shaw's speech included invitations to the defendants to "fly with the eagles rather than trot with the turkeys," and references to the defendants' "inner child." These comments are alleged to have been undignified and to have created the appearance of prejudgment and a lack of impartiality, in violation of California Code of Judicial Ethics canons 1, 2A and 3B(4).

The masters found that Judge Shaw made the speeches but concluded "that the evidence, when tested by the clear and convincing evidence standard, fails to show impropriety in Judge Shaw's arraignment procedure."

In concluding that Judge Shaw's conduct was not undignified, the masters cite the testimony from a number of the examiners' witnesses that they were not offended by Judge Shaw's speeches or that they thought portions of the presentation were well taken. The masters found that there was no authority prohibiting a judge from using props in conducting certain types of hearings.

The commission has some concerns with the masters' approach on this count. The fact that a litigant may agree with part of a judge's presentation does not save the speech from being undignified. Nonetheless, due respect for the masters' findings compels the commission to conclude that the charges in count three were not proved by clear and convincing evidence.[6] Accordingly, the charges alleged in count three are dismissed.

### B. *Count Four*

The notice alleges that on July 3, 1996, at the beginning of the morning arraignment calendar, Judge Shaw called a DUI case and, before asking the defendant how he wished to plead, asked if the defendant's wife was in the audience. When the defendant's wife raised her hand, Judge Shaw allegedly pointed a shot glass at her and asked if she would like to stand at her

[6] Two factors underlie this conclusion. First, in *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 168 [48 Cal.Rptr.2d 106, 906 P.2d 1260], the Supreme Court noted that it gives "special weight" to factual determinations in the report of the masters, as the masters have the advantage of observing the demeanor of the various witnesses. Second, to the extent that the masters' findings are determined to be reasonable, the countervailing evidence cannot be said to be clear and convincing.

husband's graveside. Judge Shaw's comments were alleged to be undignified and discourteous, and to have created the appearance of prejudgment and a lack of impartiality, in violation of California Code of Judicial Ethics canons 1, 2A and 3B(4).

The masters noted that two witnesses testified that Judge Shaw called the first case of the morning, asked the defendant if his wife was present, and then asked the wife how she would like to be standing by his graveside. There was no evidence that Judge Shaw pointed a shot glass at the wife. The masters, however, stated that they lacked sufficient confidence in these witnesses to conclude, by clear and convincing evidence, that the incident occurred. The masters went on to observe that while "a judge should ordinarily not single out a defendant's family member and direct comments to that person," the propriety of particular comments might depend on the particular circumstances and context.

The commission, having considered the masters' findings and all the evidence, concludes that the charges in count four were not proved by clear and convincing evidence. Accordingly, the charges alleged in count four are dismissed.

C. *Count Five*

The notice alleges that on July 3, 1996, during the afternoon arraignment calendar, Judge Shaw urged all of the defendants to take responsibility for their actions and said that anything else was "whining." These comments are alleged to have improperly suggested that the defendants should plead guilty, and to have created the appearance of prejudgment and a lack of impartiality, in violation of California Code of Judicial Ethics canons 1 and 2A.

The masters found that Judge Shaw urged the defendants to take responsibility for their actions and told people she would appreciate it if they did not whine. The masters, however, found no impropriety, noting that at arraignments Judge Shaw apprises the defendants of what will happen if they plead guilty (including having to take responsibility) and makes offers on the cases. If a defendant chooses to plead not guilty, Judge Shaw sets the case for a pretrial hearing in another court.

The commission is concerned that Judge Shaw's approach may suggest prejudgment or a lack of impartiality to a defendant appearing in court for the first time, or even to an "objective observer." Nonetheless, due deference to the masters' findings compels the commission to conclude that the allegations are not supported by clear and convincing evidence and the allegations in count five are dismissed.

D. *Count Six*

The notice alleges that on July 3, 1996, during the afternoon arraignment calendar in a particular DUI case, Judge Shaw overheard an exchange where the defendant's mother told the deputy public defender that her daughter wanted to enter a not guilty plea and the attorney responded that the daughter was guilty. Judge Shaw allegedly told the daughter that it was not in her best interest to enter a not guilty plea, and told the defendant's mother that she could be paying for a coffin in addition to bail. Judge Shaw's comments are alleged to have been undignified and discourteous, and to have created the appearance of embroilment, prejudgment and a lack of impartiality, in violation of California Code of Judicial Ethics canons 1, 2A and 3B(4).

The masters found that Judge Shaw increased bail because she discovered that the defendant had been driving on a suspended license and that she spoke to the defendant's mother—saying she should be happy she did not have to buy her daughter a coffin—only because the mother interjected herself into the proceeding. The masters noted that in setting bail Judge Shaw was justified in attempting to apprise the defendant and the mother of the seriousness of the conduct. The masters noted that all the allegations in this count rest solely on the testimony of the mother and daughter and that they lack sufficient confidence in these witnesses to establish any allegations. In sum, the masters found that the allegations were not supported by clear and convincing evidence.

The commission, having considered the masters' findings and all the evidence, concludes that the charges in count six were not proved by clear and convincing evidence. Accordingly, the charges alleged in count six are dismissed.

E. *Count Seven*

The notice alleges that on November 13, 1996, during a jury trial in a particular DUI case, Judge Shaw interrupted a defense witness who testified that she had been driving the vehicle. Judge Shaw asked a few questions, then before the witness could answer, read the Penal Code section for perjury to the witness in front of the jury. It is alleged that, by this conduct, Judge Shaw assumed the role of an advocate and abandoned her duty to be impartial, and displayed bias and embroilment, in violation of California Code of Judicial Ethics canons 1, 2A, and 3B(4).

The masters found that the factual allegations were proven. During the DUI case, the defense called a young woman to testify. She had been in the vehicle when the defendant was arrested and had, up to this point, been

considered a passenger. The woman testified, in a manner that raised serious questions concerning her credibility, that she had in fact been the driver. The masters found that Judge Shaw became concerned for the consequences the witness might suffer by committing perjury. She interrupted proceedings and, with the jury present, Judge Shaw read the perjury statute to the witness. The masters noted that Judge Shaw thereafter realized she had committed error and notified defense counsel that she would grant a new trial if the jury convicted the defendant. Judge Shaw declared a mistrial after the jury was unable to agree on a verdict.

The masters concluded that a judge may comment on evidence (citing *People v. Proctor* (1992) 4 Cal.4th 499 [15 Cal.Rptr.2d 340, 842 P.2d 1100]), but that Judge Shaw committed legal error in reading the perjury statute to the witness in front of the jury. They concluded, however, that Judge Shaw's legal error was not properly subject to judicial discipline, citing *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 396, footnote 20 [84 Cal.Rptr.2d 466, 975 P.2d 663]. The masters found that Judge Shaw did not embroil herself in the matter. The masters opined that she "concluded a witness was lying and let it be known. Her mistake was in failing to comply with the strict procedures in place for imparting such an opinion to a jury." The masters also found that Judge Shaw did not become an advocate for either party. They noted that her concern was directed solely at the witness and they opined that she would have had the same motivation if it had been a prosecution witness instead of a defense witness. Finally, the masters found that Judge Shaw did not abandon her duty to be impartial as her action "was not aimed at influencing the outcome of the case, but instead at keeping a young witness from putting herself in jeopardy."

The masters then distinguished the cases cited by the examiners, finding that each case involved flagrant misconduct that far exceeded anything that Judge Shaw had done.[7] They concluded that Judge Shaw did interrupt the proceedings and read the perjury statute to the witness, but then she made it plain she would not let a conviction stand in light of her acknowledged error.

**(1)** The commission agrees that Judge Shaw committed legal error and that her mistake does not warrant discipline. In *Oberholzer v. Commission on Judicial Performance, supra*, 20 Cal.4th at page 398, the Supreme Court

[7] The masters noted that in *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512 [116 Cal.Rptr. 260, 526 P.2d 268], the judge engaged in an ongoing pattern of harassing the witnesses and parties and persistently examined witnesses in a manner that demonstrated advocacy; in *Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d 826, the judge criticized and chastised a defense witness and was openly hostile to the defense; and in *Roberts v. Commission on Judicial Performance, supra*, 33 Cal.3d 739, the judge in a child neglect case interrupted the mother's testimony, ordered her off the stand and refused to listen to any further testimony.

wrote: "In summary, a judge who commits legal error which, *in addition*, clearly and convincingly reflects bad faith . . . , bias . . . , abuse of authority . . . , disregard for fundamental rights . . . , intentional disregard of the law . . . , or any purpose other than the faithful discharge of judicial duty . . . , is subject to investigation. . . . Mere legal error, without more, however, is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and thus should be disciplined." (Citations omitted.)

Although the examiners are correct in noting that Judge Shaw did not claim that she intended to comment on the evidence to the jury, the record does not support a finding of the additional element required to elevate legal error to a violation of the California Code of Judicial Ethics. Judge Shaw acted out of concern that the witness was perjuring herself. She quickly recognized her error and assured defense counsel that she would not allow it to prejudice his client. The record does not contain clear and convincing evidence of bad faith, bias, abuse of authority, disregard of fundamental rights, intentional disregard of the law or any purpose other than the faithful discharge of her judicial duty.

F. *Count Nine*

The notice alleges that on April 9, 1997, during an arraignment calendar, Judge Shaw stated to a DUI defendant before he entered a plea, "You better think about what you've done. You could have killed somebody." Judge Shaw's comments were alleged to have been discourteous and to have reflected prejudgment and a lack of impartiality, in violation of California Code of Judicial Ethics canons 1, 2A and 3B(4).

The masters noted that impropriety depends on context. They commented that it would be inappropriate to utter such remarks to a defendant at the beginning of trial, but a judge could comment on the severity of the conduct in determining an appropriate sentence.

The examiners offered Mr. D___'s testimony that the remarks were directed to the defendants who had not pled guilty nor asked for an indicated sentence. The masters found Mr. D___ to be "a self-styled legal expert" who had "thoroughly impeached his own credibility with his grossly exaggerated testimony about his legal experience." They declined to sustain a charge dependent solely on Mr. D___'s testimony, concluding that the evidence "failed to demonstrate clearly and convincingly that Judge Shaw's comments were delivered in an improper context."

The commission, having considered the masters' findings and all the evidence, concludes that the charges in count nine were not proved by clear and convincing evidence. Accordingly, the charges alleged in count nine are dismissed.

G. *Count 10*

The notice alleges that on May 19, 1997, during the morning arraignment calendar in a particular DUI case, Judge Shaw stated to the defendant as she remanded him into custody, "How could you do that? You might have killed somebody." The defendant was being remanded as a result of an increase in bail; he had not entered a guilty plea or otherwise been convicted. Judge Shaw's comments are alleged to have been discourteous and to have reflected prejudgment and a lack of impartiality, in violation of California Code of Judicial Ethics canons 1, 2A and 3B(4).

The masters found that the comments were delivered during the setting of bail, and that a judge is entitled to assume the truth of the charges at that time. They noted that the defendant testified that his blood-alcohol level was nearly three times the statutory limit and that Judge Shaw's comments were accurate. The masters found that the comments had the effect of informing the defendant that bail was required because it was unacceptable that the defendant had chosen to drive in such a condition as to constitute a danger to public safety. The masters concluded that the comments were not discourteous, and did not reflect prejudgment or lack of impartiality.

The commission, having considered the masters' findings and all the evidence, concludes that the charges in count 10 were not proved by clear and convincing evidence. Accordingly, the charges alleged in count 10 are dismissed.

H. *Count 11*

The notice alleges that on June 16, 1997, a defendant charged with petty theft appeared before Judge Shaw and during a pause in the proceedings, Judge Shaw began singing, "when you're stealing, when you're stealing," to the tune of "When You're Smiling (The Whole World Smiles With You)." It also alleges that on December 26, 1996, a defendant appeared before Judge Shaw on a bench warrant for a speeding ticket and when he questioned Judge Shaw's indicated sentence of 30 days, Judge Shaw sang in response, "fa la la la la." When the same defendant appeared in early February 1997, for arraignment on a disturbing the peace charge, which arose out of an arrest on Christmas 1996, Judge Shaw again sang, "fa la la la la" to him. Count 11 further alleges that on other occasions Judge Shaw sang in court at the expense of the defendants, for example singing, "bye-bye, you're going to jail." Judge Shaw's conduct is alleged to have been undignified and demeaning, in violation of California Code of Judicial Ethics canons 1, 2A and 3B(4).

The masters noted that Judge Shaw admitted that she sang in court on occasion since she has "a happy heart" and sings "for levity." They noted that

levity can relieve the tension inherent in court proceedings. It does not always work, "but there is no general prohibition against levity nor, so far as we are aware, against using singing as a form of levity."

The masters recognize that it would be inappropriate to sing in court in a manner that mocked or denigrated a defendant. They found, however, that the specific charges in count 11 were not supported by clear and convincing evidence. The masters implicitly agree that singing, "when you're stealing, when you're stealing" to a defendant charged with petty theft would be inappropriate, but found that the evidence put forward by the examiners did not carry their burden of proof. The masters found that Judge Shaw sings in court and they acknowledged that there was a possibility that Judge Shaw may have on occasion sung inappropriately in court. The masters concluded, however, that there was insufficient evidence that Judge Shaw had sung inappropriately on any particular occasion.

The commission remains concerned that singing in court is problematic, as are many attempts to inject levity into court proceedings. Although on occasion humor may defuse tensions in court proceedings, it does not always work and may have a negative effect on the parties and members of the public present in the courtroom. The singing of snippets of songs seems particularly likely to raise questions in the minds of some of the listeners, regardless of the judge's intentions. Nonetheless, having considered the masters' findings and all the evidence, the commission accepts that the specific charges in count 11 were not proved by clear and convincing evidence. Accordingly, the charges alleged in count 11 are dismissed.

I. *Count 12*

The notice alleges that on June 30, 1997, during the morning arraignment calendar, in a specific case in which a young defendant was charged with being drunk in public outside a club for young people, Judge Shaw commented, "this looks real bad." Judge Shaw then commented about the hazards of drunk driving, using a shot glass as a prop, although she acknowledged that the defendant was not driving. While reviewing the police report, Judge Shaw stated, "I see you had a childhood accident, so you should know the dangers of drunk driving." In fact, the childhood traffic accident, which was noted on the first page of the police report, did not involve drunk driving. Judge Shaw concluded by stating, "What would your parents have done if the officers had come to your house to tell them that you were dead? This club isn't a place for you to go." Judge Shaw's comments are alleged to have been gratuitous, undignified, discourteous and intimidating, and to have reflected prejudgment and a lack of impartiality, in violation of California Code of Judicial Ethics canons 1, 2A and 3B(4).

The masters found that during the arraignment Judge Shaw commented that the situation looked bad, terrible, and awful. She noted that the defendant had incurred injuries in a childhood accident and said that he, of all people, should be aware of the dangers of drunk driving. Judge Shaw asked him how he would like it if the police went to his home in the middle of the night to tell his parents he was dead because he had gone to this club. She told him he should not go to the nightclub.

The masters, however, found that, although the comments upset the defendant and his family, they did not constitute misconduct. The comments were uttered during an arraignment hearing while Judge Shaw was considering whether to let the defendant remain free on his own recognizance or whether to impose conditions on the release. The masters recognized that personalized comments, such as the reference to the childhood accident, often cross the line of proper judicial behavior. The masters noted, "[w]e find it insignificant that Judge Shaw mistakenly commented on the dangers of drunk driving as opposed to drunk walking in a parking lot. In setting conditions for an OR release, she was trying to point out to this young man that the justice system does not necessarily look kindly on such conduct." They found that the comment about police going to the home to inform the family of his death was also an attempt to impress upon the young defendant that his conduct can have a severe impact on his family as well as himself and must not be repeated if he is to comply with the conditions of an own recognizance release. The masters conclude that there was nothing gratuitous, undignified or discourteous about the remarks.

The commission, having considered the masters' findings and all the evidence, concludes that the charges in count 12 were not proved by clear and convincing evidence. Accordingly, the charges alleged in count 12 are dismissed.

## DISCIPLINE

**(2)** The Supreme Court has indicated that the purpose of a commission disciplinary proceeding is not punishment, "but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1112 [77 Cal.Rptr.2d 408, 959 P.2d 715], citing *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].) The court has further noted that "choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar." (*Broadman, supra*, 18 Cal.4th at p. 1112, citing *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1318 [240 Cal.Rptr. 859, 743 P.2d 919].)

The masters found that Judge Shaw is genuinely concerned about her community and "is a widely respected judge within the legal community who carries out her duties honestly, faithfully, diligently, and with a great deal of regard for her responsibilities."

**(3)** Her good reputation, however, does not necessarily weigh against disciplining Judge Shaw. The Supreme Court has held that honesty and a good reputation do not mitigate conduct prejudicial to the administration of justice.[8] The Supreme Court has also questioned the weight to be given to "persons who were not present, and thus cannot assess the serious nature of the incidents of misconduct, but nonetheless believe petitioner to be a fair and patient person . . . ." (*Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d at p. 866.) Indeed, the public has as great a need for protection from unethical conduct by popular judges as from unpopular judges. An outpouring of support for a judge from prosecutors, defense counsel, judges, peace officers and administrative personnel may inhibit some witnesses from coming forward and testifying.

**(4)** The commission has determined that a public admonishment is the appropriate discipline for Judge Shaw's two acts of conduct prejudicial to the administration of justice and one incident of improper action. A public admonishment assures all those who were concerned with Judge Shaw's statement to Ms. S___, her ex parte comments to the deputy district attorneys and her comment to the thin white defendant, that these comments are not acceptable judicial behavior. This public admonishment will help educate the bench and the public as to when a judge's comments may violate the Code of Judicial Ethics.

**(5)** An admonishment is also appropriate to advise Judge Shaw that her actions are not acceptable. "Judicial personality is important to the fabric of the judicial system, and it would be dangerous to that system were the judiciary to become a group of faceless bureaucrats who attempt to fit into a mold in order to stay out of trouble." (Rothman, Cal. Jud. Conduct Handbook (2d ed. 1999) § 1.52.) However, the cultivation of a particular judicial personality may not be used as an excuse for unethical conduct. California

[8] In *Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d at page 865, the Supreme Court noted: "Several witnesses, including colleagues on the bench and attorneys who appear before him, testified that petitioner is a person of unquestioned honesty and integrity. None of the charges against petitioner suggest otherwise. This evidence, and that which confirms that petitioner had a good reputation for legal knowledge and administrative skills are not mitigating, however. [Fn. omitted.] Honesty and good legal knowledge are minimum qualifications which are expected of every judge. (Cal. Code Jud. Conduct, canons 1 & 3.) Neither these qualities nor a judge's administrative skills can mitigate either 'wilful misconduct' or 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute.' " (See Cal. Const., art. VI, § 18, subd. (c).)

Code of Judicial Ethics canon 3B(4) provides that a "judge *shall* be patient, dignified, and courteous." (Italics added.) A judge has considerable latitude to develop her own or his own judicial "style," but regardless of the judge's style, she or he must respect the litigants and attorneys who appear in her or his court. When a judge fails to do so, it is the commission's responsibility to bring such failures to the judge's attention.

Our concern is that Judge Shaw may feel that her genuine concern for the litigants and the community somehow excuses her misconduct.[9] An irony of Judge Shaw's defense in this action is the masters' reliance on the testimony of judges, lawyers and others who frequent the courts and their discounting of the testimony of the defendants and their families—those individuals whom Judge Shaw seeks to reach. The record before the commission reveals that Judge Shaw has a reputation as a good judge, who "is genuinely concerned about the parties who appear before her and about the consequences of criminal conduct on victims and the community." However, in having chosen—for the best of reasons, or because it is who she is—to run her court informally, Judge Shaw must appreciate that unless she takes steps to control her admitted weakness for blurting out something that would have been better left unsaid, her comments will on occasion embarrass or demean a litigant or attorney.

There is no better example of the harm from being flip than Judge Shaw's comment concerning thin white males in jail (see count 8). Joking or making a casual comment about the possibility of an inmate having to endure same-gender rape while incarcerated may be perceived as not only an indifference to and acceptance of a tragic reality in our criminal justice system, but as a perhaps unintended admission of its inevitability under present conditions.

Judge Shaw is described by her supporters as frank, a straight talker, forthright, honest to a fault, and tough but fair. One of the judges who testified in support of Judge Shaw stated that "she tells you exactly what she thinks and why she thinks it, and most people can't take the truth." The commission, in turn, has been forthright in this public admonishment. It is confident that Judge Shaw will use this admonishment to refine her unique style that has earned her the respect of judges, prosecutors and defense counsel alike.

[9] When she appeared before the commission, Judge Shaw apologized if anyone had misunderstood her, but not for her actions. Of course, Judge Shaw should not apologize for any intent that she did not have. She should, however, recognize her role in creating a misunderstanding. For example, Judge Shaw may not have intended to imply that the prosecuting attorney drank intemperately on the weekend (see count 1), but her comment did just that.

This decision shall constitute the order of public admonishment of Judge Shaw.

Commission members Justice Daniel M. Hanlon, Mr. Michael A. Kahn, Ms. Lara Bergthold, Mr. Mike Farrell, Judge Madeleine I. Flier, Ms. Gayle Gutierrez, Mr. Patrick M. Kelly, Mrs. Crystal Lui, Judge Risë Jones Pichon, and Ms. Ramona Ripston voted in favor of this public admonishment. There is currently one public member vacancy.

[No. 155. Oct. 3, 2000.]

# INQUIRY CONCERNING FORMER JUDGE LUIS A. CARDENAS

## SUMMARY

A disciplinary matter was brought concerning a former superior court judge.

The Commission on Judicial Performance publicly admonished the former judge. The commission found that the former judge's actions in several cases gave the impression that two attorneys were in positions to influence him. The former judge, by being available to his two attorney friends after hours, by relying on their ex parte communications, and by failing to follow statutes and practices designed to limit a judge's discretion, violated Cal. Code Jud. Ethics, canon 2. A public admonishment was necessary to guide the former judge and to reassure all those in the county who were aware of the incidents in question, as well as the bench and the public, that the former judge's accommodation of his friends was contrary to the Code of Judicial Ethics. (Opinion by Daniel M. Hanlon, Chairperson.)

## HEADNOTES

(1) **Judges § 6—Discipline—Conduct Prejudicial—Ex Parte Release of Prisoner.**—The judge's order to release a prisoner in a case to which the judge was not assigned, based on an ex parte after hours request of the judge's attorney friend who was not counsel of record, without making a diligent attempt to verify the alleged medical problem, created an appearance of impropriety and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(2) **Judges § 6—Discipline—Conduct Prejudicial—Ex Parte Release on Own Recognizance.**—The judge's willingness to act on the late night ex parte request of his attorney friend to release on his own recognizance an individual arrested on the charge of driving under the influence and on three outstanding warrants, including one "no bail" warrant, created an appearance of impropriety and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(3) **Judges § 6—Discipline—Conduct Prejudicial—Ex Parte Release of Individual Arrested for Spousal Battery.**—The judge's own-recognizance release of an individual arrested for spousal battery, based on an ex parte request by the judge's attorney friend, after the judge had been told of the requirement of holding a hearing in open court and after the judge had questioned the statute but had failed to research its validity, created an appearance of impropriety and was conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(4) **Judges § 6—Discipline—Conduct Prejudicial—Ex Parte Order Changing Sentencing Order of Other Judge.**—The judge's willingness to change a sentencing order imposed by another judge to allow an individual to serve his jail time in a drug rehabilitation facility, based on the ex parte request of the judge's attorney friend, without reviewing the file and investigating the matter, created an appearance of impropriety and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(5) **Judges § 6—Discipline—Conduct Prejudicial—Ex Parte Bail Reduction Ordered While on Vacation.**—The judge's reduction of an individual's bail while the judge was on vacation, based on the ex parte request of the judge's attorney friend, instead of directing the attorney to the duty magistrate constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(6) **Judges § 6—Discipline—Conduct Prejudicial—Ex Parte Bail Reduction in Violation of Statute.**—The judge's willingness to rely upon the representations of his attorney friend regarding additional information from the victim of spousal abuse and to violate Pen. Code, § 1270.1, by reducing the bail of the individual charged with the offense based on the ex parte request of the judge's attorney friend, created an appearance of impropriety and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(7) **Judges § 6—Discipline—Purpose—Facts of Case.**—The purpose of a judicial performance commission disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar.

(8) **Judges § 6—Discipline—Appearance of Impropriety.**—Cal. Code Jud. Ethics, canon 2, requires that a judge avoid the appearance of impropriety as well as actual impropriety.

(9) **Judges § 6—Discipline—Friendship—Position to Influence.**—The judge, by being available to his two attorney friends after hours, by relying on their ex parte communications, and in failing to follow statutes and practices designed to limit a judge's discretion, violated Cal. Code Jud. Ethics, canon 2, by perpetuating the appearance that his friends were in special positions to influence him.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, §§ 56, 72.]

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**OPINION**

**HANLON, Chairperson.**—This disciplinary matter concerns former Judge Luis A. Cardenas. Judge Cardenas served as a judge of the Orange County Municipal Court from March 30, 1976, to January 12, 1980, and as a judge of the Orange County Superior Court from January 12, 1980, to March 31, 1996. As a retired judge he sat on assignment in the Orange County Superior Court through December 31, 1996.

For the reasons set forth in this decision, the Commission on Judicial Performance finds that Judge Cardenas violated canon 2 of the California Code of Judicial Ethics as his actions in several cases gave the impression that two attorneys were in positions to influence him. The commission concludes that Judge Cardenas's actions constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) Judge Cardenas is hereby publicly admonished.

## PROCEDURAL HISTORY

Formal proceedings in this matter commenced with the filing on April 19, 1999, of a notice of formal proceedings. A first amended notice of formal proceedings was filed on November 4, 1999.

As provided by rule 121(b) of the Rules of the Commission on Judicial Performance, the Supreme Court appointed three special masters to conduct an evidentiary hearing and to prepare a written report. The special masters who conducted the hearing and issued the report were Judge Rudolph R. Loncke, presiding, of the Sacramento County Superior Court, Judge Judith D. Ford of the Alameda County Superior Court, and Judge William J. Howatt, Jr.,

of the San Diego County Superior Court. The evidentiary hearing was held in Santa Ana commencing January 31, 2000, and concluding February 7, 2000. The special masters filed their report to the commission on May 4, 2000.

Following the receipt of objections and briefs from Judge Cardenas and the Office of Trial Counsel, the matter was orally argued before the commission on August 29, 2000. Arguments were presented by Mr. William Smith, trial counsel, and by Judge Cardenas on his own behalf.

## FINDINGS AND CONCLUSIONS

The first amended notice of formal proceedings, with two exceptions,[1] alleged that Judge Cardenas violated the California Code of Judicial Conduct[2] by taking a number of actions between 1994 and the end of 1996 on behalf of two attorney friends, Leonard Basinger and Basinger's daughter, Ginger Larson Kelley.

### A. *The Friendship.*

There is clear and convincing evidence that Judge Cardenas had a special friendship with Leonard Basinger and Ginger Larson Kelley. Judge Cardenas has known Leonard Basinger since they worked together in the Orange County District Attorney's Office in the early 1970's. At the request of Basinger's counsel and pursuant to subpoenas, Judge Cardenas testified as a witness to Basinger's good character in California State Bar proceedings in 1987 and 1991.

[1] Count two of the first amended notice of formal proceedings concerned Judge Cardenas's order in November 1993 finding that a certain person had completed a specific program concerning drinking and driving, and his order in April 1994 to the director of the school that offered the program. The masters found that Judge Cardenas was mistaken in issuing the subject orders, but that the mistakes did not constitute misconduct. They further noted that Judge Cardenas, when informed of there being a disputed factual issue, recused himself in a timely manner.

The first amended notice of formal proceedings also alleged that Judge Cardenas, while sitting on assignment, at the request of his wife's sister—who was a deputy public defender—ordered a cousin of his wife released on his own recognizance. The masters found that Judge Cardenas had a clear duty not to act on behalf of a relative and violated canon 2B by allowing a family relationship to influence his judicial conduct. They concluded that Judge Cardenas's actions constituted prejudicial conduct.

[2] The California Code of Judicial Conduct was replaced by the California Code of Judicial Ethics, effective January 15, 1996. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1097, fn. 5 [77 Cal.Rptr.2d 408, 959 P.2d 715].) The Code of Judicial Ethics did not change the ethical standards at issue in this case, and the citations to canons in this decision are to the Code of Judicial Ethics.

Judge Cardenas testified that in 1993, when Kelley was admitted to the practice of law, she approached him and he offered some assistance in the incipient stages of her career. He recommended her to the district attorney's office and to a private attorney. He further testified that Kelley would call him at home seeking legal advice. Although the calls became annoying, Judge Cardenas refrained from telling her that because he did not want to hurt her feelings.

In March 1994, Judge Cardenas performed the marriage ceremony for Ginger Larson and Bill Kelley. After the ceremony in California, Judge Cardenas flew with the Kelleys to England and performed a ceremonial wedding service in Bath, England. Basinger and his wife also attended the wedding service. In 1995, Judge Cardenas led a group of five or six couples, including the Basingers, on an antiquities tour of the Greek Islands and portions of Italy. Judge Cardenas paid for the Basingers' airfare to and from Europe in order to offset the financial benefit, if any, of meals or drinks that the Basingers might pay for during the tour.

The commission finds that Judge Cardenas's friendships with Basinger and Kelley were of a different nature than his acquaintances with other attorneys. There is, of course, nothing wrong with Judge Cardenas having a friendship with Basinger or Kelley. Judge Cardenas, however, was obligated to consider the friendship whenever either Basinger or Kelley appeared before him.[3]

B. *Specific Incidents.*

The commission determines that the evidence as a whole shows that Judge Cardenas engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute by making himself available to Basinger and Kelley and granting their requests in such a way as to suggest that they were in a special position to influence him.

[3] Canon 3E, "Disqualification," states: "A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law. In all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification." The advisory committee commentary notes: "under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, or whenever required by the disqualification provisions of the Code of Civil Procedure."

Section 170.1 of the Code of Civil Procedure sets forth the legal standard for when a judge shall be disqualified. Subdivision (a)(6) provides that a judge shall be disqualified if: "For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification."

This conclusion is demonstrated by the following six incidents that were charged in the first amended notice of formal proceedings.

1. *Vargas.* Mr. Vargas had been held to answer on seven counts of insurance fraud and grand theft. On June 10, 1994, Vargas appeared before Judge Kathleen O'Leary, to whom the case was assigned. Bail was discussed with Vargas's attorney, and Judge O'Leary declined to reduce bail. Judge O'Leary set a trial date of August 8, 1994.

In the evening of Thursday, June 23, 1994, Basinger—who was not Vargas's attorney of record—telephoned Judge Cardenas at his home and requested that Vargas be released on his own recognizance because he had a life-threatening health problem that required his immediate release for appropriate medical treatment. Judge Cardenas contacted the detention release unit and ordered that Vargas be released on his own recognizance. Vargas was ordered to appear in Judge O'Leary's court on August 8, 1994, but he never appeared.

Judge Cardenas did not contact Judge O'Leary or the district attorney. He also did not make an attempt to verify the medical emergency with jail personnel. The masters noted that, although Judge Cardenas acted in good faith, it was improper "to have relied on the word of Basinger as to Vargas' medical emergency without making a substantial effort to contact jail medical personnel to confirm the 'emergency.' "

**(1)** The masters found that by not making a diligent attempt to verify the alleged medical problem, Judge Cardenas created the appearance of impropriety in violation of canon 2.[4] This appearance was heightened by the fact that Judge Cardenas acted after hours on the representation of his friend without contacting the judge to whom the case was assigned, as well as by the subsequent publicity that resulted from Vargas's failure to appear. The commission concludes that Judge Cardenas's actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

2. *Bailey.* On Friday, December 22, 1994, Bailey was arrested on a charge of driving under the influence of alcohol. He was also arrested on three

[4] Canon 2 is entitled "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities." (Some capitalization omitted.) Subsection A is entitled, "Promoting Public Confidence" and states: "A judge shall respect and comply with the law . . . and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 2B(1) is entitled "Use of the Prestige of Judicial Office" and states: "A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge."

outstanding warrants, one of which was a "no bail" warrant. Late that night, Basinger contacted Judge Cardenas and asked him to release Bailey on his own recognizance. Shortly after midnight Judge Cardenas contacted the detention release unit. Although he was informed of the no bail, out-of-county warrant, Judge Cardenas ordered Bailey released on his own recognizance.

**(2)** Judge Cardenas's willingness to act late at night on the ex parte representation of Basinger, following the Vargas incident and despite a "no bail" warrant, created the appearance of impropriety in violation of canon 2. Judge Cardenas's actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

**(3)** 3. *Calderon.* On May 31, 1995, Calderon was arrested for spousal battery and bail was set at $50,000. At 6:00 in the evening, Judge Cardenas, who was not the duty magistrate, contacted the detention release unit at the request of Kelley. The detention release officer advised Judge Cardenas that Penal Code section 1270.1 required a hearing in open court prior to any own recognizance release of a person charged with domestic violence and that the prosecutor was entitled to two court days' written notice. Nonetheless, Judge Cardenas ordered Calderon released on his own recognizance.

Judge Cardenas had been advised a week earlier of the statute and had questioned its constitutionality. The masters found that Judge Cardenas had done no research between his first learning of Penal Code section 1270.1 and his order releasing Calderon. The masters concluded that Judge Cardenas's failure to research the constitutionality of the code section "after having had a sufficient opportunity to do so, neither upheld the higher standards expected of a judge (Canon 1) nor demonstrated the respect for and compliance with the law (Canon 2A)."

The commission concurs that Judge Cardenas's actions created an appearance of impropriety in violation of canons 1 and 2.[5] The commission concludes that Judge Cardenas's actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

4. *Warner.* On February 20, 1996, Warner pled guilty to possession for sale of a controlled substance and an enhancement count. Kelley represented

[5] Canon 1 is entitled "A Judge Shall Uphold the Integrity and Independence of the Judiciary" (some capitalization omitted) and reads, in relevant part: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."

Warner. Judge Didier sentenced Warner to a four-year suspended prison sentence, with Warner to be confined for one year in the Orange County jail and to be on felony probation for three years.

**(4)** Between February 20 and 27, 1996, Basinger asked Judge Cardenas to release Warner on his own recognizance. He then requested that Judge Cardenas modify Warner's probation to allow him to serve his previously imposed jail term in a drug rehabilitation program rather than the county jail. Judge Cardenas told Basinger that he needed a full medical report and a personal appearance from Warner. Basinger provided a medical report and Warner appeared in Judge Cardenas's courtroom. On February 27, 1996, Judge Cardenas issued an order modifying Warner's probation to allow him to serve his jail time in a drug rehabilitation facility.

The masters noted that after Judge Cardenas entered his order, "he discovered that the previous judge on the Warner case had already reviewed the medical information on the defendant (which was in a sealed envelope in the court file)." Judge Didier had declined the relief requested by Basinger. The masters found that Judge Cardenas "did not take sufficient time to read the file and investigate the Warner matter before acting on counsel's request." In addition, the evidence shows that Judge Cardenas failed to contact Judge Didier concerning Basinger's request, to notice a probation modification hearing, and to state his reasons for the modification on the record.

Judge Cardenas's willingness to act in this matter and to grant the relief requested by Basinger violated canon 2. It created the appearance that Basinger was in a special position to influence the judge. The commission concludes that Judge Cardenas's actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

**(5)** 5. *Bass.* On March 1, 1996, Bass was arrested for possession of a controlled substance for sale and bail was set for $25,000. On Saturday, March 2, 1996, Basinger contacted Judge Cardenas, who was on vacation in Hawaii, and requested that the judge order Bass released on his own recognizance or reduce the bail. Judge Cardenas contacted the detention release unit and ordered that Bass's bail be reduced to $5,000.

The masters noted that the circumstances of Basinger's request while the judge was on vacation in Hawaii "should have put [Judge Cardenas] on notice that responding favorably would constitute prejudicial misconduct. [Judge Cardenas] failed to inform Basinger that it would be improper for him to consider such a request while on vacation and failed to direct Basinger to the duty magistrate."

Judge Cardenas's accommodation of Basinger while the judge was on vacation in Hawaii violated canon 2 as it gave the impression that Basinger

was in a special position to influence the judge. Judge Cardenas's actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

**(6)** 6. *Alvarez.* Alvarez was in custody charged with spousal battery and a violation of probation with a total bail of $35,000. On Thursday, January 4, 1996, Basinger contacted Judge Cardenas requesting that he reduce the bail. The masters found that Judge Cardenas contacted the detention release unit and ordered bail reduced to $5,000, stating that he had received additional information from the victim. Judge Cardenas failed to comply with Penal Code section 1270.1.

The masters found that Judge Cardenas's failure to comply with Penal Code section 1270.1 was improper. Judge Cardenas's representation that he had received additional information from the victim was misleading as he had only spoken with Basinger. Judge Cardenas's willingness to rely on Basinger's representations and to violate Penal Code section 1270.1 created an appearance of impropriety in violation of canon 2. Judge Cardenas's actions constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The commission has reviewed the remaining allegations in the first amended notice of formal proceedings. Although trial counsel has reasonably objected to the masters' conclusions, the commission has determined to accept the masters' conclusions on the remaining allegations, many of which are cumulative. Further elaboration on these allegations and trial counsel's objections is unnecessary as it would not affect the commission's perspective on Judge Cardenas's behavior or its determination of the appropriate level of discipline, when all the circumstances of the case are considered including Judge Cardenas's status as a retired judge.

## DISCIPLINE

**(7)** The Supreme Court has indicated that the purpose of a commission disciplinary proceeding is not punishment, " 'but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system.' " (*Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at p. 1112, quoting *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 912 [42 Cal.Rptr.2d 606, 897 P.2d 544].) The court has further noted that " '[c]hoosing the proper sanction is an art, not a science, and turns on the facts of the case at bar.' " (*Broadman, supra*, 18 Cal.4th at p. 1112, quoting *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1318 [240 Cal.Rptr. 859, 743 P.2d 919].)

In determining the appropriate discipline, the commission cannot ignore that Judge Cardenas retired four years ago in March 1996, after serving 20 years as a judge. The commission has not previously disciplined Judge Cardenas. The record supports the masters' perspective that Judge Cardenas "was a hard working judge who made himself available beyond the call of duty to just about anyone who asked, day and night." They noted that he took his job as judge "seriously and was extremely well respected by prosecutors, public defenders, private attorneys and law enforcement." Indeed, there is no evidence that Judge Cardenas acted with any corrupt purpose or intent, nor evidence that he ever received, or expected to receive, anything from Basinger or Kelley.

Judge Cardenas's actions, however, violated canon 2. Canon 2 requires that a judge pay attention not only to his or her actions but also to the reasonable appearances flowing from those actions. Although the masters noted that Judge Cardenas did not act in bad faith or with any corrupt purpose, they recognized that despite Judge Cardenas's subjective good faith, his action in the *Bass* matter constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. A judge must avoid the appearance of impropriety as well as actual impropriety.

**(8)** The commission concludes that a public admonishment is the appropriate discipline. Judge Cardenas continued to entertain requests from Basinger and Kelley even after the *Vargas* incident, which the masters found should have made him more cautious. The masters opined: "The record demonstrates that Basinger and Kelley took advantage of [Judge Cardenas's] availability to an extent that should have raised a red flag in the eyes of [Judge Cardenas]. [Judge Cardenas's] continuing personal association with these two attorneys is simply inexplicable and gives rise to a spectre of impropriety in regard to his actions which affected these attorneys or their clients. Respondent never asked himself, 'How would it look to the objective observer that I continue to act on requests of Basinger and Kelley' even when prudence would have dictated to him greater care in dealing with these attorneys." Canon 2 requires that a judge avoid the appearance of impropriety as well as actual impropriety.

A public admonishment is necessary to guide Judge Cardenas[6] and to reassure all those in Orange County who were aware of the above described

[6] In his argument before the commission Judge Cardenas continued to defend his conduct by arguing that after the *Vargas* incident no other defendant whom he ordered released on his or her own recognizance or on bail failed to appear. Judge Cardenas violated canon 2, however, because he acted in such a way that it reasonably appeared that Basinger and Kelley were in special positions to influence him. This appearance arose at the time of Judge Cardenas's actions and persisted regardless of whether the defendants showed up at the subsequent court hearings.

incidents, as well as the bench and the public, that Judge Cardenas's accommodation of Basinger and Kelley was contrary to the Code of Judicial Ethics. Many of Judge Cardenas's actions followed ex parte communications. Shaman et al. in Judicial Conduct and Ethics (3d ed. 2000) pages 159–160, note: "*Ex parte* communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. *Ex parte* conversations or correspondence can be misleading; the information given to the judge 'may be incomplete or inaccurate, the problem can be incorrectly stated.' At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, *ex parte* communication is an invitation to improper influence if not outright corruption." (Fns. omitted.) These ills exist, or appear to exist, regardless of a judge's intent when entering into an ex parte communication. Furthermore, the likelihood of harm from an ex parte communication or any other appearance of impropriety is such that the incident tarnishes the judiciary even if there was no direct harm or prejudice.

**(9)** The commission is mindful of Judge Rothman's warning that "Judicial personality is important to the fabric of the judicial system, and it would be dangerous to that system were the judiciary to become a group of faceless bureaucrats who attempt to fit into a mold in order to stay out of trouble." (Rothman, Cal. Judicial Conduct Handbook (2d ed. 1999) §1.52, p. 29.) Neither the first amended notice of formal proceedings nor this decision challenges either Judge Cardenas's continuing friendship with Basinger and Kelley or the informality of Judge Cardenas's methods. Rather, the commission holds that, although Judge Cardenas had considerable latitude to choose his friendships and to adopt his own judicial "style," he remained responsible for the appearances created by his choices and actions. Judge Cardenas, by being available to his friends after hours, by relying on their ex parte communications, and in failing to follow statutes and practices designed to limit a judge's discretion, violated canon 2 by perpetuating the appearance that Basinger and Kelley were in special positions to influence him.

A public admonishment in this case is consistent with discipline imposed by the commission in other cases. (See, e.g., *Inquiry Concerning Shaw* (2000) No. 156, Decision and Order Imposing Public Admonishment [48 Cal.4th CJP Supp. 125], and *Inquiry Concerning Smith* (Nov. 25, 1996).)

This decision shall constitute the order of public admonishment of Judge Cardenas.

Commission members Justice Daniel M. Hanlon, Mr. Michael A. Kahn, Ms. Lara Bergthold, Mr. Mike Farrell, Judge Madeline I. Flier, Ms. Gayle Gutierrez, Mr. Patrick M. Kelly, Mrs. Crystal Lui, Judge Risë Jones Pichon, and Ms. Ramona Ripston voted in favor of this public admonishment. There is currently one public member vacancy.

# PUBLIC ADMONISHMENT OF JUDGE BERNARD E. REVAK

The Commission on Judicial Performance orders Judge Bernard E. Revak publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and rules 115 and 116 of the Rules of the Commission on Judicial Performance.

## STATEMENT OF FACTS AND REASONS

Judge Revak has been a judge of the San Diego County Superior Court since October 2, 1987; his current term began in January 1995.

On February 6, 2000, Judge Revak had dinner at his home with Fourth District Court of Appeal Justice Terry O'Rourke. During the evening, Judge Revak inquired about an appeal pending before the Fourth District in *Argo* v. *General Dynamics*, in which a jury had awarded approximately $100 million in compensatory and punitive damages to 98 plaintiffs. Two friends of Judge Revak had financial interests in the case; Mr. Jack Sinnott is a plaintiff in the case; Mr. Jim Doherty is married to a plaintiff in the case. According to Justice O'Rourke and Judge Revak, Justice O'Rourke stated to Judge Revak that he had recently recused from what he believed to be a related case. According to both Judge Revak and Justice O'Rourke, they did not engage in any substantive discussion of the *Argo* appeal or its merits.

The following day, Judge Revak played a round of golf with three friends, including Mr. Sinnott and Mr. Doherty. During the game, Judge Revak stated to his friends that he had been told that the *Argo* verdict and/or the punitive damages award had been reversed. Judge Revak did not identify the source of this information by name, but stated that he had had a friend from the Court of Appeal over for dinner. Judge Revak also made a statement indicating that the Court of Appeal, or the opinion writer, "didn't like [the trial judge] anyway." At no time on this date did Judge Revak state to his friends that his remarks about the *Argo* case were not true or were intended as a joke.

As of February 2000, the parties' briefing had been completed in the *Argo* appeal. Oral argument had not yet been scheduled, and thus the case had not been taken under submission by the court. Judge Revak's friends had not been apprised of any decision having been issued.

On February 8, 2000, attorney Brian Monaghan, one of the attorneys representing the plaintiffs in the *Argo* case, contacted Judge Revak by telephone and asked to meet with him about an important issue; Mr. Monaghan did not indicate that his call concerned the *Argo* case. A meeting was scheduled for the morning of February 10, 2000.

On February 9, 2000, Judge Revak played another round of golf with the friends he had played with on February 7. During the game, Judge Revak chastised Mr. Sinnott for having told Mr. Monaghan about the judge's remarks on the golf course on February 7. According to Judge

Revak, during the February 9 game he informed his friends that his comments about the appeal were a joke. Mr. Sinnott and Mr. Doherty deny they were told the comments were a joke, and assert that Judge Revak made further statements, including that when he met with Mr. Monaghan he would not tell him where the information came from, and that he thought the Court of Appeal's decision was a matter of public knowledge. Judge Revak denies making these comments.

During the afternoon of February 9, Judge Revak was informed that Mr. Monaghan had cancelled the meeting scheduled for February 10, and would instead send a letter. Judge Revak received Mr. Monaghan's letter sometime during the morning of February 10. The letter advised that Mr. Monaghan had wanted to meet with Judge Revak concerning a statement the judge had reportedly made on a golf course concerning the *Argo* case, but that he had determined to present his concerns in writing to Fourth District Presiding Justice Daniel Kremer. After receiving the letter, Judge Revak initiated a telephone conversation with Mr. Monaghan during which the judge advised that he had been joking.

During the morning and early afternoon of February 10, 2000, Judge Revak also contacted Mr. Sinnott and Mr. Doherty by telephone. The judge told them that his remarks about the appeal had been meant as a joke and asked them to convey this to Mr. Monaghan when they met with him.

On the afternoon of February 10, Mr. Sinnott and Mr. Doherty met with their attorneys and provided declarations concerning the golf course conversations. The declarations of Mr. Sinnott, Mr. Doherty and attorney Monaghan were submitted to the Fourth District Court of Appeal in support of a motion filed by the *Argo* plaintiffs on February 14. The motion requested an evidentiary hearing, the recusal of justices and the transfer of the *Argo* appeal to another court on grounds of the alleged disclosure of confidential information by Judge Revak and a member or employee of the Court of Appeal, and the alleged pre-judgment of the appeal by the court.

Justice Daniel Kremer, Presiding Justice of Division One of the Fourth District Court of Appeal, conducted an investigation of the matters alleged in the *Argo* plaintiffs' motion. Justice Kremer reviewed the appellate court's files and questioned the justices of the court. On February 17, 2000, Justice Kremer issued an order denying the *Argo* plaintiffs' motion and referring to this commission the allegation that certain statements by, and possibly to, Judge Revak constituted judicial misconduct.

The *Argo* plaintiffs filed a motion for reconsideration by the Court of Appeal, which was also denied, and a petition for review in the California Supreme Court. On April 12, 2000, the California Supreme Court entered an order transferring the *Argo* appeal to the Fifth District Court of Appeal "[i]n order to avoid even the appearance of impropriety." The Supreme Court did not hold a hearing, and denied further review of the matter. The *Argo* plaintiffs' motion, Justice Kremer's February 17, 2000 order, and the Supreme Court's order transferring the appeal were the subject of considerable publicity.

The issues before the commission are whether Judge Revak was apprised of confidential information about how the appellate court was going to rule on the *Argo* case and revealed it to his friends, and whether Judge Revak's comments, even if not revealing confidential information about the outcome of the *Argo* appeal, violated his ethical obligations as a judge.

On the issue of whether confidential information was imparted, both Justice O'Rourke and Judge Revak have testified under oath pursuant to Government Code section 68753 that their February 6 conversation did not involve any substantive information regarding the *Argo* appeal. Although these statements might be regarded as self-serving, the evidence adduced by the commission investigation is that there had not yet been a determination by the Court of Appeal as to how it would rule on the case. While the case had at one time been tentatively assigned to a three-justice panel, this assignment had been vacated when re-briefing was required. Upon completion of re-briefing, Justice O'Rourke was tentatively assigned as the authoring justice, but within days he recused himself from the case – well before his dinner with Judge Revak. Thereafter the case remained unassigned. As of February 17, 2000, when Justice Kremer denied the *Argo* plaintiffs' motion, the *Argo* appeal had not been re-assigned to an appellate panel for decision and no draft or tentative decision, bench memorandum, or analysis of the merits of the appeal had been prepared or undertaken by any Fourth District justice or law clerk, or circulated to the justices of the appellate court. The evidence that no determination of the outcome of the appeal had been made at the Court of Appeal supports the conclusion that the judges could not have discussed how the appellate court had decided to rule, and Judge Revak therefore could not have conveyed such information to his friends on the golf course.

Even though Judge Revak could not have imparted the substance of a decision that the Court of Appeal had not made, Judge Revak made remarks to his friends that purported to convey the outcome of the *Argo* appeal. Judge Revak contends that his remarks were a joke: he asserts that he spoke in what he believed was a joking manner at the time he made his remarks on February 7, and that he believed his friends understood the remarks as a joke from the beginning. Judge Revak claims he expressly stated he had been joking to Mr. Sinnott and Mr. Doherty, as well as the fourth golfer, Dr. Finlay, during the February 9 golf outing, which Dr. Finlay corroborates. Judge Revak also claims that Mr. Doherty acknowledged on February 9 that he had known on February 7 that Judge Revak was joking. However, Mr. Doherty filed a declaration in the appellate court stating that he did not believe Judge Revak's comments were a joke, as did Mr. Sinnott. Mr. Sinnott and Mr. Doherty both claim that the judge first revealed that the comments were meant to be a joke on February 10.

Judge Revak's remarks, even if a joke, constitute misconduct. In *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, the California Supreme Court found that Judge Kennick committed conduct prejudicial to the administration of justice when he engaged in a conversation with a cocktail waitress concerning her recent arrest for drunk driving, and implied that she should not worry about the arrest. The judge testified before the commission that the comments were in the nature of general reassurance that "it is going to be all right; these things have a way of working themselves out" and were not intended to imply that he would use any improper influence in the matter. While not finding that the judge had implied that he could in

some manner exert influence to affect the disposition of the case, the Supreme Court found the judge's comments to be prejudicial conduct, explaining that: "for a judge to give a layperson assurances about the outcome of a prosecution against the latter may imply inside information and thus be inappropriate." (*Kennick v. Commission on Judicial Performance, supra,* 50 Cal.3d at 332-333.)

In this matter, Judge Revak's comments to Mr. Sinnott and Mr. Doherty were misconduct for the same reason set forth in *Kennick.* Judge Revak's comments purported to convey to his friends the outcome of a court case in which they were involved and in which no decision had been announced by the appellate court. Even if intended as a joke, the comments implied to laypersons involved in a pending case that the judge was conveying inside information. Indeed, the implication was apparently so strong in the minds of Judge Revak's friends that they did not believe the judge when he later told them the comments were only a joke. The comments were improper.

The potential harm to public confidence in the integrity and impartiality of the judiciary was fully realized in the impact of Judge Revak's conduct on the parties to the *Argo* case and on the courts. As a result of the judge's conduct, the *Argo* plaintiffs filed two motions with the Fourth District Court of Appeal seeking an evidentiary hearing, the recusal of justices, and the transfer of the case to another court on grounds that Judge Revak's comments made it appear that the Fourth District had prejudged the appeal. After these motions were denied, the California Supreme Court ordered the appeal transferred to another district of the Court of Appeal "to avoid even the appearance of impropriety." As noted, Judge Revak's comments, and the *Argo* plaintiffs' motions and their aftermath resulted in substantial publicity adverse to public confidence in the judiciary.

Judge Revak's conduct implicates various provisions of the California Code of Judicial Ethics. Canon 3B(9) provides that "[a] judge shall not . . . make any nonpublic comment that might substantially interfere with a fair trial or hearing. . . ." Canon 2A provides that "[a] judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . ." Canon 1 provides that "a judge shall uphold the integrity and independence of the judiciary." Judge Revak's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (California Constitution, Article VI, section 18(d); see *Kennick v. Commission on Judicial Performance, supra,* 50 Cal.3d at 332-333.)

In reaching its decision, the commission noted that Judge Revak has forthrightly admitted that his conduct was the result of an unfortunate lapse of judgment, and acknowledged that it impaired the perception of the *Argo* plaintiffs and their counsel of the fairness of the appellate process and caused the courts and judiciary to suffer embarrassing and damaging publicity. After the Supreme Court transferred the case from the Fourth District Court of Appeal, Judge Revak publicly acknowledged his responsibility for the comments and apologized for the damage they caused, particularly to the Court of Appeal and to Justice O'Rourke.

Commission members Justice Daniel M. Hanlon, Mr. Michael A. Kahn, Ms. Lara Bergthold, Judge Madeleine I. Flier, Ms. Gayle Gutierrez, Mr. Patrick M. Kelly, Mrs. Crystal Lui, Judge Rise Jones Pichon, and Ms. Ramona Ripston voted to impose a public admonishment. Commission member Mr. Mike Farrell did not participate in this matter. There is currently one public member vacancy.

This decision and order shall constitute the order of public admonishment.

Dated: December 12, 2000

Honorable Daniel M. Hanlon
Chairperson

**PUBLIC ADMONISHMENT OF JUDGE PETER J. McBRIEN**

The Commission on Judicial Performance has ordered Judge Peter J. McBrien publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge McBrien has been a judge of the Sacramento County Superior Court since July 1989; his current term began in January 1997. He was previously a judge of the Sacramento County Municipal Court from April 1987 to July 1989.

On October 27, 2000, Judge McBrien pled nolo contendere to a violation of Penal Code section 384a, a misdemeanor, was found guilty, and was placed on probation.

Penal Code section 384a prohibits the willful or negligent cutting or mutilation of any tree growing upon public land or the land of another without permission. Judge McBrien's criminal conviction arose out of the 1999 cutting of trees, and removal of limbs from trees, on public land adjacent to his residence. The trees were growing in a nature center located in a public park owned by the County of Sacramento. The trees included mature oaks, and were cut for the purpose of improving the view of a nearby river from the McBrien residence. The trees were cut without the permission of the County of Sacramento.

The terms of Judge McBrien's probation included payment of $20,000 in restitution to the County, as well as a $500 fine. Judge McBrien complied with the terms of his probation, and his probation therefore terminated. His subsequent petition pursuant to Penal Code section 1203.4 was granted.

Judge McBrien's conduct evidenced disregard of the principles of personal and official conduct embodied in the California Code of Judicial Ethics, including failure to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved (canon 1), and failure to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2), and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (California Constitution, Article VI, section 18(d).)

In a letter to the commission, Judge McBrien stated, "I sincerely regret my misdemeanor violation of the law, primarily because it brings dishonor and disrespect to the bench."

Judge McBrien's conduct was the subject of numerous news articles, including in the *Sacramento Bee* and *Sacramento News & Review*.

Commission members Judge Rise Jones Pichon, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Marshall Grossman, Mr. Michael Kahn, Mrs. Crystal Lui, Ms. Ramona Ripston, Ms. Barbara Schraeger, and Dr. Betty Wyman voted to impose a public admonishment. Commission member Justice Vance W. Raye recused himself from participating in this matter. Commission member Ms. Gayle Gutierrez did not participate in this matter.

April 25, 2002

**PUBLIC ADMONISHMENT OF JUDGE JAMES L. ROEDER**

The Commission on Judicial Performance orders Judge James L. Roeder publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and rules 115 and 116 of the Rules of the Commission on Judicial Performance.

STATEMENT OF FACTS AND REASONS

1. From at least February 2001 to February 2002, Judge Roeder presided over the felony arraignment calendar in Placer County Superior Court. While conducting that calendar and for at least that period of time, Judge Roeder maintained a practice of stating, for the record, that defendants had waived their rights to have a speedy preliminary examination without obtaining the defendants' personal waivers of these rights, as required by law.

Penal Code section 859b provides, in relevant part, that in a felony case, "[b]oth the defendant and the people have a right to have a speedy preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found ... the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later . . . ." Section 859b further provides that "[w]henever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days" from the time of the defendant's arraignment or plea, whichever occurs later, "unless either of the following occur: (a) The defendant personally waives his or her right to a preliminary examination within 10 court days" [or] (b) [t]he prosecution establishes good cause for a continuance beyond the 10-court day period." In addition and regardless of the defendant's custody status, section 859b provides that "[t]he magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment [or] plea . . . unless the defendant personally waives his or her right to a preliminary examination within 60 days." (Emphases added.)

The following excerpt from arraignment proceedings on January 11, 2002, in the matter of *People v. Brian Allen Costanzo* (case No. 62-26239) illustrates Judge Roeder's practice. The transcript reflects that Mr. Costanzo was in custody on that date and was appearing before Judge Roeder for arraignment on a felony complaint. Prior to calling Mr. Costanzo's matter, Judge Roeder made the following statement to him and the other defendants who were present for arraignment:

> Good afternoon. We'll do the arraignments first. When I call your matter, tell the Court if you have hired your own attorney or if you're requesting a Court-appointed attorney. If you're here on a felony, you have the right to a preliminary examination within ten days.

(January 11, 2002 R.T. 2:19-23.)

When Mr. Costanzo's case was called, Judge Roeder asked him whether he was going to retain his own attorney or was requesting that the court appoint an attorney for him. Mr. Costanzo replied he was requesting a court-appointed attorney "for now." (R.T. 2:19-23.) Judge Roeder then stated:

> Sure. Give you written notice of your responsibility to reimburse Placer County. Appoint the public defender. Give you a copy of the felony complaint. Waiving formal arraignment, stipulating to advisement of constitutional rights, not guilty pleas will be entered. Set this for a conference Tuesday, January 15, at 8:30 in this courtroom. Waiving time for the preliminary examination both 10 days and 60 days, that will not be scheduled. There is a parole hold. I'll set bail at $25,000 on this case. Direct [that] he be retained at this facility pending his next appearance.

(R.T. 3:3-12, emphasis added.)

As the foregoing example shows, Judge Roeder stated that Mr. Costanzo was waiving "both [the] 10 days and 60 days" time limits within which to have a preliminary examination, without obtaining his personal waiver of those time limits, as required by Penal Code section 859b.

On February 26, 2002, a preliminary hearing was held in *People v. Costanzo*, at which Mr. Costanzo was held to answer on both felony and misdemeanor charges. On March 12, 2002, Mr. Costanzo was arraigned on an information charging him with felony and misdemeanor offenses. On April 11, 2002, Mr. Costanzo, through his attorney, the Office of the Public Defender, filed a motion to dismiss the information, pursuant to Penal Code section 995, on grounds that he "never personally waived" his right to have a preliminary examination within 10 court days of the January 11, 2002 arraignment proceedings, and therefore he was not lawfully held to answer at the preliminary examination. The motion averred that "at all times relevant herein [Mr. Costanzo had] insisted that the minute order of [the January 11, 2002 arraignment proceeding] inaccurately stated that [he] did waive time." Further, the motion alleged that on January 11, 2002,

> ... [Mr. Costanzo] was arraigned, but had no opportunity to speak with his counsel during or prior to the arraignment," and that [i]mmediately following the appointment of counsel, [Judge Roeder] ordered that [Mr. Costanzo] waived his Pen[al] C[ode] [section] 859b right to [a] preliminary examination within 10 [court] days. In fact, [Mr. Costanzo] did not waive that right, and was subsequently thwarted in his efforts to vindicate that right based on another court's reliance upon the minute order from [January 11, 2002].

On April 16, 2003, the motion was granted, and the information was dismissed.

2. From at least February 2001 to February 2002, Judge Roeder also regularly conducted an in-custody misdemeanor arraignment calendar. During at least that period of time, he maintained a practice of stating, for the record, that defendants who were appearing before him for arraignment without counsel, and who were requesting appointment of counsel, had waived their right to have a trial within the time limit prescribed by law, without obtaining the defendants' consent. Judge Roeder's practice is illustrated by his conduct on May 24, 2001, during arraignment proceedings in the matter of *People v. Kenneth Santos* (case No. 62-021664). A transcript of the proceedings shows that Mr. Santos appeared in custody and without representation, and that the following colloquy occurred:

> THE COURT: Kenneth Santos?
> DEFENDANT SANTOS: Here.
> THE COURT: Are you going to get your own attorney or requesting one?
> DEFENDANT SANTOS: Court appointed.
> THE COURT: Giving you written notice of your responsibility to reimburse Placer County, appoint the public defender. Give you a copy of the misdemeanor complaint. Waiving formal arraignment, stipulating to advisement of constitutional rights, not guilty pleas will be entered . . . . Waiving time for the misdemeanor jury trial, that will not be scheduled.... [Y]our bail is reduced to $2,500....

(R.T. 7:14-26, emphasis added.)

Penal Code section 1382(a)(3) provides that "[r]egardless of when the complaint is filed," a defendant charged with a misdemeanor who is "in custody at the time of arraignment or plea, which ever occurs later," must be brought to trial within 30 days after arraignment or entry of plea, whichever occurs later.[1] "Article I, section 15, of the California Constitution guarantees criminal defendants the right to a speedy trial. The Legislature by the enactment of section 1382 quantified and implemented this right by establishing specific limits on the time during which a trial must take place." (*Arreola v. Municipal Court* (1983) 139 Cal. App. 3d 108, 113.)

Penal Code section 1382(a)(3)(A) provides that a defendant who is in custody may waive the 30-day time limit. A defendant may request or consent to the setting of a trial date beyond the 30-day limit. (Pen. Code § 1382(a)(3)(B).) However, "[i]f the defendant is not represented by counsel," the defendant shall not be deemed under this section to have consented to the date

[1] A defendant who is charged with a misdemeanor "in all other cases" must be brought to trial within 45 calendar days of arraignment or plea, whichever occurs later.

for the defendant's trial unless the court has explained to the defendant his or her rights under this section and the effect of his or her consent." (Pen. Code § 1382(c), emphasis added.)[2]

The commission concluded that Judge Roeder abdicated his judicial responsibility to ensure the rights of criminal defendants by his practice at felony and misdemeanor arraignment proceedings of stating, for the record, that defendants had waived their rights to have a preliminary examination or misdemeanor trial within applicable time limits, without properly obtaining the defendants' consent to a waiver of those rights, in the manner prescribed by law.

In *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, the California Supreme Court held: "[A] judge who commits legal error which, *in addition*, clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty is subject to investigation." (*Oberholzer v. Commission on Judicial Performance, supra*, 20 Cal.4th at p. 398, original italics.) Judge Roeder's practices at arraignment were clearly legal error and represent a disregard for the statutory and constitutional rights of the defendants.

Judge Roeder, in his response to the commission's preliminary investigation letter, did not deny having maintained the practices regarding time waivers, as described above, at arraignment proceedings, nor did he state that he was unaware of the requirements of the relevant statutes. He explained that the public defender or private counsel "routinely need time" to open files and investigate cases and that it "was/is" counsel's practice either not to schedule a preliminary examination or misdemeanor jury trial until the case was "conferenced." Judge Roeder's motivation thus appears to have been a desire to accommodate defense counsel, and that this was accomplished at the expense of the statutory rights of defendants to a speedy preliminary examination or trial.

In 1996, the California Supreme Court adopted the commission's recommendation for public censure of Judge Claude Whitney, holding that the evidence supported the commission's findings, including that the judge had "abdicated his responsibility to protect the statutory and constitutional rights of defendants in certain respects" during arraignment proceedings. (*In Re*

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[2] In *People v. Byrd* (1991) 233 Cal.App.3d 806, at pp. 810-811, the court observed: "Penal Code section 1382 subdivision (d) [now subdivision "(c)"] mandates that courts inform defendants appearing without representation of their speedy trial rights. This would include informing defendants of their rights pursuant to that entire section." The court went on to say:

> Cases discussing the [trial] court's failure to explain speedy trial rights are usually in the context of writ proceedings dealing with misdemeanor charges. These cases conclude that the purpose of mandating that the court inform defendants of their speedy trial rights is to "ensure that a defendant without counsel would not waive [the defendant's] right to a speedy trial through ignorance or oversight . . . ." An in propria persona defendant does not waive such rights by failing to object below or by failing to object after counsel is appointed. Further, the record must indicate the court complied with its obligations; "a mere entry in the court's docket' is not enough to show consent." (Citations omitted.)

*Whitney* (1996) 14 Cal.4th 1, 2-3.) The court accepted the commission's finding that Judge Whitney, "as a matter of routine practice in the conduct of the in-custody misdemeanor arraignment calendar," failed to (a) "exercise his judicial discretion to consider release of defendant's on their own recognizance," (b) "consider grants of probation or concurrent sentencing for defendant's pleading guilty or no contest at arraignment," (c) "appoint counsel to assist defendants at the arraignment itself," and, (d) "as required by law, to inform defendants pleading guilty of the negative consequences a conviction could have on a noncitizen with regard to immigration." (*In re Whitney, supra,*15 Cal.4th at p. 3.) The court also accepted the commission's determination that Judge Whitney's practice of refusing to appoint counsel to assist indigent defendants at the arraignment itself constituted willful misconduct. The court concluded, however, that the remaining practices "constituted, at most, conduct prejudicial to the administration of justice. (*Ibid.*) In mitigation, the court noted that the record showed that Judge Whitney was considered a "diligent and hard-working" judge, and that he had other laudatory traits. (E.g., that he was "generally well regarded among the bench and bar," and that he had "good relationships" with court staff.) In addition, the court found that the judge "ha[d] since improved his conduct and acknowledged he erred in several respect," that the charged misconduct ceased in 1992, and that he "responded honestly and appropriately to the commission's inquiry and disciplinary proceedings." (*Ibid.*)

In 1998, Judge Christopher J. Sheldon received a public admonishment for, among other conduct, leaving the bench during the misdemeanor calendar and for allowing court clerks, in his absence, to enter pleas and execute court documents imposing sentences, to enter continuances agreed to by the attorneys, and to set hearing dates. (*Inquiry Concerning Judge Christopher J. Sheldon, No. 142,* Decision and Order of Public Admonishment.) For some of the pleas entered in his absence, Judge Sheldon allowed the clerks to stamp his signature on the defendants' constitutional rights waiver forms and plea forms, even though the judge had not reviewed the forms, questioned the defendant, or made any of the purported findings. Among the factual findings recited in the commission's Decision and Order were that "[d]efense counsel and the prosecutor liked Judge Sheldon's method of handling the pretrial calendar and believed the pleas entered under the system were valid," and that "[a]pparently, no legal challenge ha[d] been made to a plea entered under Judge Sheldon's procedures." The commission concurred in the Special Masters conclusion that Judge Sheldon's actions did not constitute willful misconduct, instead finding that his conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission noted Judge Sheldon's contentions that he "did not think that the procedures violate the law" and that he was "motivated by a desire to make the pretrial calendar run more efficiently, and that he promptly changed his procedure after being counseled by the supervising judge." Nonetheless, the commission concluded that a public admonishment was appropriate discipline because, among other reasons, Judge Sheldon "abandoned his fundamental responsibilities to be on the bench to preside over cases when they are adjudicated in his court" and because his "practice of allowing his courtroom clerks to stamp his signature on [constitutional rights waiver forms] when he never saw the files, created inaccurate and misleading court records."

Judge Roeder's conduct, at a minimum, constituted improper action under article VI, section 18(d) of the California Constitution. The judge's actions, as set forth above, violated canons 1 ("A judge shall uphold the integrity and independence of the judiciary"), 2A ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality"), and 3B(2) ("A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law").

The commission concludes that issuance of a public admonishment is required for at least three reasons. First, Judge Roeder abdicated his judicial responsibility to ensure the rights of criminal defendants by his practice at felony and misdemeanor arraignment proceedings of stating, for the record, that defendants had waived their rights to have a preliminary examination or misdemeanor trial within applicable time limits, without properly obtaining the defendants' consent to a waiver of those rights, in the manner prescribed by law. Second, for at least one year, the public observed Judge Roeder state for the record at arraignment that defendants had waived their statutory rights to a speedy preliminary examination or misdemeanor trial without soliciting or obtaining any input from the defendants. Third, this practice created inaccurate and misleading court records, reflecting that defendants had waived their right to have a preliminary examination or misdemeanor trial within applicable time limits when, in fact, the defendants had not consented to the purported waiver.

In mitigation, the commission notes Judge Roeder's statements "acknowledg[ing] the error" and that as of April 2002, he has altered his arraignment practice by asking each defendant if he or she "personally agree[s]" with the time waiver.

Commission members Judge Risë Jones Pichon, Justice Vance W. Raye, Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Mrs. Penny Perez, and Ms. Barbara Schraeger voted to impose a public admonishment Mr. Jose C. Miramontes did not participate in this matter. There are currently two public member vacancies on the commission.

This decision and order shall constitute the order of public admonishment.

Dated: December 16, 2003

Risë Jones Pichon

Honorable Risë Jones Pichon
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| IN THE MATTER CONCERNING<br>JUDGE FRANCISCA P. TISHER | DECISION AND ORDER IMPOSING<br>PUBLIC ADMONISHMENT |

This disciplinary matter concerns Judge Francisca P. Tisher, a judge of the Napa County Superior Court since June 1998. She was previously a judge of the Napa County Municipal Court from May 1995 to June 1998. Her current term began in January 2003. Following the appearance of Judge Tisher and her attorney, Mr. James A. Murphy, on March 30, 2004, pursuant to rule 116 of the Rules of the Commission on Judicial Performance, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

STATEMENT OF FACTS AND REASONS

On the afternoon of October 3, 2002, Judge Tisher was sent an e-mail message by a commissioner of her court concerning a family law case, *Maroney v. Ruiz*, then being handled by the commissioner.

*Maroney v. Ruiz* involved a couple who had divorced in Texas; the father had moved to New Jersey and the mother had moved to California. In February 2002, the parties stipulated in the Napa County Superior Court that the parties would take certain actions and that California would retain jurisdiction over custody issues. However, in July 2002, the father asked the New Jersey court to assume jurisdiction over the custody dispute. The New Jersey court did assume jurisdiction, on August 30, 2002, but the order assuming jurisdiction was stayed by a New Jersey appellate court on September 5, 2002. After the stay went into effect, the New Jersey trial court judge communicated with the California commissioner handling the case, and the commissioner agreed to prepare an order declining California's jurisdiction. On October 3, 2002, while the New Jersey appellate court's stay was still in effect, the father removed one of the children from school in California and took him back to New Jersey, without notifying the mother or school officials. The police, Napa Child Abduction Unit, and FBI were contacted. Later that day, the commissioner sent Judge Tisher the e-mail message mentioned above.

The e-mail message the commissioner sent to Judge Tisher on the afternoon of October 3 read, "The judge in New Jersey asked me to prep an order declining jurisdiction. Here is what I have written. I forgot to do it and now someone came and picked up the kid and it sounds like it is going to heat up but I would like to have it heat up in NJ." Judge

Tisher replied on October 4 at 9:45 a.m. She wrote, "It looks fine. I don't exactly know what you mean by the sentence 'The law of venue jurisdiction differs from venue for custody and visitation and that issue is not yet upon us.'" The commissioner replied one minute later, at 9:46, "The rules for child SUPPORT are different from the rules for CUSTODY. It is entirely possible Napa will be the appropriate jurisdiction for child support." A minute later, at 9:47, Judge Tisher e-mailed the commissioner, "OK. We'll keep it in. [A clerk] is in my office and I'll tell her to fax it off." The commissioner replied one minute later, at 9:48, with the fax number, and added, "They are waiting by the fax for it in NJ. Also [the mother's attorney] has an ex parte for today in this case and she is not stipping to a Commish."

The order was then signed by the commissioner, dated September 30, 2002, and file-stamped September 30, 2002. A copy was transmitted by fax to New Jersey.

Later the same morning (October 4), Judge Tisher presided over the ex parte hearing set by counsel for the mother. The transcript of that hearing shows that Judge Tisher called the case before the father's attorney arrived, and stated to the mother's attorney:

> THE COURT: …I have had a chance to review the order to show cause for modification of child custody, visitation, attorneys fees and costs and immediate return of the child and other orders and the injunctive order.

(10/4/02 R.T. 3:21-24.)

Shortly thereafter, Father's attorney arrived, and Judge Tisher said:

> THE COURT: What I was indicating is that I understand that we have some serious issues here and I have had a chance to look at the paperwork and I'm not sure that you have.
>
> MR. ROTHSCHILD [Father's attorney]: I have not.
>
> THE COURT: *I also have the file in front of me, which indicates that there was an order filed by Commissioner Boyd on September 30th, 2002. I don't know if you both have copies of that, but it is an order where she declined jurisdiction.*
>
> MS. RICHARDS: I have never received that, your Honor.
>
> MR. ROTHSCHILD: Nor have I.
>
> THE COURT: Okay.
>
> MR. ROTHSCHILD: And--
>
> THE COURT: I don't see the proof of service attached to this.

(10/4/02 R.T. 5:1-17; emphasis added.)

A short time later, Judge Tisher stated that she was not going to make any orders that day, and asked mother's counsel what she would like to do. After the attorney began to reply, Judge Tisher interrupted the attorney and stated:

> THE COURT: I'm not going to make an order *when one was made September 30th*, the order having the child returned. It looks like the child was just taken to New Jersey. I'm not saying it's right or wrong and I understand that your client would like to have the matter resolved one way or the other, but certainly I cannot do that on an ex parte.

(10/4/02 R.T. 7:9-15; emphasis added.)

Mother's counsel then asked that the matter be put on calendar for the following Monday. Judge Tisher responded:

> THE COURT: One of my problems is that I have an order here in the court file *from September 30th* indicating that jurisdiction has been declined by the Superior Court of California, County of Napa. So I think this really goes back as to how you wish to proceed.

(10/4/02 R.T. 8:9-13; emphasis added.)

At the time that she presided at the October 4 hearing, Judge Tisher knew that the order declining jurisdiction had been signed and filed earlier that same morning, not on September 30, 2002. During the hearing, she made misleading statements repeatedly indicating to the parties that the order had been filed on September 30, 2002. The making of these misleading statements was contrary to canon 2A of the Code of Judicial Conduct, which provides that judges should conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commission members Justice Vance W. Raye, Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted to impose a public admonishment. Mrs. Crystal Lui did not participate in this matter. There is currently one public member vacancy on the commission.

Dated: April 8, 2004

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Honorable Vance W. Raye
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| IN THE MATTER CONCERNING<br>FORMER JUDGE ROBERT M. LETTEAU | DECISION AND ORDER IMPOSING<br>PUBLIC ADMONISHMENT |

This disciplinary matter concerns former Judge Robert M. Letteau, previously a judge of the Los Angeles County Superior Court from his appointment on January 27, 1982 until his retirement effective September 10, 2002. Following the appearance of Judge Letteau and his attorney, Mr. Edward P. George, Jr., on May 11, 2004, pursuant to rule 116 of the Rules of the Commission on Judicial Performance, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

STATEMENT OF FACTS AND REASONS

For the reasons set forth below, the commission found that Judge Letteau engaged in misconduct while presiding over two matters between 1998 and 2000: an attorney's motion for fees in the *Conservatorship of Feist*, and the court trial in *Condon v. Mazza*. The Court of Appeal reversed both matters.

The commission further found that Judge Letteau's misconduct in the *Feist* and *Condon v. Mazza* matters was similar to conduct between 1996 and 2001 in three other matters for which the judge was privately admonished in 2002. Accordingly, the commission concluded that Judge Letteau's misconduct warrants this notice of intended public admonishment.

1. Attorney Fees Award in *Conservatorship of Feist*

*Background*

Beginning in 1998, Judge Letteau presided over *Conservatorship of Feist* (SP003455). Conservatee Feist was 79 years old and suffering from memory dysfunction and dementia. His family was concerned that he was being verbally and emotionally abused, inadequately cared for and financially exploited by Lee Lane, a woman who had been living in his home for two years. Family members retained attorney Marc Hankin, who specializes in probate work, to file a petition for conservatorship. Professional conservator Frumeh Labow was appointed as conservator of the person and estate of Mr. Feist. A Probate Volunteer Panel (PVP) attorney, Irving Goldring, was also appointed to independently represent Mr. Feist.

Over the next twenty-four months, contentious litigation between Conservator Labow and Ms. Lane ensued. Labow sought orders to compel Lane to account for her use and management of Feist's assets, to obtain discovery from Lane, to set aside durable powers of attorney obtained by Lane, and to annul a September 1997 marriage between Lane and Feist. Ms. Labow also opposed attempts by Lane to retain private counsel to represent Feist and to remove Labow. In March 1999, the parties reached a settlement of their various claims, which was later set aside. After additional negotiations a new settlement was reached and approved by the court in April 2001.

In December 1999, Conservator Labow filed an accounting and a request for conservator's fees in the amount of approximately $25,000, and attorney fees and costs to Mr. Hankin in the amount of approximately $63,820. Labow later supplemented her accounting to request additional conservator's fees of approximately $24,397 for the period September 1, 1998 through December 31, 1999. Mr. Hankin supported the attorney fees request with a declaration that included approximately 50 pages of time records detailing approximately 275 hours of attorney and paralegal services and compensation paid to consult with legal experts in other specialties.

Mr. Hankin's declaration included a section entitled "Public Policy Issues" that contained five paragraphs of comments critical of what Hankin characterized as the Los Angeles Probate Court's "practice" of "cutting" the fees requested by conservators and their attorneys, particularly in protracted litigation. Hankin asserted that because of this practice attorneys "expect" to be denied their normal hourly rate, "do not trust" judges to award adequate fees in protracted litigation, and are discouraged from vigorously representing their clients. This, he asserted, was a potent "weapon in the arsenal of those people who abuse the elderly for profit as a regular business practice."

Attorney Goldring recommended approval of the conservator's accounting and approval of the full amount of fees requested by Labow and Hankin. Judge Letteau approved Ms. Labow's fee request at a hearing on June 2, 2000. As to Mr. Hankin's fee request, however, the judge first deferred decision to the end of the hearing, stating that "it is going to take some considerable time . . . ." (6/2/00 R.T. p. 3:2.) The judge then indicated as to the attorney fees "there are a lot of things that I need to know about. And it may well be that I am never going to approve it. In fact, I have to tell you, I doubt I am going to ever approve the request made for $62,000 in fees." (6/2/00 R.T. p. 3:18-28.)

Judge Letteau also referred to the public policy statements in Mr. Hankin's declaration, which the judge characterized as "really ascrib[ing] elder abuse to the court" (6/2/00 R.T. p. 4:4-5), and which the judge said were "not fair" (6/2/00 R.T. p. 4:5-6). After continuing the hearing to accommodate the schedules of Mr. Goldring and Ms. Labow, the judge sought to engage Mr. Hankin in a discussion of the public policy issues, and stated his intention to "circulate" Mr. Hankin's declaration "so it can be considered by my colleagues on the bench." (6/2/00 R.T. p. 8:8-10.)

When Mr. Hankin appeared before Judge Letteau on another case a week later (June 9, 2000), the judge brought up *Feist*, saying he "hadn't decided" what to do about the fee

request. The judge asked Mr. Hankin if he could speak with retired Judge Irving Shimer (who initially handled the case), and invited Mr. Hankin to submit the name of a proposed referee to speak with Judge Shimer. Mr. Hankin noted that conservator Labow and attorney Goldring were absent and had no notice of Judge Letteau's proposals, stating "this is sort of ex parte without [Mr. Goldring] being present." (6/9/00 R.T. pp. 2:28-3:7.) Judge Letteau agreed to defer the matter to the next *Feist* hearing on June 23: "Okay. Tell you what we'll do. You come in on whatever the date is, and we'll have the same discussion then. That's fine. I don't mind. I was trying to save you some time. [¶] . . . Don't expect that there are going to be substantive decisions made on your 60-some thousand dollar fee request on the scheduled date. [¶] . . . Go back to square one, Mr. Hankin." (6/9/00 R.T. p. 3:8-18.)

At the June 23 hearing in *Feist*, Judge Letteau referred to the conversation on June 9, stating that Mr. Hankin was "less than enthusiastic" about his request to speak with Judge Shimer. (6/23/00 R.T. p. 16:10-11.) Mr. Hankin said, "[Y]ou were asking me to do that on an ex parte communication that was not proper. I felt I should communicate with [Mr. Goldring and Ms. Labow] beforehand." (6/23/00 R.T. pp. 16:28-17:2.) Judge Letteau responded, "I don't see how [Goldring's] client, who is the conservatee, would be adversely affected." (6/23/00 R.T. p. 17:5-6.) Ms. Labow and Mr. Goldring then reiterated their support for Mr. Hankin's fee request. Judge Letteau stated that he would not speak with Judge Shimer in light of "this personal animus by Mr. Hankin towards the court, which I'm willing to ignore":

> COURT: . . . It would have been my preference, and with almost anybody else that hadn't personalized this, I would have simply called Judge Shimer and listened to what he had to say. After hearing further remarks by Mr. Hankin today, I absolutely would not talk to Judge Shimer about this case because I think whatever I then did would be subject to very possible mischaracterization, unless I simply awarded Mr. Hankin all of his fees. So I've made the decision since we've had this long discussion, that I will not ever talk to Judge Shimer about this case, even though I think it might have been helpful, productive and constructive. And we'll probably do it in virtually every other situation where there didn't seem to be this personal animus by Mr. Hankin towards the court, which I'm willing to ignore. (6/23/00 R.T. p. 22:1-17.)

Mr. Hankin responded that he had no objection to Judge Letteau questioning Judge Shimer, for whom he had "the highest respect," so long as they did not meet ex parte. (6/23/00 R.T. p. 23:5-9.)

Also at this hearing, Judge Letteau requested a list of proposed referees to review Mr. Hankin's fee request. Mr. Hankin stated that he would object should the judge appoint retired Judge Edward M. Ross, whom he had previously sought to disqualify. Judge Letteau responded, "I hadn't thought about Judge Ross, but since you mention it, that would be one possibility. Feel free to submit his name . . . ." (6/23/00 R.T. pp. 18:28-19:6.)

Judge Letteau also directed Mr. Hankin to further support his fee request by filing, by August 1, a "brief synopsis of what was accomplished" at each of his appearances in *Feist*. (6/23/00 R.T. p. 12:6-7.) When Mr. Hankin objected that he would need to obtain costly transcripts, the judge responded "That's your decision." (6/23/00 R.T. p. 15:13.) The matter was continued to August 18.

Following the hearing, Mr. Hankin and Mr. Goldring jointly submitted a list of proposed referees that did not include Judge Ross. On July 10, Judge Letteau appointed one person on the list of proposed referees, and also appointed Judge Ross as "second referee/special master." Mr. Hankin filed a peremptory challenge against Judge Ross, which Judge Letteau rejected on July 20. Mr. Goldring then objected to Judge Ross. On July 25, Judge Letteau vacated his order appointing the referees, stating that he would rule on the fee request "in due course."

On July 26, 2000, Mr. Hankin filed an objection to Judge Letteau deciding the fee matter without a hearing, as well as a motion to disqualify Judge Letteau on grounds of bias. (The disqualification motion was later re-filed after the judge advised it had not been properly served.) On August 1, Mr. Hankin filed the synopsis of appearances that Judge Letteau had requested on June 23. On August 18, Judge Letteau struck as untimely and insufficient Mr. Hankin's re-filed motion to disqualify him from hearing the fee motion. The matter was continued for four months to December 15.

As of December 14, 2000, Judge Letteau had not ruled on the fee request for almost a year. The judge also had not ruled on Mr. Hankin's request for a hearing for more than four months. Mr. Hankin amended his fee request to include interest occasioned by the delay, with a new total of about $67,420.

Prior to the December 15 hearing date, Mr. Hankin learned the hearing was to be continued because the file was missing. He contacted the court's probate attorney, who agreed to Mr. Hankin's request that the new hearing date be January 19, 2001, because Mr. Hankin was going to be out of town on vacation. On December 15, attorney Goldring was present but Mr. Hankin was not, because he believed the matter had been continued. Judge Letteau noted that circumstance but said he would continue the matter only to December 22, whether Mr. Hankin could attend or not: "[I]t's a fee order. Everything else has already been resolved. There needn't be any discussion. I can even make the order now, but I'm willing to put it over a week. If [Mr. Hankin] can be here, fine. If he can't, it won't make any difference." (See Opinion in Appeal B149324 at pp. 13-14.)

On December 20, Mr. Hankin submitted an *ex parte* motion seeking to continue the hearing until a date in January. Judge Letteau denied it, advising Mr. Hankin to the effect that, "No, we're really not going to have a lot of discussion [at the December 22 hearing]. This is going to be a time for decision and not debate, so there's no reason to continue it." (See 12/22/00 R.T. p. 1:19-22.)

On December 22, Mr. Goldring was present but Mr. Hankin was not. Judge Letteau stated that Mr. Hankin, in his amended fee request, asserted that he had "saved Mr. Feist's life." Judge Letteau then commented on the fee request as follows:

> COURT: I appreciate that Mr. Hankin has possibly spent a lot of time on this. A lot of money has already been paid to the conservator . . . . [¶] . . . In terms of the life saving, I do have a hard time understanding the lawyer's role in that. I've read and I did at one time ask Mr. Hankin if I could talk to the Judge who was first involved, Judge Shimer. [Mr. Hankin] had some problems with that. [¶] I suggested because I know he feels that there's a personal problem between this court and Mr. Hankin that we . . . put into place a mechanism so this could be determined by a lawyer and a retired judge, and he recommended – I recommended [Judge] Ed Ross, and I would have been very happy to adopt whatever recommendation that he made. [¶] You [Mr. Goldring] objected to that, as you had every right to. So here we are . . . . (12/22/00 R.T. pp. 1:28-2:21.)

Judge Letteau then made his order allowing Mr. Hankin "all of his costs, $1,280.30, [and] fees of $11,134.71 . . . ." (12/22/00 R.T. p. 2:22-23.) Judge Letteau did not state any reason for reducing Mr. Hankin's fee request from $67,400 to $11,135 – a reduction of more than 80% – and did not issue a written explanation of his ruling.

In February 2001, Mr. Goldring filed a petition for fees of $28,025 (95 hours at $295 per hour) for the period from January 1999 through December 2000. Judge Letteau approved that request in full at the first hearing on the matter. Mr. Goldring had previously been awarded fees of $15,151. Thus, Mr. Goldring's compensation in *Feist* totaled $44,176, as compared to $11,135 to Mr. Hankin, and was awarded at an hourly rate of $295, in contrast to the hourly rate of $275 requested by Mr. Hankin.

Mr. Hankin appealed from the reduction of his fees, and attorney Goldring filed a letter stating he did not oppose the appeal and supported the request for fees. In December 2001, the Court of Appeal reversed and remanded the matter for further consideration in a different department of the superior court. The Court of Appeal concluded that Judge Letteau's "unexplained drastic reduction" of Mr. Hankin's fee request was "tainted by an evident bias against counsel and constitutes a clear abuse of discretion." (Opinion in Appeal B149324, at pp. 16-17.)

*Findings*

After a full review of the record, the commission found that Judge Letteau committed misconduct with respect to Mr. Hankin's fee request in *Feist* as follows.

A. Bias and Embroilment

A judge must "perform the duties of judicial office impartially and diligently" (Canon 3, Code of Judicial Ethics) and "perform judicial duties without bias or prejudice" (Canon 3B(5)). Further, a judge must "avoid impropriety and the appearance of impropriety in all the judge's activities" (Canon 2) and "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Canon 2A).

A judge who displays evident bias against one side of a case, or one who is so personally embroiled as to lose the ability to consider the matter in a neutral and objective manner, violates these canons. (See generally Rothman, *California Judicial Conduct Handbook* (2d ed. 1999) §§ 2.01, 2.03, 2.04, pp. 31-34; § 2.19, pp. 49-50; see also *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 858-861 [misconduct included failure to remain objective, improper personal involvement, and distaste for a party that overrode judge's objectivity]; see also *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1311 [judge's in-court statement to defendants that judge would always believe testimony of a police officer found to be prejudicial misconduct]; *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739, 748 [misconduct for judge to express legitimate concern in unacceptable, non-objective and non-neutral manner and to demonstrate unwarranted impatience, disbelief and hostility toward counsel, litigants and witnesses]; *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 538 [vehement expressions of personal hostility improper even in face of clearly contemptuous conduct]; *Inquiry concerning Judge James Randal Ross*, No. 141 (1998) Decision and Order Imposing Public Censure, at pp. 9-10 [judge censured for improper threats of contempt and orders to appear based on judge's anger with one party].)

In its December 2001 decision reversing the reduced fee award, the Court of Appeal noted that:

> The one clear impression that emerges from this record is that there was palpable animosity between the trial court and Hankin. In his declaration in support of his request for fees, Hankin had raised the court's ire by stating that the court's practice of cutting fees is used as a weapon by those who abuse elders because they are encouraged to drag out the litigation while the conservators and their attorneys are discouraged from doing all that is necessary to protect the elderly victims. The trial court took this outspoken commentary as a personal affront and stated that Hankin was ascribing elder abuse to the court, even saying that the court would circulate Hankin's remarks to other judges.
>
> Although Hankin's commentary was accusatory and immoderate, he was nonetheless entitled to have his fee request decided by an unbiased court. The court's thinly veiled hostility toward Hankin was manifest: the court said from the outset that it doubted it would ever approve the fee request for $62,000; the

> court appointed as one of two referees the very person to whom Hankin specifically objected; . . . the court inordinately delayed decision of the fee request for a full year; and ultimately the court refused to continue the hearing on the matter for even a few weeks to give Hankin an opportunity to appear and be heard. (Opinion in Appeal B149324, at pp. 16-17.)

The commission concluded that from June 2, 2000 forward, Judge Letteau repeatedly made oral and written statements displaying hostility and animosity toward Mr. Hankin that apparently arose, at least in part, from the judge's reaction to the material in Mr. Hankin's fee request that criticized the probate court's overall handling of attorney fees requests in cases involving possible elder abuse.

The reduction in Mr. Hankin's fees cannot be justified on the theory that Mr. Hankin's $275 hourly rate exceeded the court's maximum allowable rate for PVP attorneys, as Judge Letteau has urged. The local rules of the court do not specify a maximum compensation rate for private counsel or for PVP attorneys appointed at the expense of the conservatee's estate. Further, in the same litigation, Judge Letteau approved Mr. Goldring's fees in full based on an hourly billing rate that was $20 per hour higher than Mr. Hankin's rate. Judge Letteau also approved without question or reduction Ms. Labow's request for fees for her own services. Only Mr. Hankin's fee request – at an hourly rate lower than Mr. Goldring's – was criticized and reduced by over 80% with no statement by Judge Letteau of factual grounds for that different treatment.

Judge Letteau defended his reduction of Mr. Hankin's fees before the commission on the ground that the fee request was "overreaching." However, both Ms. Labow, the conservator, and Mr. Goldring, the PVP attorney appointed by the court to independently monitor the actions of the conservator and protect Mr. Feist's interests, agreed that Mr. Hankin's request for fees was reasonable. (See Probate Code § 2642(b).) Moreover, Judge Letteau did not tell Mr. Hankin that overreaching was suspected, did not conduct a hearing on the issue, and made no determination that overreaching had occurred or that any specific amount was attributable to overreaching or services for which compensation was not justified. To the contrary, Judge Letteau never stated any reason or basis for the reduction of more than 80% in the amount of fees awarded to Mr. Hankin.

Further, Judge Letteau's suggestion that his conclusion was justified because he had reduced Mr. Hankin's fees in previous probate matters only strengthens the commission's conclusion that the judge acted with bias and was personally embroiled with Mr. Hankin. Judge Letteau has never articulated any reason for concluding that the fees requested in *Feist* – which were approved by conservator Labow and attorney Goldring – were excessive or unwarranted.

B. Decisional Delay

The commission also concluded that Judge Letteau inordinately delayed decision of Mr. Hankin's fee request. A judge has an obligation to dispose of all matters "fairly,

promptly, and efficiently." (Canon 3B(8).) Judge Letteau violated this obligation when he failed to complete the hearing and issue a ruling on Mr. Hankin's fee request for a full year after the request was filed.

The record of the *Feist* matter contains numerous indications that Judge Letteau's failure to act promptly on Mr. Hankin's request for fees was due to the judge's annoyance with Mr. Hankin rather than the need to ensure the fairness of the judicial process. At the initial hearing on the fee request on June 2, 2000, Judge Letteau made it clear that discussion of the fee request would "take some considerable time" and that even though Mr. Goldring had found the fees "satisfactory," the judge would "need to spend a lot of time talking about this." After referring to Mr. Hankin's "public policy statements" as "not fair," the judge then indicated some of his concerns about "what was done" and the value of the services compared to the million dollar value of the estate.

When Judge Letteau later raised *Feist* with Mr. Hankin in the absence of the other parties, the judge stated he hadn't decided what he would do, and indicated he would probably put it over "for a couple of months." After Mr. Hankin objected to the *ex parte* nature of the conversation, Judge Letteau responded with pique, telling Mr. Hankin: "Don't expect that there are going to be substantive decisions made on your 60-some thousand dollar fee request on the scheduled date. [¶] . . . *Go back to square one, Mr. Hankin*." (6/9/00 R.T. p. 3:13-18; emphasis added.)

Thereafter Judge Letteau appointed referees, including one to whom Mr. Hankin had specifically objected, then vacated the appointment only after Mr. Goldring objected. In the July 25, 2000 minute order, Judge Letteau stated he would rule on the fee request "in due course." When the matter was before Judge Letteau again on August 18, he continued it until December 15, 2000 – a date nearly four months later, and nearly a full year after the request for fees was filed – despite the pendency of Mr. Hankin's demand for a hearing pursuant to Probate Code sections 2640-2642.

Judge Letteau has given no persuasive reason why it required more than six months after the initial hearing on June 2 to obtain the information the judge deemed necessary to a fair and fully-informed decision on Mr. Hankin's fee request, why the materials filed by Mr. Hankin on August 1, 2000 were not sufficient, or why the judge's expressed concerns with the quality and necessity of the services rendered, as well as his desire to obtain Judge Shimer's recollection of earlier proceedings, were not addressed promptly. With respect to the appointment of referees, the commission notes that Judge Letteau's decision to appoint a referee to whom Mr. Hankin had specifically objected undermined any chance that the appointment of referees would expedite the handling of the fee request.

The judge's obligation under Canon 3B(8) to promptly dispose of all judicial matters does not depend on whether parties or attorneys complain to the judge about a delay. The obligation to ensure timely resolution of matters before the court rests not with parties or counsel, but with the judge. Judge Letteau violated this obligation when he failed to promptly dispose of Mr. Hankin's fee request.

C. Denial of Hearing on Fee Request

Pursuant to Probate Code sections 2640, et seq., Attorney Hankin was entitled to a hearing on his application for fees, in order to address any objections raised by the parties or the court. (See, e.g., Prob. Code §§ 2640(c), 2641(b), & 2642(b).) A hearing on the substance of the fee request was never held. Judge Letteau refused to address the substance of Mr. Hankin's fee request at either the June 2 or June 23, 2000 hearing. Upon denying Mr. Hankin's attempt to disqualify Judge Ross from serving as a referee, Judge Letteau stated his intention "to rule upon the Hankin fee request without further argument and following receipt of those supporting materials already requested along with any further documents necessary for the Court's information in rendering a fair and fully-informed decision." (7/20/00 Minute Order.)

Subsequently, when the fee request came before Judge Letteau on December 15, 2000, the judge refused to continue it to a date agreed to between Mr. Hankin and the court's research attorney after the loss of the court file necessitated a continuance. Instead, Judge Letteau set a hearing for December 22, 2000 – a date when he knew Mr. Hankin could not be present. A few days later, Judge Letteau denied Mr. Hankin's *ex parte* application for a brief continuance so that he would have an opportunity to be present and be heard. In refusing the date requested by Mr. Hankin on December 15, Judge Letteau revealed that he had already made up his mind and saw the hearing as a mere formality and not as an opportunity for Mr. Hankin to address the merits of the fee request: "There needn't be any discussion. I can even make the order now . . . . If [Mr. Hankin] can be here [on December 22], fine. If he can't, it won't make any difference." Judge Letteau made similar remarks when he again denied a continuance on December 20, stating that the purpose of the hearing on the fee request was "decision and not debate."

Thereafter, on December 22, 2000, at a hearing attended only by Mr. Goldring, Judge Letteau reduced Mr. Hankin's fees by more than 80% on the basis of factors that the judge did not articulate, and to which Mr. Hankin had no opportunity to respond. The commission agrees with the Court of Appeal, which found that Judge Letteau's decision to make an "unexplained drastic reduction of Hankin's fee request" after refusing to continue the hearing for even a few weeks to give Hankin an opportunity to appear and be heard was "tainted by an evident bias." (See Opinion in Appeal B149324, at pp. 16-17.)

D. Ex Parte Communication

Canon 3B(7) of the Code of Judicial Ethics requires a judge to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law" and prohibits a judge from initiating, permitting or considering ex parte communications "concerning a pending or impending proceeding . . . ." When Judge Letteau attempted to engage Mr. Hankin in a discussion of the handling of the pending fee request in the *Feist* matter on June 9, 2000, in the absence of Ms. Labow and Mr. Goldring, he violated Canon 3B(7). Both the conservator (Ms. Labow through her counsel Mr. Hankin) and conservatee (Mr. Feist through his counsel Mr. Goldring) were entitled to be heard in proceedings relating to Mr. Hankin's fee request. (See Probate Code §§ 2640(b), 2642(a), 1460.)

It was improper for Judge Letteau to initiate a communication concerning the fee request without notice to Mr. Goldring, and outside of Mr. Goldring's presence, regardless of the fact the discussion occurred on the record in open court. (Canon 3B(7).) Nor does Judge Letteau's attempt to characterize the purpose of the communication as "procedural" ("I'm here to save you time and tell you what the procedure is going to be," R.T. p. 2:19-20), make the communication proper under Canon 3B(7)(3). The proposed appointment of a panel of referees was not a scheduling or administrative matter, but a new procedure that would have substantive impact on the conservatee and his estate because – as Judge Letteau later recognized – the cost of the referee or referees would be paid from the assets of the conservatee's estate. Moreover, there were no exigent circumstances that required the matter be addressed on an *ex parte* basis on June 9.

2. Trial of *Condon v. Mazza*

*Background*

In August 2000, Judge Letteau presided over a two-day court trial in a malicious prosecution action titled *Condon v. Mazza* (No. SC053182). The defendant, attorney Steven Mazza, had previously sued Michael Condon on behalf of an individual (Klein) who was injured in a nightclub ("The Pink"). Mazza's complaint alleged that Condon owned the club. Attorney Mazza initially secured a default judgment, but Condon, who in fact did not own the club, had that judgment set aside. Condon later prevailed on a summary judgment motion, and immediately sued attorney Mazza for malicious prosecution. Condon claimed damages to compensate him for his attorney fees in the first lawsuit, and for emotional distress. Condon also claimed punitive damages.

At the conclusion of the two-day trial, Judge Letteau found for Condon, awarding him $12,460 in attorney fees, $4,500 for emotional distress, and $17,500 in punitive damages. Mazza appealed. In November 2002, the Court of Appeal reversed on the ground that Mazza was not liable for malicious prosecution because he had probable cause to name Condon as the defendant when he filed the *Klein* lawsuit. (Opinion in Appeal B145458 at pp. 2, 9.) The appellate court remanded with directions that judgment be entered in favor of defendant Mazza.

In its decision, the appellate court noted Judge Letteau's treatment of defendant Mazza, which the court characterized as "unorthodox:"

> From the outset of trial the court was openly critical of Mazza's handling of the underlying action. The judge conducted extensive cross-examination of Mazza himself, challenged his testimony and argued with him throughout the brief proceedings. (Opinion, Appeal B145458 at pp. 3-4.)

The appellate court also noted that Judge Letteau awarded plaintiff attorney fees as compensatory damages despite plaintiff's testimony that a third party had paid his legal bills in the underlying lawsuit, awarded the plaintiff damages for emotional distress despite his

testimony he had suffered no financial or other loss, and "perhaps most unorthodox," ordered defendant to testify about his net worth on the basis of an informal financial statement (prepared by hand in the courtroom), and awarded punitive damages on a finding that the defendant had "no net worth" and "lots of debt" but "the ability to borrow." (Opinion in Appeal B145458, at pp. 3-5.)

*Findings*

Canon 3 of the Code of Judicial Ethics imposes upon judges the obligation to perform the duties of judicial office impartially and diligently. Among the specific prescriptions of Canon 3 are the requirement that a judge "perform judicial duties without bias or prejudice" (Canon 3B(5)) and that a judge "be patient, dignified, and courteous to litigants . . . , witnesses, lawyers and others with whom the judge deals in an official capacity." (Canon 3B(4).)

Failure to comply with these obligations is misconduct. (E.g., *Kloepfer v. Commission on Judicial Performance, supra,* 49 Cal.3d at 844-845; *Roberts v. Commission on Judicial Performance, supra,* 33 Cal.3d at 748; *McCartney* v. *Commission, supra,* 12 Cal.3d at 533; *Inquiry Concerning Judge Bruce Van Voorhis*, No. 165 (2003).) After considering the full record of the matter, the commission concluded that Judge Letteau violated Canon 3 and committed misconduct in the trial of *Condon v. Mazza* as follows.

A. Prejudgment and Advocacy

Judges may examine witnesses appearing before them, but that power "must be exercised impartially . . . . [T]he judge should not appear to be an advocate." (California Judges Benchbook: Civil Proceedings -- Trial [Cal CJER 1997] § 5.55, pp. 234-235 [citations omitted]; see also, Rothman, California Judicial Conduct Handbook, *supra*, § 2.20 ["Although a judge has the inherent power to examine witnesses . . . , the judge cannot use these powers in a manner that compromises his or her impartiality"].) In *McCartney v. Commission on Judicial Qualifications*, *supra,* 12 Cal.3d 512, the Supreme Court emphasized that, while judges may examine witnesses when it appears that counsel will fail to elicit "relevant and material testimony," they "may not . . . in the course of examining witnesses become an advocate for either party or cast aspersions or ridicule upon a witness." (*McCartney* v. *Commission, supra,* 12 Cal.3d at p. 533 [emphasis in original].) The court found that Judge McCartney's "extended examinations of witnesses [were] particularly destructive of the image of the court as an impartial forum for the determination of truth." (*Ibid.*) In *Kloepfer v. Commission on Judicial Performance, supra,* 49 Cal.3d 826, the Supreme Court found misconduct where a judge "did not limit himself to questions directed to eliciting clarifying testimony [but] told the witness his testimony did not make sense, and engaged in argumentative dialogue . . . ." (*Id.* at p. 845.)

The record of *Condon v. Mazza* shows that Judge Letteau failed to maintain impartiality in several instances.

(1) During re-direct examination of defendant Mazza

During trial, Judge Letteau focused on two aspects of Mazza's conduct in the *Klein* case that the judge concluded showed malice and lack of probable cause to maintain the *Klein* action against Condon: (1) a collection letter Mazza sent to Condon after obtaining the default judgment, in which Mazza essentially threatened to ruin Condon by executing on all of his property to satisfy the default judgment; and (2) Mazza's failure to dismiss the action against Condon promptly when he learned through discovery after the default judgment was set aside that Condon had no ownership interest in The Pink. (See Opinion in Appeal B145458 at p. 8.) Judge Letteau also expressed considerable concern as to whether Mazza was justified in relying on conversations with an insurance adjuster for The Pink's insurer and a letter from the carrier addressed to Mr. Condon d.b.a. The Pink. (The appellate court held this was "information from which a reasonable attorney could conclude that Condon would be subject to liability under a premises liability theory as well as general negligence principles." Opinion in Appeal B145458 at p. 7.)

On the second day of trial, during re-direct examination of Mazza by plaintiff's attorney, Judge Letteau asked whether Mazza could "show me a single piece of paper that says that a Mr. Condon is the owner of this business?" (8/3/00 R.T. p. 8:7-8.) When Mazza responded there was no such document, Judge Letteau stated: "See, that's the problem you have, Mr. Mazza. Nobody told you he owned the business . . . . You didn't take reasonable efforts to make that determination. When you found out that he didn't own the business, you wouldn't let him go. That's the problem . . . ." (8/3/00 R.T. p. 8:12-18.) Later, when Mazza testified he had multiple conversations with people, Judge Letteau asked "Where are these people? Why haven't you brought them into the courtroom? . . . They're presumably the people that you need. Have you taken their deposition in this case? . . . Presumably you would have thought that these people might assist you in your defense of the claim. But as you didn't think to depose Mr. Condon . . . you haven't thought to bring into this courtroom the ammunition you might need to successfully defend yourself. So what you are telling me is hearsay. It's just words, and it's empty at that." (8/3/00 R.T. pp. 8:27-9:11.)

With these comments Judge Letteau essentially told Mazza the judge had determined it was not reasonable for Mazza to have relied on the insurer's letter, and that, in the judge's view, the defense Mazza had presented was inadequate because Mazza had not produced additional witnesses at trial. In doing so, Judge Letteau abandoned the impartial role of eliciting relevant and material testimony, and used the examination of Mazza to criticize the defense. The judge also indicated he had made up his mind on the disputed issue of whether Condon's reliance on the insurer's letter in the underlying *Klein* case was reasonable.

(2) Comments on damages prior to closing argument

Prior to closing arguments, Mazza's attorney, Silberman, objected to the lack of authentication of checks and billing records offered to prove Condon's claim for damages for attorney fees paid in the underlying *Klein* matter. Judge Letteau asked attorney Silberman what amount of fees he thought would have been reasonable, and then expressed the opinion that the attorney fees paid on behalf of Mr. Condon were "very reasonable" in amount "for what Mr. Lindblom had to deal with to extricate Mr. Condon from a situation that he never

should have been in the first place." (8/3/00 R.T. p. 48:14-17.) Later that day, at the conclusion of the trial, Judge Letteau awarded Mr. Condon damages that included the full amount of attorney fees paid in the *Klein* matter, $12,460.

Judge Letteau's comment concerning the reasonableness of the fees paid on behalf of Condon indicated that the judge had made up his mind as to two disputed issues: liability and the attorney fees portion of plaintiff's damages. The comment was consistent with the damages awarded by the judge later that day. However, at the time Judge Letteau made the comment, he had not yet heard all of the evidence; after overruling Mazza's evidentiary objection, the judge permitted Mazza to reopen and examine Mr. Condon on his attorney fees in the *Klein* matter. Nor had the judge heard the arguments of either party's counsel on the issues of liability and damages. The matter was not yet submitted for decision. By making these comments before the completion of evidence and argument, Judge Letteau gave the appearance of advocacy on behalf of Condon and indicated he had prejudged the matter.

(3) Comments at beginning of defendant's closing argument

Mazza's attorney, Silberman, began his closing argument by asserting there was no proof of the malice element of malicious prosecution and no evidence supporting plaintiff's claim for damages. The court immediately interrupted with a question about the definition of malice, and then commented that Mazza's conduct has been "just carelessness, sloppiness." The judge then stated, "I disagree with Mr. Lindblom. I think the damages for his [client's] emotional distress are greater than $3,000. And I certainly intend to award damages greater than $3,000." (8/3/00 R.T. p. 66:7-13.) At the conclusion of the trial, the judge awarded Condon $4,500 for emotional distress.

Judge Letteau's statement of intent to award a specific amount in emotional distress damages – made at the beginning of defense counsel's closing argument – gave the appearance of prejudgment. As with the comments about the attorney fees portion of damages, these comments indicated that Judge Letteau reached a decision on the issues of liability and damages for emotional distress prior to completion of the trial.

B. Lack of patience, dignity and courtesy

Canon 3B(4) requires that a judge "be patient, dignified, and courteous to litigants . . . , witnesses, lawyers and others with whom the judge deals in an official capacity" (Canon 3B(4)). Sarcastic, demeaning or belittling comments toward a litigant or counsel are not consistent with the conduct required by Canon 3B(4). (See, e.g., *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 323-327 [demeaning, rude, impatient and abusive behavior toward counsel, litigants and witnesses]; *Roberts v. Commission on Judicial Performance, supra,* 33 Cal.3d at 748 [judge's expression of legitimate concern in unacceptable, non-objective and non-neutral manner, demonstrating unwarranted impatience, disbelief and hostility toward attorneys, litigants and witnesses]; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 703 [deliberate ridiculing of attorneys]; *Inquiry Concerning Judge Bruce Van Voorhis*, *supra*, No. 165 Decision and Order at pp. 10-13, 18, 20, 23 [ridicule, disparagement, belittling of counsel, giving an appearance of lack of impartiality].)

The commission found that on numerous occasions during the trial of *Condon v. Mazza*, Judge Letteau made remarks that were sarcastic, disparaging, belittling and discourteous to defendant Mazza and his counsel:

> (1) Judge Letteau interrupted the direct examination of defendant Mazza to question him concerning a collection letter he sent to Mr. Condon after the default judgment was entered: "No, no no. If you listen to the question, the question was, after you took your default judgment, did you send him a letter that preceded this totally classless, stupid letter that you sent them saying, 'We have a default judgment.' Two paragraphs. 'We're going to go after all your property'?" After Mazza answered "no," the judge continued: "This is one of the more offensive things I've seen a lawyer, presumably a college graduate, a law school graduate do. It's an embarrassment to the entire profession . . . ." (8/3/00 R.T. pp. 17:25-18:7.)
>
> (2) During Mazza's testimony on redirect examination, Judge Letteau took over the questioning and examined Mazza extensively about discovery he had failed to undertake in the *Klein* matter: "These are the depositions you never bothered to take, right?" After Mazza admitted he never took depositions, the judge commented "So does that mean that you didn't do anything towards trying to identify the assailant, ever?" and "You testified you were going to determine who did it when you took depositions, but you never took depositions?" Attorney Silberman attempted to interject a comment (". . . he didn't take depositions because he had a judgment") but the judge cut him off: "I'm doing the examination, but thank you anyway, Mr. Silberman." (8/3/00 R.T. pp. 32:16-33:4.)
>
> (3) When discussing the legal issue of malice with plaintiff's counsel, Judge Letteau commented on Mazza's defense in the *Condon v. Mazza* matter: "I might say, by the way, this defense of Mr. Mazza has been just about as careless and sloppy as his prosecution of the underlying case of Mr. Condon . . . . One of the problems is he was sloppy, he was careless, he was professionally negligent . . . ." (8/3/00 R.T. pp. 60:17-20, 61:25-26.)
>
> (4) When defense counsel Silberman commenced his closing argument on the issue of malice and general damages, Judge Letteau interrupted with a lengthy comment about defendant Mazza. The comments included lecturing attorney Silberman on the definition of the term, then stating: ". . . And I think I've been kind when I've said that he's [Mazza] – he was just careless in his practice, careless in the filing of this case . . . . And the real problem with this is, it's Mr. Mazza. It's his testimony . . . . But he was really, in a true sense, holding Mr. Condon hostage to this claim. That's offensive. It's improper. It rises to the level of malice . . . . That's wrongful. It's wrong for anybody. It's especially wrong for a lawyer, an officer of the court, a professional. This is awesome what he did . . . . This is just carelessness, sloppiness . . . ." (8/3/99 R.T. pp. 64:25-66:8.)
>
> (5) During direct examination of Mazza by plaintiff's counsel, Mazza's attorney objected to the use of the term "owner of a corporation" as vague and ambiguous, and

stated, "There is really no such legal term as 'owner of a corporation.' There are –" Judge Letteau overruled the objection, stating that the question was "How do you determine who owns, meaning who owns shares in the corporation." Silberman noted that the question had not been phrased that way, and Judge Letteau retorted: "It's understood by the court, and, I'm sure, everybody in this courtroom . . . ." (8/3/00 R.T. p. 7:23-24.) The comment belittled attorney Silberman by suggesting that he did not understand a matter of common knowledge, and further suggested the judge viewed attorney Silberman as either incompetent or disingenuous.

(6) During the direct examination of defendant Mazza by plaintiff's counsel, Judge Letteau interrupted and questioned Mazza about his decision not to serve the complaint on the Briggs Trust, the owner of the building where The Pink was located. Mazza testified that his decision was reached after conversations with insurance company representatives, and Judge Letteau commented: ". . . you are taking your orders from the other side, so to speak?" When Mazza disagreed, Judge Letteau continued: "The insurance company gave you some information? . . . You don't represent the insurance company? . . . You don't take your orders from the insurance company? . . . And without having anything in writing, based on these alleged verbal conversations, you decided not to proceed with a named party. Is that right?" (8/3/00 R.T. pp. 15:23-16:20.)

In addition to reflecting a lack of impartiality, these comments violated the duty imposed by Canon 3B(4), which requires a judge to be patient, dignified and courteous to litigants and parties appearing before the judge.

3. Prior similar misconduct

The misconduct on which this public admonishment is based bears a striking similarity to conduct for which the commission has previously privately disciplined Judge Letteau. On February 14, 2002, Judge Letteau was privately admonished for conduct in three separate cases that included:

- In one matter, the appearance of prejudgment in favor of one party in remarks during trial at the conclusion of one witness's testimony: "I think you've acted with complete honor at your personal financial cost in bringing this ever so long ago to the court's attention" and "I think you're an entirely credible person for having taken the steps that you did at enormous personal financial cost . . . and I thank you for doing so."

- In that same case, abuse of authority by ordering a person who was not a party to the case to provide information to the court.

- In the second mater, denial of due process to a conservatee by failing to afford statutory protections – including the right to trial – at the hearing to impose a permanent conservatorship, improper ex parte communications with the conservatee's retained attorney and

bias against that attorney. The conservatorship order was reversed on appeal.

- In the third matter, prejudgment and abuse of the sanctions power in the imposition of substantial sanctions (totaling in excess of $50,000) after a hearing at which the judge peremptorily announced his ruling at the outset of the hearing, then refused to permit the attorney to present contrary evidence or argument. The sanctions order was reversed on appeal.

Judge Letteau's handling of the matters included in the prior private discipline, and the two matters included here occurred over a span of six years and resulted in four appellate decisions reversing his orders. Three of the appellate decisions reversed Judge Letteau on grounds that he had displayed bias, prejudgment, abuse of the sanctions power, and/or disregard of the rights of parties or their attorneys.[1]

Taken together, the incidents described in the body of this admonishment, and those that were the subject of the prior private discipline, present a troubling pattern of repeated violation of ethical duties that are fundamental to the fairness, and the perceived fairness, of the judicial process. In the commission's view, the existence of a pervasive pattern of bias, prejudgment, *ex parte* communication, and abuse of judicial authority toward parties and attorneys warrants a public admonishment.

The conduct set forth above was at a minimum improper action.

Commission members Justice Vance W. Raye, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted to impose a public admonishment. Mr. Marshall Grossman did not participate in this matter. There is currently one public member vacancy on the commission.

Dated: May 20, 2004

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Honorable Vance W. Raye
Chairperson

[1] The decision in *Condon v. Mazza* found that the judge had applied the wrong legal standard to determine the defendant's liability and did not reach additional issues raised on appeal.

[No. 171. Sept. 29, 2004.]

# INQUIRY CONCERNING JUDGE JOSEPH W. O'FLAHERTY

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance publicly admonished the judge. The commission concluded that the judge violated Cal. Code Jud. Ethics, canons 1 and 2A, when he instructed potential jurors in one criminal case to lie during voir dire if they harbored racial bias and, in another case, invited potential jurors to violate their oath by telling them that, if they harbored racial animus, they could invent an excuse to get off the jury if necessary. The judge did not make any discrete ruling or decision that was legally incorrect. Rather, he gave a series of improper directives to the various jury panel members in the two cases. The judge's course of conduct was unjudicial, not mere legal error. The judge's conduct was shocking and astounding. Reversals of the two criminal convictions were required because of the violations of fundamental constitutional rights. The commission rejected the judge's argument that his instructions should not subject him to discipline because he was condoning lying only in limited or narrowly defined circumstances. It was inconceivable to the commission that any judicial complicity in any lying in any courtroom ever could be proper, no matter how laudable any other goal that the lying may be thought to advance. (Opinion by Marshall B. Grossman, Vice-chairperson.)

## HEADNOTES

**(1) Judges § 6—Disciplinary Proceedings—Clear and Convincing Evidence Standard.**—In a judicial disciplinary proceeding, the clear and convincing evidence standard of proof applies to the inquiry. Evidence of a charge is clear and convincing so long as there is a high probability that the charge is true. The evidence need not establish the fact beyond a reasonable doubt.

**(2) Judges § 6—Discipline—Prejudicial Conduct—Objective Observer.**—Prejudicial misconduct by a judge includes acts that a judge

undertakes in good faith, but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. It is not necessary that actual observers view the judge's conduct as prejudicial to the administration of justice; rather the appropriate standard is how an objective observer would view the judge's conduct.

**(3) Judges § 6—Discipline—Potential Jurors—Instructions to Lie.**—The judge violated Cal. Code Jud. Ethics, canons 1 and 2A, and engaged in prejudicial misconduct, when he instructed potential jurors in one criminal case to lie during voir dire if they harbored racial bias, and instructed potential jurors in another criminal case to violate their oath by telling them that, if they harbored racial animus, they could invent an excuse to get off the jury if necessary. Code Civ. Proc., § 232, subd. (a), requires that before voir dire begins, prospective jurors must agree to accurately and truthfully answer under penalty of perjury all questions concerning their qualifications and competency to serve as trial jurors.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85.]

**(4) Judges § 6—Discipline—Misconduct Grounds.**—Under Cal. Const., art. VI, § 18, subd. (d), the Commission on Judicial Performance may discipline a judge for willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and improper action.

**(5) Judges § 6—Discipline—Willful Misconduct.**—Willful misconduct by a judge is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity.

**(6) Judges § 6—Discipline—Unjudicial Conduct—Code of Judicial Ethics—Public Confidence.**—In order for the Commission on Judicial Performance to determine whether a judge's conduct is unjudicial, the conduct is measured with reference to the California Code of Judicial Ethics. The failure of a judge to comply with the canons suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.

**(7) Judges § 6—Discipline—Willful Misconduct—Prejudicial Conduct—Bad Faith.**—A primary distinction between willful misconduct and prejudicial conduct is the presence or absence of bad faith. Unlike willful misconduct, prejudicial conduct does not require the presence of bad faith, but may occur when a judge, though acting in good faith, engages in conduct that adversely would affect the esteem in which the

judiciary is held by members of the public who become aware of the circumstances of the conduct.

**(8) Judges § 6—Discipline—Bad Faith.**—A judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith.

**(9) Judges § 6—Discipline—Legal Error—Exceptions.**—Mere legal error, without more, is insufficient to support a finding that a judge engaged in misconduct. The California Supreme Court has specified certain instances of conduct or circumstances that in addition to the legal error would support investigation and discipline by the Commission on Judicial Performance, namely, bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty.

**(10) Judges § 6—Discipline—Legal Error.**—A judge may, through repeated legal error, commit acts that would lead to violations of the judicial canons.

**(11) Judges § 6—Discipline—Unjudicial Conduct—Instructions to Lie.**—Instructions to lie, however well intended, are incompatible with fundamental principles of the administration of justice. They constitute unjudicial conduct that is prejudicial to public esteem for the judicial office, and improper conduct by a judge that reflects an intentional disregard of the law, a disregard for fundamental rights, and an abuse of judicial authority.

**(12) Judges § 6—Discipline—Public Confidence—Faithful Adherence to the Law.**—The public expects and embraces the concept that a judge shall be faithful to the law. This is so fundamental to a system of justice that it serves as a basic cornerstone of public confidence. Where serious acts of misconduct that undermine public confidence take place in open court, public discipline is appropriate to assure the public that such actions are not condoned.

**(13) Judges § 6—Lying in Court—Judicial Complicity.**—Irrespective of the intended objective or any attenuating circumstances, judicial complicity in lying in a courtroom cannot be tolerated.

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## OPINION

**GROSSMAN, Vice-chairperson.**—This disciplinary matter concerns Judge Joseph W. O'Flaherty of the Placer County Superior Court. Judge O'Flaherty

is represented by James A. Murphy, Esq., and Harlan B. Watkins, Esq., of Murphy, Pearson, Bradley & Feeney of San Francisco, California. The examiners for the commission are Jack Coyle, Esq., and Bradford Battson, Esq.

In section I, we set forth the masters' final report in its entirety and adopt it (except as noted in fn. 1, at p. 6, *post*) as the foundation for the commission's decision in this matter. In part II, we discuss Judge O'Flaherty's legal arguments concerning our authority to discipline him, followed in part III by the reasons for our determination to issue this public admonishment.

## I

## ADOPTION OF MASTERS' FINDINGS AND CONCLUSIONS

The special masters appointed by the Supreme Court are Hon. Sandra L. Margulies, Associate Justice, Court of Appeal, First Appellate District, Division One, Hon. Michael T. Garcia, Judge of the Superior Court of Sacramento County, and Hon. Donald Cole Byrd, Judge of the Superior Court of Glenn County. With the one exception noted hereafter, the commission hereby adopts the masters' final report, filed with the commission on May 20, 2004, as its own findings and conclusions. The following text of the masters' report constitutes the commission's own findings and conclusions.

"INTRODUCTION

"By its Notice of Formal Proceedings, the Commission on Judicial Performance (the Commission) has charged Placer County Superior Court Judge Joseph W. O'Flaherty with two counts each of willful misconduct in office, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and improper action within the meaning of article VI, section 18 of the California Constitution.

"Having been appointed by the Chief Justice of the California Supreme Court to hear and take evidence in this matter, and having presided over a trial of the charges, the special masters submit this final report, containing findings of fact and conclusions of law, in accordance with rule 129(c) of the rules of the Commission on Judicial Performance.

"FINDINGS OF FACT

"*Burden of Proof*

**(1)** "The clear and convincing evidence standard of proof applies to this inquiry. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].) 'Evidence of a charge is clear and convincing so long as there is a "high probability" that the charge is true. [Citations.] The evidence need not establish the fact beyond a reasonable doubt.' (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715].)

"*Count One*: People v. Mello

"In December 1999, Judge O'Flaherty presided over a jury trial in the case of *People v. Mello* (Placer County Super. Ct. case No. 62-7093). (Judge Joseph W. O'Flaherty's Answer to Notice of Formal Proceedings (hereafter Answer), p. 1.) Ms. Mello, an African-American, was charged with second degree robbery and false imprisonment. Pursuant to Code of Civil Procedure section 232, subdivision (a), the prospective jurors were sworn to tell the truth during voir dire concerning their qualifications and competency.

"As a resident of Placer County for 23 years, Judge O'Flaherty has become familiar with the demographics of the county. According to the judge, the jury venire panels in 1999 were almost entirely Caucasian. His recollection is that during voir dire in the *Mello* case, the jury panel was overwhelmingly Caucasian, and Ms. Mello was the only African-American in the courtroom. Concerned that racial bias could impact the verdict, Judge O'Flaherty instructed the panel:

" 'Now, a touchy subject. Some of these voir dire issues are kind of touchy here. If you feel that an issue is so sensitive that you'd rather not answer it in front of all these people, we can arrange so that it would be the Court, myself, the two attorneys, the defendant and the court reporter, but some of these questions do need to be asked.

" 'All right. Here's a sensitive one. The defendant is African American. Okay. Almost everybody in this courtroom is white, Caucasian.

" 'Now, race simply does not—I don't want any racism in my court, which most of you know by now, but I go a little further than that.

" 'I recognize that most people in today's age don't want to raise their hand and say I am a bigot or I'm a racist. So what I'm going to do, if any of

you have the slightest doubt that you might not, for racial reasons, be able to give this defendant a fair trial, *I'm going to give you permission to lie.*

" 'I want you to tell me—there's plenty of other reasons, which you as intelligent people know that you can dream up, how you will not—you can get out of sitting here.

" 'Okay. I want you to come up with something so that you can get out of sitting here. I don't want that issue to raise its head in this courtroom. All right. Can everybody assure me of that?'

"Judge O'Flaherty decided to give this instruction either on the morning of the trial or on the previous day. This was the first time he had given such an instruction. Although Judge O'Flaherty has previously presided over at least 10 jury trials involving minority defendants, he had no direct evidence that jurors had lied during voir dire to cover up their racial prejudice. He was, however, still concerned that some jurors might not acknowledge racial animus, and he wanted to give them a way to get off the jury. According to Judge O'Flaherty, rather than forcing jurors to 'choose between openly admitting racism or keeping quiet and erroneously being selected,' he told them to lie as a way of ensuring that race would not become an issue in the trial. Judge O'Flaherty testified that when he gave this instruction, he was looking for any kind of false excuse that would get the person with racial animus off the jury. Typical excuses jurors might give would be that they had a business to attend to or that the type of crime would engender prejudice on their part.

"Judge O'Flaherty gave a number of reasons for instructing the jurors to lie. One rationale for the instruction related to a prior case involving a minority defendant, in which a prospective juror admitted during voir dire that he did not think he could be fair ' "because the defendant is Mexican." ' According to Judge O'Flaherty, as the juror was leaving the courtroom, Judge O'Flaherty perceived that the remaining panel exhibited hostility toward the excused juror because of his racial bias. Judge O'Flaherty testified that another reason for the instruction was to emphasize to those jurors who did sit on the jury the importance of not considering race in their verdict. Finally, the judge explained that he had had conversations with criminal defense attorneys who complained that jurors in Placer County were not giving minority defendants a 'fair shake . . . .'[1]

[1] The masters concluded this sentence with the following clause: ". . . to the extent that concerns about jury bias were causing minority defendants to plead guilty." We do not find the evidence supports the inclusion of this clause. According to the evidence adduced, there was one actual instance where a defendant reportedly pled guilty because of an alleged fear of being unable to obtain a fair jury trial. Under questioning by the examiner, Judge O'Flaherty

"Judge O'Flaherty thought that the *Mello* trial was a ' "perfect storm" ' for the problem of a jury finding the defendant guilty due to [her] race. According to the judge, there were three elements which made the case a ' "perfect storm" ': (1) the defendant was of a different race than the jury; (2) the facts of the case were inflammatory; and (3) there was a perception in Placer County that criminals were invading the county to commit crimes.

"During a recess following the judge's instruction, defense counsel moved for a mistrial on the ground that the judge had tainted the jury panel by referring to Ms. Mello's race as African-American and then within a couple of minutes thereafter making reference to the O.J. Simpson trial. Defense counsel believed that connecting the two events prejudiced Ms. Mello's right to a fair trial. Although defense counsel did not object to the instruction standing alone, he cited to it during the course of argument in support of the mistrial. Judge O'Flaherty denied the motion for mistrial and also denied a motion to discharge the entire panel and replace it with a new one.

"Additional jurors were subsequently called during the afternoon session. Judge O'Flaherty informed them that if a sensitive question was asked, then any juror could request to answer the question privately in chambers with the judge, counsel, defendant, and court reporter present. Judge O'Flaherty then instructed the new jurors:

" 'Now, the defendant is African American. Okay. Obviously, racism has no place in the courtroom. I would like to see it have no place at all, but it's around, and so I don't want it in here.

" 'So when we go through this, I mean, I know that some people, unfortunately, still harbor some bigotry, and my job is definitely not to judge you jurors. I want to make that clear, and I'm not doing that; but on the other hand, like I said, bigotry cannot have any place in this courtroom.

" 'If you feel, if you have the slightest doubt that you can give the defendant a fair trial because of this reason, you can just come right out and say it.

" 'That would be one way to do it, but I recognize that this is—it's kind of insulting and embarrassing to raise your hand and say I'm a racist.

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stated that this occurred *after* the *Mello* trial, and thus did not influence the instruction in *Mello*. The judge later placed the plea case as *also* having been after the *Abbaszadeh* trial (discussed *post*, at pp. 9–11)—thus precluding its having influenced his instructions in either case. Accordingly, for purposes of stating our own findings, we exclude this one clause on the ground it is not supported by the evidence.

" 'What I'd like you to do, and I will give you permission in this very narrow area, *you can lie*. You can say that—what I want you to do is to find some other reason to get excused.

" 'It doesn't take a rocket scientist to figure out how to get excused, if you put your mind to it, and I'd rather have you do that than sit on the jury if there's a problem in this area. Okay. Does everybody understand that?

" 'Is there anybody who feels, who is willing to say that they cannot or might not give the defendant a fair trial because of race? Anybody?'

"Judge O'Flaherty contended that he did not tell the jurors to lie directly about race or their racial feelings or animus. He denied that he gave jurors permission to lie about racial prejudice. The judge explained that he told the jurors that if they had a problem admitting racial animus, 'they could come in and have a chambers conference with me, and/or they could admit it directly.' Judge O'Flaherty testified that he told the jurors that 'if, and only if, . . . they could not admit this [racial animus] and would otherwise stay on the jury, . . . they should find some other excuse to get off the jury.'

"Despite Judge O'Flaherty's rationale for the instructions, he did, in fact, give the jurors permission to lie about racial prejudice, and his instructions conflicted with the jurors' oath to tell the truth pursuant to Code of Civil Procedure section 232, subdivision (a). The judge told the first group of jurors that 'if any of you have the slightest doubt that you might not, for racial reasons, be able to give this defendant a fair trial, I'm going to give you permission to lie.' The judge again repeated this instruction when he told the second group of jurors, 'I will give you permission in this very narrow area, you can lie.'

"Although the judge prefaced his remarks by announcing that if a juror would rather not answer a sensitive question in the courtroom, the juror could answer the question in chambers, this statement was not necessarily directed to the issue of racial bias and was superseded by the more specific instruction to lie about racial prejudice. Moreover, when Judge O'Flaherty told the jurors that sensitive matters could be discussed in chambers, he also stated, 'It will cause some pomp and circumstance, but I'll accommodate you if you feel that way.' This 'pomp and circumstance' remark had the effect of discouraging potential jurors from seeking an in-chambers meeting with the judge and no potential juror requested such a meeting.

"While Judge O'Flaherty claimed that he did not preclude voir dire by the lawyers on the subject[] of racial animus, and that he wanted the lawyers to ask questions about race, he nonetheless discouraged potential jurors from

being introspective and taking an appropriate amount of time to assess their ability to be fair when he told the panel:

" 'Okay. I'll tell you folks the same thing I told the jurors up there. If you hesitate in your answer, these attorneys are going to go after you on it. Believe me. One hundred percent, they will go after you.

" 'Okay. So just a clue as to how to answer these questions.'

"This remark prohibited a full and honest response by the jurors by limiting the disclosure of vital information relevant to challenges for cause.

"Prior to instructing jurors that they could lie regarding racial animus, Judge O'Flaherty was unaware of any cases, statutes, or other authority that allowed a potential juror to make up an excuse in order to be dismissed from the jury. He had not consulted other judges regarding the propriety of giving such an instruction and had not heard of any other judge giving a similar instruction. It had never been suggested at a judicial education class attended by Judge O'Flaherty that judges should have jurors lie during voir dire. The established practice in Placer County, as throughout California, was to have jurors answer all questions truthfully during voir dire.

"At the conclusion of voir dire, no juror was excused because of racial bias. Judge O'Flaherty did not know whether any juror followed his instruction and made up an excuse to get off the jury.

"A jury was ultimately impaneled and Ms. Mello was convicted. Ms. Mello moved for a new trial on among other grounds that the instruction authorizing jurors to cover up any feelings of racial bias by lying was given in conjunction with a discussion of the O.J. Simpson case. Judge O'Flaherty denied the motion and Ms. Mello appealed.

"In April 2002, the Court of Appeal, by unanimous vote, reversed the conviction on the grounds that Judge O'Flaherty's instructions to prospective jurors to lie under oath during voir dire violated the defendant's rights under the United States and California Constitutions to a fair and impartial jury and to due process of law. (*People v. Mello* (2002) 97 Cal.App.4th 511 [118 Cal.Rptr.2d 523].)

"*Count Two*: People v. Abbaszadeh

"In February 2000, Judge O'Flaherty presided over a jury trial in the case of *People v. Abbaszadeh* (Placer County Super. Ct. case No. 63-1593). Mr. Abbaszadeh, an Iranian immigrant, was charged with grand theft by false

pretenses and sale of securities by means of false statements or omissions. After the prospective jurors were sworn to tell the truth during voir dire pursuant to Code of Civil Procedure section 232, subdivision (a), Judge O'Flaherty told the jury panel:

" 'Now, you probably all know that race and nationality have no place in this courtroom. The very integrity of the system that has developed in the last several generations depends on that we keep this social problem at least out of the courtroom.

" 'Now, obviously being labeled a bigot or a racist, this sort of thing, is insulting to most people. And so it's entirely possible that if you harbor these types of feelings that you may not want to raise your hand and basically put a sign on yourself saying: I am a racist, etcetera.

" 'I don't want somebody who harbors those types of feelings sitting on this jury, for obvious reasons.

" '*So I would ask that you do whatever you have to do to get off the jury.* And it's much more important, in my opinion, that you get off the jury, even if, you know, *you have to answer my questions in such a way that you get off in some other way, then do it.*

" 'Does everybody understand that?'

" 'Is there anybody in the 18 who has a slightest doubt that they can give the defendant in this case a fair trial or in any way consider his nationality or race or this sort of thing?

" 'Is there anybody who feels that way?'

"Judge O'Flaherty decided to give the instruction right before jury selection or during voir dire. After the instruction was given, one potential juror admitted that he had feelings of prejudice toward Mr. Abbaszadeh. This juror was excused. Unlike *Mello*, defense counsel did not object to the instruction.

"Judge O'Flaherty admitted that he was telling potential jurors that they could invent an excuse to get off the jury if necessary. The judge testified that the instruction 'was calling for them to lie as far as invent a false excuse if they were racist and there was no other way to handle it, yes. It was not telling them to lie about race.'

"As in *Mello*, Judge O'Flaherty decided to give the instruction to provide a biased juror with a way of getting off the jury without publicly admitting to

racism or bias. At the time the judge gave the instruction, he did not believe the instruction was erroneous and he did not intend to violate the rights of criminal defendants.

"While the instruction in *Abbaszadeh* did not give potential jurors direct permission to lie as in *Mello*, nevertheless it invited potential jurors to hide their racial bias. Judge O'Flaherty told the jurors, '[Y]ou may not want to raise your hand and basically put a sign on yourself saying: I am a racist, etcetera.' He then told them to 'do whatever you have to do to get off the jury . . . even if . . . you have to answer my questions in such a way that you get off in some other way' than admitting racial bias. By instructing the venire in such a manner, the judge was impliedly giving potential jurors permission to lie in response to his question that immediately followed the instruction: 'Is there anybody in the 18 who has a slightest doubt that they can give the defendant in this case a fair trial or in any way consider his nationality or race or this sort of thing?' As in *Mello*, Judge O'Flaherty could not tell whether any juror followed his instruction and made up an excuse to get off the jury.

"Although Judge O'Flaherty claimed that he did not preclude voir dire by lawyers on race or ethnicity, like *Mello*, he again discouraged jurors from showing any hesitancy regarding whether they could be fair when he stated to a potential juror:

" '[L]et me give you a clue how to answer the questions around here.

" 'If you hesitate, you know, the attorneys, trust me, will jump on that like a duck on a June bug. Keep that in mind.'

"A jury was ultimately impaneled and Mr. Abbaszadeh was convicted. He subsequently appealed the conviction. In February 2003, the Court of Appeal, by a vote of 2–1, reversed the conviction and remanded the matter to the Placer County Superior Court with directions to reassign the case to a different judge. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 651 [130 Cal.Rptr.2d 873].)

"*Evidence of Mitigation*

"Judge O'Flaherty acknowledged at the hearing that it was a 'mistake to do it' (give the instructions) and 'I feel real badly about it.'

"Judge O'Flaherty submitted the declarations of five *Abbaszadeh* jurors and two *Mello* jurors. In general, the jurors found Judge O'Flaherty to be a fair judge who conducted the trial in an appropriate manner. Several jurors

commented that Judge O'Flaherty was sensitive to racial issues and emphasized that individuals with racial animus should not serve on the jury.

"Dean Starks, a Placer County criminal defense attorney, testified on behalf of Judge O'Flaherty. He testified that he has tried approximately 100 cases to verdict in Placer County. He has appeared before Judge O'Flaherty over 100 times and has tried four cases before him. Mr. Starks opined that the racial composition of a typical panel in Placer County is at least 95 percent Caucasian. As a trial attorney, Mr. Starks has serious concerns about racial bias in cases involving African-American defendants. Mr. Starks testified that Judge O'Flaherty is a fair and hard-working judge who is impartial and makes efforts to keep the courtroom free of bias.

"CONCLUSIONS OF LAW

"Having considered all the evidence, the Special Masters find there is clear and convincing proof that Judge O'Flaherty's actions in instructing potential jurors to 1) lie during voir dire in *Mello*, and 2) violate their oath in *Abbaszadeh*, constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute, as alleged in counts one and two.

"We further find that the Commission has failed to prove by clear and convincing evidence that Judge O'Flaherty committed willful misconduct. The Commission has asserted that Judge O'Flaherty acted with knowledge that his actions were beyond lawful judicial power and/or that he acted with a conscious disregard for the limits of his judicial authority. We do not agree. We accept Judge O'Flaherty's explanation that he believed in good faith that he was acting within his lawful judicial authority, without a conscious disregard for the limits of his judicial power.

"*Prejudicial Misconduct*

**(2)** "Prejudicial misconduct includes acts that a judge 'undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.' (*Geiler v. Commission on Judicial Qualifications*, *supra*, 10 Cal.3d 270, 284.) It is not necessary that actual observers view the judge's conduct as prejudicial to the administration of justice; rather the appropriate standard is how an ' "objective observer" ' would view the judge's conduct. (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 324–325 [45 Cal.Rptr.2d 254, 902 P.2d 272].)

**(3)** "Code of Civil Procedure section 232, subdivision (a) requires that before voir dire begins, prospective jurors must agree to ' ". . . accurately and

truthfully answer, under penalty of perjury . . . ." ' all questions concerning qualifications and competency to serve as trial jurors.

"Canon 2A of the Code of Judicial Ethics provides, 'A judge shall respect and *comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.' (Italics added.)

"In *People v. Mello*, Judge O'Flaherty instructed the prospective jurors during voir dire:

" 'I recognize that most people in today's age don't want to raise their hand and say I am a bigot or I'm a racist. So what I'm going to do, if any of you have the slightest doubt that you might not, for racial reasons, be able to give this defendant a fair trial, *I'm going to give you permission to lie*.'

"In *People v. Abbaszadeh*, Judge O'Flaherty stated to the prospective jurors during voir dire:

" 'Now, obviously being labeled a bigot or a racist, this sort of thing, is insulting to most people. And so it's entirely possible that if you harbor these types of feelings that you may not want to raise your hand and basically put a sign on yourself saying: I am a racist, etcetera.

" 'I don't want somebody who harbors those types of feelings sitting on this jury, for obvious reasons.

" '*So I would ask that you do whatever you have to do to get off the jury.* And it's much more important, in my opinion, that you get off the jury, even if, you know, *you have to answer my questions in such a way that you get off in some other way, then do it.*'

"By instructing the jurors to lie under oath in *Mello* and to 'do whatever you have to do to get off the jury' in *Abbaszadeh*, Judge O'Flaherty directed the jurors to violate their oath in contravention of Code of Civil Procedure section 232, subdivision (a). As a result, Judge O'Flaherty not only condoned violating the law, but he directed it.

"Judge[] O'Flaherty's conduct would appear to an objective observer to be prejudicial to public esteem for the judicial office. It is uncontroverted that the jurors were sworn to tell the truth in the presence of Judge O'Flaherty. He thereafter directed and encouraged them to ignore and violate that oath. Such action on its face cannot be reconciled by any objective observer to be anything but prejudicial to public esteem for the judicial office. The public

expects and embraces the concept that a judge shall be faithful to the law. This is so fundamental to a system of justice that it serves as a basic cornerstone of public confidence.

"In addition, such conduct casts doubt upon whether the jury selected in each case was truly fair and impartial. Rather than providing a probing examination by the court and counsel to determine if racial bias existed, Judge O'Flaherty's actions allowed jurors to create excuses to avoid jury service thereby depriving the defendants of a jury drawn from a fair and representative cross-section of the community.

"Judge O'Flaherty's failure to follow the law in this context is a violation of the fundamental constitutional right to a trial by jury. Ignorance of the law or other action that effectively deprives an individual of their constitutional rights amounts to judicial misconduct even when there is no evidence of bad faith. (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 530–531, 540–541 [247 Cal.Rptr. 378, 754 P.2d 724].)

"As noted in the Advisory Committee Commentary to Canon 2A: 'Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.'

"Based upon the findings of fact and the reasoning expressed in the conclusions of law, we find that Judge O'Flaherty's actions constituted conduct prejudicial to the administration of justice." (Original italics, fn. added.)

## II

## JUDGE O'FLAHERTY'S LEGAL CONTENTIONS

In briefs filed with the commission pursuant to Commission rule 130, as well as at oral argument before the commission pursuant to rule 132, Judge O'Flaherty asserted that he committed only good faith legal error, and therefore the commission neither could nor should discipline him. We disagree on both accounts. In this part, we discuss the bases for our authority to discipline Judge O'Flaherty. In part III, we set forth our reasons for exercising that authority by issuing this public admonishment.

### A. *"Prejudicial Misconduct," by Definition, Includes Good Faith Conduct That Is Unjudicial.*

**(4)** Under article VI, section 18, subdivision (d) of the California Constitution, the commission may discipline a judge, among other grounds,

for "willful misconduct in office" as well as for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The California Supreme Court has provided definitional content for both constitutional standards.

**(5)** Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his or her judicial capacity. (*Broadman v. Commission on Judicial Performance*, *supra*, 18 Cal.4th at p. 1091; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 172 [48 Cal.Rptr.2d 106, 906 P.2d 1260].) Willful misconduct includes conduct prejudicial, or "prejudicial misconduct," as a lesser included offense. (See *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 369, fn. 5 [188 Cal.Rptr. 880, 657 P.2d 372].)

**(6)** In order to determine whether a judge's conduct is "unjudicial," the conduct is measured with reference to the California Code of Judicial Ethics. (See *Dodds v. Commission on Judicial Performance*, *supra*, 12 Cal.4th at p. 172.) " 'The failure of a judge to comply with the canons "suggests performance below the minimum level necessary to maintain public confidence in the administration of justice." ' " (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams II*), quoting *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 662 [34 Cal.Rptr.2d 641, 882 P.2d 358] (*Adams I*).) As discussed in this opinion, Judge O'Flaherty's conduct in giving the instructions violated both canon 2A and canon 1 and was unjudicial.

**(7)** A primary distinction between the two types of judicial misconduct is the presence or absence of bad faith. "Unlike wilful misconduct, prejudicial conduct does not require the presence of bad faith, but may occur when a judge, though acting in good faith, engages in conduct that adversely would affect the esteem in which the judiciary is held by members of the public who become aware of the circumstances of the conduct." (*Adams II*, *supra*, 10 Cal.4th at p. 878, citing *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 832 [264 Cal.Rptr. 100, 782 P.2d 239], and *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 191 [260 Cal.Rptr. 557, 776 P.2d 259]; accord, *Broadman v. Commission on Judicial Performance*, *supra*, 18 Cal.4th at p. 1092.)

**(8)** Here, the masters concluded, based on Judge O'Flaherty's testimony, that he acted in good faith. Although we adopt that conclusion, the matter is not beyond discussion. The Court of Appeal described Judge O'Flaherty's instructions in *Mello* as "grave error" (*People v. Mello*, *supra*, 97 Cal.App.4th at p. 513) and "astonishing" (*id.* at p. 516), and in *Abbaszadeh* as "shocking" (*People v. Abbaszadeh*, *supra*, 106 Cal.App.4th at p. 645) and "notori[ous]"

(*id.* at p. 650). Arguably, such unquestionably alarming behavior satisfies the Supreme Court's bad faith standard as constituting bad faith: A "judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith." (*Broadman v. Commission on Judicial Performance*, *supra*, 18 Cal.4th at p. 1092.) Here, Judge O'Flaherty's laudable objective of rooting out bias seems to have blinded him both to his extralegal method of accomplishing the goal, and to the possible or even likely consequences of authorizing lying in his courtroom. However noble the goal, the ends cannot justify any and all means. At some point, a judge's obliviousness to the consequences of the means to a given end may override, as a matter of law, a judge's statement of subjective good intent. The masters accepted Judge O'Flaherty's testimony that he was acting in good faith, and we are willing to allow that to be ultimately dispositive of the issue here, particularly since it is not determinative of whether sanctions are appropriate or of the level of actual discipline to be imposed. Further, the fact that Judge O'Flaherty believed in good faith that he was acting within his lawful judicial authority does not insulate him from a charge of prejudicial misconduct, which as noted, *by definition* may include unjudicial conduct undertaken by a judge in *good faith.*

It is not necessary that actual observers view the judge's conduct as prejudicial to the administration of justice; rather the appropriate standard is how an " 'objective observer' " would view the judge's conduct. (*Doan v. Commission on Judicial Performance, supra*, 11 Cal.4th at pp. 324–325.) "The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred under this [objective observer] standard." (*Adams II*, *supra*, 10 Cal.4th at p. 878, citing *Gonzalez v. Commission on Judicial Performance*, *supra*, 33 Cal.3d at p. 376.)

Judge O'Flaherty admitted that he should not have used the term "lie" in the *Mello* instruction because of "the effect it might have on the people who, outside the courtroom, heard it." Beyond that admission is the fact that after administering the oath to tell the truth to the jury panelists in both cases, he promptly directed and encouraged them to violate that very oath, thereby eviscerating it. As stated in the earlier quote from the masters' report, and as adopted by us (*ante*, at pp. 13–14): "Such action on its face cannot be reconciled by any objective observer to be anything but prejudicial to public esteem for the judicial office. The public expects and embraces the concept that a judge shall be faithful to the law. This is so fundamental to a system of justice that it serves as a basic cornerstone of public confidence."

It is incomprehensible to us that any objective person could observe, or later hear about, Judge O'Flaherty's serious undermining of the jurors' oath

without it negatively influencing such person's opinion of the entire ensuing process in the courtroom, including his or her esteem for the judge presiding.

B. *The* Oberholzer *Decision Supports the Commission's Imposition of Discipline on Judge O'Flaherty.*

Judge O'Flaherty conflates his argument that he cannot be disciplined for "good faith legal error" with the contention that under a "special rule" enunciated by the Supreme Court decision in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371 [84 Cal.Rptr.2d 466, 975 P.2d 663], the commission is precluded from disciplining him. While unquestionably there is a "special rule" under *Oberholzer* applicable to cases involving "legal error," this is not such a case.

**(9)** The "special rule" of *Oberholzer* to which the judge alludes is stated by the court as follows: "Mere legal error, without more, . . . is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and thus should be disciplined." (*Oberholzer v. Commission on Judicial Performance, supra*, 20 Cal.4th at p. 398.) The court specified certain instances of conduct or circumstances that "in addition" to the "legal error," would support investigation and discipline by the commission, namely, "bad faith," "bias," "abuse of authority," "disregard for fundamental rights," "intentional disregard of the law," "or any purpose other than the faithful discharge of judicial duty." (*Ibid*., italics omitted.) Here, since there is considerably more than "mere legal error," this case is distinguishable from *Oberholzer.*

The *Oberholzer* case arose out of Judge Oberholzer's issuance of *an order* dismissing a *single* criminal case because the prosecution was not ready to proceed and had failed to file a written motion to continue the trial. That single judicial ruling, or decision, was the only judicial conduct in question. The Supreme Court was considering that one ruling in the context of the provision of canon 1 that states "[*a*] *judicial decision* or *administrative act* later determined to be incorrect legally is not itself a violation of [the California Code of Judicial Ethics]." (*Oberholzer v. Commission on Judicial Performance, supra*, 20 Cal.4th at p. 395, some italics omitted.) Judge Oberholzer contended that a *single ruling*—"a judicial decision" in the language of canon 1—could never constitute misconduct if *it* had any intellectual merit. (20 Cal.4th at p. 396.) The commission contended—again focused on a single ruling—"that *an act* that is legally erroneous" (*ibid*., italics added) can involve misconduct if there are extraneous circumstances that implicate the canons, and that the proper analytic focus was on the "*additional circumstances that surround the ruling* in question" (*id.* at p. 397, original italics).

**(10)** The Supreme Court agreed with the commission on this point, noting that conduct beyond a single ruling may implicate other canons and constitute misconduct. The court stated, "A judge may, through repeated legal error, commit acts that would lead to violations of the judicial canons" (*Oberholzer v. Commission on Judicial Performance*, *supra*, 20 Cal.4th at p. 397), giving as an example, "A judge who repeatedly dismisses certain kinds of claims might be subject to discipline . . ." (*id.* at p. 398). Even in that example, however, it seems clear the court was looking at a series of individual *rulings or decisions* (repeated dismissal orders), each of which was legally erroneous, but that cumulatively might suggest some broader-based misconduct. In our view, the initial trigger for the applicability of *Oberholzer* is that there be "a judicial decision or administrative act"—something that implicates the language of canon 1, as was the situation in that case.

In contrast to Judge Oberholzer's single order of dismissal, Judge O'Flaherty did not make any discrete ruling or decision that was legally incorrect. Rather, he gave a series of improper directives to the various jury panel members in two separate cases; he engaged in a repeated course of improper conduct. That broad-based wrongful conduct directly violates particularly canon 2A, for the reasons explained by the masters (*ante*, at pp. 12–13), and subjects Judge O'Flaherty to our jurisdiction. The course of conduct was unjudicial, and not "mere legal error."

In addition, the appellate court held that Judge O'Flaherty's instructions in *Mello* violated the defendant's federal and state constitutional rights to a fair and impartial jury and to due process of law (*People v. Mello*, *supra*, 97 Cal.App.4th at p. 515), and in *Abbaszadeh*, described the *Mello* error as "structural error" that "rendered the trial fundamentally unfair, requiring reversal without a showing of prejudice." (*People v. Abbaszadeh*, *supra*, 106 Cal.App.4th at p. 644.) In *Abbaszadeh*, the court again found "*Mello* error" (*ibid.*), and again reversed the conviction because the error was "structural" (*id.* at p. 647), that " 'irremediably tainted the trial by making it impossible for the parties to know whether a fair and impartial jury had been seated' " (*ibid.*, quoting *People v. Mello*, *supra*, 97 Cal.App.4th at p. 517). As stated by the Court of Appeal: "[T]he instructions to lie about racial bias resulted in voir dire so inadequate as to render the trial fundamentally unfair. [Citation.] This error—which inevitably skewed the integrity of the entire voir dire process and adversely affected the manner in which the jurors would evaluate the evidence—is a 'defect affecting the framework within which the trial proceeds' . . . . [Citations.]" (*People v. Mello*, *supra*, 97 Cal.App.3d at p. 519.)

Judge O'Flaherty's actions constitute misconduct because, as soundly denounced by the Court of Appeal, they manifest, at least, an intentional

disregard of the law, a disregard of fundamental rights and an abuse of judicial authority, any and all of which warrant discipline, including under the "legal error plus" standard of *Oberholzer*.

Intentional Disregard of the Law: Although we believe that *Oberholzer* is factually inapposite to this case, it nonetheless provides useful guidance for determining whether there is misconduct that may or should subject Judge O'Flaherty to discipline by the commission. In that regard, the case the Supreme Court cited in *Oberholzer v. Commission on Judicial Performance*, *supra*, 20 Cal.4th at page 398 as illustrative of "intentional disregard of the law" is *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 695–698 [122 Cal.Rptr. 778, 537 P.2d 898]. Two types of conduct underlay the disregard of the law by Judge Cannon—violations of the law concerning contempt (*id.* at pp. 695–696) and violations of a Supreme Court decision concerning the power of a judge to involuntarily remove defense counsel in a criminal case (*id.* at pp. 696–698).

In light of the unique rules concerning misconduct in connection with abuse of the contempt power (see, e.g., Rothman, Cal. Jud. Conduct Handbook (2d ed. 1999) Contempt, § 4.03, pp. 101–102), there is some question of the broader applicability of the court's reasoning concerning Judge Cannon's contempt violations to Judge O'Flaherty's conduct. However, the court's analysis in *Cannon* of the second issue (Judge Cannon's failure to follow the court's earlier decision on removing counsel) seems very instructive here.

In a number of instances, Judge Cannon had relieved appointed counsel in ongoing criminal prosecutions and substituted newly appointed counsel, a practice the commission had concluded amounted to an unlawful interference with the attorney-client relationship and constituted misconduct. (*Cannon v. Commission on Judicial Performance*, *supra*, 14 Cal.3d at pp. 695–696.) Judge Cannon argued before the Supreme Court that under the circumstances of the various underlying criminal cases, she had the inherent power to remove the attorney. But the court cited its earlier opinion in *Smith v. Superior Court* (1968) 68 Cal.2d 547 [68 Cal.Rptr. 1, 440 P.2d 65], where it had detailed a judge's duty to balance the competing interests of adequate representation of the defendant against the sanctity of the attorney-client relationship in connection with a proper judicial removal of counsel. The court held that by reason of Judge Cannon's failure to follow the clearly enunciated law of *Smith*, her conduct was improper and warranted discipline. (*Cannon v. Commission on Judicial Performance*, *supra*, 14 Cal.3d at pp. 696–698.)

The Supreme Court pointed out that Judge Cannon's misconduct arose "not only in the *fact* of the substitutions but also the *manner* in which they were

accomplished." (*Cannon v. Commission on Judicial Performance*, *supra*, 14 Cal.3d at p. 697, original italics.) As concerns the judge's "manner," the court summarized the serious infringement of rights that ensued as a result of the judge's improper substitutions. (*Id.* at pp. 697–698.) In other words, the misconduct was not attributable solely to the fact that she removed counsel, but that *the way she did it resulted in infringements of fundamental rights.*

The important part of *Cannon* for present purposes is that there is no indication that Judge Cannon was aware of the *Smith* decision or that what she was doing ran afoul of the case or impacted on protected attorney-client relations or right to counsel. Nonetheless, her failure to heed *Smith*, viewed from the vantage point of the ensuing infringements of important protected rights, was denounced by the court in *Oberholzer* as an *intentional* disregard of the law.

Here, as noted by the Court of Appeal in *Mello*, there was clear law from the Supreme Court concerning the *proper* way for Judge O'Flaherty to accomplish his goal of getting bias out of his courtroom: "There is a simple way during voir dire for trial judges to inquire properly into racial bias. They need only follow the Judicial Council's guidelines for such inquiry, which our high court has expressly endorsed. [Citing *People v. Holt* (1997) 15 Cal.4th 619, 660, fn. 13 & 661 [63 Cal.Rptr.2d 782, 937 P.2d 213].] [Citation.] . . . [¶] Our Supreme Court has pointedly observed: '*Trial court judges should closely follow the language and formulae for voir dire recommended by the Judicial Council in the Standards to ensure that all appropriate areas of inquiry are covered in an appropriate manner*.' (*People v. Holt*, *supra*, 15 Cal.4th at p. 661.)" (*People v. Mello*, *supra*, 97 Cal.App.4th at p. 516, italics added.)

Judge O'Flaherty was not aware he was violating *Holt* when he implemented his own procedures to attempt to rid the juries of bias. Likewise, he appeared oblivious to the serious constitutional ramifications of his variance from the high court's directive. But it seems that he, like Judge Cannon, by reason of "the manner" in which he conducted himself, nonetheless "intentionally disregarded" the clear law enunciated in an earlier Supreme Court case.

Judge O'Flaherty repeatedly told the jury panelists to violate their oath, alarmingly unaware of the broader impact those instructions almost necessarily would have on the defendants' constitutional rights. This situation is a striking parallel to Judge Cannon's repeated substitution of counsel in the middle of criminal trials, seemingly oblivious to the resulting impact on attorney-client relations or the quality of the legal defense. Although neither judge apparently was aware of a specific Supreme Court case that proscribed

their conduct, the determinative factor is that the *overall manner* in which they conducted themselves demonstrated a *generalized and serious lack of awareness or concern that the consequences of their conduct* ran afoul of the law. Such serious inattention constitutes an intentional disregard of the law.

Disregard of Fundamental Rights: The Court of Appeal reversed the defendant's conviction in the underlying *Mello* case, and then, based on "*Mello* error," ordered a reversal in *Abbaszadeh* as well. The appellate court held that Judge O'Flaherty's instructions resulted in a deprivation of "federal and state constitutional rights to a fair and impartial jury and to due process of law." (*People v. Mello, supra*, 97 Cal.App.4th at p. 515.) The instructions undermined each defendant's "ability to secure a fair and impartial jury and adversely affected the fundamental truth-finding function of the jury" (*id.* at p. 513) and "irremediably tainted the trial by making it impossible for the parties to know whether a fair and impartial jury had been seated" (*id.* at p. 517). The instructions "frustrated the main object of voir dire, to 'ferret[] out bias and prejudice on the part of prospective jurors.' " (*Id.* at p. 518, quoting *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314 [7 Cal.Rptr.2d 676].) The instruction might have induced false statements that affected the composition of the juries and the outcome of the trials. (*People v. Mello, supra*, 97 Cal.App.4th at pp. 518–519.)

These themes are echoed by the masters as well, as follows: "[Judge O'Flaherty's instructions cast] doubt upon whether the jury selected in each case was truly fair and impartial. Rather than providing a probing examination by the court and counsel to determine if racial bias existed, Judge O'Flaherty's actions allowed jurors to create excuses to avoid jury service thereby depriving the defendants of a jury drawn from a fair and representative cross-section of the community."

Judge O'Flaherty urges that his improper instructions "*involving* a constitutional right" should not subject him to discipline. There is more than an involvement of rights here though. There was an alarming disregard for consequences of the exercise of judicial power, including the impact on the most fundamental rights to an impartial jury and basic due process. Grave constitutional ramifications were *inherent* in the instructions such that even a modicum of forethought would have revealed the serious mistake that Judge O'Flaherty now concedes he made. We do not suggest in any way that the judge intended to cause a violation of the defendants' constitutional rights, but rather, that he acted with irresponsible disregard concerning them.

As noted, *intentional* "disregard of the law" can result from serious inattentiveness to legal consequences of judicial acts or omissions. It seems clear that such heedless conduct by Judge O'Flaherty also satisfies the standard for *nonintentional* "disregard of fundamental rights."

Abuse of Authority: Code of Civil Procedure section 232, subdivision (a) requires prospective jurors to take an oath to respond truthfully during voir dire, and a violation of the oath may subject the person to prosecution for perjury. (E.g., *People v. Blackwell* (1987) 191 Cal.App.3d 925, 930–931 [236 Cal.Rptr. 803]; *People v. Meza* (1987) 188 Cal.App.3d 1631, 1633 [234 Cal.Rptr. 235].) There is no indication that the code section requiring the oath is unconstitutional, and as stated by the Court of Appeal in *Mello*, Judge O'Flaherty, therefore, did "not have authority to disregard" it; furthermore, the judge was not permitted to authorize, in advance, the violation of a valid criminal statute. (*People v. Mello, supra,* 97 Cal.App.4th at p. 517.) As found by the masters (*ante,* at pp. 8−9), the judge admitted that he was unaware of any arguable legal basis supporting his instructions. In fact, the *Holt* case proscribed it. The judge was absolutely without authority to instruct the panel members in *Mello* to lie, and to invite them to do so in *Abbaszadeh.*

As the masters pointed out (*ante*, at pp. 8−9), Judge O'Flaherty further frustrated his own stated goal of ridding his courtroom of bias because he "discouraged potential jurors from being introspective and taking an appropriate amount of time to assess their ability to be fair" by telling the second group of panelists in *Mello* that if they hesitated in answering a question, the lawyers would go after them. He stated, "Believe me. One hundred percent, they will go after you." He made a similar comment to the first group in *Mello* and to the panel members in *Abbaszadeh.* And although the judge invited jurors to come into chambers to talk privately about bias, he quite effectively discouraged anyone from actually doing so by stating that such a meeting " 'will cause some pomp and circumstance.' "

Judge O'Flaherty argues that for there to be "abuse of authority," there must be an intentional, bad faith violation of known authority, citing *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778 [119 Cal.Rptr. 841, 532 P.2d 1209], on the claimed basis that Judge Spruance knew his actions were in violation of the law. The Supreme Court opinion in *Spruance*, however, makes clear that in a number of instances where Judge Spruance was held to have abused his authority, he merely "knew or should have known" the correct law. (See *Spruance, supra,* 13 Cal.3d at pp. 786 & fn. 6, 787 & fn. 7, 789 & fn. 10, 790 & fn. 11, 791–792 & fn. 12, 794 & fn. 15.)

*Spruance* does not support Judge O'Flaherty's argument. Moreover, as we have noted, even conduct labeled by the Supreme Court as "*intentional* disregard of the law" may be satisfied by irresponsible lack of regard for legal consequences of judicial conduct. Nonintentional "abuse of authority" may also be satisfied by the same heedlessness to consequences. The Supreme Court has never indicated a view in accord with that asserted by Judge O'Flaherty and we do not believe it is the applicable standard. Judge

O'Flaherty overfocused his attention on the singular end result, thereby blinding himself to the shockingly improper means to that end, as well as to the serious negative consequences of those utilizing those means. He thereby abused his judicial authority.

## III

## DISCIPLINE

Judge O'Flaherty asserts that the two reversals by the Court of Appeal, and the extensive news coverage of those decisions in the local press in Placer County, already have provided adequate notice to the public that he committed error. We agree that the appellate court decisions made clear the justices' views that Judge O'Flaherty's conduct was shocking and astounding, and that reversals of the two criminal convictions were required because of the violations of fundamental constitutional rights.

The Court of Appeal, however, also referred this matter to this commission as "the body best suited to determine whether Judge O'Flaherty's actions constitute *actionable judicial misconduct*." (*People v. Abbaszadeh, supra*, 106 Cal.App.4th at p. 650, italics added.) The appellate court vindicated the defendants' rights by reversing the convictions. Our mandate, in contrast, is the " 'enforcement of rigorous standards of judicial conduct' " and " 'the maintenance of public confidence in the integrity . . . of the judicial system.' " (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918 [81 Cal.Rptr.2d 58, 968 P.2d 958], quoting *Adams II*, *supra*, 10 Cal.4th at p. 912.) For the reasons stated, we conclude there was conduct that was inconsistent with canon 2A, requiring judges to "respect and comply with the law" and to "act at all times in a manner that promotes public confidence in the integrity" of the judiciary, as well as canon 1, imposing a similar obligation on a judge to uphold the integrity of the judiciary.

**(11)** In our view, therefore, it is necessary for this commission publicly to express its views that the instructions to lie, however well intended, are incompatible with fundamental principles of the administration of justice. They constitute unjudicial conduct that is prejudicial to public esteem for the judicial office, and improper conduct by a judge that reflects an intentional disregard of the law, a disregard for fundamental rights and an abuse of judicial authority. This is different from the appellate court's rulings concerning the defendants' constitutional rights in the underlying prosecutions.

Judge O'Flaherty asserts that his instructions should not subject him to discipline because he was condoning lying only in limited or narrowly defined circumstances. We could not disagree more. Lying of any kind is

never appropriate in a court of law, the very existence of which is for the ascertainment of the truth. White lies, limited lying, carefully defined permissible lying are at the edge of a slippery slope that we decline to even approach. We cannot conceive that any judicial complicity in any lying in any courtroom ever could be proper, no matter how laudable any other goal the lying may be thought to advance.

The commission has not previously been faced with misconduct that directly matches Judge O'Flaherty's behavior on the bench. However, prior decisions of the commission establish that failure by a judge to ensure the constitutional rights of defendants in criminal proceedings is a basis for discipline. In 1996, the Supreme Court adopted the commission's recommendation of public censure of Judge Claude Whitney for conduct that included refusing to appoint counsel for defendants at arraignment. (*In re Whitney* (1996) 14 Cal.4th 1 [56 Cal.Rptr.2d 705, 922 P.2d 868].) Judge Whitney also had failed to advise defendants during the mass advisement of rights at arraignment proceedings that the right to counsel extended to representation at the arraignment itself, and had failed to advise defendants individually of the right to counsel at arraignment. (*Id.* at pp. 2–3.)

The commission has publicly admonished other judges who disregarded the law, albeit arguably in good faith. In 2003, we publicly admonished Judge James L. Roeder for failing to "ensure the rights of criminal defendants by his practice at felony and misdemeanor arraignment proceedings of stating, for the record, that defendants had waived their rights to have a preliminary examination or misdemeanor trial within applicable time limits, without properly obtaining the defendants' consent to a waiver of those rights, in the manner prescribed by law." (Public Admonishment of Judge James L. Roeder (2003) p. 4.) Judge Roeder's motivation appeared to have been a "desire to accommodate defense counsel" who " 'routinely need[ed] time' to open files and investigate cases" and whose practice was "not to schedule a preliminary examination or misdemeanor jury trial until the case was 'conferenced.' " (*Ibid*.)

In 1998, the commission publicly admonished Judge Christopher J. Sheldon for permitting guilty pleas to be entered and sentences to be imposed in his absence pursuant to stipulation of the parties. (*Inquiry Concerning Sheldon* (1998) No. 142, Decision and Order of Public Admonishment [48 Cal.4th CJP Supp. 46].) Judge Sheldon "maintained that he did not think that the procedures violated the law and that he was motivated by a desire to make the pretrial calendar run more efficiently." (*Id.* at pp. 5–6 [48 Cal.4th CJP Supp. at p. 53].) A public admonishment was imposed, notwithstanding the commission's determination there was no bad faith and even though the judge "promptly changed his procedure after being counseled" by his supervising judge. (*Id.* at p. 6 [48 Cal.4th CJP Supp. at p. 54].)

**(12)** We repeat the masters' apt summation here: "The public expects and embraces the concept that a judge shall be faithful to the law. This is so fundamental to a system of justice that it serves as a basic cornerstone of public confidence." (*Ante*, at pp. 13–14.) Where serious acts of misconduct that undermine public confidence take place in open court, public discipline is "appropriate to assure the public that such actions are not condoned." (*Inquiry Concerning Broadman* (1999) No. 145, Decision and Order Imposing Public Admonishment, p. 13 [48 Cal.4th CJP Supp. 67, 83].) **(13)** Irrespective of the intended objective or any attenuating circumstances, judicial complicity in lying in a courtroom cannot be tolerated.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted to impose a public admonishment. Commission member Justice Vance W. Raye was recused and commission member Ms. Patricia Miller did not participate in this matter. There is currently one public member vacancy on the commission.

The judge's petition for review by the Supreme Court was denied on February 2, 2005.

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| **IN THE MATTER CONCERNING JUDGE BRETT CARROLL KLEIN** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |
|---|---|

This disciplinary matter concerns Judge Brett Carroll Klein, a judge of the Los Angeles Superior Court since 2000. The judge's current term began in January 2003; he previously was a judge of the Los Angeles Municipal Court from 1990 to 2000. Judge Klein and his attorney, Mr. Edward P. George, Jr., appeared before the commission on October 13, 2004 pursuant to rule 116 of the Rules of the Commission on Judicial Performance; good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

STATEMENT OF FACTS AND REASONS

From 1999 through 2002, Judge Klein presided over the case of *Butler et al. v. Terry*, case number BC 204642, in which two tenants sued their landlord for injuries caused by a ceiling falling on them. Judge Klein abused his authority and displayed bias and embroilment through actions he took after a judgment he had entered was reversed by the Court of Appeal.

In *Butler,* after the defendant failed to obey certain discovery orders, Judge Klein struck the defendant's answer and the matter proceeded to a default prove-up hearing to assess damages. At the outset of that hearing, held in October 2000, Judge Klein denied the defendant's request that the court hear a motion for reconsideration of its order striking her answer. Thereafter, testimony was given by one of the plaintiffs and an orthopedic surgeon; the surgeon testified that the cost of diagnosis and treatment of each plaintiff was approximately $3200. Because the defendant was in default, there was no cross-examination or other participation by defendant's counsel. At the end of the hearing, Judge Klein found that fair compensation to the plaintiffs totaled $200 for medical expenses and $1050 for other damages, $300 of which was not compensable. The judge then ordered nominal damages of $1 to each plaintiff, on the ground that awarding damages would deprive the defendant of due process of law because the plaintiffs' statement of damages was first served on her after she engaged in the conduct that resulted in entry of her default as a terminating sanction for the discovery violation. The judge concluded by saying, "I suppose this case illustrates adage [sic] 'Be careful what you ask for. You might get it.'" The judge then asked defendant's counsel whether the motion for reconsideration of the court's order striking the defendant's answer was withdrawn; counsel said that it was.

The plaintiffs appealed. The Court of Appeal reversed the judgment. The appellate court found that Judge Klein's determination that $100 each would adequately compensate the plaintiffs for their medical expenses was arbitrary and capricious. The Court of Appeal also held that the defendant had received adequate notice of her potential liability prior to entry of the default judgment. The instructions to the trial court on remand were "to enter a new default judgment in accordance with the evidence [plaintiffs] presented at the prove-up hearing on October 24, 2000." Judge Klein's court received the remittitur from the Court of Appeal on or about July 1, 2002.

On August 2, 2002, Judge Klein on his own initiative issued an order setting a hearing on the defendant's previously withdrawn motion for reconsideration of the order striking defendant's answer.

Immediately after receiving a copy of this order, plaintiffs' counsel, who previously had been told that the case had not yet been reassigned after the remittitur, sent a letter to the court advising that the plaintiffs would be filing a peremptory challenge to disqualify Judge Klein under Code of Civil Procedure section 170.6. Counsel also expressed the view that Judge Klein's order setting a hearing on defendant's motion for reconsideration was in "complete disregard" of the Court of Appeal's instructions on remand.

On August 5, 2002, plaintiffs filed the challenge under Code of Civil Procedure section 170.6. On the same day, Judge Klein issued an order striking that challenge as untimely as to "any proceedings other than conduct of a new trial." On August 8, 2002, plaintiffs filed a challenge for cause against Judge Klein pursuant to Code of Civil Procedure section 170.1. On August 13, 2002, Judge Klein issued an order striking the Code of Civil Procedure section 170.1 challenge "because on its face, it discloses no legal grounds for disqualification."

On September 9, 2002, plaintiffs filed a petition for writ of mandate in the Court of Appeal contesting Judge Klein's striking of the peremptory challenge filed on August 5, 2002. The Court of Appeal ultimately denied the petition as untimely but nonetheless expressed its view that the petition had merit, and reminded the trial court of its inherent authority to reconsider the two challenges.

On September 18, 2002, the plaintiff filed another peremptory challenge under Code of Civil Procedure section 170.6.

On October 18, 2002, Judge Klein heard and granted the defendant's previously withdrawn motion for reconsideration, which had been refiled on September 11, 2002. He went on to rule that the defendant could not present certain evidence at trial unless specified conditions were met. The judge then accepted the plaintiffs' peremptory challenge under Code of Civil Procedure section 170.6 The plaintiffs thereupon petitioned the Court of Appeal for a writ of mandate.

In its decision issued December 23, 2002, the Court of Appeal issued a writ of mandate ordering Judge Klein to vacate his order granting reconsideration, and compelling compliance with its remand directions. In its decision, the Court of Appeal noted that Judge Klein, after ruling at the October 18 hearing that the defendant could only call certain witnesses if she provided their names and addresses "at least 60 days before the postreversal [sic] trial date," had "refused to comment further or provide any explanation" when asked by counsel to explain whether there would be a new trial rather than simply a new judgment. (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 981.) The appellate court then stated that "logic leads to no other conclusion but that the trial court's order materially departed from our directions on remand" and held that the order was "unauthorized and void."

The appellate court stated:

> Despite our clear and specific directions, the trial court issued an order granting a motion for reconsideration of a ruling that was rendered prior to the issuance of the judgment. The effect of the trial court's order was to allow further trial court proceedings that would be contrary to our clear directions on remand. Because the trial court's order materially differed from our remand directions, it was unauthorized and void.

(Butler v. Superior Court, supra, 104 Cal.App.4th at p. 981.)

The Court of Appeal continued:

> When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void.

(*Butler v. Superior Court, supra,* 104 Cal.App.4th at p. 982, emphasis in original.)

The commission found that Judge Klein's actions after the appellate reversal of the judgment he rendered at the default prove-up hearing displayed abuse of authority, bias and embroilment. After determining that Judge Klein's actions at the default prove-up hearing were arbitrary and capricious, the Court of Appeal reversed and remanded the case with express directions to award damages in accordance with the undisputed evidence introduced by plaintiffs at the prove-up hearing. In light of these instructions from the Court of Appeal, Judge Klein was obligated to redetermine plaintiffs' damages. In direct violation of the appellate court's order, Judge Klein did not award damages as directed but instead, on his own initiative and without authority, resurrected the defendant's previously withdrawn motion to vacate the order striking defendant's answer, and set the motion for hearing. He then struck both the peremptory challenge that was immediately filed by the plaintiffs, and plaintiff's subsequent challenge for cause. Thereafter, even though the Court of Appeal expressed its view that Judge Klein had improperly rejected the peremptory challenge, and

suggested that he reconsider his order striking the challenge for cause, Judge Klein took no further action on either challenge, and delayed accepting a second peremptory challenge until after he granted the defendant's motion for reconsideration and vacated his earlier ruling striking her answer.

The judge's actions in *Butler, et al. v. Terry* following the appellate reversal were contrary to canon 2A, which requires judges to respect and comply with the law and conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. As the California Supreme Court stated in *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1103, "there is a compelling public interest in maintaining a judicial system that both is in fact and is publicly perceived as being fair, impartial, and efficient." Thus, "[j]udges…cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law [citation] who apply the law uniformly and consistently." (*Id.* at p. 1100.) In *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 910 the California Supreme Court reaffirmed these principles in finding that a judge engaged in misconduct when he created the public impression that he had abandoned the judicial role to become an advocate for his own ruling.[1] Similarly, the commission and the California Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 858-861 found misconduct where a judge failed to remain objective and became personally involved in three matters before him.

Judge Klein's conduct as set forth above was, at a minimum, improper action within the meaning of article VI, section 18(d) of the California Constitution. His actions were not simply legal error but reflected a flagrant disregard of the order of the Court of Appeal remanding the case for a redetermination of damages, as well as an abandonment of his role as a neutral arbiter.

Commission members Justice Vance W. Raye, Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Ms. Patricia Miller, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted to impose a public admonishment. Mr. Jose C. Miramontes did not participate in this matter. There is currently one public member vacancy on the commission.

Dated: October 20, 2004

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Hon. Vance W. Raye
Chairperson

[1] In *Fletcher*, the commission and the court found that the judge engaged in willful misconduct because his actions were motivated by a personal conflict with a political rival.

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| **IN THE MATTER CONCERNING JUDGE STEPHEN P. GILDNER** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |
|---|---|

This disciplinary matter concerns Judge Stephen P. Gildner, a judge of the Kern County Superior Court since 1990, whose current term began in January 2003. Judge Gildner and his attorney, Edith R. Matthai, Esq. of Robie & Matthai, appeared before the commission on December 8, 2004 pursuant to rule 116 of the Rules of the Commission on Judicial Performance to contest the imposition of a public admonishment. Having considered the written and oral objections and argument submitted by Judge Gildner and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

STATEMENT OF FACTS AND REASONS

A. Issuing Bench Warrants Without Lawful Authority: *People v. Ricardo Jimenez* and *People v. Pablo Ramirez*.

Judge Gildner presided over *People v. Jimenez* (Kern County Superior Court No. BF094351) on March 7, 2001. The defendant had been ordered to be present at 9:00 a.m. for a pre-preliminary hearing conference. The deputy public defender who had been assigned the case advanced the matter to 8:30 a.m. for the purpose of declaring that his office had discovered that it had a conflict of interest with respect to representation of Mr. Jimenez and to facilitate appointment of successor counsel. When Judge Gildner called the matter at approximately 8:45 a.m., the defendant was not present. After Judge Gildner announced that he would issue a bench warrant, defense counsel asked that the judge not issue the warrant because counsel did not know whether the defendant had been notified to be present at 8:30, rather than at 9:00. Judge Gildner responded that there was no information that the defendant had not been notified. Thereupon, he issued the warrant, forfeited bail, and vacated the court dates previously set.

When Mr. Jimenez arrived during the 9:00 a.m. calendar call, he was taken into custody on the warrant issued by Judge Gildner. The bailiff asked Judge Gildner if he wanted to take the matter up that day or put it over. Judge Gildner told the bailiff to put the matter over; when defense counsel asked that the matter be recalled that day, Judge Gildner refused.

Judge Gildner presided over *People v. Pablo Ramirez*, Case No. BF094487 on March 8, 2001 and March 14, 2001. Mr. Ramirez had been ordered to appear for his pre-preliminary hearing at 9:00 a.m. on March 14, 2001. The public defender's office put the matter on calendar on March 8 to declare a conflict and facilitate appointment of a new attorney. The defendant had not been notified that he needed to be present at the March 8 hearing. When Judge Gildner called the matter on March 8, Mr. Ramirez was not present. The transcript of the matter includes the following colloquy with defense counsel:

> THE COURT: Is Pablo Ramirez present? No response. [¶] He appears to be out of custody. Mr. Moore from the Public Defender's Office is present, Mr. Cooley is also present, Ms. Zimmer is here on behalf of the People. [¶] This is the time and place set for hearing on the Public Defender's application for an order relieving it as attorney of record.
>
> MR. MOORE: If your Honor is inclined to issue a bench warrant, I would simply ask the matter be dropped and remain on calendar for the date Mr. Ramirez was previously ordered back.
>
> THE COURT: Tell me this, Mr. Moore: If your office has a conflict, how can you remain on the case?
>
> MR. MOORE: Well, what I want to avoid is until we are – until we are relieved, we represent him, and it's my duty to make sure that adverse consequences, or do my best to protect him against adverse consequences.
>
> THE COURT: I understand what you are wanting to avoid, but you are also avoiding a response to my question. [¶] How can you continue to represent him if your office has a conflict?
>
> MR. MOORE: I don't know at which point the conflict ripens to a level that we are ethically unable to represent him. I don't –
>
> THE COURT: Well, Mr. Moore, surely it has ripened to that point; otherwise this motion is frivolous. Somebody in your office brought it on calendar.
>
> MR. MOORE: Well, I don't know if they would – if that conclusion would differ or change and, in fact, I don't believe it would if the facts were known that if you then declare the conflict, a bench warrant will go out for the client. [¶] I don't have any reason to believe that there is basis – well, I want to avoid the situation we had yesterday where an individual may not have been notified

> about the nature of a court appearance. Certainly, there is no indication that Mr. Ramirez was ordered by the Court to come back on March 8th; that Mr. Ramirez, it's my understanding, was ordered to come back to court on March 14th, that's the date of the next court appearance. [¶] If the Court is going to be inclined to issue a bench warrant, then I simply would say, well, let's do it – let's declare the conflict when Mr. Ramirez is next ordered to return to court.
>
> THE COURT: Well, you should do something about that in your office. I am going to forfeit bail, issue a bench warrant, no bail on that warrant, day or night service.

When Mr. Ramirez appeared as previously ordered on March 14, and the deputy public defender attempted to address the court, Judge Gildner refused to allow him to do so. A private attorney was appointed to represent the defendant. After appointing the attorney, Judge Gildner ordered Mr. Ramirez taken into custody on the previously-issued bench warrant.

Based on these facts, the preliminary investigation letter asserted that Judge Gildner issued the bench warrants in the foregoing matters without legal authority to do so, and his refusal to give the defendants an opportunity to explain their earlier non-appearance when they appeared as originally ordered constituted an abuse of judicial power. Under Penal Code sections 978.5(a) and 1305(a), issuance of a bench warrant and forfeiture of bail is proper only if the defendant's presence at the subject hearing was "lawfully required." "A defendant's presence is 'lawfully required' when there is 'a specific court order commanding his appearance at a date and time certain' ([citation]) or when a defendant has notice because he or she is present when the date and time for a mandatory appearance are set, even though the court did not specifically order his or her personal presence ([citation])." (*People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301, 1304.)

In response, Judge Gildner stated through counsel as follows:

> Judge Gildner determined that neither Public Defender offered a sufficient excuse for the defendants' failure to appear, because neither attorney would definitively state that the defendant had not been notified to be present at the hearing. As a result, Judge Gildner exercised his discretion to not continue the matter and issued the bench warrants and forfeited bail to ensure that the defendants were brought before the court so that new counsel could be assigned.
>
> In *Jimenez*, the defendant appeared in court the same day as the bench warrant was issued and was remanded on the warrant…. The Commission has expressed concern that Judge Gildner "refused to consider recalling the bench warrants where it appeared that the defendant's failure to appear was neither unlawful nor willful." Again, there is no legal authority that requires the court make a finding that the defendant's failure to appear was "unlawful or willful" prior to issuing a bench warrant or prior to detaining the defendant pursuant to

> that warrant. There is no legal authority that mandates that a court recall a bench warrant nor is there authority requiring the court to hold a hearing upon a defendants [sic] eventual appearance in court.

Judge Gildner may have correctly concluded that he could not hear the motions without the presence of the defendants. Nonetheless, the issuance of bench warrants was unlawful, as there is no evidence that defendants Ramirez and Jimenez had notice of the hearings set in their cases, or that there was a court order commanding their appearance or that they were present when the date and time for the appearances were set. No statute authorizes issuance of a bench warrant when a defendant has not been ordered to appear and was not present at the setting of a hearing at which the defendant's presence is mandatory.

Judge Gildner suggests that counsel failed to present sufficient excuse for the clients' failures to appear. However, they were not required to do so in the absence of evidence of a valid order to appear. As expressed in *People v. North Beach Bonding Co.* (1974) 36 Cal.App.3d 663, 669,

> It is absurd to contend that an attorney by appearing without his client … before the latter was directed to appear could place his client in default. The remedy, if the appearance of the defendant was necessary, was to refuse to entertain the motions without the presence of the defendant ….

(See also *People v. Classified Ins. Corp.* (1985) 164 Cal.App.3d 341, 346 [construing statutes to permit forfeiture of bail in situation where the defendant does not even have notice of the court date requiring his appearance may render statute unconstitutional as violative of due process requirement of notice]; *Simmons v. Superior Court* (1988) 203 Cal.App.3d 71, 77 [court may order defendant to be present at later bail hearing if the facts and circumstances so justify, and then issue bench warrant if defendant fails to appear as ordered].)

Judge Gildner is an experienced jurist and former prosecutor with many years of experience in the field of criminal law. There was nothing that suggested either defendant had notice. Under such circumstances, the warrants could not issue, irrespective of whether defense counsel provided any explanations. No reasonable or reasonably competent judge would assume or conclude otherwise.

In Judge Gildner's objections submitted through counsel pursuant to rule 116, the judge admitted that he lacked authority to issue these two warrants, but contended that the mistaken issuance constituted only legal error for which he should not be disciplined. In *Oberholzer v. Commission on Judicial Performance* (1989) 20 Cal.4th 371, 398, the California Supreme Court held that the commission may not discipline a judge for "mere legal error, without more." The court specified certain instances of conduct or circumstances that "in addition" to the "legal error," would support investigation and discipline by the commission, namely, "bad faith," "bias," "abuse of authority," "disregard for fundamental rights," "intentional disregard of the law," "or any purpose other than the faithful discharge of judicial duty." (*Ibid*.) Here, the issuance of the warrants was both legally erroneous and in

violation of the fundamental right to notice. As such, the judge's actions constitute misconduct that subjects him to discipline under *Oberholzer*.

Judge Gildner's further refusal to give the defendants an opportunity to explain the earlier failures to appear promptly after they appeared as previously ordered, under the circumstances, appears callous and punitive. The judge's explanation that he did not conduct a hearing on the issue as soon as the defendants appeared simply because there is no express legal requirement that he do so "suggests an abdication of his responsibility" to determine whether the defendant's presence had been lawfully required and an abuse of his power to issue warrants. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 851.)

As further justification for issuance of the bench warrants in the above matters, Judge Gildner, through counsel, stated:

> Judge Gildner believed that the defendants' presence at the hearing was required because it concerned their Sixth Amendment right to conflict-free counsel at all phases of the criminal process…. The Public Defender's motions to be relieved placed Judge Gildner in a difficult situation. If Judge Gildner were to grant the motions in the absence of the defendants, thereby relieving the Public Defenders, the defendant would then be without counsel in violation of the Sixth Amendment. If Judge Gildner did not grant the motion, after being appraised [sic] of the existing conflict and waited an indeterminate time for the respective defendants to appear, the defendants would be deprived of their Sixth Amendment right to conflict-free counsel, albeit for that period. Judge Gildner believes that it is not "okay" to violate the defendants' Sixth Amendment right to counsel, even for a short time. In fact, had Judge Gildner conducted the hearing and granted the motion in the absence of the defendant he could have been susceptible to discipline for doing so.

Judge Gildner's assertion that forfeiture of bail and issuance of the warrants was necessary at that juncture to protect the defendants' right to conflict-free counsel is unpersuasive. Simply continuing the hearings on counsel's motions to withdraw until such time as the defendants had been notified to be present would have protected that right. (See *Kloepfer v. Commission on Judicial Performance*, *supra*, 49 Cal.3d at 851 [judge's assertion that he issued warrant in part because he lacked confidence in counsel's ability to appear on behalf of the defendant did not satisfactorily justify issuance of a bench warrant for the client, rather than a continuance and an order that the defendant appear].) The judge's conduct in refusing to give the defendants an opportunity to explain the failures to appear when they did appear as previously ordered was inconsistent with the judge's assertion that his purpose in issuing the bench warrants was to protect the defendant's right to the effective assistance of counsel. Incarcerating the defendants when they appeared did nothing to further the purpose of ensuring the right to conflict-free counsel.

The judge's actions, as set forth above, violated canons 2A ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in

the integrity and impartiality of the judiciary" and 3B(7) ("A judge shall accord to every person who has a legal interest in a proceeding … full right to be heard according to law").

B. Refusal To Hear Defendant's Explanation For Late Arrival On Trial Date.

The case of *People v. Curtis Moore* (Kern County Superior Court No. BF103576) was set for trial on December 29, 2003, at 9:00 a.m. Judge Gildner, who was presiding over the master calendar, called the case shortly after 9:00 a.m. Deputy Public Defender T.D. Pham stated that the defendant was not present and asked that the matter be trailed. Judge Gildner refused to do so and instead vacated the trial date, forfeited bail, and issued a bench warrant at approximately 9:13 a.m.

A few minutes later, Mr. Pham met Mr. Moore in the hallway. Mr. Moore explained that he was late because he initially had gone to the wrong courtroom. Mr. Pham and Mr. Moore then entered Judge Gildner's courtroom. Mr. Pham attempted to have the case recalled, but Judge Gildner did not respond to Mr. Pham's request. Mr. Pham left the courtroom to appear in a trial in another courtroom; Mr. Moore remained in the courtroom.

Supervising Deputy Public Defender Art Titus explained to Judge Gildner off the record that the reason Mr. Moore was late was that he initially had gone to the wrong courtroom. Toward the end of the calendar, Mr. Titus asked to have the matter recalled. Judge Gildner refused to do so. When Mr. Titus asked what Mr. Moore should do to clear the matter up, Judge Gildner stated that Mr. Moore would be arrested. Mr. Moore was then surrendered to the bailiff and was remanded into custody. (Mr. Moore remained in custody and next appeared before another judge on December 31, 2003, at which time a new trial date was set.)

Judge Gildner's refusal under the circumstances to allow Mr. Moore to present evidence that his late appearance was unintentional or that mitigating circumstances existed constituted misconduct. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 850 [judge remanded defendant for failing to comply with court order to speak with District Attorney before pre-trial conference, refusing to hear defendant's explanation for non-compliance].) The judge's conduct violated canons 2A ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), and 3B(7) ("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law"). While the judge was entitled to exercise discretion in determining when to hold the hearing, the discretion afforded trial courts

> … is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. (*Bailey v. Taaffe* (1866) 29 Cal. 422, 424.)

In response to the commission's preliminary investigation letter, Judge Gildner's justification for refusing to recall Mr. Moore's case when he appeared was that he had no legal obligation to "automatically" recall the bench warrant and had no legal obligation to set a hearing that day to consider if the bench warrant should be recalled. Judge Gildner's refusal to recall the matter and consider recalling the bench warrant was unreasonable under the circumstances, particularly as the undisputed reason for the defendant's late appearance was that he had initially gone to the wrong courtroom. The judge's refusal to give Mr. Moore a prompt hearing appears arbitrary and creates the appearance of substantial unfairness.

C. Informing Criminal Defendants At Pre-Preliminary Hearing That They Would Not See Same Offer Again.

In the fall of 2000, the Kern County Superior Court implemented a new pre-preliminary hearing procedure. As Judge Gildner explained in his response to the commission's preliminary investigation letter as well as in his rule 116 objections, under the new system, a pre-preliminary hearing is scheduled before the preliminary hearing in felony cases for the purpose of encouraging the early disposition of criminal matters. Under the new program, according to the judge, the district attorney's office is encouraged to and generally does make the best possible plea offer at the pre-preliminary hearing conference, taking the defendant's early plea into account as a mitigating factor.

*Generally*, under court policy and in actual application, the pre-preliminary hearing offer is the best available to the defendant and typically is not held open after that hearing. Judge Gildner acknowledged, however, that at all times it was and is the policy of the court to handle each case on its individual merits and circumstances, and that there are many occasions when judges accept a negotiated disposition where the sentence is the same or lower than the pre-preliminary hearing offer. Judge Gildner "many times" has personally accepted pleas to dispositions later in a case that are more lenient than the offer made by the district attorney at an earlier stage of the proceedings.

Notwithstanding the foregoing policy of handling each case on the merits, Judge Gildner, while presiding over pre-preliminary hearings and conferences between October 2000 and February 2001, frequently told defendants they *never* would receive an offer as or more lenient than the pre-preliminary hearing offer. This admonition admittedly overstated both the court policy and actual practice, and was not correct. Judge Gildner concedes that it carried the potential of coercion, and he has assured the commission that the practice ceased after attorneys pointed out the potentially coercive effect. The admonition may have convinced some defendants to accept offers at the pre-preliminary hearing that they otherwise would have rejected. The warning also created an appearance that criminal defendants might be punished or retaliated against for refusing the early offer of settlement.

Contrary to the judge's assertion that the admonition was meant to ensure the defendants "were fully informed of the circumstances so that they could make a meaningful choice," it was misleading and had the opposite effect. As with any plea offer that is not held open, there was no *guarantee* that any defendant would receive the same or better offer later

in the proceedings. However, the judge's admonition to defendants that they would "never" see the same or a better offer admittedly was incorrect. The judge's conduct violated canon 2A ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary").

***

The conduct set forth above was at a minimum improper action within the meaning of article VI, section 18(d) of the California Constitution, and suggests a pattern of failing to ensure the rights of criminal defendants. (See *In re Whitney* (1996) 14 Cal.4th 1, 2-3.)

Commission members Justice Vance W. Raye, Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted to impose a public admonishment. There is currently one public member vacancy on the commission.

Dated: January 3, 2005

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Hon. Vance W. Raye
Chairperson

[No. 173. Mar. 28, 2005.]

INQUIRY CONCERNING JUDGE JOHN D. HARRIS

**[MODIFIED DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT*]**

**SUMMARY**

A disciplinary matter was brought concerning a former superior court judge.

The Commission on Judicial Performance publicly admonished the judge. The commission concluded that the judge engaged in five acts of prejudicial misconduct and five additional instances of improper action. The judge's conduct in meeting with victims in pending criminal actions outside the presence of counsel, even though he may have been acting in good faith, violated Cal. Code Jud. Ethics, canon 2A, and constituted prejudicial misconduct. The judge's conduct in putting his hands on a division chief's face and saying "You're so cute" violated Cal. Code Jud. Ethics, canon 3B(4). The judge's comments to a public defender about her client, in the context that they were made, could have raised questions in the mind of an objective observer regarding the judge's impartiality and violated canon 2A. The judge's inappropriate remarks about defendants who appeared before him in prostitution cases were undignified, violated canon 3B(4), and constituted improper action. The judge's comments thanking counsel at sidebar for not exercising a challenge against a female juror because she was nice to look at violated Cal. Code Jud. Ethics, canons 1 and 2A. The judge's conduct in helping find dates for an attorney regularly appearing in his court violated canon 2A. (Opinion by Frederick P. Horn, Vice-chairperson.)

**HEADNOTES**

(1) **Judges § 6—Discipline—Purpose of Proceedings.**—The purpose of disciplinary proceedings before the Commission on Judicial Performance

*The Commission on Judicial Performance (Commission) decision and order entered March 23, 2005, was modified by order entered March 28, 2005. The modifications did not have an effect on the order imposing discipline.

is not to punish, but instead to protect the public, assure the evenhanded and efficient administration of justice, and maintain public confidence in the integrity of the judicial system. The commission reviews the evidence, adopts findings of fact and conclusions of law, and imposes discipline in furtherance of these goals.

(2) **Judges § 6—Discipline—Willful or Prejudicial Misconduct—Censure or Removal—Admonishment—Improper Action.**—The Commission on Judicial Performance may censure or remove a judge or former judge for willful misconduct or prejudicial misconduct (Cal. Const., art. VI, § 18, subd. (d)). In addition, the commission may publicly or privately admonish a judge or former judge for improper action.

(3) **Judges § 6—Discipline—Willful Misconduct—Elements.**—Willful misconduct by a judge is unjudicial conduct committed in bad faith by a judge acting in his or her judicial capacity. To support a finding of bad faith, the evidence must establish that the judge performed a judicial act (1) for a corrupt purpose, i.e., any purpose other than the faithful discharge of judicial duties, (2) with knowledge that the act is beyond the judge's lawful judicial power, or (3) exceeding the judge's lawful power with a conscious disregard for the limits of the judge's authority.

(4) **Judges § 6—Discipline—Prejudicial Misconduct—Definition.**—Prejudicial misconduct by a judge does not require proof of bad faith, but instead consists of acts that a judge undertakes in good faith but which would nevertheless appear to an objective observer to be unjudicial and prejudicial to public esteem for the judicial office. It is not necessary to prove actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office. The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial misconduct has occurred. This objective standard is consistent with the California Supreme Court's holdings in judicial discipline cases, and with Cal. Code Jud. Ethics, canon 2, which provides that a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(5) **Judges § 6—Discipline—Code of Judicial Ethics—Appropriate Behavior.**—The failure of a judge to comply with the canons suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.

(6) **Judges § 6—Discipline—Special Masters—Factual Determinations and Legal Conclusions.**—When special masters are appointed pursuant to

Rules of Com. on Jud. Performance, rule 121(b), they are tasked with making findings of fact and conclusions of law, but they do not make recommendations as to discipline. The California Supreme Court recognizes the expertise of the Commission on Judicial Performance in evaluating judicial misconduct, and gives great weight to the commission's conclusions of law. At the same time, however, special weight should be given to the factual determinations of the special masters because the masters have the advantage of observing the demeanor of the witnesses. Nonetheless, the California Constitution vests in the commission the power to impose judicial discipline, subject to discretionary review by the Supreme Court. Thus, the commission may determine that it is appropriate to disregard the findings of fact and conclusions of law made by the special masters and make its own findings and conclusions.

(7) **Judges § 6—Discipline—Evidence.**—The Evidence Code is applicable to all hearings before the Commission on Judicial Performance or the special masters (Rules of Com. on Jud. Performance, rule 125(a)). There must be clear and convincing evidence to a reasonable certainty to sustain the charges. The evidence need not establish a fact beyond a reasonable doubt, but must be so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind.

(8) **Judges § 6—Prejudicial Misconduct—Inviting Victim to Dinner.**—The judge's conduct in inviting a victim to dine with him after presiding over the sentencing hearing violated Cal. Code Jud. Ethics, canon 2A and constituted prejudicial misconduct.

(9) **Judges § 6—Discipline—Prejudicial Misconduct—Meeting with Victim—Pending Criminal Action.**—The judge's conduct in meeting with a victim in a pending criminal action outside the presence of counsel, even though the judge may have been acting in good faith, violated Cal. Code Jud. Ethics, canon 2A, and constituted prejudicial misconduct.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85.]

(10) **Judges § 6—Improper Action—Comments Concerning Court Employee's Appearance.**—The judge's conduct in making inappropriate personal comments to a court employee about her appearance violated Cal. Code Jud. Ethics, canon 3B(4) and constituted improper action.

(11) **Judges § 6—Prejudicial Misconduct—Comments Reflecting Lack of Impartiality.**—The judge's comment to a public defender that the defendant only wanted a jury trial so he could sit next to her for three days violated Cal. Code Jud. Ethics, canon 2A and constituted prejudicial misconduct.

(12) **Judges § 6—Improper Action—Inappropriate Comments About Criminal Defendants.**—The judge's comment that a criminal defendant would look okay if she had her teeth straightened and inappropriate comment about another criminal defendant's medical condition violated Cal. Code Jud. Ethics, canon 3B(4) and constituted improper action.

(13) **Judges § 6—Prejudicial Misconduct—Inappropriate Comment Concerning a Juror.**—The judge's comment thanking counsel for not challenging a female juror because she was nice to look at constituted prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 1 and 2A.

(14) **Judges § 6—Improper Action—Inappropriate Conduct Toward Females.**—The judge engaged in improper action and violated Cal. Code Jud. Ethics, canon 1 by pressuring a female attorney who regularly appeared before him for a lunch date, and asking female security officers to search him in chambers.

(15) **Judges § 6—Improper Action—Tossing Court File at Attorney.**—The judge who tossed a court file toward an attorney, asked her if she was going to smoke confiscated cigarettes, and said he was selective in throwing things at attorneys engaged in improper action and violated Cal. Code Jud. Ethics, canons 1, 2A, and 3B(4).

(16) **Judges § 6—Prejudicial Misconduct—Disclosure.**—The judge engaged in prejudicial conduct by failing to disclose his social relationship with an attorney appearing before him.

(17) **Judges § 9—Disqualification—Disclosure.**—Cal. Code Jud. Ethics, canon 3E(2), provides that a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.

(18) **Judges § 6—Discipline—Factors.**—While it is not an exhaustive list, the Commission on Judicial Performance has identified five factors relevant to its determination of the appropriate level of discipline: (1) the number of acts of misconduct or improper action; (2) prior discipline

against the judge; (3) evidence that the judge recognizes the inappropriateness of his or her actions; (4) the likelihood that the judge will continue to engage in misconduct or improper action; and (5) the impact of the judge's conduct on the judicial system.

## OPINION

**HORN, Vice-chairperson.**—This disciplinary matter concerns John D. Harris, a former judge of the Superior Court of California for the County of Los Angeles. Judge Harris began his judicial career as a judge of the Los Angeles County Municipal Court in October 1984, and began serving as a judge in the superior court in January 1999. Judge Harris retired from the bench in 2004.

Based on the admissions made by Judge Harris, the record in this case and the findings and conclusions of the special masters, we conclude that Judge Harris's conduct established in connection with count one A, count one B, count two D, count two F and count four constituted prejudicial misconduct, and that his conduct established in connection with count two B, count two E, count two G, count two H and count three constituted improper action.

For reasons more fully set forth hereafter, we conclude that a public admonishment is appropriate.

### Procedural History

Formal proceedings in this matter commenced on February 18, 2004, with the filing of a notice of formal proceedings setting forth five counts. On March 4, 2004, Judge Harris filed his verified answer.

Pursuant to rule 121(b) of the Rules of the Commission on Judicial Performance, the California Supreme Court appointed three special masters to conduct an evidentiary hearing and issue a written report: the Honorable Eileen C. Moore from the Court of Appeal for the Fourth Appellate District, Division Three; the Honorable Patrick J. Morris from the Superior Court of California for the County of San Bernardino; and the Honorable Henry J. Walsh from the Superior Court of California for the County of Ventura. An evidentiary hearing was held in Pasadena commencing on May 24, 2004, and concluding on May 28, 2004, and the special masters filed their report to the Commission on August 12, 2004.

The Commission heard the matter on January 26, 2005. The participating commission members included Justice Vance W. Raye, chairperson, Judge Frederick P. Horn, Michael A. Kahn, Mrs. Crystal Lui, Ms. Patricia Miller,

Jose C. Miramontes, Ms. Penny Perez, Judge Risë Jones Pichon and Ms. Barbara Schraeger. Marshall B. Grossman recused himself. Andrew Blum appeared for the examiner, and former Judge John D. Harris appeared with his counsel, Edward P. George, Jr.

## Governing Law

**(1)** The purpose of Commission proceedings is not to punish, but instead to protect the public, assure the evenhanded and efficient administration of justice, and maintain public confidence in the integrity of the judicial system. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 864–865 [264 Cal.Rptr. 100, 782 P.2d 239].) The Commission reviews the evidence, adopts findings of fact and conclusions of law, and imposes discipline in furtherance of these goals.

**(2)** The notice of formal proceedings filed with the Commission on February 18, 2004, charged Judge Harris with (1) willful misconduct in office, (2) conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and (3) improper action. (Cal. Const., art. VI, § 18.) The Commission may censure or remove a judge or former judge for willful misconduct or prejudicial misconduct. (Cal. Const., art. VI, § 18, subd. (d).) In addition, the Commission may publicly or privately admonish a judge or former judge for improper action. (*Ibid.*)

**(3)** Willful misconduct is unjudicial conduct committed in bad faith by a judge acting in his judicial capacity. (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 877–878 [81 Cal.Rptr.2d 58, 968 P.2d 958] (*Fletcher*).) To support a finding of bad faith, the evidence must establish that the judge performed a judicial act (1) for a corrupt purpose, i.e., any purpose other than the faithful discharge of judicial duties, (2) with knowledge that the act is beyond the judge's lawful judicial power, or (3) exceeding the judge's lawful power with a conscious disregard for the limits of the judge's authority. (*Fletcher, supra*, 19 Cal.4th at p. 878.)

**(4)** Prejudicial misconduct does not require proof of bad faith, but instead consists of acts that a judge undertakes in good faith but which would nevertheless appear to an objective observer to be unjudicial and prejudicial to public esteem for the judicial office. (*Fletcher, supra*, 19 Cal.4th at p. 878.) It is not necessary to prove actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office. (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams II*).) The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial misconduct has occurred. (*Ibid.*) This objective

standard is consistent with the California Supreme Court's holdings in judicial discipline cases, and with canon 2 of the California Code of Judicial Ethics, which provides that a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 531 [247 Cal.Rptr. 378, 754 P.2d 724]; see also Advisory Com. com., Cal. Code Jud. Ethics, canon 2A [a judge must avoid the "appearance" of impropriety].)

**(5)** The canons of the California Code of Judicial Ethics reflect a judicial consensus regarding appropriate behavior for California judges. (*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 661 [34 Cal.Rptr.2d 641, 882 P.2d 358] (*Adams I*).) The failure of a judge to comply with the canons " 'suggests performance below the minimum level necessary to maintain public confidence in the administration of justice.' " (*Adams I, supra*, 8 Cal.4th at pp. 661–662, quoting *Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d at p. 838, fn. 6.)

A violation of a canon of the California Code of Judicial Ethics may form the basis for a determination of willful or prejudicial misconduct if the violation was committed intentionally or recklessly, or if the violation constituted unjudicial conduct or conduct prejudicial to public esteem for the judicial office. But even if the violation of a canon does not rise to the level of willful or prejudicial misconduct, it would still constitute improper action within the meaning of article VI, section 18, subdivision (d) of the California Constitution. (See, e.g., *Adams II, supra*, 10 Cal.4th at p. 899.)

**(6)** When special masters are appointed pursuant to rule 121(b) of the Rules of the Commission on Judicial Performance, they are tasked with making findings of fact and conclusions of law, but they do not make recommendations as to discipline. (Rules of Com. on Jud. Performance, rule 129(d).) The Supreme Court recognizes the expertise of the Commission in evaluating judicial misconduct, and gives great weight to the Commission's conclusions of law. At the same time, however, special weight should be given to the factual determinations of the special masters because the masters have the advantage of observing the demeanor of the witnesses. (*Fletcher, supra*, 19 Cal.4th at p. 878; *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715].) Nonetheless, the California Constitution vests in the Commission the power to impose judicial discipline, subject to review by the Supreme Court. Thus, the Commission may determine that it is appropriate to disregard the findings of fact and conclusions of law made by the special masters and make its own findings and conclusions. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1].)

(7) The Evidence Code is applicable to all hearings before the Commission or the special masters. (Rules of Com. on Jud. Performance, rule 125(a).) There must be clear and convincing evidence to sustain the charges to a reasonable certainty. (*Fletcher, supra*, 19 Cal.4th at p. 878; *Broadman v. Commission on Judicial Performance, supra*, 18 Cal.4th at p. 1090; *Geiler v. Commission on Judicial Qualifications, supra*, 10 Cal.3d at p. 275.) The evidence need not establish a fact beyond a reasonable doubt, but must be so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*Broadman, supra*, 18 Cal.4th at p. 1090.)

## Findings And Conclusions

*Count One A*

In June and July 2000, Judge Harris presided over *People v. Tellez*, case No. BA1999915. The *Tellez* case was a felony sexual assault trial in which the defendant was charged with molesting his niece, Kassandra G. During the presentation of evidence, Judge Harris suggested to the attorneys that he meet with Kassandra to commend her courage in testifying. Because the defense counsel objected, the judge did not meet with Kassandra at that time. However, immediately after the verdict and prior to the sentencing hearing,[1] Judge Harris initiated a meeting with Kassandra in chambers. The meeting occurred outside the presence of the prosecutor and the defense counsel. During the meeting with Kassandra, Judge Harris commended her bravery, told her that her testimony was believable, told her that he could be part of her family, and stated, "I could be your grandfather." He told her, "if I can ever do anything to help you, or if you need a letter of recommendation to help get into college, please let me know." Based on Judge Harris's meeting with the victim, the Court of Appeal issued a writ of habeas corpus vacating the sentence that Judge Harris imposed, and remanding the case for sentencing before a different judge.

Judge Harris may have been motivated by humanitarian concerns in meeting with Kassandra, but as Judge Harris acknowledged during his testimony, his meeting with the victim could give the appearance of impropriety. Judge Harris's comments to a witness in a pending criminal proceeding that "I can be part of your family" and "I can be your grandfather," and his comment to her to let him know if "I can ever do anything to help you," could raise questions in the mind of an objective observer regarding the judge's impartiality in the pending case.

[1] The notice of formal proceedings, which originally alleged that the judge's meeting with the victim occurred after the sentencing hearing, was amended to allege that the meeting took place prior to the sentencing hearing.

Contrary to the masters, we find no evidence in the record to support a finding of an emergency that would require a private meeting in chambers between the judge and a witness in a pending criminal proceeding outside the presence of counsel. Nor is there evidence in the record establishing that Judge Harris made provision to promptly notify all other parties of the substance of the communications in the meeting, giving them an opportunity to respond. (See Cal. Code Jud. Ethics, canon 3B(7)(d)(ii).)

**(8)** We conclude that Judge Harris's conduct in meeting with a witness in a pending criminal action outside the presence of counsel, even though the judge may have been acting in good faith, would nevertheless appear to an objective observer to be unjudicial and prejudicial to public esteem for the judicial office. We conclude that Judge Harris's conduct violated canon 2A of the California Code of Judicial Ethics and constituted prejudicial misconduct.[2] (See *Fletcher, supra*, 19 Cal.4th at p. 878.)

*Count One B*

In August and September 2000, Judge Harris presided over a felony sexual assault trial in *People v. Lopez*, case No. BA196885. In the *Lopez* case, the defendant was charged with multiple counts of rape. The victim was an attorney identified as Jane Doe. Immediately after the sentencing hearing, without notifying defense counsel, Judge Harris initiated a meeting with the victim in chambers. During the meeting Judge Harris praised Ms. Doe for her bravery in testifying at trial, and told her that if there was anything he could do to help her in the future, she should call him. Judge Harris also invited Ms. Doe to have dinner with his family. When the victim later called Judge Harris to accept his invitation for dinner, Judge Harris suggested that instead of dining at his home, the two of them dine at a mutually convenient place. The victim later called to cancel the dinner.

**(9)** Judge Harris concedes that he had an improper ex parte communication with the victim and that his conduct gave the appearance of impropriety and led to diminished esteem for the court. Once again, Judge Harris may have been motivated by compassion for the victim. But his ex parte invitation to a victim in a pending criminal proceeding to call him if there was anything he could do to help her could raise questions in the mind of an objective observer regarding the judge's impartiality in the pending case. We conclude that Judge Harris's conduct in meeting with a victim in a pending criminal action outside the presence of all counsel, even though the judge may have been acting in good faith, would nevertheless appear to an objective observer

[2] Canon 2A of the California Code of Judicial Ethics provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (Fn. omitted.)

to be unjudicial and prejudicial to public esteem for the judicial office. We conclude that Judge Harris's conduct violated canon 2A of the California Code of Judicial Ethics and constituted prejudicial misconduct.

*Count Two A*

Deputy Public Defender Obe Ozobu was assigned to Judge Harris's courtroom in 2002. In December of that year, while Ms. Ozobu was in the judge's chambers, Judge Harris showed her a Macy's department store advertisement and invited her to go to Macy's with him to look at jackets. He said they could also have lunch together. Ms. Ozobu declined the judge's invitation.

Ms. Ozobu did not testify at the hearing, and clear and convincing evidence supporting the allegations was not presented. The allegations of count two A were not established, and they are dismissed.

*Count Two B*

On January 28, 2003, Judge Harris was assigned to the Central Arraignment Courthouse to work temporarily in Division 82. Upon arriving at the courthouse, Judge Harris was greeted by Division Chief Bettina Rodriguez, who had just returned from a lunchtime workout and was wearing exercise clothes. When Ms. Rodriguez apologized for her attire, Judge Harris told her she looked okay. Judge Harris then placed his hands on Ms. Rodriguez's face and said, "You're so cute." Judge Harris again encountered Ms. Rodriguez after she had changed into professional clothing and told her, "You looked okay then, you look even better now."[3]

**(10)** We conclude that Judge Harris's conduct in putting his hands on Ms. Rodriguez's face and saying "You're so cute" violated canon 3B(4) of the California Code of Judicial Ethics,[4] and constituted improper action. We concur with the masters that Judge Harris's other statements could be subject to differing interpretations; there is no clear and convincing evidence that the other statements, considered in context, violated the canons of judicial ethics, as alleged.

*Count Two C*

On February 4, 2003, Judge Harris presided over jury selection in *People v. Sao*, case No. 2CR10835, a case in which the defendant was alleged to have

[3] Clear and convincing evidence was not submitted to support the allegation that Judge Harris stared at the derriere of Ms. Rodriguez.

[4] Canon 3B(4) of the California Code of Judicial Ethics provides in pertinent part: "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . ."

followed, grabbed, and exposed himself to two young women. During jury selection, the deputy city attorney asked prospective jurors whether anyone had made a pass at them that made them uncomfortable. The attorney then directed a question to the prospective male jurors, asking, "Has there been a woman that made a pass at you and react [*sic*] in anger?" Judge Harris then stated, "Did some woman make a pass at you and get you angry? I've been waiting for that to happen to myself."

Given the context of the proceeding, Judge Harris showed poor judgment in making the statement, and his comment also reflects a troubling pattern of insensitivity to women. Nonetheless, when count two C is viewed in isolation, we cannot conclude that there is clear and convincing evidence establishing violations of canons 1, 2A, 3B(4) or 3B(5) of the California Code of Judicial Ethics, as alleged. We concur with the masters that the allegations of count two C were not established by clear and convincing evidence, and they are dismissed.

*Count Two D*

In March 2003, Deputy Public Defender Glendy Ruiz appeared before Judge Harris for trial in *People v. del Corral*, case No. 3CR00003. Before trial began, there was a discussion in Judge Harris's chambers regarding the possible disposition of the case. Judge Harris told Ms. Ruiz to talk to her client about a plea bargain. When Ms. Ruiz said her client wanted a jury trial, Judge Harris told her the guilty plea would only be a technicality and "doesn't really matter." When Ms. Rodriguez told the judge it did matter because her client was not guilty, Judge Harris responded, "The real reason is that [the defendant] wants to sit next to you for three days."

**(11)** We conclude that Judge Harris's comments, in the context that they were made, could raise questions in the mind of an objective observer regarding the judge's impartiality in the pending case. We further conclude that even though the judge may have been acting in good faith, his comments would nevertheless appear to an objective observer to be unjudicial and prejudicial to public esteem for the judicial office. Judge Harris's conduct violated canon 2A of the California Code of Judicial Ethics, and constituted prejudicial misconduct.

*Count Two E*

**(12)** Between October 2002 and April 2003, Judge Harris made inappropriate comments about defendants who appeared before him in criminal prostitution cases. In one case, a defendant who had a pelvic disorder appeared before the judge. After the defendant left the courtroom, Judge

Harris discussed her medical condition in open court and said "caveat emptor." In another case, after the defendant left the courtroom, Judge Harris said to counsel in open court, "She would look okay if she had her teeth straightened." In both instances the comments were made in the courtroom in the presence of numerous court staff and attorneys. We concur with the masters that Judge Harris's remarks were undignified, violated canon 3B(4) of the California Code of Judicial Ethics, and constituted improper action.

*Count Two F*

In March 2003, Judge Harris presided over the jury trial in *People v. Alvarez*, case No. 3CR04253. Upon completion of jury selection, Judge Harris thanked counsel at sidebar for not exercising a challenge against a female juror because she was nice to look at.

**(13)** We conclude that Judge Harris's comment could raise questions in the mind of an objective observer regarding whether the judge might be motivated by personal interests during the case. We further conclude that even though the judge may have made the comment as a joke, and was acting in good faith, his comment would nevertheless appear to an objective observer to be unjudicial and prejudicial to public esteem for the judicial office. The conduct violated canons 1 and 2A of the California Code of Judicial Ethics,[5] and constituted prejudicial misconduct.

*Count Two G*

Deputy Alternate Public Defender Jean Costanza made a number of appearances in Judge Harris's courtroom. In April 2003, Judge Harris complimented her on her good work and they discussed her background. Judge Harris said he enjoyed talking with her and that he would be happy to have lunch with her. Ms. Costanza replied that she would be in trial forever, but Judge Harris pressed her with further questions. Ms. Costanza declined lunch again, saying she "just ate peanuts," to which Judge Harris replied that he could check with her boss to make sure she was in trial.

Even if Judge Harris's intentions were completely innocent, as the masters found, his conduct in asking followup questions to probe her intentions placed Ms. Costanza in the awkward position of having to respond to the repeated personal questions of a judge in whose court she regularly appeared.

[5] Canon 1 of the California Code of Judicial Ethics provides in pertinent part that a judge "should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."

Assistant Supervising Judge C. H. Rehm counseled Judge Harris in 2002 about meeting alone with young women lawyers, but rather than gleaning the larger lesson from that discussion, Judge Harris apparently took Judge Rehm literally, testifying that he did not consider Ms. Costanza to be a young attorney. Judge Harris's tendency toward literal interpretation of comments made to him is troubling. The judge testified that he also interpreted Ms. Costanza's comments literally and not as a sign of rejection, saying "I took her relatively literally that she was going to be in trial for the rest of her life." While this sounds implausible, the masters were in the best position to evaluate the credibility of witnesses. Nonetheless, Judge Harris's apparent tendency toward literal interpretation suggests that he did not fully grasp the import of what Judge Rehm was trying to tell him in 2002.

**(14)** We conclude that in pressing an attorney who regularly appeared before him for a lunch appointment, Judge Harris failed to maintain and personally observe high standards of conduct so that the integrity of the judiciary would be preserved, in violation of canon 1 of the California Code of Judicial Ethics, and that his conduct constituted improper action.

*Count Two H*

On October 21, 2003, at the weapons screening area of the South Gate Courthouse, Judge Harris approached two female security officers. Judge Harris placed his hands against the wall and asked if they were going to search him. At the time, there were approximately 30 to 35 people in line. Judge Harris then asked if he could choose who would search him, and said he wanted to be searched in chambers. This incident occurred after Judge Harris was counseled by Assistant Supervising Judge Rehm about his inappropriate conduct toward women.

Judge Harris's conduct delayed others waiting for security clearance. We concur with the masters that it was inappropriate for Judge Harris to make fun of an event that the public is expected to take seriously, that Judge Harris's conduct was not suitable for a judicial officer in a public setting, and that his conduct violated canon 3B(4) of the California Code of Judicial Ethics. We conclude that his conduct constituted improper action.

*Count Three*

The allegations of count three pertain to conduct by Judge Harris in his interactions with Deputy City Attorney Chadd Kim while she was in his courtroom for the cases *People v. Castillo*, case No. 2CR02465, and *People v. Bolden*, case No. 2CR13235, and for his actions in response to a Code of Civil Procedure section 170.6 challenge filed by Ms. Kim in *People v. Bautista*, case No. 2CR02345.

On October 28, 2002, Ms. Kim appeared before Judge Harris for the first time in *Castillo*. When Ms. Kim approached the bench to help the judge find the complaint in the court file, Judge Harris tossed the file toward her. The file came apart on the floor.

On February 5, 2003, Ms. Kim appeared before Judge Harris in *Bolden*. Ms. Kim indicated there would be a disposition involving the forfeiture of a large amount of seized cigarettes. Judge Harris asked, "Are you going to smoke them yourself?"

On February 20, 2003, Ms. Kim appeared before Judge Harris in *Bautista*. After she filed a challenge to the judge under Code of Civil Procedure section 170.6, Judge Harris asked her to make a record of her reasons for filing the challenge. After Ms. Kim explained her reasons, Judge Harris agreed to transfer the case to another department. However, while Ms. Kim was still in the courtroom, Judge Harris said to the deputy city attorney in the next case, "Would you like to join your colleague in filing some paper?" Judge Harris added, "I didn't toss any files at you or near you, did I?" When the attorney said "no," Judge Harris responded, "No, I try to be selective when I throw things."

Judge Harris said he now realizes that "[a]ny comment about any party, litigant, witness appearing in court should not be made by a judge, because the judge's humor can be misinterpreted. It may not be funny to the observer and it might tend to embarrass somebody who is there." Judge Harris also admitted that his actions in response to the Code of Civil Procedure section 170.6 challenge were inappropriate and that he "should have immediately acted upon the challenge without questioning her," and that "an affidavit of prejudice should never be questioned and should be immediately transferred."

**(15)** We agree with Judge Harris. When he tossed the court file toward Ms. Kim, asked her if she was going to smoke confiscated cigarettes, and said he was selective in throwing things at attorneys, he did not reflect a patient, dignified or courteous demeanor. Moreover, when Judge Harris pressed Ms. Kim to prove up her Code of Civil Procedure section 170.6 challenge and questioned the other attorney about making a second challenge, an objective observer might have questioned whether Judge Harris had become personally embroiled in his interactions with Ms. Kim. (See *Fletcher, supra*, 19 Cal.4th at pp. 902, 905–906, 917.) Judge Harris failed to maintain a high standard of conduct so that the integrity of the judiciary is preserved, and his actions did not promote public confidence in the integrity and impartiality of the judiciary. We conclude that Judge Harris's conduct violated canons 1, 2A and 3B(4) of the California Code of Judicial Ethics, and constituted improper action.

*Count Four*

**(16)** In 2002 and 2003, Deputy City Attorney Matthew Schonbrun regularly appeared before Judge Harris. Mr. Schonbrun frequently went into Judge Harris's chambers and they discussed Mr. Schonbrun's social life. Mr. Schonbrun said he was having trouble meeting "nice Jewish girls." Over the next several months, Judge Harris gave Mr. Schonbrun the telephone numbers of three different women. Mr. Schonbrun later reported to Judge Harris about the dates he had with the three women. Judge Harris also showed Mr. Schonbrun another woman's business card and identification photo to see if Mr. Schonbrun would be interested in dating her. Notwithstanding his relationship with Mr. Schonbrun, Judge Harris did not disqualify himself from hearing Mr. Schonbrun's cases. Further, while Judge Harris disclosed various social relationships with others, he did not disclose his relationship with Schonbrun because he felt it would have been embarrassing.

In his testimony before the masters, Judge Harris shared his newfound conviction that "it was not appropriate to get involved in [Mr. Schonbrun's] social life." He also averred that "[i]f I had a social relationship, if I had gone to school with an attorney, if I had friends appear, if I attended some bar association function or dinner or meeting or program, if there was an attorney who was from that association who I recognized, I would tell the other side my relationship and ask them if they'd like to go somewhere else or stay here."

**(17)** Canon 3E(2) of the California Code of Judicial Ethics provides that "a judge shall disclose on the record information that *the judge believes* the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification." (Italics added.) Here, there is no clear and convincing evidence that Judge Harris believed the parties or the lawyers would consider the information relevant. Nonetheless, there is clear and convincing evidence that Judge Harris disclosed other social relationships he had with attorneys, but did not disclose this one because it would have embarrassed the attorney. As Judge Harris recognized, it was a mistake for him to find dates for an attorney regularly appearing in his court. Although there is no evidence of actual bias, we conclude that Judge Harris's conduct in helping Mr. Schonbrun find dates could raise questions in the mind of an objective observer regarding the judge's impartiality in cases handled by Mr. Schonbrun. We conclude that the judge's conduct did not promote public confidence in the integrity and impartiality of the judiciary, in violation of canon 2A of the California Code of Judicial Ethics. We also conclude that his conduct would appear to an objective observer to be unjudicial and prejudicial to public esteem for the judicial office, and constituted prejudicial misconduct.

*Count Five*

In his response dated October 3, 2003, to the Commission's preliminary investigation letter, Judge Harris stated, "No Supervising Judge has ever spoken to me, counseled, criticized or reprimanded me concerning any of my conduct or behavior towards any person." Contrary to this statement, on December 24, 2002, Judge Rehm, assistant supervising judge of the criminal courts, counseled Judge Harris after concerns were raised about his interactions with young, female attorneys. Further, on April 24, 2003, Judge Harris met with Presiding Judge Robert A. Dukes, Assistant Presiding Judge William McLaughlin, Supervising Judge Dan Oki and Judge Rehm and was advised of recent complaints asserting that he had persisted in asking female attorneys to lunch, and that he made comments about a court employee's body.

Judge Harris's response to the Commission therefore was false and misleading. Nonetheless, the masters concluded that Judge Harris inadvertently made a misstatement. While we would expect a judge to exercise greater care in preparing a response to the Commission's preliminary investigation letter, we defer to the finding of the masters that this was an inadvertent error, as the masters were in the best position to evaluate the credibility of the witnesses. We conclude there is no clear and convincing evidence establishing a violation of canons 1 or 2A of the California Code of Judicial Ethics, or misconduct within the meaning of article VI, section 18, subdivision (d) of the California Constitution. The charge in count five is dismissed.

## Recommended Level of Discipline

**(18)** While it is not an exhaustive list, the Commission has identified five factors relevant to its determination of the appropriate level of discipline: (1) the number of acts of misconduct or improper action; (2) prior discipline against the judge; (3) evidence that the judge recognizes the inappropriateness of his or her actions; (4) the likelihood that the judge will continue to engage in misconduct or improper action; and (5) the impact of the judge's conduct on the judicial system. (*Inquiry Concerning Judge Van Voorhis* (2003) No. 165, Decision and Order of Removal, p. 31 [48 Cal.4th CJP Supp. 257, 295].)

Applying the foregoing factors in order, we have concluded in this proceeding that Judge Harris engaged in five acts of prejudicial misconduct and five additional instances of improper action.[6] As for prior discipline, there is no record of prior discipline against the judge.

[6] Prejudicial misconduct was established in count one A, count one B, count two D, count two F and count four. Improper action was established in count two B, count two E, count two G, count two H and count three.

As to whether the judge recognizes the inappropriateness of his actions, the record is mixed. In some instances the explanations given by the judge for his conduct suggest that he does not fully grasp the implications of his actions. In addition, the record indicates he continued such conduct even after Judge Rehm counseled him about it. In other instances, however, the judge quickly acknowledged that his conduct was inappropriate. The masters found that Judge Harris voluntarily took sensitivity training and that he learned a great deal from this counseling.

Regarding the chances for future misconduct, Judge Harris informed the Commission that he retired at the end of October 2004, and he made the following representation to the Commission: "I do not now, and I do not in the future, intend to apply for a seat assignment as a retired judge. I realize my career has concluded as a bench officer." The Commission accepts this representation.

Nonetheless, the impact of the judge's conduct on the judicial system was not insignificant. The conduct established in count one received media attention and the Court of Appeal issued a writ of habeas corpus vacating the sentence in the *Tellez* case. Judge Rehm felt compelled to counsel Judge Harris in 2002. In addition, there was a "flurry" of court activity devoted to addressing Judge Harris's conduct in 2003, and Judge Dukes felt it necessary to write to the Commission and transfer Judge Harris to South Gate.

But there is also a great deal of evidence in mitigation. The masters repeatedly referenced the numerous witnesses who testified to the judge's good nature and character, and also to his long, distinguished career as a judge.

Considering the totality of these circumstances, we conclude that a public admonishment is appropriate in this case. The factors discussed above, especially when considered in light of prior decisions, indicate that censure or removal are not called for here. (See, e.g., *Inquiry Concerning Gibson* (2000) No. 152 [48 Cal.4th CJP Supp. 112] [public admonishment]; *Inquiry Concerning Willoughby* (2000) No. 154 [48 Cal.4th CJP Supp. 145] [public censure].) Nonetheless, in light of the media attention surrounding Judge Harris's conduct and the impact his conduct had on the judicial system, we conclude that a public, rather than private, admonishment is warranted.

This decision and order shall constitute the order of public admonishment of Judge Harris.

The following Commission members voted in favor of public admonishment: Justice Vance W. Raye, Judge Frederick P. Horn, Mr. Michael A. Kahn,

Mrs. Crystal Lui, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon and Ms. Barbara Schraeger. There were no votes opposed.

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| **IN THE MATTER CONCERNING JUDGE DONALD R. ALVAREZ** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |
|---|---|

This disciplinary matter concerns Judge Donald R. Alvarez, a judge of the San Bernardino County Superior Court since 2001. Judge Alvarez and his attorney, Edward P. George, Jr., appeared before the commission on December 14, 2005 pursuant to rule 116 of the Rules of the Commission on Judicial Performance to contest the imposition of a public admonishment. Having considered the written and oral objections and argument submitted by Judge Alvarez and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

STATEMENT OF FACTS AND REASONS

Judge Alvarez is a judge of the San Bernardino County Superior Court. His term commenced in June 2001.

On October 5, 2003, around 6:30 p.m., Judge Alvarez was stopped by the California Highway Patrol in San Bernardino County for speeding on Interstate 215. Judge Alvarez was arrested, and a blood sample was drawn at 7:45 p.m. On October 17, 2003, the judge was charged with the misdemeanors of driving under the influence of alcohol and driving with a blood alcohol level of .08 percent or more (California Vehicle Code sections 23152(a) and (b)). The result of the test of the blood sample by the San Bernardino County Sheriff's Department laboratory of criminalistics was a blood alcohol level of .14 percent.

On January 28, 2004, Judge Alvarez entered a no contest plea to driving under the influence of alcohol, in violation of California Vehicle Code section 23152(a), and was found guilty and convicted of that charge. (The charge of violating Vehicle Code section 23152(b) was dismissed.) Judge Alvarez was placed on three years of informal probation, ordered to

attend an alcohol program, pay a mandatory fine and comply with other conditions of probation.

Judge Alvarez's unlawful action described above evidences a serious disregard of the principles of personal and official conduct embodied in the California Code of Judicial Ethics, including failure to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved (canon 1), and failure to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2). Judge Alvarez's unlawful action also constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (Cal. Const., art. VI, § 18, subd. (d).)

Judge Alvarez further violated the Code of Judicial Ethics by failing to report the filing of the charges and his conviction to the Commission on Judicial Performance. Canon 3(D)(3) provides that a "judge who is charged … or convicted of a crime in the United States … including all misdemeanors involving … the personal use … of alcohol, shall promptly and in writing report that fact to the Commission on Judicial Performance." This matter came to the attention of the commission from a source other than Judge Alvarez. The commission wrote to the judge about this matter on May 26, 2004, which was four months after his conviction and over seven months after charges were filed; as of that time Judge Alvarez had not reported to the commission.

In his August 2, 2004 response to the commission's preliminary investigation letter, Judge Alvarez stated, "The issue was never whether I should self-report, but <u>when</u>. It was never clear to me when the report should be made." (Emphasis in original.) Judge Alvarez further stated in his August 2004 response that it was his intention to self report upon completion of all post-disposition conditions of probation, including the alcohol program, which was required to be completed by August 15, 2004, in order to "report the <u>entire</u> complete case to the commission." (Emphasis in original.)

Canon 3D(3) clearly and unambiguously mandates a <u>prompt</u> report to the commission upon being <u>charged</u> or upon being <u>convicted</u>. Judge Alvarez reported neither event. Further, on at least two occasions, before and shortly after he was convicted, Judge Alvarez was told by then Presiding Judge J. Michael Welch and Presiding Judge Peter Norell that he must self report. Under these circumstances, the commission finds untenable the notion that the reporting obligation of canon 3D(3) would be satisfied by deferring reporting until some other occasion of the judge's choice, such as in this case, after the completion of all conditions of probation.

During Judge Alvarez's appearance before the commission, he apologized for driving while intoxicated and appeared truly remorseful and contrite over the incident itself, concerning which he accepted full responsibility. Nonetheless, the judge's failure to self report as described above was at a minimum improper action within the meaning of article VI, section 18(d) of the California Constitution.

The self-reporting requirement of canon 3D(3) assists the commission in fulfilling its constitutional mandate and in protecting the public. Under the Constitution, a judge charged with certain offenses is disqualified from acting as a judge. (Cal. Const., art. VI, § 18, subd. (a).) When a judge is convicted of certain charges, the commission is required to suspend the judge without pay and, if the conviction becomes final, the commission is required to remove the judge from office. (Cal. Const., art. VI, § 18, subd. (c).) A judge may also be censured or removed from office by the commission for "habitual intemperance in the use of intoxicants or drugs…." (Cal. Const., art. VI, § 18, subd. (d).) To protect the public, when a judge is charged with an alcohol-related charge, it is the commission's policy to investigate not only the charged incident but also whether there is a substance abuse problem that is affecting the judge's performance of judicial duties. A judge's failure to report as required by canon 3D(3) impedes the commission's performance of these constitutionally mandated duties. Therefore, it is critical that judges be prompt in fulfilling their reporting obligations under canon 3D(3).

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Justice Judith D. McConnell, Ms. Patricia Miller, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted to impose a public admonishment. Commission member Mr. Lawrence Simi is recused and commission member Mr. Jose C. Miramontes did not participate in this matter.

Dated: December 27, 2005

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Marshall B. Grossman
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| **IN THE MATTER CONCERNING JUDGE RUFFO ESPINOSA, JR.** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |
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This disciplinary matter concerns Judge Ruffo Espinosa, Jr., a judge of the Los Angeles County Superior Court. Judge Espinosa and his attorney, Edward P. George, Jr., appeared before the commission on February 1, 2006 pursuant to rule 116 of the Rules of the Commission on Judicial Performance to contest the imposition of a public admonishment. Having considered the written and oral objections and argument submitted by Judge Espinosa and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

## STATEMENT OF FACTS AND REASONS

Judge Ruffo Espinosa, Jr., is a judge of the Los Angeles County Superior Court. His current term commenced in January 2001.

In the case of *People v. Netterville*, BA220480, which was before Judge Espinosa on October 30, 2003, October 31, 2003, January 29, 2004, and February 5, 2004, Judge Espinosa denied the defendant full opportunity to be heard through counsel regarding sentencing, treated defense counsel in a rude and impatient manner, and abused the contempt power by holding in contempt and immediately incarcerating an attorney who had sought to be heard on his client's behalf.

Defendant Netterville appeared before Judge Espinosa on a probation violation matter on October 30 and 31, 2003. On October 31, 2003, after finding the defendant in violation of probation, Judge Espinosa ordered a diagnostic study pursuant to Penal Code section 1203.03.

On January 29, 2004, the defendant was returned to court after the Department of Corrections had issued a report following the diagnostic study, recommending state prison. When Judge Espinosa asked defense counsel, Deputy Public Defender (DPD) Michael Pentz, if he wished to address the court, DPD Pentz presented his position that the recommendation from the Department of Corrections was "sort of a split decision[,]" (R.T. 1:27) with the psychologist's report recommending that the defendant be granted probation, to include conditions that he successfully complete alcohol and drug treatment programs, and the associate warden making the "official recommendation" (R.T. 2:17–18) of commitment to state prison. Judge Espinosa stated that he was "going to look at and consider the overall recommendation, which is that [the defendant is] not amenable [to probation]" (R.T. 2:25–26) because he had attempted to minimize his culpability and had expressed no remorse for stabbing his cohabitant. The judge then said:

> I have considered and read [the report], and I don't think I need to put more on the record so the Court does intend to follow the recommendations of the California Department of Corrections. [¶] Waive time for sentencing?

(R.T. 3:3–7.)

DPD Pentz said that he was still responding to the court's question as to whether he wished to be heard. DPD Pentz then pointed out that the warden's overall recommendation of state prison was based on a recommendation from a correctional counselor who had based his recommendation on incorrect information about the defendant's criminal history. DPD Pentz said that the counselor's report referred to a criminal history of over twenty years, although the defendant's first misdemeanor conviction was actually in 1995. Judge Espinosa stated that he did not have any trouble continuing the matter to get more complete information about the defendant's criminal history, and added that in view of the split decision and the defendant's minimal criminal history as set forth in the probation report, he would be "hard pressed" (R.T.6:3) to send him to prison based on his record. The matter was continued to February 5, 2004, and the prosecutor was asked to get more complete information about the defendant's criminal history.

At the beginning of the hearing on February 5, Judge Espinosa noted that the defendant had performed poorly on probation. He mentioned the conclusions of the Penal Code section 1203.03 report, and said that he had looked at various letters that had been submitted on the defendant's behalf. He considered a letter from the defendant. Addressing the defendant, the judge expressed concern about the defendant's "multiple arrests" (R.T. 3:16) for assaults, the previous conviction for which he was placed on probation, and the violence of the incident giving rise to the probation violation. Judge Espinosa told the defendant that stress was not an excuse for violence. He noted again that the defendant had not done well on probation. Judge Espinosa said that since the defendant's history was "not that aggravated" he would "offer" (R.T. 4:28) the mid-term of three years in state prison.

DPD Pentz asked to be heard. Judge Espinosa replied, "Of course, I'm going to allow you, but I'm just telling you how I view this. I want you to know that I'm willing to be swayed. Okay?" (R.T. 5:27–6:2.) The judge added:

> And I've been going on this case back and forth for quite a long time, and I'm tired. And the county, frankly, is under monetary restraints right now. What are we going to do, send him back to probation so he can do the same thing over and over again? [¶] You know, this gets old after a while so go ahead and make your pitch.

(R.T. 6:7–14.)

The prosecutor then reminded Judge Espinosa that he had asked her to check the defendant's record; she mentioned the defendant's three prior arrests in the 1980's as well as his misdemeanor conviction in 1995, another conviction in 1996, and his performance on probation. When asked to respond, DPD Pentz pointed out that an arrest cannot be considered "aggravating in any way." (R.T. 7:23.) Judge Espinosa said he agreed an arrest should not be used against a person, and then asked, "What if a person has ten arrests for the same offense over and over again. Isn't that a little unusual?" (R.T. 8:1-3.) DPD Pentz responded by describing the defendant as someone with a mental illness who tended to self-medicate with alcohol and sometimes with drugs. Judge Espinosa asked if someone who self-medicates with alcohol is "any less of a danger than someone that's just a bad guy?" (R.T. 8:25–26.) DPD Pentz said that someone who is mentally ill and self-medicates with alcohol "needs to be a part of a structured program that addresses those concerns." (R.T. 8:28–9:2.) Judge Espinosa noted that the defendant had previously been evaluated by a psychologist and psychiatrist; he said, "We had a 1368 [competence proceeding]." He added, "You know, frankly, I don't want to keep him on probation anymore." (R.T. 9:7–8.) Upon being informed by the prosecutor that the judge already had found the defendant in violation of probation, the judge said, "All right. So you know frankly, Counsel, let's stop wasting our breath." (R.T. 9:15–16.) He then said that he would impose a sentence of three years in state prison.

This exchange followed:

> MR. PENTZ: Your Honor, I'm sorry to interrupt the Court, but I've yet to speak to what is an appropriate sentence in this case.
>
> THE COURT: All right.
>
> MR. PENTZ: And I know the Court is busy, but I don't think speaking on behalf of my client is a waste of anybody's time.
>
> THE COURT: Counsel, I'm never too busy.

> MR. PENTZ: I would just ask the Court for leave to speak without interruption. The Court seems to have made up its mind, but I haven't had a chance --
>
> THE COURT: Frankly, I have made up my mind.
>
> MR. PENTZ: I got that from the last hearing when I was unable to speak, but now I really want to address the Court and on the record.
>
> THE COURT: I want it clear that you're addressing the Court for the benefit of the record.
>
> MR. PENTZ: Well, actually, I'm exercising my client's right to have him represented in court.
>
> THE COURT: It's not going to sway me to give him any less because I have considered this. I already know what you're going to say[,] frankly. [¶] You're going to talk about his mental illness, what a good guy he is, all the letters of recommendation, and so on and so forth, and I've taken all that into account. [¶] I've also taken into account the psychiatric reports, and I've looked at his history and his behavior while he has been on probation to me [sic], and yes, I do have a calendar. But if you want to make a record, I'll sit back, sway on my chair, and then you can put five minutes worth. All right? [¶] Go ahead.

(R.T. 9:26–11:4.)

DPD Pentz said that his remarks might not even take five minutes. He noted that resources were "stretched everywhere" (R.T. 11:10) and said that it would not help to lock the defendant up and then release him back into the community. Less than one minute after DPD Pentz began speaking, as he began to refer to a letter that had been submitted to the court, Judge Espinosa interrupted to ask when the defendant had been arrested, saying that he wanted to calculate his credits [for jail time already served]. DPD Pentz then mentioned "community reintegration" (R.T. 12:14) and rehabilitation, and began to describe a specific program he had looked into for the defendant:

> MR. PENTZ: What we do have in place is Mr. Netterville has people at Oasis House and a program whose funding and --
>
> THE COURT: Excuse me a second, sir. I have to calculate the credits because I know what I'm going to do. All right?

(R.T. 12:22–27.)

A discussion of credits followed. Judge Espinosa secured counsel's agreement as to the amount of credit, and this exchange followed.

> THE COURT: All right. Then Mr. Netterville, you are sentenced to --
>
> MR. PENTZ: Your Honor, the Court still has not allowed me to complete --
>
> THE COURT: Okay, Counsel --
>
> MR. PENTZ: I'm disheartened here.
>
> THE COURT: Counsel, you be quiet. I've made up my mind. I'm not going to listen -- one more peep out of you, and you're in contempt of court. Do you understand this?
>
> MR. PENTZ: I understand that.
>
> THE COURT: All right. Then be quiet.

(R.T. 14:3–14.)

Judge Espinosa proceeded to sentence the defendant to three years in state prison. When he finished, he said, "Next case." (R.T 15:15.) This exchange followed:

> MR. PENTZ: I'd like to state as [sic] an objection to these proceedings, Your Honor, with what I take to be the cavalier way with which this Court --
>
> THE COURT: All right, Counsel, that will be $50.00.
>
> MR. PENTZ: Your Honor, the Court is going to have to set --
>
> THE COURT: Do you want to go for a hundred?
>
> MR. PENTZ: If the Court can set it for $250, I want [a] hearing on it, and I want to order a transcript.
>
> THE COURT: That will be $250. You are sanctioned. That will be payable -- I'll give you a chance to appeal this.
>
> MR. PENTZ: Judge, I'm requesting a hearing.
>
> THE COURT: This is a direct --

> MR. PENTZ: I'm requesting a hearing. I hope the Court understands my request.
>
> THE COURT: Your request for a hearing is denied. You've already had a hearing. How many hearings do you want?
>
> MR. PENTZ: A hearing on an order to show cause is a fundamental law, Your Honor. I'm asking for that. I'll bring you the Penal Code -- the civil code section if you wish.
>
> THE COURT: This is a direct contempt of court, and you are ordered to pay the sum of -- what did we say? -- $250?
>
> MR. PENTZ: I think that was the last sum, yes.
>
> THE COURT: Payable by -- when can you pay that? -- or five days in the county jail. What do you want?
>
> MR. PENTZ: Judge, it's --
>
> THE COURT: All right. Do you want five days in the county jail?
>
> MR. PENTZ: I'm ready to surrender.
>
> THE COURT: Take him in. That's five days in the county jail, Counsel.

(R.T. 15:16–17:2.)

Attorney Pentz was removed from the courtroom and taken to a holding cell. After unrelated matters were heard, Mr. Pentz appeared before Judge Espinosa, represented by Chief Deputy Public Defender Greg Fisher. Judge Espinosa told DPD Pentz that he had given the judge no alternative but to remove him from the courtroom; Judge Espinosa said that Mr. Pentz had continued to disobey the court after being warned, and had "openly insulted" the court. (R.T. 17:16.) The judge said that he was going to impose five days in jail, and that he would stay the sentence because he knew that DPD Pentz was an attorney and might want to seek review. Judge Espinosa also said it was "entirely false at least from this Court's perspective" (R.T. 19:6–7) that he had not given DPD Pentz an opportunity to speak or to fully state his position as to defendant Netterville's sentence. He said that "this attorney kept on arguing even after the Court made a ruling[,]" and that he was "deeply insulted by this behavior." (R.T. 19:17–20.) Judge Espinosa added that unless there was some reason for a further stay, DPD Pentz should "bring [his] toothbrush" (R.T. 19:22–23) when he next appeared.

Judge Espinosa issued a written order of contempt, dated February 5, 2004 and filed on February 9, 2004. The order stated that DPD Pentz continued to argue after being ordered to be quiet; used the word "cavalier," an insult, in open court; argued that he was entitled to a hearing on contempt and "further insulted the court by insinuating that the court didn't understand that he was entitled to a hearing"; and "sarcastically threw his hands in the air [and] waved them" while saying that he was ready to surrender. The order further stated that the court "felt compelled to order Mr. Pentz removed from the court room [sic] in order to continue the orderly process of other court proceedings[,]" and included a finding that DPD Pentz "had knowledge of the order and was able to comply by simply taking a writ without the necessity of mocking the court and challenging it to find him in contempt."

On May 28, 2004, Orange County Superior Court Judge Daniel Didier, sitting by assignment, granted DPD Pentz's petition for a writ of habeas corpus, annulling the contempt order. Judge Didier concluded, after examining the record to determine whether there was any substantial evidence to support the contempt finding, that "the record in this case does not disclose a clear instance of disorderly, contemptuous, or insolent behavior towards the respondent court tending to interfere with the due course of a trial or other judicial proceeding within the meaning of Code of Civil Procedure § 1209(a)(1)." Judge Didier noted that although DPD Pentz was allowed to comment on his client's situation, he "was not afforded an opportunity to fully advance plausible sentencing options deemed appropriate for the defendant's situation"; instead, Judge Espinosa interrupted DPD Pentz, directed him to be quiet, and warned him that he would be in contempt if he spoke again. According to Judge Didier, "To the extent the contempt adjudication is premised on [DPD Pentz's] failure to observe [Judge Espinosa's] order to remain silent, such order is without evidentiary support as [Mr. Pentz's] conduct was not contemptuous. A lawyer has a duty to protect and advance the interests of his or her client at all times. This duty encompasses the right to make objections or advance other points in the client's behalf in a timely manner." Judge Didier also stated that although DPD Pentz was not entitled to a hearing on a direct contempt, his repeated requests for such a hearing, apparently made in good faith, did not constitute contempt. Finally, Judge Didier rejected the notion that DPD Pentz's use of the word "cavalier" constituted contempt, noting that "cavalier" has varying meanings. Judge Didier stated that to the extent the contempt finding might have been based on language that was not in itself contemptuous, offensive tone, and/or mannerisms such as facial expressions or gestures, a judge must warn an attorney before taking disciplinary action. Judge Didier pointed out that "contempt is a drastic remedy which should be used only when necessary in order to maintain law and order[,]" and concluded that the record "simply does not reveal the quantum of substantial evidence necessary to sustain the order of contempt issued by [Judge Espinosa]."

In addition to DPD Pentz's petition for habeas relief, an appeal of defendant Netterville's conviction was filed, based on Judge Espinosa's alleged failure to allow the defendant to be heard through counsel at sentencing. On January 7, 2005, the Court of Appeal issued its decision vacating the defendant's sentence and remanding the matter for resentencing before a different judge. (*People v. Charles Netterville* (January 7, 2005, B173174) [nonpub. opn.] [2005 Cal.App.Unpub. LEXIS 197] (*People v. Netterville*).) The appellate court found that Judge Espinosa handled the *Netterville* case properly up to the point at which he stated that he intended to sentence the defendant to the midterm in state prison but

was willing to be swayed. According to the Court of Appeal, however, shortly thereafter Judge Espinosa said that he had made up his mind, stated that further argument would not sway him, suggested that he would be inattentive by saying that he would "sit and sway" in his chair while DPD Pentz spoke, and quickly interrupted defense counsel's argument with a question about calculating sentence credits, indicating that he was not listening. (*Id*. [pp. 28, 40].) The appellate court found that Judge Espinosa "not only precluded Pentz from completing his argument, but refused to listen during an earlier portion of that argument." (*Id*. [p. 43].) The Court of Appeal held that Judge Espinosa "committed a miscarriage of justice and reversibly erred in violation of appellant's rights to counsel and fair trial by precluding Pentz from completing his sentencing argument." (*Ibid*.)

With respect to the contempt issue, the Court of Appeal determined that Judge Espinosa ordered DPD Pentz immediately into custody in violation of the mandatory stay provisions of Penal Code section 1209(c), which provides that, subject to certain exceptions, when an order of contempt is made affecting an attorney, the execution of any sentence shall be stayed for three court days. The appellate court noted that the judge apparently was aware of the provision, having referred to it when DPD Pentz reappeared with counsel by stating that he knew he would have to stay the sentence because DPD Pentz was an attorney. (*People v. Netterville, supra* [p. 46].) The appellate court also found that when DPD Pentz appeared with counsel, Judge Espinosa mischaracterized the record of the proceedings leading to the contempt finding, and later made various material omissions and misstatements in the written contempt order. (*Ibid*. [pp. 48-51].) Based on these findings, the Court of Appeal held that there was a doubt that Judge Espinosa could maintain his objectivity, and that the case must be remanded for resentencing before a different judge.

Judge Espinosa's conduct in this matter constituted, at a minimum, improper action. By denying the defendant a full right to be heard, through counsel, regarding sentencing, the judge violated canon 3B(7) of the Code of Judicial Ethics, which requires that a judge accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law.

In addition, Judge Espinosa's treatment of DPD Pentz constituted serious misconduct. Judge Espinosa held DPD Pentz in contempt in contravention of the mandatory stay provisions of Code of Civil Procedure section 1209(c). Further, as stated by the Court of Appeal, DPD Pentz was held in contempt and made to suffer "the ignominy of being removed from the courtroom simply for doing his job." (*People v. Netterville, supra* [p. 42].) The power of a judge to silence an attorney does not arise until after the attorney has had a reasonable opportunity for legitimate advocacy. (See *Cooper v. Superior Court* (1961) 55 Cal.2d 291, 298.)

Judge Espinosa's conduct also was contrary to canon 2A, which provides that a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, canon 3B(2), which requires that judges be faithful to the law, and canon 3B(5), which requires that judges perform judicial duties without bias or prejudice. In addition, the judge's treatment of DPD

Pentz was contrary to canon 3B(4), which requires judges to be patient, dignified and courteous toward those with whom the judge deals in a judicial capacity.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to impose a public admonishment.

Dated: February 9, 2006

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Marshall B. Grossman
Chairperson

**PUBLIC ADMONISHMENT OF JUDGE JOHN M. WATSON**

The Commission on Judicial Performance has ordered Judge John M. Watson publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Watson has been a judge of the Orange County Superior Court since October 1989. His current term began in January 2005.

For many years, Judge Watson owned two rental properties in Southern California, in La Habra and Whittier. (The properties were sold in 2005.) From approximately 2000 through mid-2004, Judge Watson sought and received help from his courtroom clerk with the day-to-day management of these properties. The judge instructed tenants to call him at the courtroom number, and used his clerk as the contact person for tenants. The clerk received and returned telephone calls from tenants and relayed messages between the judge and the tenants about matters such as inspections and repairs. She made calls to various businesses and the Los Angeles Housing Authority in connection with the judge's properties, and occasionally sent and received faxes from the Realtors who leased the La Habra property for the judge. Judge Watson had his clerk prepare approximately 40 letters and legal notices in connection with his real estate business, including tenancy termination notices and notices to quit. (With one exception, noted below, the judge's judicial title was not used in this correspondence.) The clerk performed these tasks whenever the judge requested, in the courtroom during the workday.

On a few occasions toward the end of 2000 and the beginning of 2001, Judge Watson had his clerk and bailiff accept rental payments in the courtroom, and had courtroom staff provide receipts to the tenants. The bailiff also received occasional calls from tenants.

From 2000 through mid-2004, Judge Watson's chambers letterhead was used in connection with the real estate business on four occasions: one letter to a tenant under the clerk's name, one letter to a tenant from "John M. Watson," one handwritten unsigned note from the judge to a tenant, and one letter to the Los Angeles Housing Authority from "John M. Watson, Judge, Orange County Superior Court." Chambers and court envelopes were used in connection with the real estate business on eight occasions.

"A judge may not use his or her office, staff, or public property and/or resources under the judge's control for personal, non-governmental purposes. This is an obvious part of the obligation of a judge to 'act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.' [Citation.] The public is entitled to expect that judges will conscientiously use resources paid for by the taxpayers only for the purpose for which those resources were intended." (Rothman, California Judicial Conduct Handbook (2d ed. 1999) § 3.33.) (See *Inquiry Concerning Judge D. Ronald Hyde*, No. 138 (1996) Decision and Order of Public Censure [over five-year period, judicial secretary spent 10 working days performing tasks for paralegal class taught by judge, 40 hours of work that benefited club judge was member of,

and 24 days of work for charity judge was interested in; judge used fax machine to send 57 personal faxes out of state, and used secretary to send over 40 personal letters on court stationery]; *In the Matter of Judge Robert C. Coates*, Pub. Admon. 23 (2000) Decision and Order of Public Admonishment [judge admonished for conduct that included use of court secretaries to prepare and send, during court hours using court resources, over 100 letters and documents involving the judge's personal interests unrelated to judicial duties; five letters were, or appeared to have been, designed to lend the prestige of judicial office to advance the judge's personal interests].)

The prohibition against the use of court resources necessarily applies with greater force with respect to a judge's business activities undertaken for personal financial gain. (See *Inquiry Concerning Judge James R. Ross*, No. 141 (1998) Decision and Order of Public Censure [retired judge censured for conduct that included use of prestige of judicial office to promote book he authored; judge sold copies of book from chambers and through his bailiff to jurors and attorneys].) "A judge may not misuse the administrative resources available to the judge. To accomplish a judge's varied administrative responsibilities … a judge has individuals, equipment, and facilities at his or her command. Among a judge's administrative responsibilities is the duty to insure that these resources are utilized primarily in connection with the judge's judicial responsibilities and secondarily in connection with peripheral matters related to the judicial function …. [¶] A judge may not use these public resources for personal financial gain." (Shaman, Lubet and Alfini, Judicial Conduct and Ethics (3d ed. 2000) § 6.13.)

Judge Watson's use of court staff, court resources and the court facilities for his personal real estate business was improper. This conduct was inconsistent with the Code of Judicial Ethics, canon 1 (judge shall uphold integrity of judiciary) and canon 2A (judge shall avoid impropriety and the appearance of impropriety; judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). The use of court and chambers stationery was inconsistent with canon 2B(2) (judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge). The one instance of correspondence sent on chambers stationery under the judge's title was inconsistent with canon 2B(4) (judge shall not use the judicial title in any written communication intended to advance the personal or pecuniary interest of the judge).

Commission members Mr. Marshall Grossman, Mrs. Crystal Lui, Justice Judith D. McConnell, Ms. Patricia Miller, Mrs. Penny Perez, Judge Rise Jones Pichon, Ms. Barbara Schraeger, and Mr. Lawrence Simi voted to impose a public admonishment. Commission member Judge Frederick P. Horn was recused. Mr. Michael Kahn and Mr. Jose Miramontes did not participate.

February 21, 2006

**PUBLIC ADMONISHMENT OF JUDGE RONALD J. MACIEL**

The Commission on Judicial Performance has ordered Judge Ronald J. Maciel publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Maciel has been a judge of the Kings County Superior Court since 1988; his current term began in January 2001.

Based upon the facts as set forth below, the commission concludes that Judge Maciel abused his authority in sanctioning an attorney without prior notice or an opportunity to be heard.

On Tuesday, January 11, 2005, Judge Maciel presided over the preliminary hearing in the matter of *People v. Pablo Garza* (No. 04CM4925). Attorney Robert Wynne appeared on behalf of the law firm of Sawl & Metzer, which had substituted in as defense counsel for defendant Garza on January 5, 2005. Mr. Wynne also appeared specially for Eric Schweitzer, the attorney with the Sawl & Metzer law firm who had been expected to handle the *Garza* preliminary hearing and who had signed the substitution of counsel form on January 4, 2005, but who was in trial on a juvenile case that was expected to be completed within the next two days. Mr. Wynne requested a continuance of the preliminary hearing for three days so that Mr. Schweitzer could complete the juvenile trial and be available to handle the preliminary hearing.

The deputy district attorney (DDA) handling the *Garza* preliminary hearing objected to a continuance, arguing that Mr. Schweitzer should have known he might not be available for the January 11, 2005 preliminary hearing when he agreed to the substitution of his law firm into the case on January 4, 2005. Judge Maciel said that he had made it quite clear when he accepted the substitution of counsel for defendant Garza on January 5, 2005, that he would not do so if substitute counsel would not be ready to proceed on January 11, 2005, the day of the scheduled preliminary hearing. Judge Maciel asked Mr. Wynne, "Why did somebody accept the representation [of the defendant] when under [Penal Code section] 1050 you have to be available to do the matter in the time allocated by the Court?" Mr. Wynne responded that he had only learned the night before that Mr. Schweitzer had been assigned to a courtroom for a juvenile trial in Fresno and that he, Mr. Wynne, was to handle the preliminary hearing. He also told the judge that the prosecution had not provided discovery and that the firm's investigator had not returned the "working file" that morning as expected, which is when he realized it would be better for defendant Garza to have Mr. Schweitzer handle the preliminary hearing. Judge Maciel then stated:

> You know, I appreciate your position, Mr. Wynne. But, you know, for them to say the night before to get prepared for a preliminary hearing, whether there's any kind of complication at all, I think is the direction of malpractice at a minimum, and may be sanctionable conduct as to that.

(1/11/05 R.T. 6:12-17.)

The DDA then asked for the name of the case being tried by Mr. Schweitzer in juvenile court so she could determine when he had been notified of its trial date. Mr. Wynne provided the information to the DDA, and court recessed. When court reconvened, the DDA stated that she had not been able to determine when the juvenile trial date had been set, but it could have been as early as December 17, 2004. After further discussion about Mr. Schweitzer's availability, the following exchange occurred:

> THE COURT: Scheduling problems, you know, particularly [Penal Code section] 1050 is clearly addressed for that particular issue. His [Mr. Schweitzer's] scheduling problems are not the problems of the court or witnesses.
>
> You know, when something is scheduled, it's supposed to go. Be that as it may, I'm going to grant the continuance because I feel that there may be problems otherwise. However, since the required notice and motion was not given under [1050(c)], court imposes sanctions of $1,000 against Mr. Schweitzer. That's payable within two days. Since it's a two-day continuance motion, the motion will be continued -- the preliminary hearing will be continued until Thursday, the 14th at 1:30.
>
> I suggest your firm be ready on that date.
>
> MR. WYNNE: Your honor, as far as, if I could, the sanctions. Could you perhaps wait until Mr. Schweitzer is here who has an accurate record of where he was at and what was said.
>
> THE COURT: Well, the sanctions are quite specific. It's that the motion was made for continuance less than two days prior to the preliminary hearing. That sets the sanctions in motion. If he wants to discuss that –
>
> MR. WYNNE: Can they be 999?
>
> THE COURT: No. I want it $1,000 because I think the firm needs to address the issue of scheduling and this type of conduct. I don't approve of that. Further I'll order that the defendant have no

> contact with the victim whatsoever. And with that in mind, the matter is continued as indicated.

(1/11/05 R.T. 12:6-13:8.)

Two days later, on January 13, 2005,[1] Mr. Schweitzer appeared before Judge Maciel for the preliminary hearing with Douglas Feinberg, an attorney he had retained personally to address the sanctions matter. Mr. Schweitzer apologized to Judge Maciel for his absence on January 11, 2005, and deferred to Mr. Feinberg on the sanctions issue. Mr. Feinberg submitted a declaration prepared by Mr. Schweitzer offering an explanation for his absence, which the judge initially refused to accept. Although Judge Maciel eventually accepted Mr. Schweitzer's declaration for filing, he did not appear to read it before cutting Mr. Feinberg off and telling him, "Take it up on appeal."

Mr. Feinberg filed a Petition for Writ of Mandate in the appellate department of the Kings County Superior Court, alleging that Judge Maciel had improperly sanctioned Mr. Schweitzer without notice or a hearing. On April 18, 2005, the appellate department issued an order vacating the sanctions.

Before sanctions are imposed, adequate notice and an opportunity to be heard are mandated, based upon the due process clauses of both the federal and state constitutions. (*Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 976 [holding that regardless of the statute under which sanctions are imposed, "the imposition of sanctions always requires procedural due process"].) While a court may raise the issue of sanctions on its own motion, it must give notice of its intent to impose sanctions "*before* findings are made and at a time preceding the trial judge's decision whether, in fact, to impose sanctions." (*Bergman v. Rifkind & Sterling, Inc.* (1991) 227 Cal.App.3d 1380, 1387, emphasis in original [sanctions reversed where judge's findings regarding sanctions preceded his review of the attorney's explanation and evidence of good cause].)

By imposing sanctions without prior notice and an opportunity to be heard, Judge Maciel violated canon 2A ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), canon 3B(2) ("A judge shall be faithful to the law … and shall maintain professional competence in the law"), and canon 3B(7) ("A judge shall accord to every person who has a legal interest in a proceeding … full right to be heard according to law").

The commission also disapproves Judge Maciel's statement to Mr. Wynne in open court that his firm's telling Mr. Wynne to prepare for a preliminary hearing the evening before "is the direction of malpractice at a minimum." Gratuitous remarks about malpractice made to an attorney in open court in the presence of the attorney's client are

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[1] The judge's reference to the 14th appears to have been a mistake, as the following Thursday was January 13th, the date the continued preliminary hearing took place.

contrary to canon 3B(4), which requires judges to be patient, dignified and courteous toward those with whom they deal in an official capacity.

The conduct set forth above was at a minimum improper action.

In determining that a public admonishment is appropriate, the commission notes that Judge Maciel has been the subject of the following prior discipline:

In 2001, Judge Maciel received an advisory letter for commenting to the press about a litigant's peremptory challenge of him while the case was still pending;

In 1999, Judge Maciel received an advisory letter for not following procedural requirements when he terminated a father's visitation rights without notice or a hearing;

In 1997, Judge Maciel received a public admonishment for ex parte communications with an attorney he had appointed to represent a defendant in a criminal case and to whom he was giving advice on how to handle the case;

In 1995, Judge Maciel, who was then the presiding judge, received an advisory letter for ordering a colleague to request in writing his permission to recuse in a case.

Commission members Mr. Marshall Grossman, Judge Frederick P. Horn, Mr. Michael Kahn, Mrs. Crystal Lui, Justice Judith D. McConnell, Ms. Patricia Miller, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger, and Mr. Lawrence Simi voted to impose a public admonishment. Commission member Mr. Jose Miramontes did not participate.

May 9, 2006

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| **IN THE MATTER CONCERNING JUDGE BRUCE CLAYTON MILLS** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Bruce Clayton Mills, a judge of the Contra Costa County Superior Court since 1995, whose current term began January 2003. Judge Mills and his attorney, James A. Murphy, Esq., appeared before the commission on May 10, 2006, pursuant to rule 116 of the Rules of the Commission on Judicial Performance, to contest the imposition of a public admonishment. Having considered the written and oral objections and argument submitted by Judge Mills and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

STATEMENT OF FACTS AND REASONS

I. In 1997 and 1998, Judge Mills engaged in and took action upon a series of improper ex parte communications regarding the matter of *People v. Mendell* (No. 104058-3), in violation of canon 3B(7) of the California Code of Judicial Ethics, as follows:

On November 4, 1997, Judge Mills presided over the *Mendell* misdemeanor theft case, which was scheduled for jury trial that day. Ms. Mendell appeared with her attorney, David Larkin, and entered a no contest plea. Two deputy district attorneys were present during the plea. After the plea was taken, the deputy district attorneys left the building, and Mr. Larkin left the courtroom, while Judge Mills and Ms. Mendell remained in the courtroom. Judge Mills and Ms. Mendell then engaged in a conversation about her plea and the possibility of diversion, meaning the criminal charges against her would be suspended while she fulfilled certain conditions (such as working a certain number of community service hours and participating in a theft awareness seminar), after which the charges would be dismissed. No prosecutor was present during this conversation between the judge and Ms. Mendell.

Ms. Mendell's attorney, Mr. Larkin, then returned to the courtroom and discussed Ms. Mendell's case briefly with Judge Mills. No prosecutor was present during this conversation between the judge and Ms. Mendell's defense attorney.

Judge Mills and Mr. Larkin then went into Judge Mills's chambers and continued discussing the *Mendell* case; Ms. Mendell remained in the courtroom. While Judge Mills and Mr. Larkin were in the judge's chambers, Judge Mills summoned probation officer Susan Cruz to his chambers. Ms. Cruz previously had determined that Ms. Mendell was "not suitable" for diversion because she had been convicted of misdemeanor theft from Nordstrom in 1991. This was indicated on a "Diversion Eligibility" form Ms. Cruz had prepared for the *Mendell* court file, on which Ms. Cruz had noted: "Same victim as '91 Grand Theft which received 1203.4 P.C. in '94." This notation indicated that the pending charges involved the same victim as a case in which Ms. Mendell had been convicted in 1991 (although the 1991 charges were removed from the record in 1994). After Ms. Cruz arrived in Judge Mills's chambers, the case was discussed further. Again, no prosecutor was present for this discussion.

Following Judge Mills's initial ex parte courtroom conversation with Ms. Mendell, he reviewed the *Mendell* court file and told Mr. Larkin that he would set aside Ms. Mendell's no contest plea and grant her diversion. Thereafter, following Judge Mills's discussion in chambers with Mr. Larkin and Ms. Cruz, the judge summoned defendant Mendell, who had been waiting in the courtroom, to his chambers and informed her that he was granting her diversion. Mr. Larkin and Ms. Cruz were present for this in-chambers discussion, but no prosecutor was present. Judge Mills thereupon set aside the no contest plea Ms. Mendell had entered earlier that day in the presence of the two prosecutors, and he granted her diversion. These post-plea proceedings were not reported, and no prosecutor was present for them.

After Judge Mills granted Ms. Mendell diversion, she immediately began fulfilling the conditions of diversion, including attending the theft awareness seminar and performing the required community service.

After the Contra Costa District Attorney's Office received a copy of Judge Mills's order setting aside Ms. Mendell's plea and granting her diversion, a supervising attorney from the district attorney's office telephoned Judge Mills to object to the diversion order and to the judge's having taken action on the *Mendell* matter without notifying or involving any prosecutor. Ms. Mendell's defense attorney, Mr. Larkin, did not know of, or participate in, this telephone communication between Judge Mills and the prosecutor about the *Mendell* case.

Because the district attorney's office objected to Judge Mills's having set aside Ms. Mendell's plea and granting her diversion without its knowledge or consent, Judge Mills put the *Mendell* case back on calendar and, at a hearing on January 12, 1998, terminated Ms. Mendell's diversion and reinstated criminal proceedings against her. By that time, Ms. Mendell had

completed 130 hours of her 200 hours of community service, completed a 12-hour theft awareness program, and paid $315 in fees.

Canon 3B(7) prohibits a judge from initiating, permitting, or considering ex parte communications. In the *Mendell* case, Judge Mills committed multiple violations of this prohibition. First, Judge Mills engaged in a conversation with Ms. Mendell about her case outside the presence of her counsel or any prosecutor. Second, Judge Mills engaged in a conversation with Ms. Mendell's attorney, Mr. Larkin, about the case without any prosecutor present. Third, Judge Mills conferred with Mr. Larkin and probation officer Cruz about the case in his chambers with no prosecutor present. Fourth, Judge Mills further discussed the case with Mr. Larkin, Ms. Cruz and Ms. Mendell in his chambers, and, following that discussion, took action contrary to the previously-entered plea to which the prosecutor had agreed. Each of the foregoing conversations about the *Mendell* case that occurred without any prosecutor's knowledge or consent constituted an improper ex parte communication in violation of canon 3B(7). Judge Mills's later communications with a prosecutor about the *Mendell* case without the knowledge or participation of defense counsel also was in violation of the prohibition against ex parte communications set forth in canon 3B(7).

In addition to these violations of canon 3B(7), Judge Mills's conduct was inconsistent with canon 2A, which states that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

In connection with Judge Mills's objections under rule 116 to the commission's Notice of Intended Public Admonishment, the judge and his counsel asserted in writing and during their appearance before the commission on May 10, 2006 that discipline cannot rest on the underlying *Mendell* matter because of the lapse of time since 1997 when the alleged misconduct occurred. The argument proceeds from an assumption the complaint was filed in 2001; the judge contends the commission has violated its own rules and policy declarations by the assumed five-year delay of its ensuing investigation. The judge also postulates the commission may have removed the matter from its active calendar, in which case he contends there was no proper basis for such action under Commission Policy Declaration 1.8. That policy declaration specifies non-exclusive circumstances under which the commission may remove a case from its active calendar.

The current proceedings before the commission represent the consolidation of seven separate complaints to the commission concerning Judge Mills. The first complaint was not filed in 2001, but rather in June 2003. Thereafter, six additional complaints were filed, beginning in January 2004 and spanning the period to late-March 2005. Consistent with commission policy, each subsequent complaint was consolidated with the first-filed complaint. The commission consolidates multiple open and pending complaints against a judge for reasons that include the need to ascertain whether there are patterns of behavior, and in order to assess the aggregate magnitude and severity of possible wrongdoing. The commission did not remove the

consolidated investigations from the active calendar at any time. Rather, the seven consolidated complaints, involving a wide variety of subject matters and witnesses, were investigated in a timely manner and consistent with standard commission policies and procedures.

Judge Mills also contends in his rule 116 objections he was prejudiced because former Judge Cunningham, "who would have supported [Judge Mills's] explanation of his conduct," died during the pendency of the commission's investigation. According to Judge Mills, the late-Judge Cunningham would have substantiated that at the time of the *Mendell* matter in 1997, the District Attorney of Contra Costa County did not staff misdemeanor arraignment calendars and did not object to a judge granting diversion or accepting a plea in the absence of a prosecutor at such proceedings.

In support of Judge Mills's rule 116 objections to the proposed public admonishment, the judge did present declarations to the commission from another Contra Costa County judge and two attorneys that substantiated the practices in question. However, the prosecutor's general policy of not staffing certain hearings is irrelevant to *Mendell* and the judge's misconduct in handling that matter. Notwithstanding the general practice, two deputy district attorneys were present at the plea hearing in *Mendell*; further, the prosecutor thereafter objected when Judge Mills set aside the plea and granted the defendant diversion. Thus, Judge Mills has not been prejudiced by the lack of further substantiation by Judge Cunningham of the general policies, because, unlike the general situation, the prosecutor was present and active in *Mendell*.

As respects the *Mendell* post-plea ex parte communications between the district attorney's office and Judge Mills, the judge submitted a declaration in support of his rule 116 objections. The declarant was one of the two deputy district attorneys who were present at the plea hearing, who attested he never engaged in any ex parte communication with Judge Mills. However, the post-plea ex parte communications between the judge and the prosecutor's office did not involve the attorney who filed the declaration. Rather, there is clear and convincing evidence that an attorney in the district attorney's office, who was senior to the two deputies who were present for Ms. Mendell's plea, had substantive ex parte communications with Judge Mills that resulted in the case being rescheduled for the purpose of setting aside the diversion order.

Judge Mills also urges in his rule 116 objections that his post-plea communications with the prosecutor falls within exception (d) to canon 3B(7), which permits a judge to have ex parte communications for scheduling purposes. However, at the outset of the hearing on January 12, 1998 that was scheduled because of the prosecutor's protest over the granting of diversion, Judge Mills made a statement that undermines his claim the conversation involved only scheduling. The judge stated as follows: "After the grant of diversion was made, *the district attorney's office advised me of other factors I was not aware of*. I telegraphed that immediately to Mr. Larkin, your counsel, and indicated that the case would have to be put back on calendar for further discussions." (1/12/98 R.T. 2:17–22, italics added.) The judge's introductory comment confirms

the evidence that the communications with the prosecutor involved substance, beyond scheduling. The scheduling exception of canon 3B(7)(d) therefore was inapplicable.

II. On January 5, 2005, while presiding over an arraignment, disposition and plea conference in *People v. Rieboldt* (No. 122979-9), Judge Mills assumed the role of the prosecutor in the case and engaged in conduct that was inconsistent with the proper role of a judge as a neutral arbiter. In that case, two co-defendants were charged with misdemeanors for having stolen windows from a construction site. Judge Mills was asked to give the defendants an indication of the sentence he would impose if they were to plead guilty to the misdemeanor charges. The transcript indicates that after Judge Mills reviewed the court file in the case, he made the following remarks:

> THE COURT*:* In addition, the district attorney's office has not charged a violation of 182 of the Penal Code which is felony conspiracy, which is a straight felony. It's not even a wobbler. [¶] *This conduct of these two co-defendants is felony conduct*, for a variety of reasons. [¶] One, because it is a criminal conspiracy to commit grand theft. When grand theft is, say, between $400, which is the bottom, and say, up to somewhere between 2,000 and $4,000, there could be some debate about whether it should be treated as a misdemeanor or as a felony. [¶] When the losses exceed $4,000, then generally in my experience, which runs back in the county some twenty years, *it's generally been the policy of the district attorney's office to pursue the cases on the felony level*. [¶] … [¶]
>
> THE COURT*: I'm appalled by this case***,** I've got to tell you. [¶] You know, I sit here day in and day out, and frankly, a lot of the cases are misdemeanor cases, that in the grand scheme of what comes through the courts in California, I can think it's fairly fair to say, are de minimis in nature. [¶] *This is not one of them.* **[¶]** And one thing that Mr. Torres hopefully can appreciate, is that the breadth of my experience is not limited to handling misdemeanor cases here. [¶] In this county, I spent two years of my life as a felony filing deputy. I am one of only two people, to my knowledge, in the history of this county to have held that job twice … [¶] which means that, I have as much if not more experience than any person in the history of this county, in reviewing felony cases to decide what charges should be filed, and if so, at what level, be it felony or misdemeanor. [¶] *This is felony conduct.* [¶] *The fact that this got filed as a misdemeanor, I'm just absolutely appalled. My hair is on fire***.**

> I can't tell you how stunned I am that somebody could be caravanning away from construction sites, using two trucks to more efficiently steal thousands of dollars worth of windows, to have not only admitted to having done it on numerous other occasions, but having checks issued by the fence company that's getting rid of and disposing these thousands of dollars of stolen property, and to have everybody think that this is one misdemeanor count of grand theft that is going to be dealt with de minimisly [sic]. [¶] *Frankly, I can't understand how it got to this posture. I am stunned*.
>
> Miss Hamoy [deputy district attorney], I know that apparently you didn't file this case. [¶] I don't know how the deputy DA who received this at the misdemeanor desk didn't run it up the flag pole. Maybe they did. Maybe they took it to the felony filing deputy and got marching orders to pursue it as a misdemeanor case. [¶] *I can't understand that. I don't know how*. [¶] It's not a question of problems of proof. [¶] Not only do we have full confessions, but we have the checks issued by the company that paid Mr. Torres for these windows, on multiple different dates. [¶] So it's not a question of problems of proof. [¶] *I just don't know how we got to this point*.
>
> So my thought is as follows. [¶] *One of two things is going to happen*. [¶] Based on my comments here today, *either Mr. Torres is going to plead and the case is going to get resolved today, or somebody is going to go back to the drawing board, have this reviewed by somebody that can intelligently assess what ought to have been charged, and I would think that it would be more likely than not that an amended pleading would come down the pike, charging, among other things, a violation of Section 182 of the California Penal Code, felony criminal conspiracy*, between the two charged co-defendants.

(1/5/05 R.T. 4:10–7:23, italics added.)

Judge Mills's conduct was contrary to canon 1, which requires judges to maintain "high standards of conduct ... so that the integrity and independence of the judiciary will be preserved," and canon 2A, which requires that a judge "… shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The authority to charge criminal cases is outside the scope of judicial power. (*Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 535.) It is improper for a judge to use his or her judicial

authority to attempt to influence officers of the court concerning criminal matters. (*Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 366-369.) As the California Supreme Court stated in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 845 (*Kloepfer*), "the court must not undertake the role of prosecutor or defense counsel if public confidence in the integrity of the criminal justice system is to be maintained." Repeating its earlier admonition in *People v. Carlucci* (1979) 23 Cal. 3d 249, 258, the court in *Kloepfer* stated, "It is fundamental that the trial court … must refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias." (*Kloepfer, supra*, 49 Cal.3d at 845.)

III. In 2004 and 2005, Judge Mills engaged in a pattern of conduct that is inconsistent with canon 3B(4), which requires a judge to be patient, dignified, and courteous with persons with whom the judge deals in an official capacity. The judge's conduct included making sarcastic, demeaning and belittling comments to attorneys and litigants appearing before him, and referring to "malpractice" when admonishing attorneys while their clients were present. This conduct is exemplified by the following:

**A. *People v. Milla***

On November 22, 2004, Judge Mills presided over *People v. Milla* (No. 122374-2), a misdemeanor theft case involving the use of a stolen credit card. Deputy Public Defender Jivaka Candappa, who was representing defendant Milla, told Judge Mills that the defendant was unwilling to accept the disposition offered by the court. The transcript reflects the following exchange, which occurred in open court in the presence of the defendant:

> THE COURT: Fine. *Sometimes I can't protect people from themselves, and sometimes I can't protect people from an attorney that is giving them the wrong advice*. [¶] *What I can tell you, Mr. Candappa, is that this is just stupidity and arrogance.* [¶] Your client absolutely has an opportunity to get out from under this for a $250 fine, and you are helping steer her into a path of jeopardy where she can go to jail for up to a year and a fine --
>
> MR. CANDAPPA: Your Honor --
>
> THE COURT: You know what? Fine. I don't need to talk about it any more. If that's what you want to do and that's the way you want to play it, go ahead. *We'll see where this gets you*.
>
> MR. CANDAPPA: Your Honor, your Honor, in fact, I advised Miss Milla to consider diversion but, and [sic] the probation officer spoke with her and then Miss Milla didn't want to

> do it. So I have not been steering her anywhere in that context, as your Honor would suggest --
>
> THE COURT: Well, you ought to be steering her somewhere, Mr. Candappa. *You ought to be steering her to take care of this for a $250 fine and no criminal history, that's what you ought to be doing.* [¶] But far be it for me, who's been in the system for some twenty years now, to tell you how to do your job. God knows, I tell the DA's how to do it often enough, maybe it's time I tell the defense how to do their job once in a while, too. [¶] *Mr. Candappa, to do anything other than taking this offer to resolve this case along the lines I am suggesting, is akin to malpractice, in my view*. But you go how you want to go. [¶] *After twenty years, how this case ought to be disposed of is self-evident to me, and I suspect to everybody else in this room. Except perhaps you.* [¶] I don't know what else to tell you.
>
> MR. CANDAPPA: Well, your Honor, I am not responsible -- just as when clients want to take pleas against my counsel, when clients don't want to take pleas against my counsel, this is one area where I do not steer, I convey the advice, I give analysis, I give the advice. But it is the client's decision to accept or reject the offer. I have been very clear on both sides, with one way or the other. [¶] And that is how I have chosen to do because that is how, I don't apply undue pressure either to take or not take it.
>
> THE COURT: Yes, we wouldn't want you to apply undue pressure to somebody to avoid a year in the county jail, a potential consequence of court probation, and a criminal history, we wouldn't want you to pressure them into getting out from under that, and pressure them into paying a $250 fine and resolving the case for an infraction that doesn't start a criminal history, yeah, that would be wrong, Mr. Candappa. *And if you detect sarcasm in my voice, that's the way it's intended*. [¶] *And I try not to be sarcastic from the bench, but in this case I just can't help myself, because I am just so irritated at the folly of what you are doing here.*

(1/22/04 R.T. 13:1–15:7, italics added.)

At the end of the hearing, Judge Mills said to Mr. Candappa, "*Perhaps it's time you start picking up the books and figuring out what you're doing*." (1/22/04 R.T. 17:13–14, italics added.)

The foregoing remarks by Judge Mills evidence a lack of patience, dignity and courtesy toward Mr. Candappa, contrary to the requirements of canon 3B(4).

**B. *People v. Gilmer***

On January 19, 2005, Judge Mills presided over the arraignment in *People v. Gilmer* (No. 123268-5). Deputy Public Defender Jivaka Candappa attempted to file a peremptory challenge against Judge Mills under Code of Civil Procedure section 170.6. That section grants a litigant the right to disqualify a judge from hearing a case based on an affidavit of prejudice; only one section 170.6 challenge may be exercised in any action. The transcript indicates that when Mr. Candappa presented his 170.6 affidavit, Judge Mills made the following remarks:

> THE COURT: Mr. Candappa, I received a document encaptioned Peremptory Challenge Under 170.6 of the Code of Civil Procedure, on this department. And I am somewhat puzzled. [¶] Maybe you could explain. [¶] ... [¶] The court has already reviewed and made an offer on the case. And therefore, has already determined a contested issue of fact relating to the merits of the case. [¶] I can't be challenged pursuant to 170.6 with regard to the conducting of this ADP [arraignment, disposition and plea conference]. [¶] You can't come before the court on ADP, obtain an offer from a judge, and then after you hear the offer, if you don't like the offer, decide to enter a peremptory challenge. [¶] Peremptory challenges don't work that way, it's prohibited. [¶] … [¶] *Exercising the peremptory challenge, in my view, would be malpractice because you are now waiving your ability to exercise a peremptory challenge on a trial department that you may be assigned out to.* [¶] But that's your decision to make. [¶] Do you want to file this now? [¶] . . . [¶]
>
> THE COURT: Mr. Candappa, in this case, this case has previously been on for ADP, before this court. [¶] This court has previously made an offer on this case. And you can't now forum shop by circumventing the offer made by this court on this case by papering this department. [¶] It doesn't work that way. As much as you might like to. [¶] You're not under any obligation to take the offer. So I find it puzzling that you would exercise a peremptory challenge prior to going to the master calendar department. [¶] *In fact, there is some case law that might indicate that that is bordering on malpractice, but, because there is no practical effect of this peremptory challenge* [sic]. [¶] You can't get out from under the offer that's been previously made by this

> department on this case. Because you can't exercise a peremptory challenge after hearing the offer of the court.

(1/19/05 R.T. 2:11–5:7, italics added.)

Judge Mills eventually accepted the filing of the 170.6 challenge.

Judge Mills's remarks to Mr. Candappa about "malpractice" were improper, in violation of canon 3B(4), which requires a judge to treat those appearing before the judge with patience, dignity, and courtesy. In addition, Judge Mills improperly attempted to dissuade Mr. Candappa from exercising a Code of Civil Procedure section 170.6 challenge against him. A judge may only inquire into the timeliness of a section 170.6 challenge or its technical sufficiency, not into the reasons for the challenge. (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531-532.)

**C. *People v. Ibrahim***

On January 26, 2005, Judge Mills presided over the arraignment of the defendant in *People v. Ibrahim* (Nos. 121353-7 and 123639-7). Mr. Candappa again attempted to file a peremptory challenge under Code of Civil Procedure section 170.6. Judge Mills previously had conducted an arraignment, disposition and plea hearing at which the defendant appeared in pro per. At that hearing, Judge Mills had made a settlement offer directly to the defendant, who did not accept the offer and was referred to the public defender's office for representation. Mr. Candappa was appearing for the defendant for the first time on January 26, 2005. In response to Mr. Candappa's submission of the section 170.6 challenge at that appearance, Judge Mills said:

> THE COURT: Fine. Do you want a trial date? [¶] Again, I reiterate, you cannot have an offer from a court, and after hearing the offer, decide you don't like it after the court has already reviewed the case and made the offer, and then forum shop. The system does not permit that, Mr. Candappa. [¶] For purposes of the pretrial offer, it's too late to do what you're attempting to do. That's why it's not done. *In fact, to do it is malpractice.*

(1/26/05 R.T. 5:27–6:8, italics added.)

Judge Mills's characterization of Mr. Candappa's decision as "malpractice" in front of the client was discourteous, in violation of canon 3B(4).

**D. *People v. Datta***

On August 29, 2003, Judge Mills presided over the misdemeanor theft case of *People v. Datta* (No. 118628-7), which was set for trial that day. The prosecutor handling the case, Deputy District Attorney Crystal Howard, had learned that morning, before trial was to begin, that the police officer whose availability she had confirmed two days before was now unavailable for trial that day. Ms. Howard made an oral motion to continue the trial, following which Judge Mills and Ms. Howard had the following exchange:

> THE COURT: You are going to have to change the manner in which you prepare for your cases. You are going to have to do preparation. You are going to have to contact your witnesses in advance. If you continue to proceed this way and you continue to choose not to do it, *you're not going to be welcome any longer in this court*.
>
> MS. HOWARD: May I respond, your Honor?
>
> THE COURT: I don't know how else to put it. I have had this discussion with you. And it's not that I don't understand your position. I have been in your position. I have been a deputy district attorney with numerous cases to prepare for trial on a particular day. I have spent hours toiling on the phone contacting witnesses in advance so that I am prepared when I show up on trial day. [¶] In 107 jury trials I never showed up on trial day once without having talked to my witnesses in advance, and without having prepared my witnesses before they took the stand. [¶] This is a chronic problem with you. It is a problem for which you and I have discussed the remedy. And it's a problem for which you choose not to pursue the remedy. [¶] I'm exceedingly disappointed, I don't know how else to put it. I don't understand this, showing up on trial day and not knowing the status of your witnesses, it's a mystery to me.
>
> MS. HOWARD: Could I respond, your Honor, please?
>
> THE COURT: I don't know what you could say. What could you possibly say? You waited until trial day and you got burned again. What could you possibly say?
>
> MS. HOWARD: I could tell the court I did, in fact, call the Sheriff's Department last night, asked to speak with Officer

> Heuerman and Deputy Moore. Was informed they were not working. [¶] Called the Fremont Police Department, asked to speak with Officer Barrett and Officer Wack. Officer Barrett called me back. He told me both he and Officer Wack are working and are available. [¶] I spoke with Deputy Moore who told me he is, in fact, available. [¶] I spoke with our subpoena clerk at our office who told me, when I had explicitly told them, please find out if they're not available because we need declarations ahead of time, I was told everyone had been told it was trailing until today, no declarations had been returned. [¶] So I realize that I may not have spoken to everyone last night, I did what I could. [¶] … [¶]
>
> THE COURT: You can't call witnesses to the stand that you haven't prepped, that you haven't sat down and talked to and gone over the case and their testimony with. *It is quote, "malpractice," end quote, to call witnesses to the stand that have not been prepared. It's malpractice*.

(8/29/03 R.T. 3:25–6:12, italics added.)

Judge Mills failed to treat Ms. Howard with patience, dignity and courtesy, as required by canon 3B(4), particularly when he told her she would not be welcome in his court and when he accused her of "malpractice" in open court.

**E. *People v. Contreras***

In mid-December 2004, Judge Mills presided over the jury trial of *People v. Contreras* (No. 121632-4). At trial, the deputy public defender representing defendant Contreras, Joni Spears, requested a court interpreter on the basis that her client did not understand, or proficiently speak, English. Judge Mills initially allowed a court interpreter for the defendant. Partway through the trial, however, Judge Mills conducted a hearing outside the presence of the jury to determine the defendant's need for an interpreter and concluded that the defendant was sufficiently fluent in English and that an interpreter was not warranted. Judge Mills then dismissed the interpreter. After the defendant was convicted by the jury, Ms. Spears argued that the dismissal of the interpreter had been the basis for the jury's conviction of her client. During this argument, Judge Mills made the following comments to Deputy Public Defender Spears while the defendant was present:

> But *I am not going to continue to spend $180 per interpreter, per half day, to conduct a charade with the defendant that*, if I believe he can clearly understand English, *is having the interpreters here to establish the fictional defense*.

(12/10/04 R.T. 72:23–27, italics added.)

> Unfortunately, you know, while *this is entertaining that you have this opinion*, it is not founded in the law.

(12/10/04 R.T. 227:16–18, italics added.)

> THE COURT: Because Mr. Contreras was feigning he didn't understand the questions, and *it was just a game. It was a dog and pony show*, Miss Spears.

(12/13/04 R.T. 255:11–13, italics added.)

A judge has discretion to make a credibility determination with regard to whether a defendant is entitled to a court-ordered interpreter. (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1452-1458.) Nevertheless, the foregoing comments Judge Mills made in connection with exercising his discretion were sarcastic and discourteous to the defendant and to his attorney in violation of canon 3B(4).

Judge Mills has engaged in a pattern of making comments that are discourteous, sarcastic, demeaning and belittling to those appearing before him. Such remarks toward a litigant or counsel are not consistent with the conduct required by canon 3B(4). (See, e.g., *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 323-327 [disapproving the use of demeaning, rude, impatient and abusive behavior toward counsel]; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 703 [disapproving the ridiculing of attorneys].)

In Judge Mills's written rule 116 objections and at his appearance before the commission on May 10, 2006, the judge acknowledged his "malpractice" language was inappropriate and he apologized to the commission for using it. He also submitted the declarations of a judge and two attorneys in support of his contention that the conduct of the attorneys in some of these cases fell below the standard of care expected of a competent attorney. However, the issue before the commission is not whether there was attorney malpractice, but rather, whether there was judicial misconduct. Irrespective of whether the attorneys in question were acting in a competent manner, Judge Mills's demeaning and insulting comments to the attorneys in open court were inappropriate and in violation of canon 3B(4).

In determining to issue this public admonishment, the commission noted that Judge Mills received a private admonishment in 2001 for ignoring a defendant's request for counsel and attempting to coerce him into a guilty plea.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose Miramontes, Mrs. Penny Perez and Ms. Barbara Schraeger voted for a public admonishment. Commission members Judge Risë Jones Pichon and Mr. Lawrence Simi voted for a private admonishment that would not base any discipline on the *Mendell* matter because of the passage of time since Judge Mills presided over that case. Commission members Mr. Michael Kahn and Mrs. Crystal Lui did not participate.

Dated: June _12_, 2006

_____/s/_____
Marshall B. Grossman
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

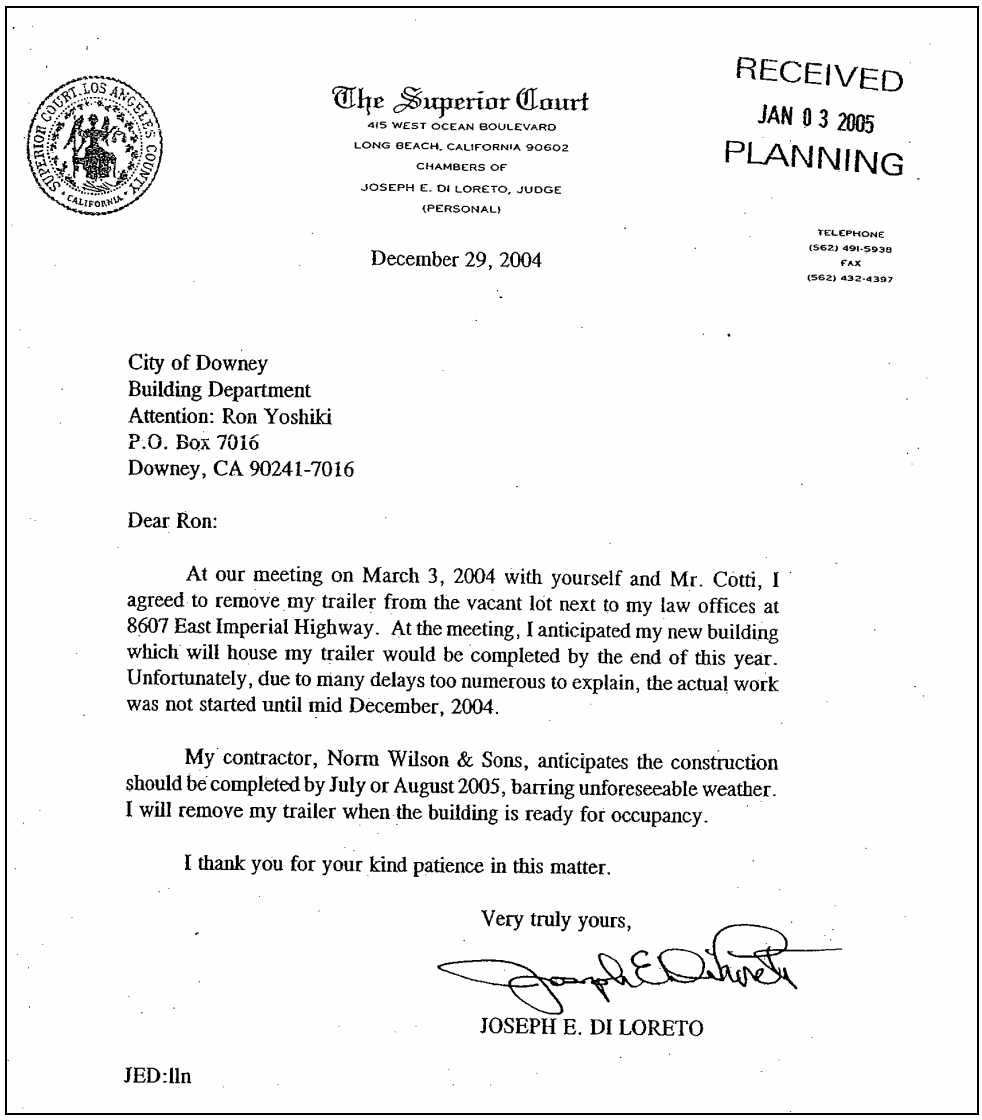
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| **IN THE MATTER CONCERNING JUDGE JOSEPH E. DI LORETO** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Joseph E. Di Loreto, a judge of the Los Angeles County Superior Court since 1995, whose current term began in January 2003. Judge Di Loreto and his attorney, Edward P. George, Jr., Esq., appeared before the commission on May 10, 2006, pursuant to rule 116 of the Rules of the Commission on Judicial Performance, to contest the imposition of a public admonishment. Having considered the written and oral objections and argument submitted by Judge Di Loreto and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

## STATEMENT OF FACTS AND REASONS

Judge Di Loreto owns a vacant lot in Downey, California next to a commercial professional building he also owns. In November 2003, the City of Downey initiated a code enforcement action, based on an alleged violation of Downey Municipal Code sections 9144.08 and 9150.14 due to the presence of trailers and motor vehicles stored on the vacant property. In March 2004, Judge Di Loreto attended a meeting at the Downey Police Department regarding the alleged violations and agreed to remove the vehicles to avoid legal action. The city was represented at the meeting by a code enforcement officer, Mark Detterich, as well as the assistant director for community development/city planner, Ron Yoshiki, and the city prosecutor, John Cotti.

On December 29, 2004, Judge Di Loreto sent the following letter to the city planner, Ron Yoshiki:



The Superior Court
415 WEST OCEAN BOULEVARD
LONG BEACH, CALIFORNIA 90802
CHAMBERS OF
JOSEPH E. DI LORETO, JUDGE
(PERSONAL)

RECEIVED
JAN 0 3 2005
PLANNING

TELEPHONE
(562) 491-5938
FAX
(562) 432-4397

December 29, 2004

City of Downey
Building Department
Attention: Ron Yoshiki
P.O. Box 7016
Downey, CA 90241-7016

Dear Ron:

At our meeting on March 3, 2004 with yourself and Mr. Cotti, I agreed to remove my trailer from the vacant lot next to my law offices at 8607 East Imperial Highway. At the meeting, I anticipated my new building which will house my trailer would be completed by the end of this year. Unfortunately, due to many delays too numerous to explain, the actual work was not started until mid December, 2004.

My contractor, Norm Wilson & Sons, anticipates the construction should be completed by July or August 2005, barring unforeseeable weather. I will remove my trailer when the building is ready for occupancy.

I thank you for your kind patience in this matter.

Very truly yours,

JOSEPH E. DI LORETO

JED:lln

The judge's letter, on "chambers" judicial stationery, with "The Superior Court" printed at the top, and with the court's address and official seal, expressly identified Judge Di Loreto as a judge; the letterhead bore the inscription "Joseph E. Di Loreto, Judge". In the letter, Judge Di Loreto sought an extension of time within which to remove his trailer and, implicitly, the forbearance of legal action. This December 29, 2004 letter was referred to in subsequent correspondence by another city employee and the City Attorney on behalf of the City of Downey regarding the dispute.

Judge Di Loreto's prior use of chambers judicial stationery resulted in discipline. This prior matter, in 2001, involved the use of chambers judicial stationery in a personal dispute over

ownership of a racing car with a "long-time personal friend" of the judge, a Mr. Barton. The stationery used was identical to that used in the December 29, 2004 letter to Mr. Yoshiki in the dispute with the City of Downey.

The commission issued an advisory letter to Judge Di Loreto in 2001 that stated, in pertinent part, as follows:

> The commission expressed disapproval of your sending a letter on chambers judicial stationery to Robert Barton concerning a dispute between you and Mr. Barton with regard to ownership of a racing car. It was the commission's view that this letter, asserting lawful ownership of property that was the subject of a dispute and dictating your preferred resolution, constituted a use of judicial stationery to advance a personal or pecuniary interest. Accordingly, the commission concluded, your letter was inconsistent with Canon 2B(2) of the Code of Judicial Ethics, which states that a judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others, and with Canon 2B(4), which states that a judge shall not use the judicial title in any written communication intended to advance the judge's personal or pecuniary interests.

Judge Di Loreto's use of chambers judicial stationery in the current matter concerning a private dispute as a property owner with the City of Downey, again violated canons 2B(2) and 2B(4). The fact that the printed judicial letterhead included a parenthetical "personal" is irrelevant, given that the court stationery was being used in the judge's personal dispute with a governmental agency regarding his own property. Letters such as the one written by Judge Di Loreto regarding official governmental business typically are included in an official record that may be reviewed by other government employees and officials, and may be used as evidence in subsequent legal proceedings.

The propriety of using judicial stationery in personal disputes does not turn on whether or not the recipient already knows the author is a judge. Rather, the use of judicial stationery is prohibited under the canons in question because, in such circumstances, such use involves lending the prestige of office or the judicial title to advance personal or pecuniary interests.

In reaching its determination that public discipline was appropriate in this matter, the commission noted that Judge Di Loreto's use of chambers judicial stationery in his dispute with the City of Downey was the same conduct that resulted in his 2001 advisory letter, and that the judge continues to advance the same justification for the improper behavior – the addressee knew the judge was a judge – that the commission rejected in 2001. In Judge Di Loreto's opposition to the commission's preliminary investigation letter in this matter, he asserted that since Mr. Yoshiki knew the judge was a judge, the use of the letterhead was appropriate. Indeed, in the

judge's written objections under rule 116 to the proposed public admonishment, he persisted in making the same assertion, which he repeated during his oral presentation to the commission on May 10, 2006.

Judge Di Loreto's use of judicial stationery for his December 29, 2004 letter to Mr. Yoshiki was, at a minimum, improper action.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted for a public admonishment. Commission member Mrs. Crystal Lui did not participate.

Dated: June 13, 2006

/s/
Marshall B. Grossman
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| **IN THE MATTER CONCERNING JUDGE PAUL E. ZELLERBACH** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Paul E. Zellerbach, a judge of the Riverside County Superior Court since 1995, whose current term began January 2001. Judge Zellerbach and his attorney, Edith R. Matthai, Esq., appeared before the commission on June 28, 2006, pursuant to rule 116 of the Rules of the Commission on Judicial Performance, to contest the imposition of a public admonishment. Having considered the written and oral objections and argument submitted by Judge Zellerbach and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

## STATEMENT OF FACTS AND REASONS

In October 2004, Judge Zellerbach presided over the murder case of *People v. Joseph Francis Close*, which involved a drunk driving accident in which the defendant's girlfriend and unborn baby were killed. Judge Zellerbach delayed taking a verdict in this case because he was at a baseball game in Anaheim. He refused to allow another judge who was available to take the verdict, and did not return from the game to take the verdict himself, as follows.

The *Close* case went to the jury on October 4, 2004. During the late morning of October 5, 2004, Judge Zellerbach left court to attend an Angels baseball playoff game in Anaheim that afternoon. Before he left, Judge Zellerbach made arrangements for Judge

Robert Spitzer to answer any questions that the deliberating jury might have. However, he did not arrange to have Judge Spitzer or any other judge take the verdict.

The jury reached a verdict around 2:30 p.m. on October 5. Judge Zellerbach's clerk immediately tried to reach the judge on his cell phone. When he did not answer, she left a message regarding the verdict. When Judge Zellerbach did not promptly return her call, the clerk contacted Judge Christian Thierbach, through his clerk, and determined that Judge Thierbach was available to take the verdict. Judge Zellerbach's clerk then contacted the attorneys in the *Close* case and told them to come to court at 3:30 p.m., in order to allow them sufficient time to have the defendant's and victim's families present for the verdict.

Judge Zellerbach then returned his clerk's telephone call. When the clerk told the judge that Judge Thierbach could take the verdict, Judge Zellerbach said that he wanted to do so himself, and instructed his clerk to tell the attorneys to return to court the next morning, October 6. The clerk reached the attorneys before they were to arrive at court that afternoon and relayed the judge's message. However, the attorneys came to court that afternoon and asked the clerk to contact Judge Zellerbach again, in order to convey their wish to have the verdict taken that day.

When the clerk telephoned Judge Zellerbach at the baseball game again, he reiterated that he did not want another judge to take the verdict, and that he would take the verdict himself the next day. Judge Zellerbach took the verdict on the morning of October 6.

Canon 3A of the Code of Judicial Ethics requires that judicial duties take precedence over all other activities of a judge. Judge Zellerbach failed to give his judicial duties precedence. He went to a baseball game while a jury was deliberating on a homicide case, without having arranged for another judge to take the verdict. When informed that the jury had reached a verdict, he was unwilling to allow another judge to take the verdict. This same conduct also violated canon 3B(8), which requires a judge to dispose of all judicial matters promptly and efficiently. In addition, Judge Zellerbach's conduct was inconsistent with canon 2A, which requires that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

In his written objections under rule 116 to the commission's Notice of Intended Public Admonishment and during his appearance before the commission on June 28, 2006, Judge Zellerbach and his attorney denied that Judge Zellerbach's actions reflect a failure to give his judicial duties precedence. The judge's written argument on this point was that he went to the game without arranging for another judge to take the verdict because he did not think the jury would return with a verdict that day, given the complicated issues in the trial. Judge Zellerbach has nearly 30 years of experience as a judge and a prosecutor, on the basis of which he must have known that it is not possible to predict how long a jury will deliberate, irrespective of how complicated the issues or how long the trial. Indeed, during his appearance before the commission, the judge conceded the impossibility of making such predictions.

As a further basis for objecting to the proposed discipline, Judge Zellerbach asserted that he instructed his clerk to put the case over until the next day, rather than allowing another judge to take the verdict, because he was concerned about complicated legal issues in the case and as related to the possible verdict. Given the asserted complexity of the legal issues, Judge Zellerbach should not have gone to the baseball game while the jury was deliberating. The judge acknowledged the correctness of this conclusion during his appearance before the commission.

As part of his oral presentation, Judge Zellerbach also referred to other cases where other judges had delayed taking a verdict until the next day. There likely are instances where good cause exists for such delay. A judge attending a baseball game is not such an instance, however.

Judge Zellerbach acknowledged during his appearance that, with the benefit of hindsight, he now realizes he should have let another judge take the verdict in his absence. The commission appreciates that Judge Zellerbach has reevaluated the situation. There was a serious dereliction of judicial duty, nonetheless, by which Judge Zellerbach jeopardized the verdict in a double homicide case and imposed hardship and additional stress on jurors, the families of the victim and the defendant, and on counsel and the defendant. There also was adverse local press coverage concerning the taking of the verdict in the *Close* case; a columnist criticized Judge Zellerbach's absence from court while attending the game, and his refusal to allow another judge to take the verdict. Judge Zellerbach described the commentary as reflecting adversely upon the judiciary in general and upon him personally.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose Miramontes, and Ms. Barbara Schraeger voted for a public admonishment. Commission members Mrs. Crystal Lui, Mrs. Penny Perez, Judge Risë Jones Pichon, and Mr. Lawrence Simi voted for a private admonishment. Commission member Mr. Michael Kahn did not participate.

Dated: August 15, 2006

/s/
Marshall B. Grossman
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| **IN THE MATTER CONCERNING JUDGE PAMELA L. ILES** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |
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This disciplinary matter concerns Judge Pamela L. Iles, who was appointed to the Orange County Municipal Court, South Orange County Judicial District, in January 1983, and elevated to the Orange County Superior Court in August 1998, upon unification of the trial courts. Her current term began in January 2001. Judge Iles and her attorney, Edith R. Matthai, Esq., appeared before the commission on June 28, 2006, pursuant to rule 116 of the Rules of the Commission on Judicial Performance, to contest the imposition of a public admonishment. Having considered the written and oral objections and argument submitted by Judge Iles and her counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

## STATEMENT OF FACTS AND REASONS

On August 5, 2002, while presiding over *People v. Wagner* (No. 02SF0210FA), a domestic violence case, Judge Iles placed the defendant on probation. The conditions of probation included that the defendant pay certain fines and donate $1,000 to a battered women's shelter called Laura's House, that he participate in a batterer's program, and that he contact the Health Care Agency by a certain date in order to be evaluated for a substance abuse program.

The terms of probation were modified several times, including (1) an extension of time until December 16, 2002, for the defendant to appear in court to present proof of enrollment in a substance abuse program, and (2) an extension of time until January 7,

2003, to provide a progress report on the batterer's program and proof that he paid the donation to Laura's House.

On December 16, 2002, Mr. Wagner failed to appear and provide proof of enrollment in a substance abuse program. Judge Iles ordered his probation revoked and a bench warrant issued for his arrest.

Two days later, on December 18, 2002, Mr. Wagner appeared voluntarily before Judge Iles, without counsel, to request a payment schedule for the money he owed. The bench warrant, issued two days earlier, was recalled when the defendant appeared. Mr. Wagner told Judge Iles that he could not enroll in the substance abuse program because he was taking prescription drugs for a medical condition. The judge ordered Mr. Wagner to appear on January 8, 2003, for further proceedings, including a hearing to consider a physician's report regarding his medical condition. She then sent the defendant to the office of her judicial assistant, Leslie Howard, to discuss payment of the funds he owed.

Mr. Wagner went to Ms. Howard's office and told her that he was unwilling to pay the donation to Laura's House. Ms. Howard left her office followed by Mr. Wagner, went to Judge Iles's courtroom, approached Judge Iles who was dealing with another case, slammed Mr. Wagner's case file down on the sidebar, and told the judge that Mr. Wagner was not cooperating with her and that she could not work with him. Judge Iles told Mr. Wagner that since he was not willing to cooperate with the assistant, he would be taken into custody, and she instructed her bailiff to do so.

Judge Iles's bailiff handcuffed Mr. Wagner and placed him in the in-custody box in the courtroom. Mr. Wagner repeatedly asked Judge Iles why he was being put in custody. Judge Iles told him that he was going into custody because he was not cooperating with Ms. Howard, but later told him he was in custody for a probation violation. Judge Iles then ordered her bailiff to "take him down," meaning that he was to be removed from her courtroom to a cell elsewhere. The bailiff did so. Judge Iles then appointed the Public Defender to represent Mr. Wagner and set the matter for an arraignment hearing – 29 days later – on January 16, 2003. No bail was set and Mr. Wagner remained in custody.

Mr. Wagner filed a petition for writ of habeas corpus. In a published opinion, the Court of Appeal granted the petition, finding that, while Mr. Wagner's disobedience of the order to appear on December 16, 2002, was a valid basis for his probation revocation, Judge Iles's placing Mr. Wagner in jail, denying him bail and scheduling a hearing nearly

one month later was a de facto revocation of Wagner's probation without affording him requisite due process. (*In re Wagner* (2004) 127 Cal.App.4th 138, 145-146 (*Wagner*).) As the appellate court noted, case law requires that, in connection with probation revocation, probationers be advised of their rights to a formal hearing, to be represented by counsel, to present evidence, to confront and cross-examine witnesses, and to disclosure of the evidence against them. (*Ibid.*, citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 488-489 and *People v. Vickers* (1972) 8 Cal. 3d 451, 457-461 (*Vickers*).)

The factual underpinnings of the Court of Appeal decision are findings made by Judge Roger D. Randall following an evidentiary hearing he held, pursuant to an order of the appellate court, as noted by the court in its decision. (See *Wagner*, *supra*, 127 Cal.App.4th at p. 141.) According to the court, contrary to the foregoing due process requirements,

> [A]ll [Judge Iles] did was tell [Mr. Wagner] he would be taken into custody because he was not willing to cooperate with the judicial assistant and, when he inquired why he was taken into custody, she merely replied that he was in violation of his probation. This did not satisfy [Judge Iles's] duty to afford due process to [Mr. Wagner].

(*Wagner*, *supra*, 127 Cal.App.4th at p. 146.)

In her written objections to the proposed public admonishment and at her appearance before the commission, Judge Iles asserted that she notified Mr. Wagner of the basis of his arrest through his public defender who was appointed after his probation was summarily revoked and after he was remanded into custody. However, she has never provided any evidence to the commission in support of this factual assertion, and it is not reflected in Judge Randall's findings. Furthermore, Mr. Wagner was already in custody before any such notice may have been given. A probationer is entitled to notice of the basis of a probation violation and an opportunity to respond at the initial hearing at which probation is summarily revoked. (*Vickers, supra,* 8 Cal.3d at pp. 456-457.)

Judge Iles also asserts that the commission should assess her conduct by the statutory standard set by Penal Code section 1203.2, subdivision (a). That code section authorizes a judge to summarily revoke probation upon the rearrest of the probationer where there is reason to believe that the person has violated any of the conditions of probation. However, the Supreme Court has made clear that section 1203.2 "provides for

some but not all of the minimum due process requirements necessary to conform such proceedings to the Fourteenth Amendment proscription." (*Vickers, supra*, 8 Cal.3d at p. 458.) As stated by the Court of Appeal here, "[p]lacing [Mr. Wagner] in jail, denying him bail, and scheduling a hearing a month hence constituted a de facto revocation of his probation without satisfying any of the due process requirements demanded upon such revocation." (*Wagner, supra*, 127 Cal.App.4th at p. 145.)

Finally, Judge Iles has asserted during the commission investigation and in connection with her objections to the proposed discipline that she has committed only legal error, for which the commission may not discipline her because of the Supreme Court decision in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371 (*Oberholzer*). In that case, the court held that the commission lacks authority to sanction a judge for "mere legal error." (*Id*. at p. 398.) However, and as relevant here, the court was specific that, a judge who commits legal error that *additionally* reflects enumerated types of misconduct is subject to commission discipline. (*Ibid.*) When, as here, there is legal error *and* clear and convincing evidence of a "disregard for fundamental rights," the commission may impose discipline. (*Ibid*.)

Judges are required to be solicitous of the rights of persons who come before the court. (See *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 286.) Judge Iles is an experienced jurist. No reasonable or reasonably competent judge would assume or conclude that he or she could summarily incarcerate an unrepresented defendant, in the manner Judge Iles did here, without implicating fundamental rights. (Cf. *In the Matter Concerning Judge Stephen P. Gildner*, Decision and Order Imposing Public Admonishment (2005), p. 4 [no reasonable or reasonably competent judge would assume or conclude that he or she could issue warrants for defendants' arrests for failure to appear, in the absence of any evidence the defendants had notice of hearing].) Judge Iles's actions in remanding Mr. Wagner to custody without notice or the opportunity to respond to the charges clearly and convincingly reflects a disregard for his fundamental rights.

Judge Iles's conduct also violates canon 2A, which requires judges to respect and comply with the law, and canon 3B(2), which requires judges to be faithful to the law and maintain professional competence in the law. At a minimum, Judge Iles committed improper action within the meaning of article VI, section 18, subdivision (d).

In determining that a public admonishment was appropriate, the commission noted that Judge Iles has been the subject of prior discipline.

In 1988, Judge Iles received an advisory letter for failing to strictly abide by statutory requirements in imposing sanctions on a litigant.

In 1997, Judge Iles received an advisory letter for her handling of a domestic violence case, which gave rise to the appearance of embroilment and abandonment of her role as a neutral judicial officer. Judge Iles told the defendant that his probation would be violated if the victim contacted him, denied bail pending appeal although the defendant was statutorily entitled to it, and participated in settling the record on appeal after having been disqualified.

In 2004, Judge Iles received a private admonishment for displaying embroilment and partiality in a criminal case, and for creating the appearance that she sought to use her judicial office to advance her personal interest in achieving a particular outcome. The judge personally contacted a prosecutor suggesting that he investigate an attorney for perjury, asked witnesses to prepare declarations for the district attorney's office, and repeatedly contacted prosecutors about their investigation while it was ongoing. In the private admonishment, the commission noted "with great concern that this is the third occasion on which the judge's inappropriate conduct has warranted commission action."

Commission members Mr. Marshall B. Grossman, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose Miramontes, Mrs. Penny Perez, and Mr. Lawrence Simi voted for a public admonishment. Commission members Mrs. Crystal Lui, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted for a private admonishment. Commission member Judge Frederick P. Horn was recused, and Commission member Mr. Michael A. Kahn did not participate.

Dated: August 16, 2006

/s/
Marshall B. Grossman
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE STEPHEN E. BENSON** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Stephen E. Benson, a judge of the Butte County Superior Court since January 2001. Judge Benson was elected to office in 2000 in a contested election that is the subject of this decision, and began his current term in January 2001. Judge Benson and his attorney, James A. Murphy, Esq., appeared before the commission on October 17, 2006, pursuant to rule 116 of the Rules of the Commission on Judicial Performance, to contest the imposition of a proposed public admonishment. The judge did not submit any substantive written objections or argument against the proposed discipline. Having considered the oral objections and argument presented by Judge Benson and his counsel during the appearance, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18, subdivision (d), of the California Constitution, based upon the Statement of Facts and Reasons that follows.

STATEMENT OF FACTS AND REASONS

This public admonishment is based on violations of the Political Reform Act (the "Act") [1] by then-attorney Stephen E. Benson (hereafter Judge Benson) when he was a candidate for the Butte County Superior Court in 2000. The Act requires candidates to deposit all contributions and loans to a campaign into a separate bank account designated for the campaign committee (Gov. Code § 85201), and to disclose the source and amount of contributions or loans of $100 or more on campaign statements for the reporting period in which the loan or contribution was received (Gov. Code §§ 84211, 84216, 84216.5).

In September 2005, the Fair Political Practices Commission (FPPC) charged Judge Benson with four violations of the Act that occurred during his campaign for judicial office in 2000. The charges were based on information received during a routine tax audit of Judge Benson's campaign committee. The audit disclosed that on or about September 21, 2000, Judge Benson deposited a $71,000 loan he received from his father, Helmer G. Benson, into the judge's personal bank account. The judge later dispersed the loan in increments of $60,000 and $11,000 into his campaign account, listing himself as the source on each occasion. The FPPC charges were as follows:

I. Judge Benson received a $71,000 contribution to his judicial campaign in the form of a loan from his father, Helmer G. Benson. On or about September 21, 2000, Judge Benson deposited the loan from his father into his personal bank account and failed to disclose the loan on required campaign statements. When Judge Benson later deposited funds from the loan into his

[1] The Political Reform Act is contained in Government Code sections 81000 through 91014.

campaign account, he reported himself rather than his father as the source of the loan in violation of the Act. (Gov. Code § 85201 (c).)

II. In a pre-election campaign statement filed on or about October 5, 2000, for the reporting period July 1, 2000 through September 30, 2000, Judge Benson failed to disclose the $71,000 campaign loan from his father in violation of the Act. (Gov. Code §§ 84211 (f) and 84216 (c).) [2]

III. In a pre-election campaign statement filed on or about October 25, 2000, for the reporting period October 1, 2000 through October 21, 2000, Judge Benson disclosed himself rather than his father as the source of the loan and improperly reported the amount of the loan as $60,000 in violation of the Act. (Gov. Code §§ 84211 (f) and 84216 (e).)

IV. In a semi-annual campaign statement filed on or about January 31, 2001, for the reporting period October 22, 2000 through December 31, 2000, Judge Benson disclosed himself rather than his father as the source of the loan and improperly reported the amount of the loan as $21,000 in violation of the Act. (Gov. Code § 84211(g).)

On September 21, 2005, Judge Benson signed a stipulation for consideration by the FPPC in which he admitted each of the above-mentioned violations. On October 13, 2005, the FPPC approved the stipulation, and entered a decision and order finding each of the above-mentioned allegations to be true and imposing a penalty of $7,000 on Judge Benson. The decision by the FPPC to impose less than the maximum penalty ($11,000) was based, in part, on its finding that Judge Benson

[2] These and subsequent citations to Government Code sections refer to the code sections as they existed in 2000; certain subdivisions were revised and re-lettered in January 2001.

was not trying to conceal that his father was a contributor to his campaign, as the judge had disclosed his father as the source of a previous loan during the campaign. The stipulation, decision and order subsequently were referred by the FPPC to the Commission on Judicial Performance in October 2005.

During his appearance before the commission to contest the proposed discipline, Judge Benson repeatedly stated he did not dispute any of the factual allegations concerning his violations of the Act. He was asked twice by a commission member why he had disclosed a smaller loan from his father during the primary election, yet failed to disclose the $71,000 loan from his father during the general election. Judge Benson stated he was not trying to hide the fact his father had loaned him money, but he could not explain his failure to disclose the large loan. According to the judge, "It was a simple detail that just didn't even occur to me as – I can't tell you why."

An express purpose of the Political Reform Act, as set forth in Government Code section 81002, subdivision (a), is to ensure that "[r]eceipts and expenditures in election campaigns [] be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Judge Benson undermined this basic purpose of the Act by failing to disclose that his father in large part financed his campaign. The father's $71,000 loan represented over 40 percent of the total contributions received by Judge Benson during the reporting period. Judge Benson's failure to obey the requirements of the Act also constitute violations of canon 3B(2) which requires a judge to "be faithful to the law," and canon 2A which requires a judge to comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary. At a minimum, the judge's misconduct constitutes improper action within the meaning of article VI, section 18, subdivision (d), of the California Constitution.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mrs. Crystal Lui, Justice Judith D. McConnell, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted for a public admonishment. Commission members Mr. Michael A. Kahn and Ms. Patricia Miller did not participate.

Dated: November 15, 2006

/s/
Marshall B. Grossman
Chairperson

**PUBLIC ADMONISHMENT OF JUDGE JAMES M. BROOKS**

The Commission on Judicial Performance has ordered Judge James M. Brooks publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Brooks has been a judge of the Orange County Superior Court since 1998. His current term began in January 2005. Previously, he was a judge of the Orange County Municipal Court from 1987 to 1998.

1. In 2004, Judge Brooks presided over the case of *Palacio Del Mar Homeowners Association v. McMahon*, case number 01CC14684.

On October 20, 2004, Judge Brooks presided over an order to show cause hearing regarding Elizabeth McMahon's alleged contempt for failure to appear for her deposition. During that hearing, Judge Brooks made statements to Arnold and Elizabeth McMahon that were sarcastic, demeaning, and intimidating. The following colloquy took place at the beginning of that hearing:

> ARNOLD MCMAHON: My deposition was set for October 15. I woke up about 3:30 on the morning of October 14, with a very intense pressure in my chest. I went over to my doctor and they did an EKG and found abnormalities in it. So he asked me to immediately go to the nearest hospital.
>
> THE COURT**:** Gee. I wonder what's going to happen when we put you in jail, Mr. McMahon. Your little ticker might stop, you think?

Then, after ordering Elizabeth McMahon to appear for her deposition on a new date, Judge Brooks stated the following to her counsel: "[T]ell her to bring a check for $5,000. That's the sanctions I'm imposing for her contempt and contemptuous conduct towards the court and Mr. Kim. First, $5,000 . . . she pays to him. If she doesn't show up on the 27th it will be [$]10,000 payable to the court. I'd mention jail but it might give her a heart attack." Judge Brooks's conduct violated canon 3B(4) of the California Code of Judicial Ethics, which requires that a judge be patient, dignified and courteous to litigants and others with whom the judge deals in an official capacity.

Judge Brooks issued a minute order embodying his oral ruling on contempt, which stated, in part: "IN THE EVENT THAT [ELIZABETH MCMAHON] DOES NOT APPEAR FOR DEPOSITION AS ORDERED[,] SANCTIONS WILL BE IMPOSED IN THE SUM OF $10,000.00 PAYABLE TO CLERK OF THE COURT."

On May 31, 2005, the Court of Appeal of the State of California, Fourth Appellate District, issued a nonpublished opinion, *McMahon v. Superior Court*, case number G034741, that, in part, affirmed Judge Brooks's order adjudging Elizabeth McMahon guilty of contempt and imposing $5,000 in sanctions. However, the Court of Appeal also found that Judge Brooks had improperly threatened to impose sanctions of $10,000 against Elizabeth McMahon, and issued an order directing Judge Brooks to vacate the portion of his October 20, 2004 order threatening to impose those sanctions. In its opinion, the Court of Appeal stated, with regard to Judge Brooks's conduct:

> On the other hand, no authority exists for the court to threaten sanctions of $10,000 should Elizabeth again fail to appear for deposition. The court plainly could not adjudicate Elizabeth in contempt for failure to appear in the future without first holding another contempt trial, pursuant to the procedures described above.
>
> . . . The Association's declarations in support of their sanctions requests do not itemize the attorney fees and costs incurred therein, which presumably do not total the entire $5,000 sanctions already imposed, let alone the threatened $10,000. Thus, the court lacked substantial evidence to threaten Elizabeth with sanctions of $10,000 for her contempt.

Judge Brooks's conduct violated canon 2A, which provides that a judge "shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Judge Brooks's conduct also violated canon 3B(7), which provides that a judge shall accord every person who has a legal interest in a proceeding full right to be heard according to the law.

2. In 2005, Judge Brooks presided over the case of *Vinci Investments Co., Inc. v. Joher, et al.*, case number 04CC04522, a contract action seeking specific performance and damages for the defendants' failure to transfer ownership of certain property. During a hearing after trial in the matter on June 15, 2005, while issuing his tentative ruling against the defendants, Judge Brooks stated:

> THE COURT: Mrs. Joher, the mother, Sosha or whatever her name is, she's the one that Joe, among others, has turned everything over to, put everything in her name; a lady that probably doesn't know where the restaurant is; a lady that, in her own country - I put a question mark; I know it's Syria, Iraq, Iran, Lebanon -probably a very nice lady, probably doesn't know how much she owns, I don't think.

(R.T. 16:21 – 17:1.)

In a supplement to his tentative ruling in that case, Judge Brooks stated that the defendant transferred "much of the business/property into the name of defendant 'Joe' Joher's wife, who, in her native Syria (?) probably wouldn't be allowed to own property."

Judge Brooks's comments in the *Joher* case violated canon 3B(5), which requires judges to refrain from speech that would reasonably be perceived as bias or prejudice. Judge Brooks's conduct also violated canon 2A, which requires judges to act in a manner that promotes public confidence in "the integrity and impartiality of the judiciary" as well as canon 3B(4) which requires judges to be "patient, dignified and courteous" toward those with whom they deal in an official capacity.

Judge Brooks's conduct described above was, at a minimum, improper action pursuant to article VI, section 18(d)(3) of the California Constitution.

In determining that a public admonishment was appropriate, the commission noted that Judge Brooks has previously been disciplined for conduct similar to that set forth above. In 1996,

Judge Brooks received an advisory letter addressing, in part, the judge's comments reflecting ethnic bias: referring to Hispanic defendants as "Pedro"; issuing a bench warrant for an Asian defendant for "ten thousand dollars or twenty thousand yen"; and stating to an undocumented Hispanic defendant, "[y]ou have more names than the Tijuana telephone book." In 1999, Judge Brooks received another advisory letter for remarks to a defendant at the conclusion of a preliminary hearing about how the judge would have handled an assault on a member of his own family: "I would go down and punch [the defendant's] lights out," and that instead of calling the police, it would be, "touch them, you die." In 2003, Judge Brooks received a private admonishment for conduct including referring to the parties in a case, the operators of a mobile home park, as "Nazis" and analogizing their actions to that of the Nazis during the Holocaust. In another matter also included as a basis for the private admonishment, in the course of denying plaintiff's motion to exclude reference to his status as an undocumented alien, Judge Brooks made remarks conveying his stereotypes of undocumented aliens, including that they place burdens on taxpayers by receiving benefits to which they are not entitled. The judge referred to the defendant as "this good doctor." The appellate court reversed Judge Brooks's ruling in that case, and based its reversal in part on the appearance of bias. *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452.

Commission members Mr. Marshall Grossman, Mrs. Crystal Lui, Justice Judith D. McConnell, Ms. Patricia Miller, Mrs. Penny Perez, Judge Risë Jones Pichon, and Mr. Lawrence Simi voted to impose a public admonishment. Commission members Mr. Michael Kahn and Mr. Jose Miramontes concurred with the imposition of a public admonishment. Commission member Judge Frederick P. Horn was recused. Commission member Ms. Barbara Schraeger did not participate.

**PUBLIC ADMONISHMENT OF FORMER JUDGE VINCENT P. DIFIGLIA**

The Commission on Judicial Performance has ordered former Judge Vincent P. DiFiglia publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and Commission Rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge DiFiglia was a judge of the San Diego Superior Court for sixteen years; he retired in November 2003. His last term began in 2001.

In 1999, the case of *Border Business Park, Inc., v. City of San Diego* was assigned to Judge DiFiglia. Lead counsel for the plaintiff filed an application requesting information about the judge's relationship with the Office of the San Diego City Attorney, where the judge had worked at one time. A conference was held, but no disclosures were placed on the record.

In April 2000, attorney Vincent Bartolotta became associated as co-counsel for the plaintiff, and he represented the plaintiff at the jury trial conducted before Judge DiFiglia in late 2000. Before the case went to the jury, Judge DiFiglia had decided a pivotal legal issue—inverse condemnation liability—in favor of the plaintiff. In January 2001, the jury returned a verdict of $94.5 million in favor of the plaintiff. Judge DiFiglia at no time disclosed on the record any relationship he had with attorney Bartolotta.

Judge DiFiglia had a long-term personal relationship with Mr. Bartolotta. In 1992, Judge DiFiglia was privately admonished by the Commission on Judicial Performance for conduct that included accepting gifts of golf tournament fees from Mr. Bartolotta and his partner in 1990 and 1991, and failing to disclose on the record his relationship with these attorneys or his participation in golf tournaments at their expense. After receiving the private admonishment in 1992, Judge DiFiglia maintained a friendly relationship with Mr. Bartolotta, which included playing golf with Mr. Bartolotta on four to six occasions at his own expense. The judge saw Mr. Bartolotta at bi-monthly dinner meetings of the American Board of Trial Advocates and at bench-bar mixers, and would sometimes have drinks with Mr. Bartolotta at a bar or restaurant. The judge also attended a Christmas Eve party at Mr. Bartolotta's home prior to 1993.

An article about Judge DiFiglia's prior commission discipline involving failure to disclose receipt of gifts from Mr. Bartolotta appeared in the press shortly after the jury verdict. After a hearing on a request filed by the City of San Diego for information about the judge's relationship with Mr. Bartolotta, Judge DiFiglia disqualified himself from the case.

Judge DiFiglia's failure to disclose on the record any information about his relationship with Mr. Bartolotta was contrary to canon 3E(2) of the California Code of Judicial Ethics, which provides that in all trial court proceedings, a judge "shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification." Judge DiFiglia failed to make such disclosure despite the fact that he had been privately admonished by the commission in 1992 for failing to disclose on the record his relationship with Mr. Bartolotta and his partner, and his acceptance of golf tournament fees from them. This was considered a factor in aggravation by the commission.

Judge DiFiglia's failure to disclose on the record his past employment with the city attorney's office also was contrary to canon 3E(2).

In addition, while the *Border* case was in trial before him, Judge DiFiglia escorted a secretary then employed in Mr. Bartolotta's office to a Christmas party hosted by the American Board of Trial Advocates. This conduct was contrary to canon 2A, which requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Judge DiFiglia's conduct as described above was, at a minimum, improper action.

Judge DiFiglia's conduct occurred in 2001. Thereafter, an appeal in the *Border* case, in which the issue of whether Judge DiFiglia was disqualified as a matter of law due to his relationship with Mr. Bartolotta, and whether the judge's prior commission discipline arising out of the that relationship conclusively demonstrated an appearance of partiality, was pending until September 19, 2006, when the appeal was decided without reference to this issue. Because the central issue before the commission was raised in the appeal, the commission deferred action while the appeal was pending in order to avoid the risk of inconsistent adjudications and perceived interference in an ongoing case.

Although Judge DiFiglia retired in 2003 and is not sitting on assignment, he continues to perform adjudicative functions as a private judge. In light of his continued performance of judicial functions, and in order to preserve public confidence in the integrity and impartiality of the judiciary, the commission determined to issue this public admonishment.

Commission members Judge Frederick P. Horn, Mrs. Crystal Lui, Mr. Jose Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger, and Mr. Lawrence Simi voted to impose a public admonishment. Commission members Mr. Marshall Grossman and Justice Judith D. McConnell were recused. Commission members Mr. Michael Kahn and Ms. Patricia Miller did not participate.

January 9, 2007

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| **IN THE MATTER CONCERNING JUDGE RONALD M. SOHIGIAN** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Ronald M. Sohigian, a judge of the Los Angeles County Superior Court since 1988. His current term began in 2003. Judge Sohigian and his attorney, Edward P. George, Jr., appeared before the commission on March 29, 2007 to contest the imposition of a public admonishment, pursuant to Rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Sohigian and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Based on the facts set forth below, the commission finds that Judge Sohigian has engaged in a practice of abusing his judicial authority in connection with the issuance of orders to show cause (OSC's) re sanctions, in violation of canons 1, 2A, and 3B(2) of the California Code of Judicial Ethics. The commission also finds that Judge Sohigian treated an attorney in a sarcastic and belittling manner in violation of canon 3B(4), which requires a judge to be patient, dignified, and courteous to lawyers with whom the judge deals in an official capacity.

## I. IMPROPER ISSUANCE OF ORDERS TO SHOW CAUSE

### A. Issuance of OSC's to plaintiffs for failure to appear at the initial status conference in cases where plaintiff's counsel did appear at the conference.

Judge Sohigian routinely issued OSC's to plaintiffs for failing to appear at the initial status conference in civil cases, even when the plaintiffs had appeared through counsel and there was no requirement that plaintiffs appear personally at the status conference. Judge Sohigian contends that these OSC's were not intended to have "a counterfactual meaning"; that is, he did not intend to mean that someone who was in attendance was alleged not to be in attendance. Instead, when there was an absence at a status conference or a failure to give notice of the status conference, he issued OSC's to require *all* parties to prove their lack of responsibility for the absence or failure to give notice. Issuance of an OSC and threatening sanctions against parties in the absence of *any* evidence of malfeasance on their part is an abuse of the sanctions power. Judge Sohigian attempts to minimize the burden and detriment to the parties by asserting that the hearings on the OSC's were scheduled on days when the parties were already scheduled to appear in court for other reasons. However, as a result of his practice, the parties were still required to expend resources to respond to OSC's that were unwarranted. Judge Sohigian's practice is exemplified by the following cases: *E.H. Butland Development Corp. v. Century Veterinary Group, et al.* (case No. BC284988) (*Butland*); *Christine Avila v. David Cervantes, et al.* (case No. BC289872) (*Avila*); *Kamel Hur v. Kwi Jong Yang, et al.* (case No. BC290771) (*Hur*); *Izumi Yokozawa v. Alliant Food Service Corp., et al.* (case No. BC290886) (*Yokozawa*); and *Shahriar Yazdani, et al. v. Janis Burns, et al.* (case No. BC305537) (*Yadzani*).

**B. Issuance of OSC's to defendants for failing to give notice of the initial status conference when they had no duty to do so.**

Judge Sohigian's practice of issuing unwarranted OSC's included issuing OSC's to defendants for failing to give notice of the initial status conference, even though only the plaintiffs were required to give notice and not the defendants. The issuance of OSC's under these circumstances was an obvious abuse of authority, as there was absolutely no factual or legal basis to sanction defendants for failing to do something they were not required to do. Judge Sohigian's practice required defendants to expend resources unnecessarily to respond to the unwarranted OSC's and is exemplified by the following cases: *Butland*; *Avila*; and *Hur*.

**C. Leaving OSC's in place during the pendency of the action.**

Judge Sohigian also engaged in a practice of repeatedly continuing hearings on certain OSC's, thereby postponing any decision on them, even though he had received a response from the party or parties threatened with sanctions that would have allowed him to decide whether to impose sanctions. The judge's practice of failing to resolve OSC's subjected the parties to the threat of sanctions for indeterminate periods and left them in an uncertain position. Judge Sohigian explained this practice by stating that it was proper for him to wait until further developments had occurred in the case to see whether he wanted to issue sanctions. While judges are permitted to consider a *previous* lack of compliance or *previous* sanctions in deciding whether to impose sanctions, fundamental principles of notice and due process preclude judges from imposing sanctions for future conduct upon which the issuance of the initial OSC was not based. Judge Sohigian's practice was a clear abuse of judicial authority.

Judge Sohigian's practice is illustrated by events in *Yokozawa*. At the initial status conference in *Yokozawa* on May 5, 2003, Judge Sohigian issued OSC's to each party for failure to file a status conference questionnaire and failure to appear at the status conference, although no defendant had made a formal appearance in the case. Defense counsel submitted a declaration on May 23, 2003, in response to the

OSC, explaining that no responsive pleading was due from defendant as of the May 5, 2003, initial status conference. Despite that submission, Judge Sohigian continued the OSC's and kept them on calendar throughout the pendency of the case, until January 27, 2004, when the case and the OSC's were dismissed.

Additional examples of this practice occurred in *New York Credit v. Unitex International, et al.* (case No. BC286265); *Stacey Snowden v. Advanced Video and Security Technologies, et al.* (case No. BC292087); and *Yazdani*.

**D. Issuance of OSC's threatening dismissal of the case at the initial status conference.**

The OSC's Judge Sohigian routinely issued at initial status conferences (entitled "Order to Show Cause Re Dismissal/ Striking-And-Default And Why Plaintiff And Counsel Should Not Be Sanctioned For Failure to Give Notice of Hearing" and "OSC Re Dismissal/ Striking-and-Default And Why Parties and Counsel Should Not Be Sanctioned") threatened sanctions that would terminate a case or a party's defense at the outset of the case. Government Code section 68608(b) permits the dismissal of a case or striking of a pleading as a sanction only "if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case." Calendar management by itself is not a sufficient basis for dismissal, and courts have no inherent power to dismiss solely for failures to comply with time standards for case disposition. (Weil and Brown, California Practice Guide: Civil Procedure Before Trial (Rutter 2006), §12:92-12:93, p. 12(1)-32.) Judge Sohigian issued one or both of his form OSC's at the initial status conference in each of the cases cited herein, even though there had been no previous sanctions or previous lack of compliance in any of the cases that he could have considered. That practice is a clear abuse of authority. Further, Judge Sohigian's issuance of OSC's threatening such severe sanctions at the outset of actions "suggests an abdication of his responsibility" to determine whether such sanctions were appropriate. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 851.)

**E. Judge Sohigian's Objections to Public Admonishment.**

In response to the commission's notice of intended public admonishment and pursuant to the commission's rules, Judge Sohigian prepared and submitted his written objection to public, as opposed to private discipline. (Rules of the Com. on Jud. Performance, Rule 116.) Judge Sohigian also appeared before the commission pursuant to the rules. (*Id.*) In both his written objections and at his appearance before the commission, Judge Sohigian requested consideration of his written response to the commission's preliminary investigation letter to explain his use of OSC's. The commission has considered Judge Sohigian's objections and responses, and briefly discusses them here. (Rules of the Com. on Jud. Performance, Rule 116(b).)

In support of his objection to public discipline and request for private discipline, Judge Sohigian expressed regret for the manner in which he used OSC's in case management. He admitted that the OSC practices described above were wrong. He advised the commission that he has changed those practices, and no longer employs the OSC forms that he used in the example cases. The commission acknowledges Judge Sohigian's expressions of regret, his admissions, and that he has taken remedial action. The commission has weighed those factors in arriving at its determination of this matter. However, the commission has determined that for the following reasons, public admonishment remains appropriate.

At his appearance before the commission, Judge Sohigian stated that he believes that the Judicial Council should define or promulgate a statewide form for OSC's, and that he would like the commission to defer or suspend action in this matter to allow him to seek a ruling from the Judicial Council on what an OSC form should contain. In support of that position, Judge Sohigian stated that several California counties are using OSC forms that are similar or the same as the ones he employed and has now abandoned, and he brought examples with him to his appearance. He suggested that the continued use of these forms threatens the same kind of misconduct and harm that he admits was involved in his OSC practices.

Moreover, in response to questions by commission members about why he issued OSC's to persons who had committed no wrongdoing, he said he "admit[ted]" that the text of his OSC forms was "too loose."

These responses suggest that Judge Sohigian believes that his abuses of the judicial power to issue OSC's occurred wholly or in part because his OSC forms were defective, and that other judges using similar forms may unknowingly commit the same abuses. However, the abusive aspects of Judge Sohigian's OSC practices are not the result of defects in form.

As discussed above, it is misconduct to issue OSC's to parties or counsel who have committed no wrongdoing, but who nonetheless must respond to the OSC's under threat of dismissal, default, or other severe sanction. (See *Kloepfer v. Commission on Judicial Performance*, *supra,* 49 Cal.3d at p. 857 [OSC to non-party to "find out the address of the defendant" and why the non-party posted bail for the defendant was a "serious misuse of the judicial office" where there was no factual basis for the judge's conclusion that the non-party had committed misconduct that would subject the non-party to the court's jurisdiction to order him to appear].) For that reason, it was at least improper action when Judge Sohigian issued OSC's threatening sanctions against innocent counsel and parties, not because he had some reasonable basis to believe they had done something that might warrant the sanctions, but only because he wanted to compel them to provide information about some other person's wrongdoing. The misconduct in that practice was not the accidental byproduct of a poorly drafted form. The misconduct was Judge Sohigian's determination to issue OSC's for the improper purpose of compelling innocent parties and counsel to provide testimony under threat of sanctions, when those sanctions could not have been lawfully imposed on them for the misconduct cited in the OSC's.

Similar considerations apply to Judge Sohigian's practice of repeatedly continuing the hearings on OSC's issued at the first status conferences in civil cases. Judge Sohigian continued the hearings on those OSC's for the stated purpose

of holding potentially severe sanctions in abeyance throughout an action, so that he could consider the acts and omissions of the parties occurring after the OSC issued in setting any sanction he might impose for the wrongdoing the OSC charged. That purpose had nothing to do with the form of the OSC, and no modification to Judge Sohigian's OSC form or that of any other court would remedy the abuse of judicial power the practice embodied.

Judge Sohigian's focus on defects of form and his request for suspension of these proceedings so that he can seek a ruling from the Judicial Council on the propriety of OSC forms similar to his own indicates a fundamental misunderstanding of the reasons the commission has acted in this matter. Judge Sohigian has described the reasons for his OSC practices in his responses to the commission's notice and at his appearance before the commission. Those reasons establish that the practices were an abuse of judicial power and at least improper action, and were not the result of imprecise or faulty forms. The commission therefore rejects Judge Sohigian's objection to public admonishment and request for suspension of the proceedings.

## II. IMPROPER TREATMENT OF ATTORNEY

In 2006, Judge Sohigian was presiding over *Wasserman, Comden, Casselman & Pearson v. Harris, et al.* (case No. BC340196), in which the plaintiff, a law firm, was seeking to recover attorney's fees from some of its former clients. Attorney Peter Q. Ezzell represented the plaintiff law firm. On February 9, 2006, Judge Sohigian set equitable causes of action (which could be decided by the judge and did not require a jury) for trial on April 17, 2006. On April 4, 2006, some of the defendants filed for bankruptcy, resulting in a stay (or suspension) of the proceedings before Judge Sohigian as to those defendants. When Mr. Ezzell appeared before Judge Sohigian on April 17, 2006, he expected to proceed with the trial on the equitable causes of action, despite the bankruptcy filings. Judge Sohigian treated him in a belittling, rude and sarcastic manner, as the transcript of the proceeding shows.

Judge Sohigian asked why trial should proceed against certain defendants given the state of the pleadings. Mr. Ezzell stated that he believed certain equitable issues were set for separate trial. The following exchange occurred:

> THE COURT: That's not exactly the answer to the question I want. ... I think my question is pretty clear on the record. You recognize your answer doesn't respond to it. If that's what you want to say, that's all right. I can't make you answer any question I've ask [sic]. I can just ask it, and then you can say whatever you want to.
>
> MR. EZZELL: I always seek to respond to the court.
>
> THE COURT: I'm not sure that's true, but in this case that didn't occur.

When Judge Sohigian asked Mr. Ezzell when the first amended complaint was filed, he initially told the judge that he did not have a copy of that pleading with him, but later in the proceeding told the judge that he wanted to check a box he had brought to court to see if it contained the pleading, after which the following exchange occurred:

> THE COURT: Wait a minute. Mr. Ezzell, you can do anything you want to do. I beg of you, sir, when I ask you a question and you give me an answer, make sure that you are telling the truth particularly about whether you have a piece of paper with you. When you tell me something and then by behavior you impeach yourself by starting to look in the briefcase put just about three and a half feet from you now – when you start to look for something that you tell me you do not have, it leaves me with a very uneasy feeling about matters having to do with credibility. I'll give you whatever period of time to look for your pleading you would like. Would you like me to sit here on the bench while you look for you [sic] or would you like me to go into recess? That's very courtly of you, but I think in view of these inconsistent statements by Mr. Ezzell, you better wait and find out whether he does or does not have his own pleading since he stated both he does have it and does not have it. I think you might want to either inforce [sic] his position or impeach his position with respect to one of those.
>
> MR. EZZELL: Your Honor, I think I said I need to look for it.

> THE COURT: You did say that just now but before you said you didn't have it so there would be no reason to look for it. For example, if someone were to ask me to look for a $10,000 bill in my pocket, I wouldn't say, just a second. I'll look for it. I pretty much would know.
>
> MR. EZZELL: I have a copy of it, Your Honor.
>
> THE COURT: That must be very comforting with respect to what you said the second time around. Go ahead and look at it. Then make whatever argument you wish regarding this topic that I raised except for the topics of credibility and accuracy.

When Mr. Ezzell indicated to the court that he was not a bankruptcy lawyer and could not tell the court whether he could dismiss certain defendants under federal bankruptcy law, Judge Sohigian stated:

> THE COURT: Mr. Ezzell, you've got to know the answer to that question. That was obvious. You knew that question was going to be asked. [¶] ... And so for anybody to show up in this courtroom again and say, I'm not a bankruptcy lawyer. I think. I don't know. It begins to sort of stretch the membrane.

After the foregoing remark, Judge Sohigian ordered Mr. Ezzell to go across the street to the law library to research the issue and return to court in twenty minutes. Mr. Ezzell left, called his office, and had portions of the cases read to him over the phone. When he returned to court, the following exchange occurred:

> THE COURT: Back on the record. Attorneys?
>
> MR. EZZELL: Thank you very much, Your Honor. In the 20 minutes I had an opportunity to have read to me portions of the cases and also –
>
> THE COURT: Would you like more time, Mr. Ezzell? These suggestion [sic] by you that you're in some way being rushed or you just haven't had the time to do something are really either meaningless or provocative or have some affirmative purpose that you intend. They're provocative in the sense that a perfectly obvious issue which all lawyers could have and should have

> anticipated is an issue that you lawyers are saying you want time to research on or you don't know the law.
>
> If you want me to give you more time, I will give you more time. I told you to go across the street to the law library. If you didn't do that, if you had someone call you or you called somebody and had someone read something to you, that's obviously not what I ordered or proposed or suggested at all. But if what you're saying is look, Your Honor, notwithstanding your specific orders as to what I was supposed to do to prepare, I didn't do it. Give me a second chance, tell me that now and I'll consider giving you a second chance.
>
> Sooner or later you have to take a legal position without saying, I don't know what the law is or somebody read something to me. In other words, you have to be the attorney for your client and you've got to make whatever legal argument that is legally either proper – I hope it's proper. Certainly in your client's interest. I think we should dispense with the, I don't know what I'm talking about.
>
> MR. EZZELL: I'm sorry, Your Honor. I had not had an opportunity to finish. I was about to say that I understand the two cases I believe and am able to speak on them ... .

Later in the hearing, Judge Sohigian decided to stay the trial pending resolution of the bankruptcy stay, and remarked:

> THE COURT: I'm going to prepare a written order that will say substantially those things. The written order will be the order. I'll need some help from you in formulating it if you care to give it. Due to behaviors that have occurred in the past if the situation is you would rather not be of assistance and/or you just don't know the answers to these questions, I'll do the necessary work on that myself.

Judge Sohigian's comments during this hearing were inconsistent with the duty of judges to be patient, dignified and courteous to lawyers with whom the judge deals in an official capacity. Sarcastic, demeaning or belittling comments toward a litigant or counsel are not consistent with the conduct required by Canon 3B(4) of the California Code of Judicial Ethics. (See, e.g., *Kennick v. Commission*

*on Judicial Performance* (1990) 50 Cal.3d 297, 323-327.) Judge Sohigian's conduct at the April 17, 2006 hearing was, at a minimum, improper action.

In determining that a public admonishment was appropriate in this matter, the commission has also considered that Judge Sohigian has been the subject of prior discipline. In 1991, Judge Sohigian received an advisory letter for abusing his authority in sanctioning attorneys. In that matter, Judge Sohigian sanctioned attorneys for exceeding the page limit on briefs submitted to the court and ordered the attorneys to display his order to all other judges before whom the attorneys might seek to file briefs exceeding the page limit in the future, an unauthorized action and clear abuse of the sanction power.

Commission members Hon. Frederick P. Horn, Mr. Michael A. Kahn, Hon. Judith D. McConnell, Ms. Patricia Miller, Mr. Jose C. Miramontes, and Ms. Barbara Schraeger voted for a public admonishment. Commission members Hon. Katherine Feinstein and Mr. Lawrence Simi voted against public admonishment, and would have imposed private discipline. Mr. Marshall Grossman was recused. Two public member positions were vacant.

Dated: April 26, 2007

/s/

Honorable Frederick P. Horn
Chairperson

**PUBLIC ADMONISHMENT OF JUDGE JAMES M. PETRUCELLI**

The Commission on Judicial Performance has ordered Judge James M. Petrucelli publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Petrucelli has been a judge of the Fresno County Superior Court since 1999. His current term began in January 2005.

Judge Petrucelli was the presiding judge of the Fresno Family Law Division from approximately 2000 through January 2006. In January 2006, he was assigned to the Coalinga courthouse, where he hears traffic matters on certain days of the week. While assigned to those courts, Judge Petrucelli engaged in a pattern of conduct that is inconsistent with canon 3B(4) of the California Code of Judicial Ethics, which requires a judge to be patient, dignified, and courteous with persons with whom the judge deals in an official capacity. The judge's conduct included making discourteous and sarcastic comments to attorneys and litigants appearing before him. This conduct is exemplified by the following:

**A. Conduct in Family Law**

1. *Silva v. Berboa*, case No. 556885-2

On September 26, 2005, attorneys Brian Tatarian and Paul Lerandeau appeared before Judge Petrucelli on a matter in which they wanted to put a stipulation on the record. On a form the clerk uses to locate files, Mr. Tatarian wrote the calendar line item number rather than the case number. The judge called "Tatarian and Lerandeau's cases," reminded them that they needed to write the case number, then called a case that was not theirs. When Mr. Tatarian said that the case called was not theirs, the judge responded, "That's because you didn't bother to write the case number on there. You'll go to the bottom of the line." The judge handled one other stipulation before calling Mr. Tatarian's case a few minutes later.

When Mr. Tatarian's case was called, he said that the "green sheet" should have listed their case as number 2, and that he "was sorry the court had a hard time finding out what the case number was." Judge Petrucelli responded angrily in an elevated tone of voice, as follows:

> Well, you know the circumstances. Mr. Tatarian, don't chastise the court, and then esteem that you can talk over the court. I have asked and I have requested many times from you and other attorneys, it says case number. It does not say number 2, Mr. Tatarian, it says case number. So don't think that you can stand there and chastise the court because you write a two on there. Okay? Yes, the court is very busy today. This is a hectic day, and your lack of cooperation is not assisting. And if you think you can

> talk over me once you've chastised the court, you're wrong, Mr. Tatarian, fair enough? Now, if you'd like to proceed, fine; if not, you can take a break and cool off. What's your preference, Mr. Tatarian?

The tone and content of the judge's response did not comport with canon 3B(4).

2. *Kaddomi v. Kaddomi*, case No. 01CEFL03817

On June 9, 2005, Judge Petrucelli presided over a hearing regarding visitation. Attorney Linda Richardson represented the mother. The father, who lived out of the country, was seeking an unsupervised visit with the minor children. After Ms. Richardson took a position with which the judge disagreed, he stated words to the effect of, "If your client persists in this behavior, I will do everything in my power to see that custody is taken away from her."

This comment violated canon 3B(4) and reflects embroilment.

3. *Jackson v. Jackson*, case No. 00CEFL10657

On January 24, 2005, attorney Beth Best made an oral motion to disqualify Judge Petrucelli pursuant to Code of Civil Procedure section 170.6, which the judge denied as untimely. Ms. Best asserted that it was not untimely, and Judge Petrucelli told her that she could provide a written motion and then he would make a ruling, "since you believe that you are more correct than I am, Ms. Best." She responded that she would file it under Code of Civil Procedure section 170.1, "actual prejudice," and because of "non-disclosure to the parties of our history," by which she was referring to the fact that the judge was presiding over her divorce proceedings. The judge became embroiled and made a number of comments in violation of canon 3B(4), as follows:

> Judge: Ms. Best, you certainly -- you certainly don't want to go there. You are still a litigant in front of me, Ms. Best.
>
> Best: That's true, Your Honor.
>
> Judge: And you have previously waived any conflict. I have made a perfect record of this in the past, Ms. Best, that I have asked you if you wanted me to sit on your cases, because I knew this was going to be a problem. Your conduct is deplorable and I am insulted by it at this juncture. So you bring whatever motion you need to bring appropriately, but I have asked you previously if you wanted me to sit on your cases, because you said, and I quote, "that it would be prejudicial to my clients if I let my case come in the way of their rulings." Now, Ms. Best, that's what the record would reflect. If you want to bring a motion, you bring that, but you make sure you include a transcript of that hearing where I initially said

> that the very first time you appeared in front of me, because I was more than willing to disqualify myself on all of your cases until your matter was resolved. Do you remember that, Ms. Best?
>
> Best: You actually were in the process of doing that and then began hearing my cases again.
>
> Judge: That is not correct, Ms. Best.
>
> Best: That is correct and I do have your transcripts. I also have several other transcripts that have you –
>
> Judge: Ms. Best, your conduct in court today is amazing to me. Your conduct with these two litigants in the settlement conference that I was part of is amazing to me. These two people are trying to get their life on track. These two people could do much better without you today. I will disqualify myself on this case. I certainly hope that these two people can talk in spite of you, and settle their minor differences because you have caused them a lot of grief today, Ms. Best. Yes, I will disqualify myself. I will disqualify myself pursuant to 170.1 and furthermore, I will disqualify myself on all of your cases, Ms. Best, because I think you are not an appropriate counsel for people in this situation. These people could have settled this case today. You were the party that caused this case not to be settled today even with my assistance. So, good luck to you, Ms. Best.

While making the comments set forth above, the judge intermittently used a loud, angry and abrasive tone of voice.

The comments regarding Ms. Best's representation improperly disparaged the attorney in front of her clients, and were demeaning and belittling. Those comments, and the comment that he would "disqualify myself on all of your cases … because I think you are not an appropriate counsel for people in this situation," were gratuitous and an improper response to an attempt to disqualify him. (See Pub. Adm. of Judge Howard Broadman, No. 19 (Feb. 26, 1999), p. 11.)

4. *Woods v. Woods*, case No. 497721-8

On September 13, 2004, Judge Petrucelli presided over a hearing regarding custody modification. Both parents were present and represented by counsel. At one point when the attorneys were arguing as to whether one attorney had prevented the father from communicating directly with the mother, the judge said, "I wonder how well these parents would do without their lawyers."

The comment improperly disparaged the attorneys in front of their clients, and was demeaning and belittling to the attorneys. It violated canon 3B(4), which requires a judge to treat those appearing before him with patience, dignity, and courtesy.

5. *Tovsrud v. Tovsrud*, case No. 03CEFL04171

On September 13, 2004, Judge Petrucelli presided over a hearing regarding spousal support. The wife was represented by counsel and the husband appeared in propria persona. The wife was seeking to have an agreement regarding spousal support set aside on grounds of duress. Her former husband, Mr. Tovsrud, was sworn in as a witness and questioned by the judge. The hearing lasted about 45 minutes. As set forth below, Judge Petrucelli made several comments that did not comport with his obligations of patience and courtesy under canon 3B(4).

Near the outset of the hearing, after questioning Mr. Tovsrud, the judge asked him to go ahead and say what he wanted to say. Mr. Tovsrud responded, "Sir?" Judge Petrucelli then said, "Is there a language problem here?" in a loud and angry tone of voice.

According to information presented at the hearing, the litigants had divorced after a long marriage following Mr. Tovsrud's affair with a translator while the Tovsruds were working as missionaries in Mongolia. At the time of the hearing, Mr. Tovsrud apparently was married to the Mongolian woman with whom he had had the affair, and had returned to his former occupation of selling cars. He testified that he was earning about $36,000 per year.

During the hearing, Mr. Tovsrud testified in a rambling fashion about various matters, including the affair. In expressing confusion as to what Mr. Tovsrud was saying was the cause of the affair, the judge referred to the possibility that "it was cold and so you needed someone to stay warm with." This comment was gratuitous and sarcastic.

Later, the judge asked Mr. Tovsrud whether he had anything to add specifically about the support issue. Before he had a chance to respond, Judge Petrucelli said, "You've got to be the lowest car salesman … maybe you ought to consider doing something else. I mean, I don't know of anybody that makes $40,000 selling cars." These comments were belittling.

Shortly thereafter, Mr. Tovsrud commented that he was "not that employable." The judge first reassured him that he was, and that he could be a great salesman. The judge then added, "You've got a new, young wife apparently. That's wonderful. Is it the Mongolian lady I hope …. Did she make it back? ... Okay … so she made it to America. I hope you're happy. That's wonderful. We should all be happy. So, anything else you want to tell me about the support issue?" The comments about Mr. Tovsrud's new wife appeared to be sarcastic.

6. Chambers argument

On July 25, 2002, Judge Petrucelli and attorney Rodney Rusca were discussing a family law matter in chambers during a break in the hearing. Another attorney was also present. The judge became involved in a heated argument with Mr. Rusca that lasted for approximately five

minutes; the judge's voice was raised to such an extent that he was yelling. This conduct evidences a lack of decorum and a lack of patience and courtesy toward those appearing before the judge, contrary to the requirements of canon 3B(4).

**B. Conduct in Traffic Court**

1. Comments to CHP officers

On February 21, 2006, California Highway Patrol (CHP) Officer Trejo had been subpoenaed to testify in certain traffic matters, but was not present in court when called. The following exchange occurred:

> Court: Okay, let's get Officer Trejo up here. Officer Trejo?
>
> Unidentified Officer: Officer Trejo has a DUI trial in Fresno today.
>
> Court: He did? ... So I have a question. Does somebody in your office set priorities on these things? He's got a subpoena here, there's a subpoena there.
>
> Unidentified Officer: I don't know, Your Honor.
>
> Court: You don't know anything? Do you have a sergeant here? I'm having lunch with your commander. He wants to meet me. I've got a mouthful for him already here.

A CHP officer told Judge Petrucelli that Officer Trejo was now assigned to the Fresno office. The judge made the following remarks:

> Judge: ... So let me see if I understand this. Somebody gets transferred and just ignores the subpoena, that's it? How does that work, does anybody know? I'm asking, does anybody know?
>
> Officer: I was transferred, but I'm here. Your Honor. I think he thought a DUI was more important.
>
> Judge: Than speeding over 100?

The judge later told a defendant that he was going to dismiss her case because the officer wasn't there, stating: "You got lucky. You won the lottery. Officer Trejo doesn't think this is important, so you go ahead and go."

The judge also dismissed the speeding case of another defendant because Officer Trejo was not present and said to the waiting CHP officers, "This is another over 100, so you can let

your supervisors know." When the defendant thanked the judge, the judge said, "Don't thank me, thank Officer Trejo."

Judge Petrucelli's remarks to the CHP officers about Officer Trejo's absence were disparaging to Officer Trejo and discourteous to the CHP officers who were there to testify, contrary to canon 3B(4). The judge's remarks also created the appearance of a lack of impartiality by publicly indicating that he was attempting to ensure the presence of officers to testify for the prosecution; this contravenes canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the impartiality of the judiciary.

2. *Tsang*

On February 14, 2006, defendant Tsang appeared before Judge Petrucelli on a charge of speeding over 100 miles per hour. Ms. Tsang said that she wanted to "plead guilty with an explanation." At one point during the following discussion, Ms. Tsang said, "Well –" and the judge interrupted with, "What could you possibly explain, that you think the radar was wrong or what? The fine is going up by the minute, so you understand. I mean, just tell me what you think you could possibly say to make me lower the fine?" By threatening that the fine was "going up by the minute" if Ms. Tsang were to speak, the judge created the appearance that he was improperly trying to discourage the litigant from speaking before she was sentenced. The comment is also inconsistent with canon 3B(4).

3. *Alvarenga*

Judge Petrucelli presided over this trial for speeding on February 7, 2006. The CHP officer testified that Mr. Alvarenga was driving his tomato truck 74 miles per hour as determined by radar. The judge said to Mr. Alvarenga that he did not see how he was going to talk him out of going by the radar, then said to him, "If you want to try and embarrass yourself by telling me that you weren't going 74, I guess you are more than welcome to, but go ahead."

That comment created the appearance that Judge Petrucelli was improperly trying to discourage the litigant from arguing his case and is inconsistent with the judge's obligations under canon 3B(4).

4. *Baracas*

On February 7, 2006, defendant Baracas appeared before Judge Petrucelli for a trial on a charge of speeding over 100 miles per hour. After the CHP officer testified, the judge addressed Mr. Baracas. At one point Judge Petrucelli said to Mr. Baracas, referring to the CHP officer, "I have another question for you. How is it that you didn't notice him in your back window? They drive those really funny looking cars, you know, they're different colors. Usually they have lights on top – ." After the defendant responded, the judge asked, "Didn't you notice that his car was keeping up with you? See, that rear view mirror is for something besides fixing your hair and stuff, you know."

These comments were demeaning to the litigant and are contrary to canon 3B(4).

The commission found that Judge Petrucelli has engaged in a pattern of making comments that are discourteous, sarcastic or demeaning to those appearing before him. Such remarks toward a litigant or counsel are not consistent with the conduct required by canon 3B(4). (See, e.g., *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 323-327 [demeaning, rude, impatient and abusive behavior toward counsel]; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 703 [deliberate ridiculing of attorneys].)

In determining that a public admonishment was appropriate, the commission noted that Judge Petrucelli received an advisory letter in 2001 and in 2002. The 2001 advisory concerned the judge's response to the filing of a peremptory challenge; the judge assigned the case to a series of family law commissioners rather than sending it back to the master calendar, and disparaged the attorney and his client for exercising the right to refuse to stipulate to a commissioner and peremptorily challenge a judge. The 2002 advisory concerned his practice regarding disqualification and disclosure as to an attorney employed by his former law firm, and an incident in which he raised his voice at county employees who had inadvertently deleted certain Internet folders while installing new software on his chambers computer, and accused them of calling him a "liar."

Commission members Mr. Marshall B. Grossman, Hon. Frederick P. Horn., Hon. Katherine Feinstein, Mr. Michael A. Kahn, Hon. Judith D. McConnell, Ms. Patricia Miller, Mr. Jose C. Miramontes, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to impose a public admonishment. There are two vacancies on the commission.

Dated: May 22, 2007.

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| **IN THE MATTER CONCERNING JUDGE CLARENCE WESTRA, JR.** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |
|---|---|

This disciplinary matter concerns Judge Clarence Westra, Jr., a judge of the Kern County Superior Court since 1983. His current term began in 2003. Judge Westra and his attorney, Reginald A. Vitek appeared before the commission on August 30, 2007 to contest the imposition of a public admonishment, pursuant to Rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Westra and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Based on the facts set forth below, the commission determined that on two occasions Judge Westra failed to be dignified, patient and courteous with deputies from the Kern County Sheriff's Department, as required by canon 3B(4) of the Code of Judicial Ethics.

1. On April 11, 2006, Judge Westra was presiding over a criminal trial; the jury began deliberating that afternoon. The bailiff assigned to Judge Westra's courtroom had been sworn in as the bailiff responsible for taking charge of the jury. The bailiff was scheduled to attend mandatory firearms training the following afternoon. Firearms training is required on a quarterly basis if a bailiff or deputy is to carry a gun. The bailiff had previously informed the judge of this scheduled training. During the afternoon of

April 12, 2006, the bailiff left to attend the mandatory firearms training. A replacement bailiff was available for the jury. Judge Westra was displeased that the bailiff who had already been sworn in had left his courtroom and insisted that the sworn bailiff return to his courtroom that afternoon, which the bailiff did without completing his mandatory firearms training. The same afternoon, Judge Westra left a voicemail message for the commander of court services, Kern County Sheriff's Department Division Commander Shelly Castaneda, stating that he wished to discuss the matter with her.

The following morning, April 13, 2006, Commander Castaneda and Senior Deputy Larry Lopez of the Kern County Sheriff's Department went to Judge Westra's chambers to discuss the matter with him in person. Commander Castaneda had recently been assigned as commander of court services and had not met Judge Westra before. Although Judge Westra had left her a voicemail the previous afternoon asking her to contact him, Judge Westra's first statement to Commander Castaneda was, "I don't know how you fit into this." Commander Castaneda began explaining that all deputies are required to take mandatory firearms training. Judge Westra responded that his bailiff's departure the previous afternoon was "unacceptable" under the circumstances and that he "would not tolerate it." It was the judge's belief that the sheriff's department did not have the authority to remove a deputy from his courtroom when a bailiff had been sworn to take charge of a jury. To clarify whether there was a court procedure requiring the same bailiff to remain in place and to ensure that the deputies under her supervision were not violating court procedures, Commander Castaneda asked Judge Westra if he had a written protocol in place regarding his courtroom procedures. Judge Westra's response was, "You are not going to tell me how to run my courtroom." Commander Castaneda again inquired about a written protocol regarding the judge's courtroom procedures. Raising his voice, he told her that she was not going to run his courtroom and that she should leave his chambers. When Commander Castaneda did not immediately leave,

Judge Westra pointed at the door to his chambers and yelled "Get out!" at her more than one time.

2. In July of 2001, while an in-custody criminal defendant was testifying during his own jury trial, over which Judge Westra was presiding, a guard in Judge Westra's courtroom was relieved by another guard who was not familiar with Judge Westra's courtroom procedures to be followed when an in-custody defendant testifies during his own jury trial. The replacement guard had entered the courtroom, conferred with the bailiff, Deputy Jackie Mitchell, and then exited the courtroom during the defendant's testimony, contrary to the judge's required procedures. Judge Westra later spoke with Deputy Mitchell about the incident and said to her, "The Keystone Cops could have handled it better."

The commission found that Judge Westra's conduct in both instances was contrary to canon 3B(4), which requires judges to be patient, dignified and courteous toward those with whom they deal in an official capacity.

The conduct set forth above was improper action at a minimum.

In determining that a public admonishment was appropriate, the commission noted that Judge Westra has been the subject of extensive prior discipline, much of which is related to improper treatment of those with whom the judge deals in an official capacity.

In 2003, Judge Westra received an advisory letter for abusing his judicial authority in his treatment of workers involved in a courthouse renovation project that was generating noise at the courthouse. Although the court staff person responsible for coordinating the courthouse renovation work was brought before Judge Westra and was available to address his concerns about the impact of the noise on court proceedings, the judge instead directed a bailiff to bring the construction workers who were using power equipment before him. The judge ordered the workers to cease using power equipment at certain times and required each worker to state his name on the record, in open court, in

the presence of litigants and others present for court proceedings. In its advisory letter, the commission noted with concern that it was Judge Westra's fifth advisory letter.

In 1992, Judge Westra received an advisory letter for making disparaging remarks about an absent attorney who was unable to be in court due to another trial and had sent another attorney to appear for him. Judge Westra's remarks about the absent attorney included, among other things, the following: "As far as I'm concerned, his license to practice law is laying on pretty cheap paper .... You might tell him you're being disadvantaged by his second rate tactics, ...." These comments were made in open court, on the record, in front of another attorney and the absent attorney's client.

In 1990, Judge Westra received an advisory letter for making denigrating remarks about a deputy district attorney who was not present in court because he was in a work-related training session out of town and had sent another deputy district attorney to court in his place. Among other demeaning remarks, Judge Westra said that the absent deputy district attorney practiced law "like a manure spreader" and that it was "downright amazing" that the district attorney's office kept him on the payroll. Judge Westra made the remarks in open court, on the record, in front of other deputy district attorneys, defense counsel, at least one defendant, and others present in the courtroom.

Judge Westra also was the subject of disciplinary action in the following matters:

In 2001, Judge Westra received an advisory letter for abusing his authority as presiding judge. During that time, the Kern County Municipal and Superior Courts were operating under a coordination plan pursuant to which municipal court judges were entitled to receive the salary of superior court judges for handling superior court assignments. Then-Presiding Judge Westra excluded two municipal court judges from certification for pay parity because he disagreed with their handling of certain cases, without giving the judges notice or an opportunity to explain. The judge's actions were

contrary to the advisements from the Administrative Office of the Courts that all municipal judges participating in coordination plans were entitled to pay parity.

In 1988, while Judge Westra was a presiding judge, he received an advisory letter for failing to appropriately supervise a court commissioner who had delayed ruling on a dissolution matter and failing to respond to letters from the complainant inquiring about the delay.

Commission members Hon. Frederick P. Horn, Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Peter E. Flores, Jr., Mr. Marshall B. Grossman, Ms. Patricia Miller, Ms. Barbara Schraeger, Mr. Lawrence Simi and Ms. Maya Dillard Smith voted for a public admonishment. Commission member Samuel A. Hardage did not participate. There is currently one public member vacancy on the Commission.

Dated: September 5, 2007

/s/

Honorable Frederick P. Horn
Chairperson

**PUBLIC ADMONISHMENT OF JUDGE PAMELA LEE ILES**

The Commission on Judicial Performance has ordered Judge Pamela Lee Iles publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Iles was appointed to the Orange County Municipal Court in January 1983, and elevated to the Orange County Superior Court in August 1998 upon unification of the trial courts. Her current term began in January 2007.

Judge Iles engaged in conduct that violated canon 2A of the Code of Judicial Ethics, which requires that judges respect and comply with the law, and canon 3B(2), which requires that judges be faithful to the law.

In February 2002 in *People v. Alhusainy*, Orange County Superior Court case no. 02SF0130, Judge Iles accepted a plea agreement proposed by the defendant and his counsel whereby sentencing would be postponed and the defendant released on his own recognizance on condition he leave and remain outside of California. The defendant had been charged with making criminal threats, child abuse causing great bodily harm, and assault with a deadly weapon arising from a domestic violence incident. An essential term of the plea agreement was that the defendant would not be sentenced as long as he stayed outside of California. Although Judge Iles gave the defendant the option to appear for sentencing, she made it clear that he could avoid imposition of sentence if he did not appear. Judge Iles also agreed that when the defendant failed to appear for sentencing, the bench warrant issued would specify that it could be served only in California. The plea was taken on March 28, 2002, without objection from the District Attorney. At that hearing, Judge Iles ordered the defendant to cooperate with the public defender's investigator, who would transfer him to the airport in Los Angeles, where the defendant would take a flight directly to Detroit, where he had family who had offered to assist him. She then continued sentencing to May 1, 2002:

> The Court: Do you understand that I'm going to continue the sentencing in this case until May the 1st, 2002?
>
> Defendant: Yes.
>
> The Court: If you fail to appear for sentencing, the Court will issue a bench warrant, but it will only be able to be served within the State of California. It will not be served in Michigan or any other State in the United States.
>
> Defendant: Yes.

> The Court: Okay. But once you re-enter California by our agreement today you empower me to sentence you anywhere up to 6 years and 8 months in the State Prison.
>
> Defendant: I will not come back.
>
> The Court: It is up to you, but I'm telling you what's gonna happen if you do.

RT 6:13-7:3.

When the defendant failed to appear at the continued sentencing hearing, Judge Iles issued a bench warrant. Thereafter, Judge Iles continued sentencing from year to year through 2005. The defendant returned to California in 2006 and was arrested under the outstanding warrant. He thereafter filed a motion to withdraw his plea (which Judge Iles denied) and a motion to disqualify Judge Iles under Code of Civil Procedure section 170.1 (which she struck as untimely). He then filed a petition for a writ of mandate. The Court of Appeal granted the writ, holding among other things that the plea agreement was unconstitutional and void as overbroad, uncertain as to duration, and contrary to public policy. (*Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 392.)

When asked by the commission about her approval of the plea agreement that the Court of Appeal had found constitutionally invalid, Judge Iles explained that she approved the plea, in part, because of the immigration status of the defendant, who could have been subject to deportation to Iraq if she had sentenced him. Conviction of a crime of domestic violence is a basis for deportation. (8 U.S.C. § 1227(a)(2)(E).) Before a conviction exists for immigration purposes, a plea or finding of guilt must be made *and* some punishment imposed. (*Id.* at § 1102(a)(48)(A).) Judge Iles stated that she was advised that there was an outstanding death warrant for the defendant in Iraq, and she was assured by counsel that deportation would result in torture and likely execution, which was never subject to dispute as between the parties. It was the reason defendant's counsel proposed the plea bargain, and the reason that Judge Iles felt the plea bargain could be accepted. She stressed that the defendant voluntarily agreed to the plea bargain. Judge Iles stated that she was unwilling to leave the defendant's family in danger of further violence, or allow him to have assaulted them with impunity, but was unaware of any alternative that would have avoided the "very real specter of torture or death following deportation." She did not believe that his relocation to Michigan would subject citizens of that state to any risk because she believed the only people likely to be harmed by him were his wife and children. Since the maximum sentence she was entitled to impose for the crimes charged was six years and eight months, Judge Iles was unwilling to impose a sentence that would lead to torture and/or death. She believed the plea bargain was an appropriate solution under the circumstances.

Canon 2A of the Code of Judicial Ethics requires that judges respect and comply with the law. Canon 3B(2) requires that judges be faithful to the law. The case law makes clear that sending felons to other states is prohibited by public policy. (*Alhusainy*,

143 Cal.App.4th at p. 392; *State v. Charlton* (Ct.App. 1992) 115 N.M. 35, 846 P.2d 341, 344 ("Banishment 'would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself.' [Citation.] 'To permit one state to dump its convict criminals into another is not in the interests of safety and welfare; therefore, the punishment by banishment to another state is prohibited by public policy.' [Citation.]. *See also Commonwealth v. Pike* (1998) 428 Mass. 393, 701 N.E.2d 951, 960 ("[i]t is against constitutional principles of interstate comity to 'make other states a dumping ground for our criminals,' [citation], [as it is] our solid waste. [Citation.];" *State ex rel. Halverson v. Young*, 278 Minn. 381, 154 N.W.2d 699 (1967); *State v. Doughtie*, 237 N.C. 368, 74 S.E. 2d 922 (1953); *People v. Baum*, 251 Mich. 187, 231 N.W. 95, 96 (1930); *Rutherford v. Blankenship* (W.D. Va. 1979) 468 F.Supp. 1357, 1360 (defendant's agreement in plea to leave the state unenforceable as against public policy).)

Judge Iles had the obligation to evaluate and determine the legality of the plea agreement. (*Alhusainy,* 143 Cal.App.4th at p. 394; *People v. Andreotti* (2001) 91 Cal.App.4th 1263, 1275.) The law is clear that sending felons out of state is contrary to public policy, and there is no legal support for the proposition that this policy can be abrogated on a case by case basis by a trial court based on the parties' agreement. As a consequence of the plea agreement, and pursuant to Judge Iles' order that defendant go to the airport under the supervision of the public defender's investigator, and fly to Detroit, the defendant went to Michigan. There is no evidence that Michigan agreed to take him. It is not clear how permitting the defendant to go to Michigan protected women living there, or that he was incapable of victimizing others there. The impropriety of approving a plea agreement whereby the defendant is transferred to another state in contravention of public policy is not subject to a reasonable difference of opinion. Accordingly, the commission finds that Judge Iles' approval of the plea agreement reflects a purpose other than the faithful discharge of judicial duty, and was at minimum improper action within the meaning of article VI, section 18, subd. (d)(3) of the California Constitution.

In issuing this Public Admonishment, the commission took into consideration Judge Iles' history of discipline by the commission. Judge Iles received an advisory letter in 1988 for failing to strictly abide by statutory requirements in imposing sanctions on a litigant. She received another advisory letter in 1997 for telling a defendant that his probation would be violated if the victim contacted him, denying him bail pending appeal although he was statutorily entitled to it, and participating in settling the record on appeal after having been disqualified, which gave rise to the appearance of embroilment and abandonment of her role as a neutral judicial officer. She received a private admonishment in 2004 for personally contacting a prosecutor and suggesting that he investigate an attorney for perjury, asking witnesses to prepare declarations for the district attorney's office, and repeatedly contacting prosecutors about their investigation while it was ongoing. She received a public admonishment in 2006 for summarily incarcerating an unrepresented defendant in disregard of his fundamental rights.

Commission members Hon. Judith D. McConnell, Mr. Marshall B. Grossman, Mr. Michael A. Kahn, Ms. Patricia Miller, Mr. Jose C. Miramontes, Ms. Barbara Schraeger, Mr. Lawrence Simi and Ms. Maya Dillard Smith voted to impose a public admonishment. Hon. Frederick P. Horn was recused. Hon. Katherine Feinstein did not participate. There is one vacancy on the commission.

Dated: November 15, 2007

**PROOF OF SERVICE**

I, the undersigned, am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action. My business address is 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102. I declare as follows:

On November 15, 2007, I served the attached:

**DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT**

on all interested parties in this matter, by delivering a true copy as follows:

**Via U.S. Mail and Facsimile**

Edith R. Matthai, Esq.
Robie & Matthai
500 South Grand Avenue, 15th Floor
Los Angeles, CA 90071-2609
FAX: (213) 624-2563

☒ **(BY MAIL)** I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.

☒ **(BY FACSIMILE TRANSMISSION)** I caused such document to be transmitted to the addressee's facsimile number noted. The facsimile machine I used complied with Rule 2003(3) and the transmission was reported as complete and without error. Pursuant to Rule 2003(6), I caused the machine to print a transmission record of the facsimile transmission, a copy of which is attached to this declaration as required by Rule 2008(e)(4).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed by me on November 15, 2007 at San Francisco, California.

_____
Judith R. Starks

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING JUDGE JAMES M. BROOKS | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |

This disciplinary matter concerns Judge James M. Brooks, a judge of the Orange County Superior Court. Judge Brooks and his counsel, Edward P. George, Jr., have stipulated to issuance of this public admonishment, as set forth in a Stipulation for Imposition of Public Admonishment. Pursuant to stipulation, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18, subdivision (d) of the California Constitution, based on the following Statement of Facts and Reasons:

## STATEMENT OF FACTS AND REASONS

Judge Brooks was elected to the Orange County Municipal Court on November 4, 1986 and began serving on January 5, 1987. He served as assistant presiding judge of the municipal court in 1991 and as presiding judge in 1992. In 1998, he was elevated to the Orange County Superior Court by unification.

The matters which caused the Commission on Judicial Performance to issue its preliminary investigation letter on August 16, 2007 all concern Judge Brooks's conduct while presiding over the jury trial in the case of *Haluck v. Ricoh Electronics, et al.* (No. 03CC10166). The *Haluck* trial, which was held from January 3 to March 1, 2005, involved a claim by James Haluck and Michael Litton against Ricoh Electronics

for employment discrimination. After the jury returned a verdict for the defense, the plaintiffs appealed on the grounds that Judge Brooks's misconduct so infected the proceedings they were deprived of a fair trial. The appellate court concluded that Judge Brooks's conduct was sufficiently egregious and pervasive that a reasonable person could doubt whether the trial was fair and impartial. Accordingly, the appellate court reversed the judgment and remanded the case with directions that it be assigned to a different trial judge for retrial. (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994.)

Judge Brooks committed the following misconduct while presiding over the *Haluck* trial:

1. "Overruled" Signs

During the trial, Judge Brooks overruled one of plaintiffs' objections and held up a hand-lettered sign, prepared by him, stating "overruled." The next day, when the court overruled another of plaintiffs' objections, defense counsel Callahan presented the judge with a different sign, stating: "Your honor, I want to help you if I may. This is a much nicer version." The following exchange then occurred between Judge Brooks and plaintiffs' counsel Reinglass:

> The Court: Better than my homemade one.
>
> Ms. Reinglass: Plaintiffs object to Mr. Callahan presenting another 'overruled' sign to the court. The court's sign was adequate enough.
>
> The Court: The court will await receiving a 'sustained' sign from plaintiff[s] so we can split the benefits here.
>
> Ms. Reinglass: How many do I get?

(2/03 R.T. 3277:13-20.)

A week later, after Judge Brooks used Callahan's "overruled" sign, Reinglass objected, Judge Brooks responded, "It's lightening things up."

The appellate court found that the use of the sign "was a sideshow in the overall circus atmosphere mocking a serious proceeding important to the parties, and it 'cast the judicial system itself in a bad light in the eyes of the litigants and the public at large.'" (*Haluck v. Ricoh, supra,* 151 Cal.App.4th at p. 1004, citing *Hernandez v. Paicus* (2003) 109 Cal.App.4th 452, 455.)

The use of the sign and the adopting of defense counsel's sign for its acknowledged entertainment value, belittled plaintiffs' objections, and violated canons 1 (failing to observe high standards of conduct), 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 3B (3) (failing to require order and decorum in the proceedings), and 3B (4) (failing to be patient, dignified and courteous).

2. The Twilight Zone

In testifying as to his emotional stress, plaintiff Litton said that he had felt like he was in a white room without doors or windows that had no boundaries. On cross-examination, the following exchange took place:

> By Mr. Callahan: Have you ever heard of The Twilight Zone?
>
> A. [by Mr. Litton]: Yes, sir.
>
> Q. Goes kind of like this, do do, do do.
>
> Ms. Reinglass: Your Honor, I would just object. This is argument.
>
> The Court: Your objection's on the record, ma'am.
>
> Ms. Reinglass: Also improper argument.
>
> Mr. Callahan: You're traveling through another dimension, a dimension not only of sight and sound, but of mind, a journey into a wondrous land, whose boundaries are that of imagination[;] that's a sign post up ahead, your next stop, The Twilight Zone. Do do, do do. Do do, do do.

The Court: That was terrible. Get to the question, please.

Ms. Reinglass: Noting for the record, counsel was singing The Twilight Zone theme song.

The Court: And how the jurors left it will be reflected on [the] same record.

By Mr. Callahan: Q. Endless white room with no doors or windows. [¶] Is that where you got your idea of this white room theory?...

[¶] ... [¶]

A. From where?

The Court: Twilight Zone. That's his question.

The Witness: No, sir.

Mr. Callahan: Do do, do do. Do do, do do.

Ms. Reinglass: I request that counsel stop singing. As entertaining as it is for the jury, it's mocking my client and mocking the trial.

By Mr. Callahan: Q. Ever heard of The Twilight Zone, the show?

A. Yes, sir.

The Court: For the record, he hit a few notes of The Twilight Zone theme song which I don't see as mocking. He was off color [sic].

Mr. Callahan: I go through life tone deaf and colorblind. This is tough.

(Vol. 16 R.T. 3168:14–3170:6.)

Although some of these comments were counsel's, the judge encouraged many of them; he gave defendants' lawyer free rein to deride and make snide remarks at will

and at the expense of plaintiff Litton. This violates canon 3B(3) which provides that judges "shall require order and decorum in proceedings."

3. Comments During the Reading of Stevenson Deposition/Litton Examination

During defense counsel Callahan's cross-examination of plaintiff Litton, Judge Brooks allowed Callahan to read approximately 30 pages of the deposition of a former Ricoh employee (Rhonda Stevenson), over numerous objections from plaintiffs' counsel Reinglass. During this part of the trial, Judge Brooks made a number of inappropriate comments:

A. At one point, Reinglass asked to "have a running objection until I add anything new." Judge Brooks responded, "That would help. Same objection that's been going on all day will be deemed to be made to every question and every answer throughout time." Reinglass then stated, "There may be some I like." The judge's response was: "With the same ruling. Well, until I die. Same ruling. Okay." (R.T. Vol. 14 at 2900:11-18.)

B. The next day, as defense counsel continued to cross-examine Litton using the Stevenson deposition, Reinglass objected, and the following exchange occurred:

> The Court: Overruled. Objection, 187.
>
> Ms. Reinglass: Huh?
>
> The Court: I got a number for all of these things.
>
> Mr. Callahan: 187 in the Penal Code, what is that, Your Honor?
>
> The Court: Murder.

(Vol. 15 R.T. 2963:26–2964:5.)

C. In another instance, when Litton was testifying that he was discriminated against because of his race, Reinglass asked: "And did you feel that it was based upon your race because of comments by [defendant] Mr. Nomura?" The court sustained Callahan's objection (leading). Reinglass then rephrased, asking, "Was there any other reason why you felt that it was based upon your race?" When Litton answered, "And due to the comment by Nomura," Callahan stated, "What a surprise," and Judge Brooks remarked, "Aren't they clever." "(Laughter)." (Vol. 13 R.T. 2692:25–2693:8.)

D. After a question by Reinglass, Callahan stated, "Objection. Gosh, what is that?" The judge responded, "What is it?" Callahan responded, "Hearsay." The judge overruled the objection and Callahan said, "How about –[.]" Judge Brooks's reply was, "No. Go back to sleep." Callahan responded, "Wake me when it's break time." Judge Brooks told him it was very close. (Vol. 17 R.T. 3409:20–3410:2.) Later that day, when Callahan objected, Judge Brooks stated, "Don't wake him up," to which Callahan replied, "Hey, I don't get a lot of sleep." (Vol. 17 R.T. 3444:9-11.)

The comments "until I die," "murder" and "187" made it clear that the court had no use for the objections. While these comments may have been humorous to the judge and defense counsel, humor should not be used to belittle litigants or their counsel. The "Aren't they clever" comment disparaged Litton's testimony and implied he was not telling the truth and that his lawyer was trying to sneak in otherwise inadmissible evidence. A trial court must avoid comments that convey to the jury the message that the judge does not believe the testimony of the witness. The "No. Go back to sleep" and the "Don't wake him up" comments belittle the seriousness of the proceedings. Judge Brooks's comments violate canons 1 (failing to observe high standards of conduct), 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and 3B(4) (failing to be patient, dignified and courteous) and constitute misconduct.

4. The Soccer Cards

During the trial, Judge Brooks advised his clerk, "Jeffrey, we're going to the soccer style method here. Red card, 50 bucks each. Okay. If I say, red card plaintiff, write it down, 50 bucks. Red card defense, 50 bucks. [¶] We'll keep a running tab. End of trial, we'll collect it from them and we may take you guys [the jury] to lunch at a very nice place...." (Vol. 17 R.T. 3358:15-21.) Further mention of red cards took place intermittently following objections by the defense over the course of 40 pages of transcript. At one point, when plaintiffs' counsel stated she was reading the last portion of a deposition, Callahan stated, "Very good.... I probably shouldn't say very good. No objection." The judge responded, "That's an orange card, not a red card." (Vol. 17 R.T. 3378:3-8.) The Court of Appeal found that the "soccer-style" red card procedure was "glaringly inappropriate" and violated the requirement of judicial decorum. The appellate court noted that a "trial is not a sporting event." (*Haluck v. Ricoh, supra,* 151 Cal.App.4th at 1005-06.) Judge Brooks's use of "soccer cards" violated canons 1 (failing to observe high standards of conduct), 2A (failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and 3B(4) (failing to be patient, dignified and courteous).

Judge Brooks's comments and actions during the *Haluck* trial were prejudicial to the administration of justice and constituted misconduct within the meaning of California Constitution, article VI, section 18, subdivision (d).

In determining that a public admonishment was appropriate, the commission noted that Judge Brooks has previously been disciplined for conduct similar to that set forth above. In 1996, Judge Brooks received an advisory letter addressing, in part, the judge's comments reflecting ethnic bias: referring to Hispanic defendants as "Pedro"; issuing a bench warrant for an Asian defendant for "ten thousand dollars or twenty thousand yen"; and stating to an undocumented Hispanic defendant, "[y]ou have more names than the Tijuana telephone book." In 1999, Judge Brooks received another advisory letter for remarks to a defendant at the conclusion of a preliminary hearing

about how the judge would have handled an assault on a member of his own family: "I would go down and punch [the defendant's] lights out," and that instead of calling the police, it would be, "touch them, you die." In 2003, Judge Brooks received a private admonishment for conduct including referring to the parties in a case, the operators of a mobile home park, as "Nazis" and analogizing their actions to that of the Nazis during the Holocaust. In another matter also included as a basis for the private admonishment, in the course of denying plaintiff's motion to exclude reference to his status as an undocumented alien, Judge Brooks made remarks conveying his stereotypes of undocumented aliens, including that they place burdens on taxpayers by receiving benefits to which they are not entitled. The judge referred to the defendant's physician as "this good doctor." The appellate court reversed Judge Brooks's ruling in that case, and based its reversal in part on the appearance of bias. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452.) In 2006, Judge Brooks received a public admonishment for conduct including telling a litigant who claimed to have failed to appear for his deposition due to a heart condition, "I wonder what's going to happen when we put you in jail, Mr. McMahon. Your little ticker might stop, you think?" Later, after imposing a fine on Ms. McMahon, Judge Brooks stated, "I'd mention jail but it might give her a heart attack." (*Palacio Del Mar Homeowners Assoc. v. McMahon*, No. 01CC14684.) The 2006 public admonishment was also based on comments Judge Brooks made during a hearing in the case of *Vinci Investments Co., Inc. v. Joher, et al.*, No. 04CC04522.) Defendant Joe Joher had allegedly transferred business property into his mother's and his wife's name instead of transferring it to plaintiff. Referring to the mother, Judge Brooks stated that, "... a lady that, in her own country – I put a question mark; I know it's Syria, Iraq, Iran, Lebanon – probably a very nice lady, probably doesn't know how much she owns, I don't think." Later, Judge Brooks stated that defendant Joher transferred, "much of the business/property into the name of defendant 'Joe' Joher's wife, who, in her native Syria (?) probably wouldn't be allowed to own property." The commission found that Judge Brooks's conduct in the *Vinci* and the *Joher* cases violated canons 2A, and 3B(4).

The commission's determination to resolve this matter with a public admonishment and to forego formal proceedings and the possible imposition of higher discipline was conditioned upon Judge Brooks's agreement to retire from the bench and not to seek or hold judicial office and not to seek or accept judicial assignment.[1] In the commission's view, this result adequately protects the public from any future misconduct.

Commission members Justice Judith D. McConnell, Honorable Katherine Feinstein, Mr. Peter E. Flores, Jr., Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott and Mr. Nathaniel Trives voted for a public admonishment. Commission members Marshall B. Grossman and Mr. Samuel A. Hardage did not participate. Commission chairperson Honorable Frederick P. Horn is recused.

Dated: 4/4, 2008.

Judith McConnell

Honorable Judith D. McConnell,
Vice-Chairperson of the Commission on
Judicial Performance

[1] The commission has been apprised by the presiding judge of the Orange County Superior Court that Judge Brooks has 128 days of accrued vacation leave and that he is authorized to take that leave after his last day presiding on the bench.

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING FORMER JUDGE ROBERT D. QUALL | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |

This disciplinary matter concerns Robert D. Quall, formerly a judge of the Merced County Superior Court. Former Judge Quall, his counsel, James A. Murphy, Esq., and trial counsel for the commission, Jack Coyle, Esq., have stipulated to issuance of this public admonishment, as set forth separately in a Stipulation for Imposition of Public Admonishment. Pursuant to stipulation, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

## STATEMENT OF FACTS AND REASONS

Judge Robert D. Quall was elected to the Merced County Municipal Court in 1979, was elevated to the Merced County Superior Court in August 1998 through court unification, and retired from judicial office on April 30, 2007. His disciplinary record consists of an advisory letter in 1994 and a private admonishment in 2006, neither of which involved conduct similar to the present subject matter.

Since at least 1994, Judge Quall and his wife have been leading volunteer medical relief "missions" every two years or so to towns in Kenya and Tanzania, under the name Masaai-Migori Africa Medical Mission, Inc. Judge Quall is the

Mission director. "Teams" of about 30 people conduct medical clinics to treat diseases such as malaria, and distribute donated items such as eyeglasses and clothing. The trips also have an evangelical component; church services are conducted in various towns, Bibles are distributed, and travel arrangements are coordinated through a Christian pastor in Kenya. (Judge Quall is a member of the Merced Presbyterian Church.) Initially comprised of college students and others connected with Merced Christian organizations, the teams grew to include community members and on occasion people within the judicial system.

An auction is held to support the mission, in the spring before the trip. Auction attendance grew over the years to an estimated 400 people, and the event was moved from the Merced Presbyterian Church to a community center owned by the church. Donations are made by local businesses and individuals, with items ranging from hay to the use of vacation homes.

A. Solicitation of Auction Donations

Although canon 4C(d)(i) of the Code of Judicial Ethics provides that a judge may assist a non-profit organization of which he is a director in planning fund-raising, it prohibits personal participation in the solicitation of funds or other fund-raising activities (with the exception that a judge may publicly solicit funds for such an organization from other judges). Also, canon 4C(d)(iv) provides that a judge shall not permit the use of the prestige of his or her judicial office for fund-raising.

Judge Quall is the main organizer of the auction, and solicited auction donations in the following instances.

1. Judge Quall asked Commissioner Henry Jacobs generally if he could donate to the auction (either at a local gym or by phone at court, or both). Commissioner Jacobs, who became a commissioner in 2000, donated a gourmet picnic, and in one instance symphony tickets, for auctions in 2002-2006. While Commissioner Jacobs initiated the first donation, Judge Quall initiated

conversations about subsequent donations by asking something like "Are you still good for it?" (While canon 4C(d)(i) permits judges to solicit funds from other judges as an exception to the prohibition on personal involvement in fund-raising, the exception does not permit judges to solicit funds from commissioners or other subordinate judicial officers.)

2. Judge Quall asked Sheriff Pazin and Undersheriff Blake to donate to the auction, and as a result they donated lunches and air patrol rides in 2002-2006. The judge contacted them about donations, either by calling or asking when he happened to run into them (or judicial secretary Tisa Hyder also contacted them at the judge's direction).

3. In 2005, Judge Quall telephoned Deputy Public Defender Marjaneh Maroufi at her office, and asked if her father would donate a room at a Berkeley hotel he owned. Ms. Maroufi's father had made the same donation the previous year after Ms. Maroufi had initiated the idea.

4. Judge Quall asked local businessman Larry Stefani to donate cases of wine over a period of years, including 2004-2006, which he did.

5. Judge Quall asked local businessman Richard Vierra to donate a deer hunt, which he did in 2006.

6. Attorney Debbie Bennett and her husband owned season tickets to San Francisco Giants baseball games. Ms. Bennett routinely appeared before Judge Quall in Merced. From approximately 2000 through 2005, the judge asked Ms. Bennett to donate Giants tickets to the auction, which she did at least once. One request occurred in the courtroom while Ms. Bennett was asking for a continuance; the judge called her up to the bench, alone, and asked her whether she was going to donate Giants tickets.

Ms. Bennett complained to then Presiding Judge Frank Dougherty about Judge Quall's conduct. Before Judge Quall was transferred to Los Banos in September 2005, Presiding Judge Dougherty spoke to him in chambers and told him not to solicit attorneys for auction donations. Thereafter, Judge Quall asked

Ms. Bennett to come into chambers. He told her that somebody had "snitched me off" about the auction, and asked if it was she. Ms. Bennett responded by asking the judge if he believed that she would do something like that. The judge said that it must have been another attorney, whose name he specified. The judge then again solicited Ms. Bennett for a donation of Giants tickets to the auction, stating, "Are you still going to get me those tickets?", or words to that effect.

7. From approximately 1996-2006, Judge Quall asked Merced attorney Logan McKechnie, who regularly appeared before him, to donate items to the Mission itself. Mr. McKechnie donated several thousand pairs of eyeglasses through the Lions Club with which Mr. McKechnie was involved. The judge also asked Mr. McKechnie to donate to the auction on a few occasions, which he declined to do.

8. Around 2003, Judge Quall had court interpreter Yolanda Garcia ask Deputy Sheriff John Strauss into chambers, then told Deputy Strauss that he wanted him to donate horses he owned for a ride for a group of people, and to transport the people to a specific place for the ride (Dinosaur Point) and provide them with a meal. When Deputy Strauss declined, saying that the horses were ranch horses not meant for casual riding, and that he did not have insurance, the judge persisted. When Deputy Strauss continued to decline, the judge asked him who else could do it, and Deputy Strauss gave him the names of two law enforcement officers who worked at the courthouse – Dan Gover and J.R. Antone. The judge then contacted both men and asked each of them to use horses they owned to donate rides, which they did.

9. Around 1999 or 2000, Judge Quall asked retired Marshal Earl Downey to see whether his sister, whom the judge knew had access to NFL memorabilia, could donate to the auction, which she agreed to do. For several years thereafter, the judge approached Marshal Downey and asked him to contact his sister and ask her to make a donation.

10. In connection with the 2006 auction, Judge Quall asked local farmer Bob McDonald (at a local "Sportsman's Club" dinner) whether he donated to good causes; when he said that he did, the judge told him that he was seeking donations for the auction. McDonald told the judge he would think about it, and then agreed to donate hay.

11. For two auctions held around 2000 and 2001, Judge Quall asked court administrator Lee Haugen to contact local golf courses and obtain donations of playing time.

B. Selling Auction Tickets/Having Others Sell Tickets

Judge Quall personally solicited attendance for the auction. The judge asked several people if they wanted to buy tickets, or if they knew anyone else who might want tickets. (Tickets cost a few dollars.) Judge Quall also directed others to sell auction tickets, including interpreter Yolanda Garcia, Undersheriff Blake and Marshal Downey.

C. Acting as Auctioneer

While the auctions were primarily conducted by a professional auctioneer, Judge Quall sometimes acted as auctioneer, at least in part, between approximately 1999 and 2005, auctioning off a few items himself. (See Cal. Judges Assoc., Judicial Ethics Update (1982) p. 1 [judge prohibited from participating as auctioneer on local public education television station for purpose of raising funds for operation of station], see Cal. Judges Assoc., Judicial Ethics Update (1989) p. 4 [if participation by judge is designed to increase donations, there is clearly implied indirect solicitation of funds by judge, which is inappropriate].)

D. Use of Judicial Secretary Tisa Hyder/Court Resources

Judge Quall used judicial secretary Tisa Hyder to create documents connected with the Africa trips and, in a few instances, pertaining to other

personal interests (father-son competitive tennis, Rescue Men's chorus, the "Quall-ity Inn," a cabin owned by the judge that he allows others to use). Hyder prepared about 60 such personal documents between 2001 and 2006, including letters directly related to fund-raising; it is estimated that she spent about 16 hours on the judge's personal work over that period.

A "judge may not use his or her office, staff, or public property and/or resources under the judges' control for personal, nongovernmental purposes. This is an obvious part of the obligation of a judge to 'act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.'" (Rothman, California Judicial Conduct Handbook (1999 2d ed.) §§ 3.33, 3.34-3.36.) The total amount of time spent during business hours was more than a de minimis nature that might be permissible (*id.*, § 3.36).

Sometime between late 2003 and mid-2004, in a brief conversation that occurred in passing, Presiding Judge Dougherty told Judge Quall that he was not to use the judicial secretary or court resources for the Africa trips; Judge Quall indicated he understood. Thereafter, Judge Quall curtailed, but did not totally cease the use of the judicial secretary; Ms. Hyder prepared about six Africa-related documents after the summer of 2004.

E. Use of Judicial Letterhead

Eleven of the letters prepared by Ms. Hyder described in the previous section were on judicial letterhead – eight concerning Africa (a fax to hotel regarding room reservations, three donation thank you notes, letter to embassy re travel arrangements, letter to travel agent re travel arrangements, letter re transmittal of Mission's statement of purpose, letter to team members re distributing brochures) and three concerning other personal interests of Judge Quall (obtaining admission to the U.S. for children of pastor in Africa who coordinated trips, getting Wimbledon tickets for Mission members stopping in London on the way home, and obtaining time off for someone to participate in a

concert by the Men's Rescue chorus, founded and directed by the judge). Most of the judicial letterhead documents were sent in 2001-2002.

The use of court stationery related to the Africa trips advanced a personal interest as prohibited by canon 2B(2) (judge shall not lend prestige of judicial office to advance personal interests of judge or others). The Africa trips at a minimum advanced the personal interests of others (medical relief), including that of the Presbyterian church. And, the letters directly related to fund-raising are a violation of canon 4C(d)(iv) (judge shall not permit the use of the prestige of office for fund-raising). (See Rothman, *supra*, §§ 8.31-8.33.)

Judge Quall's actions, as set forth above in sections A-E, violate the Code of Judicial Ethics, canons 2A, 2B, 4C(d)(i) and 4C(d)(iv), and constitute prejudicial misconduct.

Commission members Honorable Frederick P. Horn, Honorable Judith D. McConnell, Honorable Katherine Feinstein, Mr. Peter E. Flores, Jr., Mr. Marshall B. Grossman, Mr. Samuel A. Hardage, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Sandra Talcott and Mr. Nathaniel Trives voted to impose a public admonishment. Commission member Ms. Maya Dillard Smith did not participate.

Dated: 6/2/08

Honorable Frederick P. Horn,
Chairperson of the Commission on
Judicial Performance

# PUBLIC ADMONISHMENT OF JUDGE LISA GUY-SCHALL

The Commission on Judicial Performance has ordered Judge Lisa Guy-Schall publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge Lisa Guy-Schall has been a judge of the San Diego County Superior Court since 1989. Her current term began in January 2003.

On the night of September 12, 2007, around 9:00 p.m., Judge Guy-Schall drove a vehicle in a reckless manner while under the influence of alcohol, and with a blood alcohol level of approximately 0.09 percent. She drove on the wrong side of a divided highway in Escondido, San Diego County; specifically, she drove southbound in the northbound number one lane of Centre City Parkway, at Grand Avenue. She turned onto Grand Avenue and then rapidly accelerated into a left turn. She was stopped by an officer of the Escondido Police Department who observed her conduct. She failed the field sobriety test and was placed under arrest. A blood test was performed within approximately an hour and yielded a result of approximately 0.09 percent blood alcohol. On October 10, 2007, a complaint was filed charging her with driving under the influence of alcohol, a violation of section 23152(a) of the Vehicle Code, and driving while having a 0.08 percent or higher blood alcohol level, a violation of section 23152(b) of the Vehicle Code.

On March 14, 2008, Judge Guy-Schall entered a plea of guilty to alcohol related reckless driving, a violation of Vehicle Code section 23103(a), pursuant to section 23103.5. She was found guilty and convicted of that charge.

Judge Guy-Schall's unlawful action described above evidences a serious disregard of the principles of personal and official conduct embodied in the California Code of Judicial Ethics, including failure to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved (canon 1), and failure to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2). Judge Guy-Schall's conduct described above was, at a minimum, improper action pursuant to article VI, section 18(d)(3) of the California Constitution.

In determining that a public admonishment was appropriate, the commission noted that Judge Guy-Schall has been the subject of prior discipline. Specifically, Judge Guy-Schall received a private admonishment in 1995 and a public admonishment in 1999. The judge's 1995 private admonishment addressed her embroilment in a juvenile dependency case. The judge's 1999 public admonishment addressed her abuse of the contempt power.

Commission members Hon. Frederick P. Horn, Mr. Peter E. Flores, Ms. Barbara Schraeger, Ms. Maya Dillard Smith, Ms. Sandra Talcott and Mr. Nathaniel Trives voted to impose a public admonishment. Hon. Katherine Feinstein would have imposed a private admonishment. Commission members Hon. Judith D. McConnell and Mr. Marshall B. Grossman were recused. Mr. Samuel A. Hardage and Mr. Lawrence J. Simi did not participate.

Dated: September 5, 2008

**PROOF OF SERVICE**

I, the undersigned, am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action. My business address is 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102. I declare as follows:

On September 11, 2008, I served the attached:

**PUBLIC ADMONISHMENT OF JUDGE LISA GUY-SCHALL**

on all interested parties in this matter, by delivering a true copy as follows:

Reginald A. Vitek, Esq.
Seltzer Caplan McMahon Vitek
3100 Symphony Towers
750 B Street
San Diego, CA 92101
FAX: (619) 685-3100

☒ **(BY U.S. MAIL)** I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.

☒ **(BY FACSIMILE TRANSMISSION)** I caused such document to be transmitted to the addressee's facsimile number noted. The facsimile machine I used complied with Rule 2.301(3) and the transmission was reported as complete and without error. Pursuant to Rule 2.301(6), I caused the machine to print a transmission record of the facsimile transmission, a copy of which is attached to this declaration as required by Rule 2.306(g)(4).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed by me on September 11, 2008 at San Francisco, California.

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Judith R. Starks

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING JUDGE PAUL M. BRYANT, JR. | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |

This disciplinary matter concerns Judge Paul M. Bryant, Jr. (hereafter "Judge Bryant"), a retired judge of the San Bernardino County Superior Court. Judge Bryant and his counsel, Heather L. Rosing, have stipulated to issuance of this public admonishment, as set forth in a Stipulation for Imposition of Public Admonishment. Pursuant to stipulation, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18, subdivision (d) of the California Constitution, based on the following Statement of Facts and Reasons.

## STATEMENT OF FACTS AND REASONS

Judge Bryant was appointed to the San Bernardino County Municipal Court in 1988 and was elevated to the San Bernardino County Superior Court in 1989 by appointment. Judge Bryant retired on January 26, 2008.

The matters which caused the commission on Judicial Performance to issue its preliminary investigation letter on February 26, 2008 all concern improper demeanor. Judge Bryant has failed to be patient, dignified and courteous toward individuals with whom he dealt in an official capacity, contrary to canon 3B(4), as follows:

1. *WFS Financial v. Dimas Ugalde*

On or about July 14, 2005, attorney LaVonna Hayashi appeared before Judge Bryant in a civil case, *WFS Financial v. Dimas Ugalde*, No. RCV085110. The case was on calendar for a motion and for a case management conference. Judge Bryant granted Ms. Hayashi's motion and an attendant request for sanctions. Judge Bryant then began to call the next case on the calendar. Ms. Hayashi said, "It's also on for -- I'm sorry, Your Honor." Judge Bryant stated the name of the next case. Ms. Hayashi again said, "Your Honor, I'm sorry." In a harsh and threatening manner, Judge Bryant ordered Ms. Hayashi to sit down, "or we'll address it in another fashion." When Ms. Hayashi attempted to say that the case was also on for a case management conference, Judge Bryant yelled at her, "Will you have a seat." After hearing the next brief matter, Judge Bryant recalled Ms. Hayashi's case, vacated his prior orders granting Ms. Hayashi's motion and request for sanctions, and recused himself from the case. In open court, Judge Bryant told Ms. Hayashi that he had found her to be "rude and obnoxious" on this, and previous occasions.

In this matter, in addition to failing to be patient, dignified and courteous, Judge Bryant vacated orders he had issued in favor of Ms. Hayashi's client after becoming annoyed with Ms. Hayashi and immediately before recusing himself; this created the impression that the judge was not impartial and was vacating his orders out of pique.

Judge Bryant has acknowledged the impression created by his conduct in vacating his rulings after becoming annoyed with Ms. Hayashi and before recusing himself, and has expressed regret for his conduct.

2. *People v. Devorah Echeverri*

On or about July 11, 2007, attorney Rosa Sahagun appeared for an arraignment in *People v. Devorah Echeverri*, No. FMW700269, which had been added to the calendar. The defendant was present, and Ms. Sahagun and the

prosecutor had agreed on a proposed disposition. Prior to calling Ms. Sahagun's case, Judge Bryant had been conducting video arraignments. Before Judge Bryant could call Ms. Sahagun's case, a recess had to be taken to allow the bailiff to remove the video equipment, the clerk to retrieve the file for Ms. Sahagun's case, and the reporter to set up. After Judge Bryant left the bench to take recess, but before he had left the courtroom, Ms. Sahagun requested that he call her case before the recess. Upon returning to the bench, Judge Bryant asked Ms. Sahagun if she had a matter that she wished to call, and then, in the presence of her client, called Ms. Sahagun "obnoxious."

3. *People v. Anderson*

In late 2006 or early 2007, in *People v. Anderson*, No. FWV037306, Judge Bryant stated, in refusing to accept a plea agreement reached by Deputy District Attorney Mary Hosseini and defense attorney Sean Tabibian, words to the effect that DDA Hosseini must have "rocks for brains" to agree to the proposed disposition.

Judge Bryant has said that he does not recall using these precise words and does not recall this exchange, but has apologized if he did use words to this effect, and has stated his understanding that a judge should not use words even similar to those with counsel at any time.

4. *People v. Gatica*

On or about February 8, 2007, Judge Bryant heard Deputy District Attorney Kent Williams tell the bailiff that Williams had spoken with Judge Bryant's clerk that morning about having the judge review a box of discovery documents that were dropped off by the public defender's office earlier that day in preparation for a proceeding later that day in *People v. Gatica*, No. FWV039167. During the *Gatica* proceeding, Judge Bryant stated in open court, in reference to DDA Williams, "I heard him, when I was talking to my bailiff earlier, say one of the

dumbest things I ever heard a lawyer say, which is he thought sometime during the day when I was doing this other thing that I was actually going to go through that box." DDA Williams responded that the clerk had told him Judge Bryant would review the documents prior to the proceeding. Judge Bryant had overheard the earlier communication, but did not hear the clerk tell DDA Williams that the documents would be reviewed by the judge. Judge Bryant then responded: "With all do [sic] respect – no she didn't. I don't know about your command of the English language or the lack thereof, what you hear and what you don't want to hear, but I heard what the woman said. She didn't tell you I was going to go through that."

Judge Bryant has acknowledged that his comments on the record were harsh and sarcastic, and has stated that in retrospect, he would have handled the situation differently.

5. *People v. Cano*

On or about February 1, 2007, in *People v. Cano*, No. FWV039349, Judge Bryant, in explaining his unwillingness to sentence a defendant to prison and then continue the matter for two months, said, "I'm not going to sentence him to two years in state prison and have him come in 4-4 when there's no penalty if he doesn't show up other than the failure to appear, which the Government never seems to prosecute"; the judge later added that "the Government will undoubtedly wimp out and not go after the failure to appear because that's been my observation over the last 21 years…."

Judge Bryant has conceded that his words, such as "wimp out," were poorly chosen.

The commission determined that Judge Bryant's conduct in these matters was, at a minimum, improper action.

In determining that a public admonishment was appropriate, the commission took into consideration the fact that Judge Bryant received an advisory letter in 1991 for making disparaging statements about an attorney in front of a jury.

Commission members Hon. Frederick P. Horn, Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Peter E. Flores, Mr. Marshall B. Grossman, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott and Mr. Nathaniel Trives voted for a public admonishment. Commission member Mr. Samuel A. Hardage did not participate.

Dated: October 27, 2008.

/s/
Hon. Frederick P. Horn
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| IN THE MATTER CONCERNING JUDGE JOHN M. WATSON | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |

This disciplinary matter concerns Judge John M. Watson, a judge of the Orange County Superior Court. Judge Watson and his counsel, Edith R. Matthai, have stipulated to issuance of this public admonishment, as set forth in a Stipulation for Imposition of Public Admonishment. Pursuant to stipulation, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18, subdivision (d) of the California Constitution, based on the following Statement of Facts and Reasons:

## STATEMENT OF FACTS AND REASONS

### I. PRIOR DISCIPLINE

In October 2006, Judge Watson was privately admonished for an e-mail sent to other judges that was perceived as biased or prejudiced. In February 2006, he was publicly admonished for using his courtroom clerk to help with secretarial tasks involved in the day-to-day management of two rental properties he owned, and using court resources and court facilities for his personal real estate business. In 2004, Judge Watson received an advisory letter expressing the commission's "strong disapproval" of conduct that included sarcastic, demeaning, and disparaging remarks and displaying impatience toward attorneys, in two cases. In 1995, he received an

advisory letter for admitting a defendant to bail after a hearing, then revoking the defendant's bail status later that day, without notice or a hearing, based on an ex parte contact between the judge's clerk and the police.

II. PENDING MATTERS

1. *Papadopoulos v. Hickok* (No. 05CC04014)

*Papadopoulos*, involved a dispute between Michael Papadopoulos and his neighbor Patty Hickok. There had been a nuisance lawsuit, a settlement and reciprocal temporary restraining orders predating Judge Watson's involvement. Then, Mr. Papadopoulos requested a full adversary hearing, seeking a permanent injunction against Ms. Hickok and the matter was assigned to Judge Watson. Mr. Papadopoulos was represented by attorney Anthony Cosio. Ms. Hickok was represented by attorney Vincent L. Goodwin.

While presiding over the August 25 and 28, 2006 hearing in *Papadopoulos*, Judge Watson failed to be patient, dignified and courteous with the parties and lawyers and became embroiled in the matter in violation of the Code of Judicial Ethics, canons 2 and 3B(4), as exemplified by the following:

A.

While looking through the file, Judge Watson found a booklet on safe driving, and sarcastically commented, "You might need it. Who knows. Driving safely could become pivotal with this case." (R.T. 8:11-16.)

B.

Shortly thereafter, Judge Watson stated:

> The Court: You know, counsel, both of you, what I am leading up to, what I am intimating, what I am implying, is maybe this case is no big deal. [¶] The people obviously are willing to devote a lot of their psychic energy and some of their money to doing this, but the end result, and I don't intend to get to the bottom of it if I don't have to, I would love to spend the rest of the day listening to these people calling each other names, but if it is to stay away from each other, to not be rude or something to each

> other, they have no reason to communicate, no surveillance, there is no reason for any of that. So far I haven't heard one thing that is out of line. [¶] Why don't we just draft an order that fits them both and I don't have to figure out who is doing what?

(R.T. 11:13 – 12:1.)

After Mr. Cosio stated that his client would not agree to any restraining order and wanted to proceed to prove that Ms. Hickok's claims of a surveillance camera and using his vehicle as a weapon were fabrications, Judge Watson engaged in the following exchange:

> The Court: It is clear to me you intend to spend a lot of money on this for some --
>
> Mr. Cosio: It is not the money. It is the principle.
>
> The Court: Could I finish my remarks. [¶] Intends to spend a lot of money on this to feel gratified, "I got her" or whatever. Like it proves something, and it doesn't prove anything. [¶] I don't feel like spending the afternoon listening to it. I probably will. When you two guys look me in the eye at the rates you are charging and say "we object to your ordering both parties to act with good manners and leave here," that that won't work for you. That is not good enough. We want to fight some more.
>
> Mr. Goodwin: Actually, I don't object.
>
> The Court: You said that already. I am focusing on him [Cosio], and I can see by looking at his jaw he is not going to change his mind. Everybody will get a chance to name call and behave in a somehow base manner because somebody feels righteous.
>
> Mr. Cosio: May I respond to that?
>
> The Court: You could have waited until I got done.
>
> Mr. Cosio: I wasn't sure when you were going to get done.

> The Court: I am irritated at this. I do not think this is good sense or good use of these resources that I govern. We have people that have real problems. People that get killed.

(R.T. 13:25 – 14:26.)

Judge Watson then asked Mr. Cosio to respond to this statement, and Mr. Cosio explained that the parties had attempted but failed to settle the case without the court's assistance, that they had been ordered back for an adversary hearing, and that Mr. Papadopoulos was concerned about the safety of his children. Judge Watson continued to press for a mutual stay away order (R.T. 15:13 – 16:6), and Mr. Cosio responded, "All I am saying … " before Judge Watson cut him off with the following:

> The Court: You can call every witness you want. I think this is a great way to spend time and money. This is an example where the lawyer does not help the client, in my opinion, by trying to resolve this on a rational basis. [¶] I don't like to be an accessory to it. I think it is a waste of time. These are the kind of lawsuits that make people mad when they get on jury service. Dumb cases in court.
>
> Mr. Cosio: If the court wants to pass the matter to hear these other matters, it is fine with me.
>
> The Court: The other matters are just as bad as this one. It is the same thing. The only thing I tell myself, the only reason I can sleep is that the only thing I accomplish is they probably don't kill each other in the street. [¶] Mr. Papadopoulos, are you having a good time?
>
> Mr. Papadopoulos: No.
>
> The Court: You look like it. You have a big smile on your face. [¶] Now we will get to call each other names. I wish I had a sandbox.

(R.T. 16:8 – 17:2.)

C.

Mr. Goodwin objected that Mr. Cosio was attempting to get a police officer to validate another witness's testimony. In response, Judge Watson sarcastically stated to Mr. Goodwin:

> The Court: My estimation of you has gone way up. He is trying to get the policeman to corroborate what the witnesses have said. That is an interesting tactic. Maybe some other lawyers will learn it some way.

(R.T. 18:25 – 19:3.)

D.

In response to an objection from Mr. Cosio, Judge Watson spoke for a page and a half of transcript about the evidence and referred to a neighbor of Mr. Papadopoulos who was "a self-professed but unproven dog killer," ending with the statement:

> The Court: This is good stuff. This will help me. But I am inclined to overrule the evidentiary objection. We are going to have a mud throwing contest. Throw the mud. If it is all this weighty and this important, I say we do it. I just wonder if anybody had any authority.

(R.T. 30:1-5.)

E.

When Mr. Cosio stated he would read from the deposition of a police officer, Judge Watson stated:

> The Court: … believe me, the last thing in the world I would look at unless somebody points a gun at my head is a deposition in this case. I don't even want to hear this case, let alone read depositions. [¶] This is just kid's day at the beach. People like to come to court and throw mud at each other.

(R.T. 32:13-19.)

F.

Mr. Goodwin suggested that the next witness might be a priest, to which Judge Watson commented apparently to Mr. Goodwin, "Oh, he is. He is maybe praying for your salvation." (R.T. 34:8-24.)

G.

After Mrs. Papadopoulos testified about an instance in which she drove past Ms. Hickok's house and observed her running up and down waving her arms, yelling, screaming, and running toward her car "barking and biting with her teeth," which caused her to fear for her physical safety (R.T. 40:3-6; 42:11), Judge Watson sarcastically characterized her testimony:

> The Court: Like this other stuff, like this near death experience driving by the house with the Seal Beach Police there, I have taken that into consideration to understand her frame of mind.

(R.T. 43:22-25.)

H.

Mrs. Papadopoulos testified about an instance in which she observed Ms. Hickok sitting in her idling car near the Papadopoulos's new house (they moved away from Ms. Hickok). Mrs. Papadopoulos observed Ms. Hickok from the window. On cross-examination, Mr. Goodwin asked her questions that might raise uncertainty about her observation, e.g., was it nighttime, how high is the house. Mr. Cosio objected on relevance grounds to the question about the height of the house. In response Judge Watson sarcastically stated:

> The Court: I assume it is going somewhere. If you are not interested in how high the house is, I certainly am. It is as important as anything else I have heard.

(R.T. 55:15-18.)

I.

After Mrs. Papadopoulos testified that Ms. Hickok had an extra large grille in the front of her car which she could use as a battering ram, and which she feared she would use to run over her children, Judge Watson commented, "For running children down? … I can see where they would provide that." (R.T. 58:8-15.) Judge Watson then stated:

> The Court: I mean, you were in a very dangerous situation when she tried to flag you down with the biting motion with the Seal Beach police officer and all that. You were in great fear. I was wondering why you would think of it for your children when she has some sort of child crushing thing in the front of her car and not think of it for yourself and your husband. Certainly you want him to live, don't you?

(R.T. 59:3-10.)

J.

After a witness testified about Mr. Papadopoulos's driving abilities and the fact that he had never observed him try to run someone off the road (one of Ms. Hickok's claims), Judge Watson told counsel that he thought the testimony was not probative of anything, and then stated:

> The Court: If you guys think it is worth my time, I am going to listen. Just because I don't see how that is real important, I think you are going to tie it all together for me. You can call me as a witness. I have never seen him drive badly. [¶] Overruled. Is there a statue of him in Seal Beach as being a good driver or anything?
>
> The Witness: No.
>
> The Court: It is coming. [¶] Next question sir.
>
> Mr. Cosio: Q. Have you ever seen a statue of Dr. Papadopoulos -- strike that question.
>
> Mr. Goodwin [Hickok's lawyer]: Object to the comedy.

> The Court: That is my fault. Don't blame him. If there is a statue, it is probably going to be filing a lawsuit at the counter. I need to stay alive and not have my brain turn to thick liquid to come out my ears.
>
> Mr. Goodwin: I want the record to show I don't consider this comical and I am not happy to be here.
>
> The Court: I don't consider it comical either. I consider the fact that we are doing it comedy. I think it is a serious misuse of public funds. It costs $10,000 a day to keep this courtroom going, and to devote it to this sort of egotism is a terrible thing. But we all try to stay sane in our own way, counsel.

(R.T. 64:4 – 65:3.)

K.

Judge Watson stated sarcastically to Mr. Cosio in response to an objection, "If I limited the evidence to that which was relevant, this hearing would have been over about three weeks ago." (R.T. 77:20-22.)

L.

While questioning a police officer witness, Judge Watson engaged in the following exchange:

> The Court: Sergeant Lavelle, did you say you thought this situation could be ended if they would both just agree to stay away from one another?
>
> The Witness: Yes, Your Honor.
>
> The Court: Holy cow. I wish I would have thought of that. [¶] U-turns are all life-threatening, as we know, especially in a neighborhood like this. [¶] Couldn't the doctor have pulled into his own driveway and then backed out again and go the other way?
>
> The Witness: That seemed feasible.

(R.T. 81:6-16.)

……..…….

> The Court: That is really interesting that this could all disappear if they would just agree to leave each other alone. I said that to them 100 times so far. Here it is, four o'clock, but, okay. Thank you, sir. You, unlike me, may leave.

(R.T. 82:2-6.)

M.

While Mr. Papadopoulos was answering a question, Mr. Goodwin stated an objection. Mr. Papadopoulos simultaneously continued his answer, when Judge Watson sarcastically interjected:

> The Court: Could I squeeze a ruling in here? Did you hear my question?
>
> The Witness [Papadopoulos]: Yes.
>
> The Court: Would you answer it?
>
> The Witness [Papadopoulos]: Can you squeeze in a ruling?
>
> The Court: Yes. There was an objection and you started talking. I like to feel useful to the community. One of the things I am supposed to do is rule on those. Don't you ever watch T.V.?

(R.T. 91:16-24.)

N.

During his testimony, Mr. Papadopoulos explained that he had driven the same way when leaving his house for twelve years because it was the safest route (which also took him past Ms. Hickok's house), and he was very concerned with safety. He also said that his wife, who regularly parked in the driveway, always drove that same route past Ms. Hickok's house, because the law required her to back out into the lane closest to the driveway, and prohibited her from crossing the midline of the road which

would have been required to go the other way. As set forth above, Judge Watson had questioned the police officer about Mr. Papadopoulos's ability to go the other way, and gratuitously described such a U-turn as "life threatening." This time, in response to Mr. Papadopoulos's testimony about not crossing the midline when backing out, Judge Watson said, "Your adherence to the Vehicle Code is commendable. I didn't even know that." (R.T. 93:3-4.) Judge Watson later made the following statement to Mr. Papadopoulos:

> The Court: In the meantime, Doctor, I have great news. 22106 says no person shall start a vehicle, stop, standing or parked on a highway, nor shall any person back a vehicle on a highway until such movement can be made with reasonable safety. [¶] My further research reveals your street, that residential street is not a highway, but even if it was, you can do it if it is reasonably safe. [¶] So it is not like 12 years of caution is thrown out the window or anything, but you can kind of cut loose a little bit.

(R.T. 107:5-15.)

O.

In response to counsel's attempt to establish the dates of a sequence of events, Judge Watson made the following comment:

> The Court: I know when Santa delivers. There are very few things I bring to this job, but one of them is the knowledge of the date of Christmas. I am not bragging. I just know it.

(R.T. 101:14-17.)

P.

In response to an objection regarding the number of visits by Ms. Hickok's gardener, Judge Watson stated:

> The Court: I don't see its relevance, but I am hoping counsel is going to go somewhere with it. I am going to allow latitude which has colored this entire hearing to the point

where the Evidence Code and logical relevance are but distant memories of mine.

(R.T. 105:17-21.)

Q.

In response to an objection from Mr. Goodwin concerning the scope of Mr. Cosio's examination, Judge Watson stated:

> The Court: No, I'm just entertaining in my mind the thought that nothing -- none of my opinions have any affect on these proceedings anyway. I might as well not even rule on the objections. All right. Go ahead. [¶] You know, counsel, I am going to say this one time, then I am going to stop: Do you know of a judge in the State of California that wouldn't suggest that these people stay away from one another after this hearing is over? Do you honestly know one? I don't. I know hundreds of judges, and I don't know a judge that wouldn't do that. [¶] And, you know, we have another five witnesses, and I don't know what the defense is going to be.

(R.T. 16:14-25, Vol. 2.)

……..……

> Mr. Cosio: Your Honor, I just want to point out, put on the record I am just trying to put on my case, and that I'm just trying to elicit testimony from my client, and I would ask the court to be patient, dignified, courteous to my client. That's all I'm asking.
>
> The Court: Well, let's talk about that. [¶] Do you think I've done something this morning that's been discourteous or impatient or unprofessional to your client?
>
> Mr. Cosio: Not this morning.
>
> The Court: Okay. I take it from that, you thought it was this -- yesterday -- last afternoon.
>
> Mr. Cosio: That's correct, Your Honor.
>
> The Court: I thought so. First of all, let me make an admission to you counsel: In addition to being a judge, I'm also

> contemporaneously a human being. And as a result of that, I have certain feelings. And what I'm hearing now is what I consider to be a relatively minor dispute over barking puppies and gardeners who come before 7:00, and if you haven't experienced that, it's very irritating. And I have experienced it, and I know about barking puppies, as I think most of the general populous has. [¶] The reason that I got cross-ways with your client on Friday is he, in his mind, I believe, assumed some high status for some reason, because he has a Ferrari or he is a dentist or something. I don't know. But that status is either just in his mind or it -- wherever it is, it exists outside this courtroom. In this courtroom, he is just a person, and I don't think he appreciated that fact. [¶] He thought that I was going to be wow'ed or something, and I'm just listening to the facts, which while you may not believe it, I think I can probably recite almost verbatim. … [¶] And at one point, may I remind you, your client was yelling at the top of his lungs on Friday afternoon. Do you remember that? And it was like a preacher calling for hell and damnation. This was righteous indignation. He was mad, and he wanted people to know it. [It is not possible to discern from the transcript when or whether the alleged yelling by Mr. Papadopoulos occurred.] [¶] And I'm looking back at a Christmas puppy, and you can tell me about the five months if you want and the gardener that comes at 6:30 instead of 7:00. And the woman whose eyes bulged out and her teeth made an eating motion and her arms waved up and down. And maybe his wife said the grill, reinforced grill, was in order to run children down. [¶] I've heard all of the facts. I've heard this drive-around story until it's coming out my ears. And I don't treat it with the dignity that your client treats it. Your client treats it as [if] each one of these is a capital offense, and I don't view it that way. I view it the way I think most people in the world would view it. It is a personality dispute and of a relatively minor nature, but to the participants, very, very aggravating.

(R.T. 17:5 – 19:10, Vol. 2.)

Judge Watson's comments continued for several pages of transcript in which he critiqued the dispute, stating that nothing serious happened to the litigants ("in the sense of people injured or kidnapped or raped or burned houses, or I haven't even heard a flat tire even" [R.T. 19:11-13, Vol. 2]), and advised the litigants, "My personal

advice to them is to pretend like the other party moved to New Jersey. They are just gone, and get on with it." (R.T. 20:9-11, Vol. 2.) At one point during Judge Watson's comments Mr. Cosio stated:

> Mr. Cosio: Your Honor, I'm just asking the court to reserve its comments until after the conclusion of this case, because the court's comments give an appearance that you are not giving any deference to the testimony, and it also appears that you're perhaps biased not against either one of the parties, but in general, over these kinds of cases.
>
> The Court: Well, you know, counsel, I'm not going to reserve my comments. I run this courtroom, in case you don't know it, and I am going to continue to run it. What I am going to reserve is judgment.
>
> Mr. Cosio: Okay.
>
> The Court: And that's all you're entitled to.

(R.T. 20:15-26, Vol. 2.)

Judge Watson continued his comments for another page of transcript, in which he discussed why he called Papadopoulos "Mr." instead of "Doctor," and stated to Mr. Cosio that:

> The Court: … You've made the record as well as you can make it. That I'm not being fair to you and if some appellate court reviews this transcript and says you didn't get a fair hearing, and, you know, this was World War III and Judge Watson failed to recognize it, it was one of those incidents where it was a hundred percent wrong on one side, zero on the other, and keeping them apart was not a good solution, by mutual court orders, not a good solution, then I get reversed. So what? That doesn't concern me. I'm calling balls and strikes up here, counsel, doing as well as I can.

(R.T. 21:22 – 22:6, Vol. 2.)

At the end of these comments, Mr. Cosio asked for a recess so he could confer with his client, but Judge Watson said, "No. Keep going. You said you wanted to keep going, and we're going to keep going." (R.T. 22:9-10, Vol. 2.)

2. *Sea Environment Apartments* Cases

Judge Watson presided over a bench trial in three consolidated cases on October 3, 5 and 10, 2006 (*Sea Environment Apartments v. Elliot*, No. 06WL02877; *Sea Environment Apartments v. Potter*, No. 06WL03291; *Sea Environment Apartments v. Parrish*, No. 06WL04530). These were unlawful detainer cases, in which the defendant tenants were not represented by counsel.

Judge Watson was the defendant in a lawsuit filed by tenants of his apartment units; warranty of habitability was an issue in both cases. Summary judgment was granted in favor of Judge Watson; the case was settled while on appeal on July 28, 2006; the dismissal was entered by the Court of Appeal on August 23, 2006. The appellate panel of the Orange County Superior Court concluded that the failure to disclose this information was an irregularity in the proceeding that prevented the defendants from having a fair trial.

Judge Watson's conduct violated the Code of Judicial Ethics, canons 2 and 3E(2).

Judge Watson's conduct in *Papadopoulos* and *Sea Environment Apartments* was, at a minimum, improper action. The conduct did not involve moral turpitude.

Judge Watson has previously tendered his resignation from judicial office for health reasons and has agreed not to seek or hold judicial office and not to seek or accept judicial assignment. In the commission's view, this result adequately protects the public from any future misconduct.

Commission members Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Peter E. Flores, Mr. Marshall B. Grossman, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott and Mr. Nathaniel Trives voted for a public admonishment. Commission chairperson Honorable Frederick P. Horn is recused. Commission member Mr. Samuel A. Hardage did not participate.

Dated: _11/6_, 2008.

_____/s/_____
Honorable Judith D. McConnell,
Vice-Chairperson of the Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| IN THE MATTER CONCERNING JUDGE JAMES J. McBRIDE | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |
|---|---|

This disciplinary matter concerns Judge James J. McBride, a judge of the San Francisco County Superior Court. Judge McBride and his attorney, James A. Murphy, appeared before the commission on October 21, 2008, to contest the imposition of a public admonishment, pursuant to Rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge McBride and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

## STATEMENT OF FACTS AND REASONS

Judge James J. McBride was appointed to the San Francisco County Municipal Court in 1994, and elevated to the San Francisco County Superior Court in December 1998 upon unification of the trial courts. His current term began in 2003. Based on the facts set forth below, the commission finds that while presiding over the master criminal calendar in Department 22, Judge McBride improperly advanced a trial date without notice to, or the consent of, the attorney assigned to the case, thereby abusing his judicial authority in violation of canon 1 (a judge shall uphold the integrity of the judiciary), canon 2A (a judge shall respect and comply with the law), and canon 3B(2)

(a judge shall be faithful to the law). The commission also finds that Judge McBride improperly relieved the public defender and appointed new counsel for the defendant in several cases, in violation of canons 1, 2A and 3B(2). The commission further finds that Judge McBride made discourteous and disparaging remarks to attorneys appearing in court before him, contrary to canon 3B(4), which requires judges to be patient, dignified and courteous to lawyers with whom they deal in an official capacity.

## I. Advancing the trial date without adequate notice or counsel's consent

At the defendant's arraignment in the misdemeanor case of *People v. Dennis Ogg* on November 27, 2006, the case was set for trial on December 22, 2006. Mr. Ogg had not waived his statutory right to a speedy trial, so the last day his trial could be held was December 27, 2006.

On December 20, 2006, while presiding over the master calendar in San Francisco County Superior Court, Judge McBride ordered the *Ogg* case assigned out to trial (two days before the originally scheduled trial date). Mr. Ogg's trial attorney, Deputy Public Defender (DPD) Michelle Tong, was not present in Judge McBride's court at the time. At his appearance before the commission, Judge McBride stated that there was no objection to the trial assignment. The transcript from the proceeding before Judge McBride on December 20, 2006, reflects that DPD Rebecca Young, the calendar DPD in Judge McBride's court, stated she "could not accept a trial assignment on behalf of Miss Tong." Nevertheless, Judge McBride instructed DPD Young to "get her [DPD Tong] up here" and assigned the matter to a trial department.

The matter appeared back before Judge McBride the following day, December 21, 2006, because the defense filed a peremptory challenge against the judge who was assigned the trial. Judge McBride assigned the case to another courtroom for trial over the objection of DPD Young who stated that DPD Tong would be ready to try the case the next day – the originally scheduled trial date. When Young objected to having the trial date advanced, Judge McBride told her that it was his prerogative to advance the case for trial.

Judge McBride contends that he advanced the trial date based upon his presumption that Mr. Ogg wanted a disposition of his case before Christmas, and the judge wanted to avoid the dismissal of the case for violating the defendant's right to a speedy trial if the case was not tried within the statutory timeframe.

In his response to the commission's investigation, Judge McBride acknowledged that while presiding over the master criminal calendar, he advanced the trial date in a few other criminal cases in which the defendants had not waived their right to a speedy trial and a courtroom became available before the originally set trial date. Judge McBride contends that he advanced the trial dates in those cases to avoid the possibility that the case would have to be dismissed if it had not been tried by the speedy trial deadline. Judge McBride also contends that, in his role as supervising judge of the criminal courts, he had the judicial authority to manage the criminal trial docket for the proper and orderly administration of justice, and that he therefore had the authority to advance a case to trial when a courtroom became available. Judge McBride cites no legal authority for this position.

The commission finds that Judge McBride's advancement of trial dates in disregard of the due process rights of the parties involved in the cases constituted an abuse of his judicial authority and warrants discipline. Advancing a trial date before the scheduled trial date – especially with notice of the new trial date being given that same day – is contrary to fundamental principles of fairness and due process. The attorney assigned to the *Ogg* case received notice that Judge McBride had advanced the trial date on the morning of the advanced trial date. Judge McBride expected the attorney to be available for trial and the defendant to be present to commence trial even though they had not been notified of the new trial date. Moreover, witnesses had not been subpoenaed for that date.

Judge McBride's actions violated canon 1 (a judge shall uphold the integrity of the judiciary), canon 2A (a judge shall respect and comply with the law), and canon 3B(2) (a judge shall be faithful to the law). Judge McBride's conduct was, at a

minimum, improper action within the meaning of article VI, section 18, subdivision (d)(3), of the California Constitution.

**II. Improperly relieving the public defender**

On Friday, December 1, 2006, Judge McBride presided over the master criminal calendar in Department 22. He learned that Deputy Public Defender (DPD) Maria Lopez was not present in his courtroom that day for her assigned cases. DPD Lopez was in trial on another misdemeanor matter which was in recess that Friday, and DPD Lopez had been preparing for that trial in her office. Judge McBride contended that if DPD Lopez's trial was not actually in session on December 1, 2006, she should have been present in his courtroom. The deputy public defender appearing on DPD Lopez's behalf informed Judge McBride that DPD Lopez was to resume trial the following Monday, December 4, 2006, and she would not be available to start trial in new cases until that trial concluded.

One of DPD Lopez's matters that had been scheduled for Friday, December 1, 2006, was a motion to suppress in the matter of *People v. Magno.* The prosecutor in that case was present in court on Friday morning with a law enforcement officer witness and represented to the court that DPD Lopez had told him she would be available that morning for the hearing on the motion. Judge McBride was understandably displeased that DPD Lopez was not present in court for the hearing on the motion to suppress and that the motion had to be continued.

The following Monday, December 4, 2006, Judge McBride called the matter of *People v. Maxwell,* to which DPD Lopez was assigned. Mr. Maxwell had waived his speedy trial rights. DPD Nicole Solis appeared on behalf of the public defender's office and told the judge that the case was trailing for trial that day. Judge McBride responded as follows:

> THE COURT: The Court's custom is to relieve the Public Defender if the Public Defender's incapable of handling the Public Defender's obligations. On *Maxwell*, the Public Defender is relieved. As your last act, you will have your client in here so we can appoint new counsel and turn the file over. Thank you.

While he continued to preside over the master criminal calendar on December 4, 2006, Judge McBride called other cases to which DPD Lopez was assigned that were also trailing for trial until there was an available courtroom. DPD Solis told him that DPD Lopez was in trial in a different department that day but that she would stand by and the case could trail or, if no courtroom was available, other options were available, including continuing the trial date. Judge McBride responded by relieving the public defender over DPD Solis's objection and appointing new counsel for Mr. Maxwell. Judge McBride then relieved the public defender and appointed conflicts counsel or private counsel on four additional cases that had been assigned to DPD Lopez on which she had not appeared the preceding Friday, but on which another deputy public defender had appeared on her behalf (*People v. Gaines, People v. Ramirez, People v. Ginn,* and *People v. Evans*).

In another matter, *People v. Black,* Judge McBride relieved the public defender because the deputy public defender assigned to the case, DPD Stephanie Wargo, also had not been present in court the preceding Friday. When DPD Wargo appeared in court on the Monday, December 4, 2006 calendar, she informed the court that her absence the preceding Friday was due to what she described as a calendaring error by her office. DPD Wargo objected to Judge McBride's relieving the public defender in the *Black* case, and told the judge that she was present and ready to serve her client. Judge McBride responded:

> THE COURT: The Public Defender serves at the pleasure of the Court. If the Public Defender cannot serve the Court and the client on the day appointed, the Public Defender is relieved. Thank you.

Although a judge has the discretion to relieve counsel on the court's own motion over the objection of defense counsel, "this discretion has been severely limited by California decisions." *People v. McKenzie* (1983) 34 Cal.3d 616, 629, overruled in part on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 365.

Courts should "exercise their power to remove defense counsel with great circumspection." (*Id* at p. 630.) See also *People v. Daniels* (1991) 52 Cal.3d 815, 846-847 [stating that strict rules limit a court's power to remove counsel]. A trial court may relieve counsel over the objection of defense counsel "to eliminate potential conflicts, ensure adequate representation, or prevent substantial impairment of court proceedings." *People v. Cole* (2004) 33 Cal.4th 1158, 1187. "The involuntary removal of any attorney is a severe limitation on a defendant's right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed." *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697-698 [conduct of the deputy public defenders was not so flagrant as to justify the court's abrupt substitution of counsel without the prior concurrence of the attorneys and defendants involved; the judge's conduct amounted to unlawful interference with the attorney-client relationship].

In these matters, the commission finds that there was no indication of any conflict or that the attorneys' representation was inadequate, or that the impairment of court proceedings caused by DPD Lopez's unavailability and DPD Wargo's absence the preceding Friday was substantial enough to warrant the removal of the public defender's office from their cases. The commission further finds that Judge McBride's action in relieving the public defender in all of these cases created the appearance that he was acting out of pique and for the purpose of punishing the deputy public defenders for not appearing in his court the preceding Friday, December 1, 2006. Judge McBride's relieving of the public defender in these cases violated canons 1, 2A and 3B(2) and constituted improper action at a minimum.

## III. Improper demeanor

### A. *People v. Darryl Vaughn*

Defendant Vaughn was in custody when he appeared in court on December 20, 2006, having been arrested for impersonating a police officer while in a drug treatment

program. When the prosecutor said he was planning to file a motion to revoke probation, Judge McBride remarked in open court:

> THE COURT: *So we have a misdemeanor running around as a cop holding people hostage, right? That's good*. [¶] *And somebody just woke up and decided to file a motion to revoke, huh?*

Later in the proceeding, when a probation officer asked that a supplemental report be ordered for January 23, 2007, Judge McBride made the following remarks:

> THE COURT: That's a little difficult since he's got a right to have a jury [trial] on the new case before that. [¶] *I'm going to suggest that the district attorney get their act together by two o'clock this afternoon. How about that? Is that too much to ask?* You either decide what the basis of the motion is, or not file a motion, or don't or I'll send this back for trial to Department 16.
>
> [PUBLIC DEFENDER]: Mr. Vaughn indicates he wants it to go to trial with [DPD] Razzaq.
>
> THE COURT: That would be a great thing to do, but –
>
> [PUBLIC DEFENDER]: Is that right, sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: *Now that the district attorney's had the benefit of everybody explaining everything to them, maybe they'll figure out what they want to do*. Two o'clock?

[Italics added for emphasis.]

Judge McBride's sarcastic and denigrating comments violated canon 3B(4), which requires judges to be patient, dignified and courteous to those with whom they deal in an official capacity. Sarcastic, demeaning or belittling comments toward counsel are not consistent with the conduct required by canon 3B(4). (See, e.g., *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 323-327.)

B. *People v. Germaine Glenn and Winford Battle*

Co-defendants Germaine Glenn and Winford Battle, husband and wife, were on probation for felony theft. Judge McBride called their cases together during the December 20, 2006 criminal calendar. Ms. Glenn's attorney asked that the two cases be severed and that Ms. Glenn be permitted to go to drug court. Although one of the prosecutors handling the case initially agreed to allow Ms. Glenn to go to drug court, a supervising prosecutor opposed severing the cases, which would have prohibited Ms. Glenn from going to drug court because of a guideline for drug court that the cases of both defendants must be resolved before either defendant can attend drug court. When Judge McBride granted the defense motion to sever, the following exchange occurred:

> THE COURT: Motion to sever is granted.
>
> [THE PEOPLE]: Your Honor, it's part and parcel of the same transaction, one's handing the other the money from the transaction.
>
> THE COURT: Then why are you agreeing that she should go to drug court?
>
> [THE PEOPLE]: Well, your Honor, I am not punitive in nature, but if that's the case, and the Court is intending to sever, maybe we won't send her to drug court because the purposes of the [Memorandum of Understanding regarding drug court] are frustrated.
>
> THE COURT: *A little light on this subject always reveals the truth.* Motion to continue is granted. *I'm so glad the public has a district attorney who's not punitive and really sees the light here.*

[Italics added for emphasis.]

Judge McBride's remark in open court was sarcastic and denigrating to the prosecutor in violation of canon 3B(4).

C. *People v. Mark Speilman*

On January 5, 2007, while Judge McBride was presiding over the master criminal calendar, *People v. Speilman* was called, and DPD Young advised the

court that the defendant's assigned public defender was in trial. A discussion of whether the defendant wanted to keep his attorney and go to trial later ensued; the defendant told Judge McBride that he did not want a new lawyer. DPD Young told the court that three weeks remained before the deadline for the defendant to receive a speedy trial, and requested that the matter be continued for one week. The following exchange occurred in front of the defendant:

> THE COURT: I'm going to ask him now.
>
> [DPD] YOUNG: Well, he may not need to waive time. [The assigned public defender] Mr. Luce is in trial.
>
> THE COURT: He's not waiving time, Ms. Young, *if you understand the doctrine.*
>
> [DPD] YOUNG: I do you (sic) understand the doctrine.
>
> THE COURT: He is balancing his right to a statutory limit to a speedy trial against his right –
>
> [DPD] YOUNG: I understand.
>
> THE COURT: -- to the lawyer who has been appointed and works with him. [¶] I'm asking him now if he wants to find another lawyer or not?
>
> [DPD] YOUNG: I am merely saying I would like him not to waive his last day yet.
>
> THE COURT: *I don't know if you have any business in it, but thank you for your* – now I'm going to ask your clients. Do you want to come back and have me try and find you a lawyer, or Mr. Luce if possible –
>
> THE DEFENDANT: No, I don't want to waive no time.
>
> THE COURT: You don't want to waive time. [¶] Then we're back here on the 8th. We're going to look for a lawyer.
>
> [DPD] YOUNG: He said he doesn't want to look for a lawyer. If the court reporter can read it back.

THE COURT: If he's going to assert his time waiver he's going to be back here on the 8th.

[DPD] YOUNG: He's not asserting his time waiver. He's asserting and he also wants Mr. Luce as his lawyer.

THE COURT: January 8. [¶] Thank you.

[Italics added for emphasis.]

Judge McBride's remarks were rude and condescending, in violation of canon 3B(4).

The commission finds that Judge McBride's conduct constituted improper action at a minimum.

Commission members Hon. Frederick P. Horn, Hon. Judith D. McConnell, Mr. Peter E. Flores, Mr. Marshall B. Grossman, Ms. Barbara Schraeger, Ms. Maya Dillard Smith, Ms. Sandra Talcott and Mr. Nathaniel Trives voted for a public admonishment. Commission members Hon. Katherine Feinstein and Mr. Lawrence Simi were recused. Commission member Mr. Samuel A. Hardage did not participate.

Dated: November 18, 2008

/s/
Honorable Frederick P. Horn
Chairperson

**PUBLIC ADMONISHMENT OF JUDGE CHRISTINE K. MORUZA**

This disciplinary matter concerns Judge Christine K. Moruza, a judge of the Alameda County Superior Court. On October 15, 2008, pursuant to rule 116 of the Rules of the Commission on Judicial Performance, Judge Moruza waived her right to formal proceedings under rule 118 and to review by the Supreme Court and demanded an appearance. On December 8, 2008, Judge Moruza withdrew her demand for an appearance before the commission and determined not to contest the issuance of this public admonishment. The Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18 (d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Judge Moruza has been a judge of the Alameda County Superior Court since 1997. Her current term began in 2005.

The commission determined that Judge Moruza should be publicly admonished for the following conduct:

1. Comments concerning publicly-funded defense counsel

On or about February 1, 2007, Deputy Public Defender Samuel Greyson requested a continuance in *People v. Finley*, in which Deputy Public Defender Kristen McCannon represented the defendant, so that certain evidence could be retested; the prosecution had no objection. After some discussion, this exchange occurred:

> THE COURT: Okay. So we need to give him enough time to get the retest done. She hasn't submitted it yet.
>
> THE DEFENDANT: She promised me last time it would be submitted. This is the second time I've gone to court.
>
> THE COURT: Well, are you paying her?
>
> THE DEFENDANT: No.
>
> THE COURT: *You get what you pay for. If you want really good service, then you pay an attorney $10,000 to do this.*
>
> MS. THIESEN [DDA]: I'd suggest even six weeks.
>
> MR. GREYSON [DPD]: Thank you.
>
> THE COURT: Okay. March 15. In your case a retest is critical.
>
> THE DEFENDANT: Yes, it is.

> THE COURT: And Ms. McCannon has a zillion cases and she is an excellent attorney and you ain't paying a cent for it. Count yourself really really lucky.
>
> THE DEFENDANT: Okay.
>
> THE BAILIFF: What time, Your Honor?
>
> THE COURT: 8:30.

(R.T. 2:23 – 3:14, italics added.)

Four weeks later, during the morning calendar on February 28, 2007, Deputy Public Defender Elizabeth Campos asked Judge Moruza to call three matters in which she had "quick progress reports," but the judge declined to do so, asking instead if any other private counsel were ready. When Judge Moruza did begin calling public defender cases, this exchange occurred:

> THE COURT: Okay. Ms. Campos. Long last.
>
> MS. CAMPOS: Can we call Kyle Borton? He was here at 8:30.
>
> THE COURT: Right. I understand your clients were on time, but those who have attorneys that they're paying go first and those who you [sic] have a free attorney go second and it's just the way it works here.
>
> MS. CAMPOS: Right. Your Honor, I would respectfully object but I understand.
>
> THE COURT: Sure, you would. That's just the way it's run here. *You get what you pay for. You're paying nothing here.* [¶] Okay. Kyle Borton. [¶] Good. Okay. This is an okay report. So we'll have another diversion progress report on May 30th, this department, at 8:30. So we'll see you then.

(R.T. 1:14 – 2:1, italics added.)

Judge Moruza's remarks in these cases suggested that she believed that indigent defendants were entitled to receive, and consequently did receive, legal services and court access inferior to that provided to defendants who could afford to pay attorneys. The judge's comments conveyed the message that defendants who do not pay can expect to receive legal services inferior to those provided by private counsel, and that public defender clients get nothing because they pay nothing. The remarks could be expected to

have a negative impact on the attorney-client relationship, and to undermine confidence in the criminal justice system. In addition, the comments reflected a lack of patience and courtesy, and conveyed bias. The comments were contrary to canons 2A, 3B(4) and 3B(5).

Judge Moruza has admitted that making the comments was wrong. She has explained that in *Finley*, she was attempting to impress upon a defendant who was somewhat irate and agitated that he should be grateful for the justice system and the representation of the public defender. The judge has denied that she was biased. She self-reported her conduct in *Borton* in May 2007.

2. Comments in *People v. Rupple*

On or about February 21, 2007, *People v. Kenneth Rupple*, a domestic violence case, was before Judge Moruza for a readiness conference. When the case was called, defense counsel said that the matter was being maintained for jury trial. Judge Moruza asked what the offer was, and DDA Eric Swalwell stated that it was to let the defendant plead guilty to simple battery, go on court (informal) probation for three years, receive credit for time served, attend 52 domestic violence classes and pay a fine of $335. Judge Moruza confirmed the case for trial, and the prosecutor requested that she order the victim, Ms. West, to return on the trial date. This exchange followed:

> THE COURT: All right. Ms. West, be sure to be back here on Monday. [¶] Is there a stay away?
>
> MS. WEST: I didn't get the decision in that. There shouldn't be any.
>
> THE DEFENDANT: That was done by [Judge] Walker.
>
> THE COURT: Do you want to proceed with this case?
>
> MS. WEST: No.
>
> MR. SWALWELL [DDA]: Your Honor, we have a statement from the defendant where he admits to hitting.
>
> THE COURT: So.
>
> MS. CAMPOS [DPD]: It's ambiguous.
>
> THE DEFENDANT: It's pointless.
>
> MS. WEST: He's defending me.
>
> THE BAILIFF: Ma'am.

MR. SWALWELL: Defendant admitting to hitting her is pretty good evidence.

THE COURT: So we're going to have a criminal prosecution. [¶] Does he have a record?

THE DEFENDANT: No.

MR. SWALWELL: Not in [sic] county.

THE COURT: No. Okay.

MR. SWALWELL: But we know we expect a victim of domestic violence to say it didn't happen. That happens a lot.

THE COURT: Well, I know. I was a D.A. too. [¶] How long have you been married?

MR. SWALWELL: How long --

THE DEFENDANT: We're actually engaged.

MS. CAMPOS: Mr. Rupple is her caretaker. She is disabled.

THE COURT: How many times has he hit you before?

MS. WEST: Never.

THE COURT: What led up to this?

MS. WEST: We were intoxicated. I was extremely intoxicated. There was a man on top of me and in the process of getting this man off of me, he inadvertently hit me. I was belligerently drunk. Once the guy was off of me, I was like 'Okay. Let's keep partying.' If you call Gallagher's bartender, he would testify --

THE COURT: Is this what we're going to call 60 people to hear?

MR. SWALWELL: Your Honor, I --

THE COURT: This is what we're going to waste court time with.

MR. SWALWELL: I don't believe it's a waste of court time.

THE COURT: I do.

MR. SWALWELL: For a person that has been hit --

THE COURT: I do.

MR. SWALWELL: With all due respect, our office --

THE COURT: With all due respect, I have lived about 30 years longer than you have. I know a lot more about relationships and life and the court system. [¶] To tell you the truth, this is a crazy waste of time.

MR. SWALWELL: I understand, Your Honor.

THE COURT: Okay. This will go on the back burner for Monday. But now you know my feelings about -- what can I say; painting on the numbers as far as prosecutorial discretion.

MR. SWALWELL: I would have to answer to my boss on Monday if I dismissed it and she was hit again.

THE COURT: Well, I have to answer to the People of this County and they're going to be asking me why 60 people have to come and sit here and listen to this kind of stupidity. Okay.

MR. SWALWELL: I understand, Your Honor.

THE COURT: I'm going to say the D.A., has the policy about domestic violence. We don't look at each case on its individual merits. We don't try to do what's best for the victim. What can we do best to prevent this kind of thing in the future? No, we have a policy that we're guided by. [¶] I know, I was a young D.A. once too. If you were caught with a concealable weapon in San Francisco, you did 90 days, period, period. That led to a lot of stupid prosecutions.

THE DEFENDANT: Judge, can I speak freely?

THE COURT: No, don't.

THE DEFENDANT: No.

THE COURT: I've said enough.

THE DEFENDANT: All right.

THE COURT: We'll have 60 people come in. That will be great. Then afterwards we'll have them tell you what they think of it.

(R.T. 1:20 – 4:16.)

Judge Moruza's statements that the *Rupple* case was a "crazy waste of time" and that pursuing it amounted to "stupidity" suggested abandonment of the judicial role and embroilment, and appeared impatient and discourteous, contrary to canons 1, 2A and 3B(4), and 3B(5). The judge's reference to having lived about 30 years longer than the prosecutor and knowing "a lot more about relationships and life and the court system" appeared inappropriately personal, undignified and demeaning, and contrary to canon 3B(4). In addition, the judge's comments, particularly when considered in conjunction with the comments described immediately below in sections 3 and 4, suggested a bias in domestic violence prosecutions.

Judge Moruza has admitted that the remarks she made were inappropriate, demonstrated a lack of patience, and could have led an observer to think she had prejudged the case, although she has denied that she has a bias against domestic violence cases in general.

3. Comments in *People v. Dantes*

On or about February 21, 2007, immediately after discussion of the *Rupple* case, the case of *People v. Dantes*, another domestic violence case scheduled for readiness conference, came before Judge Moruza. The transcript of the matter reads in its entirety:

MS. CAMPOS [DPD]: Mr. Jester Dantes.

THE COURT: Is this another case where we're going to ruin the relationship between the victim --

MS. CAMPOS: There is no relationship with the victim and Mr. Dantes. [¶] The victim, we haven't been able to locate her. She hasn't been subpoenaed for today. She's been subpoenaed for Monday. So we're going to maintain. If she doesn't come in, it's going to be a dismissal.

THE COURT: Okay.

MS. THEISEN [DDA]: That is true and correct.

THE COURT: All right.

(R.T. 1:4-15.)

Judge Moruza's comment suggested bias in domestic violence cases, and was contrary to canons 2A, 3B(4) and 3B(5). The judge has admitted that her comment should not have been made, although she has denied that she is generally biased in domestic violence cases.

4. Comment about personal experience of domestic violence

On or about February 22, 2007, Judge Moruza made a remark to counsel in chambers to the effect that she had tried to slap her husband once, that he had been quicker and slapped her back, and that she had never tried to slap him again. The context of her remark was her expression of the view that the prosecution should not be pursuing the *Rupple* case, described in section 2, above. On another occasion, the judge told counsel that she had once called the police on her husband for domestic violence. The judge's remarks appeared inappropriate and undignified, and suggested a lack of impartiality in domestic violence cases. The remarks were contrary to canons 2A, 3B(4) and 3B(5). Judge Moruza has stated her recognition that statements about her own life experience are not appropriate, and has assured the commission that she will not in the future share personal information in her role as a judge.

5. Comment in *People v. Turner*

In or about August 2007, in *People v. Turner*, a felony assault case in which the defendant stabbed a 17-year-old in the arm in response to crude comments the victim and others shouted at him from a car, Judge Moruza told the prosecutor that her son might have reacted in a similar way in that situation. The judge's comment was inappropriately personal and suggested bias and prejudgment, contrary to canons 2A, 3B(4) and 3B(5). Judge Moruza has denied bias, but has stated that she will not mention matters related to personal relationships when handling cases in the future.

6. Comments in *People v. P.B.*

In 1999, Judge Moruza heard the case of *People v. P.B.*, in which the defendant was charged with felony assault with a deadly weapon, with an enhancement for great bodily injury. The victim in the case was a deputy sheriff who had been having an affair with a neighbor who was also employed by the sheriff's department. The deputy also had sex with this woman's 16-year-old daughter, and was prosecuted for statutory rape. The defendant was the husband of the woman and the father of the 16-year-old. The defendant beat the victim over the head with a baseball bat.

At the preliminary hearing, Judge Moruza exercised her discretion, under Penal Code section 17, to reduce the assault with a deadly weapon charge to a misdemeanor. The defendant pled guilty, and the judge sentenced him.

At sentencing, after counsel submitted the matter, Judge Moruza made the following remarks:

> THE COURT: All right. I would like to say one thing about the probation report which I, the Court, found daunting. On page five, the last sentence of the first incomplete paragraph, there it says, 'Be that as it may, there is no excuse for the defendant's behavior in the instant offense.' I think that sentence is 180 degrees wrong. That's why this Court reduced this case from a felony to a misdemeanor. [¶] The Court feels there was almost every excuse for the defendant's behavior in this offense. There was a day in this country not that long ago when if a man's young daughter was raped and his wife was seduced by a neighbor who he considered a good friend, that man would have been privileged to go ahead and take care of the matter and in a way similar to what Mr. [B] did, and it wouldn't have gone any further. There wouldn't have been felony convictions on either side. There wouldn't have been all kinds of expenditures of tax payers' money, but now the politically correct thing is to say when someone does what Mr. [B] did, that they've taken the law into their own hands. That's a cliché. It represents a lot have [sic] emoting and feeling about the issue rather than thinking. [¶] Mr. [B] did not take the law into his own hands. He knew what he was doing was illegal and he took responsibility immediately. He's done nothing to evade responsibility, as far as I can see, during the entire pendency of these proceedings. So Mr. [B] isn't taking the law into his own hands. And frankly, this Court understands perfectly well why he did what he did. Unfortunately we have the system of criminal justice that you're not allowed to do that anymore. Some people would say our system of criminal justice is immoral because of that. However, it is what it is and I must apply it.

(R.T. 11:14 – 12:20.)

Judge Moruza has said that she intended only to convey her understanding of the defendant's situation and her view that it was unfortunate *for him* that his conduct was now illegal. What she said, however, was that in the past, if someone did what the defendant did, the matter "wouldn't have gone any further," and there wouldn't have been felony convictions or "all kinds of expenditures of taxpayers' money." These remarks suggested

the view that prosecution of such cases is an unwise expenditure of public funds. The judge went on to say, "Unfortunately, we have the system of criminal justice that you're not allowed to do that anymore. Some people would say our system of criminal justice is immoral because of that. However, it is what it is and I must apply it." Regardless of the judge's intent, this statement suggested that the judge holds the view that the criminal justice system is "immoral" insofar as it requires punishments for conduct such as the defendant's. Her statements appeared to reflect disdain for the legal system, as well as bias and prejudgment, and were contrary to canons 2A and 3B(5). The judge has admitted that her statements could be construed as disdainful of the fact that the law had to be applied in that particular situation.

7. Comments in *People v. Spotorno*

On or about February 27, 2007, the case of *People v. Spotorno*, in which the defendant was charged with killing a mountain lion, came before Judge Moruza. During a bench conference, the judge made a reference to killing unborn babies, which, according to the judge, was intended to put into perspective the crime with which the defendant was charged. The comment, in addition to being inappropriately personal, suggested the view that the offense with which the defendant was charged was minor by comparison with killing unborn babies, and thus conveyed bias. The comment was contrary to canons 2A, 3B(4) and 3B(5).

During discussion of the case, Judge Moruza made a statement to the effect that she knew someone who sounded a bit like the defendant, who was an elderly rancher, as her father was also an ornery old guy. The judge's comparison of the defendant to her own father carried the suggestion of bias in favor of the defendant, and was contrary to canons 2A, 3B(4) and 3B(5).

In further discussion of the case, after the prosecutor mentioned the suffering of the mountain lion, which had died of thirst after being caught in a trap that the defendant checked infrequently, Judge Moruza made comments to the effect that she was not sure that animals were conscious of, or had the ability to contemplate, their own pain the way that human beings do, but that putting animals out of their misery was appropriate; the judge then described an incident in which her husband shot a deer that had been hit by the car in which she and her family were traveling. The judge's statements about her own views of how animals might experience pain and her references to her personal experience were inappropriate and contrary to canons 2A, 3B(4) and 3B(5).

In setting the case for trial (further discussed in section 11, below), Judge Moruza said to the prosecutor on the record, "I want to deal -- you can win your case maybe, maybe not, but let's not take an old man and just rack [sic] him over the coals for something -- I don't know, maybe he didn't know it was not okay, you know." The statement, particularly the reference to the prosecution as raking the defendant "over the coals," appeared to reflect bias and was contrary to canons 2A, 3B(4) and 3B(5).

8. Comments to prosecutor in *People v. Eubanks and Barfield*

On August 13, 2007, the case of *People v. Eubanks and Barfield* was before Judge Moruza for a hearing on a motion to suppress. During the hearing, which was contentious, the judge questioned a police officer about his age, allergies, and smoking habits in order to gauge whether he had been able to smell from outside a vehicle a small amount of marijuana that had been found in a plastic bag in a closed area inside the vehicle. At sidebar, when DDA Eric Swalwell said that he could smell the marijuana from approximately 15 feet away, Judge Moruza responded, "How old are you? Eighteen?" In further discussions at sidebar, after DDA Swalwell expressed the view that the judge had taken an "amateurish" approach to making a factual determination in the case, the judge responded, "You're the amateur." The judge's remarks were demeaning, undignified and contrary to canon 3B(4).

9. Conduct toward spectator in *People v. Rainwater*

In September 2005, Judge Moruza presided over proceedings in *People v. Rainwater*, a homicide case in which the defendant was charged with the murder of a woman discovered bound and bludgeoned in her apartment. The defense requested and received a continuance to enter a plea, on the ground that more time was needed to review recently received discovery. At the hearing, a number of the victim's friends and family sat in the courtroom, wearing red T-shirts with a picture of the victim on the front. As they filed out of the courtroom at the end of the proceedings, one of them turned in the judge's direction and interjected, "Another wasted day." Judge Moruza ordered the woman to stand before the bench and asked, "Did you graduate from high school?" When the woman said that she had, the judge asked whether she had taken any civics classes. When she said that she had not, Judge Moruza responded, "That's why you're ignorant." The judge also said, "The public's safety has been ensured. This defendant is not getting out … if you want to go back to the days when we strung people up before a trial, you can go back there on your own." Judge Moruza ordered the woman to apologize to the court, which she did.

The judge's comments were unnecessarily harsh and demeaning, and were contrary to canon 3B(4). Judge Moruza has admitted making these statements, which were not recorded by the court reporter, and has expressed regret.

10. Setting distant trial date in *People v. Burchers*

On March 1, 2007, the domestic violence case of *People v. Burchers*, which was approximately ten months old and had been set for trial twice, came before Judge Moruza for pretrial conference. DPD Samuel Greyson asked that the pretrial conference be continued for two weeks so that he could consult an immigration specialist. Judge Morzua called counsel to the bench; during an unreported conference, the judge noted a concern that the victim could be using the criminal courts for advantage in a pending family law case involving the victim and the defendant. On the record, after a short discussion of the defendant's need for an order allowing her to retrieve her belongings from the family

residence (a "civil standby"), the judge said, "This Court has November 19 [for trial]." DDA Ronda Theisen stated her desire to have the matter set for trial sooner:

> MS. THEISEN: Judge, I want a trial date. I'm not asking for anything this month or next month or even in May, but I think by June this case needs to be resolved.
>
> THE COURT: It will be November 19, readiness will be on November 14.
>
> MR. GREYSON: May we get a further pretrial or should -- well --
>
> THE COURT: Why?

(R.T. 2:16-23.)

After brief further discussion of the "civil standby" order, the proceedings concluded.

At least one other case on the judge's calendar on March 1, 2007 was set for trial May 7, 2007.

Under the circumstances, Judge Moruza's setting of the trial date in *Burchers* over eight months away, when the prosecutor asked that the trial date be set no later than June 2007, gave the appearance that the judge set the distant trial date because of her view that the case should not be tried. Such conduct constitutes an abuse of authority, is in disregard of the People's right to a speedy trial, and is contrary to canons 2A and 3B(5).

11. Setting trial date in *People v. Spotorno*

On February 27, 2007, after a pretrial conference in the case of *People v. Spotorno*, in which Judge Moruza made comments (set forth in section 7, above) suggesting a lack of impartiality, the judge set a trial date of November 5, 2007, over eight months away. The *Spotorno* case was at that time eleven months old and had been set for trial twice. In seeking a continuance of a prior trial date (February 13, 2007), defense attorney Timothy Rien had asserted, among other things, that it was lambing season, that the 80-year-old defendant and his 65-year-old wife were responsible for all the work on the ranch without help, that the defendant had recently had episodes of loss of consciousness that were being medically evaluated, and that time was needed to investigate and prepare. The prosecution did not oppose the motion, and the matter was continued to February 27, 2007, the date of the proceedings in question.

After discussion off the record on February 27, 2007, the following took place on the record:

THE COURT: Okay. Jury trial November 5.

MR. RIEN: And October 31.

THE COURT: And October 31 for readiness. [¶] The evidence isn't going to go away. It is not like you got [sic] witnesses. The worse [sic] thing that will happen, the defendant may become whatever.

MR. RIEN: I'm still going to meet with Mr. Spotorno next week. I'm still going to send a settlement over. He's a nervous wreck over the thing himself, but I haven't had any access to him.

MS. SANDBACH [DDA]: When you haven't even had access to a client, it just tells me that he's pushing this thing away and he's not going to deal with it.

THE COURT: I want to deal -- you can win your case maybe, maybe not, but let's not take an old man and just rack [sic] him over the coals for something -- I don't know, maybe he didn't know it was not okay, you know.

(Whereupon, the proceedings concluded.)

(R.T. 1:5-22.)

Although DDA Sandbach expressed her desire for an earlier resolution of the case, Judge Moruza set a trial date over eight months away, while making a comment concerning the prosecution's taking an "old man" and raking him "over the coals" for something he possibly "didn't know … was not okay." Under the circumstances, the judge's setting of the distant trial date appeared to reflect her view that the case should not be tried. Such conduct constitutes an abuse of authority, is in disregard of the People's right to a speedy trial, and is contrary to canons 2A and 3B(5).

Judge Moruza's conduct in the matters set forth above was, at a minimum, improper action.

Judge Moruza reported the *Borton* incident to the commission in May 2007. When the commission instituted a preliminary investigation concerning this incident and others and sent a preliminary investigation letter to Judge Moruza, the judge took immediate steps to address the problems brought to her attention. She enrolled in sixteen hours of group anger management counseling and found the sessions valuable.

Judge Moruza has not been the subject of prior discipline in her 11 years on the bench. She has supplied declarations from prosecutors and defense attorneys praising her judicial abilities and demeanor.

In view of the judge's forthrightness in reporting herself to the commission, her immediate efforts to address problems in her conduct that were brought to her attention, her willingness to concede the impropriety of certain of her actions, and her lack of prior discipline, the commission determined that institution of formal proceedings was not necessary for protection of the public, and that public admonishment was an appropriate resolution of this matter.

Commission members Hon. Frederick P. Horn, Hon. Judith D. McConnell, Mr. Peter E. Flores, Mr. Marshall B. Grossman, Ms. Barbara Schraeger, Mr. Lawrence J. Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott and Mr. Nathaniel Trives voted to impose a public admonishment. Hon. Katherine Feinstein and Mr. Samuel A. Hardage did not participate.

Dated: December 16, 2008

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| IN THE MATTER CONCERNING FORMER JUDGE ROBERT A. SCHNIDER | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |
|---|---|

This disciplinary matter concerns former Judge Robert A. Schnider, a retired judge of the Los Angeles County Superior Court. Judge Schnider and his attorney, James A. Murphy, appeared before the commission on August 19, 2009, to contest the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Schnider and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Judge Schnider was a commissioner of the Los Angeles County Superior Court from 1981 until 2002. He was a judge with the Los Angeles County Superior Court from 2002 until his retirement on December 15, 2008.

Between January 1, 2005, and December 31, 2007, Judge Schnider was the Family Law Supervising Judge for the Los Angeles County Superior Court. His duties included the supervision of then-Commissioner Ann Dobbs, a commissioner in the Family Law Department from March 2001 until October 31, 2007, when she retired. As the Family Law Supervising Judge, Judge Schnider was aware that Commissioner

Dobbs was not deciding all of her cases in a timely manner, but failed to take sufficient action to ensure that she did so. When Commissioner Dobbs retired in 2007, 15 cases over which she had presided had been under submission for over 90 days without her having decided them, and another 14 cases that she had under submission for less than 90 days had not been decided. Commissioner Dobbs never decided any of these cases. Prior to Commissioner Dobbs's retirement, Judge Schnider was aware of Commissioner Dobbs's failure to timely decide many of these cases. The commission determined that Judge Schnider violated California Rules of Court, rule 10.603, by failing to adequately supervise Commissioner Dobbs. The commission also determined that Judge Schnider violated California Rules of Court, rule 10.703, by failing to promptly respond to at least three complaints about Commissioner Dobbs's delay, as was required of him as her supervising judge. Judge Schnider's conduct violated canon 3C(3) of the California Code of Judicial Ethics, which requires judges with supervisory authority for the judicial performance of other judges and commissioners to take reasonable measures to ensure the prompt disposition of matters before them; canon 3D(1), which requires judges to take appropriate corrective action when they have reliable information that another judge has violated a provision of the Code of Judicial Ethics; canon 2A, which requires judges to comply with the law and act in a manner that promotes public confidence in the integrity of the judiciary; and canon 1, which requires judges to uphold the integrity of the judiciary.

Under California law, judges are expected to decide matters submitted to them within 90 days of submission, and are prohibited from receiving a salary while any cause remains "pending and undetermined for 90 days after it has been submitted for decision." (Cal. Const., art. VI, § 19; *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4.) While the 90-day period is not absolute, it has been used by the commission as a benchmark for determining delay in submitted cases. (See *Inquiry Concerning Judge Robert B. Freedman*, No. 179, Decision and Order Imposing Public Censure (2007) and *Inquiry Concerning Judge Robert G. Spitzer,* No 182, Decision and Order Removing Judge Spitzer from Office

(2007).) Canon 3B(8) of the California Code of Judicial Ethics requires judges, including commissioners, to dispose of all judicial matters "fairly, promptly, and efficiently." The Advisory Committee commentary to canon 3B(8) states that a judge "should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs," and requires judges to be "expeditious in determining matters under submission." The commission has stated that inordinate delay in deciding cases is unacceptable in all cases, but a judge's failure to decide family law matters can be particularly egregious in light of the harm to the parties caused thereby. (Public Reproval of Judge Thomas P. Breen (1995).)

As Family Law Supervising Judge for the Los Angeles County Superior Court, Judge Schnider had been delegated the duty of the presiding judge under California Rules of Court, rule 10.603(c)(3), to supervise and monitor the number of cases under submission before Commissioner Dobbs and to ensure that no case under submission remained undecided and pending for longer than 90 days. When Commissioner Dobbs was hired in 2001, the Los Angeles County Superior Court had a tracking system in place whereby reports were generated at the end of each month showing the cases each bench officer had under submission between 30 and 60 days, between 60 and 90 days, and for more than 90 days. These reports were, and still are, given to all bench officers of the Los Angeles County Superior Court each month. If Commissioner Dobbs had any cases under submission for 30 to 60 days, Judge Schnider was required by rule 10.603(c)(3)(D) to contact and alert her, and to discuss ways to ensure that cases in that category were timely decided. Between 2005 and 2007, the Cases Under Submission reports identified 34 of Commissioner Dobbs's cases as being in the 30-60-day category. Judge Schnider did not contact and alert Commissioner Dobbs and discuss ways to ensure that these cases were timely decided.

If Commissioner Dobbs had cases under submission from 60 to 90 days, rule 10.603(c)(3)(E) required Judge Schnider to consider providing assistance to her. Between 2005 and 2007, the court's monthly Cases Under Submission reports identified 33 of Commissioner Dobbs's cases as being in the 60-90-day category. Of

these, 16 had been under submission for more than 90 days at the time the report was issued. Judge Schnider informed the commission that when he contacted Commissioner Dobbs about cases appearing on the Cases Under Submission reports, she told him that the cases had been decided or that the submission dates were erroneous or had been vacated. Judge Schnider did not verify her representations. Judge Schnider also took no action to determine whether Commissioner Dobbs was in compliance with the law governing the vacating of submission dates, which she often was not. In 2006, Judge Schnider reduced the number of cases assigned to Commissioner Dobbs. In 2006 and 2007, he transferred 354 of her cases to another judge. Commissioner Dobbs still did not complete all of her submitted cases on time. On two occasions in 2007, Judge Schnider also gave Commissioner Dobbs one week off during which she was to complete her submitted cases. During that time off, Commissioner Dobbs did not decide any submitted cases, and Judge Schnider took no action to determine whether she had decided any cases.

In 2007, in addition to the information regarding Commissioner Dobbs's cases that was contained in the court's Cases Under Submission reports, Judge Schnider was aware of several cases that had not been decided by Commissioner Dobbs within 90 days of submission but were not listed on those reports. Judge Schnider took no action to determine why these cases were not being reported on the court's monthly reports. Had he done so, he likely would have learned that Commissioner Dobbs was preparing the case status information for those reports herself, rather than allowing her courtroom clerk to do so in accordance with the standard court practice. Also, he likely would have discovered that her reporting did not accurately reflect the status of the cases she had under submission.

Judge Schnider also failed to promptly respond to at least three complaints from family law litigants about Commissioner Dobbs's delays, as required by rule 10.703. Tracy Harris complained to the court on June 11, 2007, about Commissioner Dobbs's delay of nearly five years in ruling on her case. Judge Schnider did not respond to the allegations in Ms. Harris's complaint until January 4, 2008, when he acknowledged

the delay. Suzanne Lynch complained to the court on August 13, 2007, about a delay by Commissioner Dobbs of eleven months in ruling on her case. Judge Schnider never responded to the allegations in Ms. Lynch's complaint. Julia (Bandrapalli) Stokes complained on September 28, 2007, about Commissioner Dobbs's delay of six months in entering judgment on her case. Judge Schnider never responded to the allegations in Ms. Stokes's complaint.

In addition, Judge Schnider received letters dated January 9, 2007, and April 19, 2007, from attorney Margalo Ashley-Farrand complaining about Commissioner Dobbs's delays in two of her cases. In those letters, Ms. Ashley-Farrand reported that Commissioner Dobbs had not decided certain issues that were submitted in February 2003 and other issues that were submitted in 2005, and that this was causing serious problems for her client, who had continued to pay child support to a noncustodial parent. Ms. Ashley-Farrand also informed Judge Schnider that Commissioner Dobbs had initially set a trial date of March 14, 2005, in one of her cases but had continued the trial several times until February 17, 2006, that the trial had been continued several times thereafter, and that Ms. Ashley-Farrand was unable to receive a new trial date to complete the case. She also informed Judge Schnider that she had told Commissioner Dobbs in late 2005 that she would be moving to Oregon in the spring of 2006, but that the commissioner still did not set a date to complete the trial. In the meantime, Ms. Ashley-Farrand wrote that she had to pay for several trips to Los Angeles herself, including airfare, rental car and motel, pending Commissioner Dobbs's completion of her cases. Judge Schnider never responded to Ms. Ashley-Farrand's letters.

At his appearance before the commission and in his written objections, Judge Schnider maintained that he discharged his duty with respect to these complaints by repeatedly asking Commissioner Dobbs for her response to the complaints and taking her at her word when she assured him that she would respond to him within a short amount of time. In Judge Schnider's view, the commissioner's failure to provide a response to him relieved him of his obligation to investigate the complaints himself or to respond to the complainants. The rules do not require the presiding judge or

designee to wait indefinitely for a response from the subordinate judicial officer before responding to a complainant. To the contrary, rule 10.703(d) requires that complaints against subordinate judicial officers be processed promptly, and "to the extent reasonably possible," that the court "complete action on each complaint within 90 days after the complaint is submitted."

Further, Judge Schnider argued that he was justified in relying on the representations of a well-respected subordinate judicial officer. However, when Judge Schnider began his duties as supervising judge, he was informed that Commissioner Dobbs had problems with delay. Time after time, Commissioner Dobbs assured Judge Schnider that she would promptly decide her delayed cases and provide him with her responses to complaints from litigants. Yet, she repeatedly and consistently failed to follow through on these assurances. Under these circumstances, Judge Schnider's continued reliance on her promises was unreasonable. In the commission's view, Judge Schnider should have proceeded with an investigation of each complaint when Commissioner Dobbs failed to respond to him within a reasonable amount of time. Instead, Judge Schnider waited over six months to respond to the complaint from Ms. Harris, and never responded to or conducted an investigation into the complaints from Ms. Lynch, Ms. Stokes, or Ms. Ashley-Ferrand.

When Commissioner Dobbs retired in October 2007, Judge Schnider agreed to allow her to complete work on undecided cases at home. Commissioner Dobbs took approximately 30 undecided cases home with her. Judge Schnider was aware of some, but not all, of these cases. Of the cases Commissioner Dobbs took home with her, the following 15 had been under submission for over 90 days:

1. *Allain* (case no. BD 371793) submitted on March 1, 2006;
2. *Bannan* (case no. BD310701) submitted on June 26, 2005;
3. *Beuerman* (case no. BD055815) submitted on July 16, 2007;
4. *Blackburn* (case no. BD116967) submitted in February 2003 and September 2005;
5. *Dvorin* (case no. YD048141) submission date unclear; date vacated by minute order dated September 22, 2006 but no new submission date set;
6. *Ellis* (case no. BD319194) submitted on July 13, 2005;

7. *Goldman* (case no. BD407997) submitted on November 17, 2006;
8. *Harris* (case no. BD322099) submitted on March 23, 2005 and August 29, 2007;
9. *Lynch* (case no. BD364093) submitted on November 2, 2006;
10. *Mullins* (case no. BD383098) submitted on July 23, 2007;
11. *Needleman* (case no. BD393615) submitted on July 20, 2007;
12. *Perez* (case no. BD379993) submitted on March 27, 2007;
13. *Polo* (case no. BD391297) submitted on February 7, 2007;
14. *Stott* (case no. YD046723) date of submission unclear, probably soon after May 1, 2007;
15. *Striff* (case no. PD037298) submitted on January 22, 2007.

Of the cases Commissioner Dobbs took home with her, the following 14 had been under submission for less than 90 days:

1. *Adger* (case no. BD391595) submitted on October 17, 2007;
2. *Allen* (case no. BD448597) submitted on August 16, 2007;
3. *Aronson* (case no. BD420664) submitted on October 23, 2007;
4. *Birdwell* (case no. BF017596) submitted on September 14, 2007;
5. *Cooper* (case no. BF026368) submitted on August 2, 2007;
6. *Di Paola* (case no. BD377295) submitted on August 29, 2007;
7. *Glassman* (case no. BD240596) submitted on October 31, 2007;
8. *Grifka* (case no. BD413029) submitted on August 29, 2007;
9. *Hamilton* (case no. BD375899) submitted on October 2, 2007;
10. *Kim* (case no. D229695) submitted on October 12, 2007;
11. *Locatell* (case no. BD390299) submitted on October 5, 2007;
12. *Moore* (case no. BD385251) submitted on October 19, 2007;
13. *Nielsen* (case no. BD4007195) submitted on October 22, 2007;
14. *Serrano* (case no. YD032093) submitted on October 26, 2007.

During the three months following her retirement, Commissioner Dobbs completed none of these cases. The court eventually retrieved all of the files she had taken home. Several judicial officers were required to review and complete Commissioner Dobb's undecided cases. Mistrials were declared in at least 15 cases. Some cases were decided based upon the reporter's transcript of previous proceedings before Commissioner Dobbs; however, a number of cases had to be retried.

In the commission's view, Judge Schnider's failure to properly discharge his duty to supervise Commissioner Dobbs resulted in significant financial and emotional

harm to family law litigants and seriously undermined the integrity of the judiciary. Delays in family law matters can be particularly prejudicial to the parties. The commission concludes that Judge Schnider was seriously derelict in discharging his duty to supervise Commissioner Dobbs and demonstrated a disregard for the concerns of litigants who complained about their delayed cases.

The vote of the commission for the imposition of a public admonishment was 9 ayes and 2 noes. Commission members Hon. Judith D. McConnell, Mr. Peter E. Flores, Mr. Marshall B. Grossman, Mr. Samuel A. Hardage, Hon. Frederick P. Horn, Ms. Barbara Schraeger, Ms. Maya Dillard Smith, Ms. Sandra Talcott and Mr. Nathaniel Trives voted for a public admonishment. Commission members Hon. Katherine Feinstein and Mr. Lawrence Simi voted against imposing a public admonishment and would have imposed a private admonishment.

Dated: August 31, 2009

Honorable Judith D. McConnell
Chairperson

## PROOF OF SERVICE

I, the undersigned, am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action. My business address is 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102. I declare as follows:

On August 31, 2009, I served the attached:

**DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT OF JUDGE ROBERT A. SCHNIDER**

on all interested parties in this matter, by delivering a true copy as follows:

James A. Murphy, Esq.
Murphy, Pearson, Bradley & Feeney
88 Kearny St., 10th Floor
San Francisco, CA 94108
**FAX: (415) 393-8087**

☒ **(BY U.S. MAIL)** I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.

☒ **(BY FACSIMILE TRANSMISSION)** I caused such document to be transmitted to the addressee's facsimile number noted. The facsimile machine I used complied with Rule 2.301(3) and the transmission was reported as complete and without error. Pursuant to Rule 2.301(6), I caused the machine to print a transmission record of the facsimile transmission, a copy of which is attached to this declaration as required by Rule 2.306(g)(4).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed by me on August 31, 2009 at San Francisco, California.

Judith R. Starks

# PUBLIC ADMONISHMENT OF JUDGE ROBERT C. COATES

The Commission on Judicial Performance has ordered Judge Robert C. Coates publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge Coates has been a judge of the San Diego County Superior Court since 1982. His current term began in January 2005.

Judge Coates has persisted in a pattern of abuse of the prestige of his judicial office and misuse of court resources in connection with personal and non-court matters, notwithstanding his prior discipline by the commission for similar conduct, notwithstanding direction from his presiding judges that he cease such conduct, and notwithstanding advice he received from the California Judges Association (CJA) Ethics Committee to avoid such conduct. His conduct reflects a repeated refusal to comply with canon 2B(2), which prohibits judges from using the prestige of judicial office to advance the personal or pecuniary interests of the judge or others. Judge Coates' recalcitrance manifests indifference towards the erosion of public confidence in the judiciary that results from irresponsible behavior by judges. This repeated ethical indifference warrants another public rebuke.

### I. Judge Coates' Prior Discipline and Guidance

In 2000, Judge Coates received a public admonishment addressing multiple acts of misconduct. The admonishment recounted that from 1993 to 1998, Judge Coates engaged in a pattern of abuse of the prestige of judicial office and misuse of court resources in connection with personal matters. The commission found that the judge's extensive use of court secretaries and other court resources to prepare more than 100 personal documents was inconsistent with canon 2A of the California Code of Judicial Ethics, which requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

In addition, Judge Coates received an advisory letter in 2000 regarding his use of court resources to prepare and send documents, many on court letterhead, connected to the judge's personal involvement in civic activities. The commission emphasized that the judge's involvement with such civic activities was not improper but the judge's extensive use of court resources in connection with these activities was improper.

In 2005, Judge John Einhorn, then Presiding Judge of the San Diego County Superior Court, requested that Judge Coates stop using the court's fax machine, employees and time to receive and/or send personal, non-court related material. Judge Coates responded that he would purchase a facsimile machine for use at home, sending personal items to his personal secretary. In 2006, Judge Janis Sammartino, then Presiding Judge, advised Judge Coates that court computers should be used only to conduct court business and all communications should promote public confidence in the impartiality of the judiciary; and that a communication he had

sent could be seen as an inappropriate endorsement. Judge Coates responded that he was "heartily sorry" and that he would be "much more careful." In 2008, Assistant Presiding Judge Kevin A. Enright met with Judge Coates regarding his use of court email. Judge Coates stated to Judge Enright that he was not aware that he had done anything wrong but that he then understood.

In his correspondence to the commission in this matter, Judge Coates stated that he has asked the CJA Ethics Committee for opinions several times each year to avoid problems with improper use of court resources. The commission requested that Judge Coates provide copies of these opinions. The documents provided by Judge Coates show that while he was advised that minimal use of court resources for personal purposes under normal circumstances might be considered permissible, the judge was repeatedly advised that as he was being carefully scrutinized by his presiding judge he should avoid the use of court resources for anything other than strict judicial business.

## II. Judge Coates' Abuse of the Prestige of Judicial Office and Misuse of Court Resources

Notwithstanding his prior discipline, counseling, and warnings from his presiding judges and cautionary advice from the judges' association, Judge Coates abused the prestige of office and misused court resources as follows:

### A. Personal Letters to Health Insurance Company and Financial Institution

On May 28, 2007, Judge Coates wrote a note to his judicial secretary asking her to type a letter he had handwritten and send it via facsimile to his health insurance company. The judge's two-page letter, supported by 14 pages of attachments, sought the company's approval of a medical procedure he had scheduled, and addressed his personal medical condition. His secretary prepared the letter, using plain paper and home address as directed, and sent it via facsimile on May 29, 2007.

On or about July 9, 2008, Judge Coates had his judicial secretary prepare and send a letter on judicial stationery (in addition to indicating it was from the Superior Court of the State of California, San Diego, the letter was from the "Chambers of Robert C. Coates"), as "Judge of the Superior Court," to the judge's financial institution, complaining of long wait times he had experienced when attempting to call to determine why a wire transfer he was expecting had not been deposited into his account.

These letters involved the misuse of court resources for personal purposes in violation of canon 2A. The judge's letter to his financial institution, which was on court letterhead and refers to the judge by his judicial title, was also in violation of canon 2B(2), which prohibits judges from lending the prestige of their judicial office to advance the pecuniary or personal interests of the judge or others.

B. Memorandum to Undersheriff

On November 21, 2008, Judge Coates sent an email to his judicial secretary stating that "I'd like you to do, TODAY a Memo to our SD Co. Undersheriff, [Bill] Gore," and providing the text of that memorandum. The judge's email directed that the signature block for the memorandum should be as follows: "ROBERT C. COATES, Judge." The judge's secretary prepared and sent the memorandum via facsimile to William Gore, Undersheriff of the San Diego County Sheriff's Department. The judge's memorandum, prepared on court stationery, addressed his concerns regarding the field training of the judge's former courtroom bailiff, who the judge stated "served me as my Departmental Bailiff, for over a year," and "left here to follow his dream of serving 'in the field', but, as you see, this dream is about to be dashed." The judge stated in his memorandum that, "given a good chance," the deputy "will make a superb field Deputy," and "just maybe, this is the occasion for you to take a harder look at what has gone on, and what might be going on, in your training function." The memorandum was signed "Robert C. Coates, Judge of the Superior Court," and provided the judge's chambers phone number. Judge Coates attached to his memorandum email correspondence from another deputy sheriff related to the issue. The memorandum was sent under a San Diego County Superior Court facsimile cover sheet, indicating that the facsimile was from "Judge Coates."

Judge Coates contends that he was merely providing a letter of recommendation, permitted activity under canon 2B(2)(e). However, such recommendations must be based on a judge's personal knowledge. The judge's memorandum went beyond expressing the judge's personal observations as to his former bailiff's qualifications, as the memorandum suggested that there were problems with the sheriff department's training function and incorporated into the memorandum attached emails from another deputy sheriff expressing that deputy's views. In addition, the judge's memorandum was not written in connection with a job application, but evidently in connection with the sheriff department's decision as to whether to keep the former bailiff in the field training program.

C. Letter From Judge Coates as President of an Organization with Court Address and Title

On or about December 10, 2008, Judge Coates sent a letter regarding global warming and climate change on plain paper to the director of a non-governmental organization. The judge described himself in the letter as President of Understanding Climate Change, Ltd., "a Project of the Mission Valley Rotary Club." The address provided in the letter for Understanding Climate Change is "220 W. Broadway, Dept. 45," Judge Coates' department in the San Diego County Superior Court. Below his title as President of Understanding Climate Change appeared his judicial title, "Judge, San Diego Superior Court," and his chambers telephone number.

Judge Coates contends this letter was most likely prepared by his personal secretary, that he has no recollection of instructing his personal secretary to insert the address of the court, and that he does not recall noticing that the court address had been used. However, the judge signed this letter and directed his judicial secretary to send it via facsimile. Judge Coates' use of the court as the address for the judge's project makes it appear that the judge is using his

court as the office for a private organization, and the use of the judge's title in the letter gives the appearance that the judge is lending the prestige of his office to advance the personal interests of others.

Judge Coates' conduct described above evidences a serious disregard of the principles of conduct embodied in the California Code of Judicial Ethics, including improper lending of the prestige of his judicial office and using his judicial title to advance his and others' pecuniary or personal interests (canon 2B(2)); and a failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A). Judge Coates' conduct was, at a minimum, improper action pursuant to article VI, section 18(d)(3) of the California Constitution.

In determining that a public admonishment was appropriate, the commission noted that Judge Coates has been the subject of prior discipline, including his related 2000 public admonishment and advisory letter, discussed above. The judge's 2000 public admonishment for similar conduct also addressed Judge Coates' pattern of demeaning and discourteous conduct toward court staff and persons appearing before him, in violation of canon 3B(4). The commission found that such conduct was exemplified by five incidents. In one such incident, Judge Coates yelled at a court administrative analyst, who had not yet forwarded the judge's materials to a state assemblyman because the analyst thought that the proper procedure was to meet first with the presiding judge and chair of a court committee. Judge Coates made statements to the effect of "[y]ou haven't done a goddamned thing for this court and cannot analyze legislation," "I'm going to get this in your personnel file," and "[l]et me tell you what another judge said to me about you. You are a piece of shit." The judge's prior discipline also includes an advisory letter he received in 1988 for shouting and screaming at a litigant in a TRO proceeding, and a private admonishment he received in 1991 for sentencing a defendant on a speeding case based on his subjective diagnosis that the defendant was "addicted to something," and for calling a "hearing" and requiring the attendance of several attorneys to inquire into the operation of the Alternate Defender's Office.

Commission members Hon. Judith D. McConnell, Hon. Katherine Feinstein, Hon. Frederick P. Horn, Mr. Marshall B. Grossman, Ms. Barbara Schraeger, Mr. Lawrence J. Simi, Ms. Sandra Talcott and Mr. Nathaniel Trives voted to impose a public admonishment. Commission members Mr. Peter E. Flores, Mr. Samuel A. Hardage and Ms. Maya Dillard Smith did not participate.

Dated: December 2, 2009

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| IN THE MATTER CONCERNING JUDGE ANTHONY C. EDWARDS | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |
|---|---|

This disciplinary matter concerns Judge Anthony C. Edwards, a judge of the Trinity County Superior Court. Judge Edwards and his attorneys, Joseph P. McMonigle and Kathleen M. Ewins, appeared before the commission on March 18, 2010, to contest the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Edwards and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Judge Edwards has been a judge of the Trinity County Superior Court since 1998. His current term began in January 2007. Judge Edwards was elected as a justice court judge in Trinity County in 1994; he took the bench in January 1995 as a municipal court judge, pursuant to a constitutional amendment converting justice courts to municipal courts.

The matters addressed here concern acting while disqualified (*Floris, Castellanos*), improper dismissal (*Brown, Dunn*), decisional delay, the staffing of the

Hayfork court, a discourteous comment regarding the Office of the District Attorney, and courtroom decorum.

1. *People v. Floris*, No. 08F032

On March 19, 2008, defendant Corrie Floris was charged with a felony violation of Penal Code section 245(a)(1) (assault with a deadly weapon) for stabbing her boyfriend on March 12, 2008. Judge Edwards and his wife Cynthia Edwards, an attorney, have a personal relationship with defendant Floris and her family. Her parents are longtime Weaverville residents, her grandfather is a priest at the church Judge Edwards and his wife attend, and the judge and his wife are the godparents of Floris's child.

Shortly after the March 12 incident for which she was charged, defendant Floris arrived at the judge's house as he was leaving for work. She looked like she had been involved in a physical altercation. The judge escorted her inside to his wife and went to work. Later that day, the sheriff called Mrs. Edwards and told her that Floris's boyfriend was in the hospital with a knife wound. Mrs. Edwards advised the sheriff that Floris was at her house. Mrs. Edwards subsequently drove Floris to Redding and checked her into a motel. Floris later left the area.

On March 20, 2008, Judge Edwards and Judge Woodward, the other Trinity County Superior Court judge, signed separate minute orders recusing themselves from the *Floris* case. The minute order as to Judge Edwards states that the recusal was based on "his acquaintanceship with the parties and counsel for defendant," by which he was referring to his wife.

Defendant Floris was arrested in Riverside County on April 3, 2008. She was transported to the Trinity County jail on the afternoon of April 9, 2008.

On April 10, 2008, defendant Floris appeared before Judge Edwards in custody for arraignment. The judge's wife was present. She stood-up when Floris's case was called. Judge Edwards asked his wife what should be done next, or words to that effect. Mrs. Edwards replied that Floris should have the public defender. Judge

Edwards then arraigned Floris, appointed the public defender (who was present), set bail and set the matter for bail review and preliminary hearing on April 18.

As Judge Edwards walked out of the courtroom after arraigning defendant Floris, he walked by the jury box where she was sitting and hugged her. Another in-custody defendant was also sitting in the jury box, and several people were present in the audience. Court staff and attorneys also were present.

The April 10 minute order provides that Judge Edwards and Judge Woodward were "previously disqualified pursuant to CCP 170.1," and that "Court to attempt to get Visiting Judge." Later on April 10, a visiting judge from Siskiyou County was assigned by the Judicial Council; he presided over a telephonic bail review hearing on April 11.

It was improper for Judge Edwards to preside over proceedings involving defendant Floris, including an inquiry to his spouse, when he was already disqualified and where his disqualification was required by law. His actions exceed the scope of that permitted by Code of Civil Procedure section 170.4. In his response to the preliminary investigation, Judge Edwards contends that it was appropriate for him to preside over the arraignment because the only other judge in Trinity County was also disqualified, and the law requires that a felony defendant be arraigned within 48 hours of arrest. (Pen. Code § 825 [defendant to be taken before magistrate within 48 hours after arrest excluding Sundays and holidays]; see Pen. Code § 821 [pertaining to arrest in another county].) At his appearance before the commission, Judge Edwards argued that he was authorized to conduct the arraignment pursuant to Code of Civil Procedure section 170.4 which permits a disqualified judge to take any action necessary to maintain the jurisdiction of the court pending the assignment to another judge not disqualified. Judge Edwards explained that because of the difficulty in finding a judge from another county to conduct an arraignment on short notice, he believed he needed to conduct the arraignment to maintain jurisdiction. Judge Edwards has not provided any information as to what, if any, specific efforts were made to get a visiting judge to conduct the arraignment *before he presided over the matter.* The minute order of the

arraignment states, "Court *to* attempt to get Visiting Judge." (Italics added.) Even assuming attempts had been made and an arraignment could not be conducted within the time prescribed by law by another judge, the court would not have lost jurisdiction. (*People v. Wilson* (1963) 60 Cal.2d 139; *People v. Valenzuela* (1978) 86 Cal.App.3d 427 [A violation of a defendant's right to be arraigned within the time specified by law does not require dismissal of the charges or reversal after conviction unless the defendant shows that through such wrongful conduct he was deprived of a fair trial or otherwise suffered prejudice as a result thereof.].) Judge Edwards also suggests that presiding over the arraignment was necessary to prevent the release of a person accused of a felony. However, at his appearance Judge Edwards acknowledged that in his county a person charged with a felony not arraigned within the time prescribed by law is not released to the community because, upon release, the Sheriff's office immediately re-arrests the defendant at the jail.

Further, hugging Floris in open court created the appearance of bias and otherwise created the appearance of impropriety. The judge's conduct was contrary to the Code of Judicial Ethics, canon 1 (judge shall observe high standards of conduct), canons 2 and 2A (judge shall avoid impropriety and the appearance of impropriety, shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and canon 3E(1) (judge shall disqualify himself in any proceeding in which disqualification is required by law).

2. *People v. Castellanos*, No. 8M167

In April 2008, Roberto Castellanos, who lives in Hayfork, was cited by the sheriff for two misdemeanors (DUI and failing to have a license in possession) and instructed to appear in Weaverville for arraignment on May 15, 2008. A complaint was thereafter filed by the district attorney for the same incident, charging Castellanos with three misdemeanors (DUI, being under the influence of methamphetamine in violation of Health and Safety Code section 11550, and failing to have a driver's license in possession).

On May 15, 2008, defendant Castellanos failed to appear for arraignment. The district attorney had filed a peremptory challenge against Judge Edwards on May 13, pursuant to Code of Civil Procedure section 170.6. On May 15, Judge Edwards recused himself, but also ordered that the matter be set for arraignment on June 6 in Hayfork, a calendar that he knew he would be handling. The May 15 minute order also provides that the defendant was to be brought back to Weaverville before Judge Woodward, on an unspecified date.

A case against defendant's brother, Alfonso Castellanos, had previously been transferred to the June 6 Hayfork calendar. Judge Edwards knew that defendant Roberto Castellanos had accompanied his brother Alfonso and other family members to a hearing in Hayfork shortly before May 15. The judge set the *Roberto Castellanos* matter on the June 6 Hayfork calendar in order to tell defendant Roberto Castellanos that he must appear in Weaverville.

Defendant Roberto Castellanos appeared before Judge Edwards on June 6 in Hayfork. Proceedings were not reported; the minute order states that the matter was set for further arraignment before Judge Woodward in Weaverville on June 24.

It was improper for Judge Edwards to set the *Roberto Castellanos* matter before himself after he was recused. It exceeded the scope of action permitted after disqualification under Code of Civil Procedure section 170.4, and the apparent purpose for this irregular procedure was to help a defendant who had failed to appear, which at a minimum reflects the appearance of preferential treatment. The judge's conduct violates canons 2A and 3E(1).

3. Dismissing Cases

Judge Edwards has abused his authority by dismissing certain infractions and misdemeanors on the basis that the defendants live in Hayfork and were cited by law enforcement to appear in Weaverville rather than in Hayfork, and by threatening to do so in all such cases. There is no court order or legal requirement that a Hayfork resident's initial court appearance be in Hayfork, and the judge's decision to dismiss

rather than transfer cases creates an appearance of impropriety and appearance of bias against the prosecution, in violation of canons 2 and 2A.

This conduct is exemplified by *People v. Brown*, No. 08M321 and *People v. Dunn*, No. 08M524. In *Brown*, defendant John Brown, a Hayfork resident, was cited by the California Highway Patrol on July 8, 2008, to appear in Weaverville on August 14, 2008, for the misdemeanor of being an unlicensed driver and the infraction of not having a license in possession. The defendant was on parole. When he appeared in Weaverville for arraignment on August 14, Judge Edwards dismissed the case.

In *Dunn*, defendant John Dunn, a Hayfork resident, was cited by the California Highway Patrol on November 15, 2008, to appear in Weaverville on December 18, 2008, for the misdemeanor of driving on a suspended license. On December 4, the People filed a complaint alleging two prior convictions for driving on a suspended license. On December 18, Dunn failed to appear in Weaverville for arraignment and Judge Edwards dismissed the case. The People appealed. On October 6, 2009, the appellate division of the Trinity County Superior Court set aside the dismissal, ruling that it was an abuse of discretion.

Judge Edwards contends that his only error was failing to put on the record the factors pertaining to court administration he considered in dismissing *Dunn*. He maintains that the setting of misdemeanor matters in Hayfork recognizes the reality that Hayfork residents are generally impoverished and without transportation. The appellate division ruling directly addressed this issue. The decision observes that the record does not demonstrate any detriment to the defendant in having the charges filed in Weaverville since the defendant did not even appear. With respect to issues concerning court administration, the appellate decision states that court convenience and issues of court administration "are issues external to the case and, therefore, cannot be grounds for dismissal pursuant to Penal Code § 1385."

4. Decisional Delay

The two judges of the Trinity County Superior Court have approximately a half-time caseload, which they supplement by presiding over calendars in other

jurisdictions. Despite the light caseload in Trinity County, Judge Edwards has sometimes unreasonably delayed ruling on submitted matters. Under California law, judges are expected to decide matters submitted to them within 90 days of submission, and are prohibited from receiving their salaries during times when they have undecided matters under submission for more than 90 days. (Cal. Const., art. VI, § 19; *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4.) To implement this provision, the Government Code requires judges to regularly execute affidavits declaring they are in compliance with the law and entitled to receive a salary. (Gov. Code, § 68210.)

Between 2005 and 2008, Judge Edwards decided at least four matters that had been submitted for over 90 days before a decision was issued: (1) *People v. Brown*, No. 03F0119A/*People v. Floyd*, No. 03F0119B, decided June 16, 2005, at 119 days; (2) *Colburn v. Colburn*, No. 03FL0078, decided September 8, 2005, at 91 days; (3) *Young v. Brusatore*, No. 07SC006, decided July 18, 2007, at 99 days; and (4) *Katz v. Rolff*, No. 03CV0109, decided on September 11, 2007, at 91 days. The salary affidavit executed by Judge Edwards on May 26, 2005, was false, as the *Brown/Floyd* matter was over 90 days; however, the judge apparently was not aware of that fact when he signed the affidavit.

Unreasonable delay in deciding submitted matters is contrary to canon 3B(8), which provides that a judge shall decide matters fairly, promptly and efficiently. Submitting a false salary affidavit, even if not done intentionally, undermines public confidence in the judiciary and violates canons 1 and 2A.

5. Hayfork Absence

Court proceedings are held in Hayfork one Friday per month. The calendar typically is completed in the morning. After the calendar is concluded, the judge leaves for the day and the clerk remains in Hayfork until 4:00 p.m. to handle walk-in matters, with a lunch break between noon and 1:00 p.m. On Friday, June 8, 2007, the Hayfork calendar was handled by Judge Woodward.

Around noon on June 8, 2007, Judge Edwards flew to Hayfork and took the clerk and deputy marshal to lunch in his plane. They flew to the coast but did not locate an open restaurant, then returned to Hayfork and ate lunch at a restaurant there. The clerk did not return to the Hayfork court facility until approximately 2:45 p.m. to 3:00 p.m., during which time she was with Judge Edwards. The Hayfork court was locked during the clerk's absence.

Judge Edwards did not contact anyone at the court in Weaverville regarding the clerk's whereabouts during the interruption in the hours that the Hayfork court would normally be open to the public, and did not attempt to arrange for other court employees to staff the Hayfork courthouse during the extended lunch. (Cell phone service apparently was not available to Judge Edwards during this period; however, he did not attempt to call the Weaverville court using a land line.)

Judge Edwards had a few matters calendared in Weaverville at 1:30 p.m. on June 8, 2007. He did not return to Weaverville until approximately 3:30 p.m. and did not contact the court regarding his absence before then. His brief calendar was handled around 3:00 p.m. by Judge Woodward.

Court Executive Officer Donna Hanover spoke with the clerk very briefly on June 8, 2007. She later asked the clerk to meet with her on June 18 regarding the events of June 8. On June 19, Judge Edwards wrote a memo to CEO Hanover that stated as follows:

> You were informed previously by [the clerk], on the 8th of June, that she and [the deputy marshal] were with me for what turned out to be an unattended [*sic*] extended lunch. It was also explained to you that the cell phone service was down on Friday.... If for some strange reason it is not absolutely clear, I am the one and the only one responsible for getting [the clerk] back to work by 1:00 p.m. The delay was unintentional but it doesn't really matter because I can take an employee to lunch, even an extended lunch, because I am the employer and I can do that. As soon as you found out on the 8th that [the deputy marshal] and [the

> clerk] were with me, that should have been the end of it. You cannot place a letter in the personnel file because the individual went to lunch with their boss. It seems that should be painfully obvious. You are hereby directed to take anything having to do with June 8th out of [the clerk's] file and you are also directed to pay her overtime for calling her into your office last night past work hours.

Judge Edwards's conduct on June 8 reflects a disregard of the court's obligation to the public, undermines confidence in the integrity of the judiciary, and creates the appearance of favoritism, in violation of canons 1 and 2A. The June 19 letter to the CEO did not comport with canon 3B(4) (a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity) and likewise creates an appearance of favoritism.

6. Comment

During an arraignment calendar in the second half of 2008, Judge Edwards commented in a crowded courtroom that a certain misdemeanor "was just another example of the DA overcharging." A deputy district attorney was appearing on the calendar and the district attorney was observing proceedings. The comment violates canon 3B(4) and creates an appearance that Judge Edwards is biased against the district attorney's office.

7. Potential Juror with Tinfoil on Head

On October 21, 2008, a potential juror, whom Judge Edwards knows socially, reported for jury duty with a tinfoil hat on his head. (Several months before receiving the summons for jury duty, during a group conversation at which Judge Edwards was present, the potential juror had suggested that appearing for jury duty with tinfoil on his head would be a way to get out of jury duty. As the potential juror recalls, the judge responded "I dare you," not in a jovial or encouraging fashion, but in a discouraging manner that the potential juror believed was intended to convey disapproval of such action.)

The jury panel waited outside the courtroom. After the case settled, the panel was brought into Judge Edwards's courtroom and dismissed by the judge. The potential juror was still wearing the tinfoil hat. Judge Edwards saw the potential juror with the tinfoil hat on his head, but did not acknowledge him or ask him to remove the hat. It reflects a lack of decorum for Judge Edwards to have allowed the potential juror, who he knew was joking, to leave the tinfoil hat on his head during court proceedings. The judge's conduct is contrary to canon 3B(3) (judge shall require order and decorum in proceedings before the judge).

The commission determined that the conduct of Judge Edwards in these matters was, at a minimum, improper action.

Commission members Hon. Judith D. McConnell, Hon. Frederick P. Horn, Hon. Katherine Feinstein, Mr. Marshall B. Grossman, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Sandra Talcott and Mr. Nathaniel Trives voted for a public admonishment. Commission member Mr. Peter E. Flores, Jr. was recused. Commission members Mr. Samuel A. Hardage and Ms. Maya Dillard Smith did not participate.

Dated: April 12, 2010

Honorable Judith D. McConnell
Chairperson

# PUBLIC ADMONISHMENT OF JUDGE JOHN T. DOYLE

The Commission on Judicial Performance has ordered Judge John T. Doyle publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge Doyle has been a judge of the Los Angeles County Superior Court since 2001. Prior to 2001, Judge Doyle served as a court commissioner in the Los Angeles courts. Judge Doyle's current term began in 2009.

On July 2, 2009, at approximately 10:45 p.m., Judge Doyle caused a traffic collision while driving his vehicle under the influence of alcohol in Los Angeles. After breath tests showed that Judge Doyle had blood-alcohol levels of .21 and .20 percent, the judge was arrested for driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a). On July 27, 2009, Judge Doyle was charged with violations of Vehicle Code section 23152, subdivisions (a) and (b). (Case No. 9MP08210.) On October 6, 2009, following a plea of nolo contendere, Judge Doyle was convicted in the Los Angeles County Superior Court of driving with a blood-alcohol level of .08% or more, in violation of Vehicle Code section 23152, subdivision (b).

Judge Doyle's unlawful action described above evidences a serious disregard of the principles of personal and official conduct embodied in the California Code of Judicial Ethics, including failure to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved (canon 1) and failure to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A). "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." (Canon 2A advisory committee commentary.) Judge Doyle's unlawful conduct was also prejudicial to the administration of justice and brought the judicial office into disrepute within the meaning of article VI, section 18, subdivision (d) of the California Constitution.

Commission members Hon. Judith D. McConnell, Hon. Katherine Feinstein, Mr. Anthony P. Capozzi, Mr. Peter E. Flores, Mr. Samuel A. Hardage, Hon. Frederick P. Horn, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott and Mr. Nathaniel Trives voted to impose a public admonishment.

Dated: October 21, 2010

**PUBLIC ADMONISHMENT OF JUDGE JOHN B. GIBSON**

The Commission on Judicial Performance has ordered Judge John B. Gibson publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge John B. Gibson was appointed to the Municipal Court of San Bernardino County in 1990, and elevated to the San Bernardino County Superior Court in 1998 upon unification of the trial courts. His current term began in January 2007.

Based on the facts below, the commission found that Judge Gibson failed to maintain high standards of conduct, failed to act in a manner that promotes public confidence in the judiciary, and failed to be dignified, patient and courteous to those with whom he deals in an official capacity.

1. On May 12, 2010, the *People v. Nelson* case was sent to Judge Gibson's courtroom for assignment to a trial department. A female attorney representing the defendant had an appearance in another courtroom that morning and sent a male attorney from her office to appear before Judge Gibson on the *Nelson* case in her place. When Judge Gibson called the *Nelson* case, the male attorney announced that the defense was ready for trial but that the defense witnesses had not been subpoenaed to appear until the following week. Judge Gibson displayed irritation, impatience and sarcasm with the defense attorney because the defense witnesses had been subpoenaed for the following week.

Later the same day, the female attorney representing Mr. Nelson appeared before Judge Gibson and explained why the defense witnesses had been subpoenaed for the following week. Although Judge Gibson told the female attorney that she was probably right in her reasoning, he also displayed sarcasm and annoyance toward her in open court.

Later the same day, Judge Gibson ordered the female attorney and another attorney from the same office into his chambers, where he made rude, insensitive and inappropriate remarks to the female attorney about the male attorney who had appeared on her behalf earlier that day. Judge Gibson exhibited irritation toward the female attorney and said to her words to the effect of, "He was incompetent and just stood in the courtroom scratching his balls and picking his nose," or "He was incompetent and just stood in the courtroom scratching his ass and picking his nose." Judge Gibson accompanied this remark with gestures indicating the aforementioned actions.

2. In early 2010, Judge Gibson and one male attorney and one female attorney were standing in the hallway beside the judge's chambers, where he told them a story about when he was a young defense attorney and a prosecutor verbally intimidated him

while they were both standing at a urinal. While telling the story, Judge Gibson gestured in front of his groin as if he were using a urinal.

3. On another occasion, Judge Gibson referred to a tall, thin female attorney with short hair who appeared before him as a "Q-tip."

The commission found that Judge Gibson's conduct constituted a violation of canons 1 and 2A of the Canons of Judicial Ethics (judges are to maintain high standards of conduct and to act in a manner that promotes public confidence in the integrity of the judiciary) and a violation of canon 3B(4) (judges shall be dignified, patient and courteous to those with whom they deal in an official capacity).

Judge Gibson's conduct in the matter described above was, at a minimum, improper action.

In imposing this discipline, the commission took into account Judge Gibson's public admonishment in 2000 for similar insensitive and inappropriate conduct involving individuals with whom he dealt in an official capacity. The judge's prior public admonishment was for inappropriate acts toward a female employee that included making sexually suggestive comments, writing and sending a sexually suggestive memo, writing and delivering another memo that was intended as humorous about putting the employee to death, and sticking his finger out of his robe while saying, "Say hello to Mr. Bobo," as well as for grabbing and kissing a female probation officer on the lips in the courtroom.

Commission members Justice Judith D. McConnell, Judge Katherine Feinstein, Mr. Anthony P. Capozzi, Mr. Peter E. Flores, Jr., Judge Frederick P. Horn, Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms Sandra Talcott, and Mr. Nathaniel Trives voted for the public admonishment. Mr. Samuel A. Hardage did not participate.

December 14, 2010

# PUBLIC ADMONISHMENT OF JUDGE MELISSA N. WIDDIFIELD

The Commission on Judicial Performance has ordered Judge Melissa N. Widdifield publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge Widdifield has been a judge of the Los Angeles County Superior Court since August 2007. She was a court commissioner for five years before her appointment as a superior court judge.

On November 18, 2009, at approximately 1:00 a.m., Judge Widdifield drove her vehicle in a reckless manner while under the influence of alcohol, and with a blood alcohol level of approximately .09 percent. On January 19, 2010, the judge was charged with driving under the influence of alcohol, a violation of Vehicle Code section 23152(a), and driving while having a .08 percent or higher blood alcohol level, a violation of Vehicle Code section 23152(b). On May 14, 2010, the judge entered a plea of nolo contendere to reckless driving, a violation of Vehicle Code section 23103(a), pursuant to Vehicle Code section 23103.5.

Judge Widdifield's unlawful action described above evidences a serious disregard of the principles of personal and official conduct embodied in the California Code of Judicial Ethics, including failure to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved (canon 1) and failure to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A). "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." (Canon 2A advisory committee commentary.) Judge Widdifield's conduct was also prejudicial to the administration of justice and brought the judicial office into disrepute within the meaning of article VI, section 18, subdivision (d) of the California Constitution.

Commission members Hon. Judith D. McConnell, Hon. Katherine Feinstein, Hon. Frederick P. Horn, Mr. Anthony P. Capozzi, Mr. Peter E. Flores, Jr., Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith and Mr. Nathaniel Trives voted to impose a public admonishment. Commission member Ms. Sandra Talcott was recused from this matter. Commission member Mr. Samuel A. Hardage did not participate.

December 14, 2010

# PUBLIC ADMONISHMENT OF JUDGE HARVEY GISS

The Commission on Judicial Performance has ordered Judge Harvey Giss publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge Giss has been a judge of the Los Angeles County Superior Court since April 2001. His current term began in January 2009.

A criminal case was transferred to Judge Giss for trial in July 2010. The prosecutor and counsel for the co-defendants appeared in Judge Giss's courtroom. Counsel were discussing, off the record, the prospects for a plea agreement. The defendants were in a holding cell but a family member of one of the defendants was present in the courtroom.

According to Judge Giss, he perceived that counsel wished him to intercede and explain the potential benefits of the plea offer to the defendants, which the judge did not believe he could do. Judge Giss made a remark to the effect that he guessed that the only thing that would make the defendants plead was for the judge to come out in a white sheet and a pointy white hat, which the judge indicated he would not do. His remark referenced the Ku Klux Klan and the fact that both defendants were African-American.

Two days later, the defense requested that Judge Giss recuse from the case on the basis of his remark and the defendants' concern regarding his impartiality. While conceding it was a "bad statement," the judge also remarked: "People don't have a sense of humor anymore." The judge's comment referencing the Ku Klux Klan eventually resulted in his recusal from the case.

Judge Giss should have known that his insensitive courtroom reference to a history of violence towards persons of the defendants' ancestry, whether intended to make a valid point regarding his role as a judge or in jest, was offensive and inappropriate. A judge's "subjective intent is not at issue," "[a]s a judge he is charged with the obligation to conduct himself at all times in a manner that promotes public confidence and esteem for the judiciary." (*Gonzalez v. Commission on Judicial Performance* (1983), 33 Cal.3d 359, 376.)

The commission determined that the judge's remark constituted a failure to refrain from speech that would reasonably be perceived as bias or prejudice, as required by canon 3B(5) of the California Code of Judicial Ethics; a failure to be dignified and courteous to litigants, lawyers and others with whom the judge deals in an official capacity, as required by canon 3B(4); and a failure to avoid impropriety and the appearance of impropriety, and act at all times in a manner that promotes public confidence in the impartiality of the judiciary, as required by canon 2.

Judge Giss's conduct described above was, at a minimum, improper action pursuant to article VI, section 18(d)(3) of the California Constitution.

Commission members Hon. Judith D. McConnell, Hon. Frederick P. Horn, Mr. Anthony P. Capozzi, Mr. Peter E. Flores, Jr., Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted to impose a public admonishment. Commission member Mr. Samuel A. Hardage did not participate.

Dated: March 16, 2011

**PROOF OF SERVICE**

I, the undersigned, am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action. My business address is 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102. I declare as follows:

On March 16, 2011, I served the attached:

**PUBLIC ADMONISHMENT OF JUDGE HARVEY GISS**

on all interested parties in this matter, by delivering a true copy as follows:

**Via U.S. Mail and Facsimile**

Edith R. Matthai, Esq.
Robie & Matthai
500 South Grand Avenue, 15th Floor
Los Angeles, CA 90071-2609
FAX: (213) 624-2563

☒ **(BY MAIL)** I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.

☒ **(BY FACSIMILE TRANSMISSION)** I caused such document to be transmitted to the addressee's facsimile number noted. The facsimile machine I used complied with Rule 2003(3) and the transmission was reported as complete and without error. Pursuant to Rule 2003(6), I caused the machine to print a transmission record of the facsimile transmission, a copy of which is attached to this declaration as required by Rule 2008(e)(4).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed by me on March 16, 2011 at San Francisco, California.

_____
Judith R. Starks

**PUBLIC ADMONISHMENT OF JUDGE NANCY POLLARD**

The Commission on Judicial Performance has ordered Judge Nancy Pollard publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Pollard has been a judge of the Orange County Superior Court since 1997. Her current term began in January 2009.

**1. *Forline v. Chenier***

On April 30, 2009, Judge Pollard presided over a hearing on a petition for a restraining order filed by Kathy Forline against her former boyfriend, Blake Chenier. Forline alleged in her petition that Chenier had engaged in acts of violence during their relationship such as throwing rocks at her, spitting on her, choking her, and throwing protein powder, and that he had destroyed some of her property. The defense position was that Forline had fabricated the allegations and filed the petition because she was angry with Chenier for breaking up with her, and for being intimate with her roommate in her house after their relationship had ended.

The hearing began with testimony by Forline, who was questioned by Judge Pollard (with her counsel's consent) about some of the allegations in her declaration. Shortly after this questioning began, Judge Pollard addressed Chenier's attorney as follows:

> **The Court:** You know, Counsel, I have a question. [¶] May I address your client?
>
> **Mr. English:** Sure.
>
> **The Court:** Where were you born?
>
> **Mr. Chenier:** Newport Beach, California.
>
> **The Court: I'm concerned about the throwing of the rocks and the spitting. I've been doing domestic violence now for 14 years. Usually that is the kind of behavior I see in Middle Eastern clients, but almost -- if I read a declaration where they say, "He spit on me, he threw rocks at me," almost always it's a Middle Eastern client. If the declaration says, "He drags me around the house by the hair," it's almost always a Hispanic client.**

(R.T. at 10:11-25, bold added.)

A little later, when Forline was being cross-examined by Chenier's attorney but before Chenier testified or presented any testimony on his own behalf, Judge Pollard asked the attorney to explain the relevance of a question about how long Forline and Chenier had been broken up as of the night of the specific incident (an altercation involving Chenier, Forline, and Forline's roommate) giving rise to the petition. This exchange followed:

> **Mr. English:** I think she is angry my client broke up with her is what I think.
>
> **The Court:** She very (*sic*) may be. That is not the issue. **The issue is he spit on her, he choked her, he pushed her, he threw protein powder all over the room, and he destroyed a lot of expensive property.**
>
> **Mr. English:** It goes to bias, Your Honor, for filing this order. It goes to credibility, absolutely.
>
> **The Court: Well, for whatever reason she has -- and she certainly may feel betrayed in her love life, but that doesn't mean that that gives him the right to destroy the property, to choke her, to throw powder all over her room.**
> **Mr. English:** Of course not. It goes to her bias for filing this petition.

(R.T. 24:4-20, bold added.)

After Forline's attorney interjected that it was "harassment" for Chenier to come into Forline's house and be intimate with another woman there, the following occurred:

> **The Court:** Well, I don't even consider that. He can sleep with anybody he wants. He can sleep with anybody in her family. **The point is he does not get to choke her. He does not get to spit on her. He doesn't get to threaten her.**
>
> **Mr. English:** Of course not.
>
> **The Court: He doesn't need to destroy property.**

(R.T. 25:4-11, bold added.)

Following these remarks, the attorney commented, "By the way, that didn't happen. I'll be clear when I question my client." (R.T. 25.)

At the end of the hearing Judge Pollard issued a five-year restraining order and ordered Chenier to pay restitution of more than $4,500.

Chenier appealed. In an unpublished opinion filed in August 2010, the Court of Appeal affirmed Judge Pollard's orders, finding that her "inappropriate statement concerning Middle Eastern and Hispanic males did not evidence a bias against Chenier," since he is neither Middle Eastern nor Hispanic, and that there was no evidence that the judge was generally biased against males.

Although the appellate court rejected Chenier's claim of bias, it took the opportunity, in a separate section of its opinion entitled "Warning," to "caution the trial judge to be more thoughtful in her comments concerning her previous cases and statements concerning her perceptions of race, ethnicity, or gender." The court continued:

> Such comments suggest ethnic stereotyping that is inconsistent with the fair, impartial, and dispassionate administration of justice. As we explain above, the trial judge's statements did not evidence a bias against Chenier. But in the future, the trial judge's statements about ethnic propensities of past litigants could compel the conclusion that the judge prejudged a case based on ethnicity. A trial judge should refrain from comments that suggest he or she has decided a credibility contest based on some matter outside the record. Such statements do not inspire public trust and confidence in our courts.

(*Forline v. Chenier* (Aug. 2, 2010, G042242) [nonpub. opn. at p. 7].)

The Court of Appeal went on to find that the trial court properly excluded evidence that Chenier broke up with Forline and started dating her roommate, citing evidence that the termination of the relationship was mutual and testimony by Forline that she was relieved that Chenier was no longer in her life; the appellate court also stated that evidence about "when they terminated their relationship and who he was currently dating was of no relevance" to the issue of whether Chenier posed a threat to Forline. Finally, the Court of Appeal rejected Chenier's claim that the evidence was insufficient to support issuance of the five-year restraining order.

The commission found that Judge Pollard's remarks about Hispanic and Middle Eastern men were contrary to canon 3B(5), which provides, in pertinent part: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, … or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race … [or] national origin… ." Judge Pollard's remarks articulated stereotypes about two ethnic groups and their propensity to engage in certain types of domestic violence. As the Court of Appeal pointed out, these comments suggest ethnic stereotyping that is inconsistent with the fair, impartial and dispassionate administration of justice; the remarks do not inspire public trust and confidence in the courts. (See *In re Stevens* (1982) 31 Cal.3d 403, 404-405.) Judge Pollard has admitted that her remarks were inappropriate.

The commission also found that Judge Pollard made statements suggesting that she had prejudged the facts before she heard any testimony offered by respondent Chenier, contrary to canons 2A and 3B(5). The judge's comments during the cross-examination of Forline, quoted above, gave the appearance that she had already accepted Forline's version of events before hearing any testimony offered by Chenier, despite the fact that this was a hearing at which both sides were entitled to present evidence before a decision was made.

**2. *Blumenthal v. Blumenthal***

On November 18, 2005, Judge Pollard declared a mistrial in the family law case of *Blumenthal v. Blumenthal*, which had been pending before her for approximately four years, because the trial did not end within a five-hour period she had set for its completion and she was to be transferred from a family law assignment to a domestic violence assignment about six weeks later; she took this action although only a few more hours of anticipated testimony remained.

According to a chronology provided by Judge Pollard, the petition for dissolution in *Blumenthal* was filed in November 1999. The case was designated a long-cause matter in January 2000, following the filing by petitioner's counsel of an at-issue memorandum giving a trial estimate of two days. After the parties entered into a written stipulation, and a partial judgment settling the majority of the issues was entered, the case was assigned to Judge Pollard around October 2001.

In November 2001, Judge Pollard set the case for trial on March 19 and 20, 2002. She subsequently denied a motion filed by respondent to set aside the previously entered partial judgment, and continued the trial to July 11 and 12, 2002. On July 11, 2002, the judge continued the trial to allow the petitioner to consider a settlement offer, and because the respondent had failed to provide certain financial information. The judge also appointed an expert to determine respondent's controllable cash flow. She ordered the parties to cooperate with the expert and return in September 2002. In September, the matter was continued to November 2002 because the expert had not completed his evaluation. In November, the trial was continued to February 19, 2003 because the respondent had not given necessary documents to the expert; a mandatory settlement conference was set for January 30, 2003.

On January 30, 2003, Judge Pollard reset the mandatory settlement conference for February 19, 2003 and continued the trial to May 6, 2003. When she called the case on May 6, 2003, the judge said she had received notice that respondent had filed a lawsuit against the court's expert for breach of contract and malpractice, and expressed concern that he had filed this suit to delay the proceedings. The judge continued the trial because counsel had not received the expert's report ten days before the trial date. In choosing a new date for trial, Judge Pollard asked counsel to give a time estimate; after the attorneys said that the testimony of the three witnesses (the court's expert and the two parties) could be heard within three to four hours, the trial was continued to August 20, 2003.

On August 20, 2003, Judge Pollard called the case for trial and for a hearing on an order to show cause regarding support that had been filed by the petitioner. After the two parties were sworn in as witnesses, respondent's counsel asked to continue the trial because the court's expert had prepared an updated report that had not been provided ten days before the trial date. Judge Pollard suggested a date the next week, but the petitioner was scheduled to have surgery, so trial was continued to January 14, 2004. A temporary support order was made.

On January 14, 2004, the case was called for trial. The court's expert testified. Because respondent's counsel had not completed cross-examination of the expert, Judge Pollard ordered the parties to return on April 30, 2004. However, due to the court's unavailability, the trial date was continued to August 17 and 18, 2004. The court's expert was ill on August 17, so trial was continued to January 11 and 12, 2005.

On January 10, 2005, respondent moved ex parte to continue the trial date due to the unavailability of an expert he had retained. Judge Pollard granted the request, reset trial for May 10, 2005, and made orders concerning the report of respondent's expert. On May 10, 2005, the trial date was continued again, at respondent's request. Trial was reset for October 25 and 31, 2005.

On October 25, 2005, Judge Pollard called the case for trial. After discussion between the judge and counsel, it was determined that trial would continue on October 31, 2005. On that date, the court's expert and the petitioner testified. Since trial had not been completed, Judge Pollard set the matter to continue from 9:00 a.m. to 3:00 p.m. on November 18, 2005, stating "we will finish," "we are getting done," and "the very last important question is going to be asked and answered at three o'clock."

On November 18, 2005, respondent's expert testified. When he finished testifying, Judge Pollard expressed concern that the trial would not be completed that day. Respondent's counsel said that her client needed to testify, and that his testimony would probably take several hours. Judge Pollard said that the case would be mistried. She explained that she was going to the domestic violence department at the end of the year, and did not have a couple of hours on her calendar before the end of the year. The judge opined that the parties had "spent more time on $101,165 than is worth $101,165," and expressed the view that there had been "an inordinate amount of objections." A mistrial was declared.

A writ petition was filed in the Court of Appeal. The appellate court ultimately issued the writ and set the matter for completion of trial back before Judge Pollard, regardless of her reassignment to a different court. (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672.) The appellate court noted that neither party had requested the mistrial, which was ordered over the objection of both parties "for reasons peculiar to the judge's own calendar." The appellate court stated, "The abuse of discretion in granting this mistrial is manifest." (*Id.* at 685, 687.)

In the commission's investigation, Judge Pollard expressed the view that the Court of Appeal's decision was based on incomplete information, because the petitioner did not provide the appellate court a copy of the transcript of the May 2003 hearing at which counsel gave an estimate of three to four hours to complete the trial. Judge Pollard argued that the case was converted from a long-cause matter to a short-cause matter when the attorneys, at a hearing that took place more than two years before the mistrial was declared, gave an estimate of three to four hours to complete the trial, and that she therefore had discretion to declare a mistrial when they did not finish within that period. In addition, Judge Pollard reported that she was specifically instructed by her supervising judge not to keep the matter when she transferred to her domestic violence assignment. She expressed the view that if the Court of Appeal had known about this, the impression that her action was arbitrary and capricious would not have been created.

The commission found that even assuming that a long-cause matter can be converted to a short-cause matter when the attorneys, at some point during the proceedings, give an estimate of five hours or less to complete the trial, the records of the *Blumenthal* case show that the estimate of three to four hours was superseded by later events, and that the court and counsel continued to treat the case as a long-cause matter. On four occasions after May 6, 2003, the court set the trial to take place on two days: it was set for August 17 and 18, 2004; for January 11 and 12, 2005; for May 10 and 11, 2005; and for October 25 and 31, 2005. A minute order issued May 10, 2005, setting the matter along with an order to show cause filed by petitioner for two days in October, and a minute order issued October 25, 2005, both designate the matter as "trial-long cause non-jury." Moreover, the transcript of the hearing held January 14, 2004, where the court's expert testified, shows that the judge asked counsel to identify "the reserved issues on the long cause trial." (R.T. 68.) At the end of this hearing, respondent's counsel, when asked for a time estimate, said that it would take about another half hour to finish her cross-examination of the court's expert, and that an expert for respondent (who had not been retained in May 2003) would testify, for "probably as much time as it took to examine [the court's expert]." (R.T. 132:21 – 133:2.) The judge and the parties thus were aware that the previous estimate of three to four hours, which was based on the assumption that only the court's expert and the parties would be testifying, was obsolete.

Since the court records of events subsequent to May 6, 2003 show that the *Blumenthal* case remained a long cause case and that the estimate of three to four hours to complete the trial was no longer valid, it appears that the transcript of the hearing held May 6, 2003, would not have given the appellate court a basis to conclude that the matter had been converted to a short-cause case. Even assuming the Court of Appeal agreed with Judge Pollard that a long-cause matter can be converted to a short-cause matter when attorneys provide an estimate of less than five hours to complete a trial, and that this gives the trial judge discretion to declare a mistrial if the estimate is exceeded, there were no grounds for finding that *Blumenthal* had become a short-cause case.

Regarding Judge Pollard's argument that she properly followed the instructions of her supervising judge, and that the Court of Appeal would not have found her actions arbitrary and capricious if it had known that her supervising judge had instructed her not

to take the case with her to her domestic violence assignment, the commission noted that the supervising judge stated, in a declaration submitted by Judge Pollard, that she had represented to him that *Blumenthal* "started the trial with an estimate of about three hours." The commission also noted that in his declaration, the supervising judge described his actions as "suggesting" that Judge Pollard declare a mistrial. Even assuming that the supervising judge's discussions with Judge Pollard about how she might handle the *Blumenthal* case could be considered instructions, it does not appear that such instructions would legitimize Judge Pollard's actions if they were based on incorrect information she had given to the supervising judge.

The commission found that Judge Pollard's conduct in declaring a mistrial in *Blumenthal* constituted an abuse of authority and failure to hear and decide a matter assigned to her, contrary to canon 3B(1).

The commission concluded that Judge Pollard's conduct in the matters above was, at a minimum, improper action and dereliction of duty.

Commission members Hon. Judith D. McConnell, Mr. Anthony P. Capozzi, Ms. Nanci E. Nishimura, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, Mr. Adam N. Torres, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted to impose a public admonishment. Commission member Hon. Frederick P. Horn was recused from this matter. Commission member Ms. Barbara Schraeger did not participate.

Dated: July 13, 2011

**PUBLIC ADMONISHMENT OF JUDGE JOAN COMPARET-CASSANI**

The Commission on Judicial Performance has ordered Judge Joan Comparet-Cassani publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Comparet-Cassani became a judge of the Los Angeles County Municipal Court in 1995. In 2000, she became a judge of the Los Angeles County Superior Court. The judge's current term began in January 2011.

The judge presided over the matter of *People v. Evan Perkins*, No. NA083318, which involved felony charges of theft and drug possession. Perkins was initially represented in this matter by appointed counsel.

On January 22, 2010, the judge granted Perkins's motion to proceed in pro per and relieved his court-appointed attorney.

On April 13, 2010, Perkins appeared before the judge for a pretrial hearing and submitted two motions, a *Pitchess* motion and a *Brady* motion.[1] Upon receiving the *Pitchess* motion, the judge stated that she did not believe that Perkins had prepared the motion himself. Perkins responded that he had prepared the motion himself and that he had someone else type it. The judge proceeded to question Perkins about the motion and repeatedly stated that she did not believe he had prepared it despite Perkins's insistence that he had. The judge ultimately concluded that Perkins was lying to the court about not having received legal assistance in connection with the preparation of the motion and on that basis she revoked his pro per status and appointed a bar panel attorney to represent him. The following colloquy occurred during the hearing:

> THE CLERK: Here's the *Pitchess*. There's (*sic*) the other motions he filed this morning.
>
> THE COURT: Did you give [Deputy District Attorney] Recana copies?
>
> THE DEFENDANT: Yes, Your Honor.
>
> MR. RECANA: I just received it right now in my hand.

[1] In a *Pitchess* motion, a defendant whose defense entails proving violent or other improper conduct by a law enforcement officer seeks discovery of complaints by other people against the officer in order to attempt to show a pattern of improper behavior. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) In a *Brady* motion, a defendant seeks disclosure by the prosecution of information that is exculpatory and material. (*Brady v. Maryland* (1963) 373 U.S. 83.)

THE COURT: Okay. Who did you get this form from?

THE DEFENDANT: I did it myself, Your Honor.

THE COURT: I don't believe that.

THE DEFENDANT: Well, I had somebody -- I wrote it and I had somebody type it for me.

THE COURT: But it -- parts are added in, so it's a proforma form.

THE DEFENDANT: Excuse me?

THE COURT: I said, parts are added, so it looks proforma to me. You got this from somebody.

THE DEFENDANT: I wrote it in handwriting, and I had somebody type it up for me.

THE COURT: No, I don't believe you.

THE DEFENDANT: I did, Your Honor. That's the truth.

THE COURT: But you copied it from something.

THE BAILIFF: Ma'am, if you continue to react, you'll be in the hallway.

THE DEFENDANT: I have a piece of discovery right here that --

THE COURT: Excuse me. I'm reading this. You gave it to me.

(A Pause in the Proceedings.)

THE COURT: You did not draft this. There's no way.

THE DEFENDANT: I did, Your Honor. That's the honest truth.

THE COURT: No, there's no way.

THE DEFENDANT: I did, Your Honor.

THE COURT: I don't believe you; it's that simple. I don't believe you. You did not draft this. [¶] What is *People v. Memro* about?

THE DEFENDANT: I don't know, Your Honor.

THE COURT: Well, you cite it.

THE DEFENDANT: Well, I got it off the computer in the law library, Your Honor.

THE COURT: You cite it for a proposition. What does it stand for?

THE DEFENDANT: I don't know off the top --

THE COURT: You don't know. [¶] And what does *People v. Harris* stand for?

THE DEFENDANT: *People v.* who?

THE COURT: *v. Harris*. You cite it.

THE DEFENDANT: *People* versus *Harris*?

THE COURT: Yeah.

THE DEFENDANT: I haven't researched it, Your Honor.

THE COURT: You cite it.

THE DEFENDANT: It's the correct authority, Your Honor.

THE COURT: What?

THE DEFENDANT: It's the correct authority, Your Honor.

THE COURT: For what?

THE DEFENDANT: For my *Pitchess*.

THE COURT: For what proposition? For what rule of law?

THE DEFENDANT: I don't know, Your Honor.

THE COURT: Uh-huh. What about *People v. Wheeler*; what does that stand for?

THE DEFENDANT: Moral turpitude.

THE COURT: With respect to what?

THE DEFENDANT: To peace officers.

THE COURT: With respect to what?

THE DEFENDANT: Their conduct, Your Honor.

THE COURT: No, you're wrong. That isn't what you cite it for either.

THE DEFENDANT: Well, Your Honor, I'm not --

THE COURT: You cite *Wheeler*; tell me what it stands for. [¶] No, I'm asking you. Don't read it to me. Tell me what it stands for. You wrote this, you claim. Tell me what it stands for.

THE DEFENDANT: I did, Your Honor, I drafted it. I got it off the computer.

THE COURT: Get your hand away from your mouth.

THE DEFENDANT: I got it off the computer, Your Honor.

THE COURT: You got it off the computer from where?

THE DEFENDANT: From the law library.

THE COURT: You didn't write this. [¶] What are you giving me these subpoenas for? I don't have anything to do with your subpoenas. [¶] Give it back to him. [¶] You didn't write that. You're lying to the court.

THE DEFENDANT: I drafted it up, Your Honor.

THE COURT: You drafted it up copying something or somebody giving it to you. You did not write that. [¶] You're getting legal assistance, and that's improper if you're pro per.

THE DEFENDANT: I'm not allowed to have legal assistance, Your Honor?

THE COURT: No.

THE DEFENDANT: Why is that?

THE COURT: Because you're pro per.

THE DEFENDANT: I know that, Your Honor, but the D.A.'s (*sic*) get legal assistance all the time. They have --

THE COURT: Don't argue with me. You cannot have an attorney helping you.

THE DEFENDANT: I'm not having an attorney help me, Your Honor.

THE COURT: Well, you did not write that.

THE DEFENDANT: I put it together from, you know, stuff from the law library, Your Honor.

THE COURT: Absolutely not. Absolutely not. [¶] It says at the bottom, notice of motion for pretrial. That is somebody's proforma *Pitchess* motion, and you're getting legal assistance.

THE DEFENDANT: I wrote it on paper and had somebody type it for me, Your Honor.

THE COURT: Nope. You're lying to the court. [¶] I'm revoking your pro per status.

THE DEFENDANT: Objection, Your Honor.

THE COURT: I don't care. We're gonna (*sic*) have counsel. [¶] Who represented him before, Luis?

THE CLERK: Let me check, Judge.

MR. RECANA: Mr. Perry, I believe, Your Honor. Robin Perry.

THE CLERK: Robin Perry. I can contact his office. I can have the bar panel stand in for Mr. Perry today, if you'd like.

THE DEFENDANT: Your Honor, there's a conflict of interest with me and Robin Perry, Your Honor.

THE COURT: Let me see first from the beginning, was he ever represented by the P.D.'s office?

THE DEFENDANT: There's a conflict.

MR. RECANA: No. Even from as early as September, a conflict was declared, and Robin Perry was the counsel.

THE COURT: By whom, the P.D.?

MR. RECANA: I'm sorry?

THE COURT: A conflict by whom, the P.D.?

MR. RECANA: It was originally, since this was a three defendant case, it was the P.D. for Ms. Mobley, and then the A.P.D. for Ms. Duran.

THE COURT: All right. We need ICDA.

THE CLERK: Yes. I'm calling Department J.

THE DEFENDANT: Your Honor.

THE COURT: And I'm revoking his pro per status because he's lying to the court.

THE DEFENDANT: Your Honor.

THE COURT: And he's obstructing justice by using the assistance of counsel when he's not allowed to.

THE CLERK: Mr. Frisco is the duty person today.

THE COURT: All right. We'll put this over until we can get him down.

(R.T. 2:10 – 7:26.)

On May 12, 2010, Perkins filed a petition for writ of mandate with the Court of Appeal seeking to have the judge's April 13, 2010 order vacated and his pro per status restored.

On May 25, 2010, the district attorney's office filed a preliminary response to the petition wherein it was conceded that the judge had wrongly revoked Perkins's pro per status.

On May 27, 2010, the Court of Appeal issued a notice of intention to grant the writ and temporary stay order. The notice stated that the appellate court was considering granting the writ in the first instance "on the ground that it was a clear abuse of the superior court's discretion to revoke petitioner's pro per status on the basis of the court's speculation that he was 'lying' about the independent preparation of a pretrial motion."

Thereafter, at a pretrial hearing on June 2, 2010, Judge Comparet-Cassani ordered Perkins's pro per status reinstated. The writ petition was subsequently dismissed as moot.

A criminal defendant has the right under the Sixth Amendment to the U.S. Constitution to represent himself or herself. (*Faretta v. California* (1975) 422 U.S. 806, 835.) However, the right to self-representation is not absolute and may be terminated by a trial judge when a defendant deliberately engages in serious and obstructionist misconduct. (*Id.* at p. 834, fn. 46.) In short, a trial court retains jurisdiction to determine whether a defendant has become so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her conduct as to preclude the exercise of the right to self-representation. (*People v. Welch* (1999) 20 Cal.4th 701, 735.)

In her response to the commission's preliminary investigation letter, Judge Comparet-Cassani admitted that she violated Perkins's Sixth Amendment right to self-representation. She also admitted that the fact that a pro per defendant did not prepare motions submitted to the court "is not a ground for a status change." The judge asserted that her actions were motivated out of concern that Perkins was filing motions solely to delay the proceeding.

The commission noted the absence in the record to any reference that Perkins was trying to delay or obstruct the proceeding. In the commission's view, the record establishes that the judge's decision to revoke Perkins's pro per status was based on two factors: (1) her belief that Perkins had received legal assistance in connection with the *Pitchess* motion; and (2) her belief that Perkins was lying about whether he had received legal assistance. Neither of these factors, if true, provided a legal basis for the judge's decision. The commission found that the judge's conduct constituted abuse of authority, disregard for Perkins's Sixth Amendment rights, and intentional disregard of the law. (See *Inquiry Concerning O'Flaherty* (2004) 49 Cal.4th CJP Supp 1, 20-21 [serious lack of awareness or concern that consequences of judge's conduct runs afoul of law constitutes intentional disregard of law].) The judge's conduct violated canon 2A (judge shall respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and canon 3B(2) (judge shall maintain professional competence in the law).

The commission further found that the judge's demeanor toward Perkins during the hearing was improper. The judge spoke to Perkins in a harsh manner, repeatedly stated that she did not believe him, grilled him on cases cited in his motion, and stated three times that he was lying to the court. In contrast, the record reflects that Perkins remained respectful toward the judge throughout the hearing. The judge's conduct violated canon 2A and canon 3B(4) (judge shall be patient, dignified, and courteous to those persons with whom the judge deals in an official capacity).

The commission concluded that Judge Comparet-Cassani's conduct as described above constituted, at a minimum, improper action.

In reaching its decision, the commission viewed as aggravating factors two prior matters in which Judge Comparet-Cassani was disciplined for misconduct similar to that at issue here, namely, abuse of authority with regard to a pro per criminal defendant and poor demeanor. In 2000, the judge was privately admonished, in part, for ordering a sheriff's deputy to activate an electronic stun belt being worn by a pro per criminal defendant that was designed to deliver a 50,000 volt electric shock for approximately eight seconds. The judge ordered the belt activated during a hearing not to prevent courtroom violence, but because of the defendant's verbal interruptions. The admonishment also included two prior incidents, one involving the defendant who was shocked and one involving another defendant, in which the judge threatened the use of the belt as a means of controlling non-violent courtroom behavior. In 2006, the judge received an advisory letter for making demeaning remarks in open court to a criminal defense attorney in the presence of the attorney's client. The judge questioned the attorney about where and when she went to law school, when she passed the bar, and whether she was "up to" handling the case.

Commission members Hon. Judith D. McConnell, Hon. Frederick P. Horn, Mr. Anthony P. Capozzi, Ms. Nanci E. Nishimura, Ms. Barbara Schraeger Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted to impose a public admonishment. Commission member Adam N. Torres did not participate.

Dated: August 16, 2011

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| IN THE MATTER CONCERNING JUDGE JAMES R. WAGONER | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |
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This disciplinary matter concerns Judge James R. Wagoner, a judge of the El Dorado County Superior Court. Judge Wagoner and his attorney, James A. Murphy, appeared before the commission on August 31, 2011, to contest the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Wagoner and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Judge James R. Wagoner has been a judge of the El Dorado County Superior Court since 2003. His current term began in January 2009.

On the morning of Friday, July 16, 2010, Judge Wagoner was on the bench presiding over the calendar in department 1 on the second floor of the Main Street Courthouse in Placerville. At approximately 8:45 a.m., the judge received a report concerning the conduct of a member of the public named Penny Arnold, who was reportedly in the courthouse lobby using her cell phone to take pictures or videos of people in the lobby who were involved in dependency court proceedings in

department 5 on the first floor. (Ms. Arnold was present for a proceeding in department 5 that morning.) The judge recessed the proceedings in his court, removed his robe, and proceeded to the lobby with two bailiffs to contact Ms. Arnold about her reported conduct.

When Judge Wagoner contacted Ms. Arnold in the lobby, he ordered her to immediately report to his courtroom for a hearing concerning her conduct in the courthouse that morning. Ms. Arnold, who was not involved in any matter pending before Judge Wagoner, did not comply with the judge's order and asked to speak with her attorney. The judge repeated his order to Ms. Arnold and warned her that if she continued to refuse to comply she would be cited for contempt of court. Ms. Arnold did not comply with the order and consequently the judge directed the bailiffs to arrest her for contempt. Ms. Arnold was handcuffed and escorted to a jury room on the second floor. Her phone and an audio recording device in her possession were confiscated. Ms. Arnold was held in the jury room for approximately 40 minutes. She was then transported to jail pursuant to a jail remand order issued by the judge. The remand order stated that Ms. Arnold was charged with contempt of court, that the matter was set for arraignment in the judge's court on Monday, July 19, 2010, and that bail was set at $5000. Ms. Arnold was in jail for approximately three hours before she was able to post bail.

On July 16, after Ms. Arnold was arrested, Judge Wagoner issued an order to show cause re contempt in *In re the Matter of Penny Arnold*, No. PC20100441. The OSC stated that Ms. Arnold was cited for contempt for willfully disobeying a court order in contravention of Code of Civil Procedure section 1209(a)(5), which provides that "disobedience of any lawful judgment, order, or process of the court" constitutes contempt. The OSC included the judge's declaration, which states in pertinent part:

> 2. On July 16, 2010 in the immediate view and presence of the court, the alleged contemnor did the following: The court was made aware by staff that the alleged contemnor was photographing and/or recording private parties in the lobby of the courthouse at 495 Main Street, Placerville, California. This included parties to confidential juvenile matters. [¶] This bench officer proceeded to the lobby to direct the alleged contemnor to the court room (*sic*) for a hearing on this matter, as this was disruptive to the court proceedings and could possibly involve criminal conduct. The alleged contemnor refused to proceed to the court room (*sic*) for the hearing despite repeated warnings that she could be held in contempt and was subject to arrest pending a hearing on contempt charges and despite advice that her attorney, whom she requested, would be available in the court room (*sic*) for consultation. [¶] The conduct was disruptive to the business of the court and the parties involved. Further, it appeared that she was attempting to either continue her surreptitious recording or erase and/or destroy evidence of her conduct. When she was taken into custody, it was also learned that she had a recorder secreted on her person that appeared to be operating.

On July 19, 2010, Ms. Arnold entered a not guilty plea and the matter was set for trial before Judge Wagoner on August 3, 2010.

On August 3, Ms. Arnold appeared with counsel for trial on the contempt charge. At the outset of the hearing, Ms. Arnold apologized to the court. Ms. Arnold stated that she did not purposely cause a disruption and denied that she was taking pictures. She further stated, "I meant no disrespect for you, I was just

asking for my lawyer. I didn't know what was going on." Following the apology, Ms. Arnold's attorney stated that on the morning of the subject incident his client had been sitting in direct proximity to bailiffs at the metal detector, yet nothing she did caused them to respond or to speak to her. No other witnesses testified at the hearing. Judge Wagoner found Ms. Arnold guilty of direct contempt of court and sentenced her to five days in jail, giving her credit for one day served and staying the other four days for one year on the condition that she "obey all laws and all lawful orders and directives of this court."

The commission determined that Judge Wagoner's actions constituted abuse of the contempt power and violated Ms. Arnold's due process rights. First, the commission found that the judge's order that Ms. Arnold immediately report to his courtroom was not a valid order on which a contempt charge could be based. Because Ms. Arnold's conduct did not occur in the judge's courtroom and did not involve a proceeding pending in his court, the judge was without jurisdiction over her and could not lawfully order her to attend a hearing in his courtroom. Courthouse security issues are properly handled by sheriff's deputies, who could have warned or arrested Ms. Arnold if her conduct that morning had been improper. By intervening in this matter and ordering Ms. Arnold to attend a hearing "on the issue that she was creating a disturbance in the courthouse," Judge Wagoner also gave the appearance of having assumed a law enforcement role contrary to canon 2A of the Code of Judicial Ethics.

Judge Wagoner maintains that he had authority to order Ms. Arnold to his courtroom for a hearing concerning her conduct in the courthouse lobby pursuant to the court's statutory (Code Civ. Proc., § 128) and inherent powers. The commission, however, disagreed that a court's statutory or inherent powers to preserve order could be used to order a citizen to attend a hearing concerning conduct occurring outside the courtroom and that had no connection to a pending proceeding. By statute, a court has power to enforce order "in its immediate presence," and "in the proceedings before it." (Code Civ. Proc., § 128 (a)(1)(2).)

Further, a court's authority to order a person in contempt for disorderly conduct is limited to conduct "toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding." (CCP §1209(a)(1).) Judge Wagoner cited no case authority that supports the extension of these powers to the circumstances here.

In his written response to the commission and at his appearance, Judge Wagoner asserted that his actions were based not only on Ms. Arnold's reported conduct in the courthouse lobby that day, but on prior reports he had received alleging disruptive conduct in the courthouse involving Arnold. Reports of disruptive conduct on prior occasions did not give Judge Wagoner authority to order Ms. Arnold to report to his courtroom or to have her arrested for contempt.

Second, the commission found that Judge Wagoner failed to comply with the proper contempt procedures by remanding Ms. Arnold to jail without a hearing. It is misconduct for a judge to use the contempt power to incarcerate someone without following the correct contempt procedures, which include notice and the opportunity to be heard. (See *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533.) Judge Wagoner does not dispute that he remanded Ms. Arnold without a hearing. The judge asserts that he understood that a hearing was required, but because they were not in a courtroom and no court reporter was present he felt the better procedure was the one he followed. Judge Wagoner, who was a judge for seven years at the time of the incident, was obligated to know or research the proper contempt procedures.

Third, the commission found that Judge Wagoner wrongly adjudicated the matter as one of direct contempt and wrongly found Ms. Arnold guilty of that charge. Direct contempt concerns conduct that occurs *in open court or in chambers*. (Cal. Judges Benchbook: Civil Proceedings Before Trial (CJER 2008) Sanctions and Contempt, § 17.78, p. 440, italics added.) Because the conduct for which Ms. Arnold was cited did not occur in the judge's courtroom or chambers, it constituted, if anything, indirect contempt.

Fourth, the commission found that the conditions Judge Wagoner placed on Ms. Arnold's contempt sentence – that she obey all laws and all directives of the court for one year – were not authorized by law. Punishment for contempt is governed by Code of Civil Procedure section 1218(a), which provides that a person found guilty of contempt may be fined up to $1,000, or imprisoned for up to five days, or both. However, there is no provision in section 1218(a) that gives a judge the authority to impose conditions on a contempt sentence such as those imposed by Judge Wagoner, which effectively placed Ms. Arnold on court probation for one year and continued the court's jurisdiction over her.

Fifth, the commission found that after adjudicating the contempt charge, Judge Wagoner failed to comply with the proper contempt procedures by failing to issue an order that recited the evidentiary facts supporting the contempt finding. (*Koehler v. Superior Court* (2010) 181 Cal.App.4th 1153, 1169; *In re Jones* (1975) 47 Cal.App.3d, 879, 881.)

The California Supreme Court and the commission have stressed that "[t]he contempt power, which permits a single official to deprive a person of his fundamental liberty interest without all of the procedural safeguards normally accompanying such deprivation, must be used with great prudence and caution," and that "[i]t is essential that judges know and follow proper procedures in exercising this power." (*Public Admonishment of Judge Lisa Guy-Schall* (1999), citing *Ryan v. Commission on Judicial Performance*, *supra*, 45 Cal.3d at p. 533; *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1314; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 694.) Ignorance of proper contempt procedures, without more, constitutes bad faith. (*Cannon v. Commission on Judicial Qualifications*, *supra*, 14 Cal.3d at p. 694.)

In determining the level of discipline, the commission found that Judge Wagoner's conduct in this matter was aggravated by the fact that he used the contempt power to incarcerate someone over whom he had no jurisdiction. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 857

["Ordering a person to appear in court when no matter requiring his attendance is pending constitutes serious misuse of the judicial office"].) The judge's conduct was also aggravated by the fact that he received an advisory letter in 2009 for abusing his authority with regard to individuals who were not before him. He wrote a letter to a married couple, who had submitted information to the grand jury, ordering them to "cease and desist" contact with the grand jury about matters which they had been advised the grand jury no longer desired contact. He improperly threatened to enforce the order with sanctions such as contempt.

The commission concluded that Judge Wagoner's conduct as described above constituted, at a minimum, improper action.

Commission members Hon. Judith D. McConnell, Hon. Frederick P. Horn, Nanci E. Nishimura, Esq., Ms. Barbara Schraeger, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, Mr. Adam N. Torres, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted for a public admonishment. Commission member Anthony P. Capozzi did not participate.

Dated: Sept. 13, 2011

Honorable Judith D. McConnell
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING FORMER JUDGE PAUL E. ZELLERBACH** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Paul E. Zellerbach, a former judge of the Riverside County Superior Court. Judge Zellerbach and his attorney, Edith Matthai, appeared before the commission on October 19, 2011, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Zellerbach and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND CONCLUSIONS

Judge Zellerbach was a judge of the Riverside County Superior Court from 2000 until January 2011. His last term began in January 2007.

1. On March 18, 2009, Judge Zellerbach heard a discovery motion in the case of *People v. Holly Ann Gunnette*, No. RIF-136890, over which he had presided since July 2007. The defendant, who had served as treasurer for District Attorney Rod Pacheco's campaign for California State Assembly in 1996, was requesting that the district

attorney's office produce documents, including those from Mr. Pacheco's 1996 Assembly campaign, concerning his alleged conflict of interest in prosecuting the case. During the hearing on the discovery motion, Judge Zellerbach made statements that would reasonably be perceived as bias or prejudice against District Attorney Pacheco and his office, as follows.

Judge Zellerbach discussed how he, as a prosecutor, would have handled a particular discovery issue. Supervising Deputy District Attorney Michael Silverman stated that "what you may want to have done as a prosecutor isn't what is necessarily required of me." Judge Zellerbach responded: *"I know. I am faced with that issue all the time in the DA's office unfortunately these days."* Mr. Silverman replied: "What do you mean by 'unfortunately,' Your Honor?" Judge Zellerbach responded: *"Not doing their job properly."*

In his written objections to the notice of intended public admonishment and at his appearance, Judge Zellerbach acknowledged that these comments should not have been made, but asked the commission to consider that they were inspired by Mr. Silverman's failure to locate a box of documents which were required to be turned over to the defendant as part of the discovery process. The judge's comments, however, were not limited to the deputy district attorney's conduct in this case but were directed at the entire district attorney's office.

Judge Zellerbach later stated that he was not going to require the district attorney to interview all of his campaign workers from 1996, *"though a lot of them still work in the DA's office in his PR firm."* (The judge was referring to the District Attorney's Executive Division.) Mr. Silverman responded: "We don't have a PR firm, Your Honor." Judge Zellerbach replied, "Oh, yeah, you do."

Judge Zellerbach states that the "PR firm" label was not his creation but had been used by a local newspaper in reference to the executive division of the district attorney's office under Mr. Pacheco's management. Even so, this does not justify the judge's use of the disparaging label in reference to a party appearing before the judge.

Judge Zellerbach urges the commission to consider all his comments in light of the critical backlog facing Riverside County Superior Court at the time, which he attributes to Mr. Pacheco's policies as district attorney. He notes that there was much public discussion and criticism of Mr. Pacheco's policies within the legal community. The commission does not question the judge's concerns and frustrations over problems facing the courts in his county. Nevertheless, a judge must stay above the fray of political discord in the performance of judicial duties.

The judge's comments about the district attorney's office created an appearance of bias and were disparaging, undignified, and discourteous. The judge's conduct violated canons 1, 2A, 3B(4), and 3B(5). Canon 1 requires judges to observe high standards of conduct so that the integrity and independence of the judiciary is preserved. Canon 2A requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 3B(4) requires judges to be patient, dignified, and courteous to lawyers and others with whom they deal in an official capacity. Canon 3B(5) prohibits judges, in the performance of judicial duties, from engaging in speech or other conduct that would reasonably be perceived as bias or prejudice.

2. While presiding over the March 18, 2009 discovery hearing in *People v. Gunnette*, *supra*, Judge Zellerbach failed to disclose on the record the fact that he was actively considering running for district attorney against Mr. Pacheco. Six days before the hearing, the judge asked a representative of the Riverside City Firefighters' Association political action committee whom the association was going to endorse, and said that he might run for district attorney. This information was reasonably relevant to the question of the judge's disqualification under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), which provides that a judge is disqualified if, for any reason, "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

The judge's failure to disclose violated canons 1, 2A, and 3E(2). Canon 3E(2) provides that "[i]n all trial court proceedings, a judge shall disclose on the record

information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification."

Although Judge Zellerbach was not necessarily required to disclose the above information in all criminal cases, disclosure was required in *Gunnette* because it involved issues concerning Mr. Pacheco. The defense alleged that Mr. Pacheco had a conflict of interest in prosecuting the case based on disputes between Mr. Pacheco and Ms. Gunnette in connection with Mr. Pacheco's 1996 campaign for State Assembly during which Ms. Gunnette served as campaign treasurer. Under these circumstances, a person knowing that Judge Zellerbach was actively considering a run against Mr. Pacheco might reasonably entertain a doubt concerning the judge's ability to remain impartial.

3. On March 26, 2009, Judge Zellerbach addressed a gathering of the Riverside County Deputy District Attorneys Association (RCDDAA) on the subject of its endorsement of a candidate for district attorney in the June 2010 election. During his presentation, Judge Zellerbach recommended that the members of the association wait to see who, besides Rod Pacheco, might run for district attorney before deciding whom to endorse. The judge referred to recent public criticism of the district attorney's office due to certain policies allegedly adopted by Mr. Pacheco and the policies' impact on the court. Judge Zellerbach repeatedly referenced what had been written about the district attorney's office in the local press, discussed his time with the district attorney's office, and described how the office used to run when he worked there as compared to how the office was reportedly being run at that time.

By recommending that the RCDDAA delay its endorsement decision, Judge Zellerbach engaged in political activity that may have created the appearance of political bias or impropriety, and gave the appearance that he was opposing a candidate for nonjudicial office. The judge's conduct violated canons 1, 2A, 5, and 5A(2). Canon 5 requires judges to avoid political activity that may create the appearance of political bias

or impropriety. Canon 5A(2) prevents judges from publicly opposing candidates for nonjudicial office.

4. On January 30, 2010, Judge Zellerbach told Thomas Hunt, Vice-President of the Riverside Unified School District Board of Education, that he had decided to run for district attorney and would "love" Mr. Hunt's endorsement, or words to that effect. Judge Zellerbach continued to preside over criminal cases being handled by the district attorney's office until at least February 11, 2010, without disclosing on the record that he had decided to run or was seeking endorsements or other support for a campaign. Such information was reasonably relevant to the question of the judge's disqualification because a person aware of the judge's intention to run for district attorney might reasonably entertain a doubt that he would be impartial in criminal cases. (Code of Civ. Proc. § 170.1, subdivision (a)(6)(A)(iii).)

Judge Zellerbach maintains that he continued to be open-minded in all criminal cases after seeking Mr. Hunt's endorsement and after he decided to run. However, disclosure of information is required if "reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification." (Canon 3E(2).)

The judge's failure to disclose violated canons 1, 2A, and 3E(2).

5. Judge Zellerbach was on leave of absence from judicial office from February 25, 2010 until June 9, 2010. On June 8, 2010, Judge Zellerbach was elected Riverside County District Attorney. At the time he ended his leave of absence, the judge's campaign had an outstanding debt of over $200,000, including $50,000 in loans from Judge Zellerbach. After his leave of absence ended, and while he was still a judge, Judge Zellerbach allowed his judicial title to be used to solicit money from individuals to advance his interests in retiring the debt from his campaign for district attorney, as follows.

On August 3, 2010, the campaign solicited contributions in an e-mail sent to employees of the Riverside County District Attorney's Office. The e-mail, from news@judgezellerbach4da.com, had a picture of Judge Zellerbach in a black robe and

invited the recipient to "join Judge Paul Zellerbach our District Attorney Elect for the Retire the Debt Fundraiser" on August 4, 2010. The e-mail contained five other references to "Judge Zellerbach" or "Judge Paul Zellerbach" and displayed a judge's gavel in the logo.

Between August 4 and October 28, 2010, Judge Zellerbach attended and spoke at four fundraisers to raise money to retire his campaign debt. The invitations to each fundraiser instructed potential donors who wished to pay by credit card to contribute online at www.judgezellerbach4da.com. A contribution form enclosed with the invitation to at least one fundraiser had the heading "Judge Paul Zellerbach for District Attorney" with a judge's gavel in the logo. The invitations to at least two fundraisers were accompanied by return envelopes addressed to "Judge Zellerbach for District Attorney" or "Judge Paul Zellerbach for District Attorney." At least three of the fundraising events were advertised on Facebook by "Judge Paul Zellerbach for District Attorney." The Facebook entries referred persons to the campaign website, www.judgezellerbach4da.com, which advertised each of the fundraising events and invited individuals to donate to the judge's campaign, while listing Judge Zellerbach's judicial title multiple times and maintaining a judge's gavel in the logo.

Judge Zellerbach was allowed to use his judicial title in his campaign while he was on a leave of absence. (Canon 6H.) However, once Judge Zellerbach returned to the bench, he was bound by the provisions of canon 2B(2) which prevent a judge from using the judicial title to advance the pecuniary or personal interests of the judge or others. By allowing his judicial title to be used to raise money to retire his debt from a campaign for nonjudicial office, Judge Zellerbach violated canons 1, 2A, and 2B(2).

Judge Zellerbach explains that his campaign organization did not consult with him before utilizing his judicial title in connection with the fundraising events. However, as the judge acknowledges, ensuring that his campaign activities complied with this ethical obligations under the canons was ultimately his responsibility.

Judge Zellerbach's conduct described above was, at a minimum, improper action pursuant to article VI, section 18, subdivision (d)(3) of the California Constitution.

## DISCIPLINE

In deciding to impose a public admonishment, the commission took into account the number of incidents of misconduct and Judge Zellerbach's history of discipline. In 2006, the judge received a public admonishment for attending a baseball game while a jury was deliberating in a murder case, without having arranged for another judge to take the verdict. When informed that the jury had reached a verdict, Judge Zellerbach was unwilling to allow another judge to take the verdict and did not return from the game to take the verdict himself. The commission found that this was a serious dereliction of judicial duty, and that the judge failed to give his judicial duties precedence over all other activities as required by the Code of Judicial Ethics. In 2003, Judge Zellerbach received an advisory letter for making harsh comments to a doctor who was late to court, and threatening to hold him in contempt. In the present case, the judge also made harsh remarks to a person appearing before him. In addition, the judge engaged in a pattern of misconduct involving his failure to properly consider his ethical obligations while actively considering a run for nonjudicial office and in connection with his campaign for nonjudicial office.

For the foregoing reasons, and to preserve public confidence in the integrity and impartiality of the judiciary, the commission has determined to issue this public admonishment.

The vote of the commission to impose a public admonishment was 9 ayes and one no. Commission members Hon. Judith D. McConnell, Ms. Mary Lou Aranguren, Anthony P. Capozzi, Esq., Hon. Frederick P. Horn, Nanci E. Nishimura, Esq., Mr. Lawrence Simi, Ms. Maya Dillard Smith, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted for a public admonishment. Commission member Ms. Sandra Talcott would have issued a private admonishment. Commission member Adam N. Torres was recused.

Dated: Nov. 2, 2011

Honorable Judith D. McConnell
Chairperson

**PUBLIC ADMONISHMENT OF JUDGE ANTHONY C. EDWARDS**

The Commission on Judicial Performance has ordered Judge Anthony C. Edwards publicly admonished pursuant to article VI, section 18(d) of the California constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Edwards has been a judge of the Trinity County Superior Court since 1998. His current term began in January 2007. Judge Edwards was elected as a justice court judge in Trinity County in 1994; he took the bench in January 1995 as a municipal court judge, pursuant to a constitutional amendment converting justice courts to municipal courts.

On July 7, 2010, defendant Andrew Howard Hall appeared with counsel before Trinity County Superior Court Judge James Woodward, pled not guilty to charges that included attempted murder, and demanded a preliminary examination within statutory time limits. (Case No. 10F095.) Pursuant to Penal Code section 859b, the preliminary examination needed to be held within 10 court days, or by July 21. Judge Woodward set the preliminary examination to take place on July 19, 2010, and directed the court reporter (who was going to be on vacation that week) to make arrangements for another court reporter to be present.

On July 9, 2010, Judge Edwards, who was presiding judge of the court in 2010, set a second preliminary examination to be heard by Judge Woodward on July 19, 2010. On July 12, 2010, Judge Woodward set a third preliminary examination to take place in his department on July 19, 2010. On July 7, 12, and 13, 2010, respectively, Judge Woodward also set three other felony matters to be heard in his department on July 19.

On July 13, 2010, when Judge Edwards knew that at least two preliminary examinations, as well as other matters, had been set for July 19 in Judge Woodward's department, he sent Judge Woodward an e-mail advising him that

> there is no need for a reporter [on July 19]. If we can cancel that court reporter today without incurring a claim tell me why we shouldn't. If I don't hear from you I will presume you agree and I will have [Acting Court Executive Officer] L. Wills call her off.

After Judge Woodward responded by e-mail that he had a "number of matters set on the 19th that require a court reporter," including the preliminary hearings, Judge Edwards cancelled the court reporter. On July 14, 2010, Judge Edwards sent Judge Woodward an e-mail informing him that the court reporter had been cancelled because none of the cases set for July 19 required one. Judge Edwards claims (through counsel) that he cancelled the court reporter in an effort to "prompt Judge Woodward to engage in a dialogue about court expenses."

Under Code of Civil Procedure section 269, subdivision (a), an official reporter shall take down proceedings in felony cases on the order of the court or at the request of the prosecution, the defendant or the defendant's counsel. With respect to preliminary hearings, Penal Code

section 869 expressly provides that the court may appoint a court reporter in the absence of a request by the parties.

In addition, the Superior Court of Trinity County, Local Rules, rule 1.4(b), provides that "proceedings in felony criminal cases (except initial arraignments prior to the preliminary hearing) are to be reported."

Judge Edwards contends that his cancellation of the court reporter was necessitated by his responsibility as presiding judge "to actively manage the [c]ourt's financial situation." While presiding judges do have responsibility under California Rules of Court, rule 10.603, for management of the court, which includes the allocation of resources and the establishment of budget priorities, this does not extend to intruding on another judge's case-related authority by countermanding that judge's case-related orders. Judge Edwards's purported desire to prompt Judge Woodward to engage in a dialogue about court expenses was not a valid justification for cancellation of the court reporter in Judge Woodward's cases and was for a purpose other than the faithful discharge of judicial duties.

The commission concluded that by cancelling the court reporter, Judge Edwards abused his authority and violated his duties under canons 2A and 3B(2), respectively, to "respect and comply with the law" and to "be faithful to the law…." The commission determined that the conduct of Judge Edwards was, at a minimum, improper action.

In determining to issue a public admonishment, the commission noted that Judge Edwards was previously publicly admonished by the commission in April 2010, shortly before the conduct on Judge Edwards's part that is the subject of this admonishment. That discipline included the judge's abuse of authority by dismissing certain infractions and misdemeanors on the basis that the defendants lived in Hayfork and were cited by law enforcement to appear in Weaverville, and by threatening to do so in all cases. There was no court order or legal requirement that a Hayfork resident's initial court appearance be in Hayfork. (Public Admonishment of Judge Anthony C. Edwards (2010).)

Commission members Hon. Judith D. McConnell, Hon. Frederick P. Horn, Ms. Mary Lou Aranguren, Mr. Anthony P. Capozzi, Ms. Nanci E. Nishimura, Mr. Lawrence Simi, Ms. Maya Dillard Smith, Ms. Sandra Talcott, Mr. Adam N. Torres, Mr. Nathaniel Trives, and Hon. Erica R. Yew voted to impose a public admonishment.

Date: February 7, 2012

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING COMMISSIONER ALAN FRIEDENTHAL** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Commissioner Alan Friedenthal, a commissioner of the Los Angeles County Superior Court. Commissioner Friedenthal and his attorney, Edith Matthai, appeared before the commission on March 20, 2012, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Commissioner Friedenthal and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND CONCLUSIONS

Commissioner Friedenthal has been a commissioner of the Los Angeles County Superior Court since 2005.

The commission has determined that Commissioner Friedenthal should be severely publicly admonished for committing misconduct and violating the California Code of Judicial Ethics in five family law cases over which he presided between June 2007 and January 2009, as described below. In February 2009, the Los Angeles County

Superior Court reassigned Commissioner Friedenthal to a department where he no longer presides over family law matters.

Commissioner Friedenthal's misconduct included making discourteous, undignified, gratuitous and denigrating remarks to litigants, attorneys and related parties, and attempting to engage in humor at the expense of litigants; engaging in conduct that reflected embroilment and conveyed the appearance of bias; engaging in improper ex parte communications; and failing to disclose on the record information that was reasonably relevant to the question of disqualification.

The commission stated the following in the *Inquiry Concerning Judge Bruce Van Voorhis*, 48 Cal.4th CJP Supp. 257 (2003):

> When a judge lashes out in anger or frustration or personally attacks an attorney or becomes embroiled in a matter, the judge abandons his or her judicial role. This is not to suggest that judges do not become frustrated or angry. The California Code of Judicial Ethics, however, restrains the way a judge may manifest anger or frustration. For example, canon 2A states that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and canon 3B(4) provides that a judge "shall be" patient, dignified and courteous. Although any evaluation of a judge's conduct should consider the context in which the conduct took place, the canons apply even when a judge is angry or frustrated. (48 Cal.4th CJP Supp. at p. 274.)
>
> The public looks to judges to set the tone of judicial proceedings. When a judge mistreats staff, belittles counsel or gives vent to his or her anger or frustration, the audience is not only concerned about the result in the specific matter before the court, but worries that other parties, lawyers, jurors and employees will be subjected to similar mistreatment. (48 Cal.4th CJP Supp. at pp. 312-313.)

The commission recognizes that the family law matters described herein were highly contentious and that some of the litigants were challenging. Nevertheless, Commissioner Friedenthal was required to comport himself at all times in accordance with the Code of Judicial Ethics.

Commissioner Friedenthal's misconduct also includes repeated remarks during court proceedings about complaint letters from litigants or a family member of a litigant sent to the supervising family law judge. Such comments not only reflect embroilment, but may inappropriately discourage a litigant from exercising the right to file a complaint against a commissioner with the superior court and give the appearance that the commissioner will be biased against the litigant who filed the complaint in future rulings.

I. *T.R. v. A.J.*[1]

This case involved two teenage parents, T.R. and A.J., and their child, C.R. The child's father, T.R., lived at home with his mother and her boyfriend (who became T.R.'s stepfather during the proceedings), R.A. The child's mother, A.J., lived at home with her mother, T.J.

Around March 2008, attorney Carol Sternberg began representing the child's father T.R. She appeared by telephone on March 28, 2008, and in court on April 18, 2008. Commissioner Friedenthal failed to disclose at either proceeding that he had provided character testimony on behalf of Ms. Sternberg at a 2007 State Bar proceeding and that he had attended her husband's funeral in 2007.

In his written objections to the imposition of a public admonishment, Commissioner Friendenthal contends the fact that he was subpoenaed to testify at the State Bar proceedings by Ms. Sternberg's counsel is relevant to his duty to disclose. The commission disagrees. A judge may testify as a character witness, "provided the judge does so only when subpoenaed." (Canon 2B(2)(a).) Canon 2B(2)(c) provides a judge may provide *factual* information in State Bar disciplinary proceedings and "shall provide information responsive to a subpoena." Thus, the commissioner could only offer

[1] Case names and the identities of certain persons have been redacted to protect the privacy rights of minors.

character testimony pursuant to a subpoena. Most importantly, disclosure was required because the commissioner testified on Ms. Sternberg's behalf, regardless of whether the testimony was pursuant to subpoena. Commissioner Friedenthal's failure to disclose this information violated canon 3E(2), which requires judicial officers to disclose on the record information that is reasonably relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.

On May 29, 2008, Commissioner Friedenthal presided over a hearing at which A.J.'s mother, T.J., was not present. Attorney Alan Goldberg represented A.J. who was seeking a change of custody. After Commissioner Friedenthal referred to complaints T.J. had made about him to the supervising family law judge, Commissioner Friedenthal made a number of improper remarks about T.J., including the following:

> THE COURT: Now I want to interject something else for the record. It's been my understanding or my view or perception that, number one, notwithstanding the involvement of maternal grandmother, who to this day is still not a guardian ad litem for [A.J.], okay – there's a compliment coming there that Mr. Goldberg has always been, at least in court – and you're adding to that – he's always been helpful in resolving these out-of-court issues, and *Mr. Goldberg has always been a calming influence in the middle of Hurricane [T.J.]*, and I don't mean that pejoratively. I think the record in this case supports my using that term.

(R.T. 6:6-17, italics added.)

> THE COURT: And again, I am going to make a statement on the record. *Please make sure whichever one is your client orders a copy of the transcript for the next letter she's going to write. That the person stirring the pot is consistently [T.J.], not [A.J.],* and certainly not Mr. Goldberg.

(R.T. 7:4-9, italics added.)

THE COURT: *Much has been made of this in the April 24th, 2008, letter in an attempt to get me to go off this case, and I am going to tell you, Mr. Goldberg, it's never going to happen.*

(R.T. 14:13-16, italics added.)

THE COURT: Finally, I want to make a record I was advised at the last hearing by my staff that one [D.V.] [T.J.'s boyfriend] obtained a copy – I'm not sure if it was a transcript or final decision from the State Bar Court [regarding Ms. Sternberg], *though I don't agree with that decision* – and was parading that and shoving that in Ms. Sternberg's face, and I'm using the word "shove" more figuratively than literally because if it was shoved, *I would hope she'd get a restraining order, which I think is inappropriate contact, and feel free to share that with [D.V.], and if he comes to further hearings, I will exclude him.* He is not a guardian ad litem. [¶] ... [¶] *I just think that is conduct unbecoming an officer, and if it doesn't stop, then maybe with that very language someone will write a letter to the* [police] *department for which he works.*

(R.T. 14:20-15:3 and 15:21-24, italics added.)

[*S*]*he [T.J.] has no right to lie* [in the complaint letters], *and if I wasn't a semi-public figure, I would seriously contemplate suing her for defamation.*

(R.T. 16:11-13, italics added.)

*... I'm convinced ... that [A.J.]'s an empty vessel and that Mom is a marionette manipulator, and that [A.J.] is one of her marionettes ... .*

(R.T. 18:24-28, italics added.)

> *... [T.J.]'s relationship with veracity and truth is severely impaired. I would call it a dysfunctional relationship ... .*

(R.T. 19:9-11, italics added.)

> *[S]he's toxic and detrimental to the best interests of [the child], and I make that as a finding.*

(R.T. 24:21-22, italics added.)

> I don't know why she's refused to come. She's told Judge Steinberg she's afraid of me, *which I think is hysterical, this pudgy little judicial officer she's afraid of.* [¶] ...
> *Tell her I have been defanged, and I no longer have rabies.*

(R.T. 26:20-27:9.)

> THE COURT: By the way, just for the record, because I'm really in to making a record today – sorry, Debra – *[T.J.] carried on mercilessly, unprofessionally, and I can't think of – and despicably in dealing with the staff downstairs when they wouldn't let her see the file. ... I got a report from the clerical staff downstairs. She carried on like a banshee* because they told her, "You're not a party, you're not a guardian ad litem, you can't see this." [¶] ... The only people who can see them are the lawyers and the parties. So just I'm (*sic*) throwing that in just before we recess to let everybody know it's not just me that's got an issue with [T.J.]. It's the staff downstairs.

(R.T. 28:24-29:11.)

> *I am going to address it on the record because I know I am going to hear whatever I say come back to me in a letter from [T.J.].*

(R.T. 35:15-17, italics added.)

THE COURT: *Your mother [T.J.], [A.J.], has no boundaries. Hear some new stuff, if you don't know – doesn't matter whether she's dealing with this court's staff, downstairs in the clerk's office, or whether she's dealing with my supervising judge in terms of thinking she's going to get me kicked off this case. As much as you may go to bed every night praying at the edge of your bed that the good lord will take me from this earth or take me from this case, it's not going to happen, and it's all precipitated by your mother. Okay. Your mom has no concept of boundaries.*

MR. GOLDBERG: Your Honor, we are trying –

THE COURT: *Transcript's available for ordering.*

(R.T. 63:18-64:2, italics added.)

[A.J.]: [T.J.] doesn't hate him [T.R].

THE COURT: *Yes, she does. I don't care – she certainly hates me. I don't care if [D.V.] doesn't care for me, doesn't care for Ms. Sternberg, or doesn't care for [T.J.]. I could make an order, notwithstanding the fact he is a peace officer, that [the child] will not live in the home if [D.V.] is there. Now let's see what your mom thinks about that. [¶] I can make an order that [the child] will not live with you if your mom is in the house. I wish she were in here to hear this. But I'm sure you'll tell her, and she's free to order the transcript so she can write another complaint letter to Judge Steinberg, and I know she's planning a lawsuit against me, and tell her I'm waiting for it.*

[A.J.]: Can you not bring that up with me though? I am not my mother.

(R.T. 73:8-24, italics added.)

Commissioner Friedenthal's remarks during the May 29, 2008 proceeding reflected embroilment, created the appearance of bias in violation of canons 1 and 2A, and constituted a failure to be dignified, patient and courteous in violation of canon 3B(4). Canon 1 states in relevant part that "[a] judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Canon 2A states that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The Advisory Committee Commentary to canon 2A states in relevant part that a judge "must avoid all impropriety and appearance of impropriety." Canon 3B(4) states that a "judge shall be patient, dignified, and courteous to litigants, ... lawyers, and others with whom the judge deals in an official capacity, ...."

In his written objections to the public admonishment, Commissioner Friedenthal contends that T.J.'s conduct was relevant to T.R.'s request for change of custody. Even so, the commissioner could have expressed his concerns about T.J.'s conduct in a manner that did not violate his duty to be patient, dignified and courteous.

At a hearing on June 5, 2008, Commissioner Friedenthal again referred to T.J.'s complaints about him to the court, stating to A.J., "*Remember what I said last week ... I said if your mother, [T.J.], doesn't absent herself from the conflict – and I'm not talking about the conflict, apparently, she and I have, okay, or she has with Judge Steinberg about me. I'm not talking about that.*" (R.T. 16:10-16, italics added.)

Commissioner Friedenthal's remarks during the June 5, 2008 proceeding reflected embroilment, created the appearance of bias in violation of canon 2A, and constituted a failure to be dignified, patient and courteous in violation of canon 3B(4).

On June 18, 2008, at a hearing at which T.J. and R.A. (who later became T.R.'s stepfather) were present, Commissioner Friedenthal brought up the fact that D.V. (T.J.'s boyfriend) had filed a complaint against him with the court, and said, "I want to say something else that I hope you will carry back to [D.V.]." Commissioner Friedenthal

went on to address the interaction between D.V. and Ms. Sternberg that Commissioner Friedenthal had referred to on May 29, which Commissioner Friedenthal did not observe. When attorney Goldberg asked, "Let's move on, Your Honor, please," Commissioner Friedenthal remarked to T.J.:

> THE COURT: No. *The letters of complaint are going nowhere so I don't know why you dealing (sic) with [D.V.] and you are persisting in pursuing the matter. But it's your right to do so. And if you got nothing (sic) better to do than do that.*

(R.T. 57:10-14, italics added.)

Commissioner Friedenthal's remark that the "letters of complaint are going nowhere" appeared to suggest that complaints about him would serve no purpose, thereby undermining public confidence in the integrity of the judicial system, contrary to canons 1 and 2A, and the remainder of his remark constituted embroilment and violated canon 3B(4).

Later in the proceeding, Commissioner Friedenthal admonished the two teenage parents that if they could not control their parents in the use of certain county agencies as an "offensive weapon to gain an advantage in the litigation, *I will take the child away. I will have DCFS pick up [C.R.] and he will go into a placement.*" (R.T. 59:23-28, italics added.)

Commissioner Friedenthal's threat to take the child way constituted a threatened abuse of authority and contravened canons 1 and 2A.

In August 2008, T.R.'s attorney filed a civil harassment restraining order application following an incident that allegedly occurred at T.R.'s workplace, a Mexican fast food restaurant, involving A.J. and T.J. At a hearing on September 19, 2008, regarding the restraining order, Mr. Goldberg argued that he was entitled to present evidence regarding (father T.R.'s stepfather) R.A. as a defense to the harassment charge, saying that it was "in the statute." Commissioner Friedenthal responded, *"Let me write that*

*down. The next time I get mad at somebody who pushes the taco-burrito combo through the window to me, I'll say it was because of [R.A.].*" (R.T. 18:16-19, italics added.)

Commissioner Friedenthal's remark, which appeared to be sarcastic, violated canon 3B(4).

T.J. posted a number of comments about Commissioner Friedenthal on an online forum concerning court matters and on a Myspace page. While Commissioner Friedenthal was presiding over this case, he reviewed those posts, which violated canon 3B(7), which prohibits judges from considering ex parte communications concerning a pending proceeding. In his written objections to the intended admonishment, Commissioner Friedenthal states that he believed he could monitor these postings and postings by other litigants to determine if there was a threat to himself or his family. If a judicial officer has safety concerns, the appropriate steps are to alert judicial security and ask them to monitor the posts rather than to review ex parte communications.

II. *T.J. v. R.A.*

In September 2008, T.J. filed a request in the Chatsworth courthouse for a temporary civil harassment restraining order against R.A. (T.R.'s stepfather), which was granted. Commissioner Friedenthal then had the case transferred to his department in the San Fernando courthouse.

On October 3, 2008, counsel appeared before Commissioner Friedenthal concerning an ex parte motion made by attorney Carol Sternberg, who was representing R.A. in connection with the restraining order. Before that hearing, Commissioner Friedenthal conducted independent investigation of R.A., which included checking online records and having his clerk bring him R.A.'s divorce file and other files involving R.A. and T.J. The commissioner's independent investigation of litigants violated canon 3B(7), which prohibits judges from initiating or considering ex parte communications concerning a pending proceeding. The Advisory Committee Commentary to canon 3B(7) states in relevant part, "A judge must not independently investigate facts in a case and must consider only the evidence presented, unless otherwise authorized by law." The commis-

sioner's independent investigation also reflected embroilment and created the appearance of a lack of impartiality, contrary to canon 2A.

During the proceeding on October 3, 2008, Commissioner Friedenthal made the following two remarks regarding T.J. When referring to previous statements he had made about R.A. and C.R., he remarked to T.J.'s attorney, in reference to T.J.'s complaints against him, "*You can order the transcripts again because evidently there's a bottomless pit of money to order transcripts.*" (R.T. 15:5-7, italics added.) Later, when Mr. Goldberg argued that T.J. was not solely responsible for the heightened conflict in the custody case, Commissioner Friedenthal stated, "*It's never [T.J.] It's not [T.J.] who let the registered sex offender live in the back house, as I was told.*" (R.T. 30:20-22, italics added.) These gratuitous remarks reflected embroilment and violated canon 3B(4).

At the next hearing, on October 17, 2008, A.J. and T.R., the parents of C.R., were present. In the morning, Commissioner Friedenthal made a number of comments about complaints that had been made against him to the court by T.J. and her boyfriend D.V., some of which addressed the facts alleged in those complaints. At one point, Commissioner Friedenthal commented on a complaint T.J. had made to the Commission on Judicial Performance, saying, "*It would give it more credibility if Mr. Goldberg joined it. I'm not worried about it, Mr. Goldberg.*" (R.T. 22:28-23:2, italics added.) The commissioner's comment reflected embroilment and appeared to suggest that filing complaints about him would serve no purpose, thereby undermining public confidence in the integrity of the judicial system, contrary to canon 2A.

In the afternoon, Commissioner Friedenthal referred to T.J.'s online postings about him, noting after beginning a story about himself that "*I know I'm going to hear about this later probably on some website, some posting on a website.*" (R.T. 65:23-25, italics added.) The commissioner's comment reflected embroilment.

During the afternoon of October 17, Commissioner Friedenthal took over the examination of (T.R.'s stepfather) R.A. and questioned him extensively about his background, which created the appearance of embroilment.

A.J. was called as a witness later that afternoon. When she was describing R.A.'s angry demeanor during an incident in support of T.J.'s harassment claim, she said that R.A.'s face was red and that he was shaking. Commissioner Friedenthal remarked, gratuitously and apparently sarcastically, "*In June everybody's face is red.*" (R.T. 86:22, italics added.) His comment violated canon 3B(4).

T.J. posted a number of comments about Commissioner Friedenthal on an online forum concerning court matters and on a Myspace page. While Commissioner Friedenthal was presiding over this case, he reviewed those posts, thereby violating canon 3B(7).

III. *M.T. v. M.C.*

This matter concerned the minor son of father M.T. and mother M.C.

On June 2, 2008, at a hearing to review visitation, M.C. accused minor's counsel of making untrue statements about her, including that she was a lesbian. Minor's counsel denied making that statement, and M.C. apologized. Commissioner Friedenthal responded by stating, "*She called you a Martian, and that was substantiated?*" (R.T. 7:8-9, italics added.) This gratuitous and discourteous remark violated canon 3B(4).

At a hearing on August 14, 2008, Commissioner Friedenthal twice referred to the possibility of M.C. complaining about him to the court. When M.C. interrupted minor's counsel, Commissioner Friedenthal said, "Don't interrupt. *Remember, by the way, when you're filing a complaint against me with Judge Steinberg, she's going to see the transcript. If she sees you interrupting me all the time, she's going to go – (indicating). Okay?*" (R.T. 10:23-27, italics added.) Later in the same hearing, when the court reporter asked M.C. to slow down and said, "I missed half of what she said," Commissioner Friedenthal remarked, "*She* [the court reporter] *lost it. It's not in the record when she* [M.C.] *wants to send it to Judge Steinberg.*" (R.T. 23:16-23, italics added.) These remarks created the appearance of embroilment.

At the same August 14 hearing, after M.C. said she didn't want to "bag on" Commissioner Friedenthal (meaning insult or offend Commissioner Friedenthal, according to her), Commissioner Friedenthal remarked, "*Bag on me? Is that a legal*

*term*?" (R.T. 16:6-7, italics added.) This remark, which appears to be sarcastic, violated canon 3B(4).

During a discussion of the inappropriateness of voicemail messages M.C. had left for M.T., which had been listened to in court, Commissioner Friedenthal asked M.C., who was attending nursing school, whether she thought the way she had dealt with M.T. was something she "had taken away from" a court-ordered parenting class. When she said no, Commissioner Friedenthal responded, "*Good. So you flunked. I hope you do better in nursing school.*" (R.T. 17:6-7, italics added.) This remark, which is denigrating to the litigant and appears to be sarcastic, violated canon 3B(4).

Near the end of the hearing, M.C. expressed her objection to her visitation with her child being monitored. When Commissioner Friedenthal noted, "I guess you didn't hear the tapes," M.C. asked, "So what do tapes have to do with anything?" Commissioner Friedenthal then said, "*That's what Tina said to Ike*" (referring to the Tina Turner song, "What's Love Got to Do with It?"). (R.T. 30:10-12, italics added.) This apparent attempt at humor at the litigant's expense violated canon 3B(4).

In October 2008, M.T. was awarded custody of the minor son, and it was ordered that M.C. not have contact with him before a trial date in February 2009. A few days later, M.C. left a voicemail message for M.T. that included a highly offensive remark about Jewish people, which may have referred to persons affiliated with the court case. M.T. then sought a restraining order against M.C., which was heard on November 19, 2008.

During the November 19 hearing, Commissioner Friedenthal asked M.C. numerous times who she was referring to in her voicemail message and otherwise referred to her anti-Semitic comment. At one point Commissioner Friedenthal told her "*You're going to raise a little Nazi.*" (R.T. 16:9-18.) At another point, he asked M.C., "*Do you want the nursing school administration to see the text of what you said to [M.T. and his wife]*?" M.C. said she had already talked to a "few people at school" about it. Commissioner Friedenthal responded, "*They're pleased that one of their star nursing students is an anti-Semite.*" (R.T. 17:6-12, italics added.) Commissioner Friedenthal's

remarks at this hearing, in addition to exhibiting improper demeanor, reflected embroilment.

During a hearing on January 15, 2009, at which minor's counsel sought a restraining order against M.C., M.C. complained about not being able to see her son, with whom she had had no contact for several months. She said, "You still have not told me where my son is. Don't – ". Commissioner Friedenthal interrupted and said, "*Hold on. [Minor's counsel], didn't I order you to implant the GPS in his blood*?" (R.T. 40:9-13, italics added.) Commissioner Friedenthal's attempt at humor constituted a failure to be dignified and courteous to a litigant, contrary to canon 3B(4).

IV. *L.L. v. T.L.*

This case involved the minor child of mother L.L. and father T.L. Mother L.L. posted a number of comments about Commissioner Friedenthal on an online forum concerning court matters. While Commissioner Friedenthal was presiding over this case, he reviewed those posts, thereby violating canon 3B(7)'s prohibition against ex parte communications.

L.L.'s posts included references to her belief that Commissioner Friedenthal had not properly disclosed certain ownership interests in real property and that he might own property with minor's counsel in the case, and a suggestion that those concerned about Commissioner Friedenthal should call the District Attorney's Judicial Integrity Unit. One of the posts also referred to what Commissioner Friedenthal's "German-Jewish ancestors might think." At a hearing on January 21, 2009, Commissioner Friedenthal made comments about L.L.'s posts, as follows:

> *Take good notes. I look forward to reading your summary.*

(R.T. 2:14-15, italics added.)

> *First, I don't know why you can't find my statement of economic interest for 2007, but if you keep looking, you'll find it, okay, and you won't find anything untoward. Okay. [¶] Second, I don't have any investments or partnerships or any interest in any property owned by Ken Sherman or his*

*family. I have no interest in any property or interest in or any investments with [T.L.] or James [L.], who I assume is a member of his family. So you can continue this witch hunt to your heart's desire. Okay. Knock yourself out. I rule on the facts. I'm not blind. You can call the D.A.'s Judicial Integrity Unit all you want. It's not going anywhere. I've never committed a crime. I am not about to start in this case or any other case. [¶] So thank you for the defamation. Keep that in mind, that it is defamation, and my German-Jewish ancestors would be very proud of me. So thank you very much.*

(R.T. 4:13-5:3, italics added.)

In addition to constituting a failure to be patient, dignified and courteous, in violation of canon 3B(4), Commissioner Friedenthal's comments to L.L. created an appearance of bias and embroilment.

V. *M.M. v. M.M.*

This case involved the custody of a minor child, J.M. The mother had remarried. On June 8, 2007, Commissioner Friedenthal presided over a hearing on an ex parte application that included an allegation that the stepfather, W.R., had hit J.M. when J.M. attempted to stop W.R. from kissing his mother. The following exchange occurred when Commissioner Friedenthal was addressing the mother:

THE COURT: Okay. If any of this bears out, you know he may be living with his dad. [Mother's counsel] advised you of that, I assume?

[MOTHER]: Yes.

THE COURT: So you better have a real good heart to heart with [W.R.], or I will put you in the position of making a choice, *[W.R.] or [the child] – smoochie, smoochie, or [the child] – got it?*

[MOTHER]: Yes.

(R.T. 24:1-9, italics added.)

Commissioner Friedenthal's undignified and gratuitous remark, made to a mother in a custody dispute, violated canon 3B(4).

At a hearing on July 3, 2007, arrangements were made for the minor child to return by airplane to his father's residence from his mother's residence in another state pending a custody hearing set for August 3, 2007. A supplementary custody evaluation had been ordered. Commissioner Friedenthal ordered the father to pay over $4,000 in fees for minor's counsel and the supplemental custody evaluation. When the father raised his hand to address the issue of payment, Commissioner Friedenthal responded by threatening to place the child with grandparents, as follows:

> [FATHER]: I'm not refusing to pay. I owe a lot of people money –
>
> THE COURT: *Okay. This needs to be grandparent placement because he can't afford to pay the rates for the child. [¶] Where do the [grand]parents live?*
>
> [FATHER'S COUNSEL]: Mexico.
>
> THE COURT: [Mother]?
>
> [¶] ... [¶]
>
> [MOTHER]: My parents are in Mexico.
>
> THE COURT: You have brothers?
>
> [MOTHER]: I have a brother in Moorpark.
>
> [¶] ... [¶]
>
> THE COURT: I want [minor's counsel] to talk to the brother in Moorpark. [¶] Will you provide that information?
>
> [FATHER'S COUNSEL]: My client is simply saying he'd like to have a payment arrangement. On that basis, you are going to order –

THE COURT: Marsha Wiley is going to do this evaluation. If I have to stand on my head and walk on my hands all the way down McKay –

[FATHER]: I'm asking for three payments, sir.

[FATHER'S COUNSEL]: Rather than –

[MOTHER'S COUNSEL]: Miss Wiley does not accept that. Most evaluators request –

THE COURT: She wanted 2,500?

[MINOR'S COUNSEL]: No; 3,500 which is very modest.

THE COURT: Follow my order. That's it. No more discussion. [¶] What is your brother's name in Moorpark? [¶] [Mother's counsel] is to provide his name and number to [minor's counsel] for appropriateness of some shared custody.

(R.T. 15:5-16:10.)

Commissioner Friedenthal's threat to award custody of the child to other family members in response to the father's statements that he was not refusing to pay fees but wanted a payment plan constituted a threatened abuse of authority and violated canons 1, 2A and 3B(4). At his appearance before the commission, the commissioner maintained that his statement concerning a grandparent placement was based on his concerns about the father's parenting abilities. This assertion is refuted by the fact that the commissioner had already ordered a supplemental custody evaluation report and scheduled a custody hearing for the following month, as well as by the commissioner's own words: "This needs to be a grandparent placement *because he can't afford to pay the rates for the child.*" (Italics added.)

Commissioner Friedenthal's conduct in the matters described above was, at a minimum, improper action.

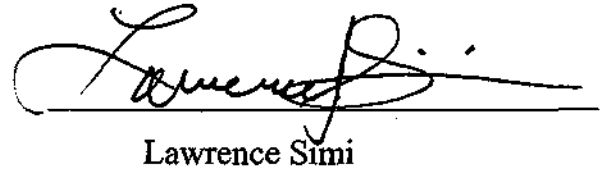
In deciding to issue a public admonishment, the commission took into consideration the number of acts of misconduct and the nature and seriousness of the

misconduct. Commissioner Friendenthal describes his misconduct as "momentary lapses" in response to difficult litigants. In the commission's view, his misconduct was not momentary or isolated. He made multiple denigrating and undignified comments toward multiple litigants and related parties in multiple proceedings reflecting a pattern of poor demeanor and embroilment. In addition, his misconduct includes inappropriately commenting on complaints made against him, viewing web posts of litigants concerning matters pending before him, independently investigating facts, and failing to disclose on the record information that was reasonably relevant to the question of disqualification.

For the foregoing reasons, and to preserve public confidence in the integrity and impartiality of the judiciary, the commission has determined to issue this this public admonishment.

The vote of the commission to impose a public admonishment was 9 ayes and one no. Commission members Mr. Lawrence Simi, Ms. Mary Lou Aranguren, Anthony P. Capozzi, Esq., Hon. Frederick P. Horn, Hon. Judith D. McConnell, Nanci E. Nishimura, Esq., Ms. Sandra Talcott, Mr. Adam N. Torres, and Mr. Nathaniel Trives voted for a public admonishment. Commission member Hon. Erica R. Yew would have issued a private admonishment. Commission member Ms. Maya Dillard Smith did not participate.

Dated: April 3, 2012



Lawrence Simi
Chairperson

## PROOF OF SERVICE

I, the undersigned, am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action. My business address is 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102. I declare as follows:

On April 3, 2012, I served the attached:

**PUBLIC ADMONISHMENT OF COMMISSIONER ALAN FRIEDENTHAL**

on all interested parties in this matter, by delivering a true copy as follows:

Edith R. Matthai, Esq.
Robie & Matthai
500 South Grand Avenue, 15th Floor
Los Angeles, CA 90071-2609
Fax: (213) 624-2563

☒ **(BY U.S. MAIL)** I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.

☒ **(BY FACSIMILE TRANSMISSION)** I caused such document to be transmitted to the addressee's facsimile number noted. The facsimile machine I used complied with Rule 2.301(3) and the transmission was reported as complete and without error. Pursuant to Rule 2.301(6), I caused the machine to print a transmission record of the facsimile transmission, a copy of which is attached to this declaration as required by Rule 2.306(g)(4).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed by me on April 3, 2012, at San Francisco, California.

Nancy Gilmore

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| IN THE MATTER CONCERNING JUDGE JOHN D. KIRIHARA | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |
|---|---|

This disciplinary matter concerns Judge John D. Kirihara, a judge of the Merced County Superior Court since 2001. His current term began in 2009. Judge Kirihara and his attorney, James A. Murphy, appeared before the commission on May 8, 2012, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Kirihara and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

## STATEMENT OF FACTS AND REASONS

### 1. Decisional Delay

Judges are required to dispose of all judicial matters promptly and efficiently. (Canon 3B(8).) The Supreme Court has found that California Constitution, article VI, section 19, and Government Code section 68210, discussed below, "reflect the judgment of the Legislature and the electorate that this period [90 days] affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases." (*Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4.)

Judge Kirihara violated his duty to dispose of all judicial matters promptly and efficiently by failing to issue timely rulings in the following submitted matters:

(a) On January 22, 2010, Judge Kirihara took under submission the case of *Gregory Rodrigues v. CVP Acquisition Corp., et al.*, No. CU148156. Judge Kirihara failed to rule on the matter until December 8, 2010, 320 days after it was taken under submission.

(b) On June 18, 2010, Judge Kirihara took under submission the case of *Estate of Vernon E. Lustre*, No. P24707. Judge Kirihara was later reminded of the fact that the case was under submission and undecided for over 90 days. On December 13, 2010, Judge Kirihara received an email from a court clerk stating that an attorney had inquired about the status of the case, and that Judge Kirihara had taken the case under submission in June 2010. Judge Kirihara failed to rule on the matter until February 10, 2011, 237 days after it was taken under submission.

(c) On November 12, 2010, in *Petition of Family Trust of Ray Buie*, No. P23034, Judge Kirihara took under submission the Petition of Successor Trustee, John Van Curen, for Settlement of Third Account and Report. Judge Kirihara failed to rule on the petition until March 2, 2011, 110 days after it was taken under submission.

Judge Kirihara's failure to decide the above matters within 90 days after they were taken under submission violated canon 3B(8), which requires that judges dispose of all judicial matters promptly and efficiently.

2. Submission of False Salary Affidavits

The California Constitution provides that a judge may not receive a salary "while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." (Cal. Const., art. VI, § 19.) To be paid, the judge must sign an affidavit to that effect. (Gov. Code, § 68210.) Payment is

not forfeited, but simply postponed until the submitted matter is decided. (*Hassanally v. Firestone* (1996) 51 Cal.App.4th 1241, 1244-1245.)

Judge Kirihara signed and caused to be submitted on his behalf, 11 salary affidavits that falsely stated that no cause remained pending and undetermined that had been submitted to him for decision for the period of 90 days prior to May 1, June 1, July 1, August 1, September 1, October 1, November 1, and December 1, 2010, and January 1, February 1, and March 1, 2011. Judge Kirihara allowed each of the salary affidavits to be processed, and received his salary for judicial office in violation of law, while a matter in at least one of the cases listed above was pending and undetermined for over 90 days.

Judge Kirihara failed to keep a list of cases he had under submission during the relevant time period, even when he was the presiding judge and had the duty under California Rules of Court, rule 10.603(c)(3), to compile and circulate a list of all matters that had been under submission for more than 30 days. The fact that a judge may be unaware that he or she has matters that have been under submission for more than 90 days, or signs the salary affidavits in advance at a time when the judge has no matters under submission for more than 90 days, is not a defense to a charge of filing false salary affidavits. "A judge who executes a salary affidavit affirming he or she has no overdue rulings should take care to ensure that the statement is true when it is made." (*Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 246.)

Judge Kirihara's conduct violated canons 1 and 2. Canon 1 requires judges to personally observe "high standards of conduct ... so that the integrity and independence of the judiciary will be preserved." Canon 2 requires judges to avoid impropriety and the appearance of impropriety in all their activities. Canon 2A requires judges to "respect and comply with the law" and to "act at all times in a manner that promotes public confidence in the integrity ... of the judiciary."

3. Failure to Circulate List of Cases Under Submission as Presiding Judge

While Judge Kirihara was presiding judge of the Merced County Superior Court between April 30, 2007, and December 31, 2010, he failed to circulate each month to each judge of the court a complete list of all causes that had been under submission for more than 30 days, as required by California Rules of Court, rule 10.603(c)(3)(C). Rule 10.603(c)(3) provides that the presiding judge, among other things,

> must supervise and monitor the number of causes under submission before the judges of the court and ensure that no cause under submission remains undecided and pending for longer than 90 days. As an aid in accomplishing this goal, the presiding judge must:
>
> (A) Require each judge to report to the presiding judge all causes under submission for more than 30 days and, with respect to each cause, designate whether it has been under submission for 30 through 60 days, 61 through 90 days, or over 90 days;
>
> (B) Compile a list of all causes under submission before judges of the court, designated as the submitted list, which must include the name of each judge, a list of causes under submission before that judge, and the length of time each cause has been under submission; [and]
>
> (C) Circulate monthly a complete copy of the submitted list to each judge of the court....

By failing to circulate the submitted lists during his tenure as presiding judge, Judge Kirihara violated canon 3C(1), which requires that a judge "shall diligently discharge the judge's administrative responsibilities ... in a manner that promotes public confidence in the integrity of the judiciary."

4. Failure to Respond to Email Inquiring of Submitted Matters

On December 30, 2010, and January 31, February 28, and March 30, 2011, a judicial assistant sent emails to Judge Kirihara asking that he let her know if he had any cases under submission and the dates they were taken under submission. The purpose of the emails was to assist the presiding judge in fulfilling his duties under California Rules of Court, rule 10.603(c)(3). Judge Kirihara failed to respond to the emails even though he had cases that had been under submission for more than 30 days at the time he received each email. Judge Kirihara's conduct violated canon 3C(1), which requires that judges "cooperate with other judges and court officials in the administration of court business."

Judge Kirihara's conduct described above was, at a minimum, improper action and dereliction of duty pursuant to article VI, section 18, subdivision (d)(3) of the California Constitution.

In the commission's view, Judge Kirihara's conduct demonstrates a lack of regard for his obligation to decide matters in a timely manner and ensure the accuracy of his salary affidavits. Over a period of less than a year, Judge Kirihara had three matters that were delayed beyond 90 days, two that were significantly delayed, and allowed 11 false salary affidavits to be processed on his behalf. His indifference is reflected in his failure to keep a list of submitted matters, failure to respond to emails from a judicial assistant asking that he let her know if he had cases under submission, and failure to circulate a list of submitted matters to other judges while he was presiding judge. These are not simply technical requirements for the sake of administrative process. Rather, they are procedures designed to alert judges to decisional delays and prevent the filing of false salary affidavits. Delays in issuing decisions can cause significant financial and emotional harm to litigants and the filing of false salary affidavits lowers public esteem for the judiciary.

Further aggravating the judge's misconduct in the commission's view is the fact that Judge Kirihara had delayed matters and allowed false salary affidavits to

be processed on his behalf while he was presiding judge. Presiding judges have the responsibility of monitoring the cases under submission in their county and ensuring that no cases remain undecided for more than 90 days. (Cal. Rules of Court, rule 10.603(c)(3).) Consequently, a presiding judge should be particularly vigilant about monitoring his or her own submitted matters.

For the foregoing reasons, the commission determined to impose this public admonishment.

Commission members Mr. Lawrence J. Simi, Ms. Mary Lou Aranguren, Hon. Frederick P. Horn, Hon. Judith D. McConnell, Nanci E. Nishimura, Esq., Ms. Sandra Talcott, Mr. Adam N. Torres, and Mr. Nathaniel Trives voted for a public admonishment. Commission members Honorable Erica R. Yew and Anthony P. Capozzi, Esq. were recused from this matter. Commission member Ms. Maya Dillard Smith did not participate.

Dated: MAY 16, 2012

Lawrence J. Simi
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE MORRIS D. JACOBSON** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Morris D. Jacobson, a judge of the Alameda County Superior Court. Judge Jacobson and his attorney, James A. Murphy, appeared before the commission on June 27, 2012, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Jacobson and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND CONCLUSIONS

Judge Jacobson has been a judge of the Alameda County Superior Court since December 2005. His current term began in January 2009.

On October 13, 2010, the judge presided over the matter of *People v. Andrew Barrientos*, No. 564482A, which was on calendar for Mr. Barrientos's motion to continue the preliminary hearing scheduled for the following day. Mr. Barrientos was charged, among other things, with the attempted murder of a police officer. There were two co-defendants charged as accessories, one of whom had not waived time for the preliminary hearing.

The judge called the case at approximately 9:00 a.m. Attorney Anne Beles appeared on behalf of Mr. Barrientos and Deputy District Attorney John Brouhard appeared for the People. Mr. Barrientos was present; however, the co-defendants were not present. The following colloquy occurred:

> THE COURT: People versus Barrientos, 564482A. Ms. Beles is here along with Mr. Brouhard. Do you want your client --
>
> MS. BELES: He's here.
>
> THE COURT: Okay. Very good. You filed a motion to continue preliminary hearing. There's two other defendants in the case, one of the other defendants declined to waive the 10-day rule.
>
> MS. BELES: That is true.
>
> THE COURT: I can't do anything in terms of ruling on this at this point until everyone is here. What I do want to do, Ms. Beles, is I'm ordering you to spend every waking moment between now and when we are next in court working on this case. And one of the things I'll be inquiring about is how you've spent your time since --
>
> MS. BELES: September 30th.
>
> THE COURT: Is that the day that --
>
> MS. BELES: Your Honor, I have kept my hours and been very cautious about that. We put this on calendar to make sure that maybe somehow miraculously I can be ready. I cannot be. I will be not able to competently defend Mr. Barrientos at preliminary examination if it is sent out tomorrow. I'm making that record now, and I'll make it tomorrow morning.
>
> THE COURT: Plan on it being sent out as long as it's in a no time waiver basis on a 10-day rule, that's what I'm telling you to plan on. I'm telling you to spend every waking moment working on it, and I'll take this matter up tomorrow. [¶] I have not read your papers yet. You just mentioned at side-bar that you've got 1,100 pages of discovery. Mr. Brouhard just

produced some sort of gang report. [¶] I'm saying to you that one of the things that I'm looking at is if Mr. Brouhard is able to be ready as the person who carries the burden of proof, you can imagine how that's part of the context. If he can be ready I expect that you can be ready.

MS. BELES: I thought that you might say that. I would like the Court to be aware even before it reads my papers, which I did file yesterday, that Mr. Brouhard has been integral in the investigation. So the statements that I am reviewing, many of which Mr. Brouhard conducted, so it is a different situation where we have a District Attorney who is faced with a certain amount of information. He was there, so he doesn't need to review these hours of statements. But I can't do it all. [¶] I've also requested an in-camera discussion tomorrow, because some of what I have done and some of what I would need to do in order to be competent would compromise defense strategy, so I would request an in-camera at that time.

THE COURT: We'll take that up tomorrow. I'm telling you since September 30th there's plenty of time to read and absorb 1,100 pages of stuff.

MS. BELES: There is not, and I strongly disagree.

THE COURT: I read about 2,000 pages a week. You and I differ on that. I read nearly 500 pages of documents every day. I'm not real sympathetic to 1,100 pages is so overwhelming. [¶] Why don't you bring your discovery with you tomorrow, because I'm going to look through it and see what 1,100 pages consists of. Please bring that and be ready to go tomorrow, that's my order to you today. We'll take up the --

MS. BELES: You --

THE COURT: Please let me finish. We'll take up the 1050 tomorrow morning when all parties are here.

MS. BELES: 9:00 or 8:30?

THE COURT: You need to contact co-counsel. I can't do anything until everyone is here. The sooner you get here the sooner I will deal with it. There's a starting place. [¶] Work all day today, work all night. Get up early tomorrow morning --

MS. BELES: Your Honor, I don't need your advice on how to be competent.

THE COURT: That is contemptuous. That is contemptuous. That was disrespectful. Take a seat.

Following the above colloquy, Ms. Beles took a seat in the courtroom and the judge called a brief recess during which he went to chambers to gather his thoughts and review a checklist to be followed in adjudicating a contempt. The judge subsequently returned to the bench and called other cases. At approximately 10:20 a.m., while the judge was handling a hearing in another matter, Ms. Beles walked across the courtroom to obtain a portion of the *Barrientos* file to review. The judge stated to Ms. Beles from the bench that she was to take a seat and remain in the courtroom as she had been told. Ms. Beles complied.

At approximately 11:05 a.m., the judge re-called the *Barrientos* case. The judge ordered Ms. Beles to return at 2:00 p.m. that afternoon for a hearing. Ms. Beles apologized for her earlier remark, which she said was "improper and too informal." The judge stated that he was holding the hearing in the afternoon out of consideration to Ms. Beles because fewer people would be present. Mr. Barrientos waived his appearance for the afternoon hearing.

At approximately 2:35 p.m., the judge called the *Barrientos* case for the contempt hearing. Ms. Beles was present. The judge proceeded to describe what had occurred when the case had been called during the morning calendar and he explained why the contempt hearing had been continued to the afternoon. When Ms. Beles was allowed to speak, she again apologized for her conduct that morning. However, she did not concede that her remark was contemptuous on its face or that the court had the authority "to order [her] to do certain things." The judge stated that he appreciated and accepted the apology. He stated that he had not been advising Ms. Beles on how to practice law, but instead was "ordering [her] how to spend the next 24 hours." The judge stated that he thought he had the authority, in the context of a no time waiver preliminary hearing, to order her to work

on the *Barrientos* case alone and to not engage in social functions. The judge did not find Ms. Beles to have been in contempt.

The commission determined that Judge Jacobson's actions constituted abuse of the contempt power and abuse of authority. Whether or not Ms. Beles's remark constituted contempt, it was improper for the judge to have ordered her to remain in the courtroom from the time she was told to "take a seat" until the case was re-called at approximately 11:05 a.m. – a period of over an hour and a half – without adjudicating the alleged contempt. In a direct contempt situation, a judge may detain an alleged contemnor in the courtroom for the time necessary to review the contempt checklist and compose oneself. (Rothman, California Judicial Conduct Handbook (3d ed. 2007) § 4.22, p. 164.) Here, however, Judge Jacobson's detention of Ms. Beles continued long after he took a recess for those purposes. In the commission's view, requiring Ms. Beles, who had not been found in contempt, to remain in the courtroom pending a contempt hearing that was to take place at a later, unspecified time was tantamount to punishing her for contempt without a hearing. It is misconduct for a judge to impose punishment for contempt without first adjudicating the contempt and sentencing the contemnor. (See *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533.)

In his response to the commission, Judge Jacobson maintained that he continued to have jurisdiction over the case, the parties, and the attorneys until the conclusion of the *Barrientos* hearing that afternoon. However, the judge cited no authority, and the commission is aware of none, that supports the proposition that a court can continue to detain an individual for a direct contempt when the matter is not summarily adjudicated and the contempt hearing is put off to a later time. The judge also asserted that his intention during the morning session was to proceed with the contempt hearing as soon as he was able to clear some cases off the calendar, in order to avoid embarrassment to Ms. Beles, but other matters took too long. The commission noted that the judge could have expeditiously conducted a contempt hearing in chambers, which would have avoided any undue embarrassment to Ms. Beles. (See Rothman, California Judicial Conduct Handbook, *supra*, § 4.35, p.188; *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108,

131.) Further, the commission notes the paradox in detaining Ms. Belles in the courtroom for over an hour and a half after having ordered her to spend every waking moment working on the case.

The commission further found that Judge Jacobson abused his authority by ordering Ms. Beles to "spend every waking moment" working on the *Barrientos* case until the time set for the preliminary hearing, to the exclusion of other cases and social activity. In his objections to the notice of intended public admonishment, Judge Jacobson contended that his direction to Ms. Beles was in accord with statutes discouraging continuances in criminal cases and authorizing a judge to relieve assigned counsel[1] or impose sanctions upon assigned counsel who, without good cause, is not ready for a preliminary hearing. (Pen. Code, §§ 1050(a), (e); 987.05.) These statutes require a judge to deny a motion for a continuance absent good cause; they do not permit a judge to direct an attorney on how to prepare his or her case.

Judge Jacobson states that his intention was to give Ms. Beles a "heads up" on what she would need to establish in order to have her motion for a continuance granted. However, that is not what Judge Jacobson said. He did not inform Ms. Beles that her convenience or other work commitments would not be considered in determining good cause. Rather, he stated, "I'm ordering you to spend every waking moment between now and when we are next in court working on this case."

Judge Jacobson also asserts that the commission's decision will chill judges from probing into the grounds for a requested continuance. There is a clear distinction between asking questions to determine why an attorney is not prepared and ordering an attorney to spend every waking moment working on a case.

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[1] Penal Code section 987.05 authorizes a judge to sanction or remove an attorney who accepted assignment of a criminal case after representing that he or she would be ready to proceed with the preliminary investigation or trial, and thereafter, without good cause, is not ready on the date set. This section applies to appointed counsel. Judge Jacobson acknowledges that he does not know whether Ms. Beles was appointed.

The commission concluded that the judge's order constituted an abuse of authority and violated canon 1, which requires judges to uphold the integrity and independence of the judiciary, and canon 2A, which requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The commission also found that the judge's statements to Ms. Beles during the morning court session to "spend every waking moment" on the case, to "work all day today, work all night" and "get up early tomorrow," violated canon 3B(4), which requires judges to be patient, dignified, and courteous to those persons with whom they deal in an official capacity. The commission concluded that the judge's remarks were demeaning and discourteous because they appear to call into question Ms. Beles's work ethic and suggest she had not adequately prepared her case. As they were made in the presence of her client, they are also the type of remarks that could be expected to damage the attorney-client relationship.

The commission concluded that Judge Jacobson's conduct as described above constituted, at a minimum, improper action.

Judge Jacobson's prior discipline for similar misconduct was a significant factor in the commission's determination to impose this public admonishment. In 2010, the judge received a strong advisory letter for abuse of authority and poor demeanor. The judge ordered an attorney to appear in his court when no matter requiring the attorney's presence was pending. When the attorney appeared, the judge chastised him for engaging in what the judge perceived as an improper ex parte communication arising out of the attorney's discussion of a matter with a court administrator. The judge ordered the attorney to remain in the courtroom while the judge summoned opposing counsel in one of the attorney's cases that was awaiting trial, after which he conducted an un-calendared hearing. In the commission's view, Judge Jacobson's repeat of similar misconduct in the present case reflects a lack of appreciation for the bounds of his authority and his duty to treat those who appear before him with courtesy, dignity and respect.

The vote of the commission to impose a public admonishment was 7 ayes and three noes. Commission members Mr. Lawrence Simi, Anthony P. Capozzi, Esq., Hon. Frederick P. Horn, Hon. Judith D. McConnell, Nanci E. Nishimura, Esq., Mr. Adam N. Torres, and Mr. Nathaniel Trives voted for a public admonishment. Commission members Hon. Erica R. Yew, Ms. Maya Dillard Smith and Ms. Sandra Talcott would have issued a private admonishment. Commission member Ms. Mary Lou Aranguren did not participate.

Dated: July 11, 2012

Lawrence Simi
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE CHARLES R. BREHMER** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Charles R. Brehmer of the Kern County Superior Court. Judge Brehmer and his attorney, Paul S. Meyer, appeared before the commission to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Brehmer and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18, subdivision (d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND CONCLUSIONS

Judge Brehmer has been a judge of the Kern County Superior Court since January 2009, when he began his current term.

This public admonishment is based on violations of the Political Reform Act (Act)[1] that occurred during and after the judge's successful 2008 campaign for judicial office. The judge was an attorney-candidate in that election.

On July 18, 2011, following an investigation by the Fair Political Practices Commission (FPPC) that arose from an audit of the judge's campaign committee, the judge signed a stipulation with the FPPC wherein he admitted to three counts of violating the Act and agreed to pay a $5,500 fine. On September 29, 2011, the stipulation was

[1] The Political Reform Act is contained in Government Code sections 81000 through 91014.

approved by the FPPC and entered as its decision and order. The judge admitted to the following FPPC charges:

- The judge and his campaign treasurer received three cash contributions of $100 or more, in violation of Government Code section 84300, subdivision (a). The Act prohibits receiving cash contributions of $100 or more. The cash contributions were (1) $1,000 from the Law Offices of Young & Nichols, received on or about April 25, 2008; (2) $500 from Steve Nichols, received on or about October 2, 2008; and (3) $500 from Todd Gall, received on or about October 2, 2008.
- The judge and his campaign treasurer failed to disclose the true source of a $15,000 loan that the campaign treasurer made to the campaign on or about October 24, 2008, in violation of Government Code sections 84211, subdivision (g), and 84301. The campaign treasurer provided the loan funds to the judge, so that the judge could contribute the funds from his personal account to the campaign account. On ensuing campaign statements, the loan was reported as having been received from the judge rather than the campaign treasurer, even though the campaign treasurer was the true source of the contribution.
- The judge and his campaign treasurer failed to timely file two semi-annual campaign statements for the reporting periods of January 1, 2009 through June 30, 2009, and July 1, 2009 through December 31, 2009, in violation of Government Code section 84200, subdivision (a). The semi-annual statements were due by July 31, 2009 and January 31, 2010, respectively. The semi-annual statements were required to be filed because of the following campaign activity: during the first reporting period there were expenditures of approximately $12,300; during the second reporting period there was a $15,750 payment made to the campaign treasurer to repay the loan.

The commission found that Judge Brehmer also committed violations of the Act not addressed in the FPPC stipulation. The additional violations found by the commission are as follows:

- On a pre-election campaign statement that was filed for the July 1, 2008 through September 30, 2008 reporting period, the judge failed to disclose $9,000 in contributions, in violation of Government Code section 84211, subdivisions (a), (c), and (f). The undisclosed contributions were (1) $5,000 from the Bakersfield Police Officers Association PAC; (2) $2,000 from Lois M. Brehmer; and (3) $2,000 from Sierra Process Systems, Inc. The judge admitted this conduct in his response to the commission's preliminary investigation letter.
- The judge failed to timely file the semi-annual campaign statement for the October 19, 2008 through December 31, 2008 reporting period, during which there were campaign contributions of $20,349 and campaign expenditures of $16,919, in violation of Government Code section 84200, subdivision (a). The semi-annual campaign statement was due by January 31, 2009. The judge admitted this conduct in his response to the commission's preliminary investigation letter.
- The judge failed to deposit the $15,000 campaign loan that he received from his campaign treasurer into the campaign committee's bank account and instead deposited it into his personal account, in violation of Government Code section 85201, subdivision (c). In his response to the commission, the judge denied that his conduct violated section 85201, subdivision (c). The judge asserted that "[t]he loan was a personal loan and the proceeds were shortly deposited into the campaign account after having been placed into [his] personal account." He also asserted that the funds deposited into the campaign account were his funds "freed up by the loan" from the campaign treasurer. The commission concluded, however, that the loan was clearly intended to be used in connection with the judge's

campaign, as opposed to being a personal loan for other purposes, as evidenced by the written document memorializing the loan, titled "Election Campaign Loan Agreement," which was signed by the judge and the campaign treasurer. Because this was a campaign loan, the proceeds should have been deposited directly into the campaign committee's bank account.

The FPPC found, and the commission concurs, that there is no evidence of any intent to conceal information from the public on the part of Judge Brehmer. In the commission's view, the violations of the Act discussed above were the result of a failure to oversee sufficiently the work of an inexperienced campaign treasurer handling the campaign's reporting requirements. The commission noted that the judge amended his campaign statements after the problems with his filings were brought to his attention (post-election), and that the cash contributions were timely reported in various campaign statements. Judge Brehmer has acknowledged that ensuring that his campaign activities were in compliance with the law was his obligation, and has accepted responsibility for his conduct.

## DISCIPLINE

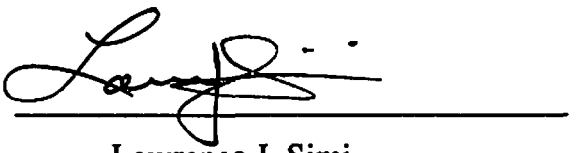
An express purpose of the Political Reform Act, as set forth in Government Code section 81002, subdivision (a), is to ensure that "[r]eceipts and expenditures in election campaigns ... [are] fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Judge Brehmer's multiple failures to comply with his campaign reporting obligations undermined this basic purpose of the Act. Public confidence in the integrity of the judicial campaign process and the judiciary is harmed when the public is deprived of important information, such as sources of contributions and amounts of expenditures made by a campaign. The judge's failure to obey the Act's requirements in his campaign for judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In addition, the violations of the Act that occurred after the judge took the oath of judicial office also constitute violations of the Code of Judicial Ethics canon 3B(2), which requires a judge to be faithful to the law, and canon 2A, which requires a judge to comply

with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary.

For the forgoing reasons, the commission has determined to impose this public admonishment.

The vote of the commission to impose a public admonishment was 9 ayes and 2 noes. Commission members Mr. Lawrence Simi; Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Hon. Frederick P. Horn; Hon. Judith D. McConnell; Nanci E. Nishimura, Esq.; Mr. Adam N. Torres; Ms. Maya Dillard Smith; and Mr. Nathaniel Trives voted for a public admonishment. Commission members Hon. Erica R. Yew, and Ms. Sandra Talcott would have issued a private admonishment.

Dated: October 25, 2012



Lawrence J. Simi,
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| IN THE MATTER CONCERNING JUDGE DEREK G. JOHNSON | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |
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This disciplinary matter concerns Judge Derek G. Johnson of the Orange County Superior Court. Judge Johnson and his attorney, Paul S. Meyer, appeared before the commission on December 5, 2012 to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Johnson and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18, subdivision (d) of the California Constitution, based on the following statement of facts and conclusions.

## STATEMENT OF FACTS AND CONCLUSIONS

Judge Johnson has been a judge of the Orange County Superior Court since 2000. His current term began in January 2009.

Judge Johnson is publicly admonished for remarks he made while sentencing a defendant convicted of rape and other sexual assault offenses. The comments created the impression that the judge was not impartial in cases involving rape without serious bodily injury showing resistance by the victim.

On June 20, 2008, Judge Johnson presided at sentencing in *People v. Metin Riza Gurel*. The defendant had been convicted at a jury trial held before the judge of rape, forcible oral copulation, domestic battery with corporal injury, stalking, and three counts of criminal threats, with use of a deadly weapon as to one count of criminal threats.

The underlying facts are set forth in the Court of Appeal's nonpublished opinion affirming the defendant's convictions. The defendant and the victim began dating in 2004 and moved in together in 2006. While they lived together, the defendant threatened the victim with a knife and threatened to slash her throat with a broken compact disk. The victim reported this conduct to the police in early 2007, and the defendant moved out at her request, but the two continued to date on and off until September 2007. They had consensual sex in October 2007. After they stopped dating, the victim continued communicating with the defendant but became increasingly concerned he would hurt her. At one point, the victim found her front door lock jammed so it could not be locked, and was unable to access her home computer. She believed that he had access to her computer because he knew everything she was doing. In the week prior to November 10, 2007, the defendant spoke to the victim on the telephone daily. In each conversation, he threatened to get her fired from her job or blow up her car, and claimed he had access to her apartment.

On the night of November 10, 2007, the defendant showed up at a restaurant where the victim was on a date with another man. The defendant referred to the man by name and threatened the victim while making a slicing motion across his throat. When the victim went to her car, she found that one of her tires had been slashed. After she reached home, the defendant called, threatening to blow up her car and cause her to lose her job if she failed to arrive at his apartment within 20 minutes. She went to his apartment where the defendant bruised her breast with a metal baton, shattered her cell phone, heated a screwdriver and threatened to use it to maim her face and vagina, threatened to burn her face and hair with a lit cigarette lighter, and threatened to shoot and kill her. He ordered her to perform fellatio, raped her, and ejaculated in her mouth. The victim did not leave after the defendant fell asleep because he was a light sleeper.

The next morning, the defendant demanded that the victim make him breakfast and told her she would live at his apartment. She convinced the defendant to allow her to return to her apartment on her own to collect her clothing. She drove to the police

station, where she reported the defendant's threats from the previous evening. In an interview about 17 days later, she reported the rape.

At the sentencing proceeding, Judge Johnson heard and rejected the prosecutor's argument that the rape and oral copulation should be considered "separate occasions" mandating full consecutive sentences; he pointed out differences between certain cases cited by the prosecutor and the case before him, and referred to another case as "just a bunch of dicta." The judge then said that he would give counsel a "preview" of what he intended to do. He stated that he intended to impose the mid-term (six years in state prison) on count 1, impose concurrent six-year terms on each of the other six counts, and stay the enhancement, for a total term of six years. The prosecutor asked the judge if he was running the sentences as to counts 1 and 2 concurrent solely because he was finding them to be the same occasion, and continued, "[C]an I ask why the court is exercising its discretionary power ... to run the[m] concurrent, or is the court finding that they're merging for some reason?" The judge said that he was "not finding merger at all," but was finding, after hearing the case, including the preliminary hearing, that the case was "worth six years." Counsel was given an opportunity to be heard and declined. The following then occurred:

> THE COURT: All right. Let me tell you why I'm going to sentence Mr. Gurel to six years only in spite of the People's request for—
>
> MS. SNYDER: Sixteen.
>
> THE COURT: —16. And that is, I spent my last year and a half in the D.A.'s office in the sexual assault unit. I know something about sexual assault. I've seen sexual assault. I've seen women who have been ravaged and savaged whose vagina was shredded by the rape. ***I'm not a gynecologist, but I can tell you something: If someone doesn't want to have sexual intercourse, the body shuts down. The body will not permit that to happen unless a lot of damage is inflicted,***

***and we heard nothing about that in this case. That tells me that the victim in this case, although she wasn't necessarily willing, she didn't put up a fight. And to treat this case like the rape cases that we all hear about is an insult to victims of rape. I think it's an insult. I think it trivializes a rape.***

MS. SNYDER: May I respond, Your Honor?

THE COURT: Pardon?

MS. SNYDER: May I respond?

THE COURT: I'm just telling you. We don't need to get into a discussion. You are free to join in, but I'm telling you the reasons why I think this case is worth six years because it's the mid-term. There's nothing in mitigation. There's nothing in aggravation. And it's what the jury has put in front of me.

MS. SNYDER: All I wanted to say, Your Honor, was I'm — obviously, it's a rape because she was not willing. I'm not in any way equating this to a stranger rape, to a forcible rape where she was beaten ... so it's not the People's intention and position to in any way trivialize what we normally consider to be true victims of rape. I just — in speaking with her and seeing her testify, I know that she doesn't feel any less of a rape victim because she had a relationship with him or she had at one time engaged in sexual intercourse with him. I understand the court's reasoning when you're looking at the cases in comparison, and I understand the court's position on them being the same occasion. The only thing I would ask, and maybe I shouldn't have submitted as quickly as I did, is on count 1 why the court is not finding there to be any circumstances in aggravation to aggravate the term to eight

years based on the fact that there were threats involved, there was a weapon involved, and just that there are aggravating circumstances that do apply where not many mitigating do? I was just wondering.

THE COURT: I just found the threats to be technical threats. ***I found this whole case to be a technical case. The rape is technical. The forced oral copulation is technical. It's more of a crim law test than a real live criminal case.*** I don't know what more to say.

(R.T. 13:9-15:11, italics added.)

The judge then imposed the six-year sentence.

The commission concluded that Judge Johnson's remarks — which first became known to the commission in May 2012 — were contrary to canon 2A, which requires a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and canon 3B(5), which requires a judge to perform judicial duties without bias or prejudice, and provides that a judge shall not, in the performance of judicial duties, engage in speech or other conduct that would reasonably be perceived as bias or prejudice. The comments suggested the judge was not impartial towards sexual assault victims who do not "put up a fight," by suggesting that they are not victims of a "real" crime. Further, the judge improperly relied on his own "expert opinion" concerning serious bodily injury showing resistance based on his experiences in the district attorney's office, rather than evidence before him. (See *Inquiry Concerning Judge Jose A. Velasquez* (2007) 49 Cal.4th CJP Supp. 175, 204; Public Admonishment of Judge Christine K. Moruza (2008) p. 7.)

Judge Johnson's comments that "if someone doesn't want to have sexual intercourse, the body shuts down," and that "the body will not permit that to happen unless a lot of damage was inflicted," were not based upon any evidence before the court, but upon his experience in the district attorney's office involving other cases. The judge's statement that the lack of physical damage showed that the victim "didn't put up

a fight," along with his comment immediately thereafter that treating the case before him like other rape cases was "an insult to victims of rape" and "trivializes rape," reflected his own view that a victim must resist in order for there to be a "real" sexual assault — a view that is inconsistent with California law, which since 1980 has contained no requirement of proof that the victim of rape either resisted or was prevented from resisting because of threats. (See Pen. Code, § 261; *People v. Iniguez* (1994) 7 Cal.4th 847, 854-856.) Judge Johnson's reference to the rape and forced oral copulation as "technical," and his statement that the case was "more of a crim law test than a real live criminal case," similarly signaled his own view that there must be resistance by the victim and associated infliction of serious bodily injury in order for there to be a "real" case involving more than a "technical" sexual assault.

In his response to the commission and at his appearance, Judge Johnson conceded his comments were inappropriate and apologized. He explained that his comments were the result of his frustration with the prosecutor whom he believed was requesting a sentence not authorized by law. He stated that he was attempting to respond to the prosecutor's arguments on the issue of whether the rape and forced oral copulation should be considered "separate occasions" for sentencing purposes, and to distinguish the more aggravated cases cited by the prosecutor. The commission found, however, that none of Judge Johnson's statements set forth above pertained to the prosecutor's argument concerning "separate occasions" or to the cases cited by the prosecutor.

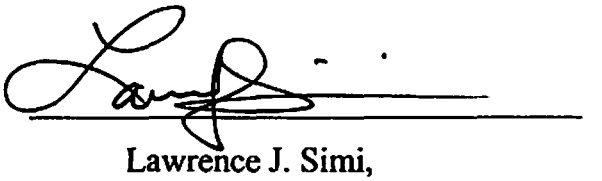
In the commission's view, the judge's remarks reflected outdated, biased and insensitive views about sexual assault victims who do not "put up a fight." Such comments cannot help but diminish public confidence and trust in the impartiality of the judiciary. At a minimum, the judge's conduct constituted improper action.

For the forgoing reasons, the commission has determined to impose this public admonishment.

The vote of the commission to impose a public admonishment was 10 ayes and 0 noes. Commission members Mr. Lawrence J. Simi; Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Hon. Judith D. McConnell; Nanci E. Nishimura, Esq.; Mr. Adam N.

Torres; Ms. Maya Dillard Smith; Ms. Sandra Talcott; Mr. Nathaniel Trives; and Hon. Erica R. Yew voted for a public admonishment. Commission member Hon. Frederick P. Horn was recused.

Dated: December 13, 2012



Lawrence J. Simi,
Chairperson

[No. 192. July 30, 2013.]

# INQUIRY CONCERNING JUDGE BRUCE CLAYTON MILLS

## SUMMARY

A disciplinary matter was commenced concerning a superior court judge.

The Commission on Judicial Performance publicly admonished the judge. The commission concluded that the judge engaged in prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 1, 2, 2A and 2B(2). By communicating his desired resolution of his son's case to the courtroom clerk of the assigned pro tempore judge and participating in a favorable disposition of the matter with the pro tempore judge through channels not available to the public, the judge created an appearance of impropriety that undermined public confidence in the impartiality and integrity of the judiciary. Moreover, the fact that both the courtroom clerk and the pro tempore judge were subordinate to the judge heightened the appearance and reality of impropriety. In aggravation, the judge had been previously disciplined for using his judicial position to bypass proper channels on behalf of his son. In mitigation, the commission took into consideration that the judge did not overtly pressure the courtroom clerk or the pro tempore judge to facilitate the meeting in chambers and told the pro tempore judge to do what she wanted or words to that effect, and the requested disposition was not more lenient than would likely have occurred if the attorney had appeared in open court on behalf of the judge's son. The commission also considered in mitigation the finding that the judge was acting as a concerned parent and the testimony of a number of character witnesses that the judge was hardworking, conscientious, and fair. (Opinion by Lawrence J. Simi, Chairperson.)

## HEADNOTES

**(1) Judges § 6—Discipline—Prejudicial Misconduct—Nonpublic Areas of Courthouse—Outside Normal Process—Appearance of Impropriety.**—A superior court judge engaged in prejudicial misconduct and violated Cal. Code Jud. Ethics, canons 1, 2, 2A and 2B(2). By allowing discussion and resolution of his son's case to take place in nonpublic areas of the courthouse and outside the normal process, the judge created an appearance of impropriety that undermined public confidence in the impartiality and integrity of the judiciary.

[Cal. Forms of Pleading and Practice (2013) ch. 317, Judges, § 317.85.]

**(2) Judges § 6—Discipline—Burden of Proving Charges—Clear and Convincing Evidence.**—The examiner for the Commission on Judicial Performance has the burden of proving the charges against a judge by clear and convincing evidence. Evidence of a charge is clear and convincing so long as there is a high probability that the charge is true.

**(3) Judges § 6—Discipline—Special Masters—Factual Findings—Legal Conclusions.**—While the Commission on Judicial Performance gives special weight and deference to the factual findings of the special masters because they had the advantage of observing the demeanor of the witnesses, legal conclusions of the masters are entitled to less deference because the commission has expertise in evaluating judicial misconduct.

**(4) Judges § 6—Discipline—Prejudicial Misconduct.**—Prejudicial misconduct is the second most serious type of judicial misconduct. Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is either conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office or willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. The provision that the conduct must be that which brings the judicial office into disrepute does not require actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office.

The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred under this standard.

**(5) Judges § 6—Discipline—Improper Action.**—The least serious type of misconduct is improper action. Improper action consists of unjudicial conduct that violates the Code of Judicial Ethics, but does not rise to the level of prejudicial misconduct because, viewed objectively, the conduct would not adversely affect the esteem in which the judiciary is held by members of the public.

**(6) Judges § 6—Judicial Conduct—Requirements.**—Cal. Code Jud. Ethics, canon 2, provides that a judge shall avoid impropriety and the appearance of impropriety in all the judge's activities. Cal. Code Jud. Ethics, canon 1, provides that a judge is required to observe high standards of conduct so that the integrity and independence of the judiciary is preserved. Cal. Code Jud. Ethics, canon 2A, provides that a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Cal. Code Jud. Ethics, canon 2B(2), provides that a judge shall not lend the prestige of judicial office to advance the personal interests of the judge or others.

**(7) Judges § 1—Solicitation of Civic or Charitable Contributions—Subordinate Judicial Officer.**—A judge is prohibited from seeking civic or charitable contributions from a subordinate judicial officer or temporary judge, although such solicitation is permitted among judges (Cal. Code Jud. Ethics, canon 4C(3)(d)(i)).

**(8) Judges § 6—Discipline—Factors.**—In determining the appropriate level of discipline, the Commission on Judicial Performance considers several factors, including the following: number of incidents of misconduct, the seriousness of the misconduct, whether the judge has prior discipline, whether the judge acknowledges and appreciates the impropriety of his actions, the impact of the misconduct on the judicial system, and the judge's reputation for administering his or her duties in a fair, impartial, and dignified manner.

**(9) Judges § 6—Discipline—Capacity to Reform.**—A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform.

## OPINION

**SIMI, Chairperson.—**

## I

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Bruce Clayton Mills, a judge of the Contra Costa County Superior Court. The commission commenced this inquiry with the filing of its Notice of Formal Proceedings (Notice) on November 1, 2012. The Notice charges Judge Mills in a single count with engaging in judicial misconduct through his communications with a courtroom clerk and a pro tempore judge in nonpublic areas of the courthouse concerning his son's scheduled court appearance on an order to show cause for failure to complete volunteer work ordered in a tobacco infraction case. The Notice alleges that the judge sought and received credit for time his son spent in a residential program in lieu of the required community service.

The Supreme Court appointed three special masters who held an evidentiary hearing and reported to the commission. The masters are the Honorable Dennis M. Perluss, Associate Justice of the Court of Appeal, Second Appellate District; the Honorable Gail A. Andler, Judge of the Orange County Superior Court; and the Honorable Vincent J. O'Neill, Jr., Judge of the Ventura County Superior Court. Judge Mills is represented by James A. Murphy, Esq., of Murphy, Pearson, Bradley & Feeney in San Francisco, California. The examiners for the commission are Gary W. Schons, Esq., and Valerie Marchant, Esq.

A three-day evidentiary hearing was held before the special masters commencing February 19, 2013, followed by oral argument on April 8, 2013.[1] The masters' report to the commission, containing their findings of fact and conclusions of law, was filed on April 25, 2013. Oral argument before the commission was heard on June 26, 2013.

**(1)** The masters found that Judge Mills communicated his desired disposition of his son's case and showed supporting documents to the courtroom clerk in an area not accessible to the public and participated in a favorable

[1] On January 29, 2013, Judge Mills filed a motion with the special masters to dismiss these proceedings, contending that the allegations as charged did not constitute judicial misconduct. The special masters declined to rule on the motion as beyond their purview. (See Rules of Com. on Jud. Performance, rules 119(a), 121(b).)

disposition of the matter in chambers with the pro tempore judge.[2] We adopt the factual findings of the masters. Based on these factual findings, we reach our own independent legal conclusion that Judge Mills engaged in prejudicial misconduct, which is unjudicial conduct prejudicial to public esteem for the judiciary. By allowing discussion and resolution of his son's case to take place in nonpublic areas of the courthouse and outside the normal process, Judge Mills created an appearance of impropriety that undermines public confidence in the impartiality and integrity of the judiciary. Moreover, the fact that both the courtroom clerk and the pro tempore judge were subordinate to the judge heightens the appearance and reality of impropriety.

For reasons discussed in this decision, we conclude that the purpose of judicial discipline—protection of the public, enforcement of rigorous standards of judicial conduct, and maintenance of public confidence in the integrity and impartiality of the judiciary—can best be accomplished through the imposition of a public admonishment.

## II

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. *Findings of Fact*

**(2)** The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*)

Factual findings of the masters are entitled to great weight because the masters have "the advantage of observing the demeanor of the witnesses." (*Broadman, supra*, 18 Cal.4th at p. 1090; see *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232 (*Freedman*).) We adopt the factual findings of the masters, which we have determined are supported by clear and convincing evidence.

The evidence presented at the hearing before the special masters concerned, for the most part, Judge Mills's conduct surrounding his son's scheduled court appearance at 1:30 p.m. on October 4, 2011, in Department 59 of the Walnut Creek courthouse to show proof of completion of volunteer

[2] A pro tempore judge is an attorney who serves as a temporary judge once, sporadically, or regularly on a part-time basis by appointment of the superior court. (See Cal. Code Jud. Ethics, Terminology.)

work in a tobacco infraction case. The son had not completed the volunteer work because he enrolled in a residential treatment program out of state shortly after his guilty plea. The disputed evidence involved Judge Mills's communications before the scheduled hearing with Jane Sims, the clerk in Department 59, and Helen Peters, a pro tempore judge who was scheduled to preside in Department 59 that day. The conflicts in the testimony primarily concerned the number, location, and substance of the judge's conversations with Ms. Sims. Most of the disputes in the evidence were resolved by the masters in accord with Judge Mills's testimony based on the masters' observation of the manner in which the witnesses testified and the extent to which the testimony was consistent or inconsistent with other evidence.

Judge Mills has no objections to the factual findings of the masters. The examiner "notes concern" as to one factual finding relevant to the masters' credibility determination as discussed later in this decision.

In deference to the masters' evaluation of the demeanor of the witnesses and based on our own independent review of the record, we adopt the following factual findings.

On March 2, 2011, Judge Mills appeared with his minor son in Department 59 for his son's arraignment on a charge of possession of tobacco by a minor. Former Commissioner Joel Golub was assigned to Department 59. For more than a decade, Judge Mills and his ex-wife Judge Cheryl Mills[3] had a strained relationship with Commissioner Golub. Shortly after taking office, Judge Mills recommended that Commissioner Golub be replaced. In 2002, Commissioner Golub unsuccessfully ran against Cheryl Mills for judicial office. During the campaign, Commissioner Golub filed a lawsuit against Cheryl Mills that was ultimately dismissed. Cheryl Mills subsequently filed a lawsuit against a person aligned with Commissioner Golub's campaign. The masters aptly described the relationship between Judge Mills and Commissioner Golub as being "marked by strong, mutual antipathy."

Judge Mills expected Commissioner Golub to recuse himself under Code of Civil Procedure section 170.1 from hearing a matter concerning the son of Judge Mills and Judge Cheryl Mills. However, the commissioner did not recuse himself and Judge Mills did not move to disqualify him.[4] Instead,

[3] We refer to respondent Judge Bruce Clayton Mills as Judge Mills throughout this decision. We refer to his former wife, Judge Cheryl Mills, by both her first and last names.

[4] See Rothman, California Judicial Conduct Handbook (3d ed. 2007) section 7.52, page 358 ("Where the party, victim or defendant is a fellow judge or a spouse of a fellow judge, there would at least be a perception of bias, or a reasonable doubt that any judge on the same court would be able to maintain impartiality."); California Judges Association, Formal Ethics Opinion No. 56 (2006) Ethical Considerations When a Judge or a Member of a Judge's Family

Judge Mills asked the commissioner to clarify whether the offense was a misdemeanor or infraction, and the commissioner explained that it was an infraction and accepted the son's plea to the infraction. The son was ordered to complete 20 hours of volunteer work with the American Lung Association or the American Cancer Society and to submit proof of completion to the court.

Shortly after the March court appearance, the son entered a 10-month out-of-state residential rehabilitation program. Consequently, he did not complete the required volunteer work. In mid-September 2011, an order to show cause (OSC) why proof of community service had not been submitted was issued by the court, setting the matter for 1:30 p.m. on October 4, 2011, in Department 59. The son was still in the out-of-state program. Judge Mills and Judge Cheryl Mills discussed the OSC and agreed an attorney should appear for their son because Commissioner Golub would be handling the matter. Judge Mills asked Attorney Elle Falahat, a close friend, to appear on his son's behalf and asked her to request that the community service requirement be satisfied through performance in the rehabilitation program. The judge explained that the therapeutic goal of volunteer work at the American Cancer Society or American Lung Association was served through his son's participation in the rehabilitation program that included counseling related to smoking.

On the morning of the October 4, 2011 scheduled hearing, Judge Mills and Ms. Falahat spoke on the phone several times concerning her anticipated court appearance at 1:30 p.m. Judge Mills asked her to arrive early so he could provide her with documents concerning his son's participation in the rehabilitation program. At 10:21 a.m. Ms. Falahat called Judge Mills on his cell phone and told him she could not appear at the hearing because of an emergency. She told Judge Mills, "We have to continue it obviously." According to Ms. Falahat, Judge Mills was "in a state of panic" and responded, "Let me see how I can handle this." (Judge Mills testified he told Ms. Falahat, "Let me think about what I want to do, and then I'll let you know." He subsequently testified he said to her, "Well, I'll figure out what we're going to do.") Judge Mills did not ask Ms. Falahat to call the clerk's office to obtain a continuance and Ms. Falahat did not offer to do so.[5]

Has Been Arrested or Is Being Prosecuted for Criminal Activity, page 2 ("If the arrest occurs within the jurisdiction of the judge's court, it is recommended that the judge notify the Presiding Judge, so that the case may be assigned to a judge whose impartiality will not be questioned.")

[5] The masters found Ms. Falahat's failure to offer to contact the court to seek a continuance to be a mitigating factor on Judge Mills's behalf. We do not consider this fact to be mitigating because Judge Mills told Ms. Falahat that he would let her know once he decided how he wanted to proceed.

According to Judge Mills's clerk, Joane Quontamatteo, the judge was upset after Ms. Falahat informed him that she could not appear. Ms. Quontamatteo offered to go to Department 59 and inform Ms. Sims that the attorney could not appear and find out what needed to be done. Judge Mills told her he would take care of it himself because it was a personal matter.

Judge Mills went downstairs to seek out Ms. Sims, the clerk in Department 59. He encountered her in the main clerk's office and informed her that neither his son nor the attorney engaged to represent him could attend the OSC hearing that afternoon. Judge Mills responded positively when Ms. Sims informed him that Commissioner Golub was not in that day and Helen Peters would be presiding in Department 59. He said something along the lines of "Well, great; that's better." Ms. Sims asked, "What is it on for?" The judge explained it was an order to show cause for proof of community service and the "lawyer was going to present the records from the program that [his son] is in and ask for credit for time served for the program that he's doing in lieu of the community service." Ms. Sims indicated that the pro tempore judge would want to review such documents to determine if the volunteer service obligation had been satisfied.

Judge Mills then went back to his chambers to retrieve the documents and brought them to Ms. Sims in the administration area of the courthouse. The documents included the parent handbook for the program and invoices for payments to the program. Judge Mills showed the documents to Ms. Sims, but she declined to take them.

As Judge Mills was leaving the courthouse for lunch at around noon that day, he stopped by Ms. Sims's office because he wanted to know "what was going to occur" and what they wanted him to do. Ms. Sims told the judge to come back when he returned from lunch.

Pro Tempore Judge Peters thought she arrived at the Walnut Creek courthouse between 12:30 p.m. and 1:00 p.m. on October 4, 2011. She testified Ms. Sims first told her Judge Mills's son's case was on calendar, an attorney would be appearing, and there was a question of whether the attorney could be given priority on the calendar. Sometime later, Ms. Sims came into chambers and told Ms. Peters the attorney was not available and Judge Mills needed to know whether he could take care of the matter before the start of his own calendar.

The windows in Department 59 chambers look directly into the judges' parking area. Ms. Peters testified that she noticed Judge Mills's car arrive shortly before the beginning of the afternoon calendar. The masters found that Ms. Peters knew an attorney would not be appearing for Judge Mills's son

before she saw the judge arrive in the parking lot.[6] The masters concluded that this fact refutes Ms. Sims's testimony that Judge Mills initially told her an attorney would appear and did not disclose that Ms. Falahat had a conflict until after he returned from lunch. The examiner urges the commission to reject this finding because Ms. Peters's observation was based on a "flash" of a car outside the chambers window[7] and because such a scenario is inconsistent with Ms. Sims's testimony on this issue.

We believe the evidence taken in its totality supports the masters' finding that Ms. Peters knew an attorney would not be appearing when she saw Judge Mills enter the parking lot. On cross-examination, Ms. Peters testified, "I knew before Judge Mills'[s] vehicle flashed, if that's what it was, that the lawyer was not going to be appearing. I knew that before he had entered the building that day." And, two other times in her testimony Ms. Peters stated or suggested that she knew the lawyer would not be appearing before she saw the judge enter the parking lot.[8]

Court security records reflect that Judge Mills returned from lunch at precisely 1:30:11 p.m. He immediately went to Ms. Sims's office. Ms. Sims asked the judge to wait while she went to confer with Ms. Peters. In a matter of seconds, Ms. Sims returned and asked Judge Mills to come and talk to Ms. Peters.

Judge Mills and Ms. Sims entered the chambers of Department 59 where Ms. Peters was sitting behind the commissioner's desk. Judge Mills and Ms. Peters greeted each other, and Judge Mills expressed pleasure or relief that she was there instead of Commissioner Golub. When Ms. Peters asked

[6] The masters accepted Ms. Peters's testimony that Ms. Sims initially told her an attorney would be appearing for Judge Mills's son and asked that the matter be given priority on the calendar. However, the masters found that there was not clear and convincing evidence that Judge Mills actually told Ms. Sims that an attorney would be appearing or asked for priority. We have difficulty understanding why Ms. Sims would convey this information to Ms. Peters if Judge Mills had not reported it to her. Nevertheless, we defer to the masters' finding that the examiner did not prove this allegation by clear and convincing evidence based on the masters' credibility determinations and inconsistencies and conflicts in the evidence with respect to when Judge Mills allegedly made this statement to Ms. Sims.

[7] When asked on direct examination if she saw Judge Mills park his car, Ms. Peters replied, "I wasn't really watching. I was just in chambers and it's a view directly outside my window. So I didn't look and say, 'Oh, there's Judge Mills; he [*sic*] parking.' I just looked up and saw a flash . . . . And I said, 'Oh, that's Judge Mills.' "

[8] "Q. [Mr. Murphy] So before you saw Judge Mills pull into the parking spot and get out of his car, you knew that the lawyer now could not attend the hearing; right? [¶] A. [Ms. Peters] I believe so, yes." Ms. Peters later testified that when she saw Judge Mills pull into the parking lot, "It was my expectation that he would be entering my chambers in order to dispose of [his son's case], yes." She also testified that she knew a lawyer would not be appearing before Ms. Sims came into chambers to tell her the judge had returned from lunch.

what was going on in the case, Judge Mills told her the matter was on calendar for an OSC regarding failure to complete required volunteer work. The judge explained that his son was in an out-of-state program. According to Judge Mills, he then told Ms. Peters his attorney intended to ask for "credit for time served" in the program. According to Ms. Peters, Judge Mills himself asked for that disposition when he entered the chambers. The masters did not expressly resolve this conflict in the testimony because the "practical effect and legal consequences are no different whether Judge Mills himself asked for the disposition or told Ms. Peters the lawyer he engaged to represent [his son] had intended to ask for that disposition." We agree.

Judge Mills said something to Ms. Peters like, "[D]o what you want." Ms. Peters asked Judge Mills about the nature of the rehabilitation program but did not receive or review any documents. Judge Mills explained that his son was participating in outreach in the community while in the program. Ms. Peters concluded that participation in the program would qualify for the community service requirement. As they were leaving chambers, each to begin their own court calendars, Ms. Peters gave Judge Mills a hug.

In assessing her own actions, Ms. Peters testified, "I felt that I made the right decision in the wrong place." The resulting disposition was within her discretion and in all likelihood would have been the same if an attorney had appeared in open court and made the request. When asked if she felt pressured to grant Judge Mills's request because he was a judge, Ms. Peters replied, "Yeah. I did."

Ms. Peters wrote "credit for time served, accepted" on the judge's notes that Ms. Sims had retrieved from her office and brought into chambers. Ms. Sims made a similar notation on the clerk's docket and minutes and also filled in "DAD" on the line for appearances. Judge Mills did not sign the stipulation for a pro tempore judge to hear the matter until the following day, October 5, 2011. However, Ms. Peters's signature on the stipulation is dated October 4, 2011. Although all proceedings in Department 59 are recorded, neither party submitted any evidence of this matter having been recorded.

When Commissioner Golub returned to court on October 6, 2011, Ms. Sims told him about how Judge Mills's son's case was handled. The commissioner told Ms. Sims to contact the supervising judge at the Walnut Creek courthouse, which she did.

B. *Conclusions of Law*

**(3)** While we give special weight and deference to the factual findings of the masters because they had the advantage of observing the demeanor of the

witnesses, legal conclusions of the masters are entitled to less deference because the commission has "expertise in evaluating judicial misconduct." (*Broadman, supra*, 18 Cal.4th at p. 1090; see *Freedman, supra*, 49 Cal.4th CJP Supp. at p. 232.) For reasons explained below, we diverge from the masters in our legal conclusions.

There are three types of judicial misconduct: willful misconduct, prejudicial misconduct and improper action. Only the latter two are pertinent in this case.[9]

**(4)** Prejudicial misconduct is the second most serious type of judicial misconduct. "Prejudicial conduct is distinguishable from willful misconduct in that a judge's acts may constitute prejudicial conduct even if not committed in a judicial capacity, or, if committed in a judicial capacity, not committed in bad faith. Prejudicial conduct is '*either* "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office" [citation] *or* "willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity." [citation].' [Citation.]" (*Broadman, supra*, 18 Cal.4th at pp. 1092–1093.) "The provision that the conduct must be that which 'brings the judicial office into disrepute' does not require actual notoriety, but only that the conduct, if known to an objective observer, would appear to be prejudicial to public esteem for the judicial office. [Citation.]" (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams*).) "The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred under this standard. [Citation.]" (*Ibid.*)

**(5)** The least serious type of misconduct is improper action. Improper action consists of unjudicial conduct that violates the Code of Judicial Ethics, but does not rise to the level of prejudicial misconduct because, viewed objectively, the conduct would not adversely affect the esteem in which the judiciary is held by members of the public. (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89 (*Ross*); *Adams, supra*, 10 Cal.4th at pp. 897–899.)

The masters concluded that by discussing the case with Ms. Peters outside the courtroom and participating in a favorable disposition of the matter in

[9] Willful misconduct, the most serious type of judicial misconduct, is defined by the Supreme Court as unjudicial conduct committed in bad faith by a judge acting in his or her judicial capacity. (*Broadman, supra,* 18 Cal.4th at p. 1091.) Although the Notice charges Judge Mills with willful misconduct, the examiner did not argue before the masters or the commission that the judge engaged in willful misconduct.

chambers, the judge created an appearance of impropriety in violation of canon 2 of the California Code of Judicial Ethics and engaged in improper action, but not prejudicial misconduct. Further, the masters concluded the judge's communications with Ms. Sims did not constitute misconduct.

**(6)** The examiner contends that Judge Mills engaged in prejudicial misconduct by meeting with Ms. Peters and in his interactions with Ms. Sims. In addition to violating California Code of Judicial Ethics, canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all the judge's activities), the examiner contends that Judge Mills violated California Code of Judicial Ethics, canons 1 (a judge is required to observe high standards of conduct so that the integrity and independence of the judiciary is preserved),[10] 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), and 2B(2) (a judge shall not lend the prestige of judicial office to advance the personal interests of the judge or others).[11]

Judge Mills urges the commission to reject the masters' legal conclusion that he engaged in misconduct. He maintains in his written brief to the commission that "[t]here was absolutely nothing improper" about his conduct and that he "acted as any concerned parent would in his situation and used the proper channels available to him after he was notified that his son's attorney could not make the 1:30 [p.m.] appearance."

We conclude that Judge Mills engaged in prejudicial misconduct by conveying his desired disposition of his son's case to Ms. Sims and Ms. Peters through channels not available to the public. His conduct falls within the category of prejudicial misconduct arising out of conduct, which, even if not done in bad faith, would appear to an objective observer to be conduct prejudicial to public esteem for the judicial office. (*Broadman, supra*, 18 Cal.4th at p. 1092; *Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146, 154.) Further, through his communications with Ms. Sims and Ms. Peters, Judge Mills used the prestige of his judicial office to influence the disposition of his son's case in violation of canon 2B(2), and created an appearance of impropriety and compromised the integrity and impartiality of the judiciary in violation of canons 1, 2, and 2A. (See *Inquiry Concerning Platt* (2002) 48

[10] The California Code of Judicial Ethics was amended effective January 1, 2013. Canon 1 was amended to add the word "impartial," so that it now reads, "An independent, impartial, and honorable judiciary is indispensable to justice in our society." The amendments are not applicable in this case because they were not in effect at the time of the charged conduct.

[11] The Notice also charges Judge Mills with a violation of canon 3B(7), which prohibits a judge from engaging in or considering ex parte communications. The masters concluded Judge Mills did not violate this canon because no party other than his son was involved in the hearing, and the evidence established that the district attorney's office has a policy of not appearing on the calendar at issue in this case. The examiner does not object to this conclusion. We adopt the conclusion of the masters.

Cal.4th CJP Supp. 227, 244–246 (*Platt*); *Censure of Judge Sarmiento* (2012) No. 191 at p. 6 (*Sarmiento*).)

When Judge Mills learned the attorney could not appear, he could properly have asked the attorney to seek a continuance, appeared himself at the scheduled hearing, or called the clerk to ask for another date. These are all courses of action available to members of the public faced with a similar situation. Instead, he went beyond what was necessary to inform Ms. Sims of the status of the case and bypassed normal procedures—he approached Ms. Sims in an area not accessible to the public, told her not just that his attorney could not appear but also of his desired resolution, and showed her documents in support of his request. By so doing, he created the appearance that he was using Ms. Sims as a conduit to the assigned judicial officer on behalf of his family member. He also discussed the matter with Ms. Peters in her chambers and off the record before the start of the afternoon calendar.

The masters summarized Judge Mills's actions accordingly: "Although aware he was about to enter an ethical minefield, he elected not to follow the safest path and simply notify the clerk's office of the situation and request a continuance." The path he chose created the appearance that he obtained special access to the court clerk and the pro tempore judge and was able to bypass ordinary procedures by virtue of his position as a judge to the benefit of his son and his own schedule. The case was heard before the start of the calendar to accommodate Judge Mills's need to start his own court calendar on time. When asked to describe the judge's demeanor, Ms. Peters replied, "We were in a hurry. It felt like it was a stop along the way, an inconvenience, something to be done quickly and be finished." Members of the public are required to take time off of work to come to court and do not have the advantage of having their case called before the start of the calendar and off the record to accommodate their work schedule and do not have special access to the judge's clerk in nonpublic areas of the courthouse to provide documentation and arguments in support of their desired disposition. Further, Judge Mills was allowed to discuss the sensitive nature of his son's situation in chambers without going through the same process expected of members of the public who request that their matter be heard in closed session. The commission has condemned conduct that creates the appearance of a "two-track system of justice—one for those with special access to the judge, and the other for everyone else. The nub of the problem is the appearance or reality that Lady Justice is not blindfolded." (*Inquiry Concerning Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 51.)

The masters concluded that an objective observer aware of all the facts would not consider Judge Mills's actions prejudicial to public esteem for the judicial office because the difference between what actually occurred and

what Judge Mills could properly have done is slight and because the same result would likely have occurred had the judge appeared in court. Whether or not his son received an unusually lenient disposition as a result of Judge Mills's actions is not a determinative factor in our analysis of the level of misconduct. Regardless of the final disposition, judges must be sensitive to the appearance of impropriety inherent in discussing a family member's court case with the judicial officer presiding over the matter behind closed doors and off the record. It leads to suspicions of favoritism and backdoor deals for the select few with connections to the judicial officer hearing the matter.

**(7)** The fact that Ms. Sims and Ms. Peters are subordinate to Judge Mills magnifies the appearance of impropriety and further undermines public confidence in the integrity of the judiciary. Judge Mills maintains he did not take advantage of his judicial position because he was acting in the role of a father, not a judge, and emphasizes that he told Ms. Peters to do what she wanted. However, Ms. Peters testified that she felt pressured to grant Judge Mills's request because he was a judge. It is not surprising that a person in a subordinate position to the judge would feel pressure to comply with a judge's request. For this reason, the canons prohibit a judge from seeking civic or charitable contributions from a subordinate judicial officer or temporary judge, while permitting such solicitation among judges. (Cal. Code Jud. Ethics, canon 4C(3)(d)(i); see Rothman, Cal. Judicial Conduct Handbook, *supra*, § 10.43, p. 557.) As a judge for 16 years, the ethical boundaries between judges and their subordinates should have been apparent to Judge Mills.

In *Platt, supra*, 48 Cal.4th CJP Supp. at pp. 244–246, the judge called a court commissioner, asked her questions about a traffic ticket issued to the judge's godfather, and conveyed information that his godfather was active in the community. The commission noted that even though the facts showed Judge Platt did not ask that any action be taken and that the commissioner was not influenced by the judge's call, it did not mean the commissioner did not perceive the call as an attempt to influence. The commission observed: "The attempt to influence is inherent in the unsolicited telephone call and the ex parte conveyance of positive information about the offender. The judge's failure to explicitly ask the referee to do anything does not change the nature of the communication." (*Id.* at p. 245.)

Judge Mills also suggests that he was simply following the directives of Ms. Sims and Ms. Peters. However, as a judge, he was responsible for ensuring that his son's case was handled no differently than any other matter before the court and that he was not granted procedural shortcuts because of his judicial position, particularly when dealing with those who are subordinate to him.

## III

## DISCIPLINE

**(8)** In determining the appropriate level of discipline, we consider several factors, including the following: number of incidents of misconduct, the seriousness of the misconduct, whether the judge has prior discipline, whether the judge acknowledges and appreciates the impropriety of his actions, the impact of the misconduct on the judicial system, and the judge's reputation for administering his or her duties in a fair, impartial, and dignified manner. (Policy Declarations of Com. on Jud. Performance, policy 7.1 [nonexclusive factors relevant to sanctions]; e.g., *Ross, supra*, 49 Cal.4th CJP Supp. at p. 138.)

Weighing heavily in aggravation is Judge Mills's history of prior discipline. This is not the first time Judge Mills has been disciplined for using his judicial position to bypass proper channels on behalf of his son. In 2011, he received an advisory letter for, after signing a search warrant, allowing his son to accompany a police officer in executing the warrant without going through the ordinary application process for going on a ride-along.

In addition, Judge Mills received an advisory letter in 2008 for improperly conditioning a defendant's release in a misdemeanor probation revocation proceeding on posting bail for the improper purpose of collecting restitution. In 2006, he was publicly admonished for engaging in improper ex parte discussions and for a pattern of making discourteous, sarcastic, and demeaning comments to attorneys and litigants appearing before him. And, in 2001, he received a private admonishment for remarks suggesting a lack of impartiality and attempting to obtain a guilty plea from a defendant despite statements from the defendant indicating he wanted counsel.

Another aggravating factor is Judge Mills's failure to acknowledge or appreciate the impropriety of his actions. At the hearing before the special masters and in his briefs to the commission, he insisted that he did nothing improper. During his oral argument before the commission, Judge Mills stated that, in hindsight, he realizes he should not have met with the pro tempore judge in chambers. However, he immediately followed this acknowledgement with excuses and justifications for his conduct. The judge also deflected questions about the public perception of his actions by questioning Ms. Sims's credibility and recollection of the time events occurred. His presentation before the commission leaves us with no confidence that he appreciates the impropriety of his actions.

**(9)** "A judge's failure to appreciate or admit to the impropriety of his or her acts indicates a lack of capacity to reform." (*Platt, supra*, 48 Cal.4th CJP

Supp. at p. 248; see *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 920–921 [81 Cal.Rptr.2d 58, 968 P.2d 958]; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 866 [264 Cal.Rptr. 100, 782 P.2d 239].) The fact that Judge Mills was advised by the commission in February 2011 that it is improper to use his judicial position to bypass normal procedures for the benefit of a family member makes his failure to recognize the impropriety of his actions in October 2011 all the more troubling. (See *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 301–302; *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 339–340 [45 Cal.Rptr.2d 254, 902 P.2d 272]; *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186, 199 [260 Cal.Rptr. 557, 776 P.2d 259] [failure to respond to prior discipline "evidences a lack of regard for the Commission, [the Supreme Court] and his obligations as a judge"].)

Judge Mills's misconduct is further aggravated by the fact that Ms. Sims and Ms. Peters were his subordinates. The judge's conduct and his subsequent response to the charges evidence a lack of sensitivity to the pressure he implicitly placed on them by virtue of his judicial position. (See *Sarmiento, supra*, No. 191 at p. 7.)

We have already discussed the adverse impact of Judge Mills's conduct on public confidence in the impartiality of the judicial system, which is another important factor in our assessment of the appropriate sanction. In imposing public discipline, we assure the public that using the influence of judicial office to obtain an advantage, no matter how slight, in a legal matter involving a family member or friend is impermissible.

In determining to issue a public admonishment, rather than a higher level of discipline, we take into consideration that Judge Mills did not overtly pressure Ms. Sims or Ms. Peters to facilitate the meeting in chambers and told Ms. Peters to do what she wanted or words to that effect, and the requested disposition was not more lenient than would likely have occurred if the attorney had appeared in open court on behalf of the judge's son.[12] We also consider in mitigation the masters' finding that Judge Mills was acting as

[12] Judge Salvador Sarmiento was censured pursuant to a stipulation in 2012 for communications with a commissioner in nonpublic areas of the courthouse concerning his wife's traffic ticket. While there are factual similarities with the present case, Judge Sarmiento's conduct was more aggravated. He approached the commissioner in the courthouse hallway and followed her into her chambers where he asked her to address his wife's $300 penalty assessment fee and left the ticket on the commissioner's desk. The judge admitted he was seeking to have the commissioner vacate the fine—something that would not necessarily occur through proper channels. Moreover, he returned to the commissioner's chambers later that day and told her nothing had been done on the ticket. The commissioner told the judge she would give him a trial date, but did not vacate the fee.

a concerned parent and the testimony of a number of character witnesses that the judge is hardworking, conscientious, and fair.[13]

Balancing the foregoing factors leads us to the conclusion that a public admonishment is the appropriate sanction.

## IV

## ORDER

Pursuant to the provisions of article VI, section 18 of the California Constitution, we hereby impose this public admonishment.

Commission members Mr. Lawrence J. Simi, Hon. Erica R. Yew, Ms. Mary Lou Aranguren, Anthony P. Capozzi, Esq., Nanci E. Nishimura, Esq., Hon. Ignazio J. Ruvolo, Mr. Richard Simpson, Ms. Maya Dillard Smith, Ms. Sandra Talcott, and Mr. Adam N. Torres voted in favor of all of the findings and conclusions expressed herein and in the foregoing order of a public admonishment. Commission member Hon. Thomas M. Maddock was recused.

[13] The character witnesses testifying on Judge Mills's behalf were a retired Contra Costa County Superior Court judge, a Contra Costa County Superior Court commissioner, the Contra Costa County District Attorney, five private attorneys, and one retired senior deputy district attorney. One of the attorney witnesses was the attorney who participated in ex parte communications with Judge Mills in the matter that resulted in the judge's 2006 public admonishment.

**PUBLIC ADMONISHMENT OF JUDGE RONALD M. SOHIGIAN**

The Commission on Judicial Performance has ordered Judge Ronald M. Sohigian publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Sohigian has been a judge of the Los Angeles County Superior Court since October 1988. Judge Sohigian's current term began in January 2009.[1]

Judge Sohigian treated attorneys in a sarcastic and belittling manner while presiding over proceedings in the civil case *DiBernardo v. Leight* (No. BC365900), as illustrated by the following:

- On April 28, 2011, the attorneys contended that they were not prepared for trial that day as the case had been trailing for trial for about a month and they had been told by another judicial officer that they would get several days of notice as to the start of trial. Judge Sohigian criticized them for being unprepared, and further stated they should have their materials and said, "Don't expect me to swallow that kind of thing. That is just [*sic*] that is preposterous. [¶] I mean, no – no lawyer with any – with any skill at all shows up here and says golly, I was just – I just walked out my office." (R.T. 64:20-24.)

- On April 29, 2011, after attorney Michael E. Leight objected to a question during examination of a witness and the judge overruled his objection, Mr. Leight said, "Your Honor, why is that not hearsay?" Judge Sohigian responded, "I'll explain it to you sometime when you pay tuition." (R.T. 190:13-15.)

- On March 22, 2012, during a colloquy about whether the plaintiff had failed to cite a statutory provision regarding authority to enforce a settlement, Judge Sohigian addressed Mr. Leight in a rude manner as follows:

> THE COURT: Why should he mention it? It's already in the record. Why should he say, by –
>
> MR. LEIGHT: Because he has to notify the other side of the basis of the relief he's seeking.
>
> THE COURT: He made a motion to enforce the settlement or, in the alternative, to have an O.S.C. issued regarding contempt. Does he have to go back and say, by the way, this is the statutory section?

[1] Judge Sohigian retired April 16, 2014. The Notice of Intended Public Admonishment in this matter was issued prior to his retirement.

MR. LEIGHT: Yes.

THE COURT: Particularly you're on the other side of the case.

MR. LEIGHT: Yes. He has to cite Authority.

THE COURT: You're a lawyer of some experience. Does he have – does he have to tell you, by the way, here, give me your finger, let me show you, I'll take you through – Here, right here, see – Does he have to do that? (R.T. 8:5-20.)

- On April 28, 2011, Judge Sohigian appeared to mock Mr. Leight's co-counsel for his role, asking him how long it would take to make his opening statement, "Or are you just going to say he's [Mr. Leight] going to make it, you're not going to do anything?" (R.T. 54:4-7.) The judge questioned each of the lawyers about whether they had exhausted the settlement possibilities, and said: "Now, if I ask that question to you, you're going to say I don't know. Ask Mr. Leight, right?" (R.T. 63:28 – 64:2.)

On February 15, 2013, Judge Sohigian treated plaintiff's counsel in *Avila v. Cervantes* (No. BC480543), in a sarcastic, belittling, and harsh manner, as illustrated by the following remarks. Judge Sohigian accused plaintiff's counsel in *Avila* of handling the case in a cavalier manner and stated at the outset of the hearing, in response to an unopposed request for a continuance, "I feel there's a certain amount of gamesmanship involved in showing up here a month before – pardon me – a trial date." (R.T. 1:20-22.) The judge later said that plaintiff's counsel was "now purporting to be concerned about her [client's pregnancy] condition and so forth, [and] didn't so much as show up [at the post-mediation status conference]." (R.T. 1:24-26.) After plaintiff's counsel argued that defense counsel had appeared and spoke on the plaintiff's behalf at the post-mediation conference, Judge Sohigian responded as follows:

> THE COURT: Was that your understanding? Tell me what provision of law authorizes a lawyer to represent simultaneously conflicting interests. I would be interested in knowing authority on that. Or if you're running through the authority in your head right now, which you might be doing, tell me if you stumble upon in your own mind a massive body of authority that says that that's absolutely prohibited. Indeed, if it occurs, it's a basis for strict disciplinary measures, including such things as disbarment and so forth.

(R.T. 2:24 – 3:5.)

While the judge's references to disbarment and State Bar discipline do not constitute misconduct here, the commission finds the above sarcastic remarks regarding the attorney's knowledge of the law to be a violation of canon 3B(4).

Judge Sohigian's remarks during both of these proceedings were inconsistent with the judge's duty to be patient, dignified, and courteous to those with whom the judge deals in an

official capacity. (Canon 3B(4).) Judge Sohigian stated in his response to the commission that, with respect to party/attorney Michael E. Leight in *DiBernardo v. Leight*, he "intended that the things [he] said to Mr. Leight would curb his disrespectful and provocative behavior and would yet be short of a contempt citation." Even when dealing with difficult litigants and counsel, however, Judge Sohigian was required to comport himself in accordance with the Code of Judicial Ethics. "The public looks to judges to set the tone of judicial proceedings. When a judge mistreats staff, belittles counsel or gives vent to his or her anger or frustration, the audience is not only concerned about the result in the specific matter before the court, but worries that other parties, lawyers, jurors and employees will be subjected to similar mistreatment." (*Inquiry Concerning Judge Bruce Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 312-313.)

Judge Sohigian's conduct in the matters described above was, at a minimum, improper action.

In determining that a public admonishment was appropriate in this matter, the commission considered that Judge Sohigian has been the subject of prior discipline, including discipline for sarcastic and belittling treatment of those who appear before him. Judge Sohigian received a public admonishment in 2007 that addressed, in part, his rude treatment of an attorney. Judge Sohigian also received an advisory letter in 1991 for abusing his authority in sanctioning attorneys.

Commission members Anthony P. Capozzi, Esq., Ms. Mary Lou Aranguren, Nanci E. Nishimura, Esq., Hon. Ignazio J. Ruvolo, Mr. Lawrence J. Simi, Ms. Maya Dillard Smith, and Mr. Adam N. Torres voted to impose a public admonishment. Commission members Ms. Sandra Talcott and Hon. Erica R. Yew voted for a private admonishment. Commission member Mr. Richard Simpson voted to close the matter. Commission member Hon. Thomas M. Maddock did not participate.

Dated: May 13, 2014

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| **IN THE MATTER CONCERNING JUDGE DANIEL J. HEALY** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |
|---|---|

This disciplinary matter concerns Judge Daniel J. Healy, a judge of the Solano County Superior Court. Judge Healy and his attorney, Harlan B. Watkins of Murphy Pearson Bradley & Feeney, appeared before the commission on October 15, 2014, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Healy and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND LEGAL CONCLUSIONS

Judge Healy has been a judge of the Solano County Superior Court since January 2011. His current term began on January 3, 2011.

The commission determined that Judge Healy should be publicly admonished for violating the California Code of Judicial Ethics in multiple family law cases over which he presided in 2012 and 2013.

1. *K.B. v. E.B.*

Judge Healy presided over the family law case *K.B. v. E.B*, in which the dissolution petition had been filed on August 19, 2013.[1] On August 23, 2013, the issues before Judge Healy included allegations that the mother had driven in the middle of the night, while intoxicated, with the parties' small child in the car.

[1] Case names and the identities of certain persons have been redacted to protect the privacy rights of minors.

a. On August 23, after some discussion with the parties regarding the issues, Judge Healy stated that he would recall the case in the afternoon to "get to the bottom of" what had happened. The mother said that she would like a chance to respond to the judge's statements about the case, and Judge Healy said that the parties would get their chance, and stated, "[B]ut I don't think either of you understand the beatdown that is coming, because this child deserves a thousand times better than all of this drama."

The case was recalled that afternoon. Judge Healy stated that he thought the parties were "just rotten":

> Here's what I think. I think that I do not have any evidence in front of me rising to the level of any chronic abuse of anything or rises [*sic*] to a level regarding drugs or alcohol. I just think, to be honest with you, sometimes people are just rotten, and they can't respect other people. Everything's drama. It's like they're trying out for Jersey Shore. You guys just both strike me as rotten. Maybe what I should do is have CPS save your child from both of you because you are both rotten.

Later, after the mother told Judge Healy that she was trying to prove to him that she was not lying, Judge Healy said: "Okay. Why don't you prove to me that you recognize what a train wreck you are, and then maybe we'll be somewhere?" Judge Healy continued to call her a "liar" and stated:

> Everything you have said you have put into doubt because you have been such a liar. So I don't know why you think you deserve anything about [*sic*] a cell door closing behind you.

Near the end of the August 23 proceedings, Judge Healy stated, "[T]he question is how hard do I have to beat you before we get going, and I've been – I know I've been beating you pretty hard here today."

During further proceedings in *K.B. v. E.B.* on August 27, 2013, Judge Healy told the mother's then-attorney that she was "executing the wrong play book" and "ought to be groveling like there is no tomorrow and you ought to be trying to re-boot, create a little time out trying to undo some of the damage your client has done rather than selling her as something other than the total human disaster that she is or at least appears to be so far."

Judge Healy's remarks while presiding over *K.B. v. E.B.* constituted a failure to be patient, dignified, and courteous, in violation of canon 3B(4), which states that a judge "shall be patient, dignified, and courteous to litigants . . . and others with whom the judge deals in an official capacity . . . ."

b. Judge Healy also attempted to influence another judicial officer's handling of an arrest warrant regarding the father in the *K.B. v. E.B.* case and appeared to become embroiled in the case. During the proceedings on August 23, 2013, Judge Healy stated that he had located a criminal file regarding the father on a judicial colleague's desk and reviewed a police report regarding the father's alleged domestic violence against the mother. Judge Healy expressed his opinion to the parties that "the event, even if true, did not rise to the level where the police should have summarily sought an arrest warrant without fully investigating the incident." Judge Healy stated that he would communicate with his judicial colleague "during the lunch hour, but what I'm going to suggest is it's probably not appropriate, based upon all of the facts and circumstance[s] here, that he summarily issue a bench warrant for [the father]'s arrest." Judge Healy stated that "obviously the District Attorney has submitted a complaint and you're going to have to litigate that, but I will try to minimize the blow-back from that and see if you can walk it in, or calendar it, rather than that. I suppose someone may be in contact with you." Judge Healy stated the following to the attorney then appearing for the father: "[Y]ou may want to call my assistant sometime this afternoon and see if we have ascertained a different manner of proceeding with that case."

Later in the case, Judge Healy stated that he had attempted, without success, to influence the handling of this arrest warrant by another judicial officer. In the afternoon, Judge Healy said, "[T]here is a possibility that there will be a warrant for [the father] based on the June-something incident out there, and I'm not sure what's going to happen with all of that." The judge further stated that he "did try to do some things" with the "criminal thing floating around there" about the father, but he was "not sure it was successful." Judge Healy said that the father maintaining custody of the child might be moot depending on law enforcement actions and that he was "not sure what to make of that."

On August 27, 2013, Judge Healy presided over further proceedings in the family law case. After counsel stated that whether the father would be remanded on the arrest warrant was "up to this Court," Judge Healy responded that it was "not up to me" and then described his attempts to influence another judge's decision as to whether to issue the arrest warrant and his questions about whether the mother's report of domestic violence could be trusted:

> I didn't issue the warrant. I actually – through the – just so you know, in full candor, on an ex parte we knew that warrant was sitting on another Judge's desk. I went and told that Judge that I had serious problems with at least a warrant going out. The District Attorney had filed a Complaint. Obviously had to be litigated because based on what I had heard there was incredibly significant questions about [the mother]'s veracity given the serial lying that she had done here on the record on Friday.
>
> So I thought – so now some bonds man's [*sic*] going to make four grand because our system lacked the flexibility to deal with these situations. To a certain extent I think that's unfortunate but I don't have control. I did what I did.

Near the end of the August 27 proceedings, Judge Healy stated that he suspected that there would be a problem with the family law case if the criminal case against the father "goes on for a while. It could go on for a year. I'm going to hope – well, I'm not going to try to solve that problem today."

Judge Healy's attempt to influence another judicial officer's handling of an arrest warrant reflected, or at least created the appearance of, embroilment, particularly in light of his treatment of the mother in *K.B. v. E.B.*, and constituted a failure to uphold the integrity and independence of the judiciary (canon 1), and a failure to act at all times in a manner that promotes respect for the integrity and impartiality of the judiciary (canon 2A).

2. *N.C. v. M.D.C.*

On August 23, 2013, Judge Healy presided over the family law case *N.C. v. M.D.C.* Judge Healy made threatening remarks, in violation of canon 3B(4), when he said, "I guess what I'm wondering is, what are we going to do with the child when both parents are in jail after I put [the father] in jail for failing to follow my court orders about

not despairing [*sic*] the other parent, and I put [the mother] in jail for lying to me?" Judge Healy later stated: "Just so both of you know, I'm only trying to get your attention. I can't unilaterally put people in jail. You're entitled to a hearing. I would have to cite you with contempt, it would be me [*sic*] a couple weeks to put you in jail. But I just want you to be thinking about that question because we may be running out of options here."

3. *R.C. v. M.E.*

On August 27, 2013, Judge Healy presided over a custody motion in the family law case *R.C. v. M.E.* Judge Healy remarked that if the mother "had been smart enough," her son would not have had to go through the process of changing schools. Judge Healy remarked that "[n]ow your son is screwed" because of these problems. Judge Healy's remarks violated canon 3B(4).

4. *K.A. v. S.H.*

On the morning of August 27, 2013, Judge Healy presided over the family law case *K.A. v. S.H.* The father's vulgar and threatening text messages to the mother about child exchanges were at issue, including the statement, "Bitch, trust me, bitch, I'm not having it." Judge Healy told the father that this conduct was unacceptable and then speculated as to what the father was thinking: "I know how I'm going to solve this problem, she's not following court orders so I'm going to talk to her like some ghetto whatever; where did that come from?" Judge Healy expressed his concern that if in the future the children get into conflict, "[t]hey're going to do something stupid and thuggish because their father is stupid and thuggish." After the father offered that his neighbors knew him to be a person who would not allow harm to his children, the judge asked if he talked to his neighbors like he had talked to the mother in the case: "Do you call your neighbors[']] wives bitches and hoes, all that. Is [*sic*] just how you roll in your neighborhood?"

Later in the hearing, Judge Healy made a harsh and threatening remark about remanding the parents to jail and taking away their child when he stated the following after the mother spoke directly to the father: "You don't talk to each other. Can I be honest with you, either one of you are about 60 seconds away from putting you both to

jail and putting you over to 1:30 and calling CPS and finding a better home for your kids." (*Sic.*)

In the afternoon, the case was recalled and Judge Healy stated that at the next hearing the parties could present proof of any improper text messages they had received, that depending on his mood he might cite them with contempt, and that "I can't put [you in] jail that day, but I can appoint a public defender for you and tell you that I'm going to upon a hearing probably put you in jail." Judge Healy said, "[The parties] could be in jail 'till [*sic*] your kids are adults if I'm in the wrong mood the next time I see you."

Judge Healy told the parties that life was too short to let kids be "tortured by rotten parents like you two."

Judge Healy's remarks to and about the parents were undignified and discourteous (canon 3B(4)) and could also be reasonably perceived as reflecting bias or prejudice (canon 3B(5)).

5. *N.D. v. L.F.*

On August 27, 2013, Judge Healy presided over the family law case *N.D. v. L.F.* Judge Healy remarked that the father's claim that he would get a job was "pie in the sky" and that the father was claiming that he would get a job "even though I [in reference to the father] admittedly am morbidly obese and at risk of dying any time . . . ."

Judge Healy's remarks were undignified and discourteous (canon 3B(4)).

6. *A.A. v. R.M.*

On December 17, 2012, Judge Healy presided over the family law case *A.A. v. R.M.* During that hearing, the judge made the following remarks reflecting a lack of courtesy (canon 3B(4)):

> So, just an observation. This is the first time I've seen you, but if you are exposing your daughter to one-fifth of the attitude I'm getting from you right now, you might as well have her start walking the streets as a hooker, because that's the life you're going to subject her to when you treat her like this, when you flash this attitude like this.

Judge Healy's conduct in the matters described above was, at a minimum, improper action.

DISCIPLINE

The commission determined to issue this public admonishment in view of the number of incidents of misconduct, the judge's apparent lack of insight into the impropriety of his treatment of litigants, and the negative impact of the misconduct on the judicial system. (See *Inquiry Concerning Judge Bruce Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 296-300; Policy Declaration 7.1(1)(a), 2(a), 1(h).) Judge Healy made multiple denigrating and undignified comments to family law litigants, most of whom were unrepresented by counsel, in multiple proceedings. And, in one case, he engaged in misconduct reflecting, at a minimum, the appearance of embroilment.

Although at his appearance before the commission Judge Healy acknowledged the impropriety of his conduct, in his response to the preliminary investigation and in his written objections to the notice of intended public admonishment, he consistently defended the specific incidents of misconduct as being appropriate in the context of the cases before him and maintained that he did not violate the canons. He argued that blunt and evocative language is sometimes necessary to compel litigants to gain awareness of their circumstances, the harm that they are causing their children, and the importance of respect and cooperation. The commission disagrees. Referring to litigants as "rotten," "stupid and thuggish," and a "total human disaster," and telling litigants their child "might as well start walking the streets as a hooker," is the antithesis of imparting the importance of respect.

Improper judicial demeanor impacts the fairness of judicial proceedings and respect for the judicial institution, and "[t]he canons' insistence on appropriate judicial demeanor rests on the idea that such demeanor is one of those things that is central to the appearance and reality of fairness and impartiality in judicial proceedings." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 2.46, p. 93.) The commission recognized that the family law cases addressed in this matter were high-conflict and difficult cases. However, the contentious nature of a case, which is not uncommon in

family law, does not relieve a judge from the duty to treat litigants in a dignified, respectful and courteous manner as required by the Code of Judicial Ethics. As the commission previously stated in *Inquiry Concerning Judge Bruce Van Voorhis, supra,* 48 Cal.4th CJP Supp. 312-313:

> The public looks to judges to set the tone of judicial proceedings. When a judge mistreats staff, belittles counsel or gives vent to his or her anger or frustration, the audience is not only concerned about the result in the specific matter before the court, but worries that other parties, lawyers, jurors and employees will be subjected to similar mistreatment.

Remarks such as Judge Healy's are improper even if there is no objection from those on the receiving end, over whom the judge wields vast power. Some of the litigants in fact did voice their objections on the record. The mother in *K.B. v. E.B.* told Judge Healy that she was "not a rotten person." The mother in *A.A. v. R.M.* took exception to Judge Healy's remarks about her child, as reflected in the following:

> Ms. [M]: So, I take kind of offense when you said what you said earlier about our child.
>
> THE COURT: Okay. Well, if you take –
>
> Ms. [M]: She's a very smart and bright child.
>
> THE COURT: Okay. Well, I mean, you can take it however you take it, but we're in here talking about your child and when you flash all this attitude, all I can assume is that when the subject is your child and this is the attitude you're flashing, that it permeates your relationship with her.

These objections to his demeaning characterizations of litigants and their children should have provided notice to the judge that his conduct was improper, in addition to the clear guidance of canon 3B(4) that he shall be dignified and courteous to litigants and others appearing before him.

The commission appreciates that at his appearance before the commission Judge Healy expressed recognition of the impropriety of demeaning litigants. Further, the commission recognizes that Judge Healy's conduct may have been motivated by a desire to help families move forward in a positive direction, and that it appears he took an active

interest in the family law cases before him and in attempting to achieve positive outcomes in those cases. Nonetheless, these goals can and must be accomplished in a manner that comports with the Code of Judicial Ethics.

For the foregoing reasons, the commission determines to issue this public admonishment.

The vote of the commission to impose a public admonishment was ten ayes and zero noes. Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Ms. Mary Lou Aranguren; Hon. Thomas M. Maddock; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Lawrence J. Simi; Mr. Richard Simpson; Ms. Maya Dillard Smith; and Ms. Sandra Talcott voted for a public admonishment. Commission member Mr. Adam N. Torres did not participate.

Dated: November 5, 2014

Honorable Erica R. Yew
Chairperson

# PUBLIC ADMONISHMENT OF JUDGE JOSEPH SCOTT

The Commission on Judicial Performance has ordered Judge Joseph Scott publicly admonished pursuant to article VI, section 18, subdivision (d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge Joseph Scott has been a judge of the San Mateo County Superior Court since 2003. His current term began in January 2011.

On May 24, 2014, at approximately 12:31 a.m., Judge Scott drove his vehicle in an erratic manner on Highway 101 in Redwood City while under the influence of alcohol. After being stopped by law enforcement, the judge submitted to breath tests that showed he had a blood-alcohol level of 0.12 percent. On June 10, 2014, the judge was charged with violations of Vehicle Code section 23152, subdivisions (a) and (b). (Case No. SM393022A.) By letter dated June 12, 2014, Judge Scott reported the charges to the commission, as required by canon 3D(3) of the Code of Judicial Ethics. On September 24, 2014, following a plea of nolo contendere, Judge Scott was convicted in the San Mateo County Superior Court of driving with a blood-alcohol level of 0.08 percent or more, in violation of Vehicle Code section 23152, subdivision (b).

Judge Scott's unlawful action described above evidences a serious disregard of the principles of personal and official conduct embodied in the California Code of Judicial Ethics, including failure to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved (canon 1), and failure to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A). "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges." (Canon 2A advisory committee commentary.) Judge Scott's unlawful conduct was also prejudicial to the administration of justice and brought the judicial office into disrepute within the meaning of article VI, section 18, subdivision (d) of the California Constitution.

Commission members Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Ms. Mary Lou Aranguren; Hon. Thomas M. Maddock; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Lawrence J. Simi; Mr. Richard Simpson; Ms. Maya Dillard Smith; Sandra Talcott and Mr. Adam N. Torres voted to impose a public admonishment.

Dated: December 30, 2014

PUBLIC ADMONISHMENT OF JUDGE JOHN L. FIELDER

The Commission on Judicial Performance has ordered Judge John L. Fielder publicly admonished pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge John L. Fielder has been a judge of the Kern County Superior Court for 33 years. His current term began in January 2013.

As set forth below, the commission found that Judge Fielder engaged in improper conduct when interacting with a member of court administration regarding the reassignment of another judge's courtroom clerk and, on a different occasion, when interacting with an attorney regarding the filing of a motion and supporting papers with the court.

I. On April 3, 2013, Judge Fielder and Judge Cory Woodward met with Deputy Chief Court Executive Officer for Court Operations Marie Castaneda regarding court administration's decision to reassign Judge Woodward's courtroom clerk. Judge Fielder concedes that, during the meeting, he improperly displayed considerable irritation toward the court administrator and engaged in a discussion that was too aggressive, too heavy-handed, and could have been intimidating to court administration. He acknowledges that he was unnecessarily forceful in his statements and that his conduct was inappropriate.

During the meeting, Judge Fielder accused court administration of being "in violation" of court protocol for moving a clerk from a judge's courtroom and stated that court administration should not be "messing around" with judges' courtrooms. He stated words to the effect that before they would allow court administration to move courtroom clerks around, the judges "would get together and fire" the court executive officer. Judge Fielder acknowledges that making a statement to an administrative officer about firing that individual's supervising administrator was "out of line" for a judicial officer.

Judge Fielder also spoke on behalf of Judge Woodward's clerk, stating that she "was getting the shaft," that there was "no significant or valid reason" to move the clerk, that the complaint about the clerk "should be something more significant," and that if the complaint was coming from another clerk, that clerk was the one who should be moved. Judge Fielder acknowledges that court administration is ultimately responsible for decisions that are made about staffing. As noted in the California Judicial Conduct Handbook:

> Interference with discipline or other actions by administrators. It is not a judge's role to become the advocate for staff in their interactions with administrators. A staff member who is in conflict with administrators may seek your support and intervention. It is not inappropriate to hear the staff member out, but it is a mistake to promise help or to be perceived as actively intervening.

(Rothman, Cal. Judicial Conduct Handbook (2007 3d ed.) § 6.27, p. 280.)

The commission found that Judge Fielder's conduct violated canon 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), canon 2B(1) (a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge), canon 2B(2) (a judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the personal interests of the judge or others), canon 3B(4) (a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity), and canon 3C(2) (a judge shall maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business).

II. On May 28, 2013, Judge Cory Woodward presided over a trial in *Erin E. Posey v. Jerrold C. Posey*. Attorney Michael Kilpatrick represented Ms. Posey. Judge Woodward ruled against Ms. Posey on June 12, 2013. On July 1, 2013, Mr. Kilpatrick filed a motion for a new trial, which was set for hearing on August 28, 2013.

On July 5, 2013, Mr. Kilpatrick's associate Andrew Smith presented to Judge Fielder on Mr. Kilpatrick's behalf an ex parte application for a temporary stay of enforcement of Judge Woodward's June 12, 2013 order pending the hearing on Mr. Kilpatrick's motion for new trial. Because the application for a stay was being made ex parte, Judge Fielder's approval as supervising judge was required before the clerk would file and set the application for hearing. Mr. Kilpatrick's application included a statement of disqualification of Judge Woodward for cause pursuant to Code of Civil Procedure section 170.1. The ex parte application and statement of disqualification presented by Mr. Smith were accompanied by a declaration signed by Mr. Kilpatrick that included statements questioning Judge Woodward's ability to hear the case, including references to recent "allegations of perhaps substantial inappropriate behavior and/or misconduct between Judge Woodward and his staff" resulting in "tremendous pressure placed upon Judge Woodward, Judge Woodward's family and other issues." The declaration also contained a statement that Judge Woodward was to have been in the Metropolitan District hearing family matters for 2013 and 2014, but that "he has now been quietly swept aside and returned to the East Kern Branch."

After Judge Fielder reviewed the ex parte application and accompanying declaration presented by Mr. Smith, he called Mr. Smith into his chambers and told him, among other things, that Mr. Kilpatrick's declaration about Judge Woodward and the court should be toned down before it was filed. Judge Fielder concedes that he was concerned that "the flamboyant statements" in the declaration "unnecessarily implicated our court administration in improper acts and cast aspersions on Judge Woodward's family." He believed the statement that the court was "sweeping aside" Judge Woodward was "an inaccurate overstatement" and that the references to Judge Woodward's family were "mean-spirited and unnecessary." He says he may have asked the attorney if he thought Judge Woodward's family "deserved this kind of treatment in a public document." Judge Fielder told the commission that he did not think he said to Mr. Smith that he would not allow the documents to be filed. As a result of Judge Fielder's statements to Mr. Smith, however, Mr. Smith concluded that the declaration needed to be modified before Judge Fielder would permit it to be filed. Mr. Smith returned to his office,

modified the declaration, and resubmitted it the same day. Judge Fielder acknowledges that Mr. Smith might have taken the judge's statements as not allowing him to file the documents unless the content was changed.

The only issue before Judge Fielder was whether a request for stay of enforcement of judgment could be filed as an ex parte application. The merits of the request for stay of enforcement of judgment and the disqualification of Judge Woodward for cause were not before Judge Fielder for decision, as evidenced by his concession to the commission that when the revised papers were presented later that day, they were filed "without review or comment."

The commission concluded that Judge Fielder abused his authority by summoning an attorney into his chambers and suggesting in any way that the declaration not be filed as presented due to his stated concerns about the court's reputation and Judge Woodward's family.

The commission found that Judge Fielder's actions violated canon 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), canon 2B(1) (a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge), and canon 2B(2) (a judge shall not lend the prestige of judicial office or use the judicial title in any manner, including any oral or written communication, to advance the personal interests of the judge or others).

The commission found that Judge Fielder's conduct was, at a minimum, improper action.

Judge Fielder's prior discipline was a factor in determining the level of discipline. In 1992, the judge received an advisory letter for accepting guilty pleas from an in-custody defendant who had entered not guilty pleas on three charges the previous day, without inquiring whether some action had been taken the previous day regarding affording counsel for the defendant on those charges. In 1994, the judge received an advisory letter for treating a witness in an unduly harsh and intimidating manner. In 1997, the judge received a private admonishment for conduct that appeared to be coercive in connection with guilty and no contest pleas, failing to advise unrepresented defendants of their right to counsel at arraignment, and reading police reports without the consent of an unrepresented defendant.

Commission members Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Ms. Mary Lou Aranguren; Hon. Thomas M. Maddock; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Lawrence J. Simi; Mr. Richard Simpson; Ms. Maya Dillard Smith; Ms. Sandra Talcott and Mr. Adam N. Torres voted to impose a public admonishment.

Dated: May 14, 2015

# PUBLIC ADMONISHMENT OF JUDGE DALE A. REINHOLTSEN

The Commission on Judicial Performance ordered Judge Dale A. Reinholtsen publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge Reinholtsen has been a judge of the Humboldt County Superior Court since 1997. His current term began in 2013. Judge Reinholtsen was a judge of the Humboldt County Municipal Court in 1996 and 1997.

As set forth below, the commission found that Judge Reinholtsen engaged in improper conduct when he signed and submitted false salary affidavits on seven occasions, received his salary for judicial office in violation of law on 13 occasions, failed to act timely on over 20 matters that had been assigned to him, and failed to prepare a case progression plan in a case he exempted from meeting certain disposition time goals.

1. On or about December 27, 2011; February 27 and June 23, 2012; January 30, April 8, and August 13, 2013; and July 14, 2014, Judge Reinholtsen signed and submitted salary affidavits pursuant to Government Code section 68210 in which the judge falsely declared that no cause remained pending and undetermined that had been submitted to him for decision for the period of 90 days prior to the effective date of each affidavit. The commission found that the judge's conduct violated his duties under canon 2A to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary.

2. On or about December 30, 2011; February 29, June 29, August 20, September 5, November 28, and December 19, 2012; January 31, February 27, and April 9, 2013; and February 25, July 15, and September 9, 2014, Judge Reinholtsen received his salary for judicial office in violation of law, while at least one cause before him was pending and undetermined for 90 days or more after it had been submitted for decision.

The California Constitution provides that "[a] judge of a court of record may not receive the salary for the judicial office held by the judge while *any cause* before the judge remains pending and undetermined for 90 days after it has been submitted for decision." (Cal. Const., art. VI, § 19, italics added.) The Legislature followed this command with an implementing statute, Government Code section 68210, which provides that "[n]o judge of a court of record shall receive his salary unless he shall make and subscribe before an officer entitled to administer oaths, an affidavit stating that *no cause before him remains pending and undetermined for 90 days after it has been submitted for decision.*" (Italics added.) The withheld salary is not forfeited; once all overdue matters are completed, the judge is again entitled to receive his or her salary, including those amounts that were not paid during the period of delay. (See *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 230, citing *Hassanally v. Firestone* (1996) 51 Cal.App.4th 1241, 1244-1245.)

The commission found that the judge's conduct violated his duties under canon 2A to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary.

3. When he was presiding judge of the Humboldt County Superior Court in 2013 and 2014, Judge Reinholtsen failed to decide each of the following matters within 90 days of the date that he took each matter under submission:

(a) A motion for an order determining good faith settlement in *Nicholson, et al. v. Ghilarducci, et al.*, No. DR110125, decided on or about May 1, 2013, at least 93 days after the judge took it under submission;

(b) The case of *Pec, et al. v. Brackenbury, et al.*, No. DR080769, decided on or about May 23, 2013, at least 111 days after the judge took it under submission;

(c) The case of *County of Humboldt v. McKee, et al.*, No. DR020825, decided on June 7, 2013, 98 days after the judge took it under submission;

(d) A motion for summary judgment in *Carr v. Kohl's Department Stores, Inc., et al.*, No. DR120088, decided on or about July 5, 2013, at least 151 days after the judge took it under submission;

(e) A motion for stay of writ of execution pending appeal in *Frank, et al. v. Keating*, No. CV120559, decided on or about July 16, 2013, at least 116 days after the judge took it under submission;

(f) The objections to the trustee's account and report in *Matter of Bruce Eldon Fraser Trust*, No. PR100259, decided on or about August 15, 2013, approximately 209 days after the judge took the matter under submission;

(g) A motion to quash a subpoena duces tecum in *People v. Young*, No. CR1301738, decided on or about October 31, 2013, at least 113 days after the judge took it under submission;

(h) The plaintiffs' motion for attorney's fees in *Pec, et al. v. Brackenbury, et al.*, No. DR080769, decided on November 8, 2013, 123 days after the judge took it under submission;

(i) A motion for summary judgment or summary adjudication in *Tsurai Ancestral Society v. Pennisi, et al.*, No. DR100981, decided on or about December 17, 2013, at least 120 days after the judge took it under submission;

(j) A motion to compel and a motion to strike in *Nicholson, et al. v. Ghilarducci, et al.*, No. DR110125, decided on or about December 31, 2013, at least 99 days after the judge took the motions under submission;

(k) A motion for leave to re-file expunged lis pendens in *City of Eureka, et al. v. Squires, et al.*, No. DR110040, decided on January 3, 2014, 102 days after the judge took it under submission;

(l) Two motions to compel responses to discovery requests in *Viadro v. Ghilarducci, et al.*, No. DR091101, decided on March 25, 2014, 127 days after the judge took the motions under submission;

(m) A motion to tax costs in *County of Humboldt v. McKee, et al.*, No. DR020825, decided on or about March 26, 2014, at least 128 days after the judge took it under submission;

(n) A matter in a family law case (No. FL110603), decided on or about July 16, 2014, at least 194 days after the judge took it under submission;

(o) A joint motion to compel discovery in *People v. Pratts, et al.*, Nos. CR1205594 and CR1303269, decided on July 29, 2014, 133 days after the judge took it under submission;

(p) A motion for reconsideration of an order approving the payment of a portion of the fees and costs sought by the receiver in *City of Eureka, et al. v. Squires, et al.*, No. DR110040, decided on or about September 8, 2014, at least 189 days after the judge took it under submission;

(q) A motion to quash a subpoena duces tecum in *People v. Warren*, No. CR1301240, decided on or about September 15, 2014, at least 159 days after the judge took it under submission; and

(r) A motion to terminate probation in *People v. Leahy*, No. 92CR0062CS, decided on or about September 15, 2014, at least 154 days after the judge took it under submission.

As presiding judge, Judge Reinholtsen had the duty to "ensure that no cause under submission remains undecided and pending for longer than 90 days." (Cal. Rules of Court, rule 10.603(c)(3).) The commission found that the judge's failure to ensure that the above matters were decided within 90 days violated the judge's duty under canon 2A to respect and comply with the law, which includes court rules.

The commission also found that Judge Reinholtsen violated canon 3B(8), which requires judges to dispose of all judicial matters promptly and efficiently. In *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, the California Supreme Court stated that Government Code 68210 and article VI, section 19 of the California Constitution, quoted above, "reflect the judgment of the Legislature and the electorate that this period [90 days] affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases." (*Id*. at p. 477, fn. 4.)

The commission recognizes that a judge's workload may make prompt decision of all matters submitted to the judge impossible. This is particularly true in counties in which the average workload exceeds the statewide average, which appears to be the case in Humboldt County. However, at the time each of the above matters was submitted for decision, Judge Reinholtsen was the court's presiding judge. As presiding judge, Judge Reinholtsen had the authority to "[a]pportion the business of the court, including assigning and reassigning cases to departments…." (Cal. Rules of Court, rule 10.603(b)(1)(B).) He also had the duty to "[s]upervise the court's calendar, apportion

the business of the court among the several departments of the court as equally as possible," and "[r]eassign cases between departments as convenience or necessity requires…." (*Id*., rule 10.603(c)(1)(C)-(D).) The commission found that since Judge Reinholtsen had the ability to assign and reassign cases and to arrange assistance to ensure that matters were timely decided in 2013 and 2014, he cannot be excused from the duty to decide matters within 90 days during that period.

4. The commission also found that Judge Reinholtsen violated his duty under canon 3B(8) to dispose of the following judicial matters promptly and efficiently, even though they were no longer "pending and undetermined" for purposes of California Constitution, article VI, section 19 and Government Code section 68210:

(a) On August 24, 2012, in *DeMars v. Hillman*, No. CP120167, Judge Reinholtsen found that the respondent had committed financial abuse of an elder and imposed conduct orders on the respondent. On September 10, 2012, petitioner's counsel submitted to the court a proposed "Judgment for Financial Elder Abuse Restraining Order; Damages; Costs of Court; Costs of Agent; and For Attorney's Fees." On July 1, 2013, petitioner's counsel wrote a letter to the court, stating that he had submitted a judgment in September 2012 but had heard nothing to date. Counsel enclosed the previously submitted judgment and cover letter to the court. Judge Reinholtsen did not sign a judgment until on or about October 3, 2014, over two years after the proposed judgment was initially submitted, and shortly after the commission notified the judge of the delay.

(b) On August 16, 2013, the court filed Judge Reinholtsen's tentative decision in *Matter of Bruce Eldon Fraser Trust*, No. PR100259. The tentative decision stated that any objections to it needed to be filed by September 20, 2013. The trustee filed his objections on September 16, 2013, and the petitioner filed a reply on September 20, 2013. On March 3, 2014, petitioner's counsel wrote to Judge Reinholtsen "RE: Request for Final Decision." Counsel enclosed the tentative decision, noted that objections to it had been filed and responded to, and inquired as to whether anything further was needed to "help facilitate a final decision in this matter." The judge did not issue a statement of decision until April 4, 2014, approximately 6½ months after briefing was completed.

(c) On November 8, 2013, in *Pec, et al. v. Brackenbury, et al.*, No. DR080769, Judge Reinholtsen issued an order asking the plaintiffs to submit a proposed judgment. On November 13, 2013, plaintiffs' counsel submitted a proposed "Judgment (Amended After Hearing)" and a cover letter addressed to the judge. The proposed judgment was the same as one that had been submitted by counsel on June 6, 2013, with the amount of attorney's fees filled in pursuant to the judge's November 8 order. The cover letter referenced and attached the proposed judgment submitted on June 6, 2013. On March 6, 2014, plaintiffs' counsel wrote to Judge Reinholtsen to "seek guidance on the status of the proposed judgment…." On March 18, 2014, the plaintiffs filed a "Motion re: Issuance of Judgment," asking the court to execute the judgment submitted on June 6, 2013, and resubmitted on November 13, 2013. Judge Reinholtsen did not sign a judgment until April 4, 2014, nearly five months after the proposed amended judgment was submitted.

5. On November 18, 2011, Judge Reinholtsen ordered that the consolidated cases of *Stewart v. Parris, et al.*, No. DR081020, *In re Estate of Lean*, No. PR090073, and *In re Estate of Stewart*, No. PR090102, involved circumstances that may prevent the court and parties from meeting the goals and deadlines imposed by the Trial Court Delay Reduction Act, and that the

management goals for the cases shall be defined by California Rules of Court, rule 3.714(c). However, Judge Reinholtsen failed to establish a case progression plan as is required by rule 3.714(c)(2).

California Rules of Court, rule 3.713(b) provides that the goal of the court is to "manage general civil cases from filing to disposition as provided under standard 2.2 of the California Standards of Judicial Administration." Standard 2.2(f) provides that the goal of each trial court should be to manage general civil cases, except those exempt, so that they are disposed of within 24 months. If the court exempts a case from the case disposition time goals, as Judge Reinholtsen did here on November 18, 2011, "the court must establish a case progression plan and monitor the case to ensure timely disposition consistent with the exceptional circumstances, with the goal of disposing of the case within three years." (Cal. Rules of Court, rule 3.714(c)(2).) On December 19, 2011, counsel for intervenor James Lewis Taylor wrote to Judge Reinholtsen requesting that her office be provided with the case progression plan. By failing to issue the required case progression plan, the judge violated his duties under canons 3B(1) and 3B(8) to dispose of all judicial matters promptly and efficiently and to hear and decide all matters assigned to him, except those in which he is disqualified.

The commission concluded that the judge's conduct, as described herein, constituted at a minimum improper action.

In aggravation, Judge Reinholtsen received an advisory letter in 2002 for conduct that included a nearly one-year delay in processing a complaint about a court commissioner.

In determining to issue a public admonishment, the commission took into account the fact that on many occasions, Judge Reinholtsen delayed signing salary affidavits while he had matters under submission for more than 90 days. The judge also appears to have made efforts to avoid similar misconduct in the future.

Commission members Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Ms. Mary Lou Aranguren; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Hon. Ignazio J. Ruvolo; Mr. Lawrence J. Simi; Mr. Richard Simpson; Ms. Sandra Talcott; and Mr. Adam N. Torres voted to impose a public admonishment. Commission member Nanci E. Nishimura, Esq. did not participate.

Dated: September 3, 2015

PUBLIC ADMONISHMENT OF JUDGE CHRISTOPHER G. WILSON

The Commission on Judicial Performance ordered Judge Christopher G. Wilson publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Wilson has been a judge of the Humboldt County Superior Court since 1999. His current term began in 2011.

As set forth below, the commission found that Judge Wilson engaged in improper conduct when he signed and submitted false salary affidavits on eight occasions and received his salary for judicial office in violation of law on six occasions.

1. On April 29, 2011, in *Certain Underwriters at Lloyd's of London, et al. v. Simpson Timber Company, et al.*, No. DR100160, Judge Wilson heard argument on the defendant's motion to stay or dismiss and took the motion under submission. The judge did not decide the motion until he denied it in a ruling that was filed on August 5, 2011, 98 days after the motion was submitted.

On August 3, 2011, Judge Wilson signed a salary affidavit in which he falsely declared that no cause remained pending and undetermined that had been submitted to him for decision for the period of 90 days prior to August 1, 2011, even though the motion to stay or dismiss in this case was pending and undetermined for 94 days on August 1, 2011.

2. On April 12, 2013, Judge Wilson took the case of *Cynthia Harcharik v. James Harcharik*, No. FL120079, under submission when each side filed post-trial briefs. The judge's list of submitted matters dated August 1, 2013, reflects that this case was submitted on April 12, 2013, and remained undecided on August 1, 2013. The judge did not decide the case until the statement of decision was filed on August 13, 2013, 123 days after the case was taken under submission.

On August 2, 2013, Judge Wilson signed a salary affidavit in which he falsely declared that no cause remained pending and undetermined that had been submitted to him for decision for the period of 90 days prior to August 1, 2013, even though this case was pending and undetermined for 111 days on August 1, 2013. On or before August 9, 2013, Judge Wilson received his salary for judicial office in violation of law, while this matter was pending and undetermined for 90 days or more after it had been submitted for decision.

3. On June 7, 2013, in *Jack Crlenjack v. Humboldt Land Title Company*, No. DR110599, Judge Wilson heard argument on the plaintiff's Motion to Add Back Causes of Action to the Third Amended Complaint and took the motion under submission. The judge sent his completed ruling to his judicial assistant on October 7, 2013. The ruling was processed and filed on October 10, 2013, 125 days after the judge took the motion under submission.

On October 4, 2013, Judge Wilson signed and submitted a salary affidavit in which he falsely declared that no cause remained pending and undetermined that had been submitted to

him for decision for the period of 90 days prior to October 1, 2013, even though this case was pending and undetermined for 116 days on October 1, 2013. On or before October 7, 2013, Judge Wilson received his salary for judicial office in violation of law, while this matter was pending and undetermined for 90 days or more after it had been submitted for decision.

4. On August 30, 2013, in *Certain Underwriters at Lloyd's of London, et al. v. Simpson Timber Company, et al.*, No. DR100160, Judge Wilson presided over a hearing on a motion for summary judgment and/or adjudication and took the motion under submission. The judge did not decide the motion until his ruling was filed on December 6, 2013, 98 days after he took the motion under submission.

On November 26, 2013, Judge Wilson signed a salary affidavit in which he falsely declared that no cause remained pending and undetermined that had been submitted to him for decision for the period of 90 days prior to December 1, 2013, even though the motion for summary judgment and/or adjudication in this case was pending and undetermined for 93 days on December 1, 2013.

5. On April 15, 2014, in *Janet Battaglieri v. Donald A. Battaglieri*, No. FL050322, Judge Wilson presided over a hearing on a request for an order to determine support arrearages and took the matter under submission. The judge did not issue his ruling until August 4, 2014, 111 days after the matter was submitted.

On July 30, 2014, Judge Wilson signed a salary affidavit in which he falsely declared that no cause remained pending and undetermined that had been submitted to him for decision for the period of 90 days prior to August 1, 2014, even though the above matter was pending and undetermined for 108 days on August 1, 2014. As a result, on August 1, 2014, Judge Wilson received his salary for judicial office in violation of law.

6. On May 23, 2014, in *Laura Lewis v. Jeffrey Lewis*, No. FL130332, Judge Wilson presided over a hearing on a motion, a demurrer, and multiple requests for orders, and took the matters under submission. The judge's lists of submitted matters dated August 7 and September 4, 2014, reflect that at least three matters in this case were submitted on May 23, 2014, and remained undecided on August 7 and September 4, 2014. The judge did not issue his rulings until September 5, 2014, 105 days after the matters were submitted.

On May 27, 2014, in *Kara Clower v. Justin Natividad*, No. FL130224, Judge Wilson presided over a hearing on a request for an order regarding child support and took the matter under submission. The judge's list of submitted matters dated August 7, 2014, reflects that this matter was submitted on May 27, 2014, and remained undecided on August 7, 2014. The judge did not issue a decision until September 2, 2014, 98 days after the matter was submitted.

On August 28, 2014, Judge Wilson signed a salary affidavit in which he falsely declared that no cause remained pending and undetermined that had been submitted to him for decision for the period of 90 days prior to September 1, 2014, even though the above matters were pending and undetermined for over 90 days on September 1, 2014. As a result, on August 29, 2014, Judge Wilson received his salary for judicial office in violation of law.

7. On July 1, 2014, in *County of Humboldt v. Frederick Breckenridge*, No. FS100378, Judge Wilson presided over a hearing on an order to show cause and three requests for orders, and took the matters under submission. One of the requests for orders concerned child custody and visitation. The judge's lists of submitted matters dated August 7, September 4, and October 3, 2014, reflect that at least one matter in this case was submitted on July 1, 2014, and remained undecided on August 7, September 4, and October 3, 2014. The judge did not decide the matters until his ruling was filed on November 3, 2014, 125 days after the matters were submitted.

On October 6, 2014, Judge Wilson signed a salary affidavit in which he falsely declared that no cause remained pending and undetermined that had been submitted to him for decision for the period of 90 days prior to October 1, 2014, even though the above matters in this case were pending and undetermined for 92 days on October 1, 2014. As a result, on October 7, 2014, Judge Wilson received his salary for judicial office in violation of law.

In addition, on October 29, 2014, Judge Wilson signed a salary affidavit in which he falsely declared that no cause remained pending and undetermined that had been submitted to him for decision for the period of 90 days prior to November 1, 2014, even though the above matters in this case were pending and undetermined for 123 days on November 1, 2014. As a result, on October 30, 2014, Judge Wilson received his salary for judicial office in violation of law.

The California Constitution provides that "[a] judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." (Cal. Const., art. VI, § 19.) The Legislature followed this command with an implementing statute, Government Code section 68210, which provides that "[n]o judge of a court of record shall receive his salary unless he shall make and subscribe before an officer entitled to administer oaths, an affidavit stating that no cause before him remains pending and undetermined for 90 days after it has been submitted for decision." The withheld salary is not forfeited; once all overdue matters are completed, the judge is again entitled to receive his or her salary, including those amounts that were not paid during the period of delay. (See *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 230, citing *Hassanally v. Firestone* (1996) 51 Cal.App.4th 1241, 1244-1245.)

In *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, the California Supreme Court stated that the Government Code section and constitutional provision "reflect the judgment of the Legislature and the electorate that this period [90 days] affords a reasonable time within which to expect a trial judge to carry out the basic responsibility of a judge to decide cases." (*Id.* at p. 477, fn. 4, citation omitted.) "When, with 'proper application,' a judge would be able to decide matters pending before him within 90 days of their submission for decision, but does not do so, the failure to perform is a basis for" discipline. (*Id.* at p. 482.) A judge's workload may make prompt decision of all matters submitted to the judge impossible, particularly in counties like Humboldt where the average workload appears to exceed the statewide average. However, that does not justify the execution of false salary affidavits or the unlawful receipt of salary for judicial office.

The commission found that the judge's conduct violated his duties under canon 2A to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary.

The commission concluded that the judge's conduct, as described herein, constituted at a minimum improper action.

In aggravation, Judge Wilson received a private admonishment in 2007 for deciding matters in seven cases between 168 and 277 days after they were taken under submission, signing three false salary affidavits, and failing to disclose in criminal cases his dispute and ongoing negotiations with the district attorney over disclosure of his salary affidavits and pay records.

Commission members Hon. Erica R. Yew; Ms. Mary Lou Aranguren; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Richard Simpson; Ms. Sandra Talcott; and Mr. Adam N. Torres voted for the Notice of Intended Public Admonishment. Commission member Anthony P. Capozzi, Esq., would have instituted formal proceedings.

Dated: January 22, 2016

# PUBLIC ADMONISHMENT OF JUDGE JOSEPH E. BERGERON

The Commission on Judicial Performance ordered Judge Joseph E. Bergeron publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge Joseph E. Bergeron has been a judge of the San Mateo County Superior Court for 18 years. His current term began in January 2015.

The commission found that, despite having been warned by the court about his behavior, Judge Bergeron treated certain women at court inappropriately, and thereby failed to maintain high standards of conduct, to act in a manner that promotes public confidence in the judiciary, and to be patient, dignified and courteous to those with whom he deals in an official capacity, as follows:

1. On August 28, 2014, a courtroom clerk was assigned to work in Judge Bergeron's courtroom. She was not regularly assigned to his courtroom. Judge Bergeron presided over two specially set criminal matters. After the first matter concluded, the clerk stood up to retrieve the file from the bench where Judge Bergeron was presiding. He asked the clerk whether she played baseball and, before she could respond, tossed a crumpled calendar at her, which hit her in the chest and fell to the floor. The clerk, who was taken aback, responded, "I guess not." After the second matter concluded, the judge again tossed a crumpled calendar at the clerk, which hit her in the chest and fell to the floor. Judge Bergeron acknowledges that his actions made the clerk feel angry and uncomfortable and that they were discourteous and undignified.

2. On October 7, 2014, a different courtroom clerk was assigned to work in Judge Bergeron's department. She was not regularly assigned to his courtroom. She arrived at his courtroom at 8:00 a.m. Judge Bergeron had not yet arrived at court. A jury panel was scheduled to arrive at 9:00 a.m. or 9:15 a.m. At some point that morning, the judge telephoned the clerk's station while the clerk was on the telephone regarding the jury. He left a voicemail message stating that he did not know who his clerk would be that day, that he would arrive at court between 9:30 a.m. and 9:45 a.m., and that the jurors should not be sent to his courtroom. In his voicemail message, he asked the clerk to call him back, but because he did not leave a telephone number in his voicemail message, the clerk did not call him back. When Judge Bergeron arrived at court, he called the clerk's supervisor from his chambers and complained about the clerk in a very stern, very loud voice, yelling words to the effect of, "She didn't call back. She didn't even pick up the message. You are putting people in here who can't follow instructions." The judge's complaints about the clerk were so loud that she and others in the courtroom, but not jurors, heard them. Judge Bergeron acknowledges that he raised his voice and overreacted to the situation.

3. On December 18, 2014, Judge Bergeron was presiding over the in-custody pretrial calendar in a fourth floor courtroom that was not his regular courtroom. A female deputy district attorney came in to the department's conference room to pretry a criminal matter, joining another deputy district attorney, who had a cup of coffee with her. As the female deputy district attorney

was leaving, Judge Bergeron asked her if her office was across the hall. When she said it was, the judge inquired about the availability of coffee there in a manner that conveyed that he would like her to bring him coffee; the facts about how he inquired, including the point at which he handed her his empty coffee mug, are in dispute. She responded by asking the judge, in a sarcastic manner intended to convey the impropriety of his request, what kind of coffee he would like and whether he would like cream and sugar. He responded, "I'll make it easy for you" and said he would take his coffee black. As she was leaving, he said, "If I had cash [or money], I'd give you a tip." She returned with his cup of coffee and said, again intending to convey with sarcasm the impropriety of his request, "Here is your coffee. Is there anything else I can do for you, Your Honor? Can I iron your shirts?" The judge remarked, "Well, at noon if it's still raining outside I can give you my keys, and you can go get my car." She responded, again sarcastically, "That may be a man's job," and left.

The commission found that the judge's conduct violated canon 1 of the Code of Judicial Ethics (judges shall personally observe high standards of conduct and uphold the integrity of the judiciary), canon 2A (judges shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and canon 3B(4) (judges shall be patient, dignified and courteous to those with whom they deal in an official capacity).

Judge Bergeron's conduct as described above was, at a minimum, improper action.

In determining to impose public discipline in this matter, the commission took into account the following aggravating factors:

First, in October 2013, less than one year before the August 2014 incident, Judge Bergeron was informed by the court's presiding judge and the court executive officer that six female court employees had complained that he treated them in a rude, abrasive and condescending manner. They told him that it was imperative that he alter his behavior and prevent future complaints.

Second, in April 2014, four months before the August 2014 incident, Judge Bergeron received a private admonishment from the commission for embroilment and abuse of authority. An attorney in a matter pending before him had come to his courtroom and had an encounter with his clerk, the facts of which were disputed. Among other things, the clerk alleged that the attorney grabbed her arm. Judge Bergeron summoned the attorney to a proceeding to address the attorney's actions and conducted that proceeding without having jurisdiction to do so, failed to advise the attorney of the nature of the proceeding or of his rights, relied on the unsworn testimony of a third party without affording the attorney the opportunity to be heard, questioned the attorney and asked him if he wanted to testify, and asserted that the attorney had committed a crime while the incident was still under investigation by law enforcement. The commission found that Judge Bergeron's actions violated canon 1 (judges shall uphold the integrity of the judiciary and personally observe high standards of conduct) and canon 2A (judges shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). Further, in December 2004, Judge Bergeron received an advisory letter for violating canon 3B(7)'s prohibition against ex parte communications by failing to place on the record prior to meeting with deliberating jurors a stipulation reflecting counsel's consent to his meeting with

jurors and for meeting with jurors after counsel objected to some of the judge's prior meetings with jurors and stated that all communication with the jury should be made in open court.

Commission members Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Ms. Mary Lou Aranguren; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Dr. Michael A. Moodian,; Nancy E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Mr. Richard Simpson; Ms. Sandra Talcott; and Mr. Adam N. Torres voted to impose a public admonishment.

Dated: January 25, 2016

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| IN THE MATTER CONCERNING JUDGE HENRY J. WALSH | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |
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This disciplinary matter concerns Judge Henry J. Walsh, a judge of the Ventura County Superior Court. Judge Walsh and his attorney, Edith R. Matthai, appeared before the commission on January 27, 2016, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Walsh and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

## STATEMENT OF FACTS AND CONCLUSIONS

Judge Walsh has been a judge of the Ventura County Superior Court since 1998. His current term began in 2013.

Judge Walsh was in a contested reelection in 2012 and received campaign contributions from many individuals, including attorneys with cases before the judge. As set forth below, the commission determined that Judge Walsh engaged in a pattern of failing to disclose the campaign contributions of attorneys who appeared before him after the election.

During his campaign for reelection, Judge Walsh received contributions of $100 or more from more than 150 attorneys. Some of the attorneys made their first contributions after the June 5, 2012 election, when Judge Walsh was reelected.

In 2010, effective January 1, 2011, subdivision (a)(9)(C) was added to Code of Civil Procedure section 170.1 to require judges to disclose campaign contributions of $100 or more. This requirement is intended to ensure impartiality and to promote public confidence in the impartiality of an elected judiciary by providing parties and lawyers

with information about campaign contributions. Canon 3E of the Code of Judicial Ethics provides for the manner of disclosure and, in 2012, required judges to disclose on the record "information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification." Regarding the duration of the duty to disclose, a formal ethics opinion issued by the California Judges Association in 1999 and the California Judicial Conduct Handbook, third edition published in 2007, advised judges to disclose campaign contributions from attorneys of $100 or more for a minimum of two years. (Cal. Judges Association, Opinion No. 48, pp. 4-6 (1999); Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 7.56, p. 364.) Canon 3E was amended effective January 2013 to expressly require disclosure of campaign contributions for two years after a candidate takes the oath of office, or for two years after the date of the contribution, whichever is later. (Canon 3E(2)(b)(iii).)

When attorneys who contributed to Judge Walsh's campaign committee, either before or after the election, appeared before him after the election, Judge Walsh did not fulfill his duty to disclose the campaign contributions of those attorneys when they appeared before him.

An example of this pattern is the case of *Randall S. Richman v. Mark Hartley*, No. 56-2011-00401599-CU-BC-VTA, which was pending before Judge Walsh between August 2011 and September 2014. Among the matters litigated in 2012 was a summary judgment motion filed by defendant Mark Hartley, which Judge Walsh granted in August 2012.

Judge Walsh received campaign contributions of more than $100 from the attorneys involved in *Richman v. Hartley,* including a contribution of $1,499 from defendant Hartley's lead attorney Peter Goldenring on April 2, 2012; $1,000 from Mr. Goldenring's law partner, James Prosser, on March 26, 2012; and $250 from plaintiff's counsel Richard Francis on May 10, 2012. Judge Walsh did not disclose those contributions on the record when the case came before him for a hearing on defendant's motion for summary judgment on July 16, 2012, 41 days after the election.

According to Judge Walsh, he did not believe he was required to disclose contributions after the election and he did not do so when attorneys who had contributed to his campaign appeared before him after the election. The commission noted that the judge's position severely restricts the extent of disclosure of campaign contributions and leads to the result that post-election contributions would never be disclosed. The commission found the judge's position to be contrary to the intent of the disclosure requirements and the ethics opinions available to the judge.

The commission found that Judge Walsh's conduct was inconsistent with his duty to disclose on the record information reasonably relevant to the question of disqualification, as set forth in canon 3E(2), and inconsistent with Code of Civil Procedure section 170.1, subdivision (a)(9)(C). Judge Walsh's failure to disclose campaign contributions after the election deprived the parties and attorneys appearing before him of information to which they were entitled. Even if the amount of a campaign contribution does not require disqualification, the perception of an impartial and independent judiciary is fundamental to public respect for the judicial system and the rule of law. In turn, public confidence in a fair and impartial judiciary depends on a transparent process through disclosure of information that may reasonably be relevant to the question of disqualification. Particularly with respect to campaign contributions, failure to disclose can give rise to public distrust in the independence and impartiality of the judiciary.

Commission members Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Ms. Mary Lou Aranguren; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Ms. Sandra Talcott; and Mr. Adam N. Torres voted for imposition of this public admonishment. Mr. Richard Simpson did not participate.

Dated: February 10, 2016

Hon. Erica R. Yew,
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING JUDGE STUART SCOTT | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |

This disciplinary matter concerns Judge Stuart Scott, a judge of the Santa Clara County Superior Court. Judge Scott and his attorney, James A. Murphy, appeared before the commission on January 28, 2016, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Judge Scott has waived his right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Scott and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND CONCLUSIONS

Judge Scott has been a judge of the Santa Clara County Superior Court since January 2015. His current term began in January 2015.

Shortly before noon on February 27, 2015, the jury returned a verdict in the case of *People v. Howard*, No. C1490791, which had been tried in Judge Scott's courtroom that week, finding the defendant guilty of violating Penal Code section 148. The same afternoon, Deputy District Attorney (DDA) Kelly Meeker, who had tried the case for the People, returned to the courtroom to pick up equipment she had left in the courtroom. DDA Meeker, who had several readiness matters on the afternoon calendar in the department next door to Judge Scott's, checked in there and then returned to

Judge Scott's department at approximately 2:00 p.m. to 2:15 p.m. to collect her equipment.

When DDA Meeker entered Judge Scott's courtroom, he was seated at the court reporter's desk, chatting with the bailiff and a court clerk. DDA Meeker said hello to everyone and began to gather her things. Judge Scott stood to leave the courtroom and asked DDA Meeker to come speak to him when she had a second. DDA Meeker, who was holding her equipment and preparing to leave, asked when he would like her to drop by. Judge Scott responded, "Right now." DDA Meeker put down her equipment and walked to Judge Scott's chambers. While standing in the doorway, she told Judge Scott that she was really looking forward to getting his feedback on her performance in trial, but that several people in her office had told her that it was necessary to wait until after sentencing. Judge Scott told DDA Meeker not to worry and that he and she would be "discreet," or words to that effect. Judge Scott then closed his chambers door and told her to sit down.

Judge Scott first spoke about office history and the changing relationship between the public defender's office and the district attorney's office. He said that judges used to tell deputy district attorneys more about what to do in trial while trials were ongoing; he said that things were different now, and that it was hard for him to sit and watch a deputy district attorney in trial when he would do things differently. Judge Scott told DDA Meeker that she had done a great job in her trial. DDA Meeker, who was aware that she and Judge Scott should not be discussing the case, interrupted to say that she had several readiness conferences in the department next door with the deputy public defender who had opposed her in the *Howard* trial, and that the deputy public defender might be waiting for her. Judge Scott again said not to worry, that he and she would be discreet, and that she should just "sit tight."

Judge Scott then gave DDA Meeker additional feedback on her trial technique, complimenting her style, suggesting that she could make her direct examinations shorter, and telling her that if he were the prosecutor, he would have been much more aggressive on rebuttal in response to arguments defense counsel had made. Judge Scott

told DDA Meeker that being subdued in closing argument was in keeping with her style, that she had tried the case in a professional manner, and that the jury had liked her.

Judge Scott then spoke about the deputy public defender's performance as defense counsel. The judge asked DDA Meeker what she thought of defense counsel's performance; she gave her opinion that it was poor and that defense counsel was unprepared. DDA Meeker mentioned being surprised that defense counsel had admitted on the record that she had not read a case she cited in support of a request for a certain instruction. Judge Scott said that defense counsel was either incompetent or lazy and did a terrible job; he said he thought that the jury hated her and this was why a guilty verdict was returned quickly. DDA Meeker again told Judge Scott that she might have to go, and he said not to worry, that this would be discreet. DDA Meeker and Judge Scott then engaged in some discussion of what sentence might be imposed on the defendant.

DDA Meeker told Judge Scott that she had several readiness conferences next door and had to go. Judge Scott asked DDA Meeker if he was "jamming her up" by keeping her in his chambers. She said that he was not, but that she had cases on calendar and did not want to keep the deputy public defender waiting. DDA Meeker stood up and told Judge Scott that she hoped to meet with him another time so that she could get further feedback on her performance. Judge Scott mentioned that he would be out the following week, and that he knew she would be in Palo Alto; he suggested that she would not be able to get feedback at a later time because of scheduling. DDA Meeker said that if she was in Palo Alto, she would make time to meet with Judge Scott to get further feedback after sentencing.

As DDA Meeker left Judge Scott's chambers, he said, "This conversation never happened."

Shortly thereafter, DDA Meeker reported the conversation to her supervisor. A news article about the matter appeared in the San Jose Mercury News on March 17,

2015. Judge Scott subsequently reported his conduct to the commission; his report was received on March 27, 2015.

The commission found that Judge Scott knowingly engaged in improper ex parte communication, contrary to the prohibition on ex parte communications set forth in canon 3B(7) of the California Code of Judicial Ethics, about a case that was pending sentencing before him, and deliberately engaged DDA Meeker in ex parte communication that violated her ethical obligations as an attorney. The commission found that Judge Scott's conduct also was contrary to canon 2A, which requires judges to conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

In his written objections to the notice of intended public admonishment, Judge Scott asserted that his comments about "being discreet" pertained to his negative critique of the deputy public defender, rather than to the fact that they were engaging in an improper ex parte communication. However, Judge Scott first told DDA Meeker that they would be "discreet," or words to that effect, before he commented on the public defender's performance and in response to DDA Meeker informing him that she had been told she should wait until after sentencing to get his feedback on her trial performance.

In 1998, the commission publicly admonished a judge who engaged in email communications with an attorney about how he might handle a dependency case in which the attorney was appearing. The judge's communication included a statement reflecting the judge's awareness that the communication was improper; when the attorney expressed discomfort about engaging in ex parte communication about a pending case, the judge responded, "chicken." (*Public Admonishment of Judge Gregory M. Caskey* (1998).) The commission found that Judge Scott similarly made comments reflecting his awareness that the conversation was improper.

Judge Scott contends there was significant prejudice in the *Caskey* matter because Judge Caskey was soliciting the attorney's advice on how to handle a matter procedurally. He maintains that his communication with the DDA was not prejudicial

to either party because the trial was over and he had already decided on what sentence to impose. The commission disagrees. Judge Scott engaged in a private discussion with one party about a pending matter that was to be decided in the future. Moreover, the commission notes that the defense had a right to be heard on sentencing before the judge decided the appropriate sentence.

The commission took into account that Judge Scott cooperated with the commission and expressed remorse. Judge Scott urged the commission to also take into consideration that he was a new judge at the time the misconduct occurred and he had not yet attended New Judges Orientation. The commission appreciates that, after attending New Judges Orientation, Judge Scott has gained a better understanding of his role as a judge and the importance of impartiality. However, the commission notes that Judge Scott made statements at the time of the ex parte communication demonstrating that he knew then that it was improper, and he acknowledged he was aware, from his experience as an attorney for many years before becoming a judge, that ex parte communications with judges are improper pursuant to rule 5-300(b) of the State Bar Rules of Professional Conduct.

The commission is charged with protecting the public and maintaining public confidence in the integrity and independence of the judiciary. Judge Scott's misconduct resulted in publicity that reflects negatively on the integrity of the judiciary. Further, the judge's misconduct placed DDA Meeker in the unpleasant position of having to report the conversation to her supervisor. In determining that a public admonishment is the appropriate sanction, the commission considered the fact that Judge Scott engaged in serious misconduct in the judge's official capacity, and that the conduct undermined the integrity of the judiciary and the fair administration of justice.

The commission concluded that Judge Scott's conduct was, at a minimum, improper action.

Commission members Anthony P. Capozzi, Esq.; Ms. Mary Lou Aranguren; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Ms. Sandra Talcott; and Mr. Adam N. Torres

voted to impose a public admonishment. Commission member Hon. Erica R. Yew was recused from this matter, pursuant to commission policy declaration 6.1. Commission member Mr. Richard Simpson did not participate.

Dated: February 17, 2016

Anthony P. Capozzi
Vice-Chairperson

# PUBLIC ADMONISHMENT OF JUDGE PATRICK E. CONNOLLY

The Commission on Judicial Performance ordered Judge Patrick E. Connolly publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge Patrick E. Connolly has been a judge of the Los Angeles County Superior Court since 2009. His current term began in January 2015.

As set forth below, the commission found that Judge Connolly engaged in a course of conduct that reflected embroilment with a criminal defense attorney and abused his authority by setting multiple post-trial hearings, including an ex parte evidentiary hearing, relating to statements the attorney made during trial without citing the attorney for contempt or issuing an order to show cause (OSC) re contempt. Judge Connolly failed to give the attorney notice of the subjects of his inquiry prior to conducting an evidentiary hearing, improperly excluded the attorney from the hearing, and engaged in improper ex parte communications before the hearing.

Judge Connolly presided over the jury trial in *People v. Jackson*, No. TA110670, in July 2010. During trial, Judge Connolly called for a sidebar conference to ask the defense attorney, Freddie Fletcher, for an offer of proof for a question he asked the alleged victim. Mr. Fletcher's offer of proof included the statement that his courtroom observer had reported seeing the prosecutor signal a police officer witness by slowing shaking her head. Judge Connolly said he had been watching the attorneys closely and had not seen anything from the prosecution that would make him believe she was trying to give answers to anyone. He described Mr. Fletcher's statement as "outrageous" and said "we will take this up at a later time."

At the end of the trial, after instructing the jury, Judge Connolly said, "I am going to be ordering a transcript about the allegation Mr. Fletcher made against the DA, and we are going to be bringing that up after the verdict." Mr. Fletcher asked for permission to put on the record his allegations regarding the conduct of the prosecutor while his witnesses were in court. Judge Connolly said Mr. Fletcher could make a record, but the court would not be taking witness testimony until after the jury returned.

The jury acquitted Mr. Fletcher's client on July 30, 2010. The verdict was not received by Judge Connolly, but by another judge. After the jury was released, the prosecutor said she believed Judge Connolly had requested that a hearing be set. Mr. Fletcher told the judge that he had been cited for contempt during the trial. The judge set the matter for an OSC on August 19, 2010 before Judge Connolly.

On August 19, 2010, Judge Connolly began the hearing by saying that Mr. Fletcher had made allegations about the conduct of the prosecutor during trial, and "at the very least we're going to have a hearing as to that conduct. Because if the DA did do the things for which the defense made those accusations, obviously, the DA would be, at the very least, in contempt of court, if not worse. ¶ But as I stated to Mr. Fletcher, I hope those are not spurious allegations, because, if so,

the Court does find that that's contemptuous behavior also." Mr. Fletcher said he believed he had been cited for contempt for asking a certain question during trial. Judge Connolly said he was not proceeding as to the question, but as to the accusations Mr. Fletcher made.

Judge Connolly continued the hearing and said, "And then in the interim period of time I'm also going to be reviewing transcripts from Long Beach, as to contempt proceedings that are involving Mr. Fletcher." The Long Beach matter concerned a hearing before another judge in which it was alleged that Mr. Fletcher had challenged the conduct of a prosecuting attorney. A contempt hearing was placed on the court's calendar in December 2009, but no OSC re contempt was ever filed and the hearing never went forward. Mr. Fletcher objected to Judge Connolly's reviewing that matter and requested copies of any materials or transcripts the judge reviewed. Mr. Fletcher said he would provide affidavits from his observers in *People v. Jackson*, who said they had seen the prosecutor signal a witness.

On September 1, 2010, Judge Connolly called the case and said he was continuing it because, although he had spoken to the judge in Long Beach about the contempt matter pending there, he had not yet received the transcripts. He said, "So, what I'm going to do at this point in time is I'm going to set another date so that I can have those and review those."

On October 7, 2010, Judge Connolly again continued the matter. On October 28, Mr. Fletcher appeared with counsel, who filed a Request for Specification of Grounds for Contempt the same day. Judge Connolly said, "Who is representing Mr. Fletcher[?] Charges will be filed by the Court by November 22nd. We'll have both of you back here on December 28th." Judge Connolly also ordered Mr. Fletcher's witnesses back to court at his attorney's request.

On December 28, 2010, Mr. Fletcher appeared again with counsel. Judge Connolly continued the matter again, this time setting a hearing as to whether Mr. Fletcher's accusations against the prosecutor were well founded. Mr. Fletcher's attorney said he did not know what charges Mr. Fletcher was facing. Judge Connolly said, "There are no charges at this time. We are going to have a hearing as to whether or not the allegation that he made against [the prosecutor] were [*sic*] well-founded or not." Mr. Fletcher's attorney asked whether it was a contempt hearing, and Judge Connolly replied, "At this point, it is not. It's an evidentiary hearing to decide whether or not either side is in contempt."

On February 3, 2011, Mr. Fletcher appeared in pro per and an attorney from the District Attorney's office appeared to represent the prosecutor in *People v. Jackson*. Before the hearing, Judge Connolly met ex parte in his chambers with the attorney from the District Attorney's office. They reportedly discussed witness and hearing logistics. The substance of their discussion was not disclosed to Mr. Fletcher.

Judge Connolly began the February 3, 2011 hearing by stating that it was "an order to show cause as to whether or not any party in this matter should be held in contempt" and announcing that "these are separate proceedings." He recounted that during trial, in July of the previous year, "I believe on either the 27th or 28th of July, Mr. Fletcher made some statements on the record as to conduct that he alleged towards [the prosecutor]. ¶ If those allegations are correct, that would be contemptuous behavior, and we are to determine whether or not there was a basis for those

allegations." Judge Connolly then asked the prosecutor in *People v. Jackson* and the DDA representing her to step outside the courtroom.

Mr. Fletcher filed three written motions on February 3, 2011: 1) objections to the court's jurisdiction to conduct an OSC re whether there was evidence to charge either of the attorneys in *People v. Jackson* with contempt, 2) a motion to disqualify Judge Connolly, and 3) notice that Mr. Fletcher was invoking his Fifth Amendment right not to appear as a witness in the hearing. Judge Connolly ruled that these motions were untimely.

Throughout the portion of the hearing in which Mr. Fletcher was permitted to participate, he objected to the court's jurisdiction. He also objected that the court had not provided him with transcripts of the statements at issue. Mr. Fletcher did not testify or present witness testimony, other than the declarations submitted with his motions, maintaining that the court did not have authority to conduct the hearing. Ultimately, Judge Connolly asked Mr. Fletcher to leave the courtroom so that he could conduct the second portion of the hearing, in which the District Attorney's office would participate. Mr. Fletcher objected strongly to being asked to leave the courtroom, but eventually left on Judge Connolly's order.

During the portion of the hearing in which the District Attorney's office participated, and from which Mr. Fletcher was excluded, Judge Connolly called as a witness his court reporter, who testified that she had been watching the prosecutor during the officer's testimony and did not see the prosecutor signal to the officer. The District Attorney's office called the police officer witness and the investigating officer, who both testified that they did not see the prosecutor signal to the officer. Mr. Fletcher did not have an opportunity to hear the testimony of these witnesses or to cross-examine them.

Judge Connolly had provided to the District Attorney's office, but not to Mr. Fletcher, excerpts of the trial transcript pertaining to two occasions on which Mr. Fletcher had arguably questioned the integrity of the prosecutor: the alleged signaling incident, and another incident in which Mr. Fletcher questioned the prosecutor's statement that she did not know of an outstanding bench warrant for the alleged victim. Judge Connolly informed the DDA's that he was inquiring into both issues, but said, "Well I have not made any true allegation. This is an order to show cause. I made both sides aware of that."

After Judge Connolly took witness testimony on February 3, 2011, he called Mr. Fletcher back into the courtroom and provided him with a copy of the transcript of "the trial testimony that the court was considering as far as contempt." He stated that he was "going to have contempt proceedings against Mr. Fletcher." Judge Connolly said he would file an OSC re contempt on February 23, 2011. Mr. Fletcher renewed his objection to the proceedings. The hearing concluded with Judge Connolly ordering Mr. Fletcher back to court on February 23, 2011.

On February 23, 2011, Judge Connolly said, "Mr. Fletcher, today I'm taking it off calendar, but checking into the Long Beach matter that you have still before you, as to perhaps consolidation and proceeding under 177.5." In response to Mr. Fletcher's question, Judge Connolly explained, referring to Code of Civil Procedure section 177.5, "It's lesser than actual contempt, it's just whether or not there should be any type of sanctions as far as monetary sanctions and such."

The commission determined that Judge Connolly's handling of these proceedings reflected embroilment, which is "the process by which the judge surrenders the role of impartial factfinder/decisionmaker, and joins the fray." (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 2.01, p. 37.) After the defendant was acquitted in *People v. Jackson*, Judge Connolly set six hearings over the course of more than six months relating to a statement Mr. Fletcher made at a sidebar conference during trial. At the outset of this series of hearings, Judge Connolly contacted a judge in a different courthouse to obtain information and transcripts relating to another possible contempt matter concerning Mr. Fletcher, which also involved statements that reflected negatively on a prosecutor. Judge Connolly continued the post-trial hearings in *People v. Jackson* at least twice to obtain transcripts from this unrelated case. These actions gave the appearance that Judge Connolly was not acting as an impartial factfinder, but was conducting an independent investigation into Mr. Fletcher's conduct, and was embroiled in the matter and biased against Mr. Fletcher. In his response to the commission's investigation, Judge Connolly acknowledged that his contact with a judge in an unrelated case was improper embroilment, and that his handling of this matter could be perceived as reflecting bias and an abuse of power. The commission found that by this conduct Judge Connolly violated his duty to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), and to refrain from speech or other conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)).

The commission further found that Judge Connolly abused his authority by setting a series of post-trial hearings regarding Mr. Fletcher's statements during trial without citing either attorney for contempt or issuing an OSC re contempt, and conducting an ex parte evidentiary hearing for the apparent purpose of obtaining evidence that could be used in future contempt proceedings. Ordering a person to appear in court when no matter requiring his attendance is pending is a serious misuse of the judicial office. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 857.) If Judge Connolly was exercising his contempt power when he set these hearings, as he asserted before the commission, he was obliged to follow the procedures for imposing contempt.

Contempt proceedings, whether indirect, direct, or "hybrid", are properly initiated with notice to the alleged contemnor that the court is considering a contempt charge and notice of the nature and facts of the specific charge. (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 4.21, p. 163, § 4.30, p. 177, § 4.01, pp. 153–154.) This notice may take the form of a verbal contempt citation in cases of direct or "hybrid" contempt, and, in cases of indirect contempt, requires an affidavit or a statement of facts by a judicial officer. (See Code of Civ. Proc., § 1211.)

Judge Connolly did not initiate a contempt proceeding by citing Mr. Fletcher for contempt or issuing an OSC re contempt. He stated generally that Mr. Fletcher had made "allegations as to the conduct of the DA" during trial, not specifying which allegations or when, and said that if those allegations were "spurious" the court found them to be contemptuous. On several occasions Judge Connolly told Mr. Fletcher that he would be filing "charges" or an OSC on a future date. But he did not do so. Instead, on February 3, 2011, he conducted what might be characterized as a "pre-contempt" evidentiary hearing.

The commission found that the evidentiary hearing Judge Connolly conducted on February 3, 2011, and the ex parte manner in which it was conducted, constituted an abuse of authority. No cause was pending before Judge Connolly when he invited testimony from Mr. Fletcher and his

witnesses, or when he called and questioned his court reporter and heard testimony from and questioned police witnesses called by the prosecution. Neither attorney had been cited with contempt, no OSC's re contempt had been issued, and the underlying case had concluded months earlier. Judge Connolly's determination to proceed with an evidentiary hearing gave the appearance that he was conducting an independent investigation into the attorneys' conduct, which was beyond the scope of his authority. (See *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 630-631.)

Having undertaken an evidentiary hearing with no cause pending before him, Judge Connolly further violated Mr. Fletcher's procedural rights by excluding him from the hearing over his objection with no legal basis, and failing to give him notice of the specific subjects of his inquiry. Judge Connolly acknowledged in his response to the commission that he should not have excluded either Mr. Fletcher or the prosecution from any hearing. He asserted, however, that prior to the February 3, 2011 hearing, he provided verbal notice on the record to Mr. Fletcher that his accusations about the prosecutor were the subject of potential contempt proceedings. But this notice did not describe with any specificity what Judge Connolly was considering as a basis for contempt proceedings. Judge Connolly provided Mr. Fletcher with transcripts of the remarks he was considering as a basis for contempt at the end of the hearing on February 3, 2011, only after conducting both portions of the ex parte evidentiary hearing.

The commission further noted that the statement underlying this series of unauthorized hearings does not appear to have constituted contempt of court. The remark does not appear to have actually interfered with court proceedings because it was made at a sidebar conference in response to a request for an offer of proof. (See Code of Civ. Proc., § 1209, subds. (a)–(b).) While it is contemptuous to intentionally make a false statement to a court, (*In re Aguilar* (2004) 34 Cal.4th 386, 394), an attorney may argue prosecutorial misconduct to the court, and must do so, to preserve the issue on appeal. (*People v. Harmon* (1948) 89 Cal.App.2d 55, 61.) If Mr. Fletcher's trial observers said they saw the prosecutor signal a witness, Mr. Fletcher's duties to his client may have compelled him to report the matter to the court.

The commission also found that Judge Connolly engaged in improper ex parte communications by meeting in chambers with the DDA representing the prosecutor in *People v. Jackson* before the February 3, 2011 hearing, and failing to disclose the substance of the communication to Mr. Fletcher. Even if this meeting concerned only scheduling or administrative matters, it would not be permissible unless the judge reasonably believed that no party would gain a procedural or tactical advantage as a result of the ex parte communication, and the judge made provision promptly to notify all other parties of the substance of the ex parte communication and allowed them an opportunity to respond. (Canon 3B(7)(b), formerly 3B(7)(d).) In his response to the commission, Judge Connolly acknowledged that he should not have had ex parte contact with either the prosecution or Mr. Fletcher. The ex parte meeting in chambers and the failure to disclose the substance of the meeting to Mr. Fletcher violated canon 3B(7) and gave rise to an appearance of impropriety and bias. (Canons 2A, 3B(5).)

The commission found that Judge Connolly's conduct in these proceedings reflected embroilment and constituted an abuse of authority. Judge Connolly violated his duty to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity

and impartiality of the judiciary (canon 2A), to be faithful to the law (canon 3B(2)), to perform judicial duties without bias or prejudice and refrain from speech or other conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)), to refrain from improper ex parte communications (canon 3B(7)), and to maintain high standards of conduct (canon 1).

Judge Connolly's conduct as described above was, at a minimum, improper action.

In imposing this public admonishment, the commission considered as an aggravating factor Judge Connolly's prior discipline. In 2010, Judge Connolly received a private admonishment for his use of profanity in a judicial profile interview and in chambers discussions with attorneys.

Commission members Hon. Erica R. Yew; Anthony P. Capozzi, Esq.; Ms. Mary Lou Aranguren; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Hon. Ignazio J. Ruvolo; Ms. Sandra Talcott; and Mr. Adam N. Torres voted for the Notice of Intended Public Admonishment. Mr. Richard Simpson did not participate.

Date: March 23, 2016

**PUBLIC ADMONISHMENT OF JUDGE JAIME R. ROMÁN**

The Commission on Judicial Performance ordered Judge Jaime R. Román publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Román has been a judge of the Sacramento County Superior Court since 2007. His current term began in January 2011.

As set forth below, the commission found that Judge Román abused his authority and violated the due process rights of individuals appearing before him when ordering an individual incarcerated for contempt, when ordering the payment of monetary sanctions, attorney fees and costs, and when granting ex parte relief. The commission also found that Judge Román's conduct in one of the sanctions matters raised an appearance of lack of impartiality and embroilment.

1. Judge Román presided over the 2010 trial of *People v. Johnson*, Nos. 08F08054, 08F10037, 09F01034 and 09F08416. The trial transcript reflects the following when witness Bryan Jones was called to testify:

> MR. GOODMAN: People call Bryan Jones.
>
> THE COURT: Hi, Mr. Jones. If you'll come on up and sit next to me.
>
> THE CLERK: Please raise your right hand.
>
> (Whereupon, in doing so, a hand gesture was made.)
>
> THE CLERK: Mr. Jones.
>
> THE COURT: I think we can do without that, Mr. Jones.
>
> [Clerk swears the witness.]

(R.T. 260:24–261:5.)

Mr. Jones then testified until the end of the day's proceedings. Judge Román recessed the proceedings, excused the jury and the following occurred:

> THE COURT: Deputy Parker, do we have someone to assist you?
>
> THE BAILIFF: I'll get somebody.
>
> THE COURT: All right. Mr. Jones, I'm having you here because when the clerk administered the oath to you, you characteristically did what we refer to as flipped her off.

THE WITNESS: I didn't mean to do that.

THE COURT: Unfortunately, that's contempt. I'm going to remand you. You're --

THE WITNESS: Oh, my God.

THE COURT: -- to jail, okay. And you'll --

THE WITNESS: What about my daughter [present in court].

THE COURT: That's unfortunate. You'll be there for 3 days.

THE WITNESS: Oh, Tony [defendant], look at all this shit you did, oh…

MS. LAMB: I'm sorry, what's happening, Your Honor?

THE COURT: He flipped off the clerk during the administration of the oath. That's contempt on its face.

THE WITNESS: I didn't mean to flip. I just put my hand up. Man, I got arthritis.

THE COURT: All right. Anything else we need to put on the record?

THE WITNESS: Oh my God.

MS. LAMB: I just wanted to state that my client has nothing to do with this.

THE COURT: That's why I did this out of the presence of the jury --

MS. LAMB: Thank you.

THE COURT: -- because I did not want anything [to] be connected with any defendant or, for that matter, the People with regard to what occurred; but it's contempt on its face. We all recognize it. So he's going to spend 3 days in the county jail thinking about that.

***

THE COURT: All right. Any event, 3 days. He'll be here tomorrow, okay, because he's going to be in custody now, all right. And I'll need all five of you tomorrow at 9:00.

(R.T. 277:6–278:25.)

The next day when Mr. Jones was brought in to continue his testimony, outside the presence of the jury, he requested counsel. Judge Román ordered Mr. Jones returned "downstairs" pending the appointment of counsel. Later, outside the presence of the jury, Judge Román appointed counsel (Mr. Matheu) for Mr. Jones. Mr. Matheu asked Judge Román, "[I]s it a contempt hearing or has he already been adjudged in contempt?" Judge Román explained the events of the prior day and informed counsel that witness Jones was already serving three days in jail for contempt. Attorney Matheu then asked, "And obviously it wasn't inadvertent or it wasn't a mistake and what he was doing wasn't a twitch of the hand; it was a clear, blatant lack of decorum before the Court?" Judge Román responded, "I'm 59 years old." Attorney Matheu responded, "You know what a bird is; is that fair to say?" and Judge Román said yes. (R.T. 291:26–292:15; 333:10–334:13.)

It is misconduct for a judge to use the contempt power to incarcerate someone without following correct contempt procedures, which include notice and the opportunity to be heard. (See *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533 [California Supreme Court found that a judge committed willful misconduct by holding a litigant in contempt without informing her that she was in contempt and failed to give her a chance to respond before sentencing her to jail]; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 855–856). Judge Román's description of Mr. Jones's conduct did not inform Mr. Jones that he was being charged with contempt of court. Judge Román did not give Mr. Jones the opportunity to speak on his behalf before sentencing him. Although Mr. Jones thereafter offered an explanation, Judge Román had already sentenced him to jail. Judge Román contended in his response to the commission that he "went a step further" than he was required to and appointed counsel, but this did not happen until the next day after Mr. Jones had spent the night in jail.

The commission determined that Judge Román's actions constituted abuse of the contempt power and abuse of authority and violated Mr. Jones's due process rights. This conduct violated canon 2A of the Code of Judicial Ethics (judges "shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary") and canon 3B(7) (judges "shall accord to every person who has a legal interest in a proceeding … the full right to be heard according to law").

Judge Román also failed to follow proper contempt procedures after incarcerating Mr. Jones by failing to issue a written order reciting the evidentiary facts supporting the contempt finding as required by statute. (*Raiden v. Superior Court* (1949) 34 Cal.2d 83, 86; *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 125 fn. 16 [advising that in view of *Raiden*, the judge "must draw the order with meticulous care and should not delegate the draftsmanship to counsel or depend upon the clerk, no matter how experienced, to incorporate it into the minutes"].) A written order is the judgment in a direct contempt proceeding and the prompt preparation of the order by the court is jurisdictional and essential to a valid contempt, and is the basis for the contemnor's right of appeal. (*In re Buckley* (1973) 10 Cal.3d 237, 247; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 694.) Judge Román explained to the commission that he understood at the time that the transcript, his observance of the conduct, Mr. Jones's excuses and the court's guilty adjudication and length of jail sentence were sufficient, but admitted his failure to prepare the required written order. Judge Román's conduct in failing to issue the required written order violated canon 2A of the Code of Judicial Ethics (judges "shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary").

The California Supreme Court and the commission have stressed that "[t]he contempt power, which permits a single official to deprive a citizen of his fundamental liberty interest without all of the procedural safeguards normally accompanying such deprivation, must be used with great prudence and caution," and that "[i]t is essential that judges know and follow proper procedures in exercising this power." (Public Admonishment of Judge Lisa Guy-Schall (1999), citing *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1314 and *Ryan v. Commission on Judicial Performance*, *supra*, 45 Cal.3d at p. 533 [failure to know or research proper contempt procedures constituted bad faith]; *Kloepfer v. Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 858.) Ignorance of proper contempt procedures, without more, constitutes bad faith. (*Cannon v. Commission on Judicial Qualifications, supra*, 14 Cal.3d at p. 694.)

2. Also during the *Johnson* trial, Judge Román sanctioned Assistant Public Defender Crystal Lamb $150 for failure to appear at 3:00 p.m. on February 2, 2010, to discuss jury instructions pursuant to his oral order at the end of the proceeding that day. After Ms. Lamb failed to appear, Judge Román instructed her to appear in his courtroom at 8:00 a.m. on February 3, 2010. On the morning of February 3, 2010, with all counsel present, Judge Román conducted a proceeding on the record outside the presence of the jury concerning Ms. Lamb's failure to appear. Judge Román began by stating, "You weren't here yesterday at 3:00." Judge Román heard Ms. Lamb's explanation, questioned her further and she responded with further explanation. Judge Román asked the co-defendant's counsel if he was appointed or retained and what level he was. (R.T. 662:23-663:28.) Judge Román then said:

> THE COURT: Okay. I'm going to sanction you, impose a monetary sanction, because we all had to be here, okay, of $150, 75 to the DA's office, 75 to the Conflict Criminal Defenders Panel, okay?

(R.T. 664:1-4.)

Judge Román then stated that the sanction was because "you [co-defendant's counsel] were here for an hour yesterday, and we were doing nothing." Ms. Lamb apologized and said she would gladly write the checks, which she did immediately thereafter. (R.T. 664:16-21.)

Judge Román did not give Ms. Lamb notice that he was contemplating a monetary sanction at any time prior to ordering her to pay the $150 sanction and never stated the statutory basis for the sanction.

The commission determined that Judge Román abused his authority and violated Ms. Lamb's due process rights by imposing a monetary sanction without prior notice. This conduct violated canon 2A of the Code of Judicial Ethics (judges "shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary") and canon 3B(7) (judges "shall accord to every person who has a legal interest in a proceeding … the full right to be heard according to law"). Before sanctions are imposed, adequate notice is mandated based upon the due process clauses of both the federal and state constitutions. (*Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 976.) While a court may raise the issue of sanctions on its own motion, it must give notice of its intent to impose sanctions "*before* findings are made and at a time preceding the trial judge's decision whether, in fact, to impose sanctions." (*Bergman v. Rifkind & Sterling, Inc.* (1991) 227 Cal.App.3d 1380, 1387 [original italics] [sanctions

award reversed because judge's findings regarding sanctions preceded his review of the attorney's explanation and evidence of good cause]; Public Admonishment of Judge Ronald J. Maciel (2006).) The reason for the notice requirement is to advise the responding party that the imposition of sanctions is being considered, and to give the party an opportunity to prepare for the hearing. (*Seykora v. Superior Court* (1991) 232 Cal.App.3d 1075, 1081.)

3. Judge Román presided over a hearing in *Rapozo v. Rapozo*, No. 10FL07683, on April 9, 2012, and issued an order of that same date enumerating and ruling on 70 issues collectively presented by the parties. Judge Román told the commission that, as always, there were only 15 minutes available to hear all of the motions associated with the *Rapozo* action. The ruling awarded petitioner $29,500 in attorney fees pursuant to Family Code section 2030, $4,500 in costs pursuant to Family Code sections 2030 and 2031, $20,000 in attorney fees as a sanction pursuant to Family Code section 271, and $5,000 in attorney fees as a sanction against respondent's counsel, Steven Wessels. Judge Román told the commission that he believed petitioner had filed a written sanctions motion, but petitioner had not requested any of these awards either in writing or in open court at the time of the hearing of the cause on the merits. (Family Code section 2031(b)(1) permits oral requests in open court at the time of the hearing on the merits for an award of attorney fees and costs under Family Code section 2030.) Judge Román had not issued an order to show cause giving Mr. Wessels or his client notice that he was contemplating such awards, nor had he otherwise provided notice. After Mr. Wessels filed a motion to vacate the awards on the ground that neither he nor his client had been provided notice and an opportunity to respond, Judge Román issued a June 1, 2012 order vacating his April 9, 2012 order as to each of these awards. Judge Román noted in his June 1, 2012 order that Mr. Wessels had objected at the April 9, 2012 hearing to lack of notice regarding attorney fees and sanctions.

The commission determined that Judge Román abused his authority and violated Mr. Wessels's and his client's due process rights in issuing these awards totaling $59,000 without notice or an opportunity to respond. This conduct violated canon 2A of the Code of Judicial Ethics (judges "shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary") and canon 3B(7) (judges "shall accord to every person who has a legal interest in a proceeding … the full right to be heard according to law").

In his response to the commission, Judge Román admitted that he erred in issuing the awards, but stated it was a harmless mistake that he corrected immediately upon notice that no motion had been made. In the commission's view, the scope of the violations precludes treating the conduct as a mistake. To the contrary, the commission determined that Judge Román's April 9, 2012 and June 1, 2012 orders raised an appearance of lack of impartiality and embroilment, in violation of canon 2A of the Code of Judicial Ethics. Notice and an opportunity to respond were required as to all of the awards. Yet, in his April 9, 2012 order, Judge Román "granted" two motions that had never been made. Notwithstanding the absence of any motion and the detailed basis required by California Rules of Court, rule 5.93 (2012) to support requests for attorney fees and costs under Family Code section 2030, Judge Román, on his own, determined the amounts of attorney fees and costs to award under Family Code section 2030(a)(2) in a 21-page highly-detailed order while failing to include the findings required by Family Code section 2030(a)(2). Judge Román had been a judge since 2007 and had been presiding in family court for a year and a half

before he issued this order. He had the opportunity to become familiar with the statutes and rules governing pretrial attorney fees and costs, and sanctions. He acknowledged in his response to the commission that motions for such attorney fees and costs were "all too common."

Further, Judge Román's comments in the April 9, 2012 order reflected embroilment. Judge Román's June 1, 2012 order stated, "Mr. Wessels again observes that he was not provided notice in petitioner's 'responding papers' -- an oversight that will clearly not recur." Judge Román's admittedly erroneous award of $5,000 in sanctions against Mr. Wessels resulted in a report to the State Bar by Judge Román (which he told the commission he corrected after he vacated the award two months later). Finally, the order requiring the total payment of $59,000 in attorney fees, costs and sanctions was outstanding from April 9, 2012 to June 1, 2012, and was only vacated after Mr. Wessels filed a motion to vacate.

4. Judge Román presided over a child custody hearing in *Gray v. Gray*, No. 99FL00645, on October 10, 2012. On October 9, 2012, respondent mother filed a Declaration of Respondent in Support of Return of Minor's Belongings along with a proof of service showing service by mail and fax on October 9, 2012 on father's counsel, Steven Wessels. The hearing date listed on the proof of service was the following day, October 10, 2012 at 9:00 a.m., the time set for the custody hearing. Mother's declaration asked the court to order father to immediately turn over certain alleged belongings of the 16-year-old minor, including her iPhone and iPad. At the custody hearing, mother reiterated her ex parte demand for the phone and iPad. Mr. Wessels objected on the ground that mother had not provided notice of the demand, other than by fax the night before the hearing, which he had only received the morning of the hearing, and that father therefore had no opportunity to respond to the demand. Mr. Wessels also contended that there was no emergency justification for mother's untimely ex parte demand, and told Judge Román that father was not present to respond to mother's demand because father believed the custody matter had been resolved by a stipulation presented to Judge Román at the hearing. Judge Román told the commission that he believed the iPhone and iPad rightly belonged to the 16-year-old minor because she was the only party with the passcode, so he ordered father to turn over the phone and iPad forthwith.

The commission determined that Judge Román abused his authority and violated the father's due process rights when he ordered him to turn over the phone and iPad in response to mother's untimely ex parte demand. This conduct violated canon 2A of the Code of Judicial Ethics (judges "shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary") and canon 3B(7) (judges "shall accord to every person who has a legal interest in a proceeding … the full right to be heard according to law").

At the time of this hearing, an applicant for ex parte relief was required to give the opposing party notice of the application by 10:00 a.m. the court day before the ex parte hearing. (Sacramento County Superior Court Local Rules, rule 14.08 (C) (2012); California Rules of Court, rule 3.1203(a) (2012).) Judge Román was aware that this requirement had not been satisfied. Judge Román contended to the commission that "untimely notice notwithstanding," father was able to appear and contest the motion through his counsel of record. This ignores the governing rules and the purpose of notice, i.e., protection of the party's constitutional right of due process. (*Caldwell, supra,* 222

Cal.App.3d at p. 976.) In the commission's view, the implication that counsel was necessarily aware of the facts that father would have been able to present concerning ownership of the phone and iPad if notice had been timely is unsupported and inconsistent with the purpose of timely notice and due process. Judge Román also contended that father was aware of mother's demand for the phone based on earlier filings and a Family Court Services report. These earlier documents did not contain a demand for turnover of the phone, were not the same as a demand for specific property being made in a timely motion, and did not give father notice that a hearing would be held on this issue on October 10, 2012. Judge Román also contended that Mr. Wessels's contention that the property belonged to the father "completely lacked merit" because none of the parties had disputed that the phone and iPad belonged to the minor until the October 10, 2012 hearing. In the commission's view, it was contrary to due process principles to expect father to dispute in advance a demand that had not yet been made. Further, in the commission's view, nothing in mother's declaration constituted the required affirmative factual showing on personal knowledge of any immediate, significant and irreparable injury or danger, or other statutory basis for granting relief without notice.

The commission concluded that Judge Román's conduct as described above constituted improper action at a minimum.

Commission members Anthony P. Capozzi, Esq.; Hon. Ignazio J. Ruvolo; Ms. Mary Lou Aranguren; Ms. Pattyl A. Kasparian; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Ms. Sandra Talcott; Mr. Adam N. Torres; and Hon. Erica R. Yew voted for the Notice of Intended Public Admonishment. Commission member Hon. Thomas M. Maddock was recused from this matter, pursuant to commission policy declaration 6.1. Commission member Mr. Richard Simpson did not participate.

Date: May 16, 2016

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SEP 29 2016
COMMISSION ON
JUDICIAL PERFORMANCE

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING JUDGE EDMUND W. CLARKE, JR.**<br>**No. 197** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

## I.

## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Edmund W. Clarke, Jr., a judge of the Los Angeles County Superior Court. The Commission on Judicial Performance (commission) commenced this inquiry with the filing of its notice of formal proceedings (Notice) on December 24, 2015. The Notice charged Judge Clarke with five counts of misconduct while he was presiding over jury selection on May 6, 2014, in a criminal trial involving four defendants charged with murder and gang allegations. The judge is charged with making discourteous and undignified comments to five prospective jurors,[1] and improperly ordering one of them to wait in the hall after she had been excused. The Notice further alleged that the charged conduct constituted a pattern of discourteous, undignified, and inappropriate treatment of members of the public. Judge Clarke filed an answer to the Notice on January 13, 2016, in which he denied that his conduct as charged in the Notice constitutes grounds for discipline under the California Constitution.

The Supreme Court appointed three special masters, who held an evidentiary hearing and reported to the commission. The masters are the Hon. Carol D. Codrington, Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two; the Hon. Vincent J. O'Neill, Jr., Judge of the Ventura County Superior Court; and the Hon. Clay M. Smith, Judge of the Orange County Superior Court. A three-day public evidentiary hearing was held before the special masters commencing March 7, 2016, in

[1] Hereafter, prospective jurors are referred to as jurors.

Los Angeles, California. The masters' report to the commission containing their findings of fact and conclusions of law was filed on May 9, 2016. On May 25, 2016, pursuant to commission rule 131,[2] the Alliance of California Judges (Alliance) filed an amicus curiae brief in support of Judge Clarke.[3] Oral argument before the commission was heard on August 24, 2016.

The masters found that Judge Clarke engaged in improper action in his discourteous comments to the juror in count one, but found no impropriety in the judge's conduct in ordering that juror to wait in the hall. The masters found no misconduct as to the remaining counts. We adopt the factual findings of the masters, with a few exceptions as discussed in this decision. For reasons we explain, we reach our own independent legal conclusions, and conclude that Judge Clarke's treatment of jurors in counts one through four violated the California Code of Judicial Ethics (the canons) and constitutes misconduct within the meaning of article VI, section 18 of the California Constitution, as specified in this decision. We agree with the masters that the judge's conduct as charged in count five did not violate the canons.

For many members of the public, jury duty is their only direct contact with the court system. When a judge engages in a pattern of discourteous and undignified treatment of jurors, public confidence in the integrity and impartiality of the judicial system is eroded.

Judge Clarke's mistreatment of four jurors in this matter, together with his prior discipline for misconduct that included making discourteous and undignified remarks to a pro per defendant, convinces us that a public admonishment is the appropriate discipline.

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[2] Hereafter, all references to a rule are to the Rules of the Commission on Judicial Performance.

[3] The Alliance states that it is an association of approximately 500 judicial officers. The Alliance website states, "The Alliance of California Judges was formed on September 11, 2009, in response to the unprecedented financial crisis now facing our judicial branch. We are a new organization of judges in the State who will be a meaningful voice to independently advocate and communicate on behalf of judges with the public, media, and Executive and Legislative branches."

Judge Clarke is represented by Edith R. Matthai, Esq., of Robie & Matthai, Los Angeles, California, and Kathleen M. Ewins, Esq., of Long and Levit LLP, San Francisco, California. The examiners for the commission are commission trial counsel Mark A. Lizarraga, Esq., and commission assistant trial counsel Sei Shimoguchi, Esq.

## II.

## APPLICABLE LEGAL PRINCIPLES

### A. Burden of Proof and Standard of Deference to Findings and Conclusions of Special Masters

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [77 Cal.Rptr.2d 408, 959 P.2d 715] (*Broadman*); *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 313 [45 Cal.Rptr.2d 254, 902 P.2d 272] (*Doan*).)

The commission gives special weight to the factual findings of the masters, who have the advantage of observing the demeanor of the witnesses; however, the commission may determine it is appropriate to disregard the factual findings of the masters based on the commission's own independent review of the record. (See, e.g., *Inquiry Concerning Stanford* (2012) 53 Cal.4th CJP Supp. 1, 18; *Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 232 (*Freedman*); see *Broadman, supra,* 18 Cal.4th at p. 1090; *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 168 [48 Cal.Rptr.2d 106, 906 P.2d 1260] (*Dodds*).) Legal conclusions of the masters are entitled to less deference because the commission has expertise with respect to the law of judicial misconduct. (See, e.g., *Broadman, supra,* 18 Cal.4th at p. 1090; *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 880 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams*); *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 878 [81 Cal.Rptr.2d 58, 968 P.2d 958].) As such, the commission reaches its own conclusions of law based on its independent review of the record and the law. (See, e.g., *Freedman, supra,* 49 Cal.4th CJP Supp. at p. 232; *Inquiry Concerning McBrien* (2010) 49 Cal.4th CJP Supp. 315, 321.) The Supreme Court has stated that it is

"particularly deferential" to the conclusions of the commission when it has acted unanimously. (*Broadman, supra,* 18 Cal.4th at pp. 1090-1091; *Dodds, supra,* 12 Cal.4th at p. 168.)

Judge Clarke and the Alliance assert that the commission should give dispositive effect to the factual findings and legal conclusions of the masters, except as to those factual findings to which Judge Clarke objects. The judge argues that to set aside the findings and conclusions of the special masters "would reduce the Formal Proceedings before the Special Masters to a fig leaf of due process used to disguise the power of the commission to impose its own views on the California judiciary." The degree of deference urged by Judge Clarke and the Alliance is contrary to Supreme Court precedent and would require the commission to relinquish to the masters the commission's constitutional mandate and authority to determine whether there is a basis for discipline, as well as the appropriate level of discipline. (Cal. Const., art. VI, § 18.)

Prior to the passage of Proposition 190 in 1994, which significantly changed the constitutional composition and procedures of the commission, the commission made recommendations to the Supreme Court on factual findings, legal conclusions and discipline following a hearing before special masters. (Cal. Const., art. VI, § 18, former subd. (c).) After reviewing the report and recommendation of the commission, the Supreme Court independently evaluated the evidence to determine if there was clear and convincing evidence to sustain the charges, and determined the appropriate level of discipline. Because the commission, not the masters, was vested with the constitutional power to make recommendations to the Supreme Court, the court held that the commission "is free to disregard the report of the masters and may prepare its own findings of fact and consequent conclusions of law." (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1] (*Geiler*).)

By the same reasoning, since the voters of California have entrusted the commission with the ultimate authority to make determinations of judicial misconduct and discipline, subject to discretionary Supreme Court review, the commission has a responsibility to independently review the record and make its own findings and

conclusions, while giving special weight to the factual findings of the masters. This responsibility takes on added import in view of the voters' decision to change the composition of the commission to a majority of public members. Moreover, with respect to conclusions of law, the commission must ensure that the law of judicial ethics is applied and interpreted consistently. The commission would be remiss in the exercise of its constitutional mandate in deferring to a legal conclusion that it determines to be incorrect.

**B. Levels of Judicial Misconduct**

A violation of the California Code of Judicial Ethics constitutes one of three levels of judicial misconduct: willful misconduct, prejudicial misconduct, or improper action. (Cal. Const., art. VI, § 18, subd. (d).)

**1. Willful Misconduct**

Willful misconduct is (1) unjudicial conduct that is (2) committed in bad faith (3) by a judge acting in his judicial capacity. (*Broadman, supra,* 18 Cal.4th at p. 1091.)

Whether a judge's conduct is *unjudicial* is measured with reference to the canons. (*Dodds, supra,* 12 Cal.4th at p. 172.)

A judge acts in *bad faith* "only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." (*Broadman*, *supra*, 18 Cal.4th at p. 1092.)

It is not disputed that Judge Clarke was acting in his judicial capacity.

**2. Prejudicial Misconduct**

The second most serious level of misconduct is prejudicial misconduct, "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).) Prejudicial misconduct while acting in a judicial

capacity does not require bad faith; rather, it is "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (*Geiler, supra,* 10 Cal.3d at p. 284.)

### 3. Improper Action

Improper action occurs when the judge's conduct violates the canons, but the circumstances do not rise to the level of prejudicial misconduct and do not bring the judiciary into disrepute. (*Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 82; *Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89 (*Ross*), citing *Adams, supra,* 10 Cal.4th at p. 899.)

## III.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Factual Background

Judge Clarke presided over jury selection in *People v. Diaz, et al.* Four defendants were charged with murder and gang allegations. The trial estimate was more than four weeks. Judge Clarke's courtroom did not have the same resources available to the courts that are usually assigned long-cause felony cases with security concerns, so additional sheriff's deputies were assigned to his courtroom. Selecting jurors for the trial was made difficult by the estimated length of the trial and the number of peremptory challenges available to the multiple defendants and the district attorney.

A number of judges from the Los Angeles County Superior Court attested to the complexity of jury selection in a multidefendant case and the reluctance of many jurors to serve, particularly in long trials. These judges also discussed the challenges in evaluating claims of hardship and lack of English proficiency.

The charged conduct in this matter occurred on May 6, 2014, the second day of jury selection. Most of our factual findings are based on the transcript of that proceeding.

**B. Count One**

**1. Factual Findings**

Juror 7122 had written on her hardship form, "Having Severe Anxiety!!" next to a drawing of a distressed face. She added, "I work as a waitress and make minimum wages, plus I'm planning a wedding in two months and all of these things, especially this courthouse are aggravating my anxiety terribly. On the verge of a meltdown!" During the afternoon session, Judge Clarke discussed the hardship request with juror 7122, and then stated, "I'm going to excuse you, and you can go. And good luck." The juror then asked if she could add something and the following transpired:

> JUROR 7122: I would just like to add that, you know, everyone here in the jury has sacrificed a lot to even be here today. And, you know, anxiety is real. And the woman who is checking us in, I'm sure it's a very stressful job. The way she's treated everyone today has just been really disrespectful and —
>
> THE COURT: You can stay then and tell me about that at the end of the day.
>
> JUROR 7122: I got to go.
>
> THE COURT: No, you're staying. You're staying. You're staying on. I've been a judge for seven years. No one's ever complained about my clerk. But I'll be happy to hear your complaint at the end of the day. So go to the hall and stay and come in, act like an adult and you can face her and tell me everything she did wrong.
>
> JUROR 7122: Yes, sir.

The next juror remarked, "Hate to follow that." Judge Clarke responded, "Trust me, it would be hard not to look good after that."

Juror 7122 went into the hallway, where she was seen crying. Approximately an hour later, near the end of the afternoon session, she was called back into the courtroom. The following occurred:

> THE COURT: All right. We now have back juror 7122. Why don't you come right up to the front row there where I can hear you.
>
> JUROR 7122: Sure.

THE COURT: Now, what did you want to tell me about the way you've been treated today?

JUROR 7122: First of all, I apologize for upsetting you, or upsetting the clerk. That wasn't my intentions. You know, we just take a lot of time out of our day to come here. And I know everyone is really stressed out here, and it's a big job. But, you know, there was a comment made about my anxiety and it kind of, you know, really affected me. And, you know, I should have kept my mouth shut, obviously.

THE COURT: Tell me what my clerk said that caused you to personally go after her like that.

JUROR 7122: Well, like I said, I know — I know she has a hard job and everything, but the way that people are being talked to out there is just a little, you know —

THE COURT: Such as what? Was there some language used that you thought was inappropriate?

JUROR 7122: No. I mean, just demanding people around kind of rudely. Like I said, I know there's a lot of people coming in here. We don't know where — what we're doing. That was — and then there was just like — I told her I was having anxiety, which is very real and very true. And then she made it — I don't know if it was a joke about anxiety, "Well, I have anxiety too. You guys back up." And I felt that was personal to me. [¶] And I know — you know, I figured this is the place where we can have freedom of speech and exercise what is right, and that's all I was trying to do. I really didn't mean to offend or upset you in any way. I apologize for that.

THE COURT: So because she didn't respond to your claim of anxiety with appropriate sensitivity, you attacked her in open court in front of a judge with your criticism?

JUROR 7122: I mean, I guess.

THE COURT: I guess that's exactly what you did. [¶] Now, you say you work as a waitress; right?

JUROR 7122: Yes, sir.

[¶] . . . [¶]

THE COURT: So if I came into your establishment and criticized you loudly and in front of your manager, in front of other employees, and it wasn't fair, how would you feel about that?

JUROR 7122: I would be pretty upset. I would probably pull you aside and talk to you about it?

THE COURT: Privately. So she should have talked to you privately about your anxiety?

JUROR 7122: Yes.

THE COURT: Where?

JUROR 7122: I don't know, away from everyone.

THE COURT: Where? Did you see how many hundred people [*sic*] were in the hallway this afternoon?

JUROR 7122: Yes, sir.

THE COURT: The world does not circulate around any one of us. Not you and not me. When we no longer can see that other people are struggling and doing their best, we run the risk of looking immature and selfish and not contributing to the society that we're supposed to support. And I see jurors potentially who do that every day in every case. [¶] You've been in the jury room. You've heard people talking. You've heard them gossip. I hear their stories in every trial. Every trial there's someone who tries to lie to me. There's a lot of good people, but there's plenty of liars. [¶] So if you came here thinking that this was going to be Disneyland and you were getting an E Ticket and have good time [*sic*], I'm afraid you have no sense of what is going on in this building. [¶] Now, seven years ago the first clerk that was assigned to me, she's still here. The only clerk I've ever had. One juror, in all that time, out of thousands, has ever complained about her. That's you. [¶] You can leave now knowing that's what you accomplished. Goodnight. We'll be in recess for 15 minutes.

Juror 7122 testified that when she asked the judge's clerk for a hardship excuse based on anxiety, the clerk said, "Oh, I'm having anxiety too. You guys get away from me. Just go stand over there." Juror 7122 felt humiliated and insignificant. Based on the

clerk's tone and gestures, juror 7122 thought the clerk was making a public joke of her anxiety.

The clerk handed out hardship request forms in the hallway outside the courtroom. When juror 7122 asked to be excused because of her anxiety, the clerk told her to discuss it with the judge. The clerk did not perceive that the juror was actually suffering from anxiety. She denied making a joke about the juror's anxiety or making rude gestures to her. The clerk had a personal space issue, which was causing her anxiety when people got too close to her. As some of the jurors started grabbing forms, she told them that she had anxiety and instructed them to step back.

Judge Clarke testified that juror 7122 did not appear to be suffering from anxiety. In cross-examining juror 7122, the judge elicited that she was a public speaker, actress, writer, and activist with a public Facebook page and a number of blogs, and that she posted on YouTube.

Multiple witnesses testified that the judge appeared upset by the juror's statement about his clerk [he was "really teeing off on her," "he was angry," he seemed like he took "personal offense," he spoke in an "elevated tone"]. Judge Clarke acknowledged that he was angry at the juror and that she had gotten "under [his] skin." He admitted he was "defensive" and personally "hurt" and felt as if the juror had attacked a "person in [his] family."

Juror 7122 testified that when she was recalled to the courtroom, she did not feel she could truly express her concerns about the judge's clerk and felt she had been recalled to be reprimanded, not heard.

Judge Clarke acknowledged that he told the juror, "I'm going to excuse you, and you can go," but denied that he actually excused her or that he lost jurisdiction over her. Instead, he asserted that he was predicting that he would excuse her later or that she was not really excused because she was required to return to the jury assembly room to see if she was needed in another case. The judge also testified that a juror is not technically excused unless he specifically informs the juror that he or she must report back to the jury assembly room, which he did not say to juror 7122. However, he acknowledged

excusing other jurors without this specific instruction. In both his response to the preliminary investigation letter and his prehearing brief, the judge admitted that he had excused juror 7122 before he ordered her to wait in the hall.

The special masters found that Judge Clarke had excused juror 7122, but then reversed excusing her after she complained about his clerk. The examiner contends this finding is not supported by the record. Whether the judge excused the juror or reversed excusing the juror is not necessary to our determination of misconduct, for reasons discussed later in our conclusions of law. Thus, we do not make a factual finding on this issue.

At the evidentiary hearing, Judge Clarke contended for the first time that he relied on a discussion in Judge Rothman's California Judicial Conduct Handbook in concluding that he had a duty and authority as a judicial officer to investigate the juror's complaint against his clerk. In response to this explanation, the masters stated:

> Although Clarke maintains he had an "ethical obligation" to investigate Juror No. 7122's complaint, the record demonstrates that Clarke did not truly consider the merits of her concerns. Instead, he immediately interrupted her and ordered her to wait outside without much explanation. When he finally called her back in at the afternoon's end, he was dismissive of her claims of anxiety. He lectured her and made condescending comments about acting like an adult and not treating the court like Disneyland. [Fn. omitted.] [¶] Clarke did not consider that his clerk, [], might have overreacted when faced with trying circumstances. He did not ask [his clerk] if possibly she had been stressed and overreacted because of the large pool of jurors clamoring for her attention and crowding her physically. Instead, Clarke admits he spoke rudely to Juror No. 7122, retaliating against her criticism in defense of his clerk.

Despite his position that the commission should defer to the factual findings of the masters, Judge Clarke asks the commission to reject this factual finding. He asserts that he inquired into the juror's concern about his clerk when he asked her, "Now, what did you want to tell me about the way you've been treated today? . . .[¶] . . . Was there some language used that you thought was inappropriate?"

We agree with the masters that the record demonstrates by clear and convincing evidence that the judge was not truly concerned with investigating the juror's complaint about his clerk, but responded to her out of anger and in retaliation for her criticism of his clerk. After juror 7122 complained about the clerk, the judge said, "No one's ever complained about my clerk. . . . So go to the hall and stay and come in, act like an adult and you can face her and tell me everything she did wrong." When the juror said she had to leave, he repeated three times "you're staying." Judge Clarke acknowledged he was angry at her for "what she had done to [his] clerk." He described feeling as if he or his family had been personally attacked. And, when the juror told the judge what his clerk had done, he responded by reprimanding her: "So because she didn't respond to your claim of anxiety with appropriate sensitivity, you attacked her in open court in front of a judge with your criticism?" Moreover, as noted by the masters, the judge did not ask his clerk if the juror's concerns had any merit, something a person truly interested in investigating the complaint would do.

**2. Conclusions of Law**

**a. Comments to Juror 7122**

We conclude, as did the masters, that Judge Clarke's disparaging and discourteous treatment of juror 7122 violated canon 3B(4), requiring a judge to be patient, dignified and courteous to jurors and others who appear before the court. The judge was dismissive of the juror's claim of anxiety, lectured her and made condescending comments about acting like an adult and not treating the court like Disneyland. We independently conclude that this conduct also violated canons 1 (a judge shall uphold the integrity of the judiciary), 2 (a judge shall avoid impropriety and the appearance of impropriety), and 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), and constitutes prejudicial misconduct.

Prejudicial misconduct is conduct that would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office. (*Broadman,*

*supra,* 18 Cal.4th at pp. 1092-1093.) The masters concluded that the judge's treatment of juror 7122 did not create an appearance of impropriety or adversely affect the judiciary's reputation. We reach a different conclusion.

The examiner contends that the masters did not properly apply the objective observer standard in determining whether the judge engaged in prejudicial misconduct, noting that the masters relied on the mixed reaction of actual observers in the courtroom, including the attorneys and court personnel. In *Doan, supra,* 11 Cal.4th 294, the Supreme Court stated, "We are concerned with an 'objective observer' and not with the 'actual observers.' . . . To be sure, it is *sufficient* that the 'actual observers' view the conduct in question to be such. [Citation.] But, contrary to [the judge's] assertion, it is not *necessary*." (*Id.* at pp. 324-325, italics in original.)

The "objective observer" standard is similar to the "reasonable person" judicial disqualification standard (a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial). (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).) In defining the reasonable person standard for purposes of disqualification, the Supreme Court states, " 'The "reasonable person" is not someone who is "hypersensitive or unduly suspicious," but rather is a "well-informed, thoughtful observer." ' [Citation.] '[T]he partisan litigant emotionally involved in the controversy underlying the lawsuit is not the *disinterested objective observer* whose doubts concerning the judge's impartiality provide the governing standard.' " (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 389 [112 Cal.Rptr.3d 853, 235 P.3d 152], italics in original, quoting *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 106, fn. 6 [216 Cal.Rptr. 4]; see also *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391 [168 Cal.Rptr.3d 605]; *Leland Stanford Junior University v. Superior Court* (1985) 173 Cal.App.3d 403, 408 [219 Cal.Rptr. 40] [employing the " 'average person on the street' " standard]; *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104, 106 [216 Cal.Rptr. 4] [applying average person on the street standard; also "the partisan litigant emotionally involved in the controversy . . . is not the disinterested objective observer"].)

These cases suggest that the view of a *disinterested* actual observer may be a fact to consider, but is not determinative on the question of whether the conduct is prejudicial to public esteem for the judicial office. Determining the view of the objective observer encompasses a general assessment of how the conduct would be viewed by members of the public, or the average person on the street, aware of the facts and circumstances.

As the commission stated in *Inquiry Concerning Van Voorhis* (2003) 48 Cal.4th CJP Supp. 257, 312-313 (*Van Voorhis*): "The public looks to judges to set the tone of judicial proceedings. When a judge mistreats staff, belittles counsel or gives vent to his or her anger or frustration, the audience is not only concerned about the result in the specific matter before the court, but worries that other parties, lawyers, jurors and employees will be subjected to similar mistreatment." We conclude that a judge's disparaging and retaliatory treatment of a juror who was simply voicing a complaint about how a clerk was treating jurors would be considered prejudicial to public esteem for the judiciary in the eyes of an objective member of the public.

**b. Ordering Juror 7122 to Wait in the Hall**

Judge Clarke engaged in additional misconduct by ordering juror 7122 to wait in the hall, where she waited for approximately an hour before being recalled and reprimanded for criticizing his clerk. The masters found no impropriety in this aspect of the judge's treatment of juror 7122. We disagree and conclude that the judge engaged in willful misconduct.

As previously discussed, there is clear and convincing evidence to support the conclusion that Judge Clarke ordered juror 7122 to wait in the hall out of anger and in retaliation for her having criticized his clerk, not to make a genuine inquiry into the validity of her complaint. We conclude that this conduct violated canons 1, 2, 2A, 3B(4) and 3B(5) (a judge shall perform judicial duties without bias or prejudice) and thus constitutes an unjudicial act by a judge acting in his judicial capacity. Judge Clarke also acted in bad faith, a requisite element of willful misconduct, because he acted for a

corrupt purpose, a purpose other than the faithful discharge of judicial duties. (*Broadman, supra,* 18 Cal.4th at p. 1092.)

When a judge acts out of anger and for a retaliatory purpose, the judge is not acting in the faithful discharge of judicial duties. In *Van Voorhis, supra,* 48 Cal.4th CJP Supp. at page 275, the commission concluded that the judge's comments, made in the presence of the jury suggesting that a prosecutor was misleading the jury, were made in bad faith and constituted willful misconduct because the judge was acting out of anger rather than in the faithful discharge of judicial duty. The commission rejected the judge's assertion that the comments were made to ensure that the defendant received a fair trial, and instead concluded that the comments were made for the corrupt purpose of venting his anger or frustration. (See also *Inquiry Concerning Velasquez* (2007) 49 Cal.4th CJP Supp. 175, 193-195, [judge engaged in willful misconduct when he became embroiled and " 'acted out of pique, irritation or impatience, any of which is a purpose other than the faithful discharge of his judicial duties' "]; *Ross, supra,* 49 Cal.4th CJP Supp. at p. 100 [judge engaged in willful misconduct by adding new criminal charges against a defendant out of pique].)

The examiner contends that Judge Clarke also acted in bad faith by exceeding his authority in ordering juror 7122 to wait in the hall after she had been excused. Judge Clarke maintains that he had authority to order the juror to wait in the hallway. We need not resolve this dispute because even if the judge had such authority, he exercised it for the improper purpose of venting his anger and in retaliation against the juror's criticism of his clerk. As such, he acted for a purpose other than the faithful discharge of judicial duties and in bad faith.

The masters concluded that although the judge engaged in "retaliatory conduct," it was not improper because he was personally defending his clerk. The Alliance asserts that Judge Clarke had a duty to come to the defense of his clerk when her "competence" was challenged. We disagree.

Juror 7122 was voicing a complaint about what she perceived to be discourteous treatment of jurors by the judge's clerk. This is something a member of the public has a

right to do. There is no requirement that a judge come to the defense of a member of the judge's staff under the circumstances presented here. To the contrary, canon 3B(4) provides that a judge shall require court staff and personnel under the judge's direction to be patient, dignified, and courteous. (See Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) 6.26, p. 276.)

Judge Clarke asserts that a judge must be able to provide for the orderly conduct of court proceedings and be in charge of time management. He maintains that he was avoiding delay in addressing other hardship requests by ordering juror 7122 to wait in the hall rather than immediately addressing her complaint. We do not question a judge's authority to manage the order of court proceedings, so long as it is done for a proper purpose. As noted, here, Judge Clarke acted for a retaliatory purpose.

The Alliance contends that the judge's actions were in keeping with the spirit of canon 3C(1). That canon requires a judge to diligently discharge administrative duties impartially and prohibits a judge from engaging in speech that could reasonably be perceived as bias in the performance of those duties.[4] Judge Rothman states that a judge, "together with court administrators and the court's judicial managers, share responsibility for staff, with the judge having the most direct control in the courtroom environment." (Rothman, Cal. Judicial Conduct Handbook, *supra,* 6.27, p. 278.) However, he warns that the "managerial role requires oversight and actions by the judge that can become more difficult when the judge's relationship to staff is too personal. . . . [¶] . . . A professional relationship means that the judge understands that the first obligation is to the court and the public to maintain high standards in the management of the courtroom and the manner in which the important staff duties are performed." (*Ibid.*)

Thus, even if inquiring into the juror's complaint was within Judge Clarke's managerial duties, the responsibility entailed determining whether there was merit to the complaint, not jumping to the conclusion that the complaint was meritless and immediately reprimanding the complainant in open court. Moreover, a judge must be

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[4] We note that ruling on hardship claims is an adjudicative responsibility, not an administrative duty.

respectful and courteous in the performance of managerial responsibilities, and not act out of bias. Here, the judge allowed his personal bias toward his clerk to interfere with his objectivity.

### C. Count Two

#### 1. Factual Findings

On the morning of May 6, Judge Clarke questioned juror 4688, who had asserted on her hardship request that she could not speak or understand English. The following occurred:

> [THE COURT:] Good morning.
>
> [JUROR 4688]: Buenos dias. Good morning.
>
> THE COURT: Good morning.
>
> [JUROR 4688]: Good morning.
>
> THE COURT: All right. So you answered in English and then you got down to the reason and — I know enough Spanish to know what you wrote here. You said "I don't speak and I don't understand English."
>
> [JUROR 4688]: Correct.
>
> THE COURT: Correct. Thank you. How long have you been in this country?
>
> [JUROR 4688]: [Twenty-five].
>
> THE COURT: [Twenty-five] years, yes. And you studied for citizenship in English, yes?
>
> [JUROR 4688]: (Answers in Spanish.)
>
> THE COURT: Don't try and fool me now, ma'am, you'll be here a lot longer. Most people that have been in this country for ten years have picked up enough English. [Twenty] or so, they're moving right along. And 25 years is — so you better have a different reason why you want to be excused than that. Otherwise you'll be around here a while. [¶] Do you want to come back tomorrow and talk to me about this more?

[JUROR 4688]: (No audible response.)

THE COURT: We'll get your jury form to see what you wrote on "Do you understand basic English," and if you wrote "Yes." [¶] You can stay in the hallway please, we'll get back to you. Stay in the hallway. [¶] Can you get her juror form? 4688.

Later, near the end of the afternoon court session, Judge Clarke recalled juror 4688, and the following transpired:

THE COURT: Good afternoon.

JUROR 4688: Good afternoon.

THE COURT: Remind me of your number?

JUROR 4688: Six eight — no. 4688.

THE COURT: 4688. Okay. So I found your form and someone put "Yes" for understanding English.

JUROR 4688: No.

THE COURT: And then they switched it.

JUROR 4688: No, I understand no English. I'm sorry.

THE COURT: Yes. I'm telling you I have it right here that you signed it and it says yes, and then someone moved it over to another side and put N-S on it. So here's — if you understand me, I'm giving you a hint. If you start being honest with me you'll go home. If I think you're still trying to fool me, you might be back here tomorrow while I investigate this further. Because the jury form says that someone already evaluated you for English and you said to them that you didn't speak English, and they already checked you. So they put a mark next to your number. [¶] So I don't care if you don't want to be here, but I do care if you're trying to fool me and you think that that's fair. So did you want to tell me how this all happened, or do you want to just come back tomorrow, I'll get a Spanish interpreter here and have that person help me communicate with you.

JUROR 4688: I'm sorry, I — I don't understand nothing. No [en]tiendo.

THE COURT: We can get an interpreter here this afternoon. You can wait in the hallway, we will get an interpreter here. [¶] As soon as we deal with this juror [Juror 7122] we'll take a break and I'll figure out what we do with our time, if any.

When Judge Clarke recalled juror 4688 at approximately 4:00 p.m., a Spanish language interpreter was present. The following occurred:

THE COURT: Is the interpreter here? Did you want to try and talk to this lady? Maybe we can get her on her way. [¶] Good afternoon, ma'am.

JUROR 4688: Good afternoon.

THE COURT: So now we have a certified Spanish language interpreter assisting you. Tell me —

JUROR 4688: Thank you so much.

THE COURT: When you just cried, why did you cry?

JUROR 4688: I felt ashamed.

THE COURT: Why ma'am?

JUROR 4688: Because I am a citizen and I really do need to speak English and I don't know how to speak English.

THE COURT: I'm sorry if you feel embarrassed about that.

JUROR 4688: I feel that way too.

THE COURT: So I assume you studied long ago to take the test; right?

JUROR 4688: No. My father was German, may he rest in peace. And he had me naturalized as a citizen when I was two years old. And then he sent me to Mexico. And when I came back here I was already a grownup.

THE COURT: All right. So as a citizen, some day we would like to have you serve as a juror. Now, I am not fluent in any other language, so I won't criticize someone who only knows one language. For citizenship here you should make an effort. People would like to have someone with your background, someone with

your knowledge, someone with your understanding hearing their case. So if you have time to work on your English, the next time you come in maybe you can stay to serve.

JUROR 4688: Well, I would have to — I've got two jobs. I would have [to] quit one of my jobs.

THE COURT: I'm not ordering you to do anything. I'm hoping you have the time to do it.

JUROR 4688: Okay. I'll try. Of course I will.

THE COURT: Many people come and they say they don't understand English, and they actually can. And this has caused me to mistrust you, and now I feel that I should have trusted you more.

JUROR 4688: Well, I want to thank you. I would not lie to you if I really could understand and if I really knew.

THE COURT: All right. So now you're free to go. You don't have to go study anything, but I think everybody here would like to see you participating, if you can find the time and if you can.

JUROR 4688: Of course. Thank you.

THE COURT: Good luck. Thank you.

JUROR 4688: Thank you so much. Thank you.

The jury services division of the Los Angeles County Superior Court interviews prospective jurors to assess their English proficiency. When Judge Clarke first addressed juror 4688, he had a list indicating that she had been prescreened and found to be English qualified.

At some point while juror 4688 was waiting in the hall, Judge Clarke received her jury affidavit form from jury services. The form inquires whether the affiant is able to read and understand basic English, and includes circles indicating "yes" and "no." Juror 4688 filled in both circles, but also crossed out and initialed the "no" box.[5]

[5] The special masters found that the juror had changed and initialed the box for non-English speaking, even though she had been deemed qualified. Judge Clarke objects to this factual finding, and asks the commission to find that she changed her answer from

The judge testified that the inconsistencies on the form, the prescreening information, and the juror's responses made him skeptical of her claim that she did not speak English. One of the defense attorneys who spoke fluent Spanish thought the juror was not being honest about her lack of English skills because he saw her speaking English with other jurors in the hallway and she had filled out the juror form in English.[6] However, there is no evidence that the attorney conveyed this information to Judge Clarke before the judge questioned juror 4688 in the morning or afternoon.

Judge Clarke testified that he eventually excused juror 4688 because she had been weeping loudly and openly.

**2. Conclusions of Law**

The masters concluded that although Judge Clarke may not have acted with absolute patience, dignity and courtesy, he did not violate the canons charged or engage in misconduct with respect to count two. Based on the factual findings of the masters and our independent review of the record, we determine that Judge Clarke violated canon 3B(4) through his discourteous and intimidating comments to juror 4688.[7] We further conclude that the conduct constitutes improper action.

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non-English to English, not the other way around. Juror 4688 did not testify at the hearing. We find that there is not clear and convincing evidence to determine which box the juror filled in first or to determine the juror's intent in making the change.

[6] The examiner objects to the masters' statement that "[b]oth the deputy district attorney and one of the defense attorneys thought she was dissimulating about her English proficiency." The transcript reflects that the deputy district attorney testified that he did not think Judge Clarke believed juror 4688, not that he (the deputy district attorney) did not believe her.

[7] The examiner asserts that Judge Clarke also violated canon 3B(4) by failing to give juror 4688 any indication of how long she would have to wait in the hall. When Judge Clarke first ordered the juror to wait in the hall, he did not know how long it would take to get her juror affidavit. The record does not reflect when the judge received the juror affidavit. Sometime in the afternoon, by his estimate at approximately 2:55 p.m., when his clerk inquired about juror 4688, the judge responded, "She can come at the end of the day when we've finished." Although, at that point, it would have been preferable

Judge Clarke contends that we should adopt the conclusion of the masters that he did not engage in misconduct because he had good reason to question the juror's claim that she was not proficient in English, because the issue of juror English proficiency is a significant and ongoing problem in the Los Angeles County Superior Court, and because of the importance of having a jury reflecting a cross-section of the community. We do not question that the judge initially had reason to doubt the juror's language claim or that language hardship claims are frequent and difficult to evaluate. However, this does not justify the judge's harsh and disparaging comments to the juror in open court. He could have simply asked juror 4688 to explain why she did not speak English after having been in the country for 25 years. If she claimed not to understand his questions, he could have told her to wait until he got the jury form and an interpreter, without accusing her of dishonesty in open court. In fact, once an interpreter arrived and the judge asked appropriate questions (why she felt embarrassed; "So I assume you studied long ago to take the test; right?"), he quickly learned that she had been naturalized as a citizen when she was two years old, and then was sent to Mexico where she stayed until she grew up.

Judge Clarke denied that he accused juror 4688 of lying, and instead describes his remarks as expressing skepticism. But, the transcript reveals that he repeatedly accused the juror of trying to "fool" him and told her if she did not "start" being honest with him, she would be there a lot longer and might even have to come back the next day. This is the equivalent of accusing her of lying.

Judge Clarke cites *People v. Venegas* (1970) 10 Cal.App.3d 814 [89 Cal.Rptr. 103], for the proposition that it is proper for a judge who believes that someone has testified falsely to say so, rather than remain silent. *Venegas* cannot reasonably be interpreted as condoning the judge's remarks to a juror in this case. In *Venegas*, the judge admonished a witness who was hostile, argumentative and evasive of the possible penalty for perjury, and told the witness, "If you are telling the truth, there is no

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to inform the juror that she would have to wait until approximately 4:00 p.m., based on this record, we conclude that there is not clear and convincing evidence that failure to do so violated canon 3B(4).

problem." The appellate court noted that the judge did not at any time directly accuse the witness of lying, and stated, "The mere comment by the court in a court trial of its disbelief of a witness' testimony in a temperate manner is not error." (*Id.* at p. 825.) In this case, Judge Clarke directly accused juror 4688 of trying to "fool" him and his comments were not made in a temperate manner. In *People v. Steinfeld* (1940) 38 Cal.App.2d 280, 282 [101 P.2d 89], the court stated: "It is not customary in American courts which follow approved principles of decorum to address witnesses in the curt manner in which defendant was addressed. Neither is it customary to interrupt the testimony of witnesses to accuse them of lying."

Significantly, Judge Clarke received an advisory letter from the commission less than six months before the conduct in this matter for conduct that included calling a criminal defendant whom the judge believed had misrepresented the amount of funds in his pro per account, "a ditherer, a dissembler, a poser and a fraud."

Judge Clarke has again violated his duty under the canons to be patient, dignified and courteous to those who appear before him by accusing juror 4688 in open court of dishonesty in an intemperate and disparaging manner.

**D. Count Three**

**1. Factual Findings**

During the afternoon court session on May 6, Judge Clarke considered the hardship request of juror 7132, who had written on her hardship form that she had $25 in her checking account. The following occurred:

> [THE COURT:] Next up, 7132. That's 137 on the random list. [¶] Hello.
>
> JUROR 7132: Hello.
>
> THE COURT: You actually told me how much you have in your checking account.
>
> JUROR 7132: I can show you too.
>
> THE COURT: No. No. It's an impressive and convincing figure.

JUROR 7132: Thank you for not sharing it.

THE COURT: Well, every one of these lawyers spent more than that on lunch today.

JUROR 7132: Great.

THE COURT: Probably. [¶] But, yes, I know some wait staff make a lot of money. Sounds like you're not in that category yet, so I'm going to excuse you. Thank you.

JUROR 7132: Thank you.

THE COURT: That's 137, 7132. She has $25 in her checking account. I know you all eat for less than $25. Sometimes we don't. That's cutting it close.

Juror 7132 had exited the courtroom when the judge revealed the amount in her checking account.

Juror 7132 testified that the judge's remark comparing the amount in her account with what the attorneys spent for lunch was "embarrassing and condescending." When she responded, "Great," to the judge's comment, she did so sarcastically. When juror 7132 left court she called a friend because it was embarrassing and she thought it was an unusual story and worth sharing. She was crying when she spoke with her friend. The juror told a commission investigating attorney that this conversation took place as she was walking to lunch. The interaction with the judge occurred in the afternoon session. In her testimony, she acknowledged that she could have been mistaken as to when she called the friend.

There was mixed reaction to the remarks from actual observers in the courtroom (a juror and defense counsel considered the comments demeaning; another defense attorney and the deputy district attorney did not find the comments to be offensive).

Judge Clarke denied he had any intent to demean or embarrass juror 7132. He testified that he intended his exchange with the juror as light-hearted banter meant humorously. He said the juror acted like she was doing comedy and was kidding and joking. He also stated he disclosed the amount in her account because he realized that it

was impolite to make a joke comparing the amount in her account with how much money the attorneys spent on lunch when the attorneys did not know the figure.

Yet another explanation offered by the judge was that he revealed the specific amount in the juror's checking account to provide the attorneys with a factual basis for the hardship excuse. However, the judge acknowledged he excused other jurors for financial hardship without providing the attorneys with a factual basis. He also admitted he did not reveal the amount in juror 5868's (count four) account to provide the factual basis for his hardship excuse.

In addition, Judge Clarke had the agreement of the attorneys to handle hardship requests without their input and without providing them with the hardship forms, although they were free to request the forms. None of the attorneys challenged the judge's decision to excuse juror 7132, or asked the factual basis for dismissing the juror. At his appearance before the commission, Judge Clarke stated he did not think the attorneys would have challenged the financial hardship of juror 7132, or would have cared if he did not disclose the amount in her account.

We find that the judge's remark was not intended to provide a factual basis for the hardship excuse.

**2. Conclusions of Law**

The masters concluded that although the judge bordered on acting undignified, his conduct did not violate the canons or constitute misconduct. We reach a different conclusion, and find that Judge Clarke violated canon 3B(4) and engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Even if Judge Clarke thought he was engaging in humorous banter,[8] joking about a juror's limited financial resources and revealing personal financial information in open court, particularly when the juror expressed that she did not want that information to be disclosed, is manifestly discourteous and undignified. Judge Rothman states:

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[8] We note that Judge Clarke could not have been engaging in banter with the juror when he revealed the amount in her account because she had already left the courtroom.

> A sense of humor is essential to judicial demeanor, and the modest injection of humor at the appropriate time can reduce tension, and can be a tool for restoring control in court. The problem, however, is that much of what seems funny in court relate [*sic*] to the conduct or demeanor of those standing before the court, creating the temptation to get a laugh at their expense. The temptation is especially great given how easy it is for a judge to get a laugh from the adoring audience of those seeking the favor of the judge. [Fn. omitted.] In addition, one must always remember there may be people in the courtroom under very serious or grave circumstances who may not appreciate jocular and humorous exchanges between the judge and counsel. A judge needs to always keep in mind that breaks to joke around and have a few laughs may not be in the service of the goals and objectives of the judicial proceeding.

(Rothman, Cal. Judicial Conduct Handbook, *supra*, 3.42, p. 140.)

The commission has recognized that humor may be inappropriate and may violate the canons, particularly when at the expense of another. In *Public Censure of Judge DeAnn M. Salcido* (2010), the commission stated, "Judicial humor should never be used in a courtroom . . . in a manner that diminishes the dignity of the judicial process." The commission has also stated, "[H]umor at the expense of another, or humor intended or likely to demean or belittle another is unacceptable." (*Public Reproval of Judge Gary T. Friedman* (1993); see also *Public Admonishment of Judge Robert C. Coates* (2000).)

When members of the public give up their time for jury service, they do not expect to have their private financial information disclosed in open court or to be the brunt of jokes about their limited financial resources. Moreover, here, Judge Clarke revealed the amount in the juror's account even after she had thanked him for not doing so. Such conduct objectively undermines public respect for the judiciary. Therefore, we conclude that the judge's comments and gratuitous disclosure of the amount in the juror's checking account constitutes prejudicial misconduct.

### E. Count Four

#### 1. Findings of Fact

Juror 5868 wrote on his hardship form that he had $33 in his checking account. In addressing the hardship claim, Judge Clarke said to the juror, "[You have a] little bit more than the other gal. [Thirty-three] bucks," and "You are putting her [juror 7132] in the shade with that big account." The judge excused the juror and said, "Good luck on getting paid and being able to bring that number up a little bit better."

Judge Clarke testified he was making a light-hearted joke. Juror 5868 testified he did not feel humiliated or embarrassed by the judge's comments.

#### 2. Conclusions of Law

We conclude the judge's comments to juror 5868 about his limited financial resources and the judge's gratuitous disclosure of the amount in the juror's account was discourteous and undignified and violated canon 3B(4). For the reasons discussed with respect to the conduct in count three, the majority of the commission also concludes that the judge's conduct undermines public esteem for the judiciary and thus constitutes prejudicial misconduct. (Four commission members considered the conduct on this count to be improper action.)

Whether the judge's comments are considered demeaning, undignified and discourteous in violation of canon 3B(4) and undermine public esteem for the judiciary is judged by an objective standard. Otherwise, the subjective perception of complainants would determine whether the judge engaged in misconduct and lead to inconsistent commission decisions. The fact that juror 5868 was not embarrassed while similar comments brought juror 7132 to tears illustrates that people have different sensitivities. The commission must view the conduct from the perspective of an objective person aware of the circumstances. In the commission's determination, such a person would find the judge's gratuitous disclosure of a juror's personal financial information and jokes about the juror's limited financial means to be discourteous and demeaning and harmful to public esteem for the judiciary.

### F. Count Five

#### 1. Findings of Fact

On her hardship form, juror 1968 indicated that during the anticipated pendency of the trial she was scheduled to shoot a film entitled, "The Big Balloon." In questioning the juror about her role in the film, the judge stated he would not disclose the name of the film. After excusing the juror and after she left the courtroom, the judge said, "It sounds like a nice PG project, by the way, for those of you letting your minds run a little bit."

Juror 1968 did not hear the "PG" comment, but heard laughter after she left the courtroom.

Judge Clarke testified that after he told the juror in open court that he would not disclose the name of the film, he became concerned that the attorneys and other jurors could be speculating that it was a gang-related movie. He testified that he wanted them to know that it was a wholesome film title. One of the defense attorneys recalled the juror being attractive and that there was whispering among the defense attorneys about whether it was a pornographic film. Judge Clarke testified that he did not hear this conversation.

The masters found implausible the judge's explanation that he was attempting to curb speculation that the movie might be about gangs and violence (rather than a sexually explicit film). Judge Clarke objects to this factual finding. We find that the masters' finding is supported by clear and convincing evidence.

The judge's assertion that he thought the jurors might be speculating that the movie was about gangs or violence makes no sense and finds no support in the record. There is no conceivable reason the jurors would make this assumption. There was nothing said about the movie that would suggest that the juror was in a movie about gangs or violence. And, the judge acknowledged that there was nothing about the juror's appearance or demeanor that would have created such curiosity.

We find that the judge made the remark in an effort to be humorous.

### 2. Conclusions of Law

The masters concluded that the "PG" remark did not violate the canons or constitute misconduct. We agree.

The use of humor in the courtroom does not in itself constitute misconduct. (*Inquiry Concerning Harris* (2005) 49 Cal.4th CJP Supp. 61, 71.) The question is whether the humor was discourteous, undignified or demeaning. Unlike the comments to the jurors about their limited finances, this remark was not making fun of a person's personal circumstances. As the examiner points out, the "PG" comment could be interpreted as suggesting that others in the courtroom were thinking that the juror was in a sexually explicit film. However, the judge's comment was not accusing the juror of being in a sexually explicit film, but dispelled any such thoughts that the judge could have created when he said he would not disclose the name of the film. Although the remark would have been better left unsaid, we agree with the masters that any lack of dignity with respect to this comment is de minimis. As such, we conclude that the conduct as proven in count five did not clearly and convincingly constitute a violation of the canons or misconduct.

## IV.

## DISCIPLINE

In determining the appropriate discipline, we consider several factors, including the nature and number of incidents of misconduct, whether the judge has prior discipline, whether the judge acknowledges and appreciates the impropriety of his or her actions, the extent to which the misconduct is injurious to others, the impact of the misconduct on public esteem for the judiciary, and the judge's reputation for administering his or her duties in a fair, impartial, and dignified fashion. (Policy Declarations of Com. on Jud. Performance, policy 7.1 [non-exclusive factors relevant to sanctions]; e.g., *Inquiry Concerning Mills* (2013) 57 Cal.4th CJP Supp. 1, 15.)

Judge Clarke engaged in one instance of willful misconduct, three instances of prejudicial misconduct, and one instance of improper action. The misconduct

demonstrates a pattern of discourteous and undignified treatment of jurors. Public esteem for the judicial system is harmed when a judge mistreats and belittles jurors, uses humor at a juror's expense, and retaliates against a juror for complaining about his clerk. Jury service is essential to maintaining one of the bedrocks of our judicial system: the constitutional right to trial by an impartial jury.

The judicial disciplinary process plays an important role in maintaining public trust and confidence in the judiciary and the administration of justice. (*Adams*, *supra*, 10 Cal.4th at p. 912.) For many members of the public, jury service is their only opportunity to witness the justice system at work. How a judge treats jurors can leave a lasting impression, not only of that particular judge, but of the entire judicial institution. Judge Clarke presented evidence concerning the reluctance of many citizens to serve as jurors in Los Angeles County. In the commission's view, jurors are more likely to be willing to serve when treated with dignity and respect. Jurors are asked to take time out of their lives as a public service, often at a financial loss. They deserve to be treated with patience, dignity and courtesy.

In addition to the impact on the esteem of the judiciary and the judicial system, the commission considers the extent to which the misconduct has been injurious to other persons. (Policy Declarations of Com. on Jud. Performance, policy 7.1(1)(f).) In this case, the judge's conduct brought three jurors to tears. Moreover, it appears that the judge's conduct was intimidating to other jurors and caused general discomfort in the courtroom, as reflected by the comment of the juror following juror 7122, "Hate to follow that."

At his appearance before the commission, Judge Clarke showed little appreciation of the impact of his conduct on the jurors who were the recipients of his discourteous and demeaning comments. While acknowledging that the juror in count one was sobbing, he was dismissive of her emotions because "[i]t fit the way she behaved that day." He admitted seeing the juror in count two crying in the presence of the interpreter, but denied that *he* made her cry because by the time she was recalled "she was no longer crying."

And, with respect to count three, he questioned the credibility of the juror's testimony that she cried while telling her friend what happened in court.

The commission understands that this was a long and stressful jury selection and that evaluating hardship claims can be difficult. However, this does not excuse Judge Clarke's disrespectful treatment of four jurors.

Judge Clarke maintains that his conduct in this case is a consequence of the unusual circumstances of the *Diaz* case and is not reflective of his treatment of jurors in general. He presented testimony and declarations from others who served as jurors or who were prospective jurors in his courtroom in other cases and who praised his treatment of jurors (a friend, an attorney, and two fellow judges). However, the examiner presented the testimony of an attorney, David Freedman, who had a poor experience when he was a prospective juror in the judge's courtroom in a different case and who contacted the commission office after reading about the charges brought against the judge. When Freedman expressed reservation about his ability to be fair given the defendant's appearance and tattoos, the judge lectured him at some length about the concept of a fair trial. Freedman thought the judge's comments were insulting and offensive.[9]

Another indication that the poor demeanor exhibited by Judge Clarke in this case is not simply a result of the stress associated with selecting a jury for a multidefendant murder trial is the judge's prior discipline for similar misconduct. As previously noted, in December 2013, less than six months before the conduct in this matter, Judge Clarke received an advisory letter for two incidents of misconduct involving a pro per criminal defendant. The first incident involved the defendant's request for additional ancillary funds for "phone time." After forming the opinion the defendant had misrepresented that he did not have funds, the judge called the defendant "a ditherer, a dissembler, a poser and a fraud." The second incident involved a statement of disqualification filed by the same

[9] Judge Clarke contends that the commission should not consider Freedman's testimony because the conduct was not charged. However, the masters correctly admitted this evidence to rebut the judge's evidence that he customarily treats jurors with respect.

defendant, which was based in part on the aforementioned comments. The judge struck the disqualification motion as having no merit on its face, rather than having it heard by another judge. The first incident is similar to the judge's conduct in accusing the juror in count two of trying to fool him into thinking she did not speak English. Prior discipline, particularly for similar misconduct, is a significant factor in the commission's determination of the appropriate level of discipline. (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)(e).) As such, this factor weighs in favor of public discipline.

Whether a judge has shown an appreciation of the impropriety of his or her acts is another factor relevant to sanctions. (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)(a).) A judge's failure to appreciate or admit the impropriety of his or her acts indicates a lack of capacity to reform. (*Inquiry Concerning Platt* (2002) 48 Cal.4th CJP Supp. 227, 248.) Judge Clarke acknowledged he displayed inappropriate judicial demeanor in his comments to juror 7122, but denied any impropriety in ordering her to wait in the hall. The judge acknowledged that it would have been better had he not stated in open court the amount in the checking accounts of jurors 7132 and 5868, but denied that doing so constituted misconduct. He denied accusing juror 4688 of lying, and instead described his remarks as appropriately expressing skepticism. Thus, Judge Clarke has shown a very limited appreciation of the impropriety of his conduct.

In determining the appropriate level of discipline, we have also taken into consideration the testimony and declarations from other judges and lawyers attesting to Judge Clarke's positive qualities as a judge. He is described as intelligent, professional, fair, even-tempered, and hardworking. While the judge's positive reputation for administering justice is a factor that may mitigate the level of discipline (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)(g)), in this case, it is outweighed by the consideration of the factors discussed above, particularly the nature and number of incidents of misconduct and the judge's prior discipline.

As recognized by the masters, Judge Clarke's conduct toward the juror in count one is similar to that of other judges who have been publicly admonished based on discourteous and denigrating comments, use of humor at the expense of litigants and

embroilment. (*Public Admonishment of Commissioner Alan H. Friedenthal* (2012); *Public Admonishment of Judge Paul M. Bryant, Jr.* (2008); *Public Admonishment of Judge James M. Petrucelli* (2007).) The comparison to prior public admonishments for this type of misconduct is even stronger given the additional misconduct we have found in counts two through four. (See also *Public Admonishment of Judge Joseph E. Bergeron* (2016); *Public Admonishment of Judge Daniel J. Healy* (2014).)

Weighing all of the foregoing factors leads us to the conclusion that a public admonishment is the appropriate discipline in order to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and impartiality of the judiciary.

Finally, we address the position of the amicus curiae with respect to discipline. The Alliance asserts that the commission should not impose discipline on Judge Clarke and instead should allow the judge's supervisor to handle the matter "locally." According to the Alliance, a "few words from a supervising judge would have handled this matter adequately without involving the disciplinary machinery of the commission."[10] This argument reflects a misunderstanding of the role of the commission. Under the California Constitution, the commission is responsible for investigating complaints of judicial misconduct and disciplining judges. (Cal. Const., art. VI, § 18.) By referring a complaint of judicial misconduct to the local court, the commission would effectively be relinquishing its responsibility under the constitution. In changing the composition of the commission from a majority of judge members to a majority of public members, the voters declared that complaints of judicial misconduct should be reviewed and decided by a commission that does not consist of all judges. The Alliance's suggestion that Judge Clarke's misconduct be handled by local judges, rather than the commission, runs contrary to the manifest intent of the voters, and the responsibility entrusted to the commission by our state constitution.

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[10] There is no evidence or suggestion that this matter was ever referred to a supervising judge, or that a supervising judge took any action.

## ORDER

Pursuant to the provisions of article VI, section 18 of the California Constitution, we hereby impose this public admonishment.

Commission members Anthony P. Capozzi, Esq.; Hon. Ignazio J. Ruvolo; Ms. Mary Lou Aranguren; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Mr. Richard Simpson; Mr. Adam N. Torres and Hon. Erica R. Yew voted in favor of imposition of a public admonishment. Commission members Anthony P. Capozzi, Esq.; Hon. Ignazio J. Ruvolo; Ms. Mary Lou Aranguren; Ms. Sarah Kruer Jager; Hon. Thomas M. Maddock; Nanci E. Nishimura, Esq. and Mr. Adam N. Torres voted in favor of all the findings and conclusions herein. Commission members Ms. Pattyl A. Kasparian, Dr. Michael A. Moodian, Mr. Richard Simpson and Hon. Erica R. Yew concur in all the findings and conclusions herein, except for the legal conclusion that the judge's conduct in count four constitutes prejudicial misconduct, and would have voted in favor of concluding that the conduct in count four constitutes improper action.

Date: September 29, 2016

Anthony P Capozzi

Anthony P. Capozzi
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| IN THE MATTER CONCERNING JUDGE TARA M. FLANAGAN | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT |
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This disciplinary matter concerns Judge Tara M. Flanagan, a judge of the Alameda County Superior Court. Judge Flanagan and her attorney, Edith R. Matthai, appeared before the commission on March 22, 2017, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Judge Flanagan has waived her right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Flanagan and her counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

## STATEMENT OF FACTS AND CONCLUSIONS

Judge Tara M. Flanagan has been a judge of the Alameda County Superior Court since 2013. Her current term began in 2013.

Judge Flanagan was a candidate for judicial office in 2012. Her campaign committee was titled Tara Flanagan for Superior Court Judge 2012. The election was held on June 5, 2012. Judge Flanagan was elected.

In March or April of 2012, Judge Flanagan's campaign manager and treasurer (treasurer) made a loan to candidate Flanagan in the form of a cashier's check in the amount of $10,000. The loan was for the campaign, but the check was made payable to

candidate Flanagan personally, not to her campaign. On April 30, 2012, the check was deposited into candidate Flanagan's business account for her law office. On May 2, 2012, the same amount of money was withdrawn by candidate Flanagan from this account and deposited into the campaign bank account held by Tara Flanagan for Superior Court Judge 2012.

In mid-May 2012, the treasurer made another loan to candidate Flanagan in the form of a check in the amount of $15,000. The loan was for the campaign, but the treasurer wrote "Personal Loan" on the check and made it payable to candidate Flanagan personally, not to her campaign. On May 14, 2012, the check was deposited into candidate Flanagan's personal bank account. On or about May 19, 2012, candidate Flanagan wrote a personal check to her campaign committee from the same account and for the same amount of money, which cleared the bank on or about May 21, 2012.

On or about May 23, 2012, candidate Flanagan and her treasurer caused to be filed a pre-election campaign statement on behalf of Tara Flanagan for Superior Court Judge 2012 for the reporting period of March 18, 2012 through May 19, 2012. The loans were reported, but instead of reporting her treasurer as the true source of the loans, candidate Flanagan disclosed the contributions as personal loans from herself to her campaign committee. No mention was made of her treasurer. The loans together comprised approximately 23 percent of reported receipts for candidate Flanagan's 2012 campaign committee. Both loans were campaign contributions because they were made for political purposes within the meaning of Government Code section 84216. Candidate Flanagan did not inform her treasurer that the treasurer was required to file campaign reports for making contributions of $5,000 or more.

Candidate Flanagan's failure to disclose her treasurer as the true source of the $25,000 in loans violated Government Code sections 84211(f) and (g) and 84216, requiring accurate reporting of information about the sources of campaign contributions. Judge Flanagan entered into a stipulation with the California Fair Political Practices Commission (FPPC) which included payment of a penalty in the amount of $4,500 for this violation. Additionally, use of a cashier's check for the $10,000 loan was a violation

of Government Code section 84300(c), which prohibits campaign contributions in the form of cashier's checks. Depositing the $10,000 cashier's check into her business account and the $15,000 check into her personal bank account constituted commingling of campaign contributions and personal funds in violation of Government Code section 84307. Candidate Flanagan's failure to inform her treasurer of the campaign treasurer's reporting responsibilities was a violation of Government Code section 84105.

These violations of law constituted improper political activity in violation of canon 5 of the Code of Judicial Ethics, applicable to candidates for judicial office, and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

In determining to issue a public admonishment, the commission considered the impact of the judge's conduct on public confidence in the integrity of the judiciary and the administration of justice. (Policy Declarations of Com. on Jud. Performance, policy 7.1(1)(h).) Candidate Flanagan failed to report the true source of a significant contribution to her campaign, and commingled personal, business and campaign funds. An express purpose of the Political Reform Act is to ensure that "[r]eceipts and expenditures in election campaigns ... [are] fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." (Gov. Code, § 81002(a).) When this is not done, the public is deprived of important information that has the potential to affect how votes are cast. When a judicial candidate violates financial reporting laws and wins the election, public respect for the judiciary is undermined.

The commission also took into consideration that the FPPC found the violations to be unintentional. (Policy Declarations of Com. on Jud. Performance, policy 7.1(1)(e).) Judge Flanagan maintained that it did not occur to her that the loans were reportable; she made logical assumptions that she had no responsibility to report the loans, and was shocked when notified of the violation. She explained that she made the contribution in her name because she was concerned the campaign account would have insufficient funds at the end of the race to repay her treasurer; whereas, she signed promissory notes to repay the loans to her treasurer. Nonetheless, regardless of her motivations, she had an

obligation to report the true source of the loans. Particularly as an attorney, she should have known to familiarize herself with the applicable reporting requirements before submitting an official campaign statement. Judge Flanagan acknowledged at her appearance that she was aware the FPPC had a website which would have informed her of her reporting responsibilities; but that she never looked at the regulations on the website.

Judge Flanagan asks the commission to take into consideration that neither she nor her treasurer had prior campaign experience. The commission has taken this into consideration, but does not consider it to be mitigating. Without an experienced treasurer or campaign manager, it was all the more incumbent upon candidate Flanagan to inform herself about the applicable statutes and instruct her treasurer to do the same. Ignorance of the law is an aggravating factor for a judicial candidate. As the commission has stated:

> The FPPC has primary responsibility for enforcing the Act, including as to candidates for judicial office. That agency may consider it mitigating when a candidate violates the Act through inadvertence due to lack of familiarity with the intricacies of the law. However, because of the additional constraints imposed by the canons on a candidate for judicial office, we consider a claim by a judicial candidate of "ignorance of the law" as a defense to a wide-ranging violation of the law, such as here, to aggravate the violation itself. It is axiomatic that candidates for judicial office are obligated to know the requirements of the law and to conduct their election campaigns in strict accordance with it.

(*Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146, 163.)

In mitigation, the commission has taken into consideration that Judge Flanagan cooperated with the FPPC and the commission, and that she has expressed regret for her errors and fully acknowledged that she had the responsibility to know the law and comply with it, but failed to do so. (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)(a)(b).)

Weighing the forgoing factors, the commission determined that a public admonishment is the appropriate discipline in order to maintain public confidence in the integrity of judiciary and the administration of justice.

Commission members Hon. Ignazio J. Ruvolo; Mr. Richard Simpson; Anthony P. Capozzi, Esq.; Hon. Michael B. Harper; Ms. Pattyl A. Kasparian; Dr. Michael A. Moodian; and Mr. Adam N. Torres voted for the Public Admonishment. Ms. Mary Lou Aranguren and Ms. Sarah Kruer Jager were not present. Commission members Nanci E. Nishimura, Esq. and Hon. Erica R. Yew were recused from this matter, pursuant to commission policy declaration 6.1.

Dated: April 11, 2017

Hon. Ignazio J. Ruvolo
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE JEFF FERGUSON** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Jeff Ferguson, a judge of the Orange County Superior Court. Judge Ferguson and his attorney, Paul S. Meyer, appeared before the commission on May 10, 2017, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Judge Ferguson has waived his right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Ferguson and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

## STATEMENT OF FACTS AND CONCLUSIONS

Judge Jeff Ferguson has been a judge of the Orange County Superior Court for two years. His current term began in January 2015.

As set forth below, the commission found that Judge Ferguson violated the Code of Judicial Ethics by posting a statement about a candidate for judicial office on Facebook with knowing or reckless disregard for the truth of the statement, and by being Facebook friends with attorneys who were appearing regularly before him in court.

1. Post on Local Bar Association Facebook Page

Deputy District Attorney Karen Schatzle was a candidate for judicial office in 2016. Judge Ferguson supported her opponent, Judge Scott Steiner, who was publicly censured by the commission in 2014 for conduct that included sexual activity in the courthouse. On April 26, 2016, Ms. Schatzle posted on the North Orange County Bar Association (NOCBA) Facebook page: "Scott Steiner uses his office for sex and yet so many aren't concerned, crazy politics!" Judge Ferguson posted in response: "Karen Shatzle [*sic*] has sex with defense lawyer whike [*sic*] shw [*sic*] is a DA on his cases and nobody cares. Interesting politics."

The Facebook page was open to all NOCBA members. Judge Ferguson removed his post after Ms. Schatzle responded to it.

The commission found that Judge Ferguson's post claiming that Ms. Schatzle was having sex at the time, or had sex in the past, with a defense attorney while she was a prosecutor on his cases was made with knowing or reckless disregard for the truth. Ms. Schatzle and the defense attorney referred to in Judge Ferguson's post deny any intimate involvement while they were appearing on the same cases. In his response to the preliminary investigation letter from the commission, Judge Ferguson stated that many years ago Ms. Schatzle was a frequent subject of discussion for her intimate relationship with the defense attorney, and when he saw her post, he "immediately thought of this commonly known information, and without thought repeated it." Judge Ferguson could provide no factual support for his reference to "commonly known information" that Schatzle and the defense attorney appeared on the same cases during the time they were in an intimate relationship. He submitted a declaration from one attorney who purportedly had knowledge of the relationship. The attorney admitted having no evidence that Ms. Schatzle and the defense attorney were working on opposite sides of cases while involved in an intimate relationship. Judge Ferguson acknowledged that he was wrong to write the post, recognized that it fell outside the bounds of professionalism and the decorum expected of a bench officer, and apologized for his conduct.

The commission found that Judge Ferguson's conduct violated canon 1 of the Code of Judicial Ethics (a judge shall personally observe high standards of conduct so that the integrity and independence of the judiciary is preserved), canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities), canon 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), canon 4A(2) (a judge shall conduct all of the judge's extrajudicial activities so that they do not demean the judicial office), and canon 5 (a judge shall not engage in political activity that may create the appearance of impropriety).

2. Failure to Disclose That Attorneys Were Facebook Friends

For a period of time after becoming a judge, Judge Ferguson was Facebook friends with Orange County criminal defense attorneys Jeffrey D. Kent, Ray Dinari and Bob Hickey while they had cases pending and appeared regularly before him in court. The judge did not disclose that he was Facebook friends with these attorneys.

The commission noted that California Judges Association Ethics Opinion No. 66 regarding "Online Social Networking" (Nov. 23, 2010, pp. 10-11) provides the following guidance to judges:

> While it may be permissible for a judge to interact on a social network site with an attorney who *may* appear before the judge, it is not permissible to interact with attorneys who have matters pending before the judge. When a judge learns that an attorney who is a member of that judge's online social networking community has a case pending before the judge the online interaction with that attorney must cease (i.e. the attorney should be "unfriended") and the fact this was done should be disclosed .... Regardless of the nature of the social networking page, maintaining online contacts while a case is pending creates appearance issues that cannot be overcome through disclosure of the contacts. [Italics in original.]

Judge Ferguson stated he agrees with the CJA opinion and that he unfriended the attorneys promptly after being contacted by the commission concerning this matter.

The commission found Judge Ferguson's conduct violated canon 2 of the Code of Judicial Ethics (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities), canon 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), and canon 2B(1) (a judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge).

Judge Ferguson's conduct as described above was, at a minimum, improper action.

## DISCIPLINE

Judge Ferguson asserts that his misconduct is mitigated by his corrective action in unfriending the attorneys who were appearing before him and in removing the post from the NOCBA Facebook page as soon as he realized it was inappropriate. In the commission's view, the judge's corrective action in removing the post is undermined by the fact that he did so after Ms. Schatzle stated in response to his post, "I'm sure The Judicial Commission of Performance (sic) would love to know about your blogging!!" In mitigation, the commission has considered that Judge Ferguson acknowledged the impropriety of his conduct related to his post and his failure to disclose, and that he took corrective action in unfriending attorneys appearing before him who were his Facebook friends. (Policy declaration 7.1(2)(a)(c).) However, in the commission's view, these mitigating factors do not outweigh the seriousness of his misconduct in accusing a judicial candidate of ethical impropriety with a reckless disregard for the truth. The judge's post was not only potentially injurious to the candidate, but also undermined public respect for the judiciary and the integrity of the electoral process. (Policy declaration 7.1(1)(b),(f),(h).) For these reasons, the commission has determined that a public admonishment is the appropriate discipline.

Commission members Hon. Ignazio J. Ruvolo; Mr. Richard Simpson; Ms. Mary Lou Aranguren; Hon. Michael B. Harper; Nanci E. Nishimura, Esq.; and Mr. Adam N. Torres voted to impose a public admonishment. Commission members Ms. Pattyl A. Kasparian and Hon. Erica R. Yew would have imposed a private admonishment. Anthony P. Capozzi, Esq. and Ms. Sarah Kruer Jager were not present. Commission member Dr. Michael A. Moodian was recused from this matter, pursuant to commission policy declaration 6.1.

Dated: May 31, 2017

Hon. Ignazio J. Ruvolo
Chairperson

# PUBLIC ADMONISHMENT OF COMMISSIONER MARK KLISZEWSKI

The Commission on Judicial Performance ordered Commissioner Mark Kliszewski publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Commissioner Kliszewski has been a commissioner of the Alameda County Superior Court since 1989.

For many years, during his assignment to the juvenile division, Commissioner Kliszewski permitted court staff members to routinely make offensive and inappropriate comments, some of which related to race, gender, and sexual conduct, in the courtroom when court was not in session. These remarks by staff members included a pattern of derogatory comments about parties and their family members who came before the court. Although the subjects of the remarks were not present, the remarks were made in the courtroom, often in the presence of Commissioner Kliszewski and other court staff. Staff members also made racial jokes and engaged in sexual banter in Commissioner Kliszewski's courtroom.

Commissioner Kliszewski reports that he spoke to the responsible staff members several times over the years to ask them to "tone down" their remarks. His actions, however, were insufficient to prevent the remarks from recurring.

Commissioner Kliszewski's tolerance of these remarks, by sometimes laughing at them and failing to take sufficient corrective action to stop them, violated his duty to be patient, dignified, and courteous to litigants and others with whom he deals in an official capacity, and to require similar conduct of his staff (canon 3B(4)), and his duty to require staff and courtroom personnel under his direction to observe appropriate standards of conduct and to refrain from manifesting bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation in the performance of their official duties (canon 3C(3)).

Between 2010 and 2015, Commissioner Kliszewski made numerous insulting and derogatory remarks about a court interpreter to other court staff; some of these remarks were made in the interpreter's presence. In 2010, after questioning another court staff member and learning that the interpreter had reported to her supervisor that Commissioner Kliszewski had spoken harshly to her in the courtroom, the commissioner said angrily, "That c…! That f…… bitch!" On several occasions, Commissioner Kliszewski expressed sympathy for court staff who worked with the interpreter and spoke about the interpreter as though she was not present, when she was.

Commissioner Kliszewski's conduct in making profane and derogatory comments about a court interpreter to other court staff violated his duty to maintain and enforce high standards of conduct (canon 1), to avoid impropriety and the appearance of impropriety (canon 2), to be

patient, dignified and courteous to individuals with whom he deals in an official capacity (canon 3B(4)), to perform judicial and administrative duties without bias or prejudice or the appearance thereof (canons 3B(5), 3C(1)), and to conduct all activities so that they do not demean the judicial office (canon 4A).

Commissioner Kliszewski's conduct as described above was, at a minimum, improper action.

In determining to impose public discipline in this matter, the commission took into account Commissioner Kliszewski's prior discipline, imposed by the Alameda County Superior Court. In 2000, the court suspended Commissioner Kliszewski without pay for 120 days for misconduct during his judicial campaign, which included making misrepresentations in his campaign literature. In 1996, the court suspended Commissioner Kliszewski without pay for two weeks for discourteous and improper treatment of a female social worker who appeared in his courtroom. In both instances the court required Commissioner Kliszewski to participate in additional training.

Commission members Hon. Ignazio J. Ruvolo; Mr. Richard Simpson; Anthony P. Capozzi, Esq.; Hon. Michael Harper; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Mr. Adam N. Torres; and Hon. Erica R. Yew voted for the Notice of Intended Public Admonishment. Commission member Ms. Mary Lou Aranguren was recused from this matter, pursuant to commission policy declaration 6.1.

Date: October 4, 2017

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING<br>JUDGE ELIZABETH W. JOHNSON | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT PURSUANT TO STIPULATION<br>(Commission Rule 116.5) |

This disciplinary matter concerns Judge Elizabeth W. Johnson, a judge of the Trinity County Superior Court. Judge Johnson and her counsel James A. Murphy, of Murphy, Pearson, Bradley & Feeney, have entered into a stipulation with commission trial counsel Mark A. Lizarraga pursuant to commission rule 116.5 to resolve the pending preliminary investigation involving Judge Johnson by imposition of a public admonishment with the judge's agreement to resign from judicial office and not seek or hold judicial office in the future. The Stipulation for Discipline by Consent (Stipulation) was approved by the commission on January 16, 2018, pursuant to the following terms and conditions and stipulated facts and legal conclusions.

TERMS AND CONDITIONS

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Johnson.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Johnson waives any further proceedings and review in this matter, including the public admonishment procedure (commission rules 115-116), formal

proceedings (rules 118, et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. Judge Johnson has agreed to resign from her position as a judge, effective January 18, 2018.

7. If Judge Johnson fails to resign in accordance with this agreement, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the preliminary investigation letters. Failure to comply with the terms and conditions of this agreement may also constitute additional and independent grounds for discipline.

8. Judge Johnson has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time in the future.

9. If Judge Johnson attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the preliminary investigation letters. Additionally, the commission may refer the matter to the State Bar of California.

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Johnson has been a judge of the Trinity County Superior Court since January 2013.

1. In 2007, Judge Johnson and her husband, Charles J. Johnson, obtained a Community Development Block Grant loan from Trinity County in the amount of $185,000 in connection with their ownership and operation of the Trinity Alps Golf Course. The terms of the loan required the Johnsons to make payments of $2,148.01 on the 22nd of each month.

On February 19, 2014, in connection with a prior investigation, the commission sent Judge Johnson a preliminary investigation letter in which it was alleged that, among

other things, there were deficiencies in the Johnsons' payment of the loan and that the Johnsons defaulted on their obligations to pay the loan.

Judge Johnson responded to the preliminary investigation letter by letter dated March 31, 2014. The judge's response stated, "The Johnson's [*sic*] lost the business but continue to make payments on the loan." The judge's statement to the commission that she and her husband were continuing to make payments on the loan was not true. As of August 5, 2013, the Johnsons had failed to make payments required by the terms of the loan while they were negotiating a resolution and repayment program on the loan. In fact, the Johnsons did not make any payments on the loan between August 5, 2013 and November 1, 2015.

The above conduct violated Judge Johnson's duties to uphold the integrity of the judiciary (canon 1), to avoid impropriety and the appearance of impropriety (canon 2), and to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A).

2. On 14 occasions from July 2014 to January 2016, Judge Johnson used the court's Cal Card credit card in a manner not permitted by the policies adopted by the Judicial Council as set forth in the Trial Court Financial Policies and Procedures Manual (the "FIN Manual"), including using the credit card for personal purposes unrelated to court business and other improper purposes (such as lunches with other court personnel that did not meet the FIN Manual requirements), and failing to provide the requisite supporting documents, such as receipts. These fourteen incidents involved total charges of $740.22.

Nine incidents concerned restaurant charges incurred either in connection with meetings the judge held with court personnel that involved court business, or for staff lunches when court sessions were held at a branch court, which the judge believed constituted business travel and would be reimbursable. Four incidents involved travel-related charges incurred in connection with legal conferences the judge attended in Southern California, either for continuing education requirements or to give a

presentation. One incident involved a charge of $36.36 for a personal matter unrelated to court business.

Judge Johnson acknowledged that her use of the Cal Card for these charges was improper and not in compliance with the requirements set forth in the FIN Manual. With the exception of one charge, at the time these charges were incurred, the judge believed she could properly use the Cal Card because the charges concerned business purposes or travel. The judge reimbursed the court for all of the above charges after learning that her conduct and interpretation was improper.

The above conduct violated the judge's duties to uphold the integrity of the judiciary (canon 1), to avoid impropriety and the appearance of impropriety (canon 2), and to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2 A).

3. Judge Johnson frequently arrived at the courthouse after her 9:00 a.m. calendar was scheduled to start. Between January 1, 2013 and August 10, 2015, on days the judge had calendars set to begin at 9:00 a.m., she arrived at the courthouse (not her courtroom or chambers) after 9:00 a.m. at least 42 times.

While most of these incidents involved the judge arriving at the courthouse within 10 minutes of 9:00 a.m., several involved longer time periods, and typically there was additional delay between the time the judge entered the courthouse and the time she took the bench.

On a weekday in July 2013, the judge had a 1:30 p.m. calendar. During lunch that day, the judge and the court executive officer went to a bakery to pick up a cake for a going-away party for a member of court personnel. The writing on the cake needed to be corrected, and the court executive officer offered to wait for it so the judge could go to court. The judge insisted on staying and waiting for the cake, which delayed her return to court until approximately 2:00 p.m.

On December 21, 2015, the judge was approximately 30 minutes late in taking the bench for her felony calendar.

On March 14, 2017, the judge had 26 matters on calendar at 8:59 a.m. and nine matters on calendar at 9:00 a.m. The judge arrived at the courthouse approximately 30 minutes late and took the bench thereafter.

On May 2, 2017, the judge had 15 matters on calendar at 8:59 a.m. and 22 matters on calendar at 9:00 a.m. The judge arrived at the courthouse approximately 15 minutes late and took the bench thereafter.

On each of these occasions, the judge's tardiness caused numerous people who were at court on time, including parties, attorneys, and court personnel, to have to wait for her to take the bench.

The above conduct violated the judge's duties to give her judicial duties precedence over all other activities (canon 3A), to dispose of all judicial matters fairly, promptly and efficiently (canon 3B(8)), and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A).

4. In July 2014, Judge Johnson revised the existing Trinity County Superior Court Local Rules without complying with the requirements of California Rules of Court, rule 10.613, pertaining to the drafting and amendment of local rules; specifically, the requirement that the court provide copies of proposed modifications of local rules to various local agencies, including the local county bar association and the district attorney's office, for comment at least 45 days before the rules are adopted. In early January 2016, the judge again revised the Trinity County Superior Court Local Rules without complying with rule 10.613.

The above conduct violated the judge's duties to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A), and to maintain professional competence in judicial administration (canon 3C(2)).

5. Trinity County does not have a public defender's office. As a consequence, private attorneys are hired by the Trinity County Auditor-Controller to serve as appointed public defenders on a yearly contract basis. Attorneys Laura Woods and Larry Olson were hired in that capacity for the fiscal year that began on July 1, 2015.

On August 5, 2015, due to a conflict of interest of the new public defenders and several other appointed conflict counsel, Judge Johnson issued a minute order appointing Attorney James Underwood as the public defender to represent the conservatee in *Matter of J.W.*, No. 15PR013. The judge and Mr. Underwood were name partners in the law firm of Wilkins Underwood & Johnson until shortly before the judge took the bench in January 2013. The minute order did not disclose the judge's prior partnership relationship with Mr. Underwood. The minute order noted that the next hearing in the case was set in the judge's department on August 17, 2015.

On August 17, 2015, the parties and counsel, including Mr. Underwood, appeared before the judge for a hearing on the petition for appointment of conservator. Judge Johnson did not disqualify herself from the case or disclose on the record her prior partnership relationship with Mr. Underwood. The judge also did not include in the court file any record of her prior partnership relationship with Mr. Underwood.

The above conduct violated the judge's duties to avoid impropriety and the appearance of impropriety (canon 2), to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), to exercise the power of appointment impartially, on the basis of merit, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary (canon 3C(5)), and to disqualify herself and/or disclose on the record information that is reasonably relevant to the question of disqualification even if the judge believes there is no actual basis for disqualification (canon 3E).

Judge Johnson's conduct described herein was, at a minimum, improper action pursuant to article VI, section 18, subdivision (d)(3) of the California Constitution.

In 2014, the judge received an advisory letter for failing to disclose in cases she presided over in which Trinity County was a party that her family business had an outstanding loan from the county. The advisory letter noted that the judge's conduct violated her duties under canon 3E(2).

Judge Johnson expressly admits that the foregoing facts are true and that she agrees with the stated legal conclusions.

DISCIPLINE

Judge Johnson engaged in multiple instances of misconduct that undermines public confidence in the integrity and impartiality of the judiciary. The Supreme Court has recognized that providing material misinformation to the commission in the course of the commission's investigation is particularly serious misconduct. (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 914; *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 887-891.) The totality of the judge's misconduct, including improper use of the court's Cal Card credit card; numerous incidents of tardiness in arriving to court and taking the bench; revising local court rules without following required procedures; and appointing her former law partner to represent a party in a conservatorship proceeding without disqualifying or disclosing her former partnership relationship, reflects a pattern of failure or inability to abide by basic rules and ethical standards required of all judges. This pattern is aggravated by the fact that Judge Johnson again failed to disqualify or disclose a relationship when required by law after having been previously disciplined for failure to disclose in cases she presided over, in which Trinity County was a party, that her family business had an outstanding loan from the county.

Although the stipulated facts might otherwise warrant greater discipline, the commission has determined that acceptance of the Stipulation is in the best interest of the public because the judge has agreed to resign from office and not to serve as a judicial officer after her resignation. Furthermore, acceptance of the Stipulation resolves the matter in a manner that protects the pubic while avoiding the delay of further proceedings. For these reasons, the commission imposes this public admonishment upon the terms and conditions in the attached Stipulation.

Commission members Hon. Ignazio J. Ruvolo; Nanci E. Nishimura, Esq.; Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Dr. Michael A. Moodian; Mr. Adam N. Torres and

Hon. Erica R. Yew voted to accept the Stipulation and issue this public admonishment.

Commission member Hon. Michael B. Harper is recused from this matter.

Date: January 16, 2018

On behalf of the
Commission on Judicial Performance,

Honorable Ignazio J. Ruvolo
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING<br>JUDGE ELIZABETH W. JOHNSON | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 116.5) |

Pursuant to Rules of the Commission on Judicial Performance, rule 116.5, Judge Elizabeth W. Johnson of the Trinity County Superior Court, represented by counsel James A. Murphy, and commission trial counsel (the "parties") submit this proposed disposition of the matters set forth in the commission's preliminary investigation letters dated March 11, 2016, October 20, 2016, and May 16, 2017. The parties request that the commission resolve this matter by imposition of a public admonishment. The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Johnson because, among other reasons, the public admonishment and the judge's agreement to resign from office and not to serve as a judicial officer after her resignation adequately protect the public and will avoid the delay and expense of further proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Johnson.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Johnson waives any further proceedings and review in this matter, including the public admonishment procedure (commission rules 115-116), formal proceedings (rules 118, et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. Judge Johnson has agreed to resign from her position as a judge, effective January 18, 2018.

7. If Judge Johnson fails to resign in accordance with this agreement, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the preliminary investigation letters. Failure to comply with the terms and conditions of this agreement may also constitute additional and independent grounds for discipline.

8. Judge Johnson has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time in the future.

9. If Judge Johnson attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the preliminary investigation letters. Additionally, the commission may refer the matter to the State Bar of California.

10. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Johnson.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public admonishment on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Johnson has been a judge of the Trinity County Superior Court since January 2013.

1. In 2007, Judge Johnson and her husband, Charles J. Johnson, obtained a Community Development Block Grant loan from Trinity County in the amount of $185,000 in connection with their ownership and operation of the Trinity Alps Golf Course. The terms of the loan required the Johnsons to make payments of $2,148.01 on the 22nd of each month.

On February 19, 2014, in connection with a prior investigation, the commission sent Judge Johnson a preliminary investigation letter in which it was alleged that, among other things, there were deficiencies in the Johnsons' payment of the loan and that the Johnsons defaulted on their obligations to pay the loan.

Judge Johnson responded to the preliminary investigation letter by letter dated March 31, 2014. The judge's response stated, "The Johnson's [*sic*] lost the business but continue to make payments on the loan." The judge's statement to the commission that she and her husband were continuing to make payments on the loan was not true. As of August 5, 2013, the Johnsons had failed to make payments required by the terms of the loan while they were negotiating a resolution and repayment program on the loan. In fact, the Johnsons did not make any payments on the loan between August 5, 2013 and November 1, 2015.

The above conduct violated Judge Johnson's duties to uphold the integrity of the judiciary (canon 1), to avoid impropriety and the appearance of impropriety (canon 2), and to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A).

2. On fourteen occasions from July 2014 to January 2016, Judge Johnson used the court's Cal Card credit card in a manner not permitted by the policies adopted by the

Judicial Council as set forth in the Trial Court Financial Policies and Procedures Manual (the "FIN Manual"), including using the credit card for personal purposes unrelated to court business and other improper purposes (such as lunches with other court personnel that did not meet the FIN Manual requirements), and failing to provide the requisite supporting documents, such as receipts. These fourteen incidents involved total charges of $740.22.

Nine incidents concerned restaurant charges incurred either in connection with meetings the judge held with court personnel that involved court business, or for staff lunches when court sessions were held at a branch court, which the judge believed constituted business travel and would be reimbursable. Four incidents involved travel-related charges incurred in connection with legal conferences the judge attended in Southern California, either for continuing education requirements or to give a presentation. One incident involved a charge of $36.36 for a personal matter unrelated to court business.

Judge Johnson acknowledged that her use of the Cal Card for these charges was improper and not in compliance with the requirements set forth in the FIN Manual. With the exception of one charge, at the time these charges were incurred, the judge believed she could properly use the Cal Card because the charges concerned business purposes or travel. The judge reimbursed the court for all of the above charges after learning that her conduct and interpretation was improper.

The above conduct violated the judge's duties to uphold the integrity of the judiciary (canon 1), to avoid impropriety and the appearance of impropriety (canon 2), and to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A).

3. Judge Johnson frequently arrived at the courthouse after her 9:00 a.m. calendar was scheduled to start. Between January 1, 2013 and August 10, 2015, on days the judge had calendars set to begin at 9:00 a.m., she arrived at the courthouse (not her courtroom or chambers) after 9:00 a.m. at least 42 times.

While most of these incidents involved the judge arriving at the courthouse within ten minutes of 9:00 a.m., several involved longer time periods, and typically there was additional delay between the time the judge entered the courthouse and the time she took the bench.

On a weekday in July 2013, the judge had a 1:30 p.m. calendar. During lunch that day, the judge and the court executive officer went to a bakery to pick up a cake for a going-away party for a member of court personnel. The writing on the cake needed to be corrected, and the court executive officer offered to wait for it so the judge could go to court. The judge insisted on staying and waiting for the cake, which delayed her return to court until approximately 2:00 p.m.

On December 21, 2015, the judge was approximately 30 minutes late in taking the bench for her felony calendar.

On March 14, 2017, the judge had 26 matters on calendar at 8:59 a.m. and nine matters on calendar at 9:00 a.m. The judge arrived at the courthouse approximately 30 minutes late and took the bench thereafter.

On May 2, 2017, the judge had 15 matters on calendar at 8:59 a.m. and 22 matters on calendar at 9:00 a.m. The judge arrived at the courthouse approximately 15 minutes late and took the bench thereafter.

On each of these occasions, the judge's tardiness caused numerous people who were at court on time, including parties, attorneys, and court personnel, to have to wait for her to take the bench.

The above conduct violated the judge's duties to give her judicial duties precedence over all other activities (canon 3A), to dispose of all judicial matters fairly, promptly and efficiently (canon 3B(8)), and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A).

4. In July 2014, Judge Johnson revised the existing Trinity County Superior Court Local Rules without complying with the requirements of California Rules of Court, rule 10.613, pertaining to the drafting and amendment of local rules; specifically, the requirement that the court provide copies of proposed modifications of local rules to

various local agencies, including the local county bar association and the district attorney's office, for comment at least 45 days before the rules are adopted. In early January 2016, the judge again revised the Trinity County Superior Court Local Rules without complying with rule 10.613.

The above conduct violated the judge's duties to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A), and to maintain professional competence in judicial administration (canon 3C(2)).

5. Trinity County does not have a public defender's office. As a consequence, private attorneys are hired by the Trinity County Auditor-Controller to serve as appointed public defenders on a yearly contract basis. Attorneys Laura Woods and Larry Olson were hired in that capacity for the fiscal year that began on July 1, 2015.

On August 5, 2015, due to a conflict of interest of the new public defenders and several other appointed conflict counsel, Judge Johnson issued a minute order appointing attorney James Underwood as the public defender to represent the conservatee in *Matter of J.W.*, No. 15PR013. The judge and Mr. Underwood were name partners in the law firm of Wilkins Underwood & Johnson until shortly before the judge took the bench in January 2013. The minute order did not disclose the judge's prior partnership relationship with Mr. Underwood. The minute order noted that the next hearing in the case was set in the judge's department on August 17, 2015.

On August 17, 2015, the parties and counsel, including Mr. Underwood, appeared before the judge for a hearing on the petition for appointment of conservator. Judge Johnson did not disqualify herself from the case or disclose on the record her prior partnership relationship with Mr. Underwood. The judge also did not include in the court file any record of her prior partnership relationship with Mr. Underwood.

The above conduct violated the judge's duties to avoid impropriety and the appearance of impropriety (canon 2), to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), to exercise the power of appointment impartially, on the basis of

merit, without bias or prejudice, free of conflict of interest, and in a manner that promotes public confidence in the integrity of the judiciary (canon 3C(5)), and to disqualify herself and/or disclose on the record information that is reasonably relevant to the question of disqualification even if the judge believes there is no actual basis for disqualification (canon 3E).

Judge Johnson's conduct described herein was, at a minimum, improper action pursuant to article VI, section 18, subdivision (d)(3) of the California Constitution.

In 2014, the judge received an advisory letter for failing to disclose in cases she presided over in which Trinity County was a party that her family business had an outstanding loan from the county. The advisory letter noted that the judge's conduct violated her duties under canon 3E(2).

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Johnson expressly admits that the foregoing facts are true and that she agrees with the stated legal conclusions.

Dated: December 18, 2017.

Judge Elizabeth W. Johnson

Dated: 12/29, 2017.

James A. Murphy, Esq.
Attorney for Judge Elizabeth W. Johnson

Dated: Jan. 4, 2018 ~~2017~~.

Gregory Dresser
Director-Chief Counsel

ACCEPTANCE OF STIPULATION FOR DISCIPLINE BY CONSENT
IN THE MATTER CONCERNING JUDGE ELIZABETH W. JOHNSON
(CJP 41682/42909)

The foregoing Stipulation for Discipline by Consent is accepted by the Commission on Judicial Performance.

Dated: January 16, 2018

Honorable Ignazio J. Ruvolo
Chairperson
Commission on Judicial Performance

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| **IN THE MATTER CONCERNING JUDGE JOHN D. LORD** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |
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This disciplinary matter concerns Judge John D. Lord, a judge of the Los Angeles County Superior Court. Judge Lord and his attorney, Edith R. Matthai, appeared before the commission on March 28, 2018, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Judge Lord has waived his right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Lord and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and conclusions.

STATEMENT OF FACTS AND CONCLUSIONS

In 2015, Judge Lord presided over the trial in the misdemeanor domestic violence case *People v. Roberts*. In February 2015, the jury found defendant Melvin Roberts guilty. The defendant subsequently filed a motion for a new trial. Prior to the April 2015 hearing on the motion for a new trial, Judge Lord commented publicly on the pending *Roberts* case to a reporter, and his comments were published in a March 26, 2015 article ("*Domestic Violence Judge Questioned*") in the Grunion Gazette. The reporter discussed with Judge Lord the judge's refusal to issue a protective order, and Judge Lord offered a reason for why he denied the request for such an order during sentencing, as follows: "I

wanted everything to remain the status quo until we had a chance to review the issue at the motion for a new trial." In response to the reporter's question about the perception that he was giving the defense an argument needed for a retrial, the judge stated the following: "No, I wasn't quite doing that. I was expecting a motion for a new trial. It is not that unusual to make that motion, no matter what the circumstances of the case. This one had at least an arguable issue for appeal, and I thought it would be brought up."

Judge Lord's public comments regarding the pending *Roberts* case violated canon 3B(9)'s prohibition against public comment by judges regarding pending cases. Judge Lord's comments, at a minimum, created the impression that he was defending his statements and rulings in *Roberts* and may have also created the appearance that he was embroiled in the *Roberts* case. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1101 ["A judge's public comment on a pending case threatens the state's interest in maintaining public confidence in the judiciary . . . . Such comments may also create the public impression that the judge has abandoned the judicial role to become an advocate for the judge's own ruling or for the position advanced by one of the parties"].)

When Judge Lord later presided over the April 14, 2015 new trial hearing in the *Roberts* case, he made a discourteous remark in open court about the domestic violence victim. After the People stated that they were renewing their request for a California Law Enforcement Telecommunication System (CLETS) protective order, "just like is typically issued in virtually every domestic violence case," Judge Lord responded, in part, as follows:

> THE COURT: So I don't understand why there is such a huge difference between Ms. Sarres [in reference to a separate case, *People v. Ernesto Oliver Sarres*], who is roughly the same age as Mrs. Roberts – Ms. Sarres has as her perpetrator a convicted felon, long history of violence, Ms. Sarres gets almost no protection from the City Prosecutor's office whereas Mrs. Roberts, who's as white as a piece of wonder bread, gets all kinds of protection and attention from the prosecution office.

(R.T. 28:17-24.)

Judge Lord argues that he perceived disparate treatment of the victims in the *Sarres* and *Roberts* cases. Judge Lord was obligated to address his concerns consistent with the Code of Judicial Ethics. His flippant remark about the victim in the *Roberts* case being "as white as a piece of wonder bread" was inconsistent with canon 3B(4), which requires judges to be patient, dignified, and courteous to those with whom they deal in an official capacity, and may have furthered the appearance that the judge was embroiled in the *Roberts* case.

In considering the appropriate level of discipline, Judge Lord's prior discipline was a significant factor in the commission's determination. In 2016, Judge Lord received a private admonishment addressing his conduct that gave rise to an appearance of embroilment with a criminal defense attorney, including his improper initiation of a contempt proceeding against that attorney, which the judge never resolved. Judge Lord also received an advisory letter in 2011 for making statements in the presence of the jury to the effect that the pro per criminal defendant was misrepresenting facts and engaging in "gamesmanship."

Judge Lord's conduct was, at a minimum, improper action.

Commission members Nanci E. Nishimura, Esq.; Anthony P. Capozzi, Esq.; Ms. Sarah Kruer Jager; Dr. Michael A. Moodian; Hon. Ignazio J. Ruvolo; and Mr. Adam N. Torres voted for issuance of the public admonishment. Commission members Ms. Mary Lou Aranguren and Hon. Erica R. Yew voted for a private admonishment. Commission members Mr. Eduardo De La Riva, Hon. Michael B. Harper and Ms. Pattyl A. Kasparian did not participate.

Dated: April 11, 2018

Nanci E. Nishimura
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE LISA A. NOVAK** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Lisa A. Novak, a judge of the San Mateo County Superior Court. Pursuant to rule 116 of the Rules of the Commission on Judicial Performance Judge Novak and her attorney, Janet L. Everson, appeared before the commission on May 16, 2018, to object to a notice of intended public admonishment issued on December 21, 2017. Judge Novak has waived her right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Novak and her counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Judge Novak has been a judge of the San Mateo County Superior Court since 2005. Her current term began in 2013.

As set forth below, the commission found that Judge Novak failed to be patient, dignified, and courteous to a criminal defense attorney, and made remarks that could reasonably be expected to impair the attorney-client relationship; failed to disclose improper ex parte communications received from her bailiff; and made improper remarks at a judges' meeting.

I. Comments to Attorney in *People v. Golden*

On August 19, 2015, Judge Novak presided at a preliminary hearing in *People v. Leon Allen Golden* (No. SF399441A/SM397700A). After Judge Novak called the case and Deputy District Attorney Ashish Bhatt stated his appearance, defense counsel Mara Feiger said, "Mara Feiger on behalf of Mr. Golden. There is a defense motion to exclude any witnesses." (R.T. 3:20-22.) Judge Novak did not address this, and instead discussed with Ms. Feiger where each party should sit in the courtroom. In her response to the commission, Judge Novak explained that she did not hear the motion to exclude because the parties and counsel were realigning their positions in the courtroom at the time.

The prosecutor then called the alleged victim as the first witness. During cross-examination, the witness testified that he was aware of an allegation that he had taken money from Mr. Golden, and denied that his father had told him that Mr. Golden was unhappy that the witness had taken Mr. Golden's money. Ms. Feiger then asked the witness, "In addition to taking Mr. Golden's money, you were aware --" (R.T. 16:2-3.) Judge Novak interrupted, said that the question was inappropriate because it assumed facts not in evidence, and admonished Ms. Feiger to avoid asking questions that might force the witness to incriminate himself. Judge Novak said she would not allow a question that assumed the witness had committed a crime, despite the absence of an objection by the prosecution, because she had a duty to protect the witness's rights. Ms. Feiger continued with the question: "You were accused by Mr. Golden of slashing his tires right after you were accused of stealing his money, right?" (R.T. 16:20-22.)

Later during Ms. Feiger's cross-examination, the witness referred to another individual who was in the courtroom, and Ms. Feiger said to the prosecutor, "I guess you are not calling him as a witness today?" (R.T. 17:22-23.) The prosecutor responded that he was not planning to call the individual as a witness, and the following exchange occurred:

THE COURT: There was no motion to exclude.

MS. FEIGER: There was. That was the very first motion that I made.

THE COURT: No.

MS. FEIGER: You can ask your court reporter.

THE COURT: I didn't grant a motion. I didn't hear a motion. [¶] Was there a motion to exclude?

THE REPORTER: I'll have to check my notes.

THE COURT: I didn't hear one, and I didn't grant one.

MS. FEIGER: It's the very first thing I did.

THE COURT: If you made one, I didn't rule on it. There is no motion to exclude. Sounds like it's irrelevant because the Deputy DA indicated to you that he is not calling a person. [¶] Your next question.

MS. FEIGER: Well, if there is any other witnesses in the courtroom, then I'm going to renew my motion to exclude witnesses.

THE COURT: That motion at this point is denied because it's not timely, Ms. Feiger. [¶] Your next question.

(R.T. 17:25-18:21.)

After Ms. Feiger asked the witness another question, Judge Novak again stated that counsel had not made a motion to exclude witnesses and quoted a portion of the transcript beginning after Ms. Feiger's reference to a motion to exclude witnesses and the discussion of where the parties should sit. Ms. Feiger stated that she had made the motion before the quoted discussion. Judge Novak disagreed, stating, "I am just looking at the record, which is consistent with my recollection...." (R.T. 19:15-17.) Ms. Feiger completed her cross-examination and the prosecutor called two additional witnesses.

After the parties indicated that they had no further evidence to present, Judge Novak stated that Ms. Feiger could present argument, and the following exchange occurred:

> MS. FEIGER: Well, I'm not going to miss an opportunity like to exclude witnesses when I'm not on the record.
>
> THE COURT: Ms. Feiger, those comments are unprofessional. I appreciate that you think you made a motion to exclude witnesses.
>
> MS. FEIGER: I know I did.
>
> THE COURT: Don't interrupt me. You have been extremely unprofessional this afternoon. You have been disparaging of the witness, irrespective of the Deputy DA not objecting. You have been unprofessional to the witness. You have been unprofessional to this court. I have been very patient. My patience has ended with your behavior this afternoon. You can have your temper tantrum outside of my courtroom. [¶] If you didn't make a motion to exclude witnesses and it's brought to your attention, live with it and learn from it. I'm sure you thought that you had made a motion to exclude witnesses because you probably do in every hearing. When we do things out of habit and custom, we think that we always do them. You didn't make the motion. I pointed that out to you. You were disrespectful to the court. I let it slide. [¶] I then reviewed the record corroborating the fact that you didn't make the motion. You were again disrespectful to the court, and I let it slide. I'm not letting it slide any longer. Let it go. [¶] Argue any issues that you have on the evidence of this case. Act like the professional that you are. [¶] Do you have any argument on the evidence in this case?

(R.T. 26:20-27:24.)

The commission found that Judge Novak's comments were discourteous and demeaning toward Ms. Feiger and constituted a violation of the judge's duty to be patient, dignified, and courteous to lawyers and others who appear before the judge. (Canon 3B(4).) Moreover, several of the judge's remarks, made in open court and in the presence of Ms. Feiger's client, were of a nature that could reasonably be expected to

impair the attorney-client relationship. Judge Novak remarked that Ms. Feiger was "disparaging of the witness" and "unprofessional to the witness." Ms. Feiger's questioning of the witness about whether he was aware that the defendant had previously accused the witness of uncharged crimes was arguably relevant to the witness's bias and state of mind. If the judge thought the line of questions was irrelevant, she could have made that ruling and advised the witness of his Fifth Amendment rights without disparaging Ms. Feiger, particularly in the presence of her client.

Judge Novak's statements that Ms. Feiger was "extremely unprofessional," "unprofessional to this court," "disrespectful to the court," and having a "temper tantrum"—which appear to have been based, at least in part, on exchanges resulting from the judge's mistaken belief that Ms. Feiger had not made a motion to exclude witnesses, and later claimed that she had—also constituted improper accusations of professional misconduct. Even if Ms. Feiger had acted unprofessionally, as Judge Novak states was the case here, the extent to which Judge Novak criticized Ms. Feiger in open court and in front of her client was conduct that could reasonably be expected to impair the attorney-client relationship. A judge has the option of calling counsel to the bench or into chambers if the judge feels that an attorney has acted unprofessionally, particularly if the judge feels that more than a brief, corrective comment is necessary.

II. Failure to Disclose Unauthorized Ex Parte Communications in *People v. Quintana*

On January 4 and 5, 2017, Judge Novak heard a motion to dismiss in *People v. Rachel Quintana* (No. 16-SM-001677). The hearing largely concerned whether Sergeant Michael Otte had recorded with a cell phone the events surrounding the arrest of defendant Rachel Quintana, which resulted in additional misdemeanor charges of battery on an officer and resisting arrest. Sergeant Otte had earlier denied that such a recording existed. On the first day of the hearing, the defendant's mother testified, and the defense introduced a cell phone video taken by a family member from inside the house that showed Sergeant Otte outside the house holding a cell phone horizontally and appearing to record the interactions between officers and the defendant. On the second day of the

hearing, Sergeant Otte testified that he did not record the incident, but only held his phone up to make it appear that he was recording in an effort to get the defendant to comply with the officers' orders.

Judge Novak's bailiff approached her outside of the presence of the prosecutor and defense counsel and said, "I think I may have seen that video," or words to that effect. Judge Novak told her bailiff she could not discuss the matter. Judge Novak recalled the communication taking place in the hallway while waiting for the proceeding to begin. Judge Novak did not disclose the communication from her bailiff to the parties.

At the end of the hearing, Judge Novak stated that she was troubled by Sergeant Otte's testimony that he had not made a recording of the arrest of Ms. Quintana. Judge Novak said, "It is evident that the man was recording this incident, and I am very troubled that his testimony was proffered because it was not honest." (R.T. 75:2-4.) Judge Novak also made a finding of bad faith, stating, "Knowing that he recorded a video, knowing that he misrepresented under oath that he recorded a video, knowing that the video no longer exists, one is reasonable in inferring that it was not preserved in bad faith. So I have no problem finding that." (R.T. 75:5-9.)

The commission found that Judge Novak's failure to disclose her bailiff's remarks regarding the video constituted a failure to promptly notify the parties of unauthorized ex parte communications, as required by canon 3B(7)(d), and a failure to disclose information relevant to the question of disqualification (canon 3E(2)(a)).

The central issue before Judge Novak was whether Sergeant Otte, who was her bailiff's colleague at the sheriff's office, had video-recorded the defendant's arrest, as he appeared to have done in the video taken from inside the defendant's home. The bailiff's statement that he may have "seen that video," bore directly on the question before the judge and constituted an unauthorized ex parte communication. It also raised a question as to whether the bailiff was a potential witness in the proceedings before the judge.
In her response to the commission, Judge Novak stated that when her bailiff said he "may have seen that video," she was not certain whether he was referring to the video recorded by Sergeant Otte or to the video played in court of Sergeant Otte holding his cell phone

that was recorded by a family member. She also said that her bailiff had been seated in a location where he could not see the recording played for the court. Nevertheless, the judge knew it was possible that her bailiff was referring to the video taken by Sergeant Otte. Therefore, she had an obligation to disclose that information to the parties.

If a judge receives an unauthorized ex parte communication, the judge must promptly notify the parties of the substance of the communication and provide them with an opportunity to respond. (Canon 3B(7)(d).) Judge Novak's conduct was inconsistent with her duties under canon 3B(7), regardless of whether she considered the bailiff's statement in her ruling.

As noted, Judge Novak recalls the conversation with her bailiff taking place during the proceeding. The judge's bailiff reported that he recalled the conversation taking place after the hearing on the motion concluded. Judge Novak contends that if her bailiff's recollection is correct, she did not have an obligation to inform the parties. The judge's failure to disclose the ex parte communication constitutes misconduct regardless of whether the communication occurred during the proceeding or following her ruling on the motion. A matter or proceeding continues to be pending through any period during which an appeal may be filed and any appellate process until final disposition. (Cal. Code of Judicial Ethics, Terminology.) Even if Judge Novak had already ruled on the motion, the district attorney's office could file an appeal and there could be future motions concerning the recording. Thus, the matter was still pending and Judge Novak had a duty to promptly notify the parties of the substance of the communication. (Canon 3B(7).)

III. Improper Comments at Judges' Meeting

After the hearing in *People v. Quintana*, Judge Novak attended a judges' meeting on January 20, 2017. There, Judge Novak informed the court's judges that she had made a finding that Sergeant Otte perjured himself. Judge Novak described the motion hearing, stating that Sergeant Otte had testified that he never made a recording of the defendant's detention, despite a second video recording depicting him doing so. Judge

Novak informed the court's judges that she had granted the motion because she found Sergeant Otte's testimony to be not credible. She told the judges that she was providing this information to them as an "FYI" and that they could do with it what they wished.

Because this was a meeting for all judicial officers, the judges who would later hear *People v. Quintana* could be present, in addition to the judges of the court's appellate division, who would hear writ petitions or an appeal in *People v. Quintana*. Judge Novak contends that her comments were proper because she did not mention the case by name. The details she shared, however, were such as to make the matter identifiable to any judge who heard subsequent proceedings in the matter. Moreover, because Sergeant Otte could be called as a witness in other cases, Judge Novak's comments could bear on other cases before the judges at the meeting.

The commission found that Judge Novak's remarks to the judges at the meeting, made while *People v. Quintana* was pending and when Sergeant Otte was a potential witness in that case and in other pending and impending cases, constituted unauthorized ex parte communications not permitted by the exception allowing judges to consult with other judges (canon 3B(7)), and also constituted comments that might substantially interfere with a fair trial or hearing (canon 3B(9)). Although judges are permitted to consult with each other and assist each other in their adjudicative responsibilities, Judge Novak was not consulting with other judges and seeking their advice, but was instead informing them of her evaluation of the evidence in a pending case and potentially impairing their independence and impartiality. Judge Novak's remarks may have interfered with the ability of the other judges present to avoid receiving factual information that is not a part of the record or an evaluation of that factual information (canon 3B(7)(a)). Further, canon 3B(7) expressly prohibits a judge from engaging in discussions about a case with another judge who may participate in appellate review of the matter. (Canon 3B(7)(a).)

Judge Novak's remarks also called into question her impartiality and gave an appearance of bias and embroilment. (Canons 2A, 3B(5).) Judge Novak stated that she did not intend to suggest to the other judges that Sergeant Otte should not be trusted when

called as a witness in other hearings. She also stated, however, that her findings bore directly on the sergeant's credibility as a witness and so her disclosure of these findings to other judges on the bench was "mandated." She noted the close relationship between the sheriff's office and the court and cited the need to have an unqualified trust relationship with this partner.

Judge Novak did not have a duty to report her findings to her judicial colleagues, and her conduct in doing so at a judges' meeting was improper. If Judge Novak's finding that Sergeant Otte committed perjury constituted exculpatory evidence in cases where the sergeant is a witness, it would be the duty of the district attorney's office to disclose that evidence to the defense, not the judge's duty to disclose that evidence to other judges. (See *U.S. v. Bagley* (1985) 473 U.S. 667, 676; *Brady v. Maryland* (1963) 373 U.S. 83, 87.)

Judge Novak's conduct as set forth above was, at a minimum, improper action.

In determining that a public admonishment is the appropriate sanction, the commission took into consideration that Judge Novak has been previously disciplined. (Policy declaration 7.1(2)(e).) In 2011, Judge Novak received an advisory letter for raising a defendant's bail and remanding him into custody after granting his request for a substitution of counsel on the day of trial, a request she considered untimely. The commission found that Judge Novak's conduct, which included her remark that she had a means by which she could ensure the case proceeded in a timely fashion, gave the appearance that she was punishing the defendant for seeking new counsel or causing a delay in the case, neither of which is a valid reason for raising bail, and violated her duty to avoid the appearance of impropriety and to act at all times in a manner that promotes public confidence in the impartiality of the judiciary.

The commission also took into consideration that in this matter, Judge Novak engaged in three different incidents of misconduct, reflecting a lack of proper judicial demeanor and a failure to understand and appreciate the requirements and restrictions imposed upon judges by the canons. (Policy declaration 7.1(1)(a), (b).)

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Ms. Mary Lou Aranguren; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Dr. Michael A. Moodian; and Mr. Adam N. Torres voted for this public admonishment. Commission members Ms. Sarah Kruer Jager, Ms. Pattyl A. Kasparian, and Hon. Erica R. Yew voted to impose a private admonishment.

Dated: May 30, 2018

Nanci E. Nishimura
Chairperson

**PUBLIC ADMONISHMENT OF JUDGE ERNEST M. HIROSHIGE**

The Commission on Judicial Performance ordered Judge Ernest M. Hiroshige publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

STATEMENT OF FACTS AND REASONS

Judge Ernest M. Hiroshige has been a judge of the Los Angeles County Superior Court since 1982, and previously served on the municipal court beginning in 1980. His current term began in January 2013.

Judge Hiroshige has engaged in a practice of delegating his responsibility to conduct case management conferences to his court clerk. The judge has continued to engage in this practice despite the private admonishment he received in 2010 addressing, in part, such conduct.

Judge Hiroshige explained in his response to the commission in this matter that, after receiving his 2010 private admonishment, he posted a notice in his courtroom advising counsel and parties that he had reviewed all case management conference statements submitted and indicated to the clerk the range of dates that should be scheduled in each case. The judge's notice further advised that "[t]he clerk will meet & confer with counsel/parties and attempt to schedule dates in court that are agreeable to all parties," and that if there is any disagreement with the proposed dates and other entries on the proposed case management order, "please request to discuss the issue with the court." As noted in Judge Hiroshige's 2010 private admonishment, Judge Hiroshige's practice violates canon 3B(1), which requires a judge to "*hear* and decide all matters assigned to the judge except those in which he or she is disqualified." (Italics added.) Improper delegation of judicial responsibilities to the court clerk constitutes misconduct. (See *Inquiry Concerning Judge Christopher J. Sheldon* (1998) 48 Cal.4th CJP Supp. 46 (*Sheldon*).)

Judge Hiroshige asserts that his case should not be compared to *Sheldon* because his conduct in delegating judicial duties is less serious than that of Judge Sheldon, who delegated his judicial authority to his clerk by, among other things, allowing his clerk to accept pleas and waivers of constitutional rights in misdemeanor matters. The *Sheldon* decision is not cited as a comparison of the facts of the two matters, but only as authority for the proposition that improper delegation of judicial responsibilities to the clerk constitutes misconduct.

In this matter, Judge Hiroshige allowed his clerk to conduct case management conferences. Case management conferences are scheduled proceedings at which attorneys and unrepresented parties are required to appear, with the expectation that issues in cases may be addressed in court by a judge. (See Cal. Rules of Court, rules 3.721, 3.722, 3.724.) The subjects to be considered at case management conferences are not limited to ministerial issues such as the setting of a jury trial date, but include a host of issues enumerated in California Rules of Court, rule 3.727, including what discovery issues are anticipated, whether discovery is complete, the nature of injuries, the amount of damages, and any additional relief sought. "At the conference, counsel for each party, and each self-represented party, must appear by telephone or personally

and must be prepared to discuss and commit to the party's position on the issues enumerated in C.R.C., Rules 3.724 and 3.727." (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment § 45, p. 69.) A case management order may, however, be issued on the court's review of the parties' written submissions when *the court determines that appearances at the conference are not necessary*, and when *the parties are notified that no appearance is required*. (Cal. Rules of Court, rule 3.722(d).)

Judge Hiroshige does not contend that it is his practice to notify parties that no appearance is required. Rather, Judge Hiroshige reviews the parties' written submissions, prepares written notes of his review for the case management order that address all the case management issues, and provides his notes to the court clerk for the clerk's use during the conference.

Judge Hiroshige's practice of having his clerk meet with parties and counsel and convey his decisions in court gives the appearance that the clerk, rather than the judge, is running the court. Further, the purpose of case management is "to secure the fair, timely, and efficient disposition of every civil case." (Cal. Rules of Court, rule 3.700.) Discussion between the court and parties or counsel at a case management conference can be effective in resolving issues that may not have been apparent from the written submissions, and, in that sense, an appearance before a judge at a case management conference can be more efficient and effective in terms of the disposition and management of a case than issuing an order without an appearance before a judge. Moreover, as noted in the private admonishment Judge Hiroshige received in 2010, a judge may not delegate judicial responsibilities to the court clerk.

Judge Hiroshige's conduct was, at a minimum, improper action and dereliction of duty.

Judge Hiroshige's 2010 private admonishment addressed the improper delegation of his judicial duties to the court clerk, as well as his abuse of the prestige of judicial office through his use of stationery and checks bearing his judicial title and address. The judge's prior discipline was a significant factor in the commission's decision to issue this public admonishment.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Dr. Michael A. Moodian; Mr. Adam N. Torres; and Hon. Erica R. Yew voted to impose a public admonishment.

Date: October 24, 2018

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| | |
|---|---|
| **IN THE MATTER CONCERNING JUDGE CAROL WILLIAMS ELSWICK** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Carol Williams Elswick, a judge of the Los Angeles County Superior Court. Judge Elswick and her attorney, Randall Miller, appeared before the commission on December 5, 2018, to object to the imposition of a public admonishment, pursuant to rule 116 of the Rules of the Commission on Judicial Performance. Having considered the written and oral objections and argument submitted by Judge Elswick and her counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based on the following statement of facts and reasons.

## STATEMENT OF FACTS AND REASONS

Judge Elswick has been a judge of the Los Angeles County Superior Court since 2000. She previously served on the municipal court from 1997 until 2000, and was a court commissioner from 1991 to 1997.

The commission found that in three separate misdemeanor probation cases, Judge Elswick improperly remanded the defendant and delayed setting a revocation hearing until after the defendant served a predetermined sentence of jail time, which conveyed the appearance that the judge was circumventing the Los Angeles County Sheriff's Department's early release program. In other matters, the judge improperly responded to a peremptory challenge filed pursuant to section 170.6 of the Code of Civil Procedure, was discourteous to several criminal defendants, and improperly referenced her personal life when discussing the ability of some defendants to pay fines. The commission concluded that Judge Elswick disregarded the fundamental rights of defendants, abused her authority, conveyed the appearance of bias and prejudgment, and violated the Code of Judicial Ethics, as set forth below.

### I. PROBATION VIOLATION MATTERS

A. *People v. Josh Chia Juin Hsu*

Mr. Hsu was convicted of a driving under the influence (DUI) offense in 2011, placed on court probation, and ordered to pay a fine of $1,812, or complete 12 days of community labor.

On March 22, 2013, Mr. Hsu appeared before Judge Elswick and requested an extension of time to pay the fine, his third such request. The following exchange occurred:

> [DEFENSE ATTORNEY]: Your Honor, Mr. Hsu is asking for an extension to pay the fine. He realizes he's not going to be able to do the community service. He's asking for two months.
>
> THE DEFENDANT: What can you offer me, Your Honor?
>
> THE COURT: Excuse me? I don't accept that. 'What can you offer me?'. [*sic*] [¶] You were placed on probation two years ago. What were you ordered to do? That's the second question. So it might be out there in the internet, okay, let's not make a deal. It's, you are the defendant on a criminal case. You were placed on probation two years ago and you have yet to live up to your responsibilities. [¶] What can you offer me?

(R.T. 1:17-2:3.)

Judge Elswick remanded Mr. Hsu, and set bail in the amount of $30,000. Prior to the bailiff removing Mr. Hsu, Judge Elswick stated:

> Mr. Hsu, this matter goes over for probation violation hearing *setting* to the date of March 27, 2013. [¶] *Listen very carefully. It's the Court's intent to keep you in custody until March 27, 2013. On that day I'll see you back in this department, sentence you credit time served, wipe out your fine of $1812.* So with the option, remaining community labor, reinstate your probation. [¶] *You can bail out. If you bail out, you're still going to owe the court the jail time. Okay. So there you go.*

(R.T. 4:3-14, italics added.)

On March 27, 2013, Mr. Hsu appeared in Judge Elswick's courtroom, out of custody. At that time, Mr. Hsu's fine of $1,812 had been paid in full, he had served two days in custody, and he had no outstanding conditions of probation. A receipt was provided to Judge Elswick. After the deputy district attorney noted that the court had requested the defendant to not post bail, and the defendant's attorney explained that the defendant's father had posted bail, the following exchange occurred:

> THE COURT: Well, Mr. Hsu, *I was serious when I made that statement. It's not a matter of you just --*
>
> THE DEFENDANT: I understand.
>
> THE COURT: -- *buying your way out of jail.* [¶] Returning your receipt to you at this time. [¶] *I indicated to you on March 22,*

*2013 that I was setting bail at 30,000 and if you bailed out, understand that you still, it's this Court's intention to have you do the jail time, have you do that time on 22nd of the* [*sic*] *March through March 27.* [¶] I arrived at that timeframe because of, as I previously put on the record, March 25, 2011 you were placed on probation by Commissioner McTaggart for DUI; fines and fees or 12 days of community labor; fines and fees weren't paid, community labor wasn't done. . . . [¶] . . . [¶] *Did you bail out on March 24?*

[DEFENSE ATTORNEY]: Yes, Your Honor.

THE COURT: *The Court, he owes the Court three more days. I wasn't playing. I just don't think that the defendant gets to run the show.*

THE DEFENDANT: May I speak, Your Honor?

THE COURT: *The tail does not wag the dog, okay. You are the criminal defendant*, and when Commissioner McTaggart made his order, which you agreed to and accepted two years ago, you had an option to pay it or do 12 days of community labor and you just -- what would be the appropriate word would be on the record -- *you messed around and didn't get it done because it's okay to buy your way out, or family buys your way out and that's not the way this court work* [*sic*]. [¶] So at this time you are remanded, and it's late in the day, but you are remanded. And I'll set it out for March the 29th, so that comes to, not a full day today, and bail is set at --

[DEFENSE ATTORNEY]: Would the Court consider allowing him to stay on his bond that his family posted and surrender himself?

THE DEFENDANT: Your Honor, may I –

THE COURT: *It's very hard for the Court -- let any criminal defendant who's on probation gets to call the shots.* [*sic*] That's the difficulty I have. [¶] Mr. Hsu, you are the one who was, [*sic*] not done what you were supposed to do. So bail is set at $35,000. [¶] The matter is set for probation violation hearing *setting* on March the 29th, and *you're going to get some phone calls and tell Dad, "Don't bail you out."*

(R.T. 2:10-4:5, italics added.)

Mr. Hsu stated he had learned his lesson, that his father had bailed him out, and that he was concerned about losing his job, when the following exchange occurred:

> THE COURT: Mr. Hsu, that is between you and your employer. I made it very clear. Very clear. [¶] So March 29 you're going to be making some phone calls, or you want [your defense attorney] to make some phone calls. *Do not have Dad, Mom, your great uncle, your rich aunt, don't have them bail you out.* [¶] *I'll see you on the 29th of March.* Okay.
>
> THE DEFENDANT: I did not request to bail out.
>
> THE COURT: I understand that.
>
> THE DEFENDANT: That's why I stayed it [*sic*] until Sunday.
>
> THE COURT: I understand that. *Make sure they don't bail you out.* Okay.

(R.T. 4:27-5:11, italics added.)

On March 29, 2013, Mr. Hsu was advised of his rights and he admitted "the violation." Judge Elswick did not describe what the probation violation was, given that Mr. Hsu had both paid the fine and served days in custody at the time of his admission. Judge Elswick sentenced Mr. Hsu to 12 days of jail (six actual and six good time/work time credits), and released him from custody for time served.

B. *People v. Riley Glover*

Ms. Glover was convicted of a DUI in 2013, but did not complete 45 days of community labor, a condition of her probation.

On October 28, 2015, Ms. Glover appeared out of custody on a bench warrant, which was recalled. Judge Elswick asked Ms. Glover why she had not completed 45 days of community labor. Ms. Glover stated that on March 12, 2015, another judge told her that she did not have to complete the community labor. Judge Elswick asked how much community labor had been completed when the following exchange occurred:

> THE DEFENDANT: None, Your Honor. I was -- I don't know. Maybe I misheard or something, but I was under the impression that I did not have to do it anymore.
>
> THE COURT: *You didn't mishear* because this is what I do. I'd say, the Court is reminding you or letting you know or reminding you that you still have community labor, or this or that, to do by a certain date. I also say, "That was previously put in writing for you. Do you need that information?" or something to that effect, or "Are you on target?" or "Do you have any questions regarding

> that?" [¶] Typically, that's how I do that. I did it at least twice, myself. I didn't place you on probation, but I did it at least twice. If you had requested that document again for community labor, we would have given it to you. So it was not deleted. Okay?

(R.T. 6:20-7:9, italics added.)

Judge Elswick said, "*So there was no misunderstanding*, counsel, with respect to the things that she needed to do." (R.T. 8:4-6.) Judge Elswick remanded Ms. Glover, set bail at $30,000, and set a date for a probation violation hearing *setting* on November 18, 2015. Judge Elswick denied the public defender's request for an earlier date and vacated an interim appearance that had previously been set for November 10, 2015. Judge Elswick then assigned the case to herself for all purposes and stated:

> *[I]t's this Court's intent that if she remains in custody until that date and she admits a violation of probation on that date that I will then wipe out all 45 days of community labor* because she will have been in custody for about 20 days, give or take. *That's if she remains in custody, doesn't bail out.* [¶] The Court has set the date, pursuant to appellate case law, within a reasonable time and, therefore, that date will remain, November 18, 2015. Thank you.

(R.T. 11:16-26, italics added.)

On November 18, 2015, when Ms. Glover returned to court after serving 22 days in custody, Judge Elswick asked if Ms. Glover wanted "to admit the violation of probation regarding the 45 days of community labor that was ordered," or have a hearing. (R.T. 1:18-20.) Judge Elswick then advised Ms. Glover of her rights, and she admitted a violation of probation. The probation condition requiring 45 days of community labor was deleted "in light of the jail time served." (R.T. 6:5.)

C. *People v. Cecilia Zavala*

In 2014, Ms. Zavala was placed on probation for a DUI conviction. On February 3, 2016, Ms. Zavala, who was self-represented appeared before Judge Elswick to request an extension to pay her fines. The following exchange occurred:

> THE DEFENDANT: And I overlooked it.
>
> THE COURT: *Yeah. You really overlooked it.* [¶] . . . [¶] So are you paying it today?
>
> THE DEFENDANT: I would like to ask for an extension.

> THE COURT: No. *Listen to my question. Listen to my question.* [¶] Are you paying it today? . . . [¶] So can you pay that 471 today?

(R.T. 1:22-2:11, italics added.)

Judge Elswick described the procedural history of Ms. Zavala's two cases. In the 2014 case, Ms. Zavala had been ordered to pay fines and fees totaling $1,888, or complete 12 days of community labor, and she had been given several extensions to February 3, 2016. Ms. Zavala stated that she worked six days a week and that she was trying to pay the $1,888, when the following exchange occurred:

> THE COURT: There won't be any further extensions. Your one case is 19 years old.
>
> THE DEFENDANT: I was unaware of that case.
>
> THE COURT: *You were aware of it, Ma'am.* You signed the terms and conditions of probation.
>
> THE DEFENDANT: No. But that case came up with this matter.

(R.T. 3:19-25, italics added.)

Judge Elswick then remanded Ms. Zavala into custody and set bail at $35,000 on each matter. Judge Elswick did not advise Ms. Zavala of any rights, or ask if she wished to be represented by counsel, prior to incarceration. The following exchange occurred when the public defender was appointed:

> [PUBLIC DEFENDER]: If I could just talk to her before she's taken into custody, Your Honor.
>
> THE COURT: Well, she's indicated she can't pay.
>
> [PUBLIC DEFENDER]: I would just like to get more of the back story.
>
> THE COURT: No. At this time, she's remanded into the custody of the Sheriff's Department and bail is set at $35,000 on each and the matter will be set for probation violation hearing *setting* in short order . . . .

(R.T. 4:8-16, italics added.)

The public defender filed a peremptory challenge against Judge Elswick and the case was heard by another judge the next day, on February 4, 2016, at which time probation in the 1998 case was terminated, and Ms. Zavala was released.

The commission found that in each of these matters Judge Elswick intentionally delayed setting a hearing until after her predetermined jail sentence had been served, which conveyed the appearance that she was circumventing the sheriff's department's early release program. Judge Elswick remanded the defendants into custody, set bail, and continued the matters for probation violation hearing *setting* dates, without advising the defendants of their right to a revocation hearing. At her appearance, Judge Elswick stated that she wanted the defendants to know they were not satisfying their probation obligations by posting bail. This, however, is not what she told the defendants. She specifically stated that her "intent" was to keep Mr. Hsu in custody until March 27, 2013, at which time she would sentence him to time served and delete the fine. She went further and said if he bailed out, he would still owe jail time, and she told him not to post bail. Judge Elswick also specifically stated that her "intent" was to keep Ms. Glover in custody until November 18, 2015, at which time she would sentence Ms. Glover to time served and delete the community labor. Judge Elswick explicitly stated that her intent was to keep Ms. Glover in custody for 22 days, and added, "That's if she remains in custody, doesn't bail out." After being remanded, Ms. Zavala did not appear again before Judge Elswick because the public defender filed a peremptory challenge, and the matter was assigned to a different judge. If the defendants had been offered the opportunity to admit the probation violation and be sentenced before being remanded on bail, it is likely they would have served only a fraction of the sentence, given the sheriff's department's early release program.

In her response to the commission, Judge Elswick denied remanding probationers, or setting bail, in order to circumvent the sheriff's department's early release program. Judge Elswick stated there was concern among the judiciary about how the early release program might affect a defendant's participation in the Substance Treatment and Re-Entry Transition (START) program. START is a jail-based treatment program that began offering services in April 2017 to inmates with a minimum amount of days left on their sentence and who meet other clinical criteria. The proceedings in *Hsu*, *Glover*, and *Zavala*, however, had concluded prior to the implementation of START, and the defendants were not sentenced to qualifying terms of incarceration.

Judge Elswick contends that, at most, her conduct constituted legal error and, as such, is not subject to discipline under *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 395. The California Supreme Court in *Oberholzer* held that legal error alone does not constitute judicial misconduct subject to discipline. (*Id.* at pp. 395-398.) A judge who

commits legal error, however, which, in addition, clearly and convincingly reflects "bad faith," "bias," "abuse of authority," "disregard for fundamental rights," "intentional disregard of the law," "or any purpose other than the faithful discharge of judicial duty" is subject to sanctions. (*Id.* at p. 398.)

The commission found that Judge Elswick abused her authority and disregarded the defendants' fundamental rights to due process by de facto revoking probation and imposing a sentence without affording the right to a revocation hearing in all three matters. These proceedings failed to comply with minimum due process requirements as specified by the California Supreme Court in *People v. Vickers* (1972) 8 Cal.3d 451, 457-458. Judge Elswick contends that she had discretion to remand defendants into custody pending their revocation hearings, as long as the time before the hearing was not unreasonable, under *Morrissey v. Brewer* (1972) 408 U.S. 471. The problem here was not the length of time between the remand and a hearing, but that the judge continued the matters for dates to *set* the hearing in order that the defendants serve a predetermined sanction, without conducting a revocation hearing or obtaining a waiver of the right to a hearing. While a judge may remand a probationer pending probation violation hearings, the remand cannot be for the improper purpose of requiring a probationer to serve a predetermined sentence.

In addition, the commission concluded that Judge Elswick acted for a purpose other than the faithful discharge of judicial duties, abused her authority, and disregarded Mr. Hsu's fundamental rights by recommitting him to custody for having exercised his right to post bail. The commission also found that Judge Elswick used bail for the improper purpose of imposing a predetermined sentence. Bail may not be used to punish a defendant, and it is misconduct for a judge to impose bail in a punitive or arbitrary manner. (See Cal. Const., art. I, § 12; Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 3:24, pp. 171-172; *People v. Gilliam* (1974) 41 Cal.App.3d 181, 191.) Moreover, Judge Elswick improperly recommitted Mr. Hsu to custody after he posted bail, when none of the statutory circumstances warranting remand existed. (See Pen. Code, §§ 1310, 1129, 1166.) Judge Elswick admitted that she should not have recommitted Mr. Hsu to custody after posting bail, but could not recall why she did so.

Further, Judge Elswick disregarded Ms. Zavala's right to counsel by failing to advise her of her right to counsel, and denying the public defender's request to speak with Ms. Zavala prior to her being incarcerated.

The commission also found that Judge Elswick's conduct toward Mr. Hsu was discourteous, sarcastic, and conveyed the appearance of embroilment, bias, and retaliation. After Mr. Hsu exercised his statutory right to post bail, the judge stated, "I wasn't playing. I just don't think that the defendant gets to run the show." The judge told Mr. Hsu, "The tail does not wag the dog, okay. You are the criminal defendant . . . ." She also warned him, "Do not have Dad, Mom, your great uncle, your rich aunt, don't have them bail you out."

Judge Elswick's conduct was inconsistent with her obligations to avoid impropriety and the appearance of impropriety in all of her activities (canon 2); to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A); to accord to every person the full right to be heard according to law (canon 3B(7)); to dispose of all judicial matters fairly, promptly, and efficiently, and to manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law (canon 3B(8)); to be patient, dignified, and courteous to litigants with whom the judge deals in an official capacity (canon 3B(4)); and to perform judicial duties without bias or prejudice, and not to engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)).

## II. RESPONSE TO PEREMPTORY CHALLENGE

On October 21, 2015, the public defender filed a peremptory challenge, pursuant to Code of Civil Procedure 170.6, in *People v. Jingles.*

The next day, during an arraignment in an unrelated matter, *People v. Salinas*, Deputy Public Defender Diane Link filed the defendant's completed financial documents and appointment of counsel forms when the case was called. The documents had been prepared in advance of the case being called. Judge Elswick asked how the forms could have been filed when the public defender had not been appointed yet, then stopped the arraignment and called Ms. Link into chambers, with a court reporter and the prosecutor. In chambers, Judge Elswick summarized her view of what had happened in court, indicating that Ms. Salinas had been approached by Ms. Link and given financial paperwork. The following exchange then occurred:

> THE COURT: *At the outset, the Court does not wish to engage in a battle with the public defender's office.*
>
> MS. LINK: I'm not engaging.

> THE COURT: I'm not saying, I'm just making a statement as for the record, calmly and professionally as I can. Not because I'm angry, but because I don't want there to be any misinterpretation. *When I say 'the Court has no intent to engage in a battle with the public defender's office,' okay, that's what I mean by that.* Okay. [¶] However, it is a violation of the law to solicit. I'm not saying you solicited. It is a violation of the law for a lawyer to solicit a client. I'm not saying you did, but we do have what we have here. I'm just -- let me finish. I'm not saying you solicited.

(R.T. 2:9-23, italics added.)

In response to the judge's expressed concern that Ms. Link had engaged in improper solicitation of a client, Ms. Link explained that she had been approached by the defendant's father, who said the defendant wanted a public defender. After discussion of the alleged solicitation and the judge's arraignment practice, Judge Elswick said, "*I understand there's a battle between your office and myself, okay.* I'm not trying to make a battle is my point. I'm just trying to lay it all out there for everyone based upon what the constitution says, what the law says, and doing my best to follow it. . . . [¶] *I shouldn't have to wake up in the middle of the night racking my brain over these particular issues when they are what they are* . . . . [¶] . . . [¶] . . . [¶] *It's not done on the part of my, not done out of animosity.*" (R.T. 9:22-10:19, italics added.) Judge Elswick ultimately made a finding that there was no solicitation.

After learning of the in-chambers discussion with Ms. Link, Jeffrey Graves, who was then the Deputy in Charge of the Alhambra branch of the Los Angeles County Public Defender's Office, approached Judge Elswick about the allegation that the public defender had violated the law by soliciting clients. Judge Elswick met with Mr. Graves and the prosecutor in chambers with a court reporter.

In chambers, Judge Elswick described the *Jingles* arraignment, which occurred the day before. During the discussion of whether Ms. Link had been improperly soliciting a client, the judge said:

> And I looked. Because Miss Link was standing there. If you want me to respond -- I'm not here to discuss 170 with you, I'm just letting you know what happened so the record is clear. Because I know I can't discuss 170's with parties. [¶] But the clerk told me, Your Honor, there's a 170.6. I looked, I saw Miss Link standing at the clerk's desk, I saw the defendant still there in custody. I thought to myself, okay, and the clerk says 'Do you want to see it?' I said 'Yes, I do.' [¶] So I looked at it and it had Mr. Jingles' name on it, it had my name on it and it was signed by Tavoukjian.

> So then I was thinking, oh, how does somebody paper the court prior to even their appointment? Now they didn't hand it to the court prior to the public defender's appointment, but certainly it was filled out before an appointment was even filled out, before it was even requested by the public defender. [¶] . . . [A]nd immediately she called madam clerk to find out where that particular case would go. . . . Again, I'm not discussing the merits or the fact of the 170 that was filed, but I'm willing, you know, how that scenario played out [*sic*]. . . . [¶] . . . [¶] After I got papered, I thought, okay, well, they had a plan. That's what I thought. They may not have had a plan, but clearly I thought they had a plan because there was a, immediately, affidavit by a lawyer who was not present and it was completed before even the appointment. [¶] So taken that [*sic*] into consideration and, again, I didn't mention that on the record a little while ago, take all that into consideration, two things, yesterday and today, it's like, well, I just need to say something to the People and see, by People I mean [the prosecutor] and Miss Link, to see what is going on.

(R.T. 39:4-40:23.)

Judge Elswick then mentioned that she was not engaging in battle with the public defender's office and mentioned the word "battle" several times during the in-chambers discussions with Mr. Graves.

Contrary to Judge Elswick's assertion, it was the judge who introduced the *Jingles* peremptory challenge, and mentioned the "battle" with the public defender numerous times in her conversation with Mr. Graves. Judge Elswick's statement, "Again, I'm not discussing the merits or the fact of the 170 that was filed, but I'm willing, you know, how that scenario played out [*sic*]," appeared to invite Mr. Graves to discuss the peremptory challenge. Mr. Graves, however, did not comment on the peremptory challenge.

When a 170.6 challenge is properly and timely filed, a judge must accept the disqualification without inquiry. (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 531-532.) Litigants have a statutory right to file a peremptory challenge of a judge. (Code Civ. Proc., § 170.6.) As noted by Judge David M. Rothman, "Any conduct by a judge that amounts to retaliation for the exercise of a lawful right amounts to judicial misconduct." (Rothman et al., Cal. Judicial Conduct Handbook, *supra*, § 7:12, p. 405.) It is improper for a judge to inquire of the attorney, or the agency for which she works, about a peremptory challenge. (*Id.* at p. 407.)

Judge Elswick asserts that her intent in raising the issue of the peremptory challenge was to inquire how the public defender could file a peremptory challenge in *Jingles* when the public defender had not yet been appointed, as proof of her concerns that the public defender was improperly interfering with the defendant's right to self-representation in the *Salinas* case. In the commission's view, the relevance is attenuated, at best, and did not authorize the judge to comment on the peremptory challenge.

The commission found that Judge Elswick's repeated remarks to Ms. Link regarding her battles with the public defender's office, the day after the public defender had filed a peremptory challenge in *Jingles,* conveyed an appearance of bias and embroilment in violation of canons 2, 2A, and 3B(5). The commission found that Judge Elswick improperly created the appearance of impropriety, in violation of canon 2, by discussing the *Jingles* peremptory challenge with Mr. Graves, who was the public defender misdemeanor attorney supervisor.

**III. REFERENCES TO PERSONAL EXPERIENCE AND POOR DEMEANOR**

The commission found that Judge Elswick referred to her personal experiences in a manner that failed to promote confidence in her impartiality and displayed poor demeanor in two cases, and, also displayed poor demeanor in a third case.

A. *People v. David Hong*

On September 16, 2016, Judge Elswick presided over an expungement motion in the matter of *People v. David Hong*, in which Mr. Hong was convicted of a DUI in 2010. Judge Elswick denied an expungement petition because an outstanding balance of $372 had not been paid, and the court lacked jurisdiction to accept payment after probation expired. The public defender appeared as a friend of the court and stated that Mr. Hong did not have the ability to pay previously, when the following exchange occurred:

> THE COURT: *He had the ability to pay SC [University of Southern California]. I went to SC. I'm a fellow [Trojan]. If I could help you, I'd help you; Bruin, I wouldn't help you. He's a Bruin.*[1] *That's why I said it. I said a Bruin I wouldn't help you.*
>
> [¶] ... [¶]

[1] The team name for the University of California at Los Angeles is the "Bruins." The team name for the University of Southern California is the "Trojans." It appears the judge meant to say, "He's not a Bruin," or "He's a Trojan."

THE COURT: Here's my position. I've already said it. I can't say it more clearly. He had money for his alcohol program. *He had money to pay SC. You see what I'm saying.*

(R.T. 10:25-11:16, italics added.)

When Mr. Hong asked to address the court again, the following exchange occurred:

THE DEFENDANT: Your Honor, if I had the ability to pay the fees --

THE COURT: You had. You had the ability. You had the abilities.

THE DEFENDANT: I lost my job. I have records from the Social Security with me, I guess, year old, my year old income. I think I made --

THE COURT: *How are you paying for housing and SC, or were you living at home?*

THE DEFENDANT: I was living at home.

THE COURT: Okay. And under whose roof?

THE DEFENDANT: My mother. But she's, she's also, she wasn't working at the time.

THE COURT: *Welcome to reality.*

THE DEFENDANT: Right.

THE COURT: *You could have had a job.* [¶] *Did you have a job?*

THE DEFENDANT: Excuse me?

THE COURT: *Did you have a job while going to school at SC?*

THE DEFENDANT: No, I did not.

THE COURT: *You could have had a job. I had a job, okay.*

THE DEFENDANT: Understood.

THE COURT: *Went to school full time, worked part-time.*

THE DEFENDANT: Understood.

THE COURT: *Over at University Village.* [¶] *You know where University Village is? Okay.*

THE DEFENDANT: Your Honor, I'm just trying to explain my situation. I'm not going to make excuses for what I didn't do, so I didn't have a job at the time I was going through school. I had financial aid.

THE COURT: *So did I.*

(R.T. 12:10-13:16, italics added.)

B. *People v. Rutu Shah*

On October 29, 2015, Judge Elswick presided over *People v. Rutu Shah*, in which Ms. Shah had been granted deferred entry of judgment (diversion) for one year on March 13, 2015, for shoplifting. Ms. Shah requested an extension (her first) on October 29, 2015 to complete five days of community labor.

When the case was called, Judge Elswick asked if Ms. Shah had completed the community labor. After Ms. Shah said she could not, because she got behind on schoolwork when she had to go to India, due to a family emergency, the following exchange occurred:

THE DEFENDANT: I am in school, graduate school, right now. And it became really difficult to finish off.

THE COURT: *No, it didn't. I, too, was in graduate school and I worked part time, which is more than five days over four months, okay?*

THE DEFENDANT: I don't know how I can go further. Is there anyway out? I have not been able to finish that.

THE COURT: Did you start it?

THE DEFENDANT: No, I went to report but I couldn't go. I had planned to go.

THE COURT: *Ma'am, you had plenty of time to go.*

THE DEFENDANT: Yes, I know. I know.

THE COURT: The Court is very clear that at the time of your guilty or no contest plea to this theft case --

THE DEFENDANT: I –

> THE COURT: I am still talking. I will let you speak. I believe I heard you went to India; that you had a family emergency.
>
> THE DEFENDANT: Yes.
>
> THE COURT: *That you were there for a month, okay? That you are in graduate school. That you are very busy. That you, quote, "Tried to do it".* [¶] The Court gave you 6 months to do 5 days. That is not even a day per month. [¶] Is there anything else you want to tell the Court? Is there anything else you want to tell me?

(R.T. 1:28-2:25, italics added.)

The judge terminated diversion and imposed a sentence with two years of summary probation.

In both *Hong* and *Shah,* by mentioning that when she was in college and graduate school she had worked, Judge Elswick implied that the defendants should have been able to do the same. Judge Elswick's reference to her personal life suggests prejudgment or bias, or that the judge was making determinations based on information outside the record. The commission found that Judge Elswick's statements about her personal experience created the impression that her personal experience might be influencing her decision-making in the matter before her, and violated canons 2A and 3B(5).

The commission also found that Judge Elswick's statements to Mr. Hong ("Welcome to reality," and comments on his ability to get a job), and her statements to Ms. Shah ("[Y]ou had plenty of time to go," and "That you are very busy. That you, quote, 'Tried to do it.'") were sarcastic and discourteous, in violation of canon 3B(4).

C. *People v. Humberto Maya*

On November 15, 2016, Judge Elswick presided over a motion to continue sentencing in the above-entitled case, in which the defendant was convicted of driving with a suspended license. The defense requested to continue the sentencing hearing in order to allow the defendant time to obtain his driver's license. Judge Elswick denied the continuance request, citing several prior failures to appear. Mr. Maya stated that he had a newborn baby and had one more ticket to clear before obtaining his license, when the following exchange occurred:

> THE DEFENDANT: I told you I have ADHD.
>
> THE COURT: And that's why it's written for you. *If you have that, then I don't know how you can drive, but that's a different story. Okay. If you forget everything, it doesn't make sense.*

*Okay.* [¶] I'm not saying you don't have that condition, okay, but your lawyer did write it down for you, okay.

(R.T. 3:18-25, italics added.)

The commission found that Judge Elswick's statement that she did not know how Mr. Maya could drive if he had ADHD was sarcastic and discourteous, in violation of canons 2A and 3B(4).

The judge's conduct, at a minimum, constituted improper action.

## IV. DISCIPLINE

Judge Elswick has engaged in numerous incidents of misconduct over a three-year period. In the commission's view, the judge's misconduct involving abuse of authority and disregard of the defendants' fundamental rights, resulting in deprivation of liberty, is particularly serious. Despite Judge Elswick's long tenure on the bench without prior discipline, the commission determined that the multitude and severity of the misconduct in this matter warrants imposition of a public admonishment.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Dr. Michael A. Moodian; and Mr. Richard Simpson voted for a public admonishment. Commission members Ms. Sarah Kruer Jager and Hon. Erica R. Yew voted for a private admonishment. Commission members Ms. Pattyl A. Kasparian and Mr. Adam N. Torres did not participate.

Dated: December 13, 2018

Nanci E. Nishimura
Chairperson

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| IN THE MATTER CONCERNING FORMER JUDGE TIMOTHY J. STAFFORD | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT PURSUANT TO STIPULATION (Rule 116.5) |
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## INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Timothy J. Stafford, a former judge of the Orange County Superior Court. Judge Stafford retired from judicial office, effective September 30, 2018.

Judge Stafford, through his counsel, Edith R. Matthai, Esq., and Commission on Judicial Performance Director-Chief Counsel Gregory Dresser proposed to settle the preliminary investigation instituted by the commission in this matter through the issuance of a public admonishment under the stated terms and conditions, and upon the stipulated statement of facts and conclusions of law. A Stipulation for Discipline by Consent (Stipulation) signed and executed by Judge Stafford, Ms. Matthai, and Mr. Dresser is attached to this decision and order. Pursuant to rule 116.5 of the Rules of the Commission on Judicial Performance, the proposed Stipulation was approved by the commission on December 5, 2018.

The terms and conditions of the Stipulation provide that, upon approval of the Stipulation, the commission shall resolve the matters alleged in the pending preliminary investigation with the issuance of a public admonishment based upon the agreed stipulated facts and legal conclusions. Further, the parties agree that the commission may articulate the reasons for its decision imposing public admonishment and include explanatory language that the commission deems appropriate.

In signing the Stipulation, Judge Stafford expressly admits that the stipulated facts are true and that he agrees with the stated legal conclusions, and waives any further

proceedings and review in this matter including formal proceedings and review by the Supreme Court. Accordingly, pursuant to article VI, section 18(d) of the California Constitution, the commission issues this public admonishment based on the following stipulated statement of facts and legal conclusions.

## FACTS AND LEGAL CONCLUSIONS

Retired Judge Timothy J. Stafford served as a judge of the Orange County Superior Court from September 13, 2013 to September 30, 2018.

On April 5, 2017, Judge Stafford presided over a hearing on a petition for a civil harassment restraining order in *K.N. v. Stowell* (No. 30-2017-00903204). At the conclusion of the hearing, Judge Stafford made undignified remarks, as set forth below. Judge Stafford's ruling denying the restraining order was reversed by the court of appeal, which found that Judge Stafford had abused his discretion. The court of appeal stated that Judge Stafford's comments did not accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality.

K.N. and Martin Stowell were co-workers at a landscaping company, and were once close friends. K.N. testified that, at some point during their relationship, Mr. Stowell began making unwanted sexual advances toward her. She testified that, although she refused Mr. Stowell's advances many times, he continued to make remarks and send texts and emails that "crossed the line" or expressed anger that she had cut off contact with him. K.N. introduced into evidence a months-long series of text messages, emails, and voice messages from Mr. Stowell. In one such email, sent three days after Mr. Stowell promised to leave K.N. alone and give her space, Mr. Stowell called K.N.'s husband a "pussy," and said, "One more thing, don't drag [your friend Nikki's] pussy husband in this like you did with the flowers[. H]e will lose his fucking teeth permanently[.]" K.N. testified that, in October 2016, she told Mr. Stowell to leave her alone entirely, and that he made approximately 70 attempts to contact her thereafter.

K.N. stated that she sought psychological treatment for anxiety and depression resulting from Mr. Stowell's conduct, and that she eventually sought and obtained

permission to work from home to avoid Mr. Stowell. She testified that Mr. Stowell contacted her several times after she began working from home, saying, in a phone call, that he had become obsessed with her, and, in a text message, "This ain't over[.] People will go down [for] this shit[.] That I guarantee you[.] You [K.N.] of all people should have blown this shit off like [me]. . . . This is gonna get ugly[.] Pass that on to[] those two bitches. . . . [I]t[']s not going to stop until this shit is worked out and over[.] This will be my primary focus until then[.]"

On cross-examination, K.N. testified about gifts Mr. Stowell had given her during their friendship. She also testified about an email she sent him, in February 2016, in which she explained that she was pulling back from their relationship, and not responding to messages she considered inappropriate, because there were rumors that they were having an affair. She further explained in the email that her husband had become uncomfortable with their relationship. K.N. also testified on cross-examination that, during the period of their friendship, K.N. told Mr. Stowell, and another co-worker, that she had sent her husband a text message saying, "Will you buy me a new car if I give you a blow job every day?" and that her husband had replied, "I wish I could, but I can't afford to."

Mr. Stowell and others from the parties' place of employment also testified. Mr. Stowell described his past relationship with K.N. as "buddies," who would "back off" and then resume being buddies a few days later. He said he did not intend to harass K.N. and said he could leave her alone without a restraining order.

At the end of the hearing, Judge Stafford said, "I feel like I've sat for the last four and a half or five hours dealing with junior high school students, both of you, even though you have some gray over your ears, all right. And the thing that concerns me is that [K.N.], your husband's here, isn't he?" She confirmed that he was, and Judge Stafford asked why no one called him as a witness. The restraining order had also been sought on his behalf. Judge Stafford asked Mr. Stowell whether he was married and learned that he was. Judge Stafford suggested that the spouses of the parties were the

ones who should be sitting at the table with attorneys, "because they had to put up with it." Judge Stafford further stated, to K.N.:

> And your husband had to listen, and it was like Mr. Stowell was pretty much the big man on campus, had the bucks in his back pocket, and the petitioner was the best looking girl in school, and he was going to get her any way he possibly could, all right. And she knew it, and she liked it, because she got things.
>
> And don't — counsel, you're giving me a frown. Look it. If I got a letter from someone, or a phone call saying, I'll give you a blow job every day for the rest of your life for a car, we will be at the Mercedes dealer pretty soon, but not because I'm married, all right.

K.N.'s lawyer interjected that K.N.'s text message had not been directed at Mr. Stowell. Judge Stafford said he understood to whom it was directed and added, "It came out of your client's mouth, out of her brain onto a piece of paper, didn't it?"

After making these remarks, Judge Stafford denied K.N.'s petition for a restraining order. K.N. appealed.

The Fourth District Court of Appeal concluded that Judge Stafford abused his discretion in denying K.N.'s request for a restraining order against Mr. Stowell. (*K.N. v. Stowell* (Aug. 27, 2018, G054963) [nonpub. opn.].) The court of appeal concluded that the judge's comments did not show actual bias or a high probability of bias. The court found, however, that the judge's statement, "If I got a letter from someone, or a phone call saying I'll give you a blow job every day for the rest of your life for a car, we will be at the Mercedes dealer pretty soon. . . ," was "clearly inappropriate." The appellate court stated:

> Although the comment does not demonstrate judicial bias, it did "'not accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality.'" (*In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1501 (*Iverson*), overruled on other grounds by *People v. Freeman* [(2010)] 47 Cal.4th [993,] 1006, fn. 4.) Judicial ethics require a judge to

> "be patient, dignified, and courteous to litigants . . . ." (Cal. Code Jud. Ethics, canon 3(B)(4).) The judge's comment is the antithesis of judicial decorum and courtesy.

(*Id.* at p. 12.)

The appellate court also addressed Judge Stafford's statement that Mr. Stowell was the "big man on campus" and K.N. was "the best looking girl in school, and [Stowell] was going to get her any way he possibly could, all right. And she knew it, and she liked it, because she got things." The appellate court found that Judge Stafford failed to identify the applicable timeframe and noted that there was no evidence that K.N. "liked" Mr. Stowell's attention or "got things" after July 2016. The appellate court stated:

> We cannot definitively conclude the judge's comments show actual bias, but the comments were inappropriate and created an appearance of gender bias because they suggest the female target of a "big man on campus" would like the attention. (See *Iverson*, *supra*, 11 Cal.App.4th at pp. 1500-1501 [at minimum, appearance of gender bias shown where judge employed gender-based stereotypes in decisionmaking process]; see also Cal. Code Jud. Ethics, canon 3B(5) ["A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias or prejudice, including but not limited to bias or prejudice based upon . . . sex, gender. . ."].)

*(K.N. v. Stowell*, *supra*, G054963 at pp. 12-13.)

The appellate court noted that any pattern of conduct over a period of time, however short, can constitute harassment, and observed:

> Because K.N. was not seriously annoyed, alarmed or harassed in the past does not foreclose the possibility she was seriously annoyed, alarmed, or harassed after October 2016. Thus, the trial court appears to have applied an improper criterion—that K.N. liked Stowell's conduct in the past—in denying K.N.'s request for a restraining order.

(*K.N. v. Stowell*, *supra*, G054963 at p. 15.)

The court further observed, "The trial court's comments and references to irrelevant evidence undermine our confidence it properly exercised its discretion in

denying K.N.'s request for a restraining order." (*K.N. v. Stowell*, *supra*, G054963 at p. 15.)

The appellate court directed, "On remand, in light of our determination that there was an appearance of judicial bias on the part of Judge Stafford, we conclude the hearing on K.N.'s request should be before a different judge." (*K.N. v. Stowell*, *supra*, G054963 at p. 16.)

Former Judge Stafford's conduct violated his duty to be dignified and courteous to those with whom he deals in an official capacity (canon 3B(4)); to perform judicial duties without bias or prejudice, and to refrain from speech or other conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)); to avoid impropriety and the appearance of impropriety in all of his activities (canon 2); to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A); to be faithful to the law (canon 3B(2)); and to maintain high standards of conduct (canon 1).

Former Judge Stafford's conduct constituted, at a minimum, improper action.

**DISCIPLINE**

Judge Stafford engaged in serious misconduct by making comments in a restraining order proceeding that were extremely undignified and inappropriate, including "If I got a letter from someone, or a phone call saying I'll give you a blow job every day for the rest of your life for a car, we will be at the Mercedes dealer pretty soon...." As stated by the appellate court, this comment "is the antithesis of judicial decorum and courtesy." (*K.N. v. Stowell, supra,* G054963, at p. 12.) The judge also suggested both parties were acting like junior high school students and that the female plaintiff liked the attention she received from her co-worker, and that Mr. Stowell was the "big man on campus." These comments were belittling and injurious to both parties and were based on gender-based stereotypes, raising the appearance of gender bias.

The commission determined that imposition of a public admonishment under the terms of the Stipulation best fulfills its mandate to protect the public and uphold high

standards of judicial conduct in view of the judge's retirement and his cooperation with the commission's investigation.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Anthony P. Capozzi, Esq.; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Dr. Michael A. Moodian; Mr. Richard Simpson; and Hon. Erica R. Yew voted to accept the Stipulation and issue this public admonishment. Commission members Ms. Pattyl A. Kasparian and Mr. Adam N. Torres did not participate.

Dated: December 13, 2018

Nanci E. Nishimura
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING FORMER JUDGE TIMOTHY J. STAFFORD | STIPULATION FOR DISCIPLINE BY CONSENT (Rule 116.5) |

Pursuant to Rules of the Commission on Judicial Performance, rule 116.5, former Judge Timothy J. Stafford of the Orange County Superior Court, represented by counsel, and commission staff counsel (the "parties") submit this proposed disposition of the matters set forth in the commission's preliminary investigation letter dated September 18, 2017. The parties request that the commission resolve this matter by imposition of a public admonishment. The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Stafford because, among other reasons, in light of the stipulated facts and legal conclusions, a public admonishment adequately protects the public and will avoid the delay and expense of further proceedings.

Former Judge Stafford retired from judicial office, effective September 30, 2018.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving former Judge Timothy J. Stafford.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Former Judge Stafford waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by former Judge Stafford.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public admonishment on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

## STIPULATED FACTS AND LEGAL CONCLUSIONS

Retired Judge Timothy J. Stafford served as a judge of the Orange County Superior Court from September 13, 2013 to September 30, 2018.

On April 5, 2017, Judge Stafford presided over a hearing on a petition for a civil harassment restraining order in *K.N. v. Stowell* (No. 30-2017-00903204). At the conclusion of the hearing, Judge Stafford made undignified remarks, as set forth below. Judge Stafford's ruling denying the restraining order was reversed by the court of appeal, which found that Judge Stafford had abused his discretion. The court of appeal stated that Judge Stafford's comments did not accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality.

K.N. and Martin Stowell were co-workers at a landscaping company, and were once close friends. K.N. testified that, at some point during their relationship, Mr.

Stowell began making unwanted sexual advances toward her. She testified that, although she refused Mr. Stowell's advances many times, he continued to make remarks and send texts and emails that "crossed the line" or expressed anger that she had cut off contact with him. K.N. introduced into evidence a months-long series of text messages, emails, and voice messages from Mr. Stowell. In one such email, sent three days after Mr. Stowell promised to leave K.N. alone and give her space, Mr. Stowell called K.N.'s husband a "pussy," and said, "One more thing, don't drag [your friend Nikki's] pussy husband in this like you did with the flowers[. H]e will lose his fucking teeth permanently[.]" K.N. testified that, in October 2016, she told Mr. Stowell to leave her alone entirely, and that he made approximately 70 attempts to contact her thereafter.

K.N. stated that she sought psychological treatment for anxiety and depression resulting from Mr. Stowell's conduct, and that she eventually sought and obtained permission to work from home to avoid Mr. Stowell. She testified that Mr. Stowell contacted her several times after she began working from home, saying, in a phone call, that he had become obsessed with her, and, in a text message, "This ain't over[.] People will go down [for] this shit[.] That I guarantee you[.] You [K.N.] of all people should have blown this shit off like [me]. . . . This is gonna get ugly[.] Pass that on to[] those two bitches. . . . [I]t[']s not going to stop until this shit is worked out and over[.] This will be my primary focus until then[.]"

On cross-examination, K.N. testified about gifts Mr. Stowell had given her during their friendship. She also testified about an email she sent him, in February 2016, in which she explained that she was pulling back from their relationship, and not responding to messages she considered inappropriate, because there were rumors that they were having an affair. She further explained in the email that her husband had become uncomfortable with their relationship. K.N. also testified on cross-examination that, during the period of their friendship, K.N. told Mr. Stowell, and another co-worker, that she had sent her husband a text message saying, "Will you buy me a new car if I give you a blow job every day?" and that her husband had replied, "I wish I could, but I can't afford to."

Mr. Stowell and others from the parties' place of employment also testified. Mr. Stowell described his past relationship with K.N. as "buddies," who would "back off" and then resume being buddies a few days later. He said he did not intend to harass K.N. and said he could leave her alone without a restraining order.

At the end of the hearing, Judge Stafford said, "I feel like I've sat for the last four and a half or five hours dealing with junior high school students, both of you, even though you have some gray over your ears, all right. And the thing that concerns me is that [K.N.], your husband's here, isn't he?" She confirmed that he was, and Judge Stafford asked why no one called him as a witness. The restraining order had also been sought on his behalf. Judge Stafford asked Mr. Stowell whether he was married and learned that he was. Judge Stafford suggested that the spouses of the parties were the ones who should be sitting at the table with attorneys, "because they had to put up with it." Judge Stafford further stated, to K.N.:

> And your husband had to listen, and it was like Mr. Stowell was pretty much the big man on campus, had the bucks in his back pocket, and the petitioner was the best looking girl in school, and he was going to get her any way he possibly could, all right. And she knew it, and she liked it, because she got things.
>
> And don't — counsel, you're giving me a frown. Look it. If I got a letter from someone, or a phone call saying, I'll give you a blow job every day for the rest of your life for a car, we will be at the Mercedes dealer pretty soon, but not because I'm married, all right.

K.N.'s lawyer interjected that K.N.'s text message had not been directed at Mr. Stowell. Judge Stafford said he understood to whom it was directed and added, "It came out of your client's mouth, out of her brain onto a piece of paper, didn't it?"

After making these remarks, Judge Stafford denied K.N.'s petition for a restraining order. K.N. appealed.

The Fourth District Court of Appeal concluded that Judge Stafford abused his discretion in denying K.N.'s request for a restraining order against Mr. Stowell. (*K.N. v. Stowell* (Aug. 27, 2018, G054963) [nonpub. opn.].) The court of appeal concluded that the judge's comments did not show actual bias or a high probability of bias. The court found, however, that the judge's statement, "If I got a letter from someone, or a phone call saying I'll give you a blow job every day for the rest of your life for a car, we will be at the Mercedes dealer pretty soon. . . ," was "clearly inappropriate." The appellate court stated:

> Although the comment does not demonstrate judicial bias, it did "'not accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality.'" (*In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1501 (*Iverson*), overruled on other grounds by *People v. Freeman, supra*, 47 Cal.4th at p. 1006, fn. 4.) Judicial ethics require a judge to "be patient, dignified, and courteous to litigants . . . ." (Cal. Code Jud. Ethics, canon 3(B)(4).) The judge's comment is the antithesis of judicial decorum and courtesy.

(*Id.* at p. 12.)

The appellate court also addressed Judge Stafford's statement that Mr. Stowell was the "big man on campus" and K.N. was "the best looking girl in school, and [Stowell] was going to get her any way he possible could, all right. And she knew it, and she liked it, because she got things." The appellate court found that Judge Stafford failed to identify the applicable timeframe and noted that there was no evidence that K.N. "liked" Mr. Stowell's attention or "got things" after July 2016. The appellate court stated:

> We cannot definitively conclude the judge's comments show actual bias, but the comments were inappropriate and created an appearance of gender bias because they suggest the female

> target of a 'big man on campus' would like the attention. (See *Iverson, supra,* 11 Cal.App.4th at pp. 1500-1501 [at minimum, appearance of gender bias shown where judge employed gender-based stereotypes in decisionmaking process]; see also Cal. Code Jud. Ethics, canon 3B(5) ["A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias or prejudice, including but not limited to bias or prejudice based upon . . . sex, gender. . ."].)

*(K.N. v. Stowell, supra,* G054963 at pp. 12-13.)

The appellate court noted that any pattern of conduct over a period of time, however short, can constitute harassment, and observed:

> Because K.N. was not seriously annoyed, alarmed or harassed in the past does not foreclose the possibility she was seriously annoyed, alarmed, or harassed after October 2016. Thus, the trial court appears to have applied an improper criterion—that K.N. liked Stowell's conduct in the past—in denying K.N.'s request for a restraining order.

(*K.N. v. Stowell, supra,* G054963 at p. 15.)

The court further observed, "The trial court's comments and references to irrelevant evidence undermine our confidence it properly exercised its discretion in denying K.N.'s request for a restraining order." (*K.N. v. Stowell, supra,* G054963 at p. 15.)

The appellate court directed, "On remand, in light of our determination that there was an appearance of judicial bias on the part of Judge Stafford, we conclude the hearing on K.N.'s request should be before a different judge." (*K.N. v. Stowell, supra,* G054963 at p. 16.)

Former Judge Stafford's conduct violated his duty to be dignified and courteous to those with whom he deals in an official capacity (canon 3B(4)); to perform judicial duties

without bias or prejudice, and to refrain from speech or other conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)); to avoid impropriety and the appearance of impropriety in all of his activities (canon 2); to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A); to be faithful to the law (canon 3B(2)); and to maintain high standards of conduct (canon 1).

Former Judge Stafford's conduct constituted, at a minimum, improper action.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, former Judge Stafford expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: Oct 2, 2018.

Former Judge Timothy J. Stafford

Dated: Oct 3, 2018.

Edith R. Matthai, Esq.
Attorney for former Judge Stafford

Dated: Oct. 4, 2018.

Gregory Dresser
Director-Chief Counsel

**STATE OF CALIFORNIA**
**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE JOSE I. SANDOVAL** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Jose I. Sandoval, a judge of the Los Angeles County Superior Court. Pursuant to rule 116 of the Rules of the Commission on Judicial Performance, Judge Sandoval and his attorney, Edith R. Matthai, appeared before the commission on May 8, 2019, to contest the imposition of a proposed public admonishment issued on February 14, 2019. Judge Sandoval has waived his right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Sandoval and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following statement of facts and reasons.

STATEMENT OF FACTS AND REASONS

Judge Sandoval has been a judge of the Los Angeles County Superior Court since 2001. His current term began in 2015.

The commission found that Judge Sandoval violated his duty to dispose of all judicial matters promptly and efficiently, as required by canon 3B(8) of the Code of Judicial Ethics, and to perform his judicial duties competently and diligently, as required by canon 3, when he failed to resentence a criminal defendant for over three years after being directed to do so by the Court of Appeal.

On February 24, 2012, the Court of Appeal issued a decision in *People v. Dewone T. Smith* (B223181), affirming a judgment issued by Judge Sandoval, but vacating the 150-years-to-life sentence he had imposed, and remanding the case to him for sentencing. The Court of Appeal issued its remittitur to the trial court on August 30, 2013. Judge Sandoval did not resentence Mr. Smith until October 12, 2016.

After the August 30, 2013 remittitur, on September 6, 2013, a different judge at the superior court ordered the remittitur forwarded to Judge Sandoval for action. Judge Sandoval told the commission that the remittitur was not received in his department until nearly a year later. On September 3, 2014, *Smith* was called by a different judge and continued to September 18, 2014 for hearing in Judge Sandoval's department. Judge Sandoval continued the hearing on September 18, 2014, September 24, 2014, and October 28, 2014; the commission found that these three continuances did not violate the Code of Judicial Ethics.

Thereafter, however, Judge Sandoval continued the hearing 16 more times, until he finally sentenced Mr. Smith on October 12, 2016. The pattern that emerged is that counsel often agreed on dates that were convenient to them, and Judge Sandoval simply accepted those dates. Mr. Smith's counsel did, however, occasionally object to further continuances. Judge Sandoval did not offer any evidence that he had questioned counsel about the need for, or length of, the continuances he granted, and he did not offer any explanation for the length of these continuances in his response to the commission. Judge Sandoval did not issue any orders during this period to ensure that the case was managed efficiently.

In the absence of proactive case management by Judge Sandoval, briefing on motions and discovery was prolonged. An issue arose on July 21, 2015 about whether Judge Sandoval or another judge should hear one of the defense motions, but Judge Sandoval still had not resolved the issue by the September 10, 2015 hearing. The prosecution repeatedly subpoenaed documents over a period of many months, and then required more time to provide them to the defense and the court, contributing to delay of the sentencing hearing between January 23, 2015 and April 20, 2016. Judge Sandoval recognized this issue, but did not take any action to manage the process. For example, on January 23, 2015, Judge Sandoval suggested setting a hearing "relatively soon" for counsel to confirm that there were no further discovery and disclosure issues. Defense counsel objected to further continuances. Judge Sandoval responded, "I appreciate that," recognized there had been "some delay," and said he wanted the parties to have the

opportunity to be heard. He did not, however, exert control over the process to assure that a sentencing hearing would occur within a reasonable period of time. Five months later, on June 9, 2015, Judge Sandoval told counsel he wanted to handle the documents issue "as soon as possible, in a week," but again did not issue an order to govern the process. On November 24, 2015, defense counsel asked to be provided with the prosecution's witness list at least a week prior to the next hearing, but Judge Sandoval did not issue any order, resulting in the prosecution providing the list only two days prior to the next hearing on January 20, 2016. The result was that the defense was not prepared to proceed at the January 20, 2016 hearing, and Judge Sandoval once again continued the matter to February 25, 2016. Judge Sandoval offered no explanation for permitting the matter to proceed in this manner. Meanwhile, Judge Sandoval had informed counsel at the September 24, 2014 hearing that he intended to substantially reduce the sentence.

"A convicted defendant should not be subjected to unnecessary and indefinite delay before a new sentence is imposed." (*People v. Domenzain* (1984) 161 Cal.App.3d 619, 623.) Mr. Smith was subjected to unnecessary and indefinite delay before the new sentence was imposed. As the Court of Appeal in Mr. Smith's subsequent appeal stated,

> After our remittitur, this case languished in the trial court for more than three years before Smith was resentenced. That is true even though the only felony for which Smith was ultimately resentenced was punishable by *two, three, or four* years had the trial court exercised its discretion in any number of ways ([Pen. Code,] § 4502, subd. (a).)

(*People v. Smith* (Oct. 4, 2018, B278596) [nonpub. opn.], at p. 12, original italics.)

The court then concluded:

> The three-year delay between remittitur and resentencing here was unconscionable. The record does not disclose the cause of the vast majority of the more-than-20 continuances. But unless the trial court had already determined when it first started continuing resentencing in this case that it was going to sentence Smith to more than the length of the continuances (taken together with whatever custody and other credits Smith was entitled to), then the

> delay had the very real possibility of implicating Smith's liberty rights. We will grant Smith's request to be resentenced before a different trial judge.

(*Smith, supra*, B278596, at p. 13.)

The commission found that Judge Sandoval's conduct in failing to manage the case, after becoming aware that it had already languished for a year after the remittitur, violated canon 3 (judges shall perform judicial duties competently and diligently), canon 3B(8) (judges must dispose of all judicial matters promptly and efficiently), and canon 2A (judges shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

Judge Sandoval's conduct was, at a minimum, improper action.

In determining to impose public discipline, the commission took into account the following aggravating factors:

(1) Judge Sandoval received an advisory letter in 2013 for delay in ruling on a criminal defendant's motion, in violation of canon 3B(8). (The advisory letter was also for unrelated improper ex parte communication.)

(2) In his response to the notice of intended public admonishment, Judge Sandoval stated that he had "no history of discipline," despite the existence of the 2013 advisory letter. At his appearance before the commission, he acknowledged having received the 2013 advisory letter, but did not seem to recall that it concerned decisional delay. Judge Sandoval did not appear to have taken into account his 2013 discipline for failing to dispose of matters promptly and efficiently while he was handling the *Smith* case between 2014 and 2016.

(3) Judge Sandoval also asserted that none of the continuances he granted was the result of his failure to perform his judicial duties. The commission determined that this assertion reflected a lack of appreciation for the impropriety of his conduct.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Dr. Michael A. Moodian; and Mr. Adam N. Torres voted for a public admonishment. Commission

members Ms. Kay Cooperman Jue, Hon. Lisa B. Lench, and Mr. Richard Simpson voted for a private admonishment. Commission member Anthony P. Capozzi, Esq. did not participate.

Dated: May 10, 2019

On behalf of the
Commission on Judicial Performance,

Nanci E. Nishimura
Chairperson

**STATE OF CALIFORNIA**
**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE BRIAN LAMB** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT** |

This disciplinary matter concerns Judge Brian Lamb, a judge of the Inyo County Superior Court since 2003. His current term began in 2015. Pursuant to rule 116 of the Rules of the Commission on Judicial Performance, Judge Lamb and his attorney, Daniel S. Agle, appeared before the commission on June 26, 2019, to contest the imposition of a proposed public admonishment issued on March 29, 2019. Judge Lamb has waived his right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Lamb and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following statement of facts and reasons.

## STATEMENT OF FACTS AND REASONS

Judge Lamb engaged in improper conduct by failing to timely act in three family law cases and by signing two false salary affidavits. His prior discipline for similar misconduct—an advisory letter in 2006 and a private admonishment in 2015—were significant aggravating factors.

Canon 3B(8) of the Code of Judicial Ethics requires judges to dispose of all judicial matters promptly and efficiently. Canon 3 requires judges to perform their judicial duties competently and diligently. Canon 2A requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Under California law, judges are expected to decide matters submitted to them within 90 days of submission, and are prohibited from receiving their salaries when they have undecided matters under submission for more than 90 days. (Cal. Const., art. VI, § 19; *Mardikian v. Commission on Judicial Performance* (1985) 40 Cal.3d 473, 477, fn. 4.) Government Code section 68210 requires judges to execute affidavits declaring that they are in compliance with the law.

1. *In Regard to the Marriage of Richardson* (SICVFL15-57764). Judge Lamb delayed more than 14 months—from January 3, 2017 until March 6, 2018—in issuing a final judgment and statement of decision in this matter. Trial concluded on August 23, 2016. The matter was submitted for decision on September 2, 2016. Judge Lamb issued a judgment on December 2, 2016. The petitioner filed an ex parte application for relief from the judgment, requesting a statement of decision. Judge Lamb issued an order vacating the judgment, converting it to a proposed statement of decision, and inviting objections from the parties. Both parties timely filed objections on January 3, 2017. On February 10, 2018, Judge Lamb set a hearing on the objections for February 26, 2018. He did not issue the dissolution judgment or the statement of decision until March 6, 2018, more than 14 months after the parties filed their January 3, 2017 objections.

Judge Lamb recognized that a "considerable amount of time" passed between his receipt of objections on January 3, 2017 and his setting the hearing on February 10, 2018, and apologized for the delay. He said he "lost track" of the matter, but this is inconsistent with the fact that he ruled on a motion in the case in the intervening period. Judge Lamb's "lost track" explanation is the same one he offered in connection with his 2006 advisory letter and his 2015 private admonishment.

The 14-month delay between the January 3, 2017 objections and the March 6, 2018 final judgment and statement of decision was unreasonable. (*Mardikian,* 40 Cal.3d at p. 477, fn. 4.) Delay in dissolution proceedings "necessarily prejudices the parties who are unable to remarry, utilize assets, or establish stable homes for the children of the marriage." (*Id*. at p. 483, fn. 9.) Judge Lamb's conduct violated canon 3B(8) and canon 3.

2. *In Regard to the Marriage of Faldowski* (SICVFL12-53648/15-58551). Judge Lamb delayed more than 12 months—from August 25, 2016 until September 5, 2017—before issuing a final statement of decision in this matter. A post-judgment request for order regarding child support, attorney fees, and support arrearages was submitted for decision on May 27, 2016. Judge Lamb issued a tentative decision 90 days later, on August 25, 2016. On September 15, 2016, the respondent filed a request for a statement of decision. Due to a clerical error, this request was not brought to Judge Lamb's attention until six weeks later, on October 27, 2016. Judge Lamb granted himself a 40-day extension of time to December 5, 2016 to issue the statement of decision. The day before this extension ran out, Judge Lamb ordered the petitioner to draft the proposed statement of decision. The petitioner filed the proposed statement of decision on December 12, 2016, followed by timely objections and a reply, closing the pleadings on December 27, 2016. Judge Lamb did not issue the final statement of decision until September 5, 2017, more than 12 months after he had issued his tentative decision.

Judge Lamb contended that there is no deadline for the issuance of a final statement of decision. Judge Lamb was, however, still required by canon 3B(8) to resolve the matter fairly, promptly, and efficiently. Judge Lamb admitted that he was reminded of the outstanding final statement of decision on June 6, 2017, when he held a hearing on petitioner's March 28, 2017 request for order, which stated that the parties were still waiting for the statement of decision and final judgment, and described the negative impact of the delay on the petitioner.

Judge Lamb nevertheless delayed an additional three months before issuing the final statement of decision. Issuing the final statement of decision more than 12 months after the tentative decision was unreasonable and violated canon 3B(8).

3. *In Regard to the Marriage of Kruse* (SICVFL16-59777). Judge Lamb ruled on a request for an order for support and attorney fees 63 days late in this matter. He presided over a hearing on the request on September 1, 2016. The matter was submitted for decision on October 4, 2016. Judge Lamb did not issue an order on the request until March 7, 2017, 63 days after the 90th day after submission. This delay was unreasonable and violated canon 3B(8).

Further, on December 6, 2016, the respondent filed a request for a ruling regarding attorney fees and costs, pursuant to Family Code section 2031, subdivision (a)(2), which requires that a ruling on fees must issue within 15 days of the hearing. Judge Lamb did not issue an order within 15 days. This also violated canon 3B(8).

Judge Lamb apologized for these delays and told the commission that he did not know how he "lost track" of this matter. He admitted, however, that a court operations manager sent him emails on November 30, 2016 and December 19, 2016, both of which attached a submitted matter list showing that the ruling in *Kruse* was due by January 3, 2017. He also admitted that the presiding judge sent him an email on December 20, 2016 reminding him of his upcoming submitted matter deadlines, including *Kruse*.

In addition, in January 2017 and February 2017, while *Kruse* remained pending and undecided in excess of 90 days, Judge Lamb signed and submitted salary affidavits pursuant to Government Code section 68210 in which he falsely declared that no cause remained pending and undetermined that had been submitted to him for decision in excess of 90 days. Judge Lamb stated that he did not know the January and February 2017 salary affidavits were false when he signed them, but the fact that a judge may be unaware that he or she has matters that have been under submission for more than 90 days is not a defense

to a charge of filing false salary affidavits. "A judge who executes a salary affidavit affirming he or she has no overdue ruling should take care to ensure that the statement is true when it is made." (*Inquiry Concerning Freedman* (2007) 49 Cal.4th CJP Supp. 223, 246; *Public Admonishment of Judge John D. Kirihara* (2012), p. 3.) Lamb's false salary affidavits violated his duty to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (canon 2A).

Judge Lamb's conduct was, at a minimum, improper action.

In determining to issue this public admonishment, the commission considered Judge Lamb's prior discipline to be a significant aggravating factor. Judge Lamb received an advisory letter in 2006 for issuing a decision in a family law case 22 days after the 90th day after the matter had been submitted for decision. Judge Lamb stated that the matter "slipped between the cracks" and "dropped from his radar screen." Judge Lamb told the commission he had conferred with his presiding judge and that they "redesigned their current practices for tracking submitted cases," and "put in place parallel and redundant systems for calendaring of submitted matters, and for alerting judges to the pendency and status of those cases," said he would meet with his presiding judge "on a regular basis to assure himself that matters are decided on a timely basis, and that [he] has the time and other resources he needs to file timely decisions on submitted matters," and said that these changes were "to ensure nothing like this occurs again in Inyo County." The commission considered Judge Lamb's apology and remedial steps mitigating, but also warned him that the failure to promptly decide family law matters is particularly egregious in light of the harm to the parties.

Judge Lamb then received a private admonishment in 2015 for failing to issue a decision in a submitted matter until six months after he stated he would. Judge Lamb was reminded about the need to issue the decision approximately four months after the matter was submitted and obtained the file to determine

which judge was responsible for the matter, but failed to promptly review the file (and it was his case all along). During that time, another judge expressed concern to Judge Lamb about the submitted matter and the 90-day rule. A month later, Judge Lamb was provided definitive notice that it was his decision that was overdue, but he did not issue the decision until another month had passed. While the underlying matter remained pending and undecided in excess of 90 days, Judge Lamb also signed false salary affidavits declaring that no cause remained pending and undetermined that had been submitted to him for decision in excess of 90 days. Judge Lamb recognized that he should not have allowed the matter to "fall off his radar," said he regretted the delay, and asserted that he did not knowingly sign the false salary affidavits. The private admonishment referred to the 2006 advisory letter, and the further delay in ruling after it became clear that Judge Lamb was responsible for the outstanding ruling, as aggravating factors.

The commission recognizes that Judge Lamb is a hard-working judge, but it did not consider his assertions about his workload or his apologies mitigating in this matter because he has been previously disciplined twice for similar misconduct.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Anthony P. Capozzi, Esq.; Ms. Sarah Kruer Jager; Ms. Kay Cooperman Jue; Hon. Lisa B. Lench; Dr. Michael A. Moodian; and Mr. Adam N. Torres voted for the public admonishment. Hon. William S. Dato, Mr. Eduardo De La Riva, and Mr. Richard Simpson did not participate.

Dated: July 2, 2019



Nanci E. Nishimura
Chairperson

# PUBLIC ADMONISHMENT OF JUDGE DAVID A. MASON

The Commission on Judicial Performance ordered Judge David A. Mason publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Judge David A. Mason has been a judge of the Modoc County Superior Court since May 1, 2009. His current term began in 2017.

According to Judge Mason, at the time he took the bench, he had a "personal and sustained" relationship with attorney Tom Gifford, including a "prior professional relationship," and "ongoing social interactions in the community," which continued after he took the bench. In 2013, Judge Mason went on a two-week trip to Italy with Mr. Gifford and their spouses as part of a celebration of the Giffords' wedding anniversary, which "marked an escalation of the friendship." Mr. Gifford made regular appearances before Judge Mason during this period. Mr. Gifford moved to Texas shortly after the trip to Italy, but this did not immediately impact their social relationship. Judge Mason traveled to Mr. Gifford's home in Texas on two occasions, for about one week each time, including once over a Thanksgiving holiday. In or about April 2017, Mr. Gifford returned to Modoc County, and was awarded a contract to serve as Modoc County's conflicts attorney for indigent defense. He resumed making regular appearances before Judge Mason, including appearances in at least 86 criminal cases between April and December 2017, and has continued to do so. According to Judge Mason, he and Mr. Gifford "maintained some form of friendship" in 2017, but it was "not as strong" as before Mr. Gifford moved to Texas. Judge Mason recalled only one dinner with Mr. Gifford in 2017.

In his response to the commission's December 4, 2018 preliminary investigation letter, Judge Mason stated that there are only a few attorneys in Modoc County, that his friendship with Mr. Gifford had never influenced his handling of any case, and that, "I have always and routinely made full disclosures to all attorneys and litigants in every case where ethics and fairness made it necessary and expedient that attorneys and litigants be made aware of any possible grounds for disqualification." In response to the commission's March 25, 2019 supplemental preliminary investigation letter, Judge Mason stated, "[I]t is more appropriate for Judge Mason to recognize that his . . . prior response to the Commission may have overstated his diligence regarding disclosing specific information concerning his relationship with Mr. Gifford, on the record, in every matter. The fact is that he cannot stand by such definitive statements with absolute confidence." He also stated that he made "appropriate disclosures" "regularly" during his first years on the bench, but could not make definitive statements about his practices ten years ago. Judge Mason did not provide any evidence that he had ever made any disclosure on the record in any case in which Mr. Gifford had appeared. Judge Mason stated that he is "willing to acknowledge lapses in diligence and formal statements on

the record regarding his relationship with Mr. Gifford." Judge Mason expressed regret if his prior statements created confusion or were in any way misleading. Judge Mason provided a proposed disclosure that he will put on the record in Mr. Gifford's cases in the future.

Judge Mason explained that he was aware of the need to disclose his relationship with Mr. Gifford when he took the bench, and that he and his presiding judge agreed disclosure was required, but not disqualification, because his interactions with Mr. Gifford were "fairly ordinary within the context of the Modoc legal community." Judge Mason stated that he was confident he could be fair, that "local attorneys" knew about the relationship, and that they did not object to him presiding over cases in which Mr. Gifford appeared. Judge Mason also stated that the "political climate" in Modoc County is such that the "population expects that the judges will know many of the litigants and would view it as concerning if the judges sidestepped their responsibility so 'outsiders' could decide local legal matters." In his supplemental response to the commission, Judge Mason stated that he "recognizes now that he may have erred by substituting the actual views of local attorneys for the more standardized, objective standard applicable to judges statewide, and that such an analysis may have required a different decision regarding disqualification."

"By their terms, the canons impose uniform statewide standards. Whenever an assigned case involves a party the judge 'knows,' the judge must be particularly vigilant to ensure the appearance and reality of independence and impartiality. The situation may arise more frequently in a small town than a major metropolitan area, but the judge's ethical duties are the same irrespective of population statistics." (*Inquiry Concerning Former Judge David Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 46; Rothman, et al., California Judicial Conduct Handbook (4th ed. 2017) § 7.65.) Moreover, Judge Mason's repeated references to "local attorneys" leaves out attorneys who are not local, and the parties, including self-represented parties.

When Judge Mason took the bench in 2009, canon 3E(2) of the Code of Judicial Ethics stated that judges "shall disclose on the record information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification." This requirement was renumbered as canon 3E(2)(a) effective January 1, 2013. Under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), judges are disqualified when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." This is an objective standard. The question is whether the "average person on the street" would harbor doubts as to the judge's impartiality, not whether the judge is actually biased. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104; *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.) Pursuant to this standard, even if Judge Mason was not disqualified from presiding over Mr. Gifford's cases, he was required to disclose all facts about their relationship that were reasonably relevant to disqualification, on the record, in every case in which Mr. Gifford appeared. Judge Mason presented no evidence that he ever did so, and concedes that he did not make a disclosure in every case where he was

required to do so, and that he made "mistakes . . . regarding disclosures." Judge Mason violated canons 3E(2) and 3E(2)(a) over an extended period by failing to make the required disclosures on the record.

Judge Mason's conduct was, at a minimum, improper action.

Commission members Nanci E. Nishimura, Esq.; Honorable Michael B. Harper; Anthony P. Capozzi, Esq.; Honorable William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Honorable Lisa B. Lench; Dr. Michael A. Moodian; Mr. Richard Simpson and Mr. Adam N. Torres voted for the Notice of Tentative Public Admonishment. Commission member Ms. Kay Cooperman Jue voted for a Notice of Tentative Private Admonishment.

Date: December 3, 2019

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COMMISSION ON
JUDICIAL PERFORMANCE

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **INQUIRY CONCERNING JUDGE MORRIS D. JACOBSON,**<br><br>**No. 205** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT PURSUANT TO STIPULATION (Commission Rule 127)** |

## I. INTRODUCTION AND SUMMARY

This disciplinary matter concerns Judge Morris D. Jacobson, a judge of the Alameda County Superior Court. On October 29, 2019, the commission filed its Notice of Formal Proceedings (Notice) against Judge Jacobson.

By Stipulation for Discipline by Consent (Stipulation), Judge Jacobson and his counsel, Edith R. Matthai, Esq., of Robie and Matthai, and the examiner for the commission, Mark A. Lizarraga, Esq., proposed that the commission resolve this matter by imposition of a public admonishment. Pursuant to the Stipulation, Judge Jacobson waives any further proceedings and review in this matter, including formal proceedings (Rules of Com. on Jud. Performance, rule 118 et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60). (The Stipulation is attached to this decision.)

Pursuant to commission rule 127, the Stipulation was approved by the commission on December 16, 2019. Accordingly, the commission issues this public admonishment based on the terms and conditions of the Stipulation and based on the following Stipulated Facts and Legal Conclusions.

## II. STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Jacobson became a judge of the Alameda County Superior Court in 2005. His current term began in January 2015.

Count One

On June 29, 2011, Deputy Public Defender Romany McNamara appeared before Judge Jacobson in Department 11, where he was filling in for another judge that day. Ms. McNamara, who was new to the felony trial department, had a number of matters set on the morning calendar, including *People v. Eric Hale*, No. 166264. During the hearing, Judge Jacobson spoke sharply to Ms. McNamara when she asked for a moment before proceeding. The following exchange occurred between Judge Jacobson and Ms. McNamara:

> THE COURT: Is this Mr. Hale? Are you Mr. Hale? Good morning, sir. [¶] 166264. [¶] Ms. McNamara is here with Mr. Hale; Mr. McCannon for the People.
>
> MS. MCNAMARA: Just a moment, please.
>
> THE COURT: Is formal arraignment waived?
>
> MS. MCNAMARA: So waived.
>
> THE COURT: Do you have the Information only, or do you have the preliminary hearing as well?
>
> MS. MCNAMARA: I have the Information only.
>
> THE COURT: Is the plea not guilty to all charges?
>
> MS. MCNAMARA: I need just a moment, please.
>
> THE COURT: Ms. McNamara. I am proceeding with the arraignment. I'm not giving you a moment. So if you want to put this over for a different day so you can visit with your client out of court, that's fine. If you anticipate you are going to be pleading guilty to a robbery and a burglary at this point, please let me know. I am assuming you are going to be pleading not guilty. [¶] I need to move this along; I have a lot of cases left on the calendar. I'm not giving you time right now.
>
> THE COURT: Plea is not guilty on all charges.
>
> MS. MCNAMARA: Plea is not guilty on all charges.

THE COURT: All clauses and priors are denied?

MS. MCNAMARA: Yes.

THE COURT: Okay. Would you guys take a moment to figure out if you want to waive time or if you don't. Either way is okay.

MS. MCNAMARA: Thank you, Judge.

(Other cases were handled)

THE COURT: Ms. McNamara, going back to Mr. Hale, what do you guys prefer to do about time?

MS. MCNAMARA: So we will not waive time, your Honor.

THE COURT: Okay. Time is not waived. August 29 is the 60th day. August 15 is the jury trial date. [¶] And would you like to have a D & S as well?

MS. MCNAMARA: Yes, please. Could I ask for July 7th?

THE COURT: Madam Clerk, is that a good date?

THE CLERK: July 8th is better.

THE COURT: Does it make a difference to you Ms. McNamara?

MS. MCNAMARA: I can't be here July 8th in the morning. Can we do July 11th? Does that work?

THE CLERK: July 11th.

THE COURT: July 11th.

MS. MCNAMARA: Thank you.

(R.T. 2:4-3:26.)

After hearing the *Hale* matter, Judge Jacobson asked to speak with Ms. McNamara, who came forward and placed her hand on the bench. Judge Jacobson apologized to Ms. McNamara for speaking sharply to her during the arraignment, and hit her hand, and inadvertently used enough force to leave a visible impression.

The conduct described above constituted, at a minimum, prejudicial misconduct and violated canons 2 (judge shall avoid impropriety and the appearance of impropriety), 2A (judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), 3B(4) (judge shall be patient, dignified, and courteous to those persons with whom the judge deals in an official capacity), and 3B(5) (judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice).

Count Two

In 1986 and 1987, Judge Jacobson clerked for a federal judge in Texas who presided over a civil rights action filed by the Justice Department against a Tarrant County judge, who was charged with coercing female prisoners to have sexual relations with him in return for leniency in court. Judge Jacobson was present throughout the trial of the case, which received a great deal of publicity at the time.

In early 2016, while Judge Jacobson was the presiding judge, a female court administrator was talking to Judge Jacobson at the Hayward Courthouse. Judge Jacobson engaged the court administrator in a discussion about Tarrant County, Texas. Judge Jacobson asked the court administrator, who had previously worked in the Tarrant County Court, whether she knew of the case against the Tarrant County judge, and, when she said she did not, told her that prostitutes performed sex acts on the judge in chambers in exchange for a better outcome in their cases. The language the judge used was crude and inappropriate.

The conduct described above constituted, at a minimum, improper action and violated canons 2, 2A, and 3B(4).

Prior discipline

In 2010, Judge Jacobson received an advisory letter for abuse of authority, embroilment, and poor demeanor. The judge ordered an attorney to his courtroom when no matter requiring the attorney's presence was pending, chastised the attorney for a perceived ex parte communication, ordered him to remain there while opposing counsel in one of the attorney's cases was contacted, and then conducted an uncalendared hearing.

In 2012, Judge Jacobson received a public admonishment for abuse of authority, abuse of the contempt power, and poor demeanor. The judge ordered an attorney to "spend every waking moment" working on a case, and, when the attorney said she did not need the court's advice on how to be competent, ordered her to stay in the courtroom, where she remained for an hour and a half, after which he ordered her to return later that afternoon for a contempt hearing. Although the judge did not find the attorney in contempt, ordering her to remain in the courtroom was found to be tantamount to punishing her for contempt without a hearing.

## III. DISCIPLINE

The commission has determined to accept the Stipulation and impose this public admonishment, because it fulfills the commission's mandate of protecting the public, and it resolves this matter without the delay and expense of further proceedings. (See *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1111-1112; Cal. Const., art. VI, § 18, subd. (d).)

Count One of the Stipulation addresses Judge Jacobson's 2011 conduct toward a female attorney, Romany McNamara, who was new to the felony trial department. Judge Jacobson's sharp speech toward Ms. McNamara, combined

with his act of hitting her hand at the bench, was a gross breach of demeanor, and would reasonably be perceived as a demonstration of bias.

Judge Jacobson's act of hitting Ms. McNamara's hand, and doing so with enough force, albeit inadvertent, to leave a visible impression, constitutes particularly serious misconduct. No attorney should fear being hit by the judge, whose duty it is to maintain a courtroom free of such conduct by any of the participants. Judges have at their disposal many tools for carrying out their judicial duties; hitting an attorney's hand is unequivocally not among them.

Judge Jacobson's conduct toward Ms. McNamara was, at a minimum, "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Cal. Const., art. VI, § 18, subd. (d).)

Judge Jacobson engaged in further misconduct in his conversation with a court administrator about a case involving sexual misconduct by a judge in another state. The commission notes that, while judges can, and sometimes must, discuss sensitive case-related facts with court personnel, it is improper to use crude and inappropriate language when doing so. In this instance, Judge Jacobson's conversation with the court administrator did not pertain to a case before him. Judge Jacobson's use of crude and inappropriate language constituted, at a minimum, improper action.

In determining that a public admonishment is the appropriate sanction, the commission took into consideration Judge Jacobson's acknowledgment that he engaged in misconduct in both instances set forth in the Stipulation, and his history of prior discipline, an advisory letter and a public admonishment. Judge Jacobson's 2012 public admonishment for abuse of authority, abuse of the contempt power, and poor demeanor toward an attorney was issued a year after his conduct toward Ms. McNamara, in Count One. His conduct in Count Two, which does not concern misconduct toward attorneys, but rather the judge's use of crude and inappropriate language, took place after both instances of prior discipline.

Commission members Nanci E. Nishimura, Esq.; Hon. Michael B. Harper; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Kay Cooperman Jue; Hon. Lisa B. Lench; Dr. Michael A. Moodian; Mr. Richard Simpson; and Mr. Adam N. Torres voted to issue this decision and order imposing a public admonishment pursuant to the Stipulation. Commission members Anthony P. Capozzi, Esq., and Ms. Sarah Kruer Jager voted to reject the Stipulation, because Count Two did not contain the specific language the judge used.

Date: December 19, 2019

Nanci E. Nishimura
Chairperson

FILED

DEC 11 2019

COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br>JUDGE MORRIS D. JACOBSON<br><br>No. 205 | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 127) |

Pursuant to Rules of the Commission on Judicial Performance, rule 127, Judge Morris D. Jacobson of the Alameda County Superior Court, represented by counsel Edith R. Matthai, Esq. of Robie & Matthai, and the examiner ("the parties") submit this proposed disposition of Inquiry No. 205. The parties request that the commission resolve this matter by imposition of a public admonishment. The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Jacobson because, among other reasons, in light of the stipulated facts and legal conclusions, a public admonishment adequately protects the public and will avoid the delay and expense of further proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the Inquiry Concerning Judge Morris D. Jacobson, No. 205.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public admonishment may

articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation, the judge's affidavit of consent, and the commission's decision and order shall be made public.

5. Judge Jacobson waives any further proceedings and review in this matter, including formal proceedings (rules 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. The commission may reject this proposed disposition and resume formal proceedings. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Jacobson.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public admonishment on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions:

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Jacobson became a judge of the Alameda County Superior Court in 2005. His current term began in January 2015.

Count One

On June 29, 2011, Deputy Public Defender Romany McNamara appeared before Judge Jacobson in Department 11, where he was filling in for another judge that day. Ms. McNamara, who was new to the felony trial department, had a number of matters set on the morning calendar, including *People v. Eric Hale*, No. 166264. During the hearing, Judge Jacobson spoke sharply to Ms. McNamara when she asked for a moment before proceeding. The following exchange occurred between Judge Jacobson and Ms. McNamara:

THE COURT: Is this Mr. Hale? Are you Mr. Hale? Good morning, sir. [¶] 166264. [¶] Ms. McNamara is here with Mr. Hale; Mr. McCannon for the People.

MS. MCNAMARA: Just a moment, please.

THE COURT: Is formal arraignment waived?

MS. MCNAMARA: So waived.

THE COURT: Do you have the Information only, or do you have the preliminary hearing as well?

MS. MCNAMARA: I have the Information only.

THE COURT: Is the plea not guilty to all charges?

MS. MCNAMARA: I need just a moment, please.

THE COURT: Ms. McNamara. I am proceeding with the arraignment. I'm not giving you a moment. So if you want to put this over for a different day so you can visit with your client out of court, that's fine. If you anticipate you are going to be pleading guilty to a robbery and a burglary at this point, please let me know. I am assuming you are going to be pleading not guilty. [¶] I need to move this along; I have a lot of cases left on the calendar. I'm not giving you time right now.

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MS. MCNAMARA: Plea is not guilty on all charges.

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THE COURT: Okay. Would you guys take a moment to figure out if you want to waive time or if you don't. Either way is okay.

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THE COURT: Ms. McNamara, going back to Mr. Hale, what do you guys prefer to do about time?

MS. MCNAMARA: So we will not waive time, your Honor.

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THE COURT: Madam Clerk, is that a good date?

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MS. MCNAMARA: Thank you.

(R.T. 2:4–3:26.)

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judge in chambers in exchange for a better outcome in their cases. The language the judge used was crude and inappropriate.

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By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Jacobson expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: Dec. 10, 2019.

Judge Morris D. Jacobson
Respondent

Dated: DEC 6, 2019.

Edith R. Matthai, Esq.
Attorney for Respondent

Dated: 12/11, 2019.

Mark A. Lizarraga, Esq.
Examiner for the Commission

FILED

DEC 11 2019

COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br>JUDGE MORRIS D. JACOBSON<br><br>No. 205 | AFFIDAVIT OF CONSENT<br>FOR DISCIPLINE |

Pursuant to Rules of the Commission on Judicial Performance, rule 127(d), Judge Morris D. Jacobson submits the following affidavit of consent in Inquiry No. 205:

1. I consent to a public admonishment, as set forth in the Stipulation for Discipline by Consent.

2. My consent is freely and voluntarily rendered.

3. I admit the truth of the charges as modified by the Stipulation for Discipline by Consent.

4. I waive review by the Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of December, 2019.

Judge Morris D. Jacobson
Respondent

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| **IN THE MATTER CONCERNING JUDGE MATTHEW J. GARY** | **DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT PURSUANT TO STIPULATION (Commission Rule 116.5)** |

This disciplinary matter concerns Judge Matthew J. Gary, a judge of the Sacramento County Superior Court. Judge Gary and his counsel, James A. Murphy, Esq., have entered into a stipulation with commission trial counsel Mark A. Lizarraga, Esq., pursuant to commission rule 116.5, to resolve the pending preliminary investigation involving Judge Gary by imposition of a public admonishment. The Stipulation for Discipline by Consent (Stipulation) was approved by the commission on May 6, 2020, pursuant to the following terms and conditions and stipulated facts and legal conclusions.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's preliminary investigation involving Judge Gary and the Notice of Intended Public Admonishment, dated September 13, 2019.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions, set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Judge Gary waives any further proceedings and review in this matter, including further formal proceedings (Rules of Com. on Jud. Performance, rule 118 et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

5. Failure to comply with the terms and conditions of this agreement may constitute additional and independent grounds for discipline.

6. Judge Gary agrees that the facts set forth herein are true and correct, and that the stipulated discipline, recited herein, is appropriate, given those facts.

7. The commission may reject this proposed disposition and resume the proceedings. If the commission does so, nothing in this proposed disposition will be deemed to be admitted by Judge Gary.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public admonishment on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

## STIPULATED FACTS AND LEGAL CONCLUSIONS

### A. FACTS

#### History and case procedure

Judge Gary has been a judge of the Sacramento County Superior Court since June 2007. His current term began in January 2017. He was a court commissioner from 2002 to 2007. Judge Gary presided over *In re Marriage of Battilana* (No. 16FL04193) from January 2017 to December 2018.

The *Battilana* case involved the mother's Request for Order (RFO), filed December 16, 2016, seeking permission to relocate with the parties' minor child to Medford, Oregon, and attorney fees. Judge Gary presided over a series of short cause hearings on the mother's RFO, including on January 30, 2017, June 19, 2017, July 24, 2017, and July 31 – August 1, 2017, and a long cause hearing on January 11, 12, 16, 18, and 19, 2018. On January 19, 2018, Judge Gary issued an oral tentative statement of decision. On March 15, 2018, after the father filed objections to the tentative statement of decision, Judge Gary

issued a formal Proposed Statement of Decision. Both parties subsequently lodged objections. On April 16, 2018, the matter was argued before Judge Gary. The judge bifurcated the issues of attorney fees and costs from the relocation/custody issues, re-opened evidence on attorney fees and costs, ordered both parties to file updated income and expense declarations (I&Es) and detailed attorney fee statements, and continued the hearing to June 1, 2018. On April 17, 2018, Judge Gary issued a Statement of Decision and Order After Hearing on the bifurcated relocation/custody issues.

On May 29, 2018, the father filed for bankruptcy. On June 1, 2018, because of the bankruptcy stay, Judge Gary continued the hearing on attorney fees and costs. On June 5, 2018, the mother filed an ex parte RFO concerning a summer visitation issue and an issue concerning the child's asthma medication. Judge Gary issued a temporary order on June 5, 2018, and the matter came back on for hearing on July 20, 2018. The bifurcated issues of attorney fees and costs, and the June 5, 2018 RFO, eventually came back on for hearing on December 7, 2018.

July 31, 2017 Hearing

On July 31, 2017, the *Battilana* matter was before Judge Gary for an ex parte hearing concerning the mother's request to move out of state pending a long cause hearing in December. During the proceeding, in response to the mother's claim that the father would not compromise, Judge Gary stated, "It's a battle. Your name is appropriate. Pretty close." (R.T. 17:7-8.)

Judge Gary accused the parents of damaging their child, as exemplified by the following:

> And, more important, how bad do you want to ruin your child? (R.T. 15:21-22.)
>
> She. She's going to get married and then she's going to get divorced. And your grandkid is going to go through

> the same things she's going through because this is all she knows. (R.T. 16:7-10.)

Judge Gary also stated the following:

> [I]n my opinion, the case is out of control, the fees are being churned. (R.T. 6:23-24.)
>
> Once again, we don't even have an initial starting of your case and we're nearing $100,000 in attorney's fees, with two people who say they don't have enough money to live on. [¶] I'm not buying it. It may be that you don't have any money; but I'm not buying that there is no solution. This is a self-created, self-inflicted wound that I'm ready to give up on. You can bleed out. It's not my responsibility anymore. (R.T. 7:1-9.)
>
> What I would do in the meantime is, I would try to find a suitable place, or let her go without prejudice. She has a right to go – or a suitable place to live; or you can go and leave the child. Or because you can't do anything with your employment because of all of this, move to Oregon and get a job up there part-time. [¶] If you guys were really interested in your child, the solutions are many. And the one solution you keep coming back to, that is not the solution, is me. I'm the perpetuation of the problem. [¶] Grow up, figure it out, take matters into your own hands, come up with a reasonable solution, or you get what you get. (R.T. 16:15-17:2.)
>
> I'm picking sides right now. I know where the problems lie; but I'll wait to see how it all plays out. (R.T. 17:14-15.)

Judge Gary continued the ex parte hearing to the next day, August 1, 2017.

August 1, 2017 Hearing

During the hearing, Judge Gary made the following comments:

> Mr. Sagaria [the mother's attorney], you're about to come out of your underwear there. What do you need? (R.T. 21:15-16.)
>
> We can look at prior transcripts where I've gone off on you guys about how crazy this is, how much fees have been churned, how far off track we are on all of this; how we've made such a huge, colossal, nuclear meltdown over all of this. [¶] You've got a two-year marriage, a two-year-old child, nobody has any property, nobody has any income; and we're exceeding $100,000 in attorney's fees, and $30,000 for -- or strike that -- $11,000 for a 3111 eval, and we're off to trial, and we haven't even done our disclosures, and we're nowhere even near a divorce on a two-year-old marriage, with a two-year-old child. Way to go. Way to go. I'm done. [¶] Go off to trial, burn it all up. Good luck. [¶] And good luck to [the child], because it ain't going to turn out well for her. [¶] This is unbelievable. (R.T. 38:25-39:16.)

January 2018 Trial

Judge Gary conducted the hearing concerning the mother's December 16, 2016 RFO on January 11, 12, 16, 18, and 19, 2018. Attorneys Scott Sagaria and Lauren Pruett appeared on behalf of the mother, and attorney Fredrick Cohen appeared on behalf of the father.

During the testimony of Mary Jo Battilana,[1] the paternal grandmother, the following exchange occurred:

> THE WITNESS: If your child is sick more than a couple of days, I, as a mother, would always either make a phone call, be advised, or get your child into the doctor if she's running a fever.

[1] Due to the similarity of names, Mary Jo Battilana is herein referred to as the "grandmother."

THE COURT: Sure. How do you think Jillian [the mother] got the prescription?

THE WITNESS: I have no idea, sir.

THE COURT: Do you know whether Jillian is a pharmacist?

(R.T. 620:23-622:3.)

The grandmother testified that she had heard disagreements between the mother and the father but she stayed out of them. Subsequently, during re-direct examination of the mother by Pruett, the following exchange occurred:

Q: The next message, can you read that out loud, his next message?

MR. COHEN: What page?

MS. PRUETT: Same page, Bates Stamp 67.

THE WITNESS: 67, after I said, "Again, please don't be mean," his next response is, "Your daughter is in the house by herself."

Q: Do you recall the incident surrounding that?

A. This is directly after he assaulted me.

Q: So why was [the child] in the house by herself?

A: Because he left, and I was at the next door neighbors, in front of her house.

Q: Had you -- you were -- you had already left for the neighbor's house while he's still there?

A: Yes, I left from the front door, went immediately next door while on the phone with 911.

THE COURT: Let me ask you this, you heard [the grandmother] testify earlier?

THE WITNESS: Yes.

THE COURT: She testified that she had heard disagreements between you and Will. She wanted to stay out of them.

THE WITNESS: Yes, I heard that.

THE COURT: It was the essence of her testimony, and that you had come to her to talk to her about Will. Did your wanting to go talk to her about Will have anything to do with this type of marital interaction?

THE WITNESS: Yes, she was there.

THE COURT: Was she – that was my next question. Was she ever in the same room with you and Will when Will talked and behaved like this toward you?

THE WITNESS: Yes. Yes. She was there the night that he threw the magazine at me while I was holding [the child].

THE COURT: How many times can you recall, let's say, within the last six months of your marriage, January of '16 through June of '16, would you guess or would you recall that [the grandmother] was present when you and Will had an oral confrontation in the same room with [the grandmother] or in a room where it's obvious that someone else can hear it where you were being belittled and treated like this?

THE WITNESS: Yes.

THE COURT: How many times?

THE WITNESS: At least once a week. At least once a week for -- when she got in her incident, she started to taper off to do therapy, so I would say at least 20 times she was there.

THE COURT: Today she suffered a bout of amnesia, I would guess?

THE WITNESS: Yes.

(R.T. 717:13 -719:6.)

Judge Gary also made comments about religion and death, and referenced a passage in the Bible. During the testimony of Terry Nichols, a retired licensed clinical social worker, Nichols testified that she heard the child say her father was going to die, and that a child that age does not understand death, when the following exchange occurred:

THE COURT: Who do you think planted -- how do you think the child got it in her head?

THE WITNESS: I don't know. I don't know how else to answer that.

THE COURT: Okay.

THE WITNESS: I can say developmentally that a child that age doesn't understand death. It's not permanent in their mind, and they see things on TV, and they see things on movies.

THE COURT: Well, sure. Adults don't understand death. One of the purposes of religion and culture is because people don't understand death.

WITNESS: But we do understand the permanence. And a two or three year old doesn't understand the permanence of death.

THE COURT: Well, sure, excepting that in religion, you take Western culture religion, almost all religions -- what is the purpose of the religion?

WITNESS: I'm just saying developmentally. I have nothing to say about the religious part, just developmentally where a child is at that age.

THE COURT: Okay. Without bickering with me, isn't it one of the purposes of religion for adults [*sic*] everlasting life so that you don't have to face death? Don't we all have perceptions of death?

MR. COHEN: Objection; relevance, Your Honor; argumentative, Your Honor.

THE COURT: Overruled. Overruled. It's not intended to be argumentative at all. The point is, and the two parents should understand this, and since one of the parents is pointing the finger at the other parent, and I'm looking for the evidence, Mr. Cohen, again, mountains made of molehills. [¶] Is it unhealthy for a child to face a death issue -- and this is not a question for the witness. The record will reflect I'm talking to the parties. And the answer to that question is obviously no, it's not unhealthy. In fact, it's healthy for a person, at least in this trier of fact's opinion since I'm having to rule on the best interest of your child. Death is part of life. In fact, it's one of the certainties of life. [¶] And the reason I raised religion is not to get into a deep philosophical religious discussion, but to address this witness's concern with these two parents that a child not understanding the permanence of death, that is true, but parents or adults also struggle with the permanence of death. And one of the ways they cope with the permanence of death is through religion, through the promise of when you die, somehow you will live again. [¶] The Christian religion -- I know dad goes to church, or at least I've heard testimony. The Christian religion, you will have everlasting life, John 3:16. If you go through that, what is the purpose for that for adults? This is all commentary on the side. It's so that you don't have to face the permanence of death. [¶] Well, the truth of the matter is we don't know. Some of us have strong opinions one way or the other on that. Wars have been fought over that, are continually fought over

> religion. My concern is not as much the statement having been made unless there is solid proof that one of you is running around saying to the child your daddy's going to die soon. Your mommy is going to die soon. If that's happening, that is way, way out of bounds. [¶] But you should both understand that children pick up on things and say things that sometimes just totally come out of the blue. It could come from a Disney movie. It could come from something from a book. It could come from anywhere. My bigger concern is not the child's affect, whether she said it and the fact that she said it, that was easily addressed. [¶] Rather than lawyering up and litigating the issue – let me say that again. Rather than lawyering up and litigating the issue, you might want to sit down with your daughter, put her on your lap and say, sweetheart, I'm not going to die any time soon. I love you. I'm going to be around, but death is part of life. We have pets that die. We have flowers that die. [¶] Mr. Cohen, are you listening? What I want the parties to do i[s] in these situations, rather than blow this up and run to court and point fingers, the answer to this question, the answer to this issue was [to communicate].

(R.T. 598:16-601:26.)

Throughout the trial, Judge Gary made comments that the case was "contrived."[2] Judge Gary stated that the parties were making "mountains out of a molehills," and that it was a "nothing case" that should have settled.[3] Judge Gary also commented about the parties "lawyer[ing] up," and accused the parties of

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[2] See R.T. 551:3, 563:27, 926:27, 927:13, 932:8, 938:1, 954:2-3, 961:18-19, 962:7-14, 963:5.

[3] See R.T. 551:1-2, 563:1-2, 599:19-20, 603:9-10, 919:27-28, 934:8-11, 960:16.

churning litigation and churning fees.[4] In addition, in responding to Cohen's argument that Family Code section 271 attorney fees were not before the court, Judge Gary made the following remarks:

> No, I intended all [Family Code section] 271s. Because of the history of the case, I wasn't limiting it just to your motion. Because of what was going on in the case as a whole, because I was watching, and as I told you guys earlier, you went on my radar on January 30th of 2017. That is unusual. I see so many cases, but I saw this case come up. On January 30th you went on my radar. By the time we got to July, I thought about you after work, unusual. [¶] I was always watching for your case. I even kept your file in my chambers for a while, for a long while. When pleadings would come in, I would keep the pleadings. You were always on my radar. . . . And I had told you guys the path you're going down, you shouldn't be going down ad nauseam. And that in the end what I fully intended was that someone is going to win and someone is going to lose, and it will be big time. [¶] Judgment day is today. One of you will win. One of you will lose, and judgment day will be big time. All attorney's fees, including 271 for both sides, including 2030 for both sides, all of it will be decided before you leave this place today. All of it. This is the day. I'm not putting anything over for any further day. It's all -- it's all on the table.

(R.T. 901:1-25.)

On January 19, 2018, after taking evidence and hearing closing arguments, Judge Gary gave an oral tentative statement of decision and issued a tentative order after hearing on all issues. On January 29, 2018, the father filed objections to the statement of decision and requested a formal written statement

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[4] See R.T. 273:10, 601:2-3, 608:13, 723:6-7, 960:28.

of decision. On March 15, 2018, Judge Gary filed his Proposed Statement of Decision and Proposed Order. After both parties lodged objections, the matter was heard by Judge Gary on April 16, 2018. During the hearing, Judge Gary bifurcated the issues of attorney fees and costs, re-opened evidence, ordered the parties to file and serve updated I&Es with detailed attorney fee statements, and continued the hearing on the bifurcated issues to June 1, 2018. On April 17, 2018, Judge Gary issued an Order After Hearing on the relocation/custody/visitation issues. Judge Gary (1) granted the mother's request to relocate, (2) ordered sole legal and sole physical custody of the child to the mother, (3) ordered visitation to the father, and (4) made other miscellaneous orders concerning child custody.

June 1, 2018 Hearing

On this date, the case was set before Judge Gary for a hearing on the bifurcated issues of attorney fees and costs. The mother appeared at the hearing with attorney Sagaria, and Kayleigh Birks, an associate of Cohen's, appeared on behalf of the father. During the hearing, Judge Gary noted that the proceeding was stayed because of a bankruptcy petition filed by the father on or about May 29, 2018. Judge Gary also noted that the mother had filed her up-dated I&Es and attorney fee statements as ordered, but that the father had not.

Judge Gary made comments concerning the timing of the father's bankruptcy proceeding, and disparaged Cohen, as set forth below:

> MS. BIRKS: Excuse me, Your Honor.
>
> THE COURT: Yes.
>
> MS. BIRKS: We do have a DVRO hearing or trial, excuse me, on the 24th of August.
>
> THE COURT: A DVRO?
>
> MS. BIRKS: Yeah, a DV hearing out of county.
>
> MR. SAGARIA: Oh, out of county.

MS. BIRKS: On the 24th of August.

THE COURT: Well, here's my problem with it. I'll probably honor it, but I have honored -- and Ms. Birks, this is nothing personal to you.

MS. BIRKS: I know.

THE COURT: I really enjoy you. Every time you've come in, you're very -- you're just very professional, and I really enjoy you --

MS. BIRKS: Thank you.

THE COURT: -- but I do want this to be noted. Every turn I have offered Mr. Cohen the professional courtesy he's asked for, and at virtually every turn he has burned me every time he can. It's not appreciated. It's not professional. It's undignified. It detracts from the quality of the bar. I will offer him the courtesy again, but at some point I would appreciate professional courtesy in response, not just to me, but also to Ms. Battilana and Ms. Battilana's attorney. [¶] This -- dropping this, in my mind it is no accident. It is no coincidence that the filing of the bankruptcy occurred on the day before or the day before the day before the hearing after the deadline for the May 21st filing of the document. I had actually asked both parties to file as soon as they could. I gave May 21st as the deadline. If they could offer me the courtesy, to get them filed earlier, but no later than. [¶] Again, Ms. Battilana complied, and as you can see, once again, for the record, I meticulously went through every single entry on her billing statements looking for, well, should this have been done, is this appropriate, is that not appropriate, is this too much billing, is it not too much billing. I went through everything, how much was written off, how many times were there no charges for services. I noted everything. And then in the end to get nothing. [¶] And then to be hit with an e-mail that didn't even come directly to the department even though your

> office -- and again, it's not you. Your office has called my clerk, the department, numerous times when it needed something. To send it to the place where it is least likely to be gotten on the day before the day before the hearing so that I would get it the day before the hearing, so that all of the work that I put in, all of the work Mr. Sagaria put in, all of the work Ms. Battilana put in, to continue this trial would be ambushed and for not [*sic*]. Those types of tactics do not go unnoticed by the Court.

(R.T. 11:8-13:3.)

June 5, 2018 Hearing

On June 5, 2018, Judge Gary presided over the mother's ex parte RFO concerning summer visitation and an asthma inhaler for the minor child that the father was allegedly refusing to administer. Judge Gary engaged in the following colloquy with father:

> THE COURT: Because you are in such conflict, I have given one party already sole legal, sole physical custody, and that legal decision-making has been challenged when it shouldn't be. There is no legal authority to stand on he can question her call on the medical. He has no right to do that. That was taken away from him with the sole legal custody order to mom. And one of the reasons mom got sole legal custody is not just the domestic violence, not just the presumption, but because after all of the fighting, I knew at the end of the day these two would not be able to agree on anything. And it turns out that's the way it's turned out. It's not fun or happy for me to do something like this. For the State to step in and [d]o something like this, but we've left it that way, or you've left it that way. [¶] The proposed order is Respondent to administer the medications prescribed to the minor child, and I'm going to strike out and add as mother directs.

> MS. PRUETT: Thank you, Your Honor.
>
> THE COURT: Unfortunately for Mr. Battilana, he is not in a position to veto or question mom at this point.
>
> RESPONDENT: So if she tells me not to follow the doctors [*sic*] orders, then I'm supposed to follow her orders instead of the doctors [*sic*]?
>
> THE COURT: What part of that is hard to understand?
>
> RESPONDENT: I'm just --
>
> THE COURT: What you're doing is bickering. What that was, that was a challenge to my order now masquerading as some sort of valid question. No, it wasn't. It was just a challenge to the order. It was bickering. And this is the same thing I've watched you do to her in your texts. I've watched you belittle her. I am pretty convinced that what she said happened, the "yeah, right" is exactly what happened because I saw them in all of those text messages at trial, all of them.

(R.T. 15:8-24.)

July 20, 2018 Hearing

On July 20, 2018, the parties appeared before Judge Gary for a return on mother's June 5, 2018, ex parte RFO. The father was represented at the hearing by Daniel Lynch, an attorney with Gary, Till, Burlingham & Lynch. Lynch informed Judge Gary that a statement of disqualification (challenge for cause, pursuant to Code of Civil Procedure sections 170.1 and 170.3) had been served on both the clerk and opposing counsel. The statement of disqualification was based on the allegation that Judge Gary's clerk had made remarks reflecting lack of impartiality, and the allegation that the judge previously worked for the firm Gary, Till, Burlingham & Lynch, where his father was a founding member, and that Judge Gary had routinely recused himself when an attorney from that firm appeared on a case assigned to him.

Judge Gary then discussed the history of the case, informed Lynch of the issues at trial that the father's prior attorney had raised, and stated:

> And here we are in the middle of a continuing trial. Every step along the way has been tortuous. I can't remember a case that has been like this in 30 years in family law, 16 of which has been on the bench. And now another 170.3 from my own firm -- my old firm. My old firm, not my own firm. My old firm. [¶] It is not surprising at all to me after everything that has happened in this case that Gary Till & Burlingham came into the case. No shot at all. None. And I sort of knew. I knew it would put that firm in a position of: Do we attack the judge or not? Do we take the case and attack the judge or not? And I didn't know which way it was gonna go, but it took the case, and it's attacking the judge. [¶] I'm not going to take it as a personal attack. I'm going to take it as a legal attack, but it is a tactic. It is a tactic.

(R.T. 16:16-17:7.)

Judge Gary then took a recess to "decide how to handle the 170.3," and directed the parties to look over the mediation report. Prior to doing so, Judge Gary accepted a responsive declaration from Lynch. Following the recess, Judge Gary asked whether the parties had come to an agreement, and Lynch explained that a partial agreement had been reached, but that the father preferred to have the matter continued. Pruett objected, and she and Judge Gary discussed the issues that were preventing resolution, including Lynch's preference for the judge not to make any orders that day, when the following exchange occurred:

> MR. LYNCH: That is correct. I don't think that can happen, Your Honor. I don't want to waive my challenge, so I object to any orders being made today.

> THE COURT: I understand that. I'm not asking you to. I'm just trying to figure out what the dispute is. Not that I'm going to make an order. [¶] … [¶] Here's my assessment. There is no Holy Grail in those reports. [¶] What I'm asking parties to do is just consider what the actual issues are. What I begged them to do for a year and a half is to get out of litigation mode. You're ruining your daughter. It does not surprise me one bit that she's not adjusted on these -- she's a four-year-old little girl. [¶] She's been suffering this for a year and a half to two years now. I just don't know why you can't come to some agreement that the issues are nominal. There was an emergency temporary order put in place that expires today unless the court makes an order, and the parties cannot seem to reach an agreement even on an inhaler. And counsel wants to bicker about it.
>
> MR. LYNCH: Your Honor --
>
> THE COURT: The parties want to bicker about it. It is so obvious. It is so obvious what the solution is aside from litigation. It is so entirely obvious.

(R.T. 20:1-21:10.)

The hearing on the mother's June 5, 2018 RFO was ultimately continued to December 7, 2018. The motion to disqualify Judge Gary was later denied by an out of county judge.

December 7, 2018 Hearing

On December 7, 2018, counsel and the parties in *Battilana* appeared before Judge Gary for the continued hearing on the mother's June 5, 2018 RFO. During the hearing, the parties reached a full agreement, which was read into the record. Judge Gary subsequently addressed allegations made by the father that he was wrongfully keeping the case and preventing the father from having access to the file. In responding to a question from the father's attorney about the availability of the case file, Judge Gary stated:

> I hate it that I have been brought into this personally. I hate it. That is not the role of a judge, and frankly, it's not the role of parties to involve a judge like has happened here. The ball that we should be keeping our eye on is [the child]. I don't like being the object of it all.

(R.T. 42:11-16.)

B. DISCIPLINE

1. Embroilment, bias, and prejudgment. "Embroilment is the process by which the judge surrenders the role of impartial factfinder/decision-maker, and joins the fray." (Rothman, et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2.1, p. 58.) Prejudgment can occur when a judge "drift[s] from professional distance and objectivity." (*Id*. at § 2.19, p. 86.) Judges are required to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. (Canon 2A.) Judges are also required to perform judicial duties without bias or prejudice. (Canon 3B(5).)

Judge Gary remarked (prior to the January 2018 long cause hearing) that he was "picking sides," "knew where the problems lie," and that "the parties are going to find themselves with nothing in the end." These remarks reflected, at a minimum, the appearance of prejudgment and embroilment in violation of canons 2A and 3B(5).

During the December 7, 2018 hearing, Judge Gary stated, "I hate it that I have been brought into this personally. I hate it. That is not the role of a judge, and frankly, it's not the role of parties to involve a judge like has happened here." (R.T. 42:11-14.) During the January 2018 hearing, Judge Gary stated that the *Battilana* case went on his "radar" January 30, 2017, and by July 2017, he was thinking about the parties after work. He stated that he was always watching for the case, kept the file in his chambers for a long while, and kept the pleadings when they came in. He stated, "You were always on my radar. . . And that in the

end what I fully intended was that someone is going to win and someone is going to lose, and it will be big time. [¶] Judgment day is today. One of you will win. One of you will lose, and judgment day will be big time." (R.T. 901:11-20.) During the August 1, 2017 hearing, the judge stated, "Way to go. Way to go. I'm done. [¶] Go off to trial, burn it all up. Good luck. [¶] And good luck to [the child], cause it ain't going to turn out well for her. [¶] This is unbelievable." (R.T. 38:25-39:16.) These comments exhibited embroilment and the appearance of bias in violation of canons 2A and 3B(5).

2. Comments accusing the parents of damaging the child. Throughout multiple proceedings, Judge Gary accused the parents of damaging their child ("[H]ow bad do you want to ruin your child," "And good luck to [the child], because it ain't going to turn out well for her," and "[S]he's going to get divorced. And your grandkid is going to go through the same things she's going through because this is all she knows."). Judge Gary's remarks to and about the parents were undignified and discourteous (in violation of canon 3B(4)), could also be reasonably perceived as reflecting bias or prejudice (in violation of canon 3B(5)), and failed to promote public confidence in the integrity and impartiality of the judiciary (in violation of canon 2A).

3. Questioning witnesses. While judges may examine witnesses to elicit or clarify testimony, they must not become an advocate, comment on the evidence, or cast aspersions about, or ridicule, a witness. (*People v. Perkins* (2003) 109 Cal.App.4th 1562.)

Judge Gary made discourteous remarks to and about the grandmother (the father's mother) during the long cause hearing in January 2018. While examining the grandmother, Judge Gary sarcastically asked her if she knew whether the child's mother was a pharmacist. In addition, while questioning the mother, Judge Gary made a gratuitous remark about the grandmother "suffer[ing] a bout of amnesia." Judge Gary's conduct was undignified and discourteous (in

violation of canon 3B(4)), and could also be reasonably perceived as reflecting bias or prejudice (in violation of canon 3B(5)).

4. Comments concerning religion and death. Judge Gary initiated a discussion with Nichols over the purpose of religion, referenced the Bible (John 3:16), and discussed the promise of everlasting life. Judge Gary's comments at the *Battilana* trial improperly injected religion into court proceedings, and created an appearance of lack of impartiality contrary to canon 2A (requiring judges to conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and canon 3B(5) (requiring judges to perform judicial duties without bias or prejudice and to refrain from engaging in speech, gestures or other conduct that would reasonably be perceived as bias or prejudice, including but not limited to bias based upon religion). As the commission has previously stated, "The bench is not a pulpit nor soapbox for self-expression. A litigant is entitled to assume that a judge's attention will be focused entirely upon the relevant facts of his or her case, and that his or her cause will be judged dispassionately – without consideration of anyone's religion. . . ." (*Censure of Judge Jose A. Velasquez* (1997) pp. 9-10.)

5. Bankruptcy comments and comments disparaging the father's attorney. At the first hearing after the father filed a bankruptcy petition, Judge Gary stated that Cohen "burned [him] every time he [could]." The judge said Cohen's conduct was "not professional" and "undignified," and "detracts from the quality of the bar." The commission found these remarks undignified and discourteous, and reasonably likely to interfere with the attorney-client relationship, in violation of canons 2A and 3B(4).

6. Remaining remarks and conduct. The following comments and conduct of Judge Gary were discourteous and undignified: mocking the father's name ("it's a battle"), accusing the parties of engaging in excessive litigation and of "churning fees," remarking that an attorney was about to "come out of [his] underwear," commenting about the parties "lawyering up," telling the parties they

could “bleed out” and to “grow up,” repeatedly referring to the case as “contrived,” stating that it was a “nothing case,” and responding to the father’s question about whether he should follow the mother’s orders rather than the doctor’s, by stating, “What part of that is hard to understand?” and “What you’re doing is bickering. What that was, that was a challenge to my order now masquerading as some sort of valid question. No, it wasn’t. It was just a challenge to the order. It was bickering.” The judge’s remarks and conduct, as described, violated canons 2A and 3B(4).

Judge Gary’s conduct, as set forth above in paragraphs Nos. 1 – 6, constituted, at a minimum, improper action.

Judge Gary’s misconduct was significantly aggravated by the judge’s prior discipline. Judge Gary received an advisory letter in 2014 for misconduct in two family law matters. The commission stated, “The canons insist on appropriate demeanor even if a litigant has engaged in conduct a judge considers repugnant and detrimental to the litigant’s family and the court system.”

In the first matter, a mother was contemptuous toward Judge Gary. When she asked to be arrested, the judge responded, “If your desire here today is so that you can be taken down and play the martyr, I won’t give you that privilege.” Judge Gary continued with the hearing and later warned the mother of the possibility of direct contempt if she continued to interrupt. After making a custody ruling, Judge Gary stated that he was finding the mother in direct contempt and sentenced her to five days in jail “commencing forthwith.” The commission found that Judge Gary failed to provide the mother an adequate opportunity to respond and offer an excuse or an apology before adjudicating the contempt and sentencing her to jail. The judge’s conduct violated canons 2 and 2A.

In the second matter, Judge Gary treated a mother in a rude manner and appeared to become embroiled in the proceedings. He invited the father to file a motion seeking sole custody of the child, by saying, “So I’m willing to give him sole legal, sole physical custody. I am willing to do that. If he only files the

motion, that will be heard. . . . And if Mr. [A.] were to file a motion for sole legal and sole physical custody, given all that has happened, the Court would entertain it like it would entertain any other motion." Judge Gary also remarked that the mother had "played" the males involved in the cases, and had played games with many people. The commission found that the judge's treatment of the mother created the appearance of embroilment and prejudgment, particularly in light of his repeated invitations to the father to file a motion seeking sole custody. The judge's conduct violated canons 2A, 3B(4), and 3B(5).

DISCIPLINE IMPOSED BY COMMISSION

Judge Gary's multiple instances of misconduct while presiding over the *Battilana* family law matter failed to comport with high judicial standards and undermined public respect for the integrity and impartiality of the judiciary. Judge Gary's loss of objectivity and neutrality, his lack of courtesy and dignity when addressing those appearing before him, and his improper comments about religion violated the canons of judicial ethics.

"The canons' insistence on appropriate judicial demeanor rests on the idea that such demeanor is one of those things that is central to the appearance and reality of fairness and impartiality in judicial proceedings." (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2019) § 2:46, p. 116.) "Once a judge becomes embroiled in a matter, fairness, impartiality, and the integrity of decisions leave the courtroom." (*Id.* at § 1:35, p. 27.)

Family law matters can be particularly fraught with emotion. These situations are when a calm and steady hand, a respectful demeanor, and the appearance of neutrality are especially needed. A judge may convey to family law litigants the judge's concerns about the detrimental effects that high-conflict disputes may have on children, but may not do so by telling parents, in harsh terms, that the judge knows how their children will turn out. Judges may also express their concerns about counsel's conduct, but may not do so in a

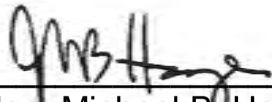
disparaging manner, or in a manner that is likely to interfere with the attorney-client relationship. Judges may also question witnesses, but must comply with the canons' mandates of patience, dignity, and courtesy when doing so.

The commission determined to accept the Stipulation and impose a public admonishment because Judge Gary has accepted responsibility for his multiple acts of misconduct and has acknowledged that his prior discipline in two family law matters is a significantly aggravating factor.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Kay Cooperman Jue; Hon. Lisa B. Lench; Nanci E. Nishimura, Esq.; Victor E. Salazar, Esq.; and Mr. Richard Simpson voted to accept the Stipulation and to issue this public admonishment of Judge Gary. Commission members Ms. Sarah Kruer Jager and Mr. Adam N. Torres did not participate.

Date: May 14, 2020

On behalf of the Commission on Judicial Performance,



Hon. Michael B. Harper
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| IN THE MATTER CONCERNING<br>JUDGE ROBERT L. TAMIETTI | DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT PURSUANT TO STIPULATION<br>(Commission Rule 116.5) |

This disciplinary matter concerns Judge Robert L. Tamietti of the Nevada County Superior Court. On August 24, 2020, Judge Tamietti and his counsel, David S. McMonigle, Esq., entered into a stipulation with Director-Chief Counsel Gregory Dresser, pursuant to commission rule 116.5, to resolve the pending preliminary investigation involving Judge Tamietti by the imposition of a public admonishment and the judge's agreement to retire and not to serve in a judicial capacity in the future. Judge Tamietti has tendered his retirement from judicial office, effective October 31, 2020. The Stipulation for Discipline by Consent was approved by the commission on October 7, 2020, pursuant to the following terms and conditions and stipulated facts and legal conclusions. A copy of the stipulation is attached.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Tamietti.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth herein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing a public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Tamietti waives any further proceedings and review in this matter, including formal proceedings (Rules of Com. on Jud. Performance, rule 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. On July 27, 2020, Judge Tamietti tendered his retirement effective October 31, 2020 through written correspondence to Governor Gavin Newsom. A copy of that letter is attached hereto as an exhibit and incorporated by this reference. Judge Tamietti shall use accrued vacation or other leave time, and shall be absent from the bench and not preside over any judicial proceedings after September 11, 2020. Judge Tamietti represents and warrants that he has sufficient vacation/leave time to be absent from the bench between September 12 and October 31, 2020, inclusive, and that his presiding judge will allow him to be absent during that period.

7. Failure to comply with the terms and conditions of this agreement may constitute additional and independent grounds for discipline.

8. Judge Tamietti has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time after October 31, 2020.

9. If Judge Tamietti attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the preliminary investigation letters.

10. Judge Tamietti agrees that the facts recited herein are true and correct, and that the discipline to which the parties stipulate herein is acceptable in light of those facts.

11. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted or conceded by the parties.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public admonishment on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Robert L. Tamietti became a judge of the Nevada County Superior Court in 2003. His current term began in January 2019.

I. *People v. Anthony Coronado-Smith*, No. TF19-000233

A. Pre-charge conduct

On June 19, 2019, Judge Tamietti signed a warrant for the arrest of Anthony Coronado-Smith on a violation of Penal Code section 647.6 (annoying or molesting a child), which is a misdemeanor. The judge set bail at $7,500, but did not impose any bail conditions. Mr. Coronado-Smith was arrested on the warrant later that day. After interviewing Mr. Coronado-Smith, a Truckee Police Department officer executed a request to increase bail to $150,000. Judge Tamietti telephonically authorized the request, but did not impose any bail conditions based on his expectation that Mr. Coronado-Smith would not post bail and would appear for arraignment within 48 hours of his arrest. On June 20, 2019, Mr. Coronado-Smith posted bond and was released, and was given an appearance date of September 30, 2019. No charges were filed.

On June 21, 2019, Judge Tamietti sent Deputy District Attorney (DDA) Anna Tyner an email that stated, “Who is the DA on this child molest case? He bailed (to 9/30/19) and we need to get him in more quickly for bail conditions.” The subject line of the email stated, “Tony Coronado-Smith.”

On June 24, 2019, at 9:50 a.m., DDA Edward Grubaugh sent Judge Tamietti an email, stating, “It will be my case, Your Honor.” At 9:53 a.m., Judge Tamietti responded to DDA Grubaugh, stating, “Thank you. [¶] He posted bail to

September. I want to see him before then to impose bail conditions. [¶] Judge T." At 2:34 p.m., DDA Grubaugh sent the following response: "I will do my best to bring him into court as soon as we make a filing decision, Your Honor. As of now, unfortunately, I have no reports to review."

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On Friday, September 6, 2019, at 12:25 p.m., Judge Tamietti emailed DDA Grubaugh, District Attorney (DA) Clifford Newell, Assistant District Attorney (ADA) Christopher Walsh, and Presiding Judge Linda Sloven, stating:

> He bonded out on June 20 and has been free without any conditions since then despite facing child molestation charges and having an extensive occupational and avocational history of dealing with minors. This level of "service" is far below what the citizens of this community expect and deserve.

At 3:07 p.m., DA Newell responded as follows, while adding Truckee Police Department Chief of Police Robert Leftwich as a recipient:

> Good afternoon Judge Tamietti: [¶] Please do not try to influence my Office's filing decisions. You have no idea what is going on in the case nor should you. A rush to filing could very well jeopardize a case and result in serious injustice. You can be assured the "level of service" to the citizens of Truckee is extensive and DDA Grubaugh is appropriately handling the matter. [¶] Regards, Cliff Newell

At 4:33 p.m., Judge Tamietti responded, as follows:

> Baloney. When the inaction and/or inattention of your office or any other agency puts this community at risk I have a duty to speak up. If that offends you in this circumstance, so be it.

While Judge Tamietti was not aware that Mr. Coronado-Smith had retained counsel on or before July 10, 2019, until after the above referenced e-mails, he did not include Mr. Coronado-Smith on the communications.

Judge Tamietti's conduct conveyed the appearance of bias against the Nevada County District Attorney's Office. The judge intruded into the charging authority of the executive branch of government, and engaged in conduct that was inconsistent with the proper role of a judge as a neutral arbiter. The judge violated his duties to avoid impropriety and the appearance of impropriety (canon 2); to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A); to be patient, dignified, and courteous while acting in a judicial capacity (canon 3B(4)); to refrain from speech or conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)); and to not initiate, permit, or consider ex parte communications (canon 3B(7)).

B. Improper Response to Filing of Peremptory Challenge

1. On September 19, 2019, DDA Grubaugh filed a felony complaint in *People v. Anthony Coronado-Smith*, No. TF19-000233, and an "Invitation to the Honorable Judge Robert L. Tamietti to Recuse Himself." The "Invitation" attached the emails that are quoted above, and requested that the judge recuse himself to protect the rights of the defendant and ensure public confidence in the judiciary. Attorney Grubaugh stated in the "Invitation" that "[t]he People do not believe Judge Tamietti holds actual bias in this case." On the same day, Judge Tamietti filed a "Response Regarding People's Invitation to Recuse." The response stated that the "Invitation" did not set forth grounds that would require the judge to disqualify himself.

On September 24, 2019, DDA Grubaugh timely filed a peremptory challenge against Judge Tamietti pursuant to Code of Civil Procedure section 170.6. The peremptory challenge, which DDA Grubaugh signed under oath, stated that Judge Tamietti was prejudiced against the People of the State of California. Instead of allowing the case to be reassigned as required by Code of

Civil Procedure section 170.6, subdivision (a)(4), Judge Tamietti questioned DDA Grubaugh about the challenge, suggested that he may have committed perjury, advised him of his Fifth Amendment right to remain silent, and alluded to a possible inquiry by the State Bar.

Judge Tamietti's conduct conveyed the appearance of retaliation for filing the peremptory challenge, and the appearance of attempting to improperly influence a deputy district attorney in the exercise of the People's statutory rights. The judge's conduct violated his duties to avoid impropriety and the appearance of impropriety (canon 2); to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A); to be patient, dignified, and courteous while acting in a judicial capacity (canon 3B(4)); and to refrain from speech or conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)).

2. Instead of notifying Presiding Judge Linda Sloven of the peremptory challenge in *Coronado-Smith*, for the purpose of case reassignment, Judge Tamietti improperly chose the successor judge, who had served as a visiting judge in Truckee on occasion, in violation of Code of Civil Procedure section 170.6, subdivision (a)(4). Judge Tamietti thereby violated his duties to avoid impropriety and the appearance of impropriety (canon 2), to respect and comply with the law (canon 2A), and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A).

II. *People v. Anthony Torres*, No. T13/0408

Anthony Torres was charged in a criminal complaint with three felonies: (1) assault with a deadly weapon (Penal Code § 245(a)(1)), (2) battery with serious bodily injury (Penal Code § 243(d)), and (3) street terrorism (involving active participation in a criminal street gang) (Penal Code § 186.22). The alleged assault occurred as a number of people were leaving a late night party, and the victim was seriously injured.

On August 20, 2013, Judge Tamietti presided over the preliminary hearing. At the outset of the hearing, the judge granted the prosecutor's motion to dismiss the counts of assault with a deadly weapon and street terrorism. The hearing proceeded with the prosecutor calling numerous Truckee Police Department (PD) officers, who testified about their interviews of percipient witnesses, and the defense calling a single eyewitness. There was conflicting evidence as to whether the defendant was involved in the alleged assault, including the eyewitness's testimony that she was certain the defendant was not involved because he was wearing a bright white shirt and those involved were wearing dark clothing. Judge Tamietti concluded that there was sufficient evidence to hold the defendant to answer on the one remaining count, battery with serious bodily injury.

On February 11, 2014, DA Newell appeared before Judge Tamietti to request dismissal of case number T13/0408. DA Newell asked that the case be dismissed because it could not be proved beyond a reasonable doubt, due to tainted witness statements. Judge Tamietti asked how much "DA investigator time" had been expended on the case. (R.T. 4:1-2.) DA Newell stated that a DA investigator had not been used, because the Truckee PD had not requested assistance. Judge Tamietti then stated, "And it's been my experience that recantation isn't all that uncommon in cases; we see it in the DV [domestic violence] situations quite frequently." (R.T. 4:18-20.) DA Newell stated that, in addition to two recanting witnesses, there was a third witness who testified that the defendant was at least 10 feet away from the altercation. DA Newell also stated that there was subsequent testimony of "white-dressed figures" running away after the incident. Judge Tamietti then stated:

> Well, the testimony at the preliminary, as I recall, was the only person who had white on was Mr. Torres and that was how one of the witnesses testified that Mr. Torres wasn't in the scrum because according to that

> witness, everybody in the scrum was wearing dark clothing.

(R.T. 5:16-20.)

DA Newell responded that an additional person had been seen running. In response, Judge Tamietti stated:

> I got a couple of problems here with this file. One is I have got a victim beaten within an inch of his life who thankfully survived.
>
> Two, I have got this insinuation, I'll call it, of gang activity, which is a cancer that seems to be working its way into this community and to which most of the citizens of the community are oblivious. Sitting where I sit doing what I do, I'm a little less oblivious than average to that.
>
> And there was enough of an insinuation of gang involvement in this circumstance that it initially got charged as a gang case. And then the gang aspects of the case got dismissed, for whatever reason, some of which is attributable to your assistant DA's statement that we are not, meaning you, are not prepared to try a gang case.
>
> And I think the citizens of this community are probably ready to have a gang case tried for a couple of reasons: One, to figure out, if in fact, that's true; and two, to educate the community about the risks that are inherent in that insinuation into the society of this community.
>
> So I heard the preliminary. I remember what was said. And I haven't seen the investigative work that the defendant's investigator, for which I have signed a couple of orders, has performed, I don't know what they say. I'm at a little bit of disadvantage there.
>
> But the mere fact that people are not getting their stories straight or recanting their stories, there is a lot of different reasons that might be happening in a case that has gang insinuation.
>
> I'm not suggesting that I have any evidence of [*sic*] Mr. Torres, or any of his cohorts are pressuring witnesses,

> but I don't think that's a naive thing to assume that might be happening and might be an explanation for the result of some of the investigative works performed by the defense.
>
> I would point out, which is my question to you, was whether your office had expended any investigative resources on this file? I don't see Womack or Lopez here, so I don't know what their views are on that subject.[1]
>
> I'm also increasingly concerned, Mr. Newell, about the impact on this community about the absence of an assigned DA. You and I have spoken about that and I know you have tried and Ms. Ferguson has tried to fill the breach here . . . but it's not getting filled, and this community is suffering as a result, and we need to put a stop to that suffering. The citizens on this side of the pass are entitled to the same level of services as the citizens on the other side of the pass, and they're not getting it. And I'm pretty annoyed that – and it puts me in a pretty tough situation because I have to assert myself into cases where I shouldn't be responsible for doing that – but I have had to, and I have, and this is one of those cases in my view, I think no one has really picked up this ball and run with it as if it were their responsibility, and that's my primary problem with this pitch. I think it's a slipshod "let's get rid of this because it's going to be hard to try," and that's not a good reason to get rid of a case that's this serious, both to Mr. Torres and to the victim of the case.

(R.T. 5:28-8:1.)

DA Newell stated that being on the record was not the appropriate context to discuss personnel issues, to which the judge stated:

> Hang on a second. I'm not talking personal [*sic*] issues. I'm talking about staffing of this branch, and that has nothing to do with a personal [*sic*] decision, that has to do with the service of citizen [*sic*] to this community. [¶] I'm not telling you how to run your office. What I'm

[1] Sergeant Robert Womack and Detective Arnulfo Lopez worked for the Truckee PD and testified at the preliminary hearing.

> telling you is the way it's being run up here is negatively affecting the operation of this branch and the citizens of this community.

(R.T. 8:9-16.)

DA Newell provided more details regarding the decision to move to dismiss the case, how the case was investigated, and his efforts to fill vacant DDA positions in the county. Judge Tamietti then questioned a victim witness advocate in the following exchange:

> THE COURT: Has he [the victim] indicated to you that he's getting any pressure?
>
> VICTIM WITNESS [ADVOCATE]: No, not at all.
>
> THE COURT: Has he indicated to you that he's aware that any of the people, who he has identified as potential witnesses, are getting any pressure?
>
> VICTIM WITNESS [ADVOCATE]: No, he has not indicated that at all.
>
> THE COURT: Okay. Has he provided a -- any additional information about potential witnesses for the case, to you, Shea?

(R.T. 10:19-28.)

The victim witness advocate responded that the victim had given a list of names to the attorneys. Judge Tamietti questioned DA Newell repeatedly about the status of follow-up reports concerning the list of names. After hearing arguments for dismissal, Judge Tamietti stated:

> Well, I would observe that having been the felony judge on the other side of the county for five years, before I got this assignment, that had this crime happened in [the] Safeway parking lot of Grass Valley, it is my impression that a whole bunch more of resources would have been thrown at this case than would have been thrown at this one.
>
> If Mr. Torres was improperly charged, he deserves an apology. If he was properly charged, we ought to take the case to trial and let a jury of 12 citizens of this

> community decide whether or not witnesses who are recanting, have been pressured into recanting.
>
> I have some live testimony at the preliminary and most of it was 115[2] from Detective Lopez, so I can't make any real independent assessment about those people's statements given to Detective Lopez and Detective Lopez isn't here to amplify on that. So I'm put in the very uncomfortable situation of not doing what I think is my best to protect the citizens of this community, which is the principal reason they gave me this job in the first place.
>
> So I don't like the spot I'm being put in here, Mr. Newell. And I credit my disgust, in large part, to your office and its handling of this file. But I'll grant the motion without prejudice, dismiss the case, in return for his plea to the dead bang we found you with drugs indicia for sale.

(R.T. 14:28-15:25.)

Judge Tamietti then asked the defendant if he had a tattoo of Marilyn Monroe on his arm. When the defendant admitted to having the tattoo, Judge Tamietti asked DA Newell if he had any idea what it meant. DA Newell stated that the tattoo was potentially gang-affiliated, but that it could not be proved. Judge Tamietti then responded, "That might go along with the 13 that's on his chest." (R.T. 16:5-6.)

Judge Tamietti's conduct, as described, was discourteous, conveyed the appearance of embroilment, bias against the DA's office, and prejudgment, and suggested that the judge had assumed a prosecutorial role. Judge Tamietti's conduct violated his duties to avoid impropriety and the appearance of impropriety (canon 2); to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A); to be patient, dignified, and courteous while acting in a judicial capacity (canon 3B(4)); and to refrain from

[2] Proposition 115 amended the constitution to allow hearsay evidence to be presented by qualified officers at a preliminary hearing.

speech and conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)).

III. Email disparaging District Attorney Newell

On Monday, February 24, 2020, at 9:56 a.m., DA Newell sent an email to Nevada County Superior Court Judge Robert Tice-Raskin with the subject heading, "KNCO article." The subject of the email was a radio interview of an attorney in the DA's office who had made comments about Senate Bill 10 (pretrial release and detention), and Penal Code section 1320.10 (pre-arraignment review), that DA Newell indicated had been taken out of context. The email stated:

> Good morning Judge,
>
> Hope you had a good weekend. Have you had a chance to listen to the whole interview in question? Chris had no idea how or what was excerpted from that interview. From my view he spoke negatively about another state's (there's a couple) well documented reform failure but [*sic*], followed with how it has given us opportunity to better craft ours. Not mentioned by the article is how judges need all the info, how it's incumbent on us to provide some of it and, Probation's role in completing the assessments thoroughly. Given the radio show in its entirety, I can't hold him to task for a reporter's inarticulate description or headline taken out of context.
>
> That said, I believe he could be more articulate on my Office's policy as it relates to SB10/ 1320.10, which is support. I will make that clear publically [*sic*] and, I will make sure, if he has any more public speaking, he uses the correct talking points. I am going to be on the radio myself later this week talking about it as well. I'll let you know when that is when I find out. I'm available all week if we need to discuss further.
>
> Thank you, Cliff

On February 24, 2020, at 10:50 a.m., Judge Tice-Raskin responded with an email addressed to DA Newell, and copied to all other Nevada County Superior Court judges, including Judge Tamietti. The email stated:

> Mr. Newell,
>
> I have forwarded your thoughts to the whole bench. We will be in touch. Thanks.
>
> SRT

On February 24, 2020, at 1:15 p.m., Judge Tamietti responded to Judge Tice-Raskin's email with an email addressed to DA Newell and to all other Nevada County Superior Court judges. The email stated: "So if he was so horribly misquoted, why hasn't he tried to get it corrected? More fecklessness from Newell."

February 24, 2020, is also the date on which Judge Tamietti submitted his response to the commission's preliminary investigation letter dated December 6, 2019.

Judge Tamietti's conduct, as described, was discourteous, and conveyed the appearance that the judge was biased against DA Newell. Judge Tamietti's conduct violated his duties to avoid impropriety and the appearance of impropriety (canon 2); to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A); to be patient, dignified, and courteous while acting in a judicial capacity (canon 3B(4)); and to refrain from speech and conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)).

Judge Tamietti's conduct, as set forth in parts I-III, above, constituted, at a minimum, improper action.

Judge Tamietti has volunteered significant amounts of time to understaffed surrounding courts, and has taught at New Judges Orientation and judicial continuing education programs.

Judge Tamietti's misconduct was aggravated by the judge's prior discipline. In 2019, Judge Tamietti received an advisory letter for discourteous remarks about an attorney who was appearing before the judge in a civil case. The advisory letter noted that the judge's conduct, which occurred in 2018, was aggravated by the fact that, in 2017, he had participated in the commission's mentoring program to address demeanor issues.

DISCIPLINE

Judge Tamietti's misconduct reflected a loss of the neutrality required of judicial officers. His actions created the appearance of bias against the local district attorney's office, which undermines public respect for, and confidence in, the integrity and impartiality of the judiciary.

Judge Tamietti's intrusion upon the charging authority of the district attorney's office and his usurpation of the prosecutorial role was inconsistent with a judge's role of neutral arbiter. The court must not undertake the role of prosecutor or defense counsel if public confidence in the integrity of the criminal justice system is to be maintained. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 845.)

Judge Tamietti's questioning of a deputy district attorney regarding the filing of a peremptory challenge, filed pursuant to Code of Civil Procedure section 170.6, further reflected a loss of neutrality. The judge's reaction to the peremptory challenge appeared to be an attempt to improperly influence the deputy district attorney and to be retaliatory. A judge must accept a proper peremptory challenge without further inquiry. (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 532.) "Any conduct by a judge that amounts to retaliation for the exercise of a lawful right amounts to judicial misconduct." (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 7:12, p. 405.) The judge also failed to comply with Code of Civil Procedure section 170.6 by choosing a successor judge to handle the case, rather than

advising his presiding judge about the peremptory challenge so that the case could be reassigned.

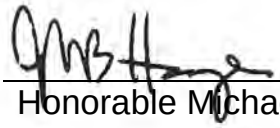
Judge Tamietti also engaged in improper ex parte communication and in behavior that was discourteous and conveyed the appearance of bias, embroilment, and prejudgment.

The commission's determination to resolve this matter with a public admonishment and to forgo formal proceedings and the possible imposition of higher discipline was conditioned upon Judge Tamietti's agreement to retire and not to serve in a judicial capacity in the future. The commission concluded that this resolution adequately fulfills its mandate to protect the public from further possible misconduct.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Kay Cooperman Jue; Hon. Lisa B. Lench; Nanci E. Nishimura, Esq.; Victor E. Salazar, Esq.; Mr. Richard Simpson; and Mr. Adam N. Torres voted to accept the stipulation. Ms. Sarah Kruer Jager did not participate.

Date: 10/14/2020

On behalf of the
Commission on Judicial Performance,



Honorable Michael B. Harper
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| IN THE MATTER CONCERNING<br>JUDGE ROBERT L. TAMIETTI | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 116.5) |

Pursuant to Rules of the Commission on Judicial Performance, rule 116.5, Judge Robert L. Tamietti of the Nevada County Superior Court, represented by counsel, and commission counsel (the "parties") submit this proposed disposition of the matters set forth in the commission's preliminary investigation letters dated December 6, 2019, March 26, 2020, and July 6, 2020. The parties request that the commission resolve this matter by imposition of a public admonishment. The parties believe that the settlement provided by this agreement is in the best interests of the commission and Judge Tamietti because, among other reasons, in light of the stipulated facts and legal conclusions, a public admonishment and the judge's agreement to retire and not serve in a judicial capacity in the future adequately protect the public and will avoid the delay and expense of further proceedings.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving Judge Tamietti.

2. The commission shall issue a public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Tamietti waives any further proceedings and review in this matter, including formal proceedings (Rules of Com. on Jud. Performance, rule 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. On July 27, 2020, Judge Tamietti tendered his retirement effective October 31, 2020 through written correspondence to Governor Gavin Newsom. A copy of that letter is attached hereto as an exhibit and incorporated by this reference. Judge Tamietti shall use accrued vacation or other leave time, and shall be absent from the bench and not preside over any judicial proceedings after September 11, 2020. Judge Tamietti represents and warrants that he has sufficient vacation/leave time to be absent from the bench between September 12 and October 31, 2020, inclusive, and that his presiding judge will allow him to be absent during that period.

7. Failure to comply with the terms and conditions of this agreement may constitute additional and independent grounds for discipline.

8. Judge Tamietti has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time after October 31, 2020.

9. If Judge Tamietti attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the public admonishment and resume the preliminary investigation as to all of the matters in the preliminary investigation letters.

10. Judge Tamietti agrees that the facts recited herein are true and correct, and that the discipline to which the parties stipulate herein is acceptable in light of those facts.

11. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted or conceded by the parties.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a public admonishment on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

STIPULATED FACTS AND LEGAL CONCLUSIONS

Judge Robert L. Tamietti became a judge of the Nevada County Superior Court in 2003. His current term began in January 2019.

I. *People v. Anthony Coronado-Smith*, No. TF19-000233

A. Pre-charge conduct

On June 19, 2019, Judge Tamietti signed a warrant for the arrest of Anthony Coronado-Smith on a violation of Penal Code section 647.6 (annoying or molesting a child), which is a misdemeanor. The judge set bail at $7,500, but did not impose any bail conditions. Mr. Coronado-Smith was arrested on the warrant later that day. After interviewing Mr. Coronado-Smith, a Truckee Police Department officer executed a request to increase bail to $150,000. Judge Tamietti telephonically authorized the request, but did not impose any bail conditions based on his expectation that Mr. Coronado-Smith would not post bail and would appear for arraignment within 48 hours of his arrest. On June 20, 2019, Mr. Coronado-Smith posted bond and was released, and was given an appearance date of September 30, 2019. No charges were filed.

On June 21, 2019, Judge Tamietti sent Deputy District Attorney (DDA) Anna Tyner an email that stated, "Who is the DA on this child molest case? He bailed (to 9/30/19) and we need to get him in more quickly for bail conditions." The subject line of the email stated, "Tony Coronado-Smith."

On June 24, 2019, at 9:50 a.m., DDA Edward Grubaugh sent Judge Tamietti an email, stating, "It will be my case, Your Honor." At 9:53 a.m., Judge Tamietti responded to DDA Grubaugh, stating, "Thank you. [¶] He posted bail to September. I want to see him before then to impose bail conditions. [¶] Judge T." At 2:34 p.m., DDA Grubaugh

sent the following response: "I will do my best to bring him into court as soon as we make a filing decision, Your Honor. As of now, unfortunately, I have no reports to review."

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> Good afternoon Judge Tamietti; [¶] Please do not try to influence my Office's filing decisions. You have no idea what is going on in the case nor should you. A rush to filing could very well jeopardize a case and result in serious injustice. You can be assured the "level of service" to the citizens of Truckee is extensive and DDA Grubaugh is appropriately handling the matter. [¶] Regards, Cliff Newell

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While Judge Tamietti was not aware that Mr. Coronado-Smith had retained counsel on or before July 10, 2019, until after the above referenced e-mails, he did not include Mr. Coronado-Smith on the communications.

Judge Tamietti's conduct conveyed the appearance of bias against the Nevada County District Attorney's Office. The judge intruded into the charging authority of the executive branch of government, and engaged in conduct that was inconsistent with the proper role of a judge as a neutral arbiter. The judge violated his duties to avoid impropriety and the appearance of impropriety (canon 2), to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), to be patient, dignified, and courteous while acting in a judicial capacity (canon 3B(4)), to refrain from speech or conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)), and to not initiate, permit, or consider ex parte communications (canon 3B(7)).

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2. Instead of notifying Presiding Judge Linda Sloven of the peremptory challenge in *Coronado-Smith*, for the purpose of case reassignment, Judge Tamietti improperly chose the successor judge, who had served as a visiting judge in Truckee on occasion, in violation of Code of Civil Procedure section 170.6, subdivision (a)(4). Judge Tamietti thereby violated his duties to avoid impropriety and the appearance of impropriety (canon 2), to respect and comply with the law (canon 2A), and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A).

II. *People v. Anthony Torres*, No. T13/0408

Anthony Torres was charged in a criminal complaint with three felonies: (1) assault with a deadly weapon (Penal Code § 245(a)(1)), (2) battery with serious bodily injury (Penal Code § 243(d)), and (3) street terrorism (involving active participation in a criminal street gang) (Penal Code § 186.22). The alleged assault occurred as a number of people were leaving a late night party, and the victim was seriously injured.

On August 20, 2013, Judge Tamietti presided over the preliminary hearing. At the outset of the hearing, the judge granted the prosecutor's motion to dismiss the counts of assault with a deadly weapon and street terrorism. The hearing proceeded with the prosecutor calling numerous Truckee Police Department (PD) officers, who testified about their interviews of percipient witnesses, and the defense calling a single eyewitness. There was conflicting evidence as to whether the defendant was involved in the alleged assault, including the eyewitness's testimony that she was certain the

defendant was not involved because he was wearing a bright white shirt and those involved were wearing dark clothing. Judge Tamietti concluded that there was sufficient evidence to hold the defendant to answer on the one remaining count, battery with serious bodily injury.

On February 11, 2014, DA Newell appeared before Judge Tamietti to request dismissal of case number T13/0408. DA Newell asked that the case be dismissed because it could not be proved beyond a reasonable doubt, due to tainted witness statements. Judge Tamietti asked how much "DA investigator time" had been expended on the case. (R.T. 4:1-2.) DA Newell stated that a DA investigator had not been used, because the Truckee PD had not requested assistance. Judge Tamietti then stated, "And it's been my experience that recantation isn't all that uncommon in cases; we see it in the DV [domestic violence] situations quite frequently." (R.T. 4:18-20.) DA Newell stated that, in addition to two recanting witnesses, there was a third witness who testified that the defendant was at least 10 feet away from the altercation. DA Newell also stated that there was subsequent testimony of "white-dressed figures" running away after the incident. Judge Tamietti then stated:

> Well, the testimony at the preliminary, as I recall, was the only person who had white on was Mr. Torres and that was how one of the witnesses testified that Mr. Torres wasn't in the scrum because according to that witness, everybody in the scrum was wearing dark clothing.

(R.T. 5:16-20.)

DA Newell responded that an additional person had been seen running. In response, Judge Tamietti stated:

> I got a couple of problems here with this file. One is I have got a victim beaten within an inch of his life who thankfully survived.
>
> Two, I have got this insinuation, I'll call it, of gang activity, which is a cancer that seems to be working its way into this community and to which most of the citizens of the community are oblivious. Sitting where I sit doing what I do, I'm a little less oblivious than average to that.

And there was enough of an insinuation of gang involvement in this circumstance that it initially got charged as a gang case. And then the gang aspects of the case got dismissed, for whatever reason, some of which is attributable to your assistant DA's statement that we are not, meaning you, are not prepared to try a gang case.

And I think the citizens of this community are probably ready to have a gang case tried for a couple of reasons: One, to figure out, if in fact, that's true; and two, to educate the community about the risks that are inherent in that insinuation into the society of this community.

So I heard the preliminary. I remember what was said. And I haven't seen the investigative work that the defendant's investigator, for which I have signed a couple of orders, has performed, I don't know what they say. I'm at a little bit of disadvantage there.

But the mere fact that people are not getting their stories straight or recanting their stories, there is a lot of different reasons that might be happening in a case that has gang insinuation.

I'm not suggesting that I have any evidence of [*sic*] Mr. Torres, or any of his cohorts are pressuring witnesses, but I don't think that's a naive thing to assume that might be happening and might be an explanation for the result of some of the investigative works performed by the defense.

I would point out, which is my question to you, was whether your office had expended any investigative resources on this file? I don't see Womack or Lopez here, so I don't know what their views are on that subject.[1]

I'm also increasingly concerned, Mr. Newell, about the impact on this community about the absence of an assigned DA. You and I have spoken about that and I know you have tried and Ms. Ferguson has tried to fill the breach here . . . but it's not getting filled, and this community is suffering as a result, and we need to put a stop to that suffering. The citizens on this side of the pass are entitled to the same level

[1] Sergeant Robert Womack and Detective Arnulfo Lopez worked for the Truckee PD and testified at the preliminary hearing.

> of services as the citizens on the other side of the pass, and they're not getting it. And I'm pretty annoyed that – and it puts me in a pretty tough situation because I have to assert myself into cases where I shouldn't be responsible for doing that – but I have had to, and I have, and this is one of those cases in my view, I think no one has really picked up this ball and run with it as if it were their responsibility, and that's my primary problem with this pitch. I think it's a slipshod "let's get rid of this because it's going to be hard to try," and that's not a good reason to get rid of a case that's this serious, both to Mr. Torres and to the victim of the case.

(R.T. 5:28-8:1.)

DA Newell stated that being on the record was not the appropriate context to discuss personnel issues, to which the judge stated:

> Hang on a second. I'm not talking personal [*sic*] issues. I'm talking about staffing of this branch, and that has nothing to do with a personal [*sic*] decision, that has to do with the service of citizen [*sic*] to this community. [¶] I'm not telling you how to run your office. What I'm telling you is the way it's being run up here is negatively affecting the operation of this branch and the citizens of this community.

(R.T. 8:9-16.)

DA Newell provided more details regarding the decision to move to dismiss the case, how the case was investigated, and his efforts to fill vacant DDA positions in the county. Judge Tamietti then questioned a victim witness advocate in the following exchange:

> THE COURT: Has he [the victim] indicated to you that he's getting any pressure?
>
> VICTIM WITNESS: No, not at all.
>
> THE COURT: Has he indicated to you that he's aware that any of the people, who he has identified as potential witnesses, are getting any pressure?
>
> VICTIM WITNESS: No, he has not indicated that at all.

> THE COURT: Okay. Has he provided a -- any additional information about potential witnesses for the case, to you, Shea?

(R.T. 10:19-28.)

The victim witness advocate responded that the victim had given a list of names to the attorneys. Judge Tamietti questioned DA Newell repeatedly about the status of follow-up reports concerning the list of names. After hearing arguments for dismissal, Judge Tamietti stated:

> Well, I would observe that having been the felony judge on the other side of the county for five years, before I got this assignment, that had this crime happened in [the] Safeway parking lot of Grass Valley, it is my impression that a whole bunch more of resources would have been thrown at this case than would have been thrown at this one.
>
> If Mr. Torres was improperly charged, he deserves an apology. If he was properly charged, we ought to take the case to trial and let a jury of 12 citizens of this community decide whether or not witnesses who are recanting, have been pressured into recanting.
>
> I have some live testimony at the preliminary and most of it was 115[2] from Detective Lopez, so I can't make any real independent assessment about those people's statements given to Detective Lopez and Detective Lopez isn't here to amplify on that. So I'm put in the very uncomfortable situation of not doing what I think is my best to protect the citizens of this community, which is the principal reason they gave me this job in the first place.
>
> So I don't like the spot I'm being put in here, Mr. Newell. And I credit my disgust, in large part, to your office and its handling of this file. But I'll grant the motion without prejudice, dismiss the case, in return for his plea to the dead bang we found you with drugs indicia for sale.

(R.T. 14:28-15:25.)

[2] Proposition 115 amended the constitution to allow hearsay evidence to be presented by qualified officers at a preliminary hearing.

Judge Tamietti then asked the defendant if he had a tattoo of Marilyn Monroe on his arm. When the defendant admitted to having the tattoo, Judge Tamietti asked DA Newell if he had any idea what it meant. DA Newell stated that the tattoo was potentially gang-affiliated, but that it could not be proved. Judge Tamietti then responded, "That might go along with the 13 that's on his chest." (R.T. 16:5-6.)

Judge Tamietti's conduct, as described, was discourteous, conveyed the appearance of embroilment, bias against the DA's office, and prejudgment, and suggested that the judge had assumed a prosecutorial role. Judge Tamietti's conduct violated his duties to avoid impropriety and the appearance of impropriety (canon 2), to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), to be patient, dignified, and courteous while acting in a judicial capacity (canon 3B(4)), and to refrain from speech and conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)).

III. Email disparaging District Attorney Newell

On Monday, February 24, 2020, at 9:56 a.m., DA Newell sent an email to Nevada County Superior Court Judge Robert Tice-Raskin with the subject heading, "KNCO article." The subject of the email was a radio interview of an attorney in the DA's office who had made comments about Senate Bill 10 (pretrial release and detention), and Penal Code section 1320.10 (pre-arraignment review), that DA Newell indicated had been taken out of context. The email stated:

> Good morning Judge,
>
> Hope you had a good weekend. Have you had a chance to listen to the whole interview in question? Chris had no idea how or what was excerpted from that interview. From my view he spoke negatively about another state's (there's a couple) well documented reform failure but [*sic*], followed with how it has given us opportunity to better craft ours. Not mentioned by the article is how judges need all the info, how it's incumbent on us to provide some of it and, Probation's role in completing the assessments thoroughly. Given the radio show in its entirety, I can't hold him to task for a

> reporter's inarticulate description or headline taken out of context.
>
> That said, I believe he could be more articulate on my Office's policy as it relates to SB10/ 1320.10, which is support. I will make that clear publically and, I will make sure, if he has any more public speaking, he uses the correct talking points. I am going to be on the radio myself later this week talking about it as well. I'll let you know when that is when I find out. I'm available all week if we need to discuss further.
>
> Thank you, Cliff

On February 24, 2020, at 10:50 a.m., Judge Tice-Raskin responded with an email addressed to DA Newell, and copied to all other Nevada County Superior Court judges, including Judge Tamietti. The email stated:

> Mr. Newell,
>
> I have forwarded your thoughts to the whole bench. We will be in touch. Thanks.
>
> SRT

On February 24, 2020, at 1:15 p.m., Judge Tamietti responded to Judge Tice-Raskin's email with an email addressed to DA Newell and to all other Nevada County Superior Court judges. The email stated: "So if he was so horribly misquoted, why hasn't he tried to get it corrected? More fecklessness from Newell."

February 24, 2020, is also the date on which Judge Tamietti submitted his response to the commission's preliminary investigation letter dated December 6, 2019.

Judge Tamietti's conduct, as described, was discourteous, and conveyed the appearance that the judge was biased against DA Newell. Judge Tamietti's conduct violated his duties to avoid impropriety and the appearance of impropriety (canon 2), to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), to be patient, dignified, and courteous while acting in a judicial capacity (canon 3B(4)), and to refrain from speech and conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)).

Judge Tamietti's conduct, as set forth in parts I-III, above, constituted, at a minimum, improper action.

Judge Tamietti has volunteered significant amounts of time to understaffed surrounding courts, and has taught at New Judges Orientation and judicial continuing education programs.

Judge Tamietti's misconduct was aggravated by the judge's prior discipline. In 2019, Judge Tamietti received an advisory letter for discourteous remarks about an attorney who was appearing before the judge in a civil case. The advisory letter noted that the judge's conduct, which occurred in 2018, was aggravated by the fact that, in 2017, he had participated in the commission's mentoring program to address demeanor issues.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, Judge Tamietti expressly admits that the foregoing facts are true and accepts the stated legal conclusions.

Dated: August 21, 2020.

Judge Robert L. Tamietti

Dated: August 24, 2020.

David S. McMonigle, Esq.
Attorney for Judge Robert L. Tamietti

Dated: August 24, 2020.

Gregory Dresser
Director-Chief Counsel

# SUPERIOR COURT OF THE STATE OF CALIFORNIA
## County of Nevada, Truckee Branch

Linda J. Sloven
*Presiding Judge*

ROBERT L. TAMIETTI
*Judge*

Jason LaChance
*Commissioner*

Jason Galkin
*Court Executive Officer*

**10075 Levon Avenue, Suite 301**
**Truckee, CA 96161**
**(530) 582-7835**

July 27, 2020

The Honorable Gavin Newsom
Governor
1303 10th Street, Suite 1173
Sacramento, CA 95814

*Re: Judicial Retirement*

Dear Governor Newsom:

Since November of 2003, it has been my honor to serve the people of Nevada County and the Truckee community as their Superior Court Judge. It has been a challenging and many times rewarding second career. In light of my health and my desire to explore other interests while I am vigorous enough to do so, I have decided to retire, effective October 31, 2020.

I urge you to appoint a resident of the Truckee community to replace me in this assignment. The citizens of this community deserve a judge who lives in this community, who has had experience in the legal system in our community, and who is familiar with the services available within this community, as well as the unique challenges that face this community.

On a personal note, and as a private citizen, please accept my humble and sincere compliments and thanks to you for your thoughtful and courageous leadership of our state through early stages of the Covid 19 pandemic and the related economic fallout. My best to you and your family in your continued service to our state.

Respectfully,

Judge Robert L. Tamietti
Superior Court Judge

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| IN THE MATTER CONCERNING<br>JUDGE FRANK ROESCH | DECISION AND ORDER IMPOSING<br>PUBLIC ADMONISHMENT |

This disciplinary matter concerns Judge Frank Roesch, a judge of the Alameda County Superior Court since 2001. His current term began in 2015. Pursuant to rule 116 of the Rules of the Commission on Judicial Performance, Judge Roesch and his attorney, David S. McMonigle, appeared before the commission on October 7, 2020, to contest the imposition of a tentative public admonishment issued on July 17, 2020. Judge Roesch has waived his right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Roesch and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the statement of facts and reasons set forth below.

As described below, in two cases, Judge Roesch displayed a lack of the dispassionate neutrality and the courtesy to others that is expected of judges. In a civil jury trial, he interrogated a witness in a hostile manner, made sarcastic remarks, and mishandled the witness's assertion of her Fifth Amendment privilege against self-incrimination. In a quiet title action, the judge questioned the parties and counsel in an injudicious manner. Although Judge Roesch believed, based on faulty assumptions, that his intervention in each case was justified, it is the misguided manner in which he attempted to address his misassumptions, and the discourteous way he comported himself toward those appearing in court before him, that is the basis for this discipline.

## STATEMENT OF FACTS AND REASONS

### I. *Victaulic Co. v. American Home Assurance Co.*

In 2015, Judge Roesch presided over a jury trial in *Victaulic Co. v. American Home Assurance Co.* (RG12642929) regarding Victaulic's claims against its insurers for breach of contract, bad faith, and punitive damages. After a three and one-half week trial, the jury awarded Victaulic $55,333,581.11. The Court of Appeal reversed the judgment due to Judge Roesch's misconduct and multiple errors during the trial. (*Victaulic Co. v. American Home Assurance Co*. (2018) 20 Cal.App.5th 948.)

During the trial, plaintiff Victaulic called Nancy Finberg, the director of complex claims for American Insurance Group (AIG), to testify as an adverse witness. The insurance defendants were members of AIG. Finberg had examined Victaulic's coverage claims and determined that there was potential insurance coverage. She had also verified, at the request of counsel, the insurers' responses to Victaulic's requests for admission (RFAs) regarding coverage, which the insurers denied on legal grounds. Victaulic's counsel questioned Finberg about the distinction between her role as a claims handler and the insurers' legal positions as reflected in their responses to the RFAs.[1] Finberg attempted to explain the difference. Judge Roesch intervened in counsel's questioning, as follows:

> Q. [MR. JEAN, counsel for Victaulic] So each of the seven cases at issue in this litigation presented a potential for coverage; right?
>
> A. [MS. FINBERG] Are you making a distinction between the handling of the claims or the coverage litigation? Because they're two separate things.

[1] The appellate court found that Judge Roesch erred in allowing Victaulic's counsel to question Finberg about the RFAs, which are not admissible, but the judge is not being disciplined for this error.

> Q. Well, I had not been because I didn't really think of them separately before you just gave that answer, but -- so are you saying that the coverage litigation -- or underlying claims handling -- I probably just mixed up words there, so let me just repeat myself. I'm sorry. [¶] So in the underlying claims handling, you make a determination as a potential for coverage one way, and then in the coverage case, this litigation, the potential for coverage is determined differently?
>
> A. They're two separate things.
>
> THE COURT: Answer his question. Are they determined differently?

Shortly thereafter, Jean asked Finberg a question on the same topic. When she answered, Judge Roesch interrupted, as follows:

> Q. [MR. JEAN] And I think where we left off, you had -- you started talking about that maybe you handled the potential for coverage one way in the -- when you handled claims, and perhaps in the litigation or this litigation maybe it's handled differently? [¶] Did I understand your testimony correctly?
>
> A. [MS. FINBERG] Well, there are two separate issues, two separate things.
>
> THE COURT: That was a yes-or-no question.
>
> THE WITNESS: I don't know if I can answer yes or no, Your Honor, the way --
>
> THE COURT: You don't know if you can answer that?
>
> THE WITNESS: The way he asked it. [¶] I'm sorry, would you ask it again.
>
> THE COURT: Why don't you rephrase the question. The witness doesn't understand it.

After further examination, Judge Roesch again intervened in the questioning of Finberg, as follows:

> [MR. JEAN]: . . . Now, do you handle the potential for coverage or make your assessments as a potential for coverage differently when you handle claims than as is done in this litigation?
>
> THE COURT: Do you understand the question?
>
> THE WITNESS: I understand what he's asked, but it's hard to answer yes or no to that question, Your Honor.
>
> THE COURT: Do you use the same analysis to determine if there's coverage in your claims handling as you would in responding to questions in this lawsuit?
>
> THE WITNESS: If it's yes or no, then I would have to say no.
>
> THE COURT: You don't?
>
> THE WITNESS: If I could qualify that.
>
> THE COURT: You use a different analysis to determine coverage in coverage litigation as in claims handling?
>
> THE WITNESS: May I --
>
> THE COURT: I'm just trying to get you to say yes or no. You'll be given plenty of opportunity to make your explanations.
>
> THE WITNESS: Okay. I'll say no then.
>
> THE COURT: So the answer is no. Mr. Jean, the answer is no.
>
> BY MR. JEAN: Q. All right. So is the answer -- I just want to make sure I'm clear. [¶] Do you treat the analysis for the potential for coverage as a claims handler the same as is done by AIG in connection with this litigation?

MR. GOINES [Counsel for AIG]: Objection. Vague, Your Honor.

THE COURT: Not vague.

WITNESS: No, not -- no.

BY MR. JEAN: Q. Okay. So -- okay. You asked for an opportunity to explain.\

A. Yes.

Q. Please explain.

A. Thank you. The claims handling I handle no matter what. In these claims that you -- the claims that are the subject of the litigation I've handled the same all along. Nobody's asked me to change the way I handle the claims or make any decisions differently than I normally would because of this coverage litigation.

Q. But then in connection with the litigation --

THE COURT: So how is it that your analysis is different if it's coverage litigation than if it's claims handling? Isn't the potential for coverage based on the facts that you find by the plaintiff in the underlying case? Isn't that where you get the concept of potential for coverage?

THE WITNESS: In the underlying case, yes, that's correct.

THE COURT: So how is that analysis different in a coverage case?

THE WITNESS: Because in this coverage litigation --

THE COURT: So what? The facts are the facts, aren't they?

THE WITNESS: We're taking a legal position in this coverage --

> THE COURT: The facts of the underlying cases are the facts of the underlying cases.
>
> THE WITNESS: Yes, correct.
>
> THE COURT: Is that right? [¶] And is it an analysis of the facts of the underlying cases that lead you to a determination of whether there's a potential for coverage?
>
> THE WITNESS: Yes.
>
> THE COURT: And that's both in -- wherever you are and whenever you are, that's the rule; right?
>
> THE WITNESS: That's correct.
>
> THE COURT: Okay. Good luck, Mr. Jean.
>
> MR. JEAN: Thank you, Your Honor.

Jean questioned Finberg further regarding the insurers' responses to the RFAs, and her verification of those responses under penalty of perjury. Judge Roesch intervened in this questioning, as follows:

> Q. [MR. JEAN] So when you were -- I'm a little confused because how is it that you could sign these under oath under penalties [*sic*] of perjury and deny the potential for coverage when you knew as a claims handler that there was the potential for coverage?
>
> A. [MS. FINBERG] I think I can clear up your confusion.
>
> Q. Yeah. Please do. I mean, that was an open-ended question, so go ahead.
>
> A. Okay. Thank you. These verifications, these requests for admissions were drafted and provided to me by coverage counsel, Mr. Eads' office.
>
> Q. Yes.

A. These are legal documents. I'm not an attorney. I'm just an adjuster. And I read them, and I reviewed them with Mr. Eads and his partners and was told, "This is a legal position that we're taking in the coverage litigation. We're preserving legal issues. We're asking the court for guidance, if you will." [¶] It had nothing to do with the way I handled my claims. Nobody ever asked me to withdraw a defense or stop handling or change the way I was handling. I signed these as the person most knowledgeable, the legal position asking the Court for guidance.

THE COURT: So you knew it was false when you verified it under penalty of perjury based on your own understanding of the underlying facts? Is that what you're telling us?

THE WITNESS: What was false, Your Honor?

THE COURT: It's false that there was, in fact, a potential for coverage under all of those seven. You told us that already today. [¶] And what you're telling me is that you signed this under penalty of perjury, and you knew it was false?

THE WITNESS: No, Your Honor. This is not false. I was handling my claims because there was a potential for coverage under all those claims. But these verifications, RFAs, were legal positions that were being taken in this coverage litigation, so . . .

THE COURT: So you knew that the underlying facts were that it was true that there was a potential for coverage, and yet you write in your verification that you declare under penalty of perjury that the foregoing responses are true and correct?

THE WITNESS: Right, because that was true and correct to the legal position that was being taken.

THE COURT: Oh, okay.

THE WITNESS: So I wasn't being inconsistent.

> THE COURT: I understand now. The facts don't matter. [¶] Is that what you're telling me?
>
> THE WITNESS: The facts don't matter in this litigation.
>
> THE COURT: All right.
>
> BY MR. JEAN: Q. So --
>
> THE COURT: May I see counsel in my chambers.

After the judge and counsel had a discussion in chambers, they returned to the courtroom, and the judge announced:

> THE COURT: Ladies and gentlemen of the jury, we are going to take an early lunchtime today. We're going to come back at one o'clock, and we are going to proceed. [¶] We'll have a different witness this afternoon, and we'll be dealing with things that are outside of your purview during that time, all right? Outside of your purview during that time. [¶] So you're excused to go to lunch.

The judge asked Finberg to "step outside," which she did. He summarized the chambers conversation that had just occurred, as follows:

> THE COURT: All right. Well, I will try to summarize. We've had a conversation, counsel and I, in my chambers regarding the testimony of the current witness, and the admission that she perjured herself in her verification. [¶] And at the conclusion of our conversations, it was determined at Mr. Goines' request that the witness be allowed an opportunity to obtain private counsel and either take the Fifth Amendment and refuse to respond to questions or not. [¶] Consequently in our questioning we're going to have a different witness this afternoon starting at one o'clock, and Ms. Finberg will be back tomorrow at nine o'clock for continued examination.

The insurers' counsel moved for a mistrial on the ground that the judge's treatment of Finberg conveyed that he did not believe her. Judge Roesch denied the motion without explanation.

The next day, Finberg appeared with personal counsel, who informed the court and counsel that Finberg would assert her Fifth Amendment privilege against self-incrimination in response to all substantive questions from either side. Judge Roesch responded, "Either side and me too, I'll bet."

Judge Roesch then ordered that, when Finberg asserted the Fifth Amendment privilege against self-incrimination, she was to take the witness stand and do so in front of the jury. This was contrary to law. Requiring a witness to invoke the privilege in front of the jury invites the jury to draw an improper inference and violates Evidence Code section 913 (forbidding judges and attorneys from commenting on the assertion of the privilege, and forbidding juries from drawing any inference from it). (*People v. Frierson* (1991) 53 Cal.3d 730, 743; *People v. Holloway* (2004) 33 Cal.4th 96, 130; *Victaulic, supra*, 20 Cal.App.5th at p. 981.)

Judge Roesch also permitted Finberg to assert a blanket claim of privilege against self-incrimination as to all questions that would be asked of her. This, too, was contrary to law. A witness claiming this privilege against self-incrimination must do so with specific reference to particular questions asked, and the trial court must undertake a particularized inquiry with respect to each specific claim of privilege to determine whether the claimant has sustained his burden of establishing that the testimony or other evidence sought might tend to incriminate him." (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045.)

After Finberg took the witness stand and asserted the Fifth Amendment privilege in a blanket fashion as to all substantive questions from either side, Judge Roesch excused her, without allowing the insurers to cross-examine her. Her testimony remained in the case, and the insurers were denied their fundamental right to examine Finberg on subjects about which she had testified before

she asserted the Fifth Amendment. The insurers had a statutory right to cross-examine Finberg. (Evid. Code, § 776, subd. (b).) Cross-examination is also a due process right that is fundamental to a fair proceeding. (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 735.) "[T]he right to cross-examination cannot be defeated by a valid claim of privilege, even a privilege as strong as that embodied in the Fifth Amendment." (*Ibid*.) Although the scope of the insurers' cross-examination would have been limited to topics on which Finberg had testified during Victaulic's questioning, she had testified to multiple topics other than the RFAs.

Judge Roesch's handling of *Victaulic,* described above, constituted misconduct in multiple ways. His questioning of Finberg was inappropriately aggressive and conveyed to the jury that he questioned her credibility. As stated by the appellate court, "[A]ny fair reading of the record reveals that the court acted in a way that from every indication was hostile to Finberg—and that it did not believe her." (*Victaulic, supra,* 20 Cal.App.5th at pp. 974-975.) Judge Roesch's improper treatment of Finberg included sarcastic and gratuitous remarks related to her (e.g., "Good luck, Mr. Jean," and "Either side and me too, I'll bet"). A trial court commits misconduct if it persists in making discourteous and disparaging remarks to a witness and utters frequent comment from which the jury may plainly perceive that the judge does not believe the witness's testimony. (*Victaulic*, at p. 975.) The appellate court found that Judge Roesch's questioning of Finberg violated these principles, was improper, and constituted misconduct. (*Ibid*.) The commission agreed.

It is also misconduct for a trial court to act as an advocate for either side, due to the significance of the court in the eyes of the jury. (*Victaulic, supra,* 20 Cal.App.5th at p. 975.) The appellate court found that Judge Roesch improperly acted as an advocate for Victaulic by intervening in the case and cross-examining Finberg as he did. (*Ibid*.) The commission agreed.

Judge Roesch's handling of Finberg's assertion of her Fifth Amendment privilege against self-incrimination was also improper. The judge lacked the judicial discretion to require Finberg to assert the Fifth Amendment in front of the jury. (*Victaulic, supra,* 20 Cal.App.5th at p. 982.) The appellate court found this ruling "hard to comprehend, in light of the authorities." (*Ibid.*) The insurers' counsel brought to the judge's attention that it was wrong to make Finberg invoke the privilege in front of the jury, but he nevertheless informed Finberg's counsel that Finberg would take the stand to invoke the privilege. When Finberg was getting ready to take the stand, the insurers' counsel said that they would request that she be questioned outside the presence of the jury, but that they understood that their request was going to be denied. Judge Roesch confirmed that it would be denied. Requiring Finberg to assert the Fifth Amendment in front of the jury without the discretion to do so constituted an abuse of authority.

Judge Roesch admitted knowing that a witness cannot assert a blanket claim of the Fifth Amendment privilege and that each question and potential answer must implicate the witness in a criminal act in some way. Counsel for Victaulic brought to the judge's attention his understanding that the Fifth Amendment needed to be evaluated on a question by question basis and that a blanket invocation was not proper. The insurers' counsel moved for a mistrial on the ground that a blanket assertion of the privilege denied them a fair trial. Judge Roesch denied the motion. Despite knowing the law on this issue, the judge allowed Finberg to invoke the privilege on a blanket basis and declined to conduct the particularized inquiry required by law. He asserted that he did this because he believed he had "buy-in" from counsel. Having attorneys agree to something the law does not permit does not obviate the judge's duty to respect and comply with the law. The judge's action in this regard constituted an intentional disregard of the law.

The insurers also raised the issue of the right to cross-examination, which is a fundamental right. They told the judge that it was unfair to allow Finberg to

invoke the privilege against self-incrimination in the middle of her testimony without giving them the opportunity to rehabilitate her or give her a chance to explain her prior testimony, and they moved for a mistrial on this basis. Judge Roesch denied the motion without explanation. The judge's handling of this issue reflected a disregard for the insurers' fundamental right to cross-examination. The appellate court found that allowing Finberg's testimony to remain in the case, rather than excluding it, had a "devastating effect." (*Victaulic, supra,* 20 Cal.App.5th at p. 980.)

Judge Roesch's conduct also reflected embroilment. According to the California Judicial Conduct Handbook (Rothman et al. (4th ed. 2017) § 2:1, p. 58), embroilment can manifest itself when a judge is "attempting to see to it that a certain result prevails out of a misguided perception of the judicial role." In *Victaulic*, Judge Roesch believed—erroneously—that Finberg had testified falsely, and he inserted himself into Victaulic's examination of her in an effort to establish that for the jury. Rather than acting as an impartial jurist, he persisted in questioning her in an overly forceful manner, required her to assert the Fifth Amendment in front of the jury, and did not permit her to be questioned by the insurers, who repeatedly asked him for the opportunity to do so. Judge Roesch acknowledged that he overstepped his role as a trial judge and that his course of conduct related to Finberg's testimony was misguided. His interaction with Finberg, and the issues that presented themselves in connection with her testimony, reflected a loss of neutrality that is the hallmark of embroilment.

Judge Roesch's conduct violated canon 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); canon 3 (a judge shall perform the duties of judicial office impartially, competently, and diligently); canon 3B(4) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity); and canon 3B(7) (a judge shall accord to

every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law).

II. *Westlake Trust v. Testate and Intestate Successors of Regete Gruhn*

In July 2017, Judge Roesch presided over a hearing in *Westlake Trust v. Testate and Intestate Successors of Regete Gruhn* (RG16820169). Attorney Caroline Gegg appeared for plaintiff Alvin Cox as trustee of the Westlake Trust. Cox was seeking a quiet title judgment. There was no opposition. Gegg explained that Regete Gruhn left the property to Barbara Blumberg in a 2005 will, that Gruhn died on December 23, 2008, and that Blumberg decided not to probate the will and entered into a purchase agreement with Cox in March 2016. Gegg also informed the court that Cox had paid the back taxes on the property, paid the arrearages to the homeowners association and to the mortgage lender, and was making payments on the loan. Judge Roesch indicated that he would need Blumberg to authenticate the copy of the will Gegg was attempting to introduce into evidence, and a certified copy of a quitclaim deed, and that he wanted to know whether there was a supplemental tax assessment, based on Gruhn's death in 2008, and whether the taxes had been paid. The hearing was continued to permit Gegg to present this evidence.

At the subsequent hearing on July 28, 2017, Blumberg testified that she was present at Gruhn's attorney's office when Gruhn signed her will. Judge Roesch asked her, "And you are the principal beneficiary under this will and the lawyer permitted you to be present when it's signed?" Blumberg responded, "No. He made me leave the room at some point." Judge Roesch then made the following statement:

> THE COURT: I used to write wills for a living. That -- for a lawyer to have permitted the principal beneficiary of a will to come with the person who made the will and to be in the same building or on the same block at the time of the signing absolutely opens the door for a challenge based on undue influence. Now, maybe it's

> true, maybe it's not. Nobody is raising that issue, but . . . .

Judge Roesch's comment implied that Blumberg's conduct may have been subject to a claim of undue influence, even after Blumberg testified that she was not in the room when Gruhn signed her will.

Judge Roesch then aggressively questioned Cox, and engaged in argument with Gegg, about the payment of property taxes. During the examination of Cox, Gegg offered to provide to the court certified copies of a Notice of Proposed Escape Assessment concerning property taxes on the subject property. Gegg asked Cox to identify the "event date" on the document, which she indicated was in the upper right-hand corner. Cox identified that date as December 23, 2008 (the date of Gruhn's death). The following exchange occurred:

> THE COURT: Isn't it more important the date in the upper left-hand corner, which is the date it was mailed to -- evidently was mailed to Mr. Cox? June 8th, 2017, so you received this on -- sometime after June 8th?
>
> THE WITNESS: Yes.
>
> THE COURT: All right. So had the taxes and the escape assessment that is listed here been paid before the last hearing?
>
> MS. GEGG: Your Honor, we are getting to that, and I would like to set a foundation for you, Your Honor, will understand how this process works.
>
> THE COURT: Well, you told me last time that these taxes had previously been paid prior to that hearing. Now --
>
> MS. GEGG: No.
>
> THE COURT: -- it turns out that may not be true.

> MS. GEGG: No, Your Honor. What I did say is all the back property taxes have been paid and the taxes are current. What Your Honor asked about were the supplemental taxes that are reassessed, and we have that information here and I would like to present that.

Shortly thereafter, Gegg asked Cox if there were additional assessments due on the property, and he answered that there were. Judge Roesch stated that the date of the notice was June 22, 2017, and said: "Well, the escape assessment was due subsequent to June the 22nd. It hadn't been paid before then." The following exchange occurred:

> MS. GEGG: Q. Mr. Cox, do you know if it's possible to pay these assessments for supplemental taxes now?
>
> A. It's not possible.
>
> Q. Why is that?
>
> A. Because they haven't given us the bill. We can't get the bill until October.
>
> Q. Did you attempt to pay the bill for the supplemental taxes?
>
> A. Believe me, we did.
>
> Q. Are these assessments secured by the property?
>
> A. Yes.
>
> THE COURT: Really?
>
> MS. GEGG: Yes.
>
> THE COURT: With who as the owner?
>
> MS. GEGG: They are secured by the property. The owner is not personally liable for these assessments. Although, Mr. Cox is willing to become personally liable for these assessments.

THE COURT: I'll tell you my opinion of what I think the law is. I believe that the law is that if the property is transferred from the heir who obtained it through somebody's death prior to supplemental taxes or escape assessments being levied on the -- whoever bought the property, either through a probate process or some other process, does not have the obligation of paying the supplemental taxes except to the date of their deed. If they bought the deed -- if the person died on January 1st, the property was transferred on July the 1st, if the county doesn't get around to assessing escape taxes until December 1st, the individual who owned the property between the date of death of January 1st and date of sale of July the 1st or June the 1st, whatever it was, is personally liable, but it's an unsecured obligation and the property becomes liable from the date of the new deed.

MS. GEGG: I --

THE COURT: I'm sorry. Your client doesn't have a deed to this property yet. If the property is transferred into his name -- well, he does have a deed. I don't remember whether it was recorded or not.

MS. GEGG: It has been recorded, yes.

THE COURT: Any escape assessment that was due prior to the date of his -- of the deed naming him as the owner becomes the unsecured obligation of the Estate of Regete Gruhn.

MS. GEGG: Q. Mr. Cox, are you willing to pay the supplemental tax assessments when they are generated in October of 2017?

A. Yes, I am.

Cox then testified that an exhibit was a first and second installment of taxes for Alameda County, and that the exhibit reflected that he had paid the taxes on the subject property, and that they were current. Judge Roesch

directed Cox to language that stated, “Assessed to Gruhn, Regete, Heirs of Estate,” with an address. Judge Roesch asked Cox whose address that was, and he replied that it was his address. Judge Roesch asked Cox to state the date of the second to the last page of the exhibit. Cox confirmed the date was July 17, 2017. Judge Roesch stated, “That was just a few days ago. . . . Eleven days.” Gegg resumed questioning Cox.

> MS. GEGG: Q. Mr. Cox, are you willing to agree to a judgement [*sic*] that you will be personally liable for the supplemental taxes?
>
> A. Yes.

Judge Roesch then examined Cox, as follows:

> THE COURT: How many pieces of property do you own, Mr. Cox?
>
> MS. GEGG: Your Honor, I object on the basis of privacy. I’m not quite sure whether Mr. Cox wants to --
>
> THE COURT: Well, I’m looking for -- what is your experience in the world of buying and selling real estate?
>
> THE WITNESS: Extensive.
>
> THE COURT: Extensive. All right. [¶] So you knew what an escape assessment was before I brought it up at the last hearing.
>
> THE WITNESS: No.
>
> THE COURT: Really? And you didn’t know what a supplemental tax assessment was after the death of an individual?
>
> THE WITNESS: None of it concerned me.
>
> THE COURT: All right.

When Gegg was giving her closing statement, Judge Roesch interrupted her, as follows:

> THE COURT: You're not -- you're not going to argue that the county's supplemental tax assessment has expired, are you?
>
> MS. GEGG: No.
>
> THE COURT: Okay.
>
> MS. GEGG: And that will be paid, as Mr. Cox promised, when generated.

Gegg summarized the actions that had been taken regarding the subject property, including that the deed from Blumberg to Cox had been recorded, that Cox had paid Blumberg for her interest in the property, that the back taxes had been paid and were current, that the arrearages due to the homeowners association had been paid and were current, that Cox had brought a loan to a bank current, that he was waiting for the supplemental tax bill, which would not be generated until October 2017, and that all the back taxes were paid during Blumberg's possession of the property. The following exchange occurred:

> THE COURT: Except for the supplemental taxes.
>
> MS. GEGG: Which haven't been generated yet.
>
> THE COURT: Well, that's not my fault. It is the obligation of somebody, whoever wants to own a piece of property, to give notice to the county that they own the property so that the property can be reassessed to its current value. What you're telling me is that Ms. Blumberg did not pay the supplemental taxes and left the county begging.
>
> MS. GEGG: No.
>
> THE COURT: And then she transferred the property over to Mr. Cox's trust. And now the debt is going to be

assessed by the county, but they haven't got around to doing it.

MS. GEGG: What I'm saying is that --

THE COURT: So all the taxes haven't been paid.

MS. GEGG: No.

THE COURT: Some of the taxes have been paid.

MS. GEGG: Correct. And the supplemental taxes haven't been paid only because they haven't been generated yet. Mr. Cox --

THE COURT: Oh -- oh, listen. I'm sitting here and I -- you were here a month ago or a little bit more than a month ago and at that point in time the representation was that all the taxes had been paid. I raised the question about the supplemental assessment. There was a suggestion that, yes, it had been paid and that we need to bring Ms. Blumberg in to tell us about it. Ms. Blumberg's testimony is she never made any effort to notify the assessor or tax collector, whoever it is, that's supposed to get notification by the person who's [*sic*] has been nominated executor on the will. She took the property. She didn't rent it out. She didn't pay homeowners association. And then Mr. Cox got involved and Mr. Cox paid those while the property -- before the property was transferred to him by deed from Ms. Blumberg. [¶] Nobody ever said a word about supplemental taxes, and if I had, in fact, approved your request at the last hearing and given Mr. Cox his qui[et] title deed, if you will, order of qui[et] title that he could record, then the county would have nothing more than an unsecured obligation on Mrs. Blumberg perhaps, but really on the Estate of Regete Gruhn. And nobody is going to probate that estate. And so when is the county going to get their money?

MS. GEGG: The county --

THE COURT: If the answer is if you had gotten the deed at the last hearing, the county would never get its money.

MS. GEGG: I beg your pardon?

THE COURT: The county would never have gotten its money.

MS. GEGG: No, Your Honor. The --

THE COURT: We would have an unsecured --

MS. GEGG: When the deed was recorded, that triggered the reassessment, and the county has said that that bill, the supplemental bill, would not be generated until October 2017, and at the last hearing, I need to correct you, because what was represented was that all the back taxes had been paid. You asked about the supplemental assessment. We showed you there was a showing on -- actually, Mr. Cox, was on his phone, showing that the supplemental assessments were -- had there been notice of the escape assessment, but again, they -- Mr. Cox had been unable to pay them, and he's tried to, because it hasn't been generated yet.

THE COURT: Well, how do you explain the fact that all the correspondence about the state [*sic*] assessment is subsequent to the last hearing?

MS. GEGG: I don't -- I don't understand.

THE COURT: Well, 11 days ago -- Exhibit R, was it? 11 days ago Exhibit R shows that they were mailing correspondence to Mr. Cox regarding the supplemental taxes. Well, why don't we have something going back to 2008. The county does not wait forever, certainly not 10 years or nine years, to assess supplemental taxes. They assess them as soon as they know about it.

MS. GEGG: Right. And --

THE COURT: Nobody --

MS. GEGG: -- what happened is recordation of the deeds triggered at the reassessment, and Mr. Cox is willing to pay the supplemental taxes. There is no issue there. The county has --

THE COURT: Your willingness to pay them is fine.

MS. GEGG: But he can't because they haven't been generated yet.

THE COURT: Well, if you asked them to generate them last week, what do you expect?

MS. GEGG: No.

THE COURT: You expect --

MS. GEGG: This was a matter of course they won't be generated until October 2017.

THE COURT: Well, if you had given them notice when Regete Gruhn died, they would have issued them in October of -- or whatever year it was that she died. She died in December 2008, so they would have been processed in 2009, but they didn't know that she was dead. All they knew was nobody was paying the taxes.

MS. GEGG: Your Honor, is the issue here that Your Honor's concerned the taxes won't be paid?

THE COURT: No. My concern is that it appears to me that you are seeking a qui[et] title judgment that has the effect of cheating somebody.

MS. GEGG: No.

THE COURT: Well –

MS. GEGG: No.

THE COURT: -- it sure looks like it to me.

MS. GEGG: As Mr. Cox has testified that he has attempted to pay the supplemental taxes. That the problem is they haven't been generated yet.

THE COURT: What was the date that you were here last?

MS. GEGG: July 14th.

THE COURT: You were here two weeks ago.

MS. GEGG: Yes.

THE COURT: All right. And he -- had he paid the supplemental taxes then?

MS. GEGG: Again, he couldn't, because they hadn't -- the bill had not been generate [*sic*] yet.

THE COURT: Well, why can't --

MS. GEGG: They aren't generated until October.

THE COURT: When did you file this lawsuit?

MS. GEGG: It was in, I believe, last year, 2016.

THE COURT: It was in 2016?

MS. GEGG: Yes.

THE COURT: Well, in 2016 when you filed this lawsuit, had all the taxes been paid? The answer is no.

MS. GEGG: And, again --

THE COURT: In your lawsuit did you say, well, whoopsie, there's some escape assessment that hasn't been made yet and we haven't paid those, but we will pay those? Don't you worry.

> MS. GEGG: No. That's because they hadn't been triggered yet. It hadn't been triggered, and what the --
>
> THE COURT: No. No. It was triggered on the death of Regete Gruhn.
>
> MS. GEGG: Right. Well, actually, this is what it says here. It says here that the event date is December 23rd, 2008.
>
> THE COURT: There are two assessment dates here. One is the date of reassessment on the date of death of Regete Gruhn. And then there is a second reassessment, and that's on the recording of the deed from Ms. Blumberg to Mr. Cox. So there is [*sic*] two assessments here. Two reassessments according to Prop 13. Nobody paid any attention at all to the reassessment based on the December 2008 date. None.
>
> MS. GEGG: Your Honor, that is not true. Again, Mr. Cox has attempted to pay the supplemental taxes, but cannot because they won't be generated until October of 2017. Now, what we are willing to propose is that in October 2017 when Mr. Cox pays the supplemental taxes that Your Honor issue a qui[et] title judgment on this property. Everything has been done. All the administration, all the things that Regete Gruhn wanted to have done in her will has been done.

In response to Judge Roesch's concerns, Gegg asked that the hearing be continued until October, when the supplemental tax bill generates, and Cox could pay the supplemental taxes. Judge Roesch denied the request. The following exchange occurred:

> THE COURT: That's denied.
>
> MS. GEGG: I see. On with [*sic*] grounds?
>
> THE COURT: Because it's denied. Actually, you should have finished your trial when you were here two weeks ago.

MS. GEGG: But, Your Honor --

THE COURT: You didn't finish it two weeks ago.

MS. GEGG: But Your Honor wanted to hear information about supplemental taxes and Mrs. Blumberg's testimony.

THE COURT: Oh, I don't mind the two weeks, but you're going to finish your presentation today. If you're not able to demonstrate your case today, I have to deny it. We've continued this case before, and we are not going to continue it again.

MS. GEGG: It's only been continued once.

THE COURT: That's right. We continued it before and we are not going to continue it again. [¶] Anything more?

MS. GEGG: Only one other matter, Your Honor. We are willing to offer that Mr. Cox will be personally liable for the supplemental taxes which will be included in the judgment.

THE COURT: How in the world could I issue a judgment saying that the plaintiff in a qui[et] title case has an obligation to pay money when -- he can have the title now, but he's got a personal obligation to pay the money later? There is no authority for me to give that kind of conditional judgment.

MS. GEGG: The only other thing I could suggest, Your Honor, is that -- and, again, the problem is that the bill won't be generated until October of 2017. Mr. Cox could provide an estimated amount and -- as proof that the supplemental taxes have been paid, and then any additional balance would be returned to him or billed to him, but that might be one of the ways to allay your concerns about supplemental taxes.

THE COURT: You know, the supplemental taxes were an example that I thought off the top of my head of an obligation that should have gone along with the estate. I don't know if there are others because I don't know that I'm smart enough to think of everything all at once. But it turned out that that hit a sore spot. The sore spot being between the last time you were here and now you've gone through considerable effort to try to get the tax assessor to assess the supplemental taxes that hadn't been paid.

MS. GEGG: Correct.

THE COURT: My reading of what I understand the law to be is that the supplemental taxes are the debt for the period of time between the death of Regete Gruhn and the date that the deed in favor of Mr. Cox, your client, was filed. The supplemental taxes that were due between that period of time are on the Estate of Ms. Gruhn. [¶] Now, I've heard testimony today that Ms. Blumberg claims she owned the property during that period of time, and so perhaps they are her personal debt. They are not Mr. Cox's personal debt.

MS. GEGG: But he's willing to pay and be liable for that debt.

THE COURT: Well, I understand that, but from the evidence it would appear that nobody has ever paid that debt to this day even though the lady died nine years ago -- well, almost nine years ago, a little less.

MS. GEGG: But that debt will be paid. That debt will be paid. Mr. Cox has been trying to pay that debt, again, just because the bill has not been generated.

THE COURT: He's been trying to since two weeks ago. [¶] Mr. Gressel, would you make holes in the document, please.

THE COURT ATTENDANT: Sure.

> THE COURT: Is there anything more that you would like to add?
>
> MS. GEGG: Yeah. I'd actually object to the characterization my client is trying to avoid paying the debt, paying the supplemental taxes. That certainly has never been his intent or never been his actions. He would like to pay, but, again, that information has -- is not provided yet.
>
> THE COURT: All right. Anything more?

Judge Roesch dismissed the case with prejudice. Cox appealed. The Court of Appeal reversed the judgment based on the uncontroverted facts established in the record and remanded the matter for entry of an order quieting title to the property, subject to the obligation to pay any supplemental real property tax that may be assessed. The appellate court stated: "The fact that real property taxes had gone into arrears while Barbara Blumberg owned the property can hardly be attributed to plaintiff [Cox], who paid all back taxes that were due, nor can plaintiff be faulted for not yet having paid a supplemental assessment that had not yet been made." (*Cox v. Blumberg* (Apr. 16, 2018, A152198) [nonpub. opn.], p. 8.)

Judge Roesch displayed poor demeanor in the *Westlake* matter. His discourteous comments include: "What you're telling me is that Ms. Blumberg did not pay the supplemental taxes and left the county begging"; "If [the] answer is if you had gotten the deed at the last hearing, the county would never get its money"; "Well, if you asked them to generate them last week, what do you expect?"; "Well, if you had given them notice when Regete Gruhn died[.] . . . All they knew was nobody was paying the taxes"; and "My concern is that it appears to me that you are seeking a qui[et] title judgment that has the effect of cheating somebody."

Judge Roesch's conduct in *Westlake* also reflected embroilment, which occurs when a judge "surrenders the role of impartial factfinder/decisionmaker."

(Rothman, Cal. Judicial Conduct Handbook, *supra*, § 2:1, p. 58.) Rather than remain neutral, the judge repeatedly engaged the parties and counsel in a manner that conveyed his concern that the parties were "cheating somebody." But the appellate court found that "the circumstances certainly do not evince an intent to cheat or negate [Cox's] entitlement to an order confirming the trust's ownership of the property." (*Cox, supra,* (April 16, 2018, A152198) [nonpub. opn.], p. 8.) The commission agreed.

Judge Roesch argued that he was merely exercising his "gatekeeping" function because he believed there should have been a probate proceeding to transfer the property to Blumberg before the sale to Cox, rather than a quiet title action, and that a supplemental assessment would not be enforceable if the petition to quiet title were granted. But the appellate court found that there were ways to protect the county's right to a future supplemental assessment. (*Cox, supra,* (April 16, 2018, A152198) [nonpub. opn.], p. 8.) And even if the judge had been correct about his concerns, he could have conveyed those concerns to the parties and counsel without resorting to unduly harsh language.

Judge Roesch's actions violated canon 2A (a judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and canon 3B(4) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity).

Judge Roesch's conduct in both cases was, at a minimum, improper action.

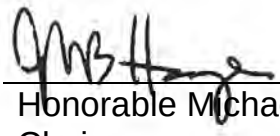
The commission considered Judge Roesch's prior discipline to be an aggravating factor. (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)(e).) In 2011, he received an advisory letter for making discourteous remarks to a self-represented litigant, who told the judge he was an attorney in another state, but was a teacher in California. During a colloquy about whether the litigant's service of process was proper, Judge Roesch remarked, "Well, I can see why you don't practice law. You don't bother to read the law." When the

litigant asked Judge Roesch if he needed to do anything else for the judge to read his motion, Judge Roesch responded, “Well, I don’t mean to be insulting, but that’s an idiotic question.” When the litigant asked Judge Roesch for an explanation, he responded, “It’s not my job to explain something to somebody who says they are a lawyer.” Judge Roesch also remarked, “I sure hope you teach elementary school better than you practice law.” Judge Roesch’s treatment of the litigant violated canon 3B(4), which requires judges to be patient, dignified, and courteous to those with whom they deal in an official capacity. Judge Roesch argued that his prior discipline is not relevant. The commission disagreed because it concerns the judge’s discourteous treatment of those appearing before him, which also occurred here.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Hon. Lisa B. Lench; Nanci E. Nishimura, Esq.; Victor E. Salazar, Esq.; Mr. Richard Simpson; and Mr. Adam N. Torres voted to impose the public admonishment. Ms. Kay Cooperman Jue would have imposed a private admonishment. Ms. Sarah Kruer Jager did not participate.

Date: 10/15/2020

On behalf of the
Commission on Judicial Performance,



Honorable Michael B. Harper
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| IN THE MATTER CONCERNING FORMER JUDGE DAVID A. MASON | DECISION AND ORDER IMPOSING SEVERE PUBLIC ADMONISHMENT PURSUANT TO STIPULATION (Commission Rule 116.5) |

This disciplinary matter concerns retired Judge David A. Mason of the Modoc County Superior Court. On November 9, 2020, former Judge Mason and his counsel, David S. McMonigle, Esq., entered into a stipulation with Director-Chief Counsel Gregory Dresser, pursuant to commission rule 116.5, to resolve the pending preliminary investigation involving former Judge Mason by the imposition of a severe public admonishment and the judge's agreement not to serve in a judicial capacity in the future. Judge Mason tendered his retirement from judicial office, effective October 31, 2020. The Stipulation for Discipline by Consent was approved by the commission on December 2, 2020, pursuant to the following terms and conditions and stipulated facts and legal conclusions. A copy of the stipulation is attached.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving former Judge Mason.

2. The commission shall issue a severe public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Mason waives any further proceedings and review in this matter, including formal proceedings (rule 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. On October 6, 2020, Judge Mason tendered his retirement effective October 31, 2020 through written correspondence to Governor Gavin Newsom. A copy of that letter is attached to the stipulation.

7. Failure to comply with the terms and conditions of this agreement may constitute additional and independent grounds for discipline.

8. Former Judge Mason has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time after the effective date of his retirement (October 31, 2020).

9. If former Judge Mason attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the severe public admonishment and resume the preliminary investigation as to all of the matters in the preliminary investigation letters.

10. Former Judge Mason agrees that the facts recited herein are true and correct, and that the discipline to which the parties stipulate herein is appropriate in light of those facts.

11. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted or conceded by the parties.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a severe public admonishment on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

## STIPULATED FACTS AND LEGAL CONCLUSIONS

Former Judge David A. Mason became a judge of the Modoc County Superior Court in 2009, following appointment to that office. His current term began in January 2017. His retirement became effective October 31, 2020.

### I. Lack of Candor in Two Responses to the Commission

#### A. 2019 Public Admonishment

On December 3, 2019, the commission issued a public admonishment to former Judge Mason for failing to disclose a personal relationship with attorney Tom Gifford. According to former Judge Mason, at the time he took the bench, he had a "personal and sustained" relationship with Mr. Gifford, including a "prior professional relationship," and "ongoing social interactions in the community," which continued after he took the bench in 2009. In 2013, former Judge Mason went on a two-week trip to Italy with Mr. Gifford and their respective spouses, as part of a celebration of the Giffords' wedding anniversary, which "marked an escalation of the friendship." Mr. Gifford made regular appearances as an attorney in cases over which former Judge Mason presided during this period. Mr. Gifford moved to Texas shortly after the trip to Italy, but this did not immediately impact their social relationship. Former Judge Mason traveled to Mr. Gifford's home in Texas on two occasions, for approximately one week each time, including once over a Thanksgiving holiday. In or about April 2017, Mr. Gifford returned to Modoc County, and was awarded a contract to serve as Modoc County's conflicts attorney for indigent defense. He resumed making regular appearances as an attorney in cases over which former Judge Mason presided, including appearances in at least 86 criminal cases from 2017 to 2019. According to former Judge Mason, he and Mr. Gifford "maintained some form of friendship" in 2017, but it was "not as strong" as before Mr. Gifford moved to Texas. Former Judge Mason recalled only one dinner with Mr. Gifford in 2017.

The commission found that, even if former Judge Mason was not disqualified from presiding over Mr. Gifford's cases, he was required to disclose

all facts about their relationship that were reasonably relevant to disqualification, on the record, in every case in which Mr. Gifford appeared. Former Judge Mason presented no evidence that he ever did so, and conceded that he did not make a disclosure in every case where he was required to do so, and that he made "mistakes . . . regarding disclosures." The commission found that former Judge Mason violated canons 3E(2) and 3E(2)(a) over an extended period by failing to make the required disclosures on the record.[1]

B. June 25, 2019 Response to the Commission

Prior to the December 3, 2019 public admonishment, former Judge Mason responded to the commission's allegations in a letter dated June 25, 2019. In his response, former Judge Mason stated that he would disseminate the following disclosure:

> To All Parties and Counsel of Record:
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> The purpose of this declaration is to disclose my longstanding relationship with local attorney Tom Gifford.
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> Prior to my appointment to the bench in 2009 I developed a professional relationship with Mr. Gifford. This relationship developed into a social friendship where I was [*sic*] occasionally dined publically [*sic*] with Mr. Gifford and his wife and was invited to dinner at Mr. Gifford's home. These interactions lessened after my appointment to the bench but did continue after I became a judge.
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> Sometime in the early part of 2013 I accompanied Mr. Gifford and his wife on a trip to Italy for two weeks as part of their celebration of their anniversary. Shortly thereafter, Mr. Gifford moved back to

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Texas and was practicing law there. I visited Mr. Gifford in his home in Texas on two occasions for about one week each time.

Mr. Gifford returned to Modoc County in 2017 and resumed his law practice. Since he returned in 2017, my social contact with Mr. Gifford has been minimal. We speak in a friendly manner on occasion and had dinner once in 2017. Mr. Gifford and I no longer have social contact, though we are friendly and exchange pleasantries when we interact in public.

Notwithstanding our history, I believe that I have and that I can in the future remain fair and impartial in matters where Mr. Gifford appears. You may inquire when your case is called if you wish to receive more information concerning my history with Mr. Gifford.

I declare under penalty of perjury that the foregoing is true and correct.

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Former Judge Mason described the above disclosure as a "comprehensive disclosure that will disseminate all relevant detail. . . ." Former Judge Mason stated that the above-written disclosure "will be published in Judge Mason's department with copies available for attorneys appearing in a new matter involving Mr. Gifford."

C. Misleading Disclosure Following the 2019 Public Admonishment

Following the December 3, 2019 public admonishment, instead of the disclosure described, above, in his response to the commission, former Judge Mason gave the following disclosure [hereinafter referred to as the "alternate" disclosure], which he delivered orally and in writing:

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The alternate disclosure acknowledges that former Judge Mason has dined at Mr. Gifford's home, and has also dined in public with Mr. Gifford and his wife, but creates the misimpression that all of those dinners occurred prior to 2009. Former Judge Mason also failed to disclose that he and Mr. Gifford met for social dinners within the last three years.

The alternate disclosure states that former Judge Mason visited Mr. Gifford in Texas on two occasions, on undisclosed dates, and for undisclosed durations. By failing to disclose the dates and durations of the visits, former Judge Mason improperly minimized the disclosure of his contacts with Mr. Gifford. By referencing the Texas trips prior to a 2013 trip to Italy, former Judge Mason created the false impression that the Texas visits occurred prior to 2013. Former Judge Mason also improperly minimized his contacts with Mr. Gifford by failing to disclose the duration and purpose of the trip to Italy.

Former Judge Mason's June 25, 2019 response to the commission lacked candor by providing to the commission a disclosure that was materially different from the actual disclosure that he gave to parties who appeared before him in court, as described above.

D. June 26, 2020 Response to the Commission

In the most recent preliminary investigation, the commission contacted former Judge Mason on April 23, 2020, concerning the disparate disclosures and an apparent lack of candor to the commission. In a letter dated June 26, 2020, former Judge Mason stated that the alternate disclosure, "was circulated to litigants prior to his June 2019 submission, but believes that occurred as early as

late May 2019." He stated, "These protocols, detailed in Judge Mason's prior submission, were followed from that time until the present, including cases in which Mr. Gifford appeared after the December 2019 Public Admonishment." Former Judge Mason stated he used the alternate disclosure throughout 2019, and that it "was also published in the courtroom and at the clerk's office continuously over the last year . . . ." Despite former Judge Mason's assertion that he continuously disclosed his relationship with Mr. Gifford throughout 2019, he made no disclosure in many cases in which Mr. Gifford appeared during the time period from May to December 2019. Former Judge Mason's June 26, 2020 response to the commission lacked candor by making misrepresentations about the disclosures the judge made from May to December 2019.

The judge's conduct constitutes a failure to uphold the integrity and independence of the judiciary (canon 1), a failure to avoid impropriety and the appearance of impropriety in all of the judge's activities (canon 2), a failure to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), a failure to cooperate with the commission (canon 3D(4)), a failure to disclose on the record information that is reasonably relevant to the question of disqualification (canon 3E(2)), and a failure to conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially (canon 4A).

II. Continuing Failure to Disclose Personal Relationship with Attorney Tom Gifford

A. Failure to Disclose Gift to Mr. Gifford

On or about October 29, 2019 to December 16, 2019, former Judge Mason orally disclosed in chambers, to two attorneys and two probation department employees, that he brought Mr. Gifford a gift and placed it in his attorney mail slot. The gift was a pennant from Mr. Gifford's alma mater. Judge Mason failed to ever disclose the gift on the record in any case.

B. Failure to Disclose After the Public Admonishment

Following the December 3, 2019 public admonishment, Mr. Gifford continued to appear regularly before former Judge Mason in both criminal and civil cases. After December 3, 2019, former Judge Mason failed to properly disclose on the record information concerning his relationship with Mr. Gifford that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, as exemplified by the following.

On December 10, 2019, in *People v. Sarah Hewitt* (No. F-19-099), former Judge Mason stated, "I don't know if you heard my disclosure. Mr. Gifford and I have been friends for years, we practiced law against one another and developed a friendship. It's kind of spelled out there." On December 18, 2019, in *People v. Danny Ray Dial* (No. F-19-124), former Judge Mason stated, "I have a long standing friendship with Mr. Gifford. We haven't had any social connection in person for probably a year and a half or two years. But in the past I've visited the home that he owns in Corpus Christi, Texas. I've also had dinner with him and his wife and other friends on two occasions since I've been a Judge. And early on in my career as a judge I went to – took a trip to Italy with Mr. Gifford and his wife. [¶] All of those things being said, I do not believe that I am unable to be fair and unbiased, and I do not recuse myself." The above disclosures in *Hewitt* and *Dial* were misleading and improperly minimized the judge's contacts with Mr. Gifford, and failed to comport with the June 25, 2019 disclosure referenced in the judge's letter to the commission. Also, in *Dial* [*sic*], by referring to a written disclosure, former Judge Mason failed to make a disclosure on the record.

On various dates after December 3, 2019 (the date of his public admonishment), former Judge Mason read the alternate disclosure verbatim at some point during his calendar, but did not ensure that the defendants were present to hear the disclosure in the following cases in which Mr. Gifford represented a party: *People v. Ruben Ayala* (No. F-19-331), *People v. Amber*

*Sharrett* (No. M-18-479), *People v. Kiajaney Dejesus-Roman* (No. F-19-476), *People v. Valerie Hubbard* (Nos. F-19-420/M-19-475), *People v. James Fristoe* (No. F-20-050), *People v. Leroy Michael Donnor* (Nos. F-19-212/F-20-065), *People v. Donald Vick* (No. M-20-079), *People v. Charles James Preston, Sr.* (Nos. F-18-429/F-20-104), *People v. Robin Klabbatz* (No. F-20-052), *People v. Ronald Cannon* (No. F-20-059), *People v. Fanchon Lafaver* (Nos. F-18-471/F-19-011/F-19-038/M-18-367), *People v. Lyle Castillo* (No. F-19-485), *People v. Corey Adam* (Nos. F-19-483/F-19-261), and *People v. Megan Blue* (Nos. F-16-248/M-19-481).

At times, former Judge Mason failed to disclose his relationship with Mr. Gifford at the first appearance in a case in which Mr. Gifford represented a party, in *People v. Samuel Alan Kiser* (No. F-20-005) (three appearances before disclosure made), *People v. James Fristoe* (No. F-20-050) (one appearance before disclosure made), *Eveann Smith v. Allen Lee Moore* (No. FL-20-007) (two appearances before disclosure made), *Walter Sphar v. Eriquiago, Bunyard, Bostic* (No. CU-19-100) (three appearances before disclosure made), and *Candice Mastagni v. Dale L. O'Neil* (No. FL-20-011) (two appearances before disclosure made).

In many cases, minute orders indicated that the judge disclosed his relationship with Mr. Gifford, but the transcripts and recordings of the appearances did not reflect that former Judge Mason made a disclosure on the record. Former Judge Mason failed to disclose, or failed to properly disclose, in the following cases: *People v. Sarah Hewitt* (No. F-19-099), *People v. Stephen Anastacio* (No. F-19-383), *People v. Arlen Javier Gonzalez* (Nos. F-19-128/ F-17-094/F-17-045), *People v. Ryan Randall West* (Nos. M-19-293/ M-19-429), *People v. Rogers Amerson* (No. M-19-238), *People v. Phillip Skaggs* (No. F-17-075), *People v. William Roy Biggerstaff* (No. F-19-139), *People v. Richard Chapman* (No. F-19-368), *People v. John Gregory Hughes* (No. F-17-096), *People v. Tamyara Cawthorn* (No. F-18-462), *People v. Rhyan James Urena* (Nos. F-19-

197/ F-19-200), *People v. Danny Ray Dial* (No. F-19-124), *People v. Valerie Hubbard* (No. F-19-420), *People v. William Eugene Sainsbury* (Nos. F-19-471/ F-19-365), *People v. Fanchon Lafaver* (Nos. F-18-471/F-19-011/F-19-038/M-18-367), *People v. Lyle Castillo* (No. F-19-485), *People v. Corey Adam* (Nos. F-19-483/F-19-261), *People v. Megan Blue* (Nos. F-16-248/M-19-481), *People v. Donald Vick* (No. M-20-079), *People v. Charles James Preston, Sr.* (Nos. F-18-429/F-20-104), *People v. Robin Klabbatz* (No. F-20-052), and *People v. Ronald Cannon* (No. F-20-059).

On December 18, 2019, in *People v. Michael Lamug* (Nos. M-19-404/M-19-454), after reading the alternate disclosure verbatim, former Judge Mason stated, "So you're going to hear that all the time, and you're going to be sick of hearing it, just like I get sick of reading it, but it's – it's what I have to do." (R.T. 3:8-10.) Former Judge Mason's comments were gratuitous and trivialized the importance of complying with his duty to disclose on the record information, concerning his relationship with Mr. Gifford that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1.

Canon 3E(2) and 3E(2)(a) of the Code of Judicial Ethics requires judges to disclose on the record "information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification." Under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), judges are disqualified when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." This is an objective standard. The question is whether the "average person on the street" would harbor doubts as to the judge's impartiality, not whether the judge is actually biased. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104; *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.) Pursuant to this standard, even if former Judge Mason were not disqualified from presiding over Mr. Gifford's cases, he was required to disclose all facts about their relationship that were reasonably

relevant to disqualification, on the record, in every case in which Mr. Gifford appeared. Former Judge Mason concedes that, despite his prior discipline for the same misconduct, he did not make a disclosure in every case where he was required to do so. Former Judge Mason violated canons 3E(2) and 3E(2)(a) over an extended period by failing to make the required disclosures on the record. His conduct also constituted a violation of canons 1, 2, 2A, and 4A.

III. Discourtesy to District Attorney in *People v. Abernathy*

On June 23, 2020, former Judge Mason conducted a chambers conference in *People v. Ryan Abernathy* (No. M20-158), with District Attorney (DA) Sophia Meyer, Deputy District Attorney Stacey Todd, three probation department employees, the defense attorney, a bailiff, and the court clerk. DA Meyer had filed a violation of a slow plea in an underlying case, as well as a new case (No. F19-093), and the defendant requested a jury trial. Former Judge Mason stated that he thought DA Meyer's office was "unprofessional and stupid for exercising prosecutorial discretion and filing a case." Former Judge Mason also stated that the District Attorney's office was "unprofessional and superfluous." DA Meyer responded that she did not appreciate being called unprofessional. Former Judge Mason then said, "Well, maybe unprofessional is not the word. In my opinion, the DA's office is stupid for filing this." On July 7, 2020, former Judge Mason told DA Meyer that he was "not accusing anyone in particular, but the DA's office as a whole was unprofessional." (The Modoc County DA's office is comprised of two attorneys and support staff members.)

Calling the DA's office "stupid" and "unprofessional," especially in the presence of others, constituted a failure to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity (canon 3B(4)); a failure to refrain from speech and conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)); and violations of canons 2 and 2A.

Former Judge Mason's conduct, as set forth in parts I-III, above, constituted, at a minimum, improper action.

Former Judge Mason's misconduct was aggravated by the judge's prior discipline. As discussed in part I, above, former Judge Mason was publicly admonished in 2019 for not only similar conduct, but the same conduct. In 2019, former Judge Mason conceded that he made "mistakes . . . regarding disclosures," and violated canons 3E(2) and 3E(2)(a) over an extended period by failing to make the required disclosures on the record.

This stipulation imposes a higher level of discipline than former Judge Mason's 2019 public admonishment, based on the judge's prior retirement and agreement to not at any time seek or hold judicial office or seek or accept assignment. The parties request that the commission accept this stipulation because it fulfills the commission's mandate to protect the public and maintain the integrity of the judiciary in order to avoid the prolonged impact of further proceedings on the justice's [*sic*] court and the administration of justice.

## DISCIPLINE

Former Judge Mason has acknowledged his failure to properly disclose his personal relationship with attorney Tom Gifford on the record in a multitude of cases in which Mr. Gifford appeared, his lack of candor in his communication with the commission about his compliance with his disclosure obligations, and his discourteous and biased conduct toward the district attorney's office—all of which violated his duty to conduct himself with integrity and in a manner that promotes public confidence in the judiciary.

The purpose of California's statutory disclosure requirements is to ensure public confidence in the judiciary. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1070.) Former Judge Mason's persistent failure to comply with these requirements reflects an unacceptable lack of concern on his part about the public's perception of the integrity and fairness of the judiciary.

Similarly, the judicial canons' insistence on appropriate judicial demeanor rests on the idea that such demeanor is central to the appearance and reality of fairness and impartiality in judicial proceedings. (Rothman et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2:46, p. 116.) Former Judge Mason's inappropriate remarks about the district attorney's office undermined the appearance of fairness and impartiality in the court's proceedings.

Finally, honesty is a minimum qualification expected of every judge. (*Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865.) Lack of candor toward the commission is uniquely and exceptionally egregious. (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 90.) Former Judge Mason's lack of candor toward the commission is particularly grievous.

The commission considered former Judge Mason's prior public admonishment for related misconduct to be a significantly aggravating factor.

The commission's determination to resolve this matter with a severe public admonishment was conditioned upon former Judge Mason's agreement not to serve in a judicial capacity in the future. The commission concluded that this resolution adequately fulfills its mandate to protect the public from further possible misconduct and avoids the need for further proceedings.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Hon. Lisa B. Lench; Nanci E. Nishimura, Esq.; Victor E. Salazar, Esq.; Mr. Richard Simpson; and Mr. Adam N. Torres voted to accept the stipulation. Ms. Kay Cooperman Jue did not participate.

Date: 12/8/2020

On behalf of the
Commission on Judicial Performance,

Honorable Michael B. Harper
Chairperson

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| IN THE MATTER CONCERNING<br>JUDGE DAVID A. MASON | STIPULATION FOR DISCIPLINE<br>BY CONSENT (Rule 116.5) |

Pursuant to Rules of the Commission on Judicial Performance, rule 116.5, former Judge David A. Mason of the Modoc County Superior Court, represented by counsel, and commission counsel (the "parties") submit this proposed disposition of the matters set forth in the commission's preliminary investigation letters dated April 23, 2020, and September 2, 2020. The parties request that the commission resolve this matter by imposition of a severe public admonishment. The parties believe that the settlement provided by this agreement is in the best interests of the commission and former Judge Mason because, among other reasons, the severe public admonishment, and the judge's prior retirement from office, and agreement not to serve as a judicial officer after his retirement is a more severe level of discipline than former Judge Mason's 2019 discipline, adequately protects the public, and will avoid the delay, expense, and uncertain outcome of further proceedings. Former Judge Mason irrevocably retired from judicial office, effective October 31, 2020.

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters alleged in the commission's pending preliminary investigation involving former Judge Mason.

2. The commission shall issue a severe public admonishment based on the agreed Stipulated Facts and Legal Conclusions set forth therein.

3. If the commission accepts this proposed disposition, the commission's decision and order imposing public admonishment may articulate the reasons for its decision and include explanatory language that the commission deems appropriate.

4. Upon acceptance by the commission, this stipulation and the commission's decision and order shall be made public.

5. Judge Mason waives any further proceedings and review in this matter, including formal proceedings (rule 118, et seq.) and review by the Supreme Court (Cal. Rules of Court, rule 9.60).

6. On October 6, 2020, former Judge Mason tendered his retirement effective October 31, 2020 through written correspondence to Governor Gavin Newsom. A copy of that letter is attached hereto as an exhibit and incorporated by this reference.

7. Failure to comply with the terms and conditions of this agreement may constitute additional and independent grounds for discipline.

8. Former Judge Mason has agreed not to seek or hold judicial office, or accept a position or assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time after the effective date of his retirement (October 31, 2020).

9. If former Judge Mason attempts to serve in a judicial capacity in violation of the foregoing paragraph, the commission may withdraw the severe public admonishment and resume the preliminary investigation as to all of the matters in the preliminary investigation letters.

10. Former Judge Mason agrees that the facts recited herein are true and correct, and that the discipline to which the parties stipulate herein is appropriate in light of those facts.

11. The commission may reject this proposed disposition and resume its preliminary investigation. If the commission does so, nothing in this proposed disposition will be deemed to be admitted or conceded by the parties.

Accordingly, it is hereby stipulated and agreed that the commission shall issue a severe public admonishment on the above Terms and Conditions of Agreement, and based on the following Stipulated Facts and Legal Conclusions.

STIPULATED FACTS AND LEGAL CONCLUSIONS

Former Judge David A. Mason became a judge of the Modoc County Superior Court in 2009, following appointment to that office. His current term began in January 2017. His retirement became effective October 31, 2020.

I. Lack of Candor in Two Responses to the Commission

A. 2019 Public Admonishment

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The commission found that, even if former Judge Mason was not disqualified from presiding over Mr. Gifford's cases, he was required to disclose all facts about their relationship that were reasonably relevant to disqualification, on the record, in every case in which Mr. Gifford appeared. Former Judge Mason presented no evidence that he ever did so, and conceded that he did not make a disclosure in every case where he was required to do so, and that he made "mistakes . . . regarding disclosures." The commission found that former Judge Mason violated canons 3E(2) and 3E(2)(a) over an extended period by failing to make the required disclosures on the record.[1]

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> Hon. David A. Mason
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In the most recent preliminary investigation, the commission contacted former Judge Mason on April 23, 2020, concerning the disparate disclosures and an apparent lack of candor to the commission. In a letter dated June 26, 2020, former Judge Mason stated that the alternate disclosure, "was circulated to litigants prior to his June 2019 submission, but believes that occurred as early as late May 2019." He stated, "These protocols, detailed in Judge Mason's prior submission, were followed from that time until the present, including cases in which Mr. Gifford appeared after the December 2019 Public Admonishment." Former Judge Mason stated he used the alternate disclosure

throughout 2019, and that it "was also published in the courtroom and at the clerk's office continuously over the last year . . . ." Despite former Judge Mason's assertion that he continuously disclosed his relationship with Mr. Gifford throughout 2019, he made no disclosure in many cases in which Mr. Gifford appeared during the time period from May to December 2019. Former Judge Mason's June 26, 2020 response to the commission lacked candor by making misrepresentations about the disclosures the judge made from May to December 2019.

The judge's conduct constitutes a failure to uphold the integrity and independence of the judiciary (canon 1), a failure to avoid impropriety and the appearance of impropriety in all of the judge's activities (canon 2), a failure to respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (canon 2A), a failure to cooperate with the commission (canon 3D(4)), a failure to disclose on the record information that is reasonably relevant to the question of disqualification (canon 3E(2)), and a failure to conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially (canon 4A).

II. Continuing Failure to Disclose Personal Relationship with Attorney Tom Gifford

A. Failure to Disclose Gift to Mr. Gifford

On or about October 29, 2019 to December 16, 2019, former Judge Mason orally disclosed in chambers, to two attorneys and two probation department employees, that he brought Mr. Gifford a gift and placed it in his attorney mail slot. The gift was a pennant from Mr. Gifford's alma mater. Judge Mason failed to ever disclose the gift on the record in any case.

B. Failure to Disclose After the Public Admonishment

Following the December 3, 2019 public admonishment, Mr. Gifford continued to appear regularly before former Judge Mason in both criminal and civil cases. After December 3, 2019, former Judge Mason failed to properly disclose on the record information concerning his relationship with Mr. Gifford that is reasonably relevant to

the question of disqualification under Code of Civil Procedure section 170.1, as exemplified by the following.

On December 10, 2019, in *People v. Sarah Hewitt* (No. F-19-099), former Judge Mason stated, "I don't know if you heard my disclosure. Mr. Gifford and I have been friends for years, we practiced law against one another and developed a friendship. It's kind of spelled out there." On December 18, 2019, in *People v. Danny Ray Dial* (No. F-19-124), former Judge Mason stated, "I have a long standing friendship with Mr. Gifford. We haven't had any social connection in person for probably a year and a half or two years. But in the past I've visited the home that he owns in Corpus Christi, Texas. I've also had dinner with him and his wife and other friends on two occasions since I've been a Judge. And early on in my career as a judge I went to – took a trip to Italy with Mr. Gifford and his wife. [¶] All of those things being said, I do not believe that I am unable to be fair and unbiased, and I do not recuse myself." The above disclosures in *Hewitt* and *Dial* were misleading and improperly minimized the judge's contacts with Mr. Gifford, and failed to comport with the June 25, 2019 disclosure referenced in the judge's letter to the commission. Also, in *Dial*, by referring to a written disclosure, former Judge Mason failed to make a disclosure on the record.

On various dates after December 3, 2019 (the date of his public admonishment), former Judge Mason read the alternate disclosure verbatim at some point during his calendar, but did not ensure that the defendants were present to hear the disclosure in the following cases in which Mr. Gifford represented a party: *People v. Ruben Ayala* (No. F-19-331), *People v. Amber Sharrett* (No. M-18-479), *People v. Kiajaney Dejesus-Roman* (No. F-19-476), *People v. Valerie Hubbard* (Nos. F-19-420/M-19-475), *People v. James Fristoe* (No. F-20-050), *People v. Leroy Michael Donnor* (Nos. F-19-212/F-20-065), *People v. Donald Vick* (No. M-20-079), *People v. Charles James Preston, Sr.* (No. F-18-429/F-20-104), *People v. Robin Klabbatz* (No. F-20-052), *People v. Ronald Cannon* (No. F-20-059), *People v. Fanchon Lafaver* (Nos. F-18-471/F-19-011/F-19-038/M-18-367), *People v. Lyle Castillo* (No. F-19-485), *People v. Corey Adam* (No. F-19-483/F-19-261), and *People v. Megan Blue* (Nos. F-16-248/M-19-481).

At times, former Judge Mason failed to disclose his relationship with Mr. Gifford at the first appearance in a case in which Mr. Gifford represented a party, in *People v. Samuel Alan Kiser* (No. F-20-005) (three appearances before disclosure made), *People v. James Fristoe* (No. F-20-050) (one appearance before disclosure made), *Eveann Smith v. Allen Lee Moore* (No. FL-20-007) (two appearances before disclosure made), *Walter Sphar v. Eriquiago, Bunyard, Bostic* (No. CU-19-100) (three appearances before disclosure made), and *Candice Mastagni v. Dale L. O'Neil* (No. FL-20-011) (two appearances before disclosure made).

In many cases, minute orders indicated that the judge disclosed his relationship with Mr. Gifford, but the transcripts and recordings of the appearances did not reflect that former Judge Mason made a disclosure on the record. Former Judge Mason failed to disclose, or failed to properly disclose, in the following cases: *People v. Sarah Hewitt* (No. F-19-099), *People v. Stephen Anastacio* (No. F-19-383), *People v. Arlen Javier Gonzalez* (Nos. F-19-128/ F-17-094/F-17-045), *People v. Ryan Randall West* (Nos. M-19-293/ M-19-429), *People v. Rogers Amerson* (No. M-19-238), *People v. Phillip Skaggs* (No. F-17-075), *People v. William Roy Biggerstaff* (No. F-19-139), *People v. Richard Chapman* (No. F-19-368), *People v. John Gregory Hughes* (No. F-17-096), *People v. Tamyara Cawthorn* (No. F-18-462), *People v. Rhyan James Urena* (Nos. F-19-197/ F-19-200), *People v. Danny Ray Dial* (No. F-19-124), *People v. Valerie Hubbard* (No. F-19-420), *People v. William Eugene Sainsbury* (Nos. F-19-471/ F-19-365), *People v. Fanchon Lafaver* (Nos. F-18-471/F-19-011/F-19-038/M-18-367), *People v. Lyle Castillo* (No. F-19-485), *People v. Corey Adam* (No. F-19-483/F-19-261), *People v. Megan Blue* (Nos. F-16-248/M-19-481), *People v. Donald Vick* (No. M-20-079), *People v. Charles James Preston, Sr.* (No. F-18-429/F-20-104), *People v. Robin Klabbatz* (No. F-20-052), and *People v. Ronald Cannon* (No. F-20-059).

On December 18, 2019, in *People v. Michael Lamug* (Nos. M-19-404/M-19-454), after reading the alternate disclosure verbatim, former Judge Mason stated, "So you're going to hear that all the time, and you're going to be sick of hearing it, just like I get sick of reading it, but it's – it's what I have to do." (R.T. 3:8-10.) Former Judge Mason's

comments were gratuitous and trivialized the importance of complying with his duty to disclose on the record information, concerning his relationship with Mr. Gifford that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1.

Canon 3E(2) and 3E(2)(a) of the Code of Judicial Ethics requires judges to disclose on the record "information that is reasonably relevant to the question of disqualification under Code of Civil Procedure section 170.1, even if the judge believes there is no actual basis for disqualification." Under Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), judges are disqualified when "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." This is an objective standard. The question is whether the "average person on the street" would harbor doubts as to the judge's impartiality, not whether the judge is actually biased. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104; *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.) Pursuant to this standard, even if former Judge Mason were not disqualified from presiding over Mr. Gifford's cases, he was required to disclose all facts about their relationship that were reasonably relevant to disqualification, on the record, in every case in which Mr. Gifford appeared. Former Judge Mason concedes that, despite his prior discipline for the same misconduct, he did not make a disclosure in every case where he was required to do so. Former Judge Mason violated canons 3E(2) and 3E(2)(a) over an extended period by failing to make the required disclosures on the record. His conduct also constituted a violation of canons 1, 2, 2A, and 4A.

III. Discourtesy to District Attorney in *People v. Abernathy*

On June 23, 2020, former Judge Mason conducted a chambers conference in *People v. Ryan Abernathy* (No. M20-158), with District Attorney (DA) Sophia Meyer, Deputy District Attorney Stacey Todd, three probation department employees, the defense attorney, a bailiff, and the court clerk. DA Meyer had filed a violation of a slow plea in an underlying case, as well as a new case (No. F19-093), and the defendant requested a jury trial. Former Judge Mason stated that he thought DA Meyer's office was

"unprofessional and stupid for exercising prosecutorial discretion and filing a case." Former Judge Mason also stated that the District Attorney's office was "unprofessional and superfluous." DA Meyer responded that she did not appreciate being called unprofessional. Former Judge Mason then said, "Well, maybe unprofessional is not the word. In my opinion, the DA's office is stupid for filing this." On July 7, 2020, former Judge Mason told DA Meyer that he was "not accusing anyone in particular, but the DA's office as a whole was unprofessional." (The Modoc County DA's office is comprised of two attorneys and support staff members.)

Calling the DA's office "stupid" and "unprofessional," especially in the presence of others, constituted a failure to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity (canon 3B(4)); a failure to refrain from speech and conduct that would reasonably be perceived as bias or prejudice (canon 3B(5)); and violations of canons 2 and 2A.

Former Judge Mason's conduct, as set forth in parts I-III, above, constituted, at a minimum, improper action.

Former Judge Mason's misconduct was aggravated by the judge's prior discipline. As discussed in part I, above, former Judge Mason was publicly admonished in 2019 for not only similar conduct, but the same conduct. In 2019, former Judge Mason conceded that he made "mistakes . . . regarding disclosures," and violated canons 3E(2) and 3E(2)(a) over an extended period by failing to make the required disclosures on the record.

This stipulation imposes a higher level of discipline than former Judge Mason's 2019 public admonishment, based on the judge's prior retirement and agreement to not at any time seek or hold judicial office or seek or accept assignment. The parties request that the commission accept this stipulation because it fulfills the commission's mandate to protect the public and maintain the integrity of the judiciary in order to avoid the prolonged impact of further proceedings on the justice's court and the administration of justice.

By signing this stipulation, in addition to consenting to discipline on the terms set forth, former Judge Mason expressly admits that the foregoing facts are true and that he agrees with the stated legal conclusions.

Dated: November 6, 2020.

Former Judge David A. Mason

Dated: November 9, 2020.

David S. McMonigle, Esq.
Attorney for former Judge David A. Mason

Dated: November __, 2020.

Gregory Dresser
Director-Chief Counsel

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Dated: November __, 2020.

Former Judge David A. Mason

Dated: November __, 2020.

David S. McMonigle, Esq.
Attorney for former Judge David A. Mason

Dated: November 9, 2020.

Gregory Dresser
Director-Chief Counsel

DAVID A. MASON

October 6, 2020

The Honorable Gavin Newsom
Governor of the State of California
1303 10th Street, Suite 1173
Sacramento, CA 95814

Re: Judicial Retirement

Dear Governor Newsom:

Effective October 31, 2020, I am retiring from my position as a judge of the Modoc County Superior Court, where I have served since my appointment on March 26, 2009. It has been my honor and privilege to serve the citizens of this state and of the County of Modoc.

I urge you to appoint a replacement at your earliest opportunity.

Sincerely,

David A. Mason

DAVID MASON
Judge of the Modoc County Superior Court.

cc: file

# PUBLIC ADMONISHMENT OF JUDGE BARBARA L. ROBERTS

The Commission on Judicial Performance ordered Judge Barbara L. Roberts publicly admonished, pursuant to article VI, section 18(d) of the California Constitution and commission rule 115, as set forth in the following statement of facts and reasons found by the commission:

## STATEMENT OF FACTS AND REASONS

Before retiring on October 11, 2020, Judge Roberts had been a judge of the Butte County Superior Court since 1998. Her most recent term began in 2019.

The commission determined that Judge Roberts should be publicly admonished for violating the California Code of Judicial Ethics for misconduct on the bench and in the courthouse. Judge Roberts engaged in a pattern of poor demeanor in multiple dependency cases over which she presided in 2019 and 2020. This misconduct included treating primarily parents, but in one case, attorneys and a social worker, in a harsh and discourteous manner. Judge Roberts also abused her authority and became embroiled in one case. The commission also found that, on January 8, 2020, Judge Roberts yelled at court staff and engaged in a display of impatient and frustrated behavior in the clerk's office, in an adjoining internal court hallway, and in chambers. The commission further found that, on January 9, 2020, again while in chambers, the judge discourteously raised her voice to another judge.

The commission recognized that her dependency assignment and the cases addressed in this matter were often difficult and frustrating for Judge Roberts. The commission also recognized the challenges Judge Roberts experienced in moving the dependency court from one Butte County courthouse to another. Nevertheless, Judge Roberts was required to comport herself in accordance with the California Code of Judicial Ethics.

1. The commission found that Judge Roberts failed to be patient, dignified, and courteous toward parents appearing before her in 10 dependency hearings.

*a. In re: K.S. and J.S.*

On February 25, 2019, Judge Roberts presided over a dispositional hearing of a case involving two siblings.[1] J.S. suffered from significant mental illness, which the parents and Judge Roberts discussed at length. During an exchange regarding a possible out-of-state placement for J.S., both parents expressed concern that such a placement might make having access to their son more difficult.

---

[1] Case names and the identities of certain persons and locations have been obscured to protect the confidential nature of dependency cases and the privacy rights of minors.

THE COURT: So what is the objection to sending him out of state?

THE MOTHER: I'm just worried I'll never see him.

THE COURT: Of course you're going to see him.

THE FATHER: The main objection, Your Honor, is as it is right now with him in [a California location], it's costing us $200 a month to go up there every weekend and see him for six hours total. He gets –

THE COURT: What does that have to do with finding the best possible placement and treatment for him?

THE FATHER: It doesn't, Your Honor. It doesn't. If you allow me to finish, I'll get to my point. [¶] If he's moved out of state, it makes our ability to have contact, and consistent interaction with our child, that much more difficult than it already has been.

(R.T. 6:10-7:2.)

Later in the proceeding, the social worker said that he gave the parents transportation agreements to help with gas, and later sent them a packet with transportation assistance forms, but they had not returned them. The father told the court that, at the last court appearance, he told the social worker that he had lost the forms and requested new ones. The social worker then apologized. Shortly thereafter, the following exchange occurred:

THE COURT: Mother, why didn't you fill out the transportation form?

THE MOTHER: I don't really feel like getting reimbursed for -- I don't want money from CPS.

THE COURT: Then do not sit here in this courtroom and complain to me that you don't have the finances to go.

THE MOTHER: I never have.

THE FATHER: That was me, Your Honor.

THE MOTHER: I have the money.

THE FATHER: I didn't say that we didn't have the finances, I said it was a burden to have to spend $200 a month.

THE BAILIFF: You know, folks, stop arguing.

THE FATHER: I'm not trying to argue, sir.

THE COURT: You're talking out of both sides of your mouth, sir. You're telling me on the one hand that you're upset you have to pay $200 a month. There is a program set up for you to get reimbursed for your transportation expenses, but you don't feel like doing it.

THE FATHER: No, I requested the paperwork from [the social worker] over a month ago.

THE COURT: See you on March 4th. I am not going to argue with you too. You're being uncooperative, you're not following through with what you need to follow through with.

THE FATHER: No, [the social worker] is not following through. I requested that paperwork over a month ago.

THE MOTHER: They don't care.

THE COURT: Don't be rude.

THE FATHER: I have a right to say whatever the hell I want.

(Proceedings concluded.)

(R.T. 26:12-27:19.)

The commission found that Judge Roberts was discourteous to the mother by impatiently reprimanding her for something she did not do. Additionally, Judge Roberts's statements that the father was "talking out of both sides of his mouth," failed to get reimbursed for transportation expenses "because he didn't feel like doing it," and was "being uncooperative," as he tried to explain his request for replacement forms, were discourteous and impatient. The commission found that Judge Roberts's comments were contrary to canon 3B(4), which requires judges to be patient, dignified, and courteous to all those with whom they deal in an official capacity, canon 2A, which requires judges to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and canon 1, which requires judges to personally observe high standards of conduct and uphold the integrity of the judiciary.

*b. In re: K.S.*

On June 6, 2019, Judge Roberts presided over further proceedings in the *In re: K.S.* case. The mother was participating in a medication-assisted drug treatment

program, which included regular testing and prescription use of methadone and marijuana to help her overcome her addiction. During the hearing, the following occurred:

> THE COURT: Are you going to meet with the social worker without your attorney or not?
>
> THE MOTHER: I have been, yes.
>
> THE COURT: All right. The Court is going to order you to meet with your social worker without your attorney. The Court is going to order you to still communicate via text message. That is how we communicate in this court.
>
> THE MOTHER: Then I am going to turn my phone off.
>
> THE COURT: So Mother just said, "I guess I'll turn my phone off." Is that what you just said? So she just basically said she's going to turn her phone off, and she's not going to accept text messages from you. So we're going to get absolutely nowhere.
>
> [SOCIAL WORKER]: And, your Honor, she's also been testing positive still for THC. She claims that she has a prescription but won't provide it.
>
> THE COURT: You know what, I don't care if you have --
>
> THE MOTHER: You cleared it.
>
> THE COURT: -- a prescription or not, I ordered you to quit.
>
> THE MOTHER: No, you cleared that in November when you [also authorized her husband's marijuana use].
>
> THE FATHER: You told us that as long as there's a medical reason to use marijuana that it was fine. She cannot take anxiety medication for her PTSD because of the adverse side effects of the anxiety medication.
>
> THE COURT: Did I?
>
> THE FATHER: You can role [*sic*] your eyes and shake your head all you want, your Honor, but --
>
> THE MOTHER: She knows I can't take medication.

THE FATHER: -- it's not --

THE COURT: And I can.

THE FATHER: No, you cannot.

THE MOTHER: I have gotten that from the state attorney general.

THE COURT: Stop.

[ASSISTANT COUNTY COUNSEL]: Your Honor.

THE COURT: I can order you to not do anything that I say I am ordering you not to do it [*sic*].

THE FATHER: In a criminal case, this is not a criminal case, your Honor.

THE MOTHER: I have already talked to the Department of Justice about this.

[ASSISTANT COUNTY COUNSEL]: If I can be heard. On May 14th, this Court made it clear that Mother would not be able to use marijuana. There's --

THE MOTHER: Even though it was made clear in November.

[ASSISTANT COUNTY COUNSEL]: March 14, 2019, is when this Court made the order.

THE COURT: All right. So it appears that I might have authorized it at the beginning, because -- you know, here is the deal. Some people can drink and -- no problems in their life. Some people can do drugs, no problems in their life. Some people can use marijuana, no problems in their life. [¶] You are not a family with problems [*sic*].

THE FATHER: You're right, we have a son with mental disabilities that --

THE COURT: I want you to be quiet please.

THE FATHER: No. We have a --

THE MOTHER: We have a right to speak.

THE FATHER: -- a child who is uniquely handicapped, your Honor. Every report, in the initial report, except for one was about our son and his behavior.

THE COURT: See you August 29th.

THE FATHER: CSD is saying that we weren't doing any –

THE MOTHER: No, she doesn't want to hear what you have to say. She wants to hear lies and the corrupt [*sic*]. We will just continue with the Department of Justice. Go ahead, say I'm mental now. [¶] [Mother calls the judge an expletive as she leaves the courtroom.]

(R.T. 7:14-10:9.)

The commission found that Judge Roberts's conduct, including rolling her eyes, shaking her head, arguing with the parents, saying that she didn't care if the mother had a prescription for marijuana, and declaring that she could order the mother to do whatever she wanted violated canons 1, 2A, and 3B(4).

*c. In re: K.S. and J.S.*

On October 3, 2019, Judge Roberts presided over further proceedings in the *In re: K.S. and J.S.* matter. Judge Roberts spoke briefly to nine-year-old K.S., who was present in court. Immediately thereafter, with the child still present, Judge Roberts stated:

THE COURT: Mother and father, you and I have gotten off to a very bad place in this courtroom, and that is why I asked all of the attorneys to meet and confer with you over the lunch hour to see if we could start anew here.

Mother, I don't know what has happened to you. I truly don't. You were the most wonderful person when you were in my Drug Court. Delightful person. I enjoyed you so much. You were nice, you were polite, you were conscientious, you were willing to do the hard work. You were a delightful person when you graduated from Drug Court.

What happened? I want you to really stop and think about what has happened in your life that has caused you to be so incredibly nasty to social workers, your attorney. The fact that your attorney has to be relieved off this case tells me everything I need to know about how you treat people. You have also treated me terribly in this courtroom. Very, very insulting, very rude. I had to threaten to put you in jail to get

you to come around. This is not the [person] I knew when she was in Drug Court.

I want to know why you're on methadone, and why we are not trying to get off the methadone. So I want you to really think about this. And I've read the records, and supposedly you're on a really high dose because of some kind of metabolism issue. I don't believe it for a minute. I have been on the bench for 22 years, and I have never heard of somebody having such a high metabolism, or whatever this is, that they have to stay on a high dose of methadone.

I want you to be thinking about this, because I think it's affecting your personality. You are on heroin every single day, and on a very high dose of it. And you are such a different person than the person I had in front of me a couple of years ago, that I'm wondering what happened. I don't know what happened in your personal life, I don't know what's going on at home, but you are an entirely different person.

This is what scares me, [mother]: If you act this way to your attorney, so bad that he had to be asked [*sic*] to be relieved from the case, so bad with the social workers that you won't even talk to them, and you guys won't even go to CFT meetings, you storm out of a courtroom cussing at me. If you act that way in this courtroom in front of me, when I'm going to send your children home or not, I wonder how you act when I'm not around.

This really, really is frightening to me, because if you act this way in front of all of these people, how do you act towards your daughter? And my biggest concern right now is that this young child is going to end up just like your son, and that's what I'm trying to prevent.

I see the love and affection that she has for you two, and I don't want to interfere with that. But both of you have turned into very nasty people, and that's my concern. I want to save this young girl from turning out like your son has. So I want you to really just think about this.

I also want you to think about the domestic violence that has gone on in your home that you two refuse to admit to. Domestic violence is taking advantage of the other person, yelling and screaming. You don't have to touch anyone for them [*sic*] to be domestic violence. And what you're

> teaching is, you're teaching this little girl that it's okay to act like you do towards each other for somebody that you supposedly love with your heart and soul. You're teaching her that this is an okay way to treat people, and it's not.
>
> And until you two realize that the way you act in this courtroom is an indication to me of how you act with each other -- there's extreme violence going on in your home. It may not be physical, it's emotional, and that is way more damaging to a child than if you just push her, because she thinks there's something wrong with her.
>
> So I want you to just take a huge step back and realize you're burning your own bridges here. And I'm trying to get this child home, but until I see some changes in you, that's going to be really difficult.

(R.T. 8:7-11:7.)

Later in the same proceeding the judge said, "Let's all start over again with a fresh indication that we're going to do what's necessary for this child. [¶] So I don't care whether you want to do it or not, I'm going to do it for my [*sic*] child. (R.T. 12:4-9.)

The commission found that Judge Roberts's remarks were harsh and discourteous. She, among other things, incorrectly accused the mother of being on a very high dose of heroin every day, derisively discussed the mother's drug treatment records, said, without evidence, there was "extreme violence" in the parents' home, and said the parents had turned into "very nasty people." The commission found Judge Roberts's comments about trying to save K.S. from the same fate as her brother, who Judge Roberts knew suffers from very serious mental illness, troubling. Judge Roberts's statements were inconsistent with canons 1, 2A, and 3B(4).

*d. In re: X.N.*

On January 8, 2020, Judge Roberts presided over a number of cases on the dependency calendar. After Judge Roberts called the matter of *In re: X.N.*, the following occurred:

> THE COURT: All right. Mother is present. [¶] And this is on for two issues: One is to ask the Court for authorization for medical treatment. [¶] Any objection to that?
>
> THE MOTHER: For the shunt?
>
> THE COURT: Yes. [¶] I'm talking to the attorneys.
>
> THE MOTHER: Oh.

[MOTHER'S ATTORNEY]: I haven't had a chance to meet with her.

THE COURT: How come you haven't talked to your attorney about this?

[MOTHER'S ATTORNEY]: Because I've been in court.

THE COURT: Do you have any objection to the medical procedure?

THE MOTHER: Yes and no. We had a doctor's appointment. Initially I did because of the risks and stuff that were initially mentioned and went over when he got the shunt placed.

THE COURT: Do you have an objection now or not?

ASSISTANT COUNTY COUNSEL: Your Honor, if I may, I spoke with our public health nurse about this, and she thought that [mother's] objections were well placed, because the initial surgeon's report was that the shunt was going to be able to stay in place indefinitely, and [mother], I believe, was surprised when the physician then said, "Well, we're going to schedule a surgery to take it out." And so I think there's an appointment scheduled to discuss the removal of the shunt.

THE COURT: Perfect.

(R.T. 3:8-4:12.)

Later in the hearing, Judge Roberts allowed the mother an opportunity to speak about services, but thereafter twice interrupted her, and on three occasions failed to allow the mother to be heard when she had a question or a suggestion. The commission found that Judge Roberts made impatient statements to the mother, discourteously interrupted her, and discourteously failed to let the mother speak, in violation of canons 1, 2A, and 3B(4).

*e. In re: T.N. and J.N.*

The matter was before Judge Roberts on January 8, 2020, with each parent represented by counsel. When Judge Roberts asked the father why he had not contacted his attorney, he said he had just been released from jail and had lost all his paperwork. The following then occurred.

THE COURT: When were you released?

THE FATHER: On Christmas.

THE COURT: That was not just released. Do not lie to me. Because you just implied you didn't talk to your attorney because you just got out of jail. That is a lie. It's been ten days and you could have called Children's Services and asked who your attorney was and gotten the phone number. [¶] Mother, apparently you haven't contacted your attorney either. Why not?

[MOTHER'S ATTORNEY]: She has, Your Honor. She has, but she's not understanding today's proceeding. If we could trail this?

THE COURT: This is a very, very serious matter, and for you two to come into this courtroom without ever having talked to your attorneys is appalling.

[MOTHER'S ATTORNEY]: Your Honor, the Mother has called me, and we have spoken, she's just not understanding today's proceeding.

(R.T. 14:21-15:14.)

Subsequently, the social worker reported that the mother had drug tested once and Judge Roberts asked the date of test. When the mother replied, "It was the last court date that we had. It was on -- I have to look at my calendar," Judge Roberts responded, "That doesn't help me at all. How can I remember when you came to court last?" Once it was determined that the mother had not tested in five weeks, Judge Roberts asked why it had been so long. When the social worker replied that the mother said she didn't know she was supposed to call a drug testing line, Judge Roberts responded, "That's baloney."

Later in the hearing, the mother's attorney told the judge that her client had made another appointment to meet with her and was just having a hard time understanding the proceedings that day. Judge Roberts responded, "I understand. But the solution isn't to talk to you in the courtroom, the solution is to make another appointment outside of court time. Because, you know, we've accomplished nothing here. And you've taken ten minutes of the Court's time because you didn't go see your attorneys to understand what's going on here." (R.T. 19:5-10.)

Judge Roberts also asked the mother if she knew why her children had been detained and the following occurred:

THE MOTHER: I do. For the most part, I understand why the children were detained.

THE COURT: Why were the children detained?

THE MOTHER: Because of my own --

THE COURT: Why were the children detained?

THE MOTHER: Because I had drugs in my car.

THE COURT: Because you were slumped over the steering wheel, passed out, with the children in the car, and both children tested positive for methamphetamine. That's why these children were detained. Not because you made a stupid decision.

(R.T. 23:11-21.)

The commission found that Judge Roberts made numerous discourteous or impatient remarks to the parents including, "Don't lie to me"; "that is a lie"; "appalling"; "That doesn't help me at all. How can I remember when you came to court last?"; "Because, you know, we've accomplished nothing here. And you have taken ten minutes of the Court's time because you didn't go see your attorneys to understand what's going on here" (despite mother's counsel twice confirming that she had talked with her client before the hearing); "That's baloney"; and "That's why these children were detained. Not because you made a stupid decision." The commission found that Judge Roberts's remarks violated canons 1, 2A, and 3B(4).

*f.* *In re: A.V.*

On January 8, 2020, the matter was before Judge Roberts for a disposition hearing. The mother's attorney told the court that the mother was trying to get into a rehabilitation program, was having difficulty with transportation, and had asthma. She also said her client was clean for methamphetamine, but was still using marijuana when the following occurred:

THE COURT: Why are you still using marijuana?

THE MOTHER: I've been trying to stop. It's really hard for my anxiety. I wake up –

THE COURT: You have asthma and you're using marijuana? Crazy. ... The Court's going to order you not to consume marijuana. That is ridiculous with you having anxiety and asthma that you would even consider using marijuana. You need to address the underlying mental health issues, not mask it with marijuana use. [¶] So how many drug tests has she missed?

SOCIAL WORKER: [Social worker] for Children's Services. [¶] Mom has 14 FTA's.

THE COURT: So you have 14 dirty tests. [¶] How about Father?

SOCIAL WORKER: Father has 16 FTA's.

THE COURT: Why are you not going to drug testing?

THE FATHER: Transportation.

THE COURT: What are we going to do to solve the transportation problem? Are both of you working?

THE FATHER: No.

THE COURT: Why not?

THE MOTHER: He's been taking on –

THE COURT: No, no, no. Why are you not working, sir?

THE FATHER: I've been taking on odd jobs here and there, what I can get.

THE COURT: Why aren't you working full time for a paycheck?

THE FATHER: There's no jobs [*sic*], Your Honor.

THE COURT: I don't believe that for one second. How many jobs have you applied for since January 1st?

THE FATHER: Probably about 15. [Father then discusses jobs for which he applied.]

(R.T. 39:4-40:21.)

Later in the proceeding, the social worker confirmed that the 20-year-old mother had applied to an inpatient drug rehabilitation program and was also in an outpatient program. Both parents lived on a rural family farm and neither had a driver's license. The mother said that, as a result, she was only able to go to one AA meeting a week, when her sponsor gave her a ride.

Judge Roberts ordered that the child be removed from the parents' custody. When she asked if the child had been re-detained, the following occurred:

[MOTHER'S ATTORNEY]: Yes. Last dispo – [counsel] on behalf of the Mother. At the first dispo, CSD returned the child to the parents and then did an unannounced visit, and Mother was using meth, or tested positive for meth, and the place was not in good shape.

THE COURT: How do you get the methamphetamine when you're five miles out in the country with nobody around? Somehow we can find transportation to get our drugs, but we can't find transportation to get into town to do our testing and to go to NA meetings. Do you understand how ridiculous this is? [¶] So once the children are returned home, the child was found to be residing in a home that posed health and safety risks, including cigarette butts accessible to the child. So both of you have enough money to smoke. [¶] Do you smoke Mother?

THE MOTHER: Yes.

THE COURT: Father, do you smoke?

THE FATHER: Yes, I do.

THE COURT: What do you know, we have enough money to buy cigarettes, but not enough money to get services. This is ridiculous, you two.

THE MOTHER: I didn't say money was my problem. Transportation is my problem.

THE COURT: I know. And what are you doing to solve that problem?

THE MOTHER: I've been calling everybody I know that I'm allowed to contact.

THE COURT: How about you solve the problem?

THE MOTHER: What do you think --

THE COURT: You're using methamphetamine after your child was returned to you. That is not somebody who is taking this seriously and is trying to get this child back. If this continues and you continue to live in a place where you cannot get services, you can not [*sic*] get to meetings, and you cannot get to drug testing, and the residence is in this kind of squalor, there's a zero chance that this child is being returned home. I think you need to think about giving up the

family residence for now, move into town, get a place where you can attend services, both of you can get a job, both of you can get a driver's license, and maybe we can get this child home.

THE MOTHER: There's nowhere for me to move in town.

THE COURT: Why not?

THE MOTHER: The Esplanade House is full, and I haven't --

THE COURT: How about an apartment, you know, like a normal, grown up person does? Listen to me.

THE MOTHER: I have inherited [property], which is my home.

THE COURT: I'm sorry, what?

THE MOTHER: I've inherited [property] in [a town in Butte County], which is my home.

THE COURT: Great. And it's going to be a really lonely place for you and your husband.

THE MOTHER: Have you ever struggled in life ma'am?

THE COURT: [Property] does not give anything to this child, nothing.

THE MOTHER: It is my home.

THE COURT: You need to move into town, get some help, get rid of the drug addiction, get a job, get a place to live, and live like a normal, grown up person.

THE MOTHER: I'm trying.

THE COURT: No, you're not.

THE MOTHER: I'm definitely trying. I may have fucked up, but I'm trying.

THE COURT: That language is inappropriate in this courtroom.

THE MOTHER: I believe the way you are talking to me is inappropriate. You're not understanding.

[MOTHER'S ATTORNEY]: What is our next court date, please?

THE MOTHER: Yes, please.

THE COURT: The child is ordered and adjudged a dependent child ... [¶] Both of you are ordered to drug test today. Is there any reason why you can't drug test today, Mother?

THE MOTHER: No, not unless they don't get me in.

THE COURT: So we're setting ourself [*sic*] up for an excuse. Is it going to be clean or dirty?

THE MOTHER: Marijuana is the only thing possible.

THE COURT: All right. So she is going to be dirty for marijuana even though the Court has ordered her not to consume marijuana. Apparently she can get her marijuana, even though she can't get to the services.

(R.T. 47:6-50:25.)

The social worker told the court that she had offered the parents bus passes, but the mother said that would not work because of her asthma in walking to the bus stop. Judge Roberts responded, "If she'd quit using marijuana, maybe her asthma would be helped."

Later, the courtroom deputy realized the mother was recording the proceedings and ordered her to delete her recording. The following exchange then occurred:

THE COURT: You're recording this whole thing?

THE MOTHER: I was told to.

THE COURT: Sit down here, please. Sit down here, please.

THE MOTHER: You guys are recording.

THE COURT: No, we are not.

THE MOTHER: Why? This is very, very important. I just deleted it.

THE COURT: Is this child in a permanent placement, because it sounds to me like this child is not going home,

that this child is going to end up being adopted out. [¶] How old is the child?

THE MOTHER: My son is 19 months.

THE COURT: Be quiet, please.

[SOCIAL WORKER]: He's 19 months, and he's not in a prospective adoptive home.

THE COURT: We need to get him in a prospective adoptive placement.

THE MOTHER: No, you're not adopting my son out.

THE COURT: We need to make sure that this child is in a prospective adoptive placement because Mother and Father are not -- I said prospective adoptive placement to wake you up.

THE MOTHER: I am awake, and I'm trying my best to do everything you're asking me. You've obviously never struggled to know how hard this is.

THE COURT: [Calls another case] [¶] Just a minute. Come back in here. Get her back in here, please. [¶] Sit down, please.

THE MOTHER: I will stay right here.

THE COURT: You will sit down in the jury box unless you want me to hold you in contempt of court. Sit down in that jury box right now. [¶] You have no right to be that rude to this social worker.

THE MOTHER: You have no right to be this rude to me. You have pulled this out of me, and it's not okay for me to be here any longer.

THE COURT: You have no right to be rude and assaultive to this social worker.

THE MOTHER: I did not assault her.

THE COURT: Yes, you did. You grabbed the piece of paper out of her so hard that I could hear it clear up here.

THE MOTHER: I am ready to leave.

THE COURT: I want you to apologize to this social worker.

THE MOTHER: I'm sorry, [social worker].

THE COURT: Thank you.

(R.T. 53:12-55:11.)

The commission found that Judge Roberts's comments to the parents were discourteous, impatient, and harsh, in violation of canons 1, 2A, and 3B(4).

g. *In re: R.L. and S.L.*

On January 8, 2020, the matter was before Judge Roberts for both jurisdiction and disposition determinations. During the hearing, Judge Roberts described the father's failure to enroll in a rehabilitation program as "pathetic." The commission found this remark to be discourteous, and in violation of canons 1, 2A, and 3B(4).

h. *In re: H.O. and L.S.*

During the January 8, 2020 hearing, Judge Roberts asked the mother about her divorce and the following exchange occurred:

THE COURT: All right. And, let's see, so you're divorced.

THE MOTHER: Yes. It will be final on the 14th of next month.

THE COURT: How do you go about choosing partners?

THE MOTHER: That's why I'm going to counseling, for healthy relationships.

THE COURT: How do you even find them?

THE MOTHER: I'm not. I'm done.

THE COURT: How do you find them?

THE MOTHER: My picker is broken. Yeah. That's -- it was bad.

THE COURT: First of all, you should not even consider being involved in another relationship as long as these cases are pending. You need to be applying yourself 1,000 percent to these children and getting your act together. So why would you even consider getting involved in one more relationship, much less two more relationships, much less with both of them being registered sex offenders is just so

shocking to me. Why would you even consider getting involved in a relationship right now?

THE MOTHER: I don't know. I'm done, though. There's going to be no more relationships for me.

(R.T. 120:22-121:20.)

Judge Roberts then asked the father about his alcohol use. When the father acknowledged he was drinking, but not in treatment, Judge Roberts asked about his longest period of sobriety. When the father told her six months, Judge Roberts responded by calling him "a raging alcoholic." Judge Roberts subsequently asked to see the father's AA logs. When the father could not produce them because he said his backpack was stolen, Judge Roberts responded, "What do you know." Additionally, when discussing the father's alcohol use and lack of treatment, Judge Roberts said, "This is pathetic."

The commission found that Judge Roberts remarks to both parents were undignified, discourteous, and inconsistent with canons 1, 2A, and 3B(4).

i. *In re: T.P., et al.*

The matters were before Judge Roberts on January 8, 2020, for a sixth-month review. During the hearing Judge Roberts asked the father why he was not drug testing. When he said he was living in a van and did not have transportation, the following exchange occurred:

THE COURT: How about a bicycle or walk or bus?

THE FATHER: I don't have a bike, but I can walk, yeah.

THE COURT: You can walk.

THE FATHER: I do walk. My boots are falling apart already, though.

THE COURT: Well, that's the first time I've heard of somebody not drug testing because their boots are worn out. That is the most ridiculous statement I have ever heard.

THE FATHER: That's not what I said.

THE COURT: Yes, it is.

THE FATHER: I said, I do walk, my boots are worn out. I didn't say I don't test because my boots are worn out.

THE COURT: Then why did you tell me your boots are worn out if you weren't using it as an excuse?

(R.T. 138:23-139:13.)

Judge Roberts then asked the mother how she was doing. When the mother told the court that she was not well, Judge Roberts responded, "So you guys are doing terribly. I can't believe that Children's Services is extending these services out another six months. It's only by luck of the law that you're given more services here. Both of you are doing terribly, and there isn't a chance in the world these children are coming home if you continue doing what you're doing."

Later in the hearing, when the mother said she was clean but could be better about testing, Judge Roberts said, "You're clean? And you expect me to believe that?"

When Judge Roberts subsequently asked the father whether he was working, the following occurred.

THE FATHER: No. We are looking, but not working.

THE COURT: Why aren't you working?

THE FATHER: I just, I can't get any -- I'm applying. I've worked for my dad a couple of times, and he's been able to [*sic*]. But I'm trying to work.

THE COURT: Are these children in a pre-adoptive or permanent placement? Because it doesn't sound to me like they are going home.

THE FATHER: They're with my parents.

THE COURT: And so that makes you feel okay?

THE FATHER: No.

THE COURT: That's one of the problems with children being placed with relatives is you don't feel like you have to step up to the plate to get them home.

THE FATHER: I'm trying to step up.

THE COURT: No, you have not. You have not drug tested once. That is not somebody stepping up to the plate.

THE FATHER: For three and a half months I drug tested every single time, and you still yelled at me. I missed one that first court date. And I was working full time. I still

got yelled at. And I'm trying. I'm homeless, I live in a van, have no phone.

THE COURT: Then get into treatment and get into doing your drug testing and quit using drugs, and get out of your van and go to a shelter. Get into residential treatment. Get a job. There's [*sic*] lots of things that if you told me that you were doing any of those things that I'd say, you know, you're right, you're trying as hard as you can. No. You two are still using drugs, you're not drug testing, you're sleeping in your van, you're not in a home, and you're not going to services. So don't tell me you are doing the best you can.

(R.T. 143:6-144:14.)

After ordering that reunification services be continued, Judge Roberts ended the hearing by saying, "And if you don't turn this around, these children are going to be placed permanently with the grandparents. See you then."

The commission found that the judge's remarks to the parents were impatient and discourteous, in violation of canons 1, 2A, and 3B(4).

j. *In re: I.V.*

On May 20, 2020, *In re: I.V.* was before Judge Roberts for disposition. The mother and child each had counsel and an assistant county counsel appeared on behalf of Children's Services. The paternal grandmother was present, but the father was not. The judge expressed dismay at the father's failure to appear, and twice told the parties that she wanted the father to "face the music." Judge Roberts spoke to the parties as follows:

THE COURT: All right. Well, I'm encouraging father to come. [¶] Where is he?

SOCIAL WORKER: Your Honor, [social worker], at last weeks' [*sic*] meeting with the relatives and [the mother], the mother-in-law that was present, we did have an interpreter present, and we did explain to them the importance of father showing up to court.

THE COURT: Where is he?

SOCIAL WORKER: They were going to try to encourage him to come.

THE COURT: Mother, where is Father? No. You.

[MOTHER'S ATTORNEY]: Your Honor –

THE COURT: Where is the father?

THE MOTHER: He's at home.

[MOTHER'S ATTORNEY]: My client –

THE COURT: I'm sorry. What did she say?

[ASSISTANT COUNTY COUNSEL]: "He's at home."

THE COURT: He's at home. He doesn't care about this?

[MOTHER'S ATTORNEY]: Your Honor, I would object to my client being asked questions about somebody who has a different potential interest than her.

THE COURT: I have every right to ask where the father is. This is a father and him not coming to court [*sic*]. This couple is together. It's not as if he's separated and living somewhere else. [¶] As far as I know they are together. They have produced three children together. They are not able to take care of any of these children. I want father here to face the music. [¶] Now, if he refuses to come, we'll still look at the relatives, but I don't understand why a father would not come to court to advocate what's right for his child.

(R.T. 9:9-10:16.)

Later in the proceeding, after a discussion about the mother possibly nominating a guardian, Judge Roberts spoke harshly to the crying 20-year-old mother.

THE COURT: This is a very sad situation. [¶] Mother, what are you doing about the drug problem?

THE MOTHER: I'm quitting.

THE COURT: I'm sorry?

THE MOTHER: I'm quitting. I'm trying to go to rehab.

THE COURT: You're going to quit, and you're going -- you have given birth to three drug addicted babies. That is not okay. You have sentenced them to a lifetime of problems. [¶] And I don't understand what's wrong with you as to why you would continue to get pregnant when you continued to abuse drugs and bring drug addicted babies in

> this world. It's not okay. You either go get some permanent birth control, or you quit using drugs. This is not okay.

(R.T. 12:9-26.)

The commission found that Judge Roberts's questioning of the mother as to the father's whereabouts, while her attorney tried to object, was discourteous. The commission also found that Judge Roberts's other comments, excerpted above, were harsh and discourteous. Judge Roberts's demeanor and remarks violated canons 1, 2A, and 3B(4).

2. The commission found that, in one case, Judge Roberts was discourteous to the attorneys and the social worker.

During the same May 20, 2020 hearing in *In re: I.V.*, discussed above, an attorney appeared on behalf of a local family who was about to adopt the child's older sister. That family also wished to care for the child, but Children's Services denied placement with them. Instead, Children's Services was considering placing the child with either the father's relatives or the out-of-county family who had adopted the child's other sister. When the attorney for the local family asked about visitation, the social worker told the court that the child was having video-conferencing visits with both her mother and the out-of-county family, but not the local family. The judge then interrupted the social worker, threw her arms up, and, with a raised voice, said, "What? With a newborn baby. That's ridiculous."

Later, when the assistant county counsel told Judge Roberts that the last judicial officer on the case approved of the video-conferencing, Judge Roberts appeared upset and responded by giving Children's Services full discretion for any and all visits and setting a further hearing date of July 22nd. When the attorney for the local family pointed out that Judge Roberts said she wanted the next hearing to be earlier than July, Judge Roberts responded, "I'm not interested. Sorry. I've said my peace [*sic*]. It's been rejected, so I'll see you in July."

The commission found that Judge Roberts was discourteous to the social worker and the attorneys. She raised her voice, threw her arms up, interrupted the social worker, twice suggested that the video-conferencing visits were "ridiculous," and appeared upset after the assistant county counsel told her another judge supported the video-conferencing visits. The judge's conduct was contrary to canons 1, 2A, and 3B(4).

3. The commission found that, over the course of four hearings in the *In re: K.S. and J.S.* matters, Judge Roberts became embroiled and abused her authority regarding the mother's prescription use of marijuana and methadone.

During the February 25, 2019 hearing, when Judge Roberts asked the mother if she planned to reduce her dose of methadone, the mother explained that she had a plan to decrease her prescription methadone use mapped out with her doctor. Judge Roberts requested a copy of the plan saying, "Let's get a copy of the plan she has,

because we don't do a lot of good to these parents if they're taking so much methadone with no plan to get off it and decrease it. I would rather you be on methadone than heroin, but I would rather you be off methadone altogether." Later in the hearing Judge Roberts said, "I have people sit in this courtroom who are on methadone who are so doped up they can barely even talk. So it's not a foregone conclusion just because you're on methadone that it's the appropriate dose and the minimum dose you can take to keep from having to go back to heroin, but enough that you can function." During the same hearing, the father's attorney reminded Judge Roberts that she had authorized the father's use of opioids and marijuana because they were medically cleared.

At the March 14, 2019 hearing, despite an earlier authorization, Judge Roberts ordered the mother not to use marijuana. The judge also said the following:

> THE COURT: I would like to see some kind of plan to get Mother off the methadone. We don't stay on methadone forever. Methadone is a treatment to help you stay clean from heroin, and if we don't have any plan in place to start decreasing the amount of methadone, we have a Mother who is quite potentially is [*sic*] doped up every day. She doesn't appear to be under the influence when she comes into this courtroom, but we don't know what time she gets her dose, how much her dose is, is it going up, is it decreasing? We don't know because Mother refuses to cooperate. [¶] I think Father is doing much better. Father appears to be cooperating. Father appears to be drug testing as asked by the Court. He does appear to be using opiates and marijuana, but he appears to be using it [*sic*] appropriately. He does have significant medical conditions.

(R.T. 68:2-18.)

Judge Roberts also noted that the father "doesn't seem to have the animosity and anger towards the Court or the system that Mother seems to have."

As discussed above, at the June 6, 2019 hearing, Judge Roberts argued with the parents about authorizing, and then subsequently prohibiting, the mother's marijuana use, saying, "You know what, I don't care if you have -- a prescription or not, I ordered you to quit." With a raised voice, Judge Roberts then said, "I can order you to not do anything that I say I am ordering you not to do it [*sic*]."

During the October 3, 2019 hearing, Judge Roberts said to the mother, "I want to know why you're on methadone, and why we are not trying to get off methadone. So I really want you to think about this. And I've read the records, and supposedly you're on a really high dose because of some kind of metabolism issue. I don't believe it for a minute. I have been on the bench for 22 years, and I have never heard of somebody having such a high metabolism, or whatever this is, that they have to stay on a high

dose of methadone." Judge Roberts also discussed, at some length, her view that methadone was having a negative impact on the mother's personality.

"Embroilment is the process by which the judge surrenders the role of impartial factfinder/decisionmaker and joins the fray." (Rothman, et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2.1, p. 58.) Additionally, a judge's role is constrained to consideration of the evidence before her. A judge may not supplement that evidence, however lacking, with independent investigation.

The commission found that over the course of the four hearings, the judge abused her authority by substituting her own judgment for that of the mother's doctor on the issue of prescription marijuana and methadone use. Judge Roberts also abandoned the role of neutral arbiter and became embroiled when she argued with the parents about the mother's marijuana use and repeatedly and negatively commented on the mother's prescription use of methadone. Judge Roberts's conduct violated canons 2A and 3 (a judge shall perform the duties of judicial office impartially, competently, and diligently).

The commission found that on January 8, 2020, Judge Roberts engaged in undignified, discourteous, and abusive treatment of court staff and, the following day, discourteously raised her voice to another judge.

For several years, Judge Roberts was the presiding judge of the juvenile dependency court in the Chico courthouse. A commissioner handled juvenile delinquency cases in the Oroville courthouse, under the supervision of a criminal judge. In 2019, the Board of Judges voted to consolidate the two juvenile divisions under one presiding judge. They agreed, however, that the two juvenile courts would not be formally joined until Judge Roberts retired. The Board of Judges also voted to move the dependency court from the Chico courthouse to the Oroville courthouse. Judge Roberts did not agree with the consolidation plan and had concerns about the move and the size of her new courtroom and its single-inmate holding cell.

On January 8, 2020, Judge Roberts had her first dependency calendar in Oroville. One of the difficulties she faced was a court-wide internet outage. As all the dependency court files were digital, the outage delayed Judge Roberts's already-full calendar. Sometime during the morning, a court staff member entered Judge Roberts's courtroom to bring the courtroom clerk a message. Judge Roberts appeared frustrated and upset by the lack of internet service and yelled, "This is ridiculous!" The court staff member immediately left the courtroom to find someone who could help with tech support.

Sometime later that morning, another court employee, who was in a room off the internal hallway that connects the courtrooms to chambers and the clerk's office, heard Judge Roberts come out of her courtroom yelling, "This isn't working! This isn't working!" As Judge Roberts walked down the internal hall toward the clerk's office, her voice continued to be raised, but the court employee could no longer clearly hear what she was saying.

Also sometime that morning, another court staff member was at her desk when she heard Judge Roberts yelling in the internal hallway as she approached the clerk's office. She could not tell what Judge Roberts was saying, but said she heard Judge Roberts yelling loudly. Judge Roberts then approached her desk and was very angry about issues in her courtroom. Judge Roberts yelled at this court staff member words to the effect of, "This is my worst nightmare coming to Oroville. I never wanted this to happen. Fix it immediately!" The court staff member, who had worked for the court for many years, said she had never seen Judge Roberts, or any other judge, act this way. She offered to see if she could move the judge to another courtroom, but Judge Roberts yelled that she wasn't moving to another courtroom. Then Judge Roberts turned and loudly stomped back down the internal hallway in the direction of the courtroom and her chambers.

At some point during the lunch hour, Judge Roberts returned to the clerk's office and entered the juvenile room. She loudly demanded that a juvenile clerk request that a courtroom be opened in the Chico courthouse, as a matter on Judge Roberts's afternoon calendar was incorrectly noticed for Chico. Several court employees were in the clerk's office and observed that Judge Roberts was upset. The juvenile clerk contacted a supervisor who said that the court staff in Chico decided not to open another courtroom. When the juvenile clerk relayed this information to Judge Roberts, the judge appeared to be very upset and left the clerk's office.

After either the first or second outburst in the clerk's office, court staff heard Judge Roberts return to her chambers and slam both her outer and inner doors. Later, when a court supervisor repeatedly knocked on Judge Roberts's closed outer door, Judge Roberts refused to respond.

As the court supervisor walked back from Judge Roberts's chambers toward the clerk's office, she encountered another supervisor in the internal hallway. The second supervisor heard that Judge Roberts had yelled at her staff and was going to chambers to talk with her. The first supervisor explained that the judge would not respond to her knocking, and both court employees returned to the clerk's office to talk with the juvenile clerk.

The supervisors were in the juvenile room, with three other staff members, for only a few minutes when Judge Roberts returned. Judge Roberts was very upset and appeared to have been crying. Judge Roberts began screaming and pointing her finger at one of the supervisors, demanding that court staff open a courtroom in Chico. The supervisor attempted to calm Judge Roberts and explain the alternative plan to opening the courtroom. But Judge Roberts refused to listen, repeatedly interrupted, and continued to scream and point her finger. Judge Roberts then turned and walked out of the juvenile room with the supervisor following. Judge Roberts suddenly stopped in the middle of the Criminal Division of the clerk's office and turned to face the supervisor. In front of a number of court employees, Judge Roberts yelled, "Fine! I'll just do this myself!" Shortly thereafter, Judge Roberts left the courthouse after emailing the presiding judge to tell her that she was sick and going home. Court staff expressed concern for Judge Roberts and concern that the public may have overheard her

outbursts in the clerk's office. The following day, Judge Roberts returned to the courthouse and apologized to court staff for her behavior.

On January 9, 2020, at the request of both Judge Roberts and the presiding judge, the assistant presiding judge observed Judge Roberts's dependency calendar. During a recess, the judges went to Judge Roberts's chambers to talk. Judge Roberts asked the assistant presiding judge why she couldn't be moved to another specific courtroom. When the assistant presiding began to explain, Judge Roberts spoke to her with a raised voice. The assistant presiding judge told Judge Roberts that she was going to leave if Judge Roberts continued to yell. She also said that it was not acceptable for Judge Roberts to yell at her or at court staff. As the assistant presiding judge left chambers, Judge Roberts said, in a manner that reflected derision, "Thanks for the support."

"Judges must conduct themselves in a judicious and professional manner in relation to courtroom staff and other court employees." (Rothman, et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 6:27, p. 367.) As Judge Rothman also states, "Canon 3B(4) of the Code of Judicial Ethics requires a judge to be 'patient, dignified, and courteous to ... others with whom the judge deals in an official capacity ....' This includes court personnel." (Rothman, et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 3.18, p. 142.)

The commission found that Judge Roberts engaged in significant and repeated abusive conduct toward court staff, including yelling in the courtroom and entering the clerk's office three separate times, inappropriately raising her voice to three specific court employees. She also yelled in the internal hallway, stomped her feet, slammed both her chambers' doors, and refused to answer her door when court employees sought to resolve the matter with her privately. The commission also found that Judge Roberts raised her voice and spoke derisively to the assistant presiding judge while in chambers. Judge Roberts's conduct violated canons 1, 2A, and 3B(4).

Judge Roberts's harsh and discourteous remarks to parents, attorneys and a social worker, discussed above, constituted misconduct. Describing, among other things, parties' conduct as "pathetic" and "ridiculous," as well as using sarcasm and a raised voice, constitute failures by a judge to be dignified and courteous to those with whom the judge deals in an official capacity. "Improper judicial demeanor impacts the fairness of judicial proceedings and respect for the judicial institution. The canons' insistence on appropriate judicial demeanor rests on the idea that such demeanor is one of those things that is central to the appearance and reality of fairness and impartiality in judicial proceedings." (Rothman, et al., Cal. Judicial Conduct Handbook (4th ed. 2017) § 2.46, p. 116.)

In response to the commission's preliminary investigation, Judge Roberts acknowledged that, on January 8, 2020, she should not have made the remark regarding the father's boots in the *In re: T.P., et al.* matter, should not have said unspecified things in the *In re: A.V.* matter, and should have let the mother offer her suggestions in the *In re: X.N.* matter. She pointed to the stress of the dependency court

move, the significant delay in her calendar, and/or her frustration with the parents' behavior as an explanation for her conduct. She otherwise contended that her conduct was appropriate and that "[j]udges are human and courts have recognized that judges cannot be held to a 'superhuman standard' that would allow no expression of emotion. (*Railey v. Webb* (6th Cir. 2008) 540 F.3d 393, 411; *Jones v. Luebbers* (8th Cir. 2004) 359 F.3d 1005, 1013.)" She also asserted that "expressions of impatience, dissatisfaction, annoyance, and even anger are within the bounds of what imperfect men and women selected as judges sometimes display. (*Liteky v. United States* (1994) 510 U.S. 540, 555-556.)" The commission found those cases inapposite as they discuss, not the standards of proper judicial conduct under the canons, but rather the degree of judicial bias or partiality that would require recusal or disqualification in order to avoid a due process violation. With respect to her treatment of parents, Judge Roberts stated that she employed a "tough love" approach that she also used while presiding in drug court, arguing that her approach was necessary to compel parents to gain awareness of the harm they were causing their children and to change their behavior. The commission, however, found that belittling and demeaning litigants is not appropriate in any court, dependency, criminal, or otherwise. Such conduct violates the Code of Judicial Ethics.

Judge Roberts acknowledged her mistreatment of staff, her misconduct in the courthouse, and her discourtesy to the assistant presiding judge. She stated that she sincerely regrets her lack of composure on January 8 and 9, 2020, and recognizes that her behavior was not appropriate.

In determining to issue a public admonishment, the commission considered that Judge Roberts's misconduct involved harsh and degrading treatment of multiple vulnerable and struggling parents in dependency. The number and nature of these incidents indicate a pattern of misconduct.

The commission considered the impact of the judge's remarks on the public's regard for the integrity and impartiality of the court system. In determining to issue a public admonishment, notwithstanding Judge Roberts's retirement and lack of prior discipline, the commission considered the judge's apparent lack of remorse for the harm her "tough love" approach caused parents appearing before her, as well as her significant misconduct directed at court staff and her discourtesy to another judge.

The commission found that Judge Roberts's conduct in the matters described above was, at minimum, improper action.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Ms. Sarah Kruer Jager; Hon. Lisa B. Lench; Nanci E. Nishimura, Esq.; Victor E. Salazar Esq.; Mr. Richard Simpson; and Mr. Adam N. Torres voted for the Notice of Tentative Public Admonishment. Ms. Kay Cooperman Jue did not participate.

Date: February 18, 2021

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| IN THE MATTER CONCERNING<br>JUDGE PATRICK E. CONNOLLY | DECISION AND ORDER IMPOSING<br>PUBLIC ADMONISHMENT |

This disciplinary matter concerns Judge Patrick E. Connolly, a judge of the Los Angeles County Superior Court since 2009. His current term began in 2015. Pursuant to rule 116 of the Rules of the Commission on Judicial Performance, Judge Connolly and his attorney, Edith R. Matthai, appeared before the commission on March 24, 2021, to contest the imposition of a tentative public admonishment issued on December 15, 2020. Judge Connolly waived his right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge Connolly and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the statement of facts and reasons set forth below.

As described below, Judge Connolly displayed improper demeanor toward two criminal defense attorneys during an arraignment and, in a different criminal case, made an inappropriate remark about the jury's verdict to a defendant who had been acquitted. The commission determined that a public admonishment was warranted due to Judge Connolly's significant prior discipline (a public admonishment in 2016 and a private admonishment in 2010) and his failure to fully acknowledge that his conduct was inconsistent with the California Code of Judicial Ethics.

## STATEMENT OF FACTS AND REASONS

I. *People v. Felipe Ramirez and Jorge Ramirez*

Attorney Martin Lijtmaer represented criminal defendant Jorge Ramirez, and attorney Rachel Steinback represented co-defendant Felipe Ramirez, in *People v. Ramirez* (TA151719), a matter pending before Judge Connolly. On March 20, 2020, the day after Governor Gavin Newsom announced the statewide stay-at-home order due to COVID-19, Mr. Lijtmaer called Judge Connolly's clerk to request permission to appear by telephone for the arraignment scheduled that afternoon, based on his and Ms. Steinback's concern about having been exposed to the COVID-19 virus and the possibility of spreading it at the courthouse. Judge Connolly spoke to Mr. Lijtmaer over the phone and said his clerk would call back to communicate his decision. In the meantime, Mr. Lijtmaer and Ms. Steinback attempted to find another attorney who could appear at the arraignment of their clients in their stead, but they were unable to do so. At approximately 2:00 p.m., the clerk told Mr. Lijtmaer that the judge had agreed to allow counsel to appear at the arraignment by telephone later that day.

That afternoon, Mr. Lijtmaer and Ms. Steinback appeared by telephone. Their clients, co-defendants Jorge Ramirez and Felipe Ramirez, were in custody and appeared in person. After arraignment, Mr. Lijtmaer asked that his client, Jorge Ramirez, be released on his own recognizance, citing, among other reasons, health concerns outlined in a recent letter in Mr. Lijtmaer's possession. The following exchange occurred:

> THE COURT: How am I going to see that letter, if you're not in my courtroom?
>
> MR. LIJTMAER: Well --
>
> THE COURT: How am I going to see that letter if you are not in my courtroom? I'm not going to, am I?
>
> MR. LIJTMAER: As an officer of the court –

THE COURT: All right.

MR. LIJTMAER: -- I'd ask the court to --

THE COURT: Is there anything further? Is there anything further, sir? Anything further, sir?

MR. LIJTMAER: Yes, your honor. I have letters -- Yes. I have letters from both --

THE COURT: Which I cannot see, because you have not come to my courtroom? [¶] All right.

MR. LIJTMAER: Your honor, respectfully, the reason I didn't --

THE COURT: Respectfully? You have not come to the courtroom.

MR. LIJTMAER: Your honor --

THE COURT: All right. So, with that, I'm going to set -- I am going to set -- I am speaking, sir. I am speaking. [¶] We are setting the preliminary hearing at this time for April 13th, for each. Bail is going to be set for Mr. Ramirez, Jorge, for $150,000; and for Felipe at $100,000. [¶] If you have those letters, you can bring those in at the time.

Ms. Steinback asked to be heard and requested that her client, Felipe Ramirez, be released on his own recognizance because, among other reasons, he has a compromised immune system that makes him "particularly vulnerable to the condition --." Before Ms. Steinback finished explaining that her client was vulnerable to complications from COVID-19, which he was more likely to contract if he remained in custody, Judge Connolly asked: "And how do you know this? And how do you know this?" Ms. Steinback responded that she had learned about her client's medical history from his family. The judge replied: "I suggest you bring in that paperwork at the time of the preliminary hearing." Ms.

Steinback said that her client has a family to support and a full-time job that has been deemed essential under the stay-at-home orders, and that he would lose that job if he were not released from custody. Judge Connolly responded as follows:

> Okay. I'm going to stop you there. Because we're done. [¶] All right. I am not releasing either of these people, with these charges. There are multiple charges. If you wished to present this evidence, you should have been here or had someone represent you. [¶] . . . [¶] Bail for Jorge in the amount of $150,000, and for Felipe at $100,000.

In Judge Connolly's response to the preliminary investigation letter, he acknowledged that he "should not have demonstrated irritation or impatience with defense counsel" and that he "spoke too sharply" to them. He asked the commission to "take into account the highly unusual circumstances present at that time." He stated that, as of March 20, 2020, the court had not yet implemented operations to conduct matters remotely, which was becoming necessary due to the public health crisis; it was not yet clear how long the Governor's stay-at-home order would be in effect; and there was no clear guidance about how to handle the attorneys' request to appear telephonically at a criminal proceeding. The commission acknowledges that the circumstances caused by the public health crisis were unusual and presented challenges, but notes that the unusual circumstances and challenges affected the defense attorneys as well as the court. The commission concluded that the initial lack of clarity about how to handle court proceedings during the public health crisis did not excuse or explain the judge's mistreatment of the attorneys.

In his objections to the notice of tentative public admonishment, Judge Connolly objected to the commission's conclusion that his conduct toward the attorneys constituted improper action. He argued that, in *Offutt v. United States* (1954) 348 U.S. 11, 17, the United States Supreme Court said that a "modicum

of quick temper" must be allowed even judges. But the court made that comment in the context of a judge being provoked by contumacious counsel and citing the attorney for contempt. Here, there is no evidence of provocative conduct by counsel. Before the hearing, the attorneys requested, and Judge Connolly granted, permission for them to appear by telephone, due to the stay-at-home order and concern that one of the counsel was experiencing COVID symptoms. At the hearing, Judge Connolly exhibited irritation that Mr. Lijtmaer referred to a letter the judge did not have, but the situation caused by the stay-at-home order arose unexpectedly, through no fault of the attorneys. When Mr. Lijtmaer tried to discuss the letter with the judge, the judge did not allow him to do so.

At his appearance before the commission, Judge Connolly claimed—for the first time—that he spoke with Mr. Lijtmaer on the telephone twice and told Mr. Lijtmaer to send whatever information he had to present to the court before the hearing, but that he had not received anything from Mr. Lijtmaer. Judge Connolly told the commission that, during the telephone arraignment, he did not mention his earlier instruction to Mr. Lijtmaer because he was cognizant of the relationship between the attorneys and their clients who were standing in his courtroom.

First, the commission does not consider new evidence at an appearance, absent certain circumstances not present here.[1] In his response to the preliminary investigation letter, Judge Connolly stated that he spoke to Mr. Lijtmaer once, asked Mr. Lijtmaer if he could find another attorney to appear in his and Ms. Steinback's stead, and told Mr. Lijtmaer that he would make a

[1] Rule 116(b) provides that factual representations not previously presented to the commission during the preliminary investigation will not be considered unless it is shown that the new factual information is either: (1) (a) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (b) could not have been discovered and presented to the commission with reasonable diligence during the preliminary investigation, (2) offered to correct an error of fact in the notice of tentative public admonishment, or (3) necessary to prevent a miscarriage of justice.

decision later that afternoon. The judge further stated that he later instructed his clerk to call Mr. Lijtmaer and inform him that his request to appear telephonically had been granted. There is no mention in the judge's response of any instruction to Mr. Lijtmaer to provide anything to the court before the hearing.

Second, the commission was not persuaded by Judge Connolly's explanation for why, during the telephonic hearing, he did not question Mr. Litjmaer about why he had not provided the letter to the court before the hearing. If Judge Connolly had instructed Mr. Lijtmaer by telephone to provide the court with whatever he had before the hearing, Judge Connolly likely would have brought that up during the arraignment. Instead of asking Mr. Lijtmaer why he had not provided the letter to the court before the hearing, Judge Connolly rebuked him by stating four times that Mr. Lijtmaer had not come to the courtroom. Further, the commission found that, as far as the potential effect of the judge's comments on the attorney-client relationship, there would be no difference between chastising Mr. Lijtmaer in front of his client for not coming to the courtroom and chastising him for not providing a letter before the hearing. Hence Judge Connolly's rationale for not asking Mr. Lijtmaer why he did not provide the letter before the hearing, if the judge had asked him to do so, was not convincing.

Mr. Lijtmaer tried to respond to Judge Connolly's inquiry about how he was going to see the letter if Mr. Lijtmaer was not in his courtroom. When Mr. Lijtmaer said "Your honor, respectfully," Judge Connolly interrupted him with "Respectfully?", which seems sarcastic. Mr. Lijtmaer tried to respond. The judge cut him off again. Similarly, Judge Connolly also interrupted Ms. Steinback, displayed impatience toward her ("And how do you know this? And how do you know this?"), and cut her off ("I'm going to stop you there. Because we're done.") The attorneys, in contrast, appear polite and respectful. There is no apparent justification for the judge's display of impatience and irritation, which he admitted and which is clearly reflected in the transcript of the proceeding.

At his appearance before the commission, Judge Connolly acknowledged that the transcript "looks bad," but he did not acknowledge committing misconduct or display any contrition. Rather, he stated that he did not treat the defense attorneys any differently because they were not in the courtroom.

The commission found that Judge Connolly's poor demeanor toward the defense attorneys violated canon 3B(4) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity), canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities), and canon 2A (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary).

2. *People v. Hall-Singh, et al*.

On August 20, 2018, in *People v. Indra Hall-Singh, Dalisha Monique Jordan, and Eugene C. Germany* (TA145484), after the jury announced its verdict convicting defendants Hall-Singh and Jordan and acquitting defendant Germany, and after the jurors left the courtroom, Judge Connolly said to Mr. Germany:

> . . . let me tell you, you've been given a gift from God because there's no question in my mind that you're guilty of this crime. [¶] Now, with that, though -- well, I'll tell you, chivalry is not dead. If you'd taken the deal, Ms. Jordan would have had that six year deal. She's going to get a lot more time than that. So, you know, take that into consideration. [¶] All right. But you've been given a gift. What you do with it is your choice. Fair enough?

Mr. Germany responded, "Yeah."

At his appearance before the commission, Judge Connolly asserted that it was his "duty" and his "responsibility" as a judge to advise defendant Germany that he had been "given a gift from God" so that Mr. Germany would take advantage of opportunities he has been given. But Judge Connolly said,

"[T]here's no question in my mind that you're guilty of this crime" after the jury had rendered a verdict of acquittal, thereby disparaging the jury's determination that the defendant had not been proven guilty. The jury system is an essential pillar of American democracy. The judge's role in a jury trial is to be neutral. Judge Connolly's remark was likely to undermine public confidence in the independence of the jury and its important role in the justice system.

Further, contrary to Judge Connolly's assertion, a judge does not have a duty to advise a criminal defendant that the defendant has been given the gift of an acquittal. While a judge may encourage a defendant to make better choices and take advantage of opportunities in the future, the judge must not do so at the expense of the jury and its verdict.

Judge Connolly did not demonstrate that he understands why his comments to Mr. Germany were improper. In his objections to the notice of tentative public admonishment, he argued that they were not improper. And at his appearance before the commission, he stated, with regard to those comments, that he thinks what he did "was right" and "what [he] should have done."

The commission found Judge Connolly's remarks to Mr. Germany to be gratuitous, undignified, and improper, in violation of canons 2A and 3B(4).

Judge Connolly's conduct in both cases was, at a minimum, improper action.

In imposing this public admonishment, the commission considered Judge Connolly's prior discipline to be a significant aggravating factor. (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)(e).) In 2016, Judge Connolly received a public admonishment for a course of conduct reflecting embroilment with a criminal defense attorney and for setting multiple post-trial hearings regarding possible contempt charges, which was an abuse of his authority. In 2010, Judge Connolly received a private admonishment for using

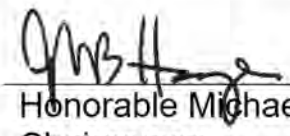
profanity during a judicial profile interview and in chambers discussions with attorneys.

The commission also considered Judge Connolly's failure to fully appreciate his misconduct as an additional aggravating factor. (Policy Declarations of Com. on Jud. Performance, policy 7.1(2)(a).)

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Ms. Sarah Kruer Jager; Ms. Kay Cooperman Jue; Hon. Lisa B. Lench; Nanci E. Nishimura, Esq.; Victor E. Salazar, Esq.; and Mr. Richard Simpson voted to impose the public admonishment. Mr. Eduardo De La Riva and Mr. Adam N. Torres did not participate.

Date: 4/2/2021

On behalf of the
Commission on Judicial Performance,



Honorable Michael B. Harper
Chairperson

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| IN THE MATTER CONCERNING<br>JUDGE MICHAEL J. O'GARA | DECISION AND ORDER IMPOSING<br>PUBLIC ADMONISHMENT |

This disciplinary matter concerns Judge Michael J. O'Gara, a judge of the Los Angeles County Superior Court since 2009. His current term began in 2021. Pursuant to rule 116 of the Rules of the Commission on Judicial Performance, Judge O'Gara and his attorney, Paul S. Meyer, appeared before the commission on September 1, 2021, to contest the imposition of a tentative public admonishment issued on June 11, 2021. Judge O'Gara waived his right to formal proceedings under rule 118 and to review by the Supreme Court. Having considered the written and oral objections and argument submitted by Judge O'Gara and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the statement of facts and reasons set forth below.

## STATEMENT OF FACTS AND REASONS

### I. *Facebook activity*

On December 10, 2020, three days after George Gascón was sworn in as the new District Attorney of Los Angeles County, Judge O'Gara used his personal Facebook account to join a recently-created Facebook group called "Recall George Gascón," and added his family members to the group.

In December 2020, Judge O'Gara posted on the group page, "[George Gascón] took an oath to uphold and defend the constitution of the state of California … He is blatantly violating Section 28(f)(4) in dismissal of any prior enhancements."

Judge O'Gara also posted, then later removed, comments that engaged with group members in response to other members' posts. Judge O'Gara's

comments included: (1) responding to the group administrator's post, "I don't know about the rest of you, but every election I am guilty of not paying attention to the Judges running. Now, I definitely will, especially after Gascón's own staff is talking about 'flipping the bench' etc. Some of the judges are fighting Gascóns [*sic*] directives and we need them to stay. They are heroes"; and (2) engaging in discussion with group members in response to another post by the group administrator, ostensibly quoting a prosecutor on a victim's right to be heard. The judge's comments, though later removed, were visible to at least 16,000 group members at the time they were made.

Judge O'Gara also "liked" the following comments by other group members: (1) regarding a complaint about a deputy district attorney implementing the district attorney's directives, "[Deputy District Attorney] Bob [Sherwood] was only doing what all the other Head Deputies are doing. He is being scapegoated here. But that's why he gets paid Grade 5 pay I guess"; and (2) regarding efforts to oust the elected district attorney, "Please let me know what I can do to help with this person's run. I work in court. The morale is extremely low."

The commission determined that Judge O'Gara's Facebook activity gave the appearance of bias against the Los Angeles County District Attorney. The judge was an active participant in a group with more than 16,000 members, formed to oppose an elected official, giving the appearance that he endorsed the group's stated goals and activity. Judge O'Gara posted remarks expressing a partisan viewpoint, and "liked" other users' comments expressing similarly partisan viewpoints.

The commission found that the judge's defense that he did not intend his social media activity to act as an endorsement of any specific partisan positions was not vindicating. "Likes" are, on their face, indicia that a person likes content. Further, Facebook is a forum with over one billion active monthly users, each of whom may, if they wish, screenshot or share content generated by another user.

Once Judge O'Gara commented on a Facebook post, he effectively distributed material to an unlimited number of persons, over whose actions he had no control.

Additionally, because Judge O'Gara heard cases prosecuted by the district attorney's office at the same time he participated in the group, Judge O'Gara's Facebook activity constituted making public comments about pending or impending proceedings in a court.

In his response to the commission, Judge O'Gara acknowledged that his actions on Facebook were "inappropriate," expressed contrition, and, in December 2020, removed himself from the Facebook group.

Judge O'Gara's participation in the "Recall George Gascón" Facebook group constituted a failure to refrain from engaging in political activity that may create the appearance of political bias or impropriety (canon 5); to refrain from making a public comment about a pending or impending proceeding in any court (canon 3B(9)); to conduct all of his extrajudicial activities so that they do not cast reasonable doubt on his ability to act impartially or demean the judicial office (canon 4A); and to participate in establishing and maintaining high standards of conduct (canon 1). Judge O'Gara's conduct was also inconsistent with his obligations to act, at all times, in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and constituted making statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office (canon 2A).

II. *Twitter activity*

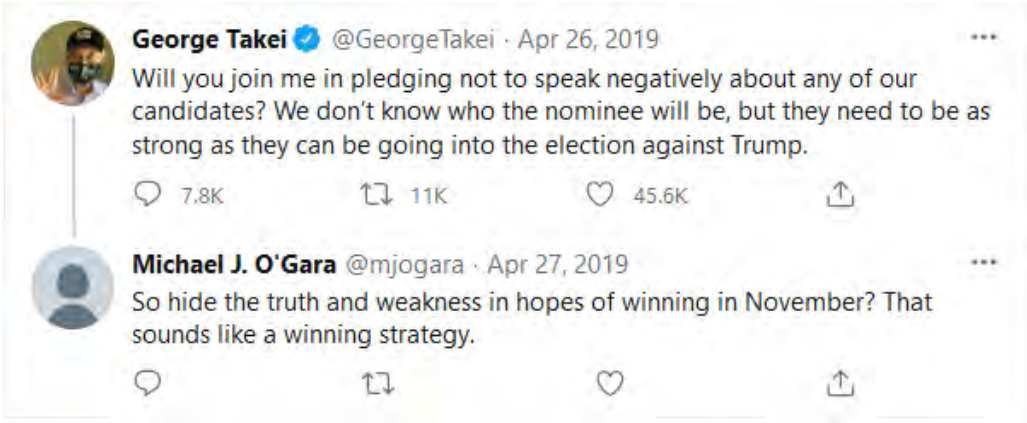
Judge O'Gara also maintained a public Twitter account, with the username @mjogara and display name "Michael J. O'Gara." Judge O'Gara's followers on Twitter included the official account for the City of Glendale, at least one Los Angeles County deputy district attorney, and multiple private attorneys. Between

2014 and 2021, Judge O'Gara posted remarks ("tweets"), re-tweeted content, or liked tweets by other users that contained partisan viewpoints on controversial issues, suggested bias against particular classes of people, and were undignified and indecorous.

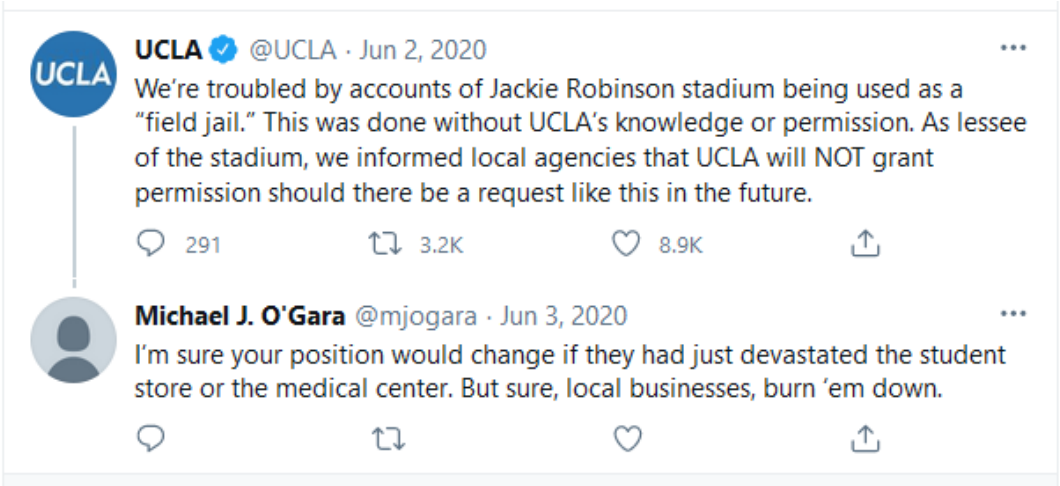
Several of Judge O'Gara's tweets appeared to reflect strong political points of view.



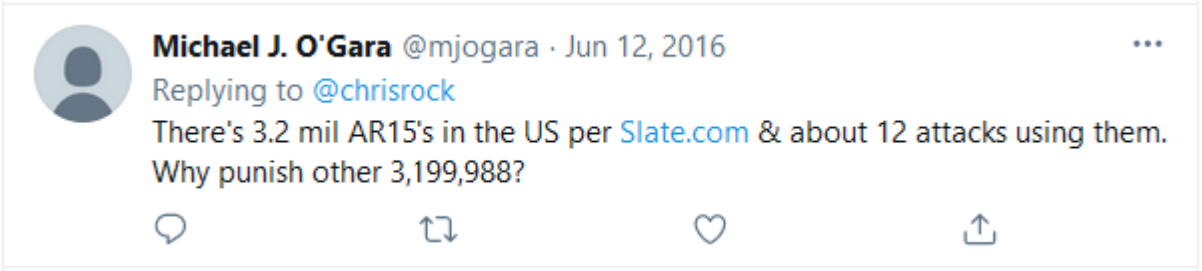



One tweet appeared critical of Black Lives Matter supporters who were exercising their First Amendment right to protest.



One tweet suggested a partisan viewpoint on the controversial issue of gun control.




Another tweet was undignified and indecorous.




Judge O'Gara also liked tweets by other users that appeared to reflect strong political points of view and opinions on controversial issues.






Judge O'Gara liked a tweet by another user that suggested racial bias against people of Chinese descent.



Judge O'Gara liked tweets that were seemingly critical of those exercising their First Amendment right to protest, such as supporters of the Black Lives Matter movement.




Several tweets the judge liked appeared to convey bias against victims of sexual assault and disdain and disrespect for women.









Other tweets liked by Judge O'Gara gave the appearance of opposition to immigrants and appeared to reflect strong political points of view and opinions on a controversial issue.



Other tweets that the judge liked suggested a partisan viewpoint on the controversial issue of police reform.




Judge O'Gara also liked a tweet that appeared to convey an anti-Muslim sentiment and gave the appearance of criticizing the First Amendment right to protest exercised by participants in Women's March.



Another tweet that Judge O'Gara liked seemed to express an opinion on the controversial issue of the death penalty.




Judge O'Gara's social media activity gave the appearance of bias. He posted undignified, indecorous remarks in response to public figures, and appeared to espouse partisan and controversial viewpoints.

The commission found that the judge's defense that he did not intend his social media activity to act as an endorsement of any specific partisan positions or controversial viewpoints was not vindicating. "Likes" are, on their face, indicia that a person likes content. In addition to the judge's original tweets, the Twitter content Judge O'Gara "liked" reflected the appearance of bias, regardless of his intent. Further, Twitter is a forum with over three hundred million active monthly users, each of whom may, if they wish, screenshot or share content generated by another user. Once Judge O'Gara tweeted or re-tweeted content, he effectively distributed material to an unlimited number of persons, over whose actions he had no control. That Judge O'Gara's followers on Twitter included the official account for the City of Glendale, at least one Los Angeles deputy district

attorney, and multiple private attorneys, compounded the harm done by his social media activity.

> Public involvement on either side in ongoing debates about controversial social and political issues is improper. Such issues (e.g., abortion and same-sex marriage) are frequently the subject of public debate and litigation. A judge who is politically active may be perceived to have prejudged issues that may come before the courts. Public involvement politicizes the judicial institution, demeans the judiciary, and impairs judicial independence and impartiality.

(Rothman, Cal. Judicial Conduct Handbook (4th ed. 2017) § 10:33, pp. 699-700.)

In his response to the commission, Judge O'Gara accepted that his actions on Twitter were inappropriate, expressed contrition, and advised the commission that he took corrective action by deleting the Twitter app from his phone and deactivating his account.

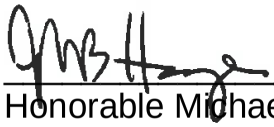
The commission determined that Judge O'Gara's Twitter activity constituted a failure to conduct all of his extrajudicial activities so that they do not cast reasonable doubt on his ability to act impartially or demean the judicial office (canon 4A); to participate in establishing and maintaining high standards of conduct (canon 1); and to act, at all times, in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and constituted making statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office (canon 2A).

Judge O'Gara's conduct was, at a minimum, improper action.

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Mr. Eduardo De La Riva; Ms. Kay Cooperman Jue; Victor E. Salazar, Esq.; and Ms. Beatriz E. Tapia voted to impose the public admonishment. Hon. William S. Dato; Hon. Lisa B. Lench; Rickey Ivie, Esq.; and Mr. Richard Simpson voted for a

private admonishment. Commission member Ms. Sarah Kruer Jager did not participate.

Date: September 14, 2021



Honorable Michael B. Harper
Chairperson

PRESIDING JUSTICE ARLEIGH M. WOODS
CHAIRPERSON

MR. ANDY GUY
VICE CHAIRPERSON
JUSTICE EUGENE M. PREMO
JUDGE INA LEVIN GYEMANT
JUDGE WILLIAM A. MASTERSON
JUDGE FRANCISCO F. FIRMAT
P. TERRY ANDERLINI, ESQ.
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JACK E. FRANKEL
DIRECTOR-CHIEF COUNSEL

September 27, 1989

Honorable Bruce A. Clark
Judge of the Municipal Court
Ventura County Municipal Court District
800 South Victoria Avenue
Ventura, CA 93009

Dear Judge Clark:

At its August 1989 meeting, the Commission on Judicial Performance determined that you should be publicly reproved for the conduct set forth below.

The conduct which is the subject of the public reproval is as follows:

In June 1988, in your home, Assemblywoman Cathie Wright spoke with you about two traffic tickets received by her daughter. These cases were pending in your court. Based on that communication, you took several judicial actions in chambers: (1) You struck the requirement that the defendant appear in court on the tickets. (2) You permitted defendant to attend traffic school in connection with both tickets. (3) You ordered that both speeding counts be dismissed upon receipt of a traffic school certificate.

Because the communication from Assemblywoman Wright was in your own home, and because your judicial acts were in chambers, the prosecutor had no opportunity to participate in these proceedings, nor had the public any opportunity to observe them. The judicial decisions you made, though lawful, were unusually lenient.

This conduct warranted discipline under Article VI, section 18(f)(2) of the California Constitution. In particular, it violated the California Code of Judicial Conduct, including the following provisions:

> Canon 2A: Judges should respect and comply with the law and should conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> Canon 2B: Judges should not allow their families, social, or other relationships to influence their judicial conduct or judgment. Judges should not. . . convey or permit others to convey the impression that they are in a special position to influence them.
>
> Canon 3A(4): Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. . .

In determining that a public reproval would be adequate discipline, the commission considered your lengthy service without discipline and your recognition that you should have handled the matter differently. The commission also considered that the incident appeared to be isolated. This public reproval is being issued with your consent.

Very truly yours,

Jack E. Frankel

JACK E. FRANKEL

JEF:JP:pmh

PRESIDING JUSTICE ARLEIGH M. WOODS
CHAIRPERSON

MR. ANDY GUY
VICE CHAIRPERSON
JUSTICE EUGENE M. PREMO
JUDGE INA LEVIN GYEMANT
JUDGE WILLIAM A. MASTERSON
JUDGE FRANCISCO F. FIRMAT
P. TERRY ANDERLINI, ESQ.
DENNIS A. CORNELL, ESQ.

State of California
Commission on Judicial Performance
1390 Market Street, Suite 304
San Francisco, CA 94102
(415) 557-2503

JACK E. FRANKEL
DIRECTOR-CHIEF COUNSEL

November 29, 1989

Honorable Calvin P. Schmidt
c/o Thomas R. Malcolm, Esq.
WYMAN BAUTZER KUCHEL & SILBERT
2600 Michelson Drive, Suite 700
Irvine, CA 92715

Dear Judge Schmidt:

Following a five-day hearing before three special masters appointed by the Supreme Court to inquire into charges against you, the commission considered the record of the hearing and the report of the special masters and ordered you publicly reproved for conduct warranting discipline as follows:

> Judge Schmidt twice ordered the release from custody of one Terri Ann McMullen, the stepdaughter of Judge Schmidt's friend, Robert Guggenheim. Judge Schmidt's first release of McMullen followed another judge's denial of McMullen's motion for an O.R. release or a bail reduction. Before Judge Schmidt's second release of McMullen, McMullen had failed to appear in court and had been arrested on new charges, and the aggregate bail settings exceeded $50,000. The obvious and sole reason for Judge Schmidt's actions was his friendship with McMullen's step-father. Judge Schmidt's O.R. releases of McMullen were arbitrary and capricious exercises of Judge Schmidt's judicial discretion and undermined public confidence in the integrity and impartiality of the judiciary. (See Canon 2, California Code of Judicial Conduct.)

Judge Schmidt made political contributions from his own campaign funds to non-judicial candidates in patent violation of Canon 7 of the Code of Judicial Conduct.

Judge Schmidt had been charged with providing preferential treatment to a friend who appeared before him. It was found that the case disposition was not unusual under existing Harbor Court policy.

Judge Schmidt had been charged with providing preferential treatment in exchange for sexual favors to a prostitute who had appeared before him. No evidence was introduced as to the exchange of sexual favors, and there was evidence that the case disposition was not unusual.

ARLEIGH WOODS, CHAIRPERSON
Commission on Judicial Performance

EXPRESS MAIL

PRESIDING JUSTICE ARLEIGH M. WOODS
CHAIRPERSON

MR. ANDY GUY
VICE CHAIRPERSON
JUSTICE EUGENE M. PREMO
JUDGE INA LEVIN GYEMANT
JUDGE WILLIAM A. MASTERSON
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JACK E. FRANKEL
DIRECTOR-CHIEF COUNSEL

December 11, 1989

Honorable Glenda Doan
Judge of the Justice Court
Corcoran Justice Court District
1001 Chittenden Avenue
Corcoran, California 93212

Dear Judge Doan:

At its November 1989 meeting, the Commission on Judicial Performance determined that you be publicly reproved for the conduct set forth below.

From January 3, 1983, to the present you have served as a judge of the Justice Court of the Corcoran Judicial District. In that same period you have continued the private practice of law, as the law permits.

From the time you became a judge through 1986, you received numerous sums of money from a client of your law practice. These sums, which exceeded $75,000, were not paid for legal services. You have variously described the money as gifts, loans, and income. You did not advise your client to obtain independent counsel before paying you the money, nor did you make the written disclosures required by the State Bar Rules of Professional Conduct, rule 3-300 (formerly rule 5-101). You did not inform the law firm where you worked that you were receiving these sums. You failed to disclose the payments on public Statements of Economic Interests filed in 1985 and thereafter.

This conduct warranted discipline under Article VI, section 18(f)(2) of the California Constitution. In particular, it was conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

In determining that a public reproval would be adequate discipline, the commission considered that the conduct occurred entirely off the bench. There was no evidence that your performance as a judge was in any way compromised. The commission also considered the great remorse you have expressed and your long record of civic service. This public reproval is being issued with your consent.

Very truly yours,

Jack E. Frankel

JACK E. FRANKEL

JEF:ng

PRESIDING JUSTICE ARLEIGH M. WOODS
CHAIRPERSON

ANDY GUY
CE CHAIRPERSON
JUSTICE EUGENE M. PREMO
JUDGE INA LEVIN GYEMANT
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JACK E. FRANKEL
DIRECTOR-CHIEF COUNSEL

December 15, 1989

Honorable John Schatz, Jr.
Santa Clara County Superior Court
270 Grant Avenue
Palo Alto, California 94306

Dear Judge Schatz:

At its November, 1989 meeting, the commission determined that you should be publicly reproved for the conduct set forth below.

The conduct which is the subject of the public reproval is as follows:

1. On the morning of July 11, 1989, you went to the chambers of Judge James L. Browning, Jr., of the San Mateo County Municipal Court, to discuss a criminal case against your son, Christopher Schatz, charging violation of Health and Safety Code Section 11364 (possession of narcotics paraphernalia). The case was calendared for arraignment that morning. Your son did not appear. You identified yourself to Judge Browning as a Santa Clara Superior Court judge, and engaged him in discussion of your son and your son's case.

Deputy District Attorney Marta Diaz entered chambers at the request of Judge Browning shortly before 9:00 a.m. You, DDA Diaz, and Judge Browning discussed the possibility of diversion, and the sentence which would be given on a guilty plea. You asked whether a lower fine than that indicated might be given. On your request, you were given diversion papers. DDA Diaz pointed out to you that you could not appear for your son. The arraignment was continued one week, to July 18, 1989.

On July 18, 1989, you again appeared in court on your son's behalf. You approached the bench and began speaking to Commissioner Gruber. When DDA Diaz saw you conversing with Commissioner Gruber, she went to the bench. You were asking Commissioner Gruber to enter a plea of not guilty on your son's behalf and continue the matter as long as possible. Noting that your son was not present, DDA Diaz asked that a bench warrant issue. This request was placed on the record and taken under submission by the commissioner.

2. On August 22, 1989, the Commission on Judicial Performance sent you a preliminary investigation letter requesting your comment on the incident reported above, and asking the following question:

> "The commission also wishes to know whether you have ever contacted any other judge, court commissioner, court, law enforcement agency, or prosecutorial agency on your son's behalf regarding any charges against him. Please explain."

In a letter dated September 13, 1989, you responded to this inquiry as follows:

> "In answer to the 'have you ever' question on page 2, my answer is 'no.'"

Your response to the commission was false, for you had previously contacted the District Attorney in Santa Clara County regarding another criminal case against your son, as described in Count 3, below.

When asked about this inconsistency, you offered the explanation that you interpreted the commission's question "as referring to any other officials in San Mateo County where the events in question had taken place."

3. In early December, 1988, you telephoned District Attorney Leo Himmelsbach and asked to meet with him. He agreed to meet you for breakfast on December 13, 1988. At the meeting, you told DA Himmelsbach about a Santa Clara County burglary case against your son which you believed was a weak case. You told DA Himmelsbach that your son wished to enter the military, but could not do so unless the charge against him was dismissed. DA Himmelsbach told you that in his experience military recruiters would sometimes come to court or write letters for defendants; he also said that in his experience, the military refused to accept defendants who were on probation, but did not make dismissal of charges a condition of acceptance. DA Himmelsbach agreed to bring the case to the attention of Deputy District Attorney Tom Ferenholz.

DDA Ferenholz represented the prosecution in court on December 15, 1988. No military recruiter appeared in court. When counsel went into chambers to discuss the case with Municipal Court Judge Hanifan, you also went into chambers. DDA Ferenholz suggested that the matter be continued for some further checking. However, on the representation that your son would be entering military service immediately and that dismissal of the case was a prerequisite to enlistment, the

burglary charge was dismissed pursuant to Penal Code Section 1385. Although your son apparently took some steps toward enlistment thereafter, he ultimately did not enter military service.

In determining that a public reproval would be adequate discipline, the commission considered your recognition that your conduct was inappropriate, and your assurance that such conduct would not be repeated.

Very truly yours,

Jack E. Frankel

JACK E. FRANKEL
Director-Chief Counsel

JEF:bw

PRESIDING JUSTICE ARLEIGH M. WOODS
CHAIRPERSON

MR. ANDY GUY
[illegible]E CHAIRPERSON
[illegible]ICE EUGENE M. PREMO
[illegible]E INA LEVIN GYEMANT
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JACK E. FRANKEL
DIRECTOR-CHIEF COUNSEL

June 19, 1990

Honorable Raymond D. Mireles
Los Angeles County Superior Court
North West District
6230 Sylmar Avenue
Van Nuys, CA 91401

Dear Judge Mireles:

The commission has investigated charges that on November 6, 1989 you gave official directions to two Los Angeles police officers which appeared to authorize their use of force to obtain the presence of Deputy Public Defender Howard Waco in your court. The commission has concluded its investigation, and at its June, 1990 meeting, determined to impose a Public Reproval for certain of your conduct as described in the following Investigative Findings:

## Investigative Findings

The commission found that on November 6, 1989, in connection with Judge Mireles's handling of the case of People v. Smith, Judge Mireles exhibited exasperation at the absence from his court of defendant Smith's attorney, Deputy Public Defender Howard Waco, and directed two Los Angeles police officers to bring Deputy Public Defender Waco into his court, adding they should bring "a piece of" or "a body part" of Waco to his courtroom. These directions apparently created in the officers the impression and belief that Judge Mireles had authorized their use of physical force.

In carrying out what they perceived to be Judge Mireles's directions, the officers employed physical force to remove Deputy Public Defender Waco from another courtroom and to convey him to and deliver him into Judge Mireles's courtroom.

Judge Mireles witnessed the officers' forcible delivery of Deputy Public Defender Waco into his courtroom, but made no inquiry of Mr. Waco or of the officers regarding their actions, and appeared to ignore Mr. Waco's attempts to discuss the officers' actions. This contributed to an appearance that Judge Mireles had authorized the police officer's use of force.

The officers' use of force to obtain Deputy Public Defender Waco's attendance in Judge Mireles's court and the appearance that Judge Mireles had authorized the officers' use of force were conveyed to the public through extensive media coverage.

The commission found that Judge Mireles did not intend to authorize or direct the use of force by the officers, but found that Judge Mireles had been careless in the manner in which he had directed the officers by making remarks which he considered jocular but which were capable of being, and apparently were, misunderstood.

The commission found further that Judge Mireles earlier had taken certain actions toward the Public Defenders regarding their appointments as counsel and their continued representation in certain cases, and the Public Defenders had perceived these actions as hostile. The earlier actions involved legal questions arising from Judge Mireles's opinion with respect to effects of the public defender's court staffing practices on court business in Judge Mireles's department; the legal issues involved were appropriately addressed and resolved. This background had further contributed to an appearance that Judge Mireles had authorized or directed the police offiders' use of force toward Deputy Public Defender Howard Waco. (The commission made no findings regarding the propriety or correctness of the earlier actions themselves.)

In imposing a public reproval, the commission noted that Judge Mireles has acknowledged responsibility for having made remarks which apparently were misunderstood as authorizing the officers' use of force, and that he has expressed regret for having made the remarks and for the ensuing mistreatment of Deputy Public Defender Waco.

Very truly yours,

Jack E. Frankel

Jack E. Frankel

JEF:PG:bw

PRESIDING JUSTICE ARLEIGH M. WOODS
CHAIRPERSON

MR. ANDY GUY
CHAIRPERSON
JUSTICE EUGENE M. PREMO
JUDGE INA LEVIN GYEMANT
JUDGE WILLIAM A. MASTERSON
JUDGE RUTH ESSEGIAN
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JACK E. FRANKEL
DIRECTOR-CHIEF COUNSEL

August 13, 1990

Honorable Glenda K. Doan
Judge of the Justice Court
Corcoran Judicial District
1001 Chittenden Avenue
Corcoran, CA 93212

Dear Judge Doan:

At its August 1990 meeting, the commission determined that you should be publicly reproved for the conduct set forth below.

1. In 1988, an acquaintance approached you privately and asked you to help obtain the release of a relative who had just been arrested for serious crimes of violence. Because he was under the age of 18, the defendant was within the exclusive jurisdiction of the superior court.

You then telephoned a superior court judge at home and asked him to release the defendant under supervision but without bail. You told him you knew the defendant's family and they were "good people." The judge declined, telling you the request was improper. The next day in court the judge disclosed this telephone call to the defendant and the prosecutor.

You also telephoned the Probation Department to request a deputy probation officer to recommend the defendant's release pending the hearing. The officer refused to do so. A day or two later, you encountered the officer in court and repeated your request, which was again refused.

These activities violated the Code of Judicial Conduct, Canon 2B: "Judges should not lend the prestige of their office to advance the private interest of others. . ."

2. On December 26, 1989, the commission sent you a letter requesting your comment on the charge that you tried to help the defendant gain his release. In a letter dated February 12, 1990, you stated that your acquaintance "asked Judge Doan whether the relative would be kept from going to college. Judge Doan simply agreed to check on the status of the case, and answer the question. . . Judge Doan made no other efforts on behalf of the defendant. . ."

This response was false.

In determining that a public reproval would be adequate discipline, the commission considered your ultimate recognition that your conduct was inappropriate, and your assurance that it would not be repeated.

Very truly yours,

Jack E. Frankel

JACK E. FRANKEL

JEF:bw

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May 29, 1992

Honorable Steven Hintz
P.O. Box 6489
Ventura, California 93006

Dear Judge Hintz:

Following an investigation and the institution of formal proceedings, the Commission on Judicial Performance determined to issue a Public Reproval for the conduct set forth below:

I

On November 15, 1990, Judge Hintz abused his judicial authority by planning and executing a detention, search and warrant check of citizens lawfully present in the courtroom. The citizens were improperly detained, without reasonable suspicion or exigent circumstances, and subjected to unwarranted personal searches. The detained citizens were also improperly required to provide identification. These actions exceeded Judge Hintz's lawful authority and violated the citizens' constitutional rights.

II

At the conclusion of the trial in People v. Rodriquez in July 1990, Judge Hintz criticized the jurors for their verdict. Judge Hintz's comments regarding the verdict were improper and contrary to the Standards of Judicial Administration. Judge Hintz also improperly detained the jurors after their verdict, requiring them to sit through a separate hearing regarding the defendant. This appeared punitive of the jury and calculated to humiliate the defendant.

III

After the trial of People v. Lopez in August 1990, Judge Hintz attempted to use his judicial office for an improper

personal purpose. The prosecution and defense had concluded there were valid grounds for a new trial. They submitted a stipulation to Judge Hintz, to which he attempted to add the following exculpatory language: "It is further stipulated that Judge Steven Hintz committed no legal error or ethical breach in the trial." When the parties refused to stipulate to Judge Hintz's exculpatory language, Judge Hintz granted a new trial on the grounds of prosecutorial misconduct -- grounds which were initiated and advanced by Judge Hintz. These actions constituted improper use of the judicial office for a personal purpose.

Your conduct as described above warranted discipline pursuant to Article VI, Section 18(f)(2) of the California Constitution.

This Public Reproval is being issued with your consent.

Very truly yours,

Victoria B. Henley

VICTORIA B. HENLEY
Director-Chief Counsel

VBH:bk/13873

State of California
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September 8, 1992

Honorable Bruce Van Voorhis
Judge of the Municipal Court
Walnut Creek-Danville Municipal Court
640 Ygnacio Valley Road
Walnut Creek, CA 94596

Dear Judge Van Voorhis:

The Commission on Judicial Performance has determined that you should be publicly reproved for the conduct set forth below:

You created the appearance of prejudgment, contrary to Canon 2A of the Code of Judicial Conduct, on the following occasion:

In November, 1990, in a criminal case, you created the appearance of prejudgment in your discussion of the case in open court by improperly predicting the outcome of the case.

You engaged in unauthorized ex parte communications, contrary to Canon 3A(4) of the Code of Judicial Conduct, on the following occasions:

In December, 1990, in a probation violation matter, you improperly engaged in an unauthorized ex parte communication concerning a pending proceeding when you telephoned an attorney from court. You asked the attorney whether he had advised the defendant, who was appearing before you pro per, that a guilty plea on a charge in another county could result in separate punishment for violation of probation. Your communication gave the appearance of improper interference with an attorney-client relationship.

For several months prior to approximately January, 1991, you engaged or attempted to engage in unauthorized ex parte communications concerning pending cases by personally making telephone calls to defendants who did not appear in court; you

explained to the commission that your purpose was to reschedule the defendants' appearances and that you were able to reschedule appearances.

You failed to fulfill your judicial responsibility to be patient, dignified and courteous to those with whom you deal in an official capacity, contrary to Canon 3A(3) of the Code of Judicial Conduct, on the following occasions:

In two criminal cases in May, 1989 and April, 1990, your conduct during questioning of a potential juror in each case caused that person to perceive a lack of sensitivity and to feel intimidated by your questioning.

In October, 1991, when arrangements for the loaning of the neighboring court reporter faltered, you entered the adjoining courtroom through a side door wearing your judicial robe and immediately directed that the court reporter be sent to your courtroom. Your inappropriate interruption of the proceedings was an abuse of authority.

On two occasions, you gave directions to your court staff in a manner which was perceived as harsh.

In two criminal cases in December, 1989 and December, 1990, you used a sarcastic and intimidating tone toward the attorneys appearing before you when they requested continuances.

You impaired public confidence in the integrity of the judiciary and brought the judiciary into disrepute through the following conduct:

Prior to your election campaign in 1986, you and your wife were divorced, but continued to live together. During your first judicial election campaign in 1986, you referred to her as "my wife[11] in your literature and in public. In making that reference, you misinformed the public of your actual marital status.

The above conduct warranted discipline under Article VI, section 18(f)(2) of the California Constitution. In particular, it was conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

In determining that a public reproval would be adequate discipline, the commission considered the absence of prior discipline, your recognition that you should have handled the

incidents differently, and your assurance that this conduct will not be repeated. This public reproval is being issued with your consent.

Very truly yours,

Victoria B. Henley

VICTORIA B. HENLEY
Director-Chief Counsel

VBH:bw/14761

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September 14, 1992

Honorable Craig Kamansky
San Bernardino County Superior Court
351 N. Arrowhead Avenue
San Bernardino, CA 92415-0240

Dear Judge Kamansky:

The Commission on Judicial Performance has determined that you should be publicly reproved for the following conduct:

> In the course of a commission investigation concerning his off-bench conduct, Judge Craig Kamansky was asked by the commission to supply certain videotapes. The judge agreed to supply the tapes, but before doing so, he deliberately overtaped them. When asked by the commission about the altered videotapes, the judge repeatedly denied the deliberate overtaping. When presented with evidence to the contrary, the judge ultimately admitted his misrepresentations.
>
> Judge Kamansky's actions constituted conduct prejudicial to the administration of justice that brings the judiciary into disrepute. The conduct was committed in bad faith.

This public reproval is being issued with your consent.

Very truly yours,

Victoria B. Henley

VICTORIA B. HENLEY
Director/Chief Counsel

VBH:bw

State of California
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June 21, 1993

Honorable Gary T. Friedman
Judge of the Superior Court
County of Kern
1415 Truxtun Avenue
Bakersfield, CA 93301

Dear Judge Friedman:

After a hearing before Special Masters, the Commission on Judicial Performance has determined that you should be publicly reproved for the following conduct:

1. In September 1987, a defendant who was representing himself in a felony criminal proceeding appeared before Judge Friedman for sentencing. The defendant told the judge he had been unable to read the probation report in part because he had observed and smelled a snake outside his cell. He told the judge that fear of snakes outside his prison cell had kept him awake at night. For the purpose of playing a joke on the defendant, the judge caused the head of a rattlesnake, enclosed in a plastic ball, to be displayed to the defendant when he was locked in a holding cell, causing an emotional outburst.

2. In October 1987, a defendant who was in custody appeared before Judge Friedman for trial. The judge was well aware of the defendant's obsession with a famous TV personality. The judge obtained a publicity photograph of the personality. He then pressured a court employee into writing on the photograph a personal inscription, purportedly from the personality to the defendant. The inscription was designed to play on the defendant's bizarre obsession. The judge caused the photograph to be passed to the defendant. His purpose in these actions was to play a joke on a vulnerable prisoner.

The commission determined that these actions constituted wilful misconduct in office (California Constitution, Article VI, section 18(c).)

The commission noted and approved this commentary by the Special Masters:

> The Special Masters recognize that humor and levity can oftentimes reduce tension in the courtroom. When appropriate, humor can assist in humanizing the otherwise intimidating atmosphere of our courts, and may even assist in improving communications between the judges, attorneys and litigants. However, humor at the expense of another, or humor intended or likely to demean or belittle another is unacceptable. This is particularly true when the object of the joke is someone who has been deprived of his liberty and who is submitting to the jurisdiction of the Court.

In determining that a public reproval was appropriate, the commission noted that these two incidents occurred more than five years ago. There is no indication that the judge has engaged in any further conduct of this kind.

The Special Masters and the commission also considered charges relating to the judge's conduct in People v. Pitts, a trial occurring in 1985. The commission declined to take action and dismissed these charges.

This public reproval is issued with Judge Friedman's consent.

Very truly yours,

Victoria B. Henley

Victoria B. Henley
Director/Chief Counsel

VBH:bw/16699

State of California
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September 13, 1993

Honorable James M. Slater
Judge of the Superior Court
County of Santa Barbara
1100 Anacapa Street
Santa Barbara, CA 93101

Dear Judge Slater:

The Commission on Judicial Performance has determined that you should be publicly reproved for the following conduct:

"On April 21, 1993, Judge Slater returned to the Santa Barbara courthouse parking lot after the lunch hour to find a van parked in his reserved parking space. Judge Slater parked in a space reserved for someone else and went into the courthouse, where he contacted the court administrator and said that he wanted the van towed. Judge Slater then returned to the parking lot, where he deflated the right front tire of the van. The van in question belonged to a handicapped person.

Findings of misconduct in formal proceedings must be established by clear and convincing evidence. In this case, there was sufficient evidence to support a finding that Judge Slater deflated the right front tire of the van. However, there was not sufficient evidence to establish that Judge Slater was aware that the van belonged to a handicapped person, or to establish that he made any comment which might have indicated such awareness. There also was not sufficient evidence to establish that Judge Slater later denied deflating the tire.

Judge Slater has offered that he was upset about previous incidents in which his parking space had been usurped, and about a previous vandalism of his automobile. Judge Slater has presented as justification that his intent was to keep the van in the parking lot until it could be cited and towed. The commission found that these concerns did not justify Judge Slater's conduct.

After conducting an investigation of the incident, the Santa Barbara County District Attorney issued a report concluding that Judge Slater had engaged in unjustified tampering with a vehicle within the meaning of Vehicle Code Section 10852, but stating that the matter would not be prosecuted.

The commission found, and Judge Slater agreed, that Judge Slater's conduct was contrary the California Code of Judicial Conduct. Canon 2 of the California Code of Judicial Conduct provides that a judge "should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 1 of the Code of Judicial Conduct provides that a judge "should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary will be preserved."

The commission noted that the judge's conduct had led to extensive negative publicity tending to diminish public confidence in the judiciary and bring the judiciary into disrepute.

In mitigation, the commission took into account Judge Slater's lengthy service without discipline and noted that the incident appeared to be an isolated one and that Judge Slater had admitted his misconduct and had expressed remorse. The commission considered that Judge Slater had apologized to the owner of the van, and had met with an organization of disabled persons to discuss improving access to public buildings and the sensitivity of government employees to problems of the handicapped."

This public reproval is being issued with your consent.

Very truly yours,

Victoria B. Henley

Victoria B. Henley
Director-Chief Counsel

VBH:bw

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February 14, 1994

Honorable James L. Stevens, Jr.
Judge of the Superior Court
County of Yolo
725 Court Street, Room 207
Woodland, CA 95695

Dear Judge Stevens:

The Commission on Judicial Performance has determined that you should be publicly reproved for the following conduct:

"1. Judge Stevens, while presiding over cases, has made improper and offensive remarks:

For example, in a well-publicized civil case decided in 1991, a parental rights suit which involved a sperm donor, Judge Stevens made denigrating remarks about parties to the case, as follows:

In inquiring about the obligation for child support, Judge Stevens trivialized the relationships involved by mischaracterizing them when he set forth a hypothetical scenario wherein one of the litigants called the other party to the case "sweetheart". Judge Stevens stated, "She said to him, sweetheart make me a baby...", despite the absence of a romantic relationship between the parties.

In the same case, Judge Stevens also stated, "As I look at it, I frankly get the very distinct impression that this child is conceived as a sort of a toy for the mother and her friend, something to fill their lives up and to hell with the needs of the child and to hell with the rights of the father."

In another example, following a hearing and court appearance by a male defendant in a criminal case in May of 1993, Judge Stevens commented about the defendant to the female clerks in the courtroom, "Ladies, how would you like to wake up with that naked in your bed?" or words to that effect.

2. Judge Stevens used language and engaged in behavior toward members of the court staff which were abusive and demeaning.

This behavior included his discontinuing the services of his court reporter of some seven years as his official court reporter after presenting her with a partially rotten zucchini which to some observers conveyed a sexual connotation. The judge later joked about the incident and appeared to trivialize the employee's concern.

The commission found that Judge Stevens' conduct was in disregard of the California Code of Judicial Conduct. Canon 1 of the Code of Judicial Conduct provides that a judge "should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary will be preserved." Canon 2 of the Code of Judicial Conduct provides that a judge "should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3 of the Code of Judicial Conduct provides that "a judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."

Extensive publicity over these matters diminished public confidence in the judiciary and brought the judiciary into disrepute.

In mitigation, the judge has acknowledged that he has offended people and has apologized and he has agreed to refrain from further conduct as exemplified herein and to attend appropriate communication and sensitivity classes."

This public reproval is being issued with your consent.

Very truly yours,

Victoria B. Henley

Victoria B. Henley
Director-Chief Counsel

VBH:bw

State of California
Commission on Judicial Performance
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April 11, 1994

Honorable Richard A. Haugner
Judge of the Superior Court
County of Alameda
1225 Fallon St.
Oakland, CA 94612-4293

Dear Judge Haugner:

The Commission on Judicial Performance has determined that you should be publicly reproved for the following conduct:

"On May 27, 1993, Deputy Public Defender Jeffrey Adachi appeared before Judge Haugner at a hearing in People v. Spencer. As Mr. Adachi commenced his argument, Judge Haugner stated:

> COURT: No, no. Listen, you filed your papers. . . . Do you have something to add to those papers which isn't in there, some brilliant case you found somewhere in the Upper Tokyo Reports or somewhere that nobody knows about, tell me about it. Otherwise there is no need to argue over what you already have.

The commission found that Judge Haugner's reference to "Upper Tokyo Reports" reflected insensitivity toward persons of Japanese-American ancestry and was offensive to Mr. Adachi. The commission further found that, regardless of Judge Haugner's intent in making the remark, it was suggestive of racial or ethnic bias.

The commission also determined that Judge Haugner's conduct was contrary to the California Code of Judicial Conduct, i.e., Canon 3 (avoiding appearance of bias or prejudice), Canon 2 (preserving public confidence in the judiciary), and Canon 1 (maintaining high standards of conduct).

The commission noted that Judge Haugner's conduct had led to negative publicity tending to diminish public confidence in the judiciary and bring the judiciary into disrepute."

This public reproval is being issued with your consent.

Very truly yours,

Victoria B. Henley

Victoria B. Henley
Director-Chief Counsel

VBH:es/19194

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November 21, 1994

Honorable Michael A. Kanner
Judge of the Municipal Court
Alhambra Municipal Court District
Los Angeles County
150 West Commonwealth Avenue
Alhambra, CA 91801

Dear Judge Kanner:

The Commission on Judicial Performance has determined that you should be publicly reproved for the following conduct:

"For a period of approximately two years, and ending in 1994, Judge Kanner maintained a policy of issuing no-bail bench warrants for all defendants who failed to appear on misdemeanors, despite the fact that the California Constitution and Penal Code Section 1270 et seq. provide that individuals have a right to bail before conviction with limited exceptions. No-bail warrants were issued by Judge Kanner for approximately one hundred to two hundred individuals. One of these individuals, Robert C. Lewis, was a man who had failed to appear in court on an infraction case in which he was charged with failing to have his dog licensed and vaccinated. (Case No. 93M03821) The man was arrested on the warrant and spent four days in jail in March, 1994.

Judge Kanner has stated that he instituted the no-bail policy because the Sheriff's Department routinely cited and released defendants arrested on warrants of less than $2,500 or for whom bail of less than $12,500 was set. In an article which appeared in the Los Angeles Times on March 8, 1994, Judge Kanner was quoted as follows:

> But this is just the tip of the iceberg. This situation has created an uneasy pact: Judges understand that the Sheriff's Department has a definite problem, but a judge represents the people who elect him or her. And the people who keep me in office expect that people who violate the law will be punished. And I can't punish anybody who isn't brought before me.

In his statement to the press, Judge Kanner appeared to suggest that his policy of issuing no-bail warrants on misdemeanor matters was justified by the need to bring people before the court so that they could be punished, despite the fact that the policy constituted a denial of the fundamental right to bail and a failure to exercise judicial discretion in handling the cases before him.

After being asked about his policy by the commission by letter dated May 27, 1994, Judge Kanner stated that he now realized that the no-bail policy was wrong, and recognized that it had resulted in failure to exercise judicial discretion in individual cases. Judge Kanner also stated that the policy was not intended to apply to 'license type' offenses, whether misdemeanors or infractions.

The commission found that Judge Kanner's no-bail policy was in disregard of the California Constitution and Penal Code Section 1270 et seq., and that the judge failed to exercise judicial discretion regarding bail in the cases in which these warrants were issued during the approximately two years his policy was in effect. The commission found that Judge Kanner's policy resulted in the denial of a fundamental right to a considerable number of individuals. With respect to the Lewis case, the commission noted that, at a minimum, Judge Kanner had necessarily failed to review the nature of the charges before issuing the no-bail warrant, since the judge would otherwise have discovered that the warrant was for a failure to appear on a license infraction, to which his 'no bail' policy was not to be applied.

The commission found that Judge Kanner's conduct was contrary to Canons 2A of the Code of Judicial Conduct, which provides that a judge 'should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,' and contrary to Canon 3B(2), which provides that a judge 'should be faithful to the law and maintain professional competence in it,' and that a judge 'should not be swayed by partisan interest, public clamor or fear of criticism.'"

This public reproval is being issued with your consent.

Very truly yours,

Victoria B. Henley

Victoria B. Henley
Director-Chief Counsel

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February 28, 1995

Honorable Thomas P. Breen
Judge of the Superior Court
San Benito County Superior Court
440 Fifth Street, Room 206
Hollister, CA 95023

Dear Judge Breen:

The Commission on Judicial Performance has determined that you should be publicly reproved for the following conduct:

"Judge Breen has engaged in a continuing pattern of failure to dispose of judicial matters promptly and efficiently.

On July 16, 1986, the commission sent Judge Breen an advisory letter concerning an unacceptable delay of 17 months in issuing a decision in American Forest Products Corporation v. Russell. The matter was submitted for decision on January 7, 1985, and a tentative decision was issued on June 2, 1986.

On July 13, 1987, Judge Breen was privately admonished by the commission for: (1) failing to rule for 31 months on a demurrer submitted on November 30, 1984, in Hospital and Institutional Workers' Union Local 250 v. San Benito Hospital District (decision issued June 24, 1987); and (2) failing to file a statement of decision for seven to nine months after submission of proposed statements of decision on September 26, 1985, and November 18, 1985, in Hospital and Institutional Workers' Union Local 250, SEIU AFL-CIO v. San Benito Hospital Workers (decision issued June 13, 1986).

On May 15, 1989, the commission sent Judge Breen another advisory letter for failure to recognize or take steps to correct serious problems in the clerk's office involving the misfiling and loss of legal documents. Judge Breen was referred in that letter to the Training & Consulting Unit of the Administrative Office of the Courts.

Judge Breen has nonetheless continued to delay disposition of judicial matters. There have been submitted matters in his court, involving issues of child and spousal support, marital property disposition, marital dissolution and corporate dissolution, that were ready for disposition but which remained undecided for excessive periods of time, constituting inordinate delay. These cases include the following:

1. Castillo v. Castillo Bros. Feed, Inc. (Tulare County No. 145933). Judge Breen's decision after a request for statement of decision, submitted on July 1, 1992, was not issued until September 27, 1993, almost 15 months later. His ruling on a motion to tax costs, which was submitted on July 9, 1992, was issued on February 19, 1994, more than 18 months later.

2. Marriage of Arena (San Benito County No. 19816). The matter was submitted on September 21, 1993, and was not decided until November 1994, approximately 14 months later.

3. Marriage of Morrison (San Benito County No. 19116). The matter was submitted on January 6, 1993, and was not decided until January 21, 1994, more than 12 months later.

4. Marriage of Quinn (San Benito County No. 16181). The matter was originally submitted on December 13, 1991, and a memorandum decision addressing some, but not all, of the issues was not filed until April 29, 1992, four and one-half months later. The remaining issues were briefed and submitted on October 5, 1992, and findings were issued on some, but not all, of the remaining issues on July 1, 1993, almost nine months later. Objections to the proposed statement of decision were submitted on November 16, 1993, but findings were not issued until March 3, 1994, three and one-half months later.

5. Marriage of McDavid (San Benito County No. 16837). The case was submitted on June 24, 1991, and was not decided until May 11, 1994, almost three years later.

Although inordinate delay in decision making is unacceptable in all cases, Judge Breen's failure to promptly decide family law matters before him was particularly egregious in light of the harm to the parties caused thereby.

During those periods when the above-referenced cases were under submission in Judge Breen's court, and remained undecided in excess of 90 days, he executed salary affidavits pursuant to Government Code section 68210, representing under

penalty of perjury that he had no cases under submission for periods in excess of 90 days. During those periods while there were cases pending and undecided over 90 days after they were submitted for decision, Judge Breen received the salary for his judicial office in violation of California Constitution, Article VI, section 19.

In mitigation, the commission noted Judge Breen's agreement to submit monthly reports to the commission of all cases remaining undecided as of the date of the submission of his salary affidavits. These monthly reports to the commission shall contain the date of submission for each such case and shall be submitted for the next three years from the date of this public reproval."

This public reproval is being issued with your consent.

Sincerely,

Victoria B. Henley

VICTORIA B. HENLEY
Director-Chief Counsel

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Commission on Judicial Performance
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February 28, 1995

Honorable Thomas M. Kelly
Judge of the Justice Court
Alpine Judicial District
P. O. Box 515
Markleeville, CA 96120-0515

Dear Judge Kelly:

The Commission on Judicial Performance has determined that you should be publicly reproved for the following conduct:

"In 1987, before justice court judges were prohibited from practicing law by California Constitution Article VI §17 and Government Code §71607, Judge Kelly became attorney of record for the plaintiff in Okoye v. Citicorp, Los Angeles Superior Court Case No. C 683268. Judge Kelly signed a complaint prepared by a Nevada attorney whose law library and office Judge Kelly sometimes used. Judge Kelly accommodated the Nevada attorney without receiving a fee or promise of fee, and without expecting a fee. The attorney had told Judge Kelly that he intended to handle the case and would file a motion to appear pro hac vice, seeking the court's permission to appear as an out-of-state attorney with Kelly, a California attorney, associated as counsel. However, within a month after the complaint was filed, the Nevada attorney abandoned his plan to file the application, and so advised Judge Kelly.

Because Kelly was counsel of record in Okoye v. Citicorp, the defendant's counsel communicated with Judge Kelly at the Nevada counsel's address. A demurrer to the complaint was filed. Judge Kelly and the Nevada attorney discussed the matter and agreed to stipulate to the demurrer. A first amended complaint was filed; a demurrer to that complaint was sustained, as well. No second amended complaint was filed.

During the spring and summer of 1987, defense counsel contacted Judge Kelly four times to schedule the plaintiff's deposition. Although Judge Kelly informed the Nevada attorney, Judge Kelly did not notify the plaintiff. On one occasion, Judge Kelly told defense counsel that he could not attend a deposition because he was scheduled on a judicial assignment.

No discovery pertinent to the merits of the case was provided to the defense. On July 8, 1987, a motion to compel production of documents was heard. There was no appearance for plaintiff. The court ordered production of the requested documents and ordered sanctions against Judge Kelly and the plaintiff, which were later paid by the Nevada attorney. Judge Kelly never notified the plaintiff.

On August 25, 1987, Judge Kelly appeared at a hearing on defendant's motion to dismiss. This was the first occasion on which the plaintiff and Judge Kelly met with each other. The court ordered the case dismissed for failure to file a second amended complaint, and imposed sanctions of $2,500 on both Judge Kelly and the plaintiff.

A federal complaint signed by Judge Kelly also was filed on behalf of the plaintiff, in April of 1987. It was dismissed for lack of prosecution, and the motion to set the dismissal aside was dismissed without hearing in December 1987.

The plaintiff sued Judge Kelly and the Nevada attorney for breach of contract, fraud, and legal malpractice in their representation of him in the Okoye v. Citicorp case. After a court trial, the court found Judge Kelly and the Nevada attorney liable on the cause of action for legal malpractice. The Nevada attorney was also held liable for breach of contract. Both were ordered to pay a judgment of $351,000. The judgment was affirmed on appeal.

The trial court determined that Judge Kelly, by agreeing that the Nevada attorney would handle the management of the lawsuits in the absence of a court order permitting the Nevada attorney to appear as counsel, after signing the complaints prepared by the Nevada attorney, unlawfully aided and abetted the unauthorized practice of law, contrary to Business and Professions Code § 6126(a) and Code of Professional Responsibility Rule 3-101. The commission finds that by his conduct in the case, including abandoning, for all intents and purposes, a client for whom he was attorney of record, Judge Kelly committed a breach of fiduciary duty and committed legal malpractice. Judge Kelly's conduct constitutes conduct prejudicial to the administration of justice that brings the judiciary into disrepute."

This public reproval is being issued with your consent.

Very truly yours,

Victoria B. Henley

VICTORIA B. HENLEY
Director-Chief Counsel

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February 28, 1995

Honorable Kenneth E. Vassie
Judge of the Municipal Court
Inglewood Judicial District
One Regent Street
Inglewood, CA 90301

Dear Judge Vassie:

The Commission on Judicial Performance has determined that you should be publicly reproved for the following conduct:

"1. On March 28, 1994, Judge Vassie called the case of a defendant charged with driving under the influence. Her attorney, Deputy Public Defender Jason Rubel, stated that he wished to set the matter for a motion to suppress pursuant to Penal Code § 1538.5 and jury trial. The deputy district attorney advised the court that the case was a 'DUI refusal' and that an offer had been made. Judge Vassie then said to the defendant, 'You understand...that the offer that the prosecution has made will not be repeated.' Her attorney said that he had related the offer to the defendant. Judge Vassie replied, 'I am talking to her.' Mr. Rubel said that he objected to the judge talking to his client. This colloquy followed:

THE COURT: What is your authority for that? She has a right to speak to me if I ask her something, and if you interfere with that you are in contempt.

MR. RUBEL: Judge, this is my client. You have no right to speak to her.

THE COURT: Please stand. I'm finding you in contempt for interfering with the lawful process of this court.

You are interrupting me. This is a second count. Is there anything you'd like to say about that; either the interruption of my conferring with this defendant or your interruption?

MR. RUBEL: Judge, I represent her.

THE COURT: Is there anything you wish to say?

MR. RUBEL: Yes. I represent her as her attorney. If you wish to address her you address her through me.

THE COURT: What is your authority for that position?

MR. RUBEL: I am her attorney, Judge.

THE COURT: You are in contempt. You are remanded to the County Jail for 5 days.

Mr. Rubel was released a few hours later. On April 5, Judge Vassie held further proceedings in which he stated that he was vacating any previous action taken against Mr. Rubel.

Judge Vassie's actions constituted an abuse of the contempt power and an interference with the attorney-client relationship between Mr. Rubel and his client. Judge Vassie completely failed to follow proper contempt procedures. He jailed Mr. Rubel immediately, with no hearing or written order of contempt. Judge Vassie, who has been a judge for twenty-six years, was obligated to know or research proper contempt procedures. The contempt power, which permits a single official to deprive a citizen of his fundamental liberty interest without all of the procedural safeguards normally accompanying such a deprivation, must be used with great prudence and caution. It is essential that judges know and follow proper procedures in exercising this power, which has been called a court's 'ultimate weapon.' (See, Furey v. Commission on Judicial Performance (1987) 43 Cal. 3d 1297, 1314; Cannon v. Commission on Judicial Performance (1975) 14 Cal. 3d 678, 694, 696.)

In mitigation, Judge Vassie has acknowledged that he handled the matter improperly, and that he failed to follow proper contempt procedures.

2. Judge Vassie has refused to exercise his discretion to consider traffic school as a possible disposition in traffic matters. Judge Vassie has told traffic litigants requesting traffic school that he did not give traffic school because it was 'a joke,' and that he would not give traffic school until the traffic school system, which the judge characterizes as 'corrupt,' was cleaned up.

In mitigation, Judge Vassie has changed his policy. He now considers traffic school as a possible disposition in traffic matters, and exercises his discretion to grant or deny traffic school on a case-by-case basis.

Judge Vassie's conduct in these two matters was contrary to Canon 2A of the California Code of Judicial Conduct, which provides that a judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and Canon 3B(2), which provides that a judge should be faithful to the law."

This public reproval is being issued with your consent.

Very truly yours,

Victoria B. Henley

VICTORIA B. HENLEY
Director-Chief Counsel

COMMISSION ON JUDICIAL PERFORMANCE
101 Howard Street, Suite 300
San Francisco, CA 94105

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Contact:
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(415)904-3650

FOR RELEASE
March 11, 1996

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# JUDICIAL PERFORMANCE COMMISSION ANNOUNCES THE INSTITUTION OF FORMAL PROCEEDINGS AGAINST JUDGE ALAN E. KLEIN AND REFERRAL OF MATTER TO STATE BAR FOLLOWING JUDGE'S RESIGNATION

On May 11, 1995, the Commission on Judicial Performance announced that it had instituted an investigation concerning Judge Alan E. Klein of the Kern County Municipal Court. After an investigation, the Commission instituted formal proceedings at its January 31-February 1, 1996 meeting.

Judge Klein was charged with two counts of willful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Before being formally served with the notice of formal proceedings, Judge Klein offered to resign from office immediately. He also agreed to stipulate not to seek or accept judicial office, whether by election, appointment or assignment. At the time of his resignation, the Commission was also investigating possible additional charges of misconduct concerning the judge's involvement in a videotape recording made by a private investigator of a witness against the judge in the criminal proceeding against the judge which concluded in November 1995.

If the judge had not resigned, the charges would have been heard by a panel of impartial judges appointed by the Supreme Court. At the hearing, the Commission would have been required to prove the charges by clear and convincing evidence. The judge would have had the right to be represented by counsel, to examine and cross-examine witnesses, and to present evidence of his own. If, after the hearing, the Commission had determined to publicly admonish, censure or remove the judge from office, Judge Klein would have been entitled to seek review by the Supreme Court of the Commission's decision.

Because of the judge's resignation, the Commission has determined to close its proceedings, subject to re-opening if the judge seeks or accepts judicial office.

In view of the seriousness of the allegations and the fact that the judge resigned before the charges had been adjudicated and the remaining investigation completed, the Commission has determined to refer the matter to the State Bar, pursuant to California Rules of Court, rule 902(b)(4). This rule states:

> If a judge retires or resigns from judicial office following institution of formal proceedings, the commission may, in the interest of justice or to maintain confidence in the administration of justice, release information concerning the investigation and proceedings to a public entity.

The State Bar is a public entity with jurisdiction to investigate charges of misconduct by former judges in order to determine their fitness to practice law.

A copy of the notice of formal proceedings involving Judge Klein is available at the Commission office. Judge Klein chose not to file a response.

The Commission is composed of three judges, two lawyers and six public members. The Chairperson of the Commission is the Honorable William A. Masterson of the Court of Appeal, Second Appellate District in Los Angeles.

[Nos. 134, 135. Feb. 11, 1997.]

# INQUIRY CONCERNING JUDGE SWIFT & JUDGE McGUIRE

## SUMMARY

Two disciplinary matters were brought, one concerning a municipal court judge, and the other concerning a superior court judge. The matters were consolidated.

The Commission on Judicial Performance ordered that the matters be dismissed. The commission concluded that the municipal court judge did not violate Cal. Code Jud. Ethics, canon 2A, when he called his wife to determine the whereabouts of his stepson, who was the subject of an investigation by the National Park Service regarding the possible theft of Native American artifacts. The property that park service rangers wanted to search belonged to the municipal court judge. The telephone call did not create an appearance of impropriety where the judge already had disclosed a conflict of interest and disqualified from the matter and there was no indication that the call revealed information about the investigation. The municipal court judge did not commit misconduct in the superior court judge's chambers by advocating a consent search of the property or by remaining in the superior court judge's chambers. Taking leave from the chambers discussion with information that could compromise the criminal investigation arguably could have raised a more substantial appearance of impropriety. Even if the superior court judge should have signed a warrant authorizing a search of the property while the rangers were present, his failure to do so did not constitute misconduct. His mistake, if any, was at most legal error. (Opinion by Commission Counsel, by direction of the Commission.)

## HEADNOTES

(1) **Judges § 6—Ethics—Conflict of Interest—Appearance of Impropriety.**—A municipal court judge did not violate Cal. Code Jud. Ethics, canon 2A, when he called his wife to determine the whereabouts of his stepson, who was the subject of an investigation by the National Park Service regarding the possible theft of Native American artifacts. The

telephone call did not create an appearance of impropriety where the judge already had disclosed a conflict of interest and had disqualified from the matter. There was no indication that the call revealed information about the investigation.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 56.]

(2) **Judges § 9—Disqualification—Participation in Matter.**—The prohibition in Code Civ. Proc., § 170.3, subd. (a)(1), on participation in a matter after a judge has disqualified himself or herself pertains to participation as a judge, i.e., as a judicial decisionmaker. If a judge discerns a personal interest in a controversy and determines he or she is disqualified, the judge could nonetheless participate in some other capacity in appropriate circumstances, e.g., intervene in the proceeding as a litigant or testify as a witness.

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**OPINION**

**Commission Counsel,** by direction of the Commission.—These are two disciplinary matters, one concerning Bert L. Swift, Judge of the San Bernardino County Municipal Court, and the other concerning James C. McGuire, Judge of the San Bernardino County Superior Court. The matters have been consolidated for all purposes. After formal factfinding and review by the Commission on Judicial Performance (Commission), the Commission has concluded that both matters should be dismissed.

BACKGROUND

Formal proceedings were commenced with the service of the Commission's notices of formal proceedings dated February 6, 1996.

Judge Swift was represented in the formal proceedings by Thomas C. Brayton and Jones Mahoney, Brayton & Soll of Claremont, California. Judge McGuire was represented by Thomas R. Hudson of Ontario, California. The examiners for the Commission were Dennis F. Coupe and Jack Coyle of the Commission's Office of Trial Counsel.

Special masters were appointed by the Supreme Court on May 7, 1996.[1] The special masters were directed to prepare a report containing "a brief

[1] The special masters were Justice Coleman A. Blease, Judge James H. Chang and Judge Irma J. Brown. They were selected by the Commission from a list submitted by the Supreme Court to hear and take evidence in this matter and to report thereon to the Commission. (See rule 907, Cal. Rules of Court; order by Chief Justice George, dated May 7, 1996.)

statement of the proceedings had and their findings of fact and conclusions of law with respect to the issues presented by the notice of formal proceedings and the answer thereto [and if they choose] an analysis of the evidence and reasons for the findings or conclusions." (Then applicable Cal. Rules of Court, rule 912.)

A hearing to take evidence was conducted on August 26 through 28, 1996. On October 17, 1996, the special masters issued their report, recommending dismissal.

Objections were filed by the parties and oral argument was heard by the Commission on January 29, 1997. All commissioners participated. In the course of briefing and argument to the Commission, trial counsel modified or abandoned certain of their contentions before the special masters, and the focus of the proceeding was therefore narrowed. The Commission having considered the arguments of the parties, the report of the special masters, and having independently reviewed the record to assure that the findings reported are supported by clear and convincing evidence, makes the following findings of fact and conclusions of law.

## THE FINDINGS OF THE COMMISSION

### I

### Findings of Fact

In 1993, the National Park Service was investigating the possible theft of Native American artifacts from the Joshua Tree National Monument (Monument). Ranger Todd Swain was the lead investigator. A principal target of the investigation was one Warren Churchwell.

Acting undercover and in the course of his investigation in the fall of 1993, Ranger Swain had twice visited a man named Tony Soares at his residence on Quail Springs Road in Joshua Tree. On both occasions Soares showed him an olla (a ceramic pot) taken from the Monument. Soares told him he had purchased the olla from Warren Churchwell, knowing it had been illegally collected, and that he was probably going to give it to the Monument once it had been restored. Ranger Swain also saw two manos (grinding stones) and a metate (a mortar) on a windowsill near the dining room table. Soares told Ranger Swain he had found them in the desert by Kelso, a town surrounded by the East Mohave National Scenic Area. On the second occasion, when Soares showed Swain the olla, it was sitting on the top of a dresser in his bedroom.

Ranger Swain wanted to search for contraband artifacts at Churchwell's residence in Desert Hot Springs, at a gallery in Palm Springs, and at Soares's residence. On several occasions Ranger Swain had sought to obtain assistance in preparing search warrants from the United States Attorney's office. Each time the representative of the Unites States Attorney told him that he was too busy. When this happened again on December 15, 1993, Ranger Swain decided to go through the state system. The next day, on December 16, he obtained the warrants in Riverside County for Churchwell's residence and the gallery.

Later, on the same day, Rangers Swain and Marion Damiano-Nittoli went to Joshua Tree and met with Deputy District Attorney Ray Pyle. Pyle is the Supervising Deputy District Attorney in the Morongo Office of the San Bernardino County District Attorney. The Morongo Office staff had four deputies, including Linda Root and Gordon Isen.

Pyle read the warrant application for Soares's residence and approved it. The warrant specified that the objects to be seized were the manos, the metate, the olla and items showing the ownership of the premises. The rangers had checked with the county assessor and determined that the Soares residence was owned by a Dianne Fox.[2]

At approximately 4:30 p.m. on December 16, 1993, the rangers were escorted by Pyle to the courtroom of respondent Judge Bert Swift. Judge Swift is the judge in Joshua Tree for the Morongo Basin Division of the San Bernardino County Municipal Court District. Pyle told Judge Swift that he had two rangers who had a search warrant they wanted signed. He then left.

Judge Swift went into chambers with the rangers and removed his robe. He asked why they were in the state court system rather than in the federal system. Ranger Swain explained that the matter involved multiple jurisdictions and discussed the rangers' jurisdiction under state law.

Ranger Swain then handed the warrant application to Judge Swift. Judge Swift began to read the affidavit to the warrant. When he read Soares's name and the address of the premises to be searched in the second paragraph of the

[2] Dianne Fox and Judge Swift were married in February 1993. Three children of Fox by a prior marriage, including Soares, age 23, resided or stayed from time to time at the Quail Springs Road residence. The Quail Springs Road residence had belonged to Fox before the marriage. Thereafter, title was held in her name and that of Judge Swift, as a result of a refinancing of their aggregate debt. After the marriage, Judge Swift and his wife divided their time between the former residence of Judge Swift and the Quail Springs Road house, living part time in each residence. They spent two or three nights a week at the latter residence, where they occupied the master bedroom, and ate most of their meals there with Fox's children.

affidavit he was stunned; he read no further. He announced that Soares was his stepson and that the property to be searched was his house. One of the rangers asked if he knew where Soares was. Judge Swift replied that he did not know, but he offered to find out. In the rangers' presence, he telephoned his wife, Dianne Fox, Soares's mother, at her place of employment.[3]

Judge Swift then took the rangers and the warrant application to the chambers of respondent Judge James McGuire.

Judge Swift handed the warrant application to Judge McGuire and told him that he could not review it nor issue the warrant because it involved one of his homes and his stepson Tony Soares.

The rangers sat at a conference table abutting Judge McGuire's desk; Judge Swift took a seat across from them. The special masters found by clear and convincing evidence that Judge Swift accompanied the rangers and remained in Judge McGuire's chambers (1) for the purpose of allaying any concerns that Judge Swift would inform Soares about the impending search, and (2) in order to avoid the appearance of impropriety if the search was conducted but the artifacts were not recovered after he left the presence of the rangers, thus affording an opportunity to alert Soares. The special masters also found that Judge McGuire did not question Judge Swift's continued presence for similar reasons.

Judge McGuire began reading the warrant affidavit and discussing the situation with the rangers. He asked when the rangers intended to serve the warrant. They explained that there were two related warrants (the ones issued in Riverside). The rangers planned to serve the other warrants first because they perceived Soares to be the least culpable target. Judge McGuire pointed out this plan presented a problem because the proposed search of Soares's residence had been disclosed to Soares's stepfather (Judge Swift).

Judge McGuire inquired whether they could serve the Quail Springs Road warrant that evening. They replied that they could not because they did not have the manpower. They told him that there was a policy governing service of warrants which prescribed a certain number of officers. The rangers were adamant that they would not serve a warrant that evening.

Judge McGuire asked if they would be amenable to a consent search. The rangers appeared puzzled. Because they appeared puzzled and because he

[3] The telephone call did not reveal information about the search warrant or the rangers' investigation. When Fox answered the telephone, Judge Swift asked her where the children were. She told him where she believed each child was, expressed concern that he was asking such a question, and asked if there had been an accident. He told her there had been no accident and that he would talk to her about it later.

was concerned about being overbearing, he asked the rangers if they would like him to call in the district attorney to advise them. They affirmed that suggestion.

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Judge McGuire solicited information about the location of the manos, metate and olla, as identified in the affidavit. The ensuing discussion revealed that the objects were in common use areas or in plain view from common use areas of the dwelling.

From these considerations Root concluded that there was no issue of voluntariness as to Fox and Soares because Judge Swift's consent would suffice. She advised the rangers that in those circumstances a consent search was a perfectly good search, albeit she did not advocate that they agree to a consent search.

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Ranger Swain obtained a consent form from his vehicle. Judge Swift executed the consent form. Before the rangers and Judge Swift left his chambers, Judge McGuire gave the rangers a card with his home telephone number and assured them that he would be available to issue the warrant over the telephone if they developed any misgivings about the consent to search. He told them that if there was any problem whatsoever with any of the issues that had been discussed, e.g., the items they sought were not in the common area, or if Fox and Soares were not there or would not consent to a search of any other area of the house, he would issue the warrant.

During the discussions in chambers, Judge Swift made several statements, in addition to agreeing to consent to a search. Concerned for the impact on his family, he asked if the rangers intended to arrest his stepson. Soares is a craftsman experienced in creating reproductions of Native American artifacts. Judge Swift inquired whether the olla might be such a reproduction. He also gave his recollection of the location in the house of the artifacts sought in the warrant.

Although he did participate in the discussion described above, Judge Swift did not participate in the decision as to whether to issue the search warrant.

After Judge Swift executed the consent to search form, he drove to the Quail Springs Road residence, 10 minutes from the courthouse. The rangers followed in their vehicle. Judge Swift led them into the house and introduced them to one of Soares's younger brothers who was in the living room. No one else was home. Judge Swift asked Ranger Swain where the artifacts were located. Ranger Swain showed him. All the artifacts were where Swain had said they were during the chambers discussion, clearly visible from the living room. The door was open from the living room to Soares's bedroom, where the olla was located on the top of a dresser.

The next day, December 17, 1996, searches of the Churchwell residence and the gallery were conducted and Churchwell was arrested. Ranger Swain promptly filed reports with the Riverside District Attorney and requested that a criminal complaint be filed against Churchwell. The complaint was issued in January 1994 and in June 1994 Churchwell pleaded guilty to felony counts charged against him.

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## II

## Conclusions of Law and Analysis

Before the Commission, the examiners focused their contentions of misconduct by Judge Swift upon the fact that during his conference with the rangers, he placed a call to his wife to determine Soares's whereabouts. The

[4] The Commission notes that this finding directly contradicts Pyle's testimony that he did not provide the materials to anyone. The Commission does not find Pyle to be credible on this point. Compare the hearing transcript with the testimony of Richard Crouter.

examiners also contend that Judge Swift remained in Judge McGuire's chambers and participated in the discussion which took place, and that such was misconduct.

As to Judge McGuire, they contend that he committed misconduct in permitting Judge Swift to remain in his chambers and in failing to sign the proffered warrant.

The Telephone Call to Judge Swift's Spouse

The examiners contend that the telephone call by Judge Swift to his wife violated canon 2A of the California Code of Judicial Ethics which adjures the avoidance of the appearance of impropriety.[5] They argue the telephone call created the appearance that Judge Swift had a conflicting personal interest in the case. They submit that he made the call because of his concern that he could be criticized and submit that the call could have jeopardized a five-month criminal investigation and it had an influence on the ensuing discussion of how to conduct the search.

**(1)** As a causal matter, the telephone call did not create the appearance that Judge Swift had a conflicting personal interest in the case. He already had disclosed and declared an actual personal interest conflict and announced that he could not act as the magistrate because of the conflict.

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[5] References herein to a canon are to the California Code of Judicial Ethics, and not to the Code of Judicial Conduct as it existed in 1993. For the purpose of the issues discussed in this decision, there is no material difference between the 1993 and 1996 canons.

Canon 2A and its associated advisory committee comment are as follows.

"A. Promoting Public Confidence

"A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

"Advisory Committee Commentary—

"Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.

"The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge.

"The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence."

Judge Swift's Presence in Chambers

1.

The examiners contend Judge Swift's conduct in remaining in Judge McGuire's chambers is conduct undermining public confidence in the "impartiality" of the judiciary because it indicated that Judge Swift was not impartial in the search warrant proceeding. The examiners point to canon 3B(2), which provides that in the performance of "Adjudicative Responsibilities," "(2) A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism . . . ." The examiners suggest that this canon is applicable because Judge Swift expressed a fear that he would be criticized if the search was delayed and evidence was not found.

The canon is inapplicable because the fear in issue was not fear about criticism of Judge Swift's conduct in the course of his adjudicative responsibilities. He disqualified himself immediately and was not acting as the judge in this matter, so his impartiality was not in issue.

2.

The examiners contend that remaining in Judge McGuire's chambers created an appearance of impropriety prohibited by canon 2A and that he was using his "influence" as a judge to obtain "confidential" information about his stepson's case, conduct prohibited by canon 2B.[6]

Judge Swift had a sound reason for remaining in Judge McGuire's chambers that arguably advanced an important public interest, viz., promoting confidence in the integrity of the judiciary. Through no fault of his own, Judge Swift was placed in a dilemma because a potential charge of appearance of impropriety attended either alternative course of action available. Judge Swift cannot be charged with impropriety because he chose between them, absent a showing that the course of action he selected is clearly less preferable, i.e., more likely to undermine public confidence in the judiciary.

The appearance of impropriety that could attend Judge Swift taking his leave with information that could compromise the criminal investigation may well have been more substantial than that arising from the possible speculation that by remaining he was using his "influence" as a judge to obtain

[6] Canon 2B provides in pertinent part: "(1) A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment . . . . [¶] (2) A judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others . . . ."

"confidential" information about his stepson's case. Faced with this Hobson's choice, we cannot say that it was misconduct for Judge Swift to remain in Judge McGuire's chambers.

3.

The examiners also contend that Judge Swift committed misconduct in Judge McGuire's chambers by advocating a consent search, notwithstanding his "conflict of interest." The examiners argue that this created an appearance of impropriety. The special masters found, and the Commission concurs, that Judge Swift did not engage in such advocacy.

The examiners argue that advocating a consent search is improper because it is a use of nonpublic information for a purpose unrelated to his judicial duties in violation of canon 3B(11).[7] However, the use, if any, of nonpublic information here is related to Judge Swift's judicial duties, i.e., to the prevention of the potential discredit to the judiciary if the planned searches were conducted fruitlessly after he had the opportunity to alert his stepson or other family members about the impending search.

The examiners argue that advocating a consent search was improper because it created "admissibility issues" as to the evidence obtained. The rangers were represented by an experienced prosecutor who advised them concerning such issues.

4.

The examiners contend that by remaining in Judge McGuire's chambers Judge Swift violated Code of Civil Procedure section 170.3, subdivision (a)(1) which provides: "Whenever a judge determines himself or herself to be disqualified, the judge . . . shall not further participate in the proceeding . . . ." In their view, the word "participation" should be construed broadly.

**(2)** The prohibition on participation, however, pertains to participation as a judge, i.e., as a judicial decision maker. If a judge discerns a personal interest in a controversy and determines he is disqualified, he could nonetheless "participate" in some other capacity in appropriate circumstances, e.g., intervene in the proceeding as a litigant or testify as a witness.

The evidence was clear and convincing that Judge McGuire had assumed the role of decision maker, and that any participation by Judge Swift thereafter was nonjudicial.

[7] Canon 3B(11) is as follows: "(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity."

Judge McGuire

The examiners contend that Judge McGuire was obligated to sign or reject the warrant without broaching any proposals to cope with the potential problem of disclosure. They suggest that Soares was entitled to a neutral and detached magistrate, and that Judge McGuire was not one.

The Commission finds by clear and convincing evidence that the applicant for the search warrant was advised by competent counsel, and counsel concurred that the consent search was appropriate in the circumstances as they existed on December 16, 1993. Judge Swift executed the consent form while in Judge McGuire's chambers.

While arguably it may have been preferable for Judge McGuire to sign the search warrant, we note that he gave the rangers his home telephone number and invited them to telephone if circumstances changed and they needed a court-ordered, telephonic search warrant. Thus even if Judge McGuire should have signed the search warrant while the rangers were present, we are unable to conclude, in light of the unusual facts confronting Judge McGuire, that his failure to do so constitutes misconduct. His mistake, if any, was at most legal error.

CONCLUSION

The Commission accepts the special masters' conclusion that these proceedings should be dismissed. Commission members Hon. William A. Masterson, Ms. Ophelia Basgal, Robert C. Bonner, Esq., Mr. Christopher J. Felix, Hon. Lois Haight, Ms. Eleanor Johns, Patrick M. Kelly, Esq., Mr. David Malcolm, Hon. Vincent McGraw, Ms. Harriet C. Salarno and Ms. Pearl West voted to dismiss the matter.

These matters, inquiries 134 and 135, are therefore dismissed. This order shall become final forthwith.

[Nos. 134, 135. Feb. 11, 1997.]

# INQUIRY CONCERNING JUDGE SWIFT & JUDGE McGUIRE

## SUMMARY

Two disciplinary matters were brought, one concerning a municipal court judge, and the other concerning a superior court judge. The matters were consolidated.

The Commission on Judicial Performance ordered that the matters be dismissed. The commission concluded that the municipal court judge did not violate Cal. Code Jud. Ethics, canon 2A, when he called his wife to determine the whereabouts of his stepson, who was the subject of an investigation by the National Park Service regarding the possible theft of Native American artifacts. The property that park service rangers wanted to search belonged to the municipal court judge. The telephone call did not create an appearance of impropriety where the judge already had disclosed a conflict of interest and disqualified from the matter and there was no indication that the call revealed information about the investigation. The municipal court judge did not commit misconduct in the superior court judge's chambers by advocating a consent search of the property or by remaining in the superior court judge's chambers. Taking leave from the chambers discussion with information that could compromise the criminal investigation arguably could have raised a more substantial appearance of impropriety. Even if the superior court judge should have signed a warrant authorizing a search of the property while the rangers were present, his failure to do so did not constitute misconduct. His mistake, if any, was at most legal error. (Opinion by Commission Counsel, by direction of the Commission.)

## HEADNOTES

(1) **Judges § 6—Ethics—Conflict of Interest—Appearance of Impropriety.**—A municipal court judge did not violate Cal. Code Jud. Ethics, canon 2A, when he called his wife to determine the whereabouts of his stepson, who was the subject of an investigation by the National Park Service regarding the possible theft of Native American artifacts. The

telephone call did not create an appearance of impropriety where the judge already had disclosed a conflict of interest and had disqualified from the matter. There was no indication that the call revealed information about the investigation.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 56.]

(2) **Judges § 9—Disqualification—Participation in Matter.**—The prohibition in Code Civ. Proc., § 170.3, subd. (a)(1), on participation in a matter after a judge has disqualified himself or herself pertains to participation as a judge, i.e., as a judicial decisionmaker. If a judge discerns a personal interest in a controversy and determines he or she is disqualified, the judge could nonetheless participate in some other capacity in appropriate circumstances, e.g., intervene in the proceeding as a litigant or testify as a witness.

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**OPINION**

**Commission Counsel,** by direction of the Commission.—These are two disciplinary matters, one concerning Bert L. Swift, Judge of the San Bernardino County Municipal Court, and the other concerning James C. McGuire, Judge of the San Bernardino County Superior Court. The matters have been consolidated for all purposes. After formal factfinding and review by the Commission on Judicial Performance (Commission), the Commission has concluded that both matters should be dismissed.

BACKGROUND

Formal proceedings were commenced with the service of the Commission's notices of formal proceedings dated February 6, 1996.

Judge Swift was represented in the formal proceedings by Thomas C. Brayton and Jones Mahoney, Brayton & Soll of Claremont, California. Judge McGuire was represented by Thomas R. Hudson of Ontario, California. The examiners for the Commission were Dennis F. Coupe and Jack Coyle of the Commission's Office of Trial Counsel.

Special masters were appointed by the Supreme Court on May 7, 1996.[1] The special masters were directed to prepare a report containing "a brief

[1] The special masters were Justice Coleman A. Blease, Judge James H. Chang and Judge Irma J. Brown. They were selected by the Commission from a list submitted by the Supreme Court to hear and take evidence in this matter and to report thereon to the Commission. (See rule 907, Cal. Rules of Court; order by Chief Justice George, dated May 7, 1996.)

statement of the proceedings had and their findings of fact and conclusions of law with respect to the issues presented by the notice of formal proceedings and the answer thereto [and if they choose] an analysis of the evidence and reasons for the findings or conclusions." (Then applicable Cal. Rules of Court, rule 912.)

A hearing to take evidence was conducted on August 26 through 28, 1996. On October 17, 1996, the special masters issued their report, recommending dismissal.

Objections were filed by the parties and oral argument was heard by the Commission on January 29, 1997. All commissioners participated. In the course of briefing and argument to the Commission, trial counsel modified or abandoned certain of their contentions before the special masters, and the focus of the proceeding was therefore narrowed. The Commission having considered the arguments of the parties, the report of the special masters, and having independently reviewed the record to assure that the findings reported are supported by clear and convincing evidence, makes the following findings of fact and conclusions of law.

## THE FINDINGS OF THE COMMISSION

### I

### Findings of Fact

In 1993, the National Park Service was investigating the possible theft of Native American artifacts from the Joshua Tree National Monument (Monument). Ranger Todd Swain was the lead investigator. A principal target of the investigation was one Warren Churchwell.

Acting undercover and in the course of his investigation in the fall of 1993, Ranger Swain had twice visited a man named Tony Soares at his residence on Quail Springs Road in Joshua Tree. On both occasions Soares showed him an olla (a ceramic pot) taken from the Monument. Soares told him he had purchased the olla from Warren Churchwell, knowing it had been illegally collected, and that he was probably going to give it to the Monument once it had been restored. Ranger Swain also saw two manos (grinding stones) and a metate (a mortar) on a windowsill near the dining room table. Soares told Ranger Swain he had found them in the desert by Kelso, a town surrounded by the East Mohave National Scenic Area. On the second occasion, when Soares showed Swain the olla, it was sitting on the top of a dresser in his bedroom.

Ranger Swain wanted to search for contraband artifacts at Churchwell's residence in Desert Hot Springs, at a gallery in Palm Springs, and at Soares's residence. On several occasions Ranger Swain had sought to obtain assistance in preparing search warrants from the United States Attorney's office. Each time the representative of the Unites States Attorney told him that he was too busy. When this happened again on December 15, 1993, Ranger Swain decided to go through the state system. The next day, on December 16, he obtained the warrants in Riverside County for Churchwell's residence and the gallery.

Later, on the same day, Rangers Swain and Marion Damiano-Nittoli went to Joshua Tree and met with Deputy District Attorney Ray Pyle. Pyle is the Supervising Deputy District Attorney in the Morongo Office of the San Bernardino County District Attorney. The Morongo Office staff had four deputies, including Linda Root and Gordon Isen.

Pyle read the warrant application for Soares's residence and approved it. The warrant specified that the objects to be seized were the manos, the metate, the olla and items showing the ownership of the premises. The rangers had checked with the county assessor and determined that the Soares residence was owned by a Dianne Fox.[2]

At approximately 4:30 p.m. on December 16, 1993, the rangers were escorted by Pyle to the courtroom of respondent Judge Bert Swift. Judge Swift is the judge in Joshua Tree for the Morongo Basin Division of the San Bernardino County Municipal Court District. Pyle told Judge Swift that he had two rangers who had a search warrant they wanted signed. He then left.

Judge Swift went into chambers with the rangers and removed his robe. He asked why they were in the state court system rather than in the federal system. Ranger Swain explained that the matter involved multiple jurisdictions and discussed the rangers' jurisdiction under state law.

Ranger Swain then handed the warrant application to Judge Swift. Judge Swift began to read the affidavit to the warrant. When he read Soares's name and the address of the premises to be searched in the second paragraph of the

[2] Dianne Fox and Judge Swift were married in February 1993. Three children of Fox by a prior marriage, including Soares, age 23, resided or stayed from time to time at the Quail Springs Road residence. The Quail Springs Road residence had belonged to Fox before the marriage. Thereafter, title was held in her name and that of Judge Swift, as a result of a refinancing of their aggregate debt. After the marriage, Judge Swift and his wife divided their time between the former residence of Judge Swift and the Quail Springs Road house, living part time in each residence. They spent two or three nights a week at the latter residence, where they occupied the master bedroom, and ate most of their meals there with Fox's children.

affidavit he was stunned; he read no further. He announced that Soares was his stepson and that the property to be searched was his house. One of the rangers asked if he knew where Soares was. Judge Swift replied that he did not know, but he offered to find out. In the rangers' presence, he telephoned his wife, Dianne Fox, Soares's mother, at her place of employment.[3]

Judge Swift then took the rangers and the warrant application to the chambers of respondent Judge James McGuire.

Judge Swift handed the warrant application to Judge McGuire and told him that he could not review it nor issue the warrant because it involved one of his homes and his stepson Tony Soares.

The rangers sat at a conference table abutting Judge McGuire's desk; Judge Swift took a seat across from them. The special masters found by clear and convincing evidence that Judge Swift accompanied the rangers and remained in Judge McGuire's chambers (1) for the purpose of allaying any concerns that Judge Swift would inform Soares about the impending search, and (2) in order to avoid the appearance of impropriety if the search was conducted but the artifacts were not recovered after he left the presence of the rangers, thus affording an opportunity to alert Soares. The special masters also found that Judge McGuire did not question Judge Swift's continued presence for similar reasons.

Judge McGuire began reading the warrant affidavit and discussing the situation with the rangers. He asked when the rangers intended to serve the warrant. They explained that there were two related warrants (the ones issued in Riverside). The rangers planned to serve the other warrants first because they perceived Soares to be the least culpable target. Judge McGuire pointed out this plan presented a problem because the proposed search of Soares's residence had been disclosed to Soares's stepfather (Judge Swift).

Judge McGuire inquired whether they could serve the Quail Springs Road warrant that evening. They replied that they could not because they did not have the manpower. They told him that there was a policy governing service of warrants which prescribed a certain number of officers. The rangers were adamant that they would not serve a warrant that evening.

Judge McGuire asked if they would be amenable to a consent search. The rangers appeared puzzled. Because they appeared puzzled and because he

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The call could only have jeopardized the investigation if it revealed information about the investigation; there is no suggestion that it did. The call may not have been wise, but that does not make it an unethical or unseemly action.

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[5] References herein to a canon are to the California Code of Judicial Ethics, and not to the Code of Judicial Conduct as it existed in 1993. For the purpose of the issues discussed in this decision, there is no material difference between the 1993 and 1996 canons.

Canon 2A and its associated advisory committee comment are as follows.

"A. Promoting Public Confidence

"A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

"Advisory Committee Commentary—

"Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly.

"The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge.

"The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence."

Judge Swift's Presence in Chambers

1.

The examiners contend Judge Swift's conduct in remaining in Judge McGuire's chambers is conduct undermining public confidence in the "impartiality" of the judiciary because it indicated that Judge Swift was not impartial in the search warrant proceeding. The examiners point to canon 3B(2), which provides that in the performance of "Adjudicative Responsibilities," "(2) A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism . . . ." The examiners suggest that this canon is applicable because Judge Swift expressed a fear that he would be criticized if the search was delayed and evidence was not found.

The canon is inapplicable because the fear in issue was not fear about criticism of Judge Swift's conduct in the course of his adjudicative responsibilities. He disqualified himself immediately and was not acting as the judge in this matter, so his impartiality was not in issue.

2.

The examiners contend that remaining in Judge McGuire's chambers created an appearance of impropriety prohibited by canon 2A and that he was using his "influence" as a judge to obtain "confidential" information about his stepson's case, conduct prohibited by canon 2B.[6]

Judge Swift had a sound reason for remaining in Judge McGuire's chambers that arguably advanced an important public interest, viz., promoting confidence in the integrity of the judiciary. Through no fault of his own, Judge Swift was placed in a dilemma because a potential charge of appearance of impropriety attended either alternative course of action available. Judge Swift cannot be charged with impropriety because he chose between them, absent a showing that the course of action he selected is clearly less preferable, i.e., more likely to undermine public confidence in the judiciary.

The appearance of impropriety that could attend Judge Swift taking his leave with information that could compromise the criminal investigation may well have been more substantial than that arising from the possible speculation that by remaining he was using his "influence" as a judge to obtain

[6] Canon 2B provides in pertinent part: "(1) A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment . . . . [¶] (2) A judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others . . . ."

"confidential" information about his stepson's case. Faced with this Hobson's choice, we cannot say that it was misconduct for Judge Swift to remain in Judge McGuire's chambers.

3.

The examiners also contend that Judge Swift committed misconduct in Judge McGuire's chambers by advocating a consent search, notwithstanding his "conflict of interest." The examiners argue that this created an appearance of impropriety. The special masters found, and the Commission concurs, that Judge Swift did not engage in such advocacy.

The examiners argue that advocating a consent search is improper because it is a use of nonpublic information for a purpose unrelated to his judicial duties in violation of canon 3B(11).[7] However, the use, if any, of nonpublic information here is related to Judge Swift's judicial duties, i.e., to the prevention of the potential discredit to the judiciary if the planned searches were conducted fruitlessly after he had the opportunity to alert his stepson or other family members about the impending search.

The examiners argue that advocating a consent search was improper because it created "admissibility issues" as to the evidence obtained. The rangers were represented by an experienced prosecutor who advised them concerning such issues.

4.

The examiners contend that by remaining in Judge McGuire's chambers Judge Swift violated Code of Civil Procedure section 170.3, subdivision (a)(1) which provides: "Whenever a judge determines himself or herself to be disqualified, the judge . . . shall not further participate in the proceeding . . . ." In their view, the word "participation" should be construed broadly.

**(2)** The prohibition on participation, however, pertains to participation as a judge, i.e., as a judicial decision maker. If a judge discerns a personal interest in a controversy and determines he is disqualified, he could nonetheless "participate" in some other capacity in appropriate circumstances, e.g., intervene in the proceeding as a litigant or testify as a witness.

The evidence was clear and convincing that Judge McGuire had assumed the role of decision maker, and that any participation by Judge Swift thereafter was nonjudicial.

[7] Canon 3B(11) is as follows: "(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity."

Judge McGuire

The examiners contend that Judge McGuire was obligated to sign or reject the warrant without broaching any proposals to cope with the potential problem of disclosure. They suggest that Soares was entitled to a neutral and detached magistrate, and that Judge McGuire was not one.

The Commission finds by clear and convincing evidence that the applicant for the search warrant was advised by competent counsel, and counsel concurred that the consent search was appropriate in the circumstances as they existed on December 16, 1993. Judge Swift executed the consent form while in Judge McGuire's chambers.

While arguably it may have been preferable for Judge McGuire to sign the search warrant, we note that he gave the rangers his home telephone number and invited them to telephone if circumstances changed and they needed a court-ordered, telephonic search warrant. Thus even if Judge McGuire should have signed the search warrant while the rangers were present, we are unable to conclude, in light of the unusual facts confronting Judge McGuire, that his failure to do so constitutes misconduct. His mistake, if any, was at most legal error.

CONCLUSION

The Commission accepts the special masters' conclusion that these proceedings should be dismissed. Commission members Hon. William A. Masterson, Ms. Ophelia Basgal, Robert C. Bonner, Esq., Mr. Christopher J. Felix, Hon. Lois Haight, Ms. Eleanor Johns, Patrick M. Kelly, Esq., Mr. David Malcolm, Hon. Vincent McGraw, Ms. Harriet C. Salarno and Ms. Pearl West voted to dismiss the matter.

These matters, inquiries 134 and 135, are therefore dismissed. This order shall become final forthwith.

[No. 136. Feb. 11, 1997.]

INQUIRY CONCERNING JUDGE JOHN T. BALL.

## SUMMARY

A disciplinary matter was brought concerning a superior court judge.

The Commission on Judicial Performance dismissed the proceedings. The commission concluded that the judge's purpose in calling a resentencing hearing pursuant to Pen. Code, § 1170, subd. (d), regarding a murder defendant who was rearrested after he was erroneously released from prison was to allow either side to reopen the case in light of the then existing circumstances, and to use the power of his office to correct any errors for which the judiciary was responsible. Although counsel had indicated that they did not wish to reopen the matter, their initial views were not binding. In the context of a resentencing hearing, the court and the parties were free to consider whether something different could or should be done. The judge in good faith attempted to determine whether the resentencing hearing was appropriate. He concluded that the statute did authorize such a hearing. Thus, whether authorized by the statute or not, the judge's action was at most legal error and not misconduct. (Opinion by Commission Counsel, by direction of the Commission.)

## HEADNOTES

(1) **Judges § 1—Partisan Interests—Public Clamor—Fear of Criticism.**—In 1993, Cal. Code Jud. Conduct, canon 3(B)(2), provided that a judge should not be swayed by partisan interests, public clamor or fear of criticism.

(2) **Judges § 1—Resentencing Hearing—Legal Error—Misconduct.**—A judge's purpose in calling a resentencing hearing pursuant to Pen. Code, § 1170, subd. (d), regarding a murder defendant who was rearrested after he was erroneously released from prison was to allow either side to

reopen the case in light of the then existing circumstances, and to use the power of his office to correct any errors for which the judiciary was responsible. The judge in good faith attempted to determine whether the resentencing hearing was appropriate. He concluded that the statute did authorize such a hearing. Thus, whether authorized by the statute or not, the judge's action was at most legal error and not misconduct.

[Cal. Forms of Pleading and Practice (2009) ch. 317, Judges, § 317.85; 2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 57.]

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**OPINION**

**Commission Counsel,** by the direction of the Commission.—This is a disciplinary matter concerning Judge John T. Ball, Judge of the Santa Clara County Superior Court. After formal factfinding and review by the Commission on Judicial Performance (Commission), the Commission has concluded that the matter should be dismissed.

## PROCEDURAL HISTORY

Formal proceedings were commenced with the service of the Commission's notice of formal proceedings dated February 6, 1996 (and amended on Apr. 29, 1996). Special masters were appointed by the Supreme Court on May 7, 1996.[1]

Judge Ball was represented by David R. Sylva and Christopher A. Seaman of Campbell, California. The examiners for the Commission were Dennis F. Coupe and Jack Coyle of the Commission's Office of Trial Counsel.

The California Judges Association participated before the Commission pursuant to Commission on Judicial Performance rule 131 as amicus curiae, and was represented by Ronald E. Mallen of San Francisco, California.

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[1] The special masters were Justice William A. Stone, Judge Ronald B. Robie and Judge Paul H. Alvarado. They were selected by the Commission from a list submitted by the Supreme Court to hear and take evidence in this matter and to report thereon to the Commission. (See Cal. Rules of Court, rule 907. Order by Chief Justice George, dated May 7, 1996.)

The masters heard two days of testimony, and after affording the parties an opportunity for briefing and argument, submitted their report to the Commission on November 25, 1996. The report concluded that Judge Ball had engaged in improper action within the meaning of article VI, section 18 of the California Constitution.

After affording the parties an opportunity for briefing, oral argument was held before the Commission on January 29, 1997. All commissioners participated.

The Commission has considered written and oral arguments offered on behalf of Judge Ball and makes the following findings of fact and conclusions of law.

## ISSUE

**(1)** The focus of this case is canon 3(B)(2) as it appeared in 1993 which provided: ". . . A judge should not be swayed by partisan interests, public clamor or fear of criticism."[2]

## FACTUAL SUMMARY

The following facts are preface to the hearing before Judge Ball on December 17, 1993.

Dennis Collazo was convicted of felony murder in 1982. The conviction was reversed after a review by the United States Court of Appeals for the Ninth Circuit, and the matter was eventually set for retrial before Judge Ball. A plea bargain was made between the parties. The bargain was approved by Judge Ball, and in September 1993 he entered sentence under the terms of the plea bargain.

Two terms of that plea bargain are pertinent to this case: Collazo waived credit for the 11 years that he had already spent in prison under the original conviction, and he waived any right to appeal. The overall effect of the plea bargain was to reaffirm the original murder conviction and convert an indeterminate life sentence into a term of years (so that Collazo would know the exact date when he would get out of prison).

[2] Canon 3B(2) now provides: "A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law."

Due to an error at the Department of Corrections—it gave him credit for the 11 years already served—Collazo was discharged from prison two weeks after the plea bargain. He went home to his wife in San Jose.

Judge Ball learned that Collazo was at home with his wife, and he inquired of the authorities regarding reports that Collazo had been released. The error in releasing Collazo was discovered. Collazo was rearrested and returned to prison. The arrest was performed pursuant to police procedures for arresting a convicted murderer who had escaped from prison.

Judge Ball did not order that Collazo be rearrested, nor did he participate in any way in determining how the rearrest should be performed.

Collazo's family and friends were upset both by the government's action in revoking his freedom and by the manner in which he was rearrested.

Collazo's wife was active in trying to bring her husband's plight to the public's attention. She and other Collazo supporters wrote letters to many public figures, including one to the Governor which included some 300 signatures. Some of this correspondence was copied to Judge Ball, and in fact, he referred to the 300 signatures at the December hearing. In January and February 1994, Mrs. Collazo also complained to the Commission.

On October 27, newspaperman Trotter wrote a newspaper column deploring Collazo's misfortune at being released and rearrested. Judge Ball was mentioned as being responsible for the arrest. Another article dated November 14, 1993, complained that a major injustice had occurred.

In the meantime, on November 4, 1993, Collazo filed a notice of appeal without specifying any grounds. The notice was filed in propria persona and requested the court to appoint counsel.

On November 23, 1993, Judge Ball ordered that Collazo appear before him for resentencing pursuant to Penal Code section 1170, subdivision (d) (section 1170(d)). Judge Ball's order says only, "hearing pursuant to PC 1170(d)." The hearing was set for December 10, 1993.

There is substantial controversy in the record as to whether section 1170(d) could be used in a circumstance such as herein. It is a code section that allows a judge, on his own motion, to recall a matter and revise a sentence, provided that the revised sentence is no greater than the original sentence.[3]

[3] Witness Judge Mullins testified that he used the section one time after a defendant had appealed and filed a brief pointing out an administrative error. Judge Mullins recalled the matter, corrected the error he had made, and thus avoided the appeal.

In this case, the legitimacy of Judge Ball's section 1170(d) order is subject to scrutiny because the original sentence had been entered pursuant to a plea bargain. The negotiated plea had been entered as agreed, and Judge Ball was not free to change it.[4] Judge Ball met with the attorneys prior to the section 1170(d) hearing, and both objected to having any hearing.

The resentencing hearing took place on December 17, 1993. The courtroom was packed. The transcript of the hearing reflects a number of statements by Judge Ball. One could reasonably interpret his remarks as being an effort to counter Mrs. Collazo's campaign and the newspaper articles critical of Judge Ball. While these remarks support the contention that Judge Ball was acting for a personal purpose in ordering and conducting the hearing, the Commission is unable to find clear and convincing evidence that, in fact, Judge Ball was acting for such an improper purpose.

## DISCUSSION

**(2)** The Commission has concluded that Judge Ball's purpose in calling the section 1170(d) hearing was to allow either side to reopen the case in light of the then circumstances, and to use the power of his office to correct any errors for which the judiciary was responsible. Although counsel had indicated that they did not wish to reopen the matter, their initial views were not binding (particularly in the absence of Collazo). In the context of a section 1170(d) hearing, the court and the parties were free to consider whether something different could or should be done.

The second related question is whether section 1170(d) authorized a hearing for the purpose specified. The record shows that Judge Ball considered that issue prior to calling the hearing and that he consulted with other judges. Judge Ball in good faith attempted to determine whether a section 1170(d) hearing was appropriate. He concluded that section 1170(d) did authorize such a hearing. Thus, whether authorized by section 1170(d) or not, Judge Ball's action was at most legal error and not misconduct.

[4] During the December hearing Judge Ball acknowledged that he could not change the plea bargain: ". . . [the plea bargain] was at the request, I believe, of the Court reduced to a formal plea agreement bearing the signature of both the prosecutor Mr. Waite, Mr. Vaughn, and the defendant personally having executed this document on September 1st, 1993 clearly setting forth the precise terms of this plea bargain. And I am totally unable at this time to consider a modification of that plea agreement based upon anything that has transpired subsequent to its execution. And I know of no authority nor do I know of any reason in law or logic for me to deprive the People of the benefit of their bargain."

## CONCLUSION

This proceeding is dismissed. This order shall be final forthwith.

Commission members Hon. William A. Masterson, Ms. Ophelia Basgal, Robert C. Bonner, Esq., Mr. Christopher J. Felix, Hon. Lois Haight, Ms. Eleanor Johns, Patrick M. Kelly, Esq., Mr. David Malcolm, Hon. Vincent McGraw, Ms. Harriet C. Salarno and Ms. Pearl West voted to dismiss the matter.

FILED
AUG 19 1999
Commission on
Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

| | |
|---|---|
| Inquiry Concerning<br>Justice J. Anthony Kline<br><br>No. 151 | DECISION AND ORDER<br>OF DISMISSAL |

This is a disciplinary matter concerning Justice J. Anthony Kline of the Court of Appeal, First Appellate District, Division Two. After considering the briefs filed by Justice Kline, the commission's trial counsel and the California Judges Association, as amicus curiae, the commission has concluded that the matter should be dismissed.

## BACKGROUND

On December 2, 1997, the Court of Appeal, First District, Division Two, issued an opinion in *Morrow* v. *Hood Communications, Inc.* (1997) 59 Cal.App.4th 924, granting a motion for stipulated reversal. Justice Kline wrote a dissent in *Morrow* stating that he felt this was one of the "rare instances in which a judge of an inferior court can properly refuse to acquiesce in the precedent established by a court of superior jurisdiction," even though he acknowledged "that the opinion of the California Supreme Court in *Neary* [v. *Regents of University of California* (1992) 3 Cal.4th 273] ... requires that the motion before us be granted." Justice Kline clearly articulated his reasons for believing that the *Neary* decision was "analytically flawed and empirically unjustified" and that the doctrine of stipulated reversal was "destructive of judicial institutions." The penultimate paragraph in the dissent stated:

> While I will refuse to apply the *Neary* rule when asked to do so by litigants, I will of course comply with an order of the California Supreme Court to grant a particular request for stipulated reversal, a purely ministerial act.

Shortly after the issuance of the opinion and dissent in *Morrow*, the commission received a complaint concerning the dissent. After an investigation, the commission voted to institute formal proceedings, and a Notice of Formal Proceedings issued on June 30, 1998 charging that Justice Kline's "refusal to follow the law as established by the California Supreme Court was in violation of the Code of Judicial Ethics, canons 2A and 3B(2)."

Justice Kline filed a verified answer denying the allegations and at the commission's request the Supreme Court, on December 1, 1998, appointed special masters.[1]

On April 12, 1999, Justice Kline filed his prehearing brief and a letter requesting that the commission consider dismissing the pending charges on its own motion. At the same time, the California Judges Association (CJA) tendered a brief amicus curiae in support of Justice Kline.

On April 20, 1999, the commission issued an order staying proceedings before the special masters, filing the CJA's amicus brief, requesting that trial counsel file a brief responding to the briefs filed by Justice Kline and the CJA, and allowing Justice Kline to file a reply brief to trial counsel's responding brief. Trial counsel's brief and Justice Kline's reply brief were subsequently filed.[2]

On May 13, 1999, the Supreme Court issued its opinion in *Oberholzer* v. *Commission on Judicial Performance* (1999) 20 Cal.4th 371.

## DISCUSSION

We recognize that appellate jurists deal with legal principles and ideas. It is fundamental to our system of jurisprudence that they feel free to break new ground, challenge existing assumptions, present novel legal reasoning and experiment with different approaches. In most instances they must be able to do so free from fear of discipline for the free expression of their ideas. Disagreement over interpretations of law are the essence of the work of appellate judges. We understand that appellate judges often write strong - even passionate - decisions on arcane matters of jurisprudence. Many of these involve questions regarding whether they have the authority to take certain actions. The answers are often far from obvious. To discipline a judge solely for the expression of ideas about legal questions is contrary to these principles.

These proceedings question whether there are some limits to what an intermediate appellate court justice may write. Justice Kline's dissent was unusual in that he did not seek to distinguish the precedent relied upon by the majority, but specifically recognized that the Supreme Court's opinion in *Neary* required that the motion for stipulated reversal be granted. He nevertheless reasoned that he was "constitutionally justified" in dissenting from the majority's decision to do so.

While the commission was considering this case, the Supreme Court decided *Oberholzer*. In its opinion, the Supreme Court noted that a defense of legal error does not necessarily preclude an investigation or even a finding of misconduct, reaffirmed that discipline must be based on clear and convincing evidence, and set forth the following standard for when a legal error may provide a basis for discipline:

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[1] The special masters were Justice Kenneth R. Yegan, Court of Appeal, Second Appellate District, Division Six (presiding), Justice Fred K. Morrison, Court of Appeal, Third Appellate District, and Judge Michael N. Garrigan, Superior Court of San Joaquin County.

[2] The CJA's motion to file a reply brief as amicus curiae is denied.

> In summary, a judge who commits legal error which, *in addition*, clearly and convincingly reflects bad faith (*Broadman* v. *Commission on Judicial Performance, supra,* 18 Cal.4th 1079, 1091-1092), bias (*Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 327-331), abuse of authority (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 786-795), disregard for fundamental rights (*Kloepfer* v. *Commission on Judicial Performance, supra,* 49 Cal.3d 826, 849-854), intentional disregard of the law (*Cannon* v. *Commission on Judicial Qualifications, supra,* 14 Cal.3d 678, 695-698), or any purpose other than the faithful discharge of judicial duty (*Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 545-546), is subject to investigation. (See generally, Shaman et al., Judicial Conduct and Ethics, §2.02, pp. 32-37.) Mere legal error, without more, however, is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and thus should be disciplined.

As clarified by the Supreme Court's opinion in *Oberholzer*, in order for the commission to discipline Justice Kline it must find by clear and convincing evidence that his decision to file a dissent was legal error and that the decision was made in bad faith or for some improper motive.

Justice Kline has maintained that his dissent was ethical. The CJA in its amicus brief argued that Justice Kline's dissent:

> raised a purely legal issue: whether there is a narrow exception to the doctrine of stare decisis articulated in *Auto Equity Sales, Inc.* v. *Superior Court*, 57 Cal.2d 450 (1962) that would permit a lower court judge - here a justice of the Court of Appeal writing in dissent - to depart from otherwise controlling precedent in the circumstance presented in *Morrow*. Because that legal issue plainly presented a tenable claim for an exception to the stare decisis rule applicable in the circumstances presented in *Morrow*, and because that legal issue was itself a question of first impression in California, Justice Kline's dissent in *Morrow* did not violate established California decisional law and therefore cannot properly be the basis for disciplinary charges.

Trial counsel, in response to the briefs filed by Justice Kline and the CJA, contended that the circumstances of *Morrow* did not justify a departure from stare decisis.

The commission finds the CJA's approach particularly useful. The CJA notes that it believes "that lower court judges cannot refuse to follow higher court precedent merely because of personal disagreement, even if deeply felt." The CJA suggests, however, that Justice Kline could file a dissent in *Morrow* because of the confluence of three factors: (1) Justice Kline had a tenable belief that the precedent was "destructive of judicial institutions;" (2) since the decision in *Neary*, subsequent events, including the United States Supreme Court's decision in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), provided good cause to urge reconsideration; and (3) "for procedural reasons, there would be no opportunity for the

Supreme Court to reconsider *Neary* unless a panel of the Court of Appeal declined to apply *Neary*."

None of the three factors cited by the CJA is in itself dispositive. As the CJA itself suggests earlier in it brief, a judge's sincerity is not necessarily sufficient to justify a failure to follow higher court precedent. The subsequent events, including the United States Supreme Court's decision and the general criticism of *Neary*, are not clearly persuasive. Justice Kline recognized that the doctrine of stipulated reversals was not an issue of constitutional law, but of common law, and it was clear that the Supreme Court was already aware of the United States Supreme Court's decision and the general criticism of its opinion in *Neary*. The suggestion that there was no vehicle for review is debatable in view of the practice of critical concurrences, such as Justice Kline's concurrence in *Krug* v. *Praszker* (1994) 22 Cal.App.4th 1814, and the Supreme Court's authority, which it exercised in *Morrow*, to review a decision on its own motion.

The commission, nonetheless, finds that in light of the CJA's brief and the confluence of these three factors, it cannot conclude that "the argument for a narrow exception to the stare decisis principle of *Auto Equity Sales* was so far-fetched as to be untenable." In other words, we cannot conclude under the *Oberholzer* standard that the dissent was improper (even though Justice Kline recognized that the Supreme Court's opinion in *Neary* was controlling). Accordingly, the first charge in the Notice of Formal Proceedings is dismissed.

In addition to charging Justice Kline for filing his dissent, the Notice of Formal Proceedings also charged him for stating that he "would continue to refuse to apply the law of *Neary* in future cases as well." We recognize that Justice Kline also stated that he would apply the *Neary* rule if specifically directed to do so by the Supreme Court. Although the arguments supporting his statement are more debatable than those supporting the issuance of a dissent, the commission finds, after considering all of the legal arguments presented by both sides, including the amicus brief by the judge's peers, that the *Oberholzer* standard is not met. The second charge in the Notice of Formal Proceedings is dismissed.

Justice Kline, the California Judges Association, and others have invited the commission to enunciate principles which govern cases alleging misconduct arising out of legal error and to reiterate our fundamental belief in the principle of judicial independence: we decline the former in light of the Supreme Court's opinion in *Oberholzer*. The Supreme Court has very recently carefully set forth the applicable standards and we see no reason to attempt to restate them here.

In conclusion, we readily reaffirm our fundamental belief in the principle of judicial independence. In our application of *Oberholzer* to this case, we endeavor to demonstrate that in exercising our mandate as conferred by the people, we appreciate the critical need for California judicial officers to act both independently and in conformity with the laws of the State, and we are sensitive to the substantial issues that arise when these principles clash. We recognize that Justice Kline asserts other substantive defenses as well, but in view of this decision, we need not consider them here.

The commission's vote is 8 to 1. Ms. Bergthold, Mr. Farrell, Judge Flier, Mr. Kahn, Mr. Kelly, Judge Pichon, Ms. Ripston and Ms. Sommars voted to dismiss the proceedings. Dr. Vinson voted against dismissing the proceeding. Justice Hanlon and Mrs. Lui recused themselves from participating in this proceeding.

CONCLUSION

This proceeding is dismissed. This order shall be final forthwith.

Dated: August 19, 1999

For the Commission:

Michael A. Kahn

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| Inquiry Concerning Judge Pamela R. Rogers<br><br>No. 144 | DECISION AND ORDER DISMISSING COUNT ONE AND COUNT TWO |

In January 1998, the commission filed a Notice of Formal Proceedings. Counts One and Two concerned Judge Rogers' use of prescription drugs and Count Three addressed Judge Rogers' delay in ruling on certain matters.

On October 29, 1998, the commission issued a Decision and Order publicly admonishing Judge Rogers for failing to rule on seven submitted matters in a timely manner and incorporating a consent agreement concerning Judge Rogers' use of prescription drugs. Judge Rogers agreed to provide the commission, through July 1, 2000, with confidential periodic medical reports regarding her medical condition and treatment (sent directly to the commission by the physicians) and with judicial attendance records.

Judge Rogers having complied with the terms of the consent agreement, the charges in Count One and Count Two of the January 7, 1998 Notice of Formal Proceedings are dismissed with prejudice.

Commission members Justice Daniel M. Hanlon, Ms. Lara Bergthold, Mr. Mike Farrell, Judge Madeleine I. Flier, Ms. Gayle Gutierrez, Mr. Patrick M. Kelly, Mrs. Crystal Lui, Judge Rise Jones Pichon, and Ms. Ramona Ripston voted in favor of dismissing Counts One and Two. Commission member Mr. Michael A. Kahn voted against dismissing the counts. There is currently one public member vacancy.

Dated: September 8, 2000

Honorable Daniel M. Hanlon
Chairperson

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

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| Inquiry Concerning Former Judge Patricia Gray,<br><br>No. 159 | DECISION AND ORDER<br>OF DISMISSAL |

The Commission on Judicial Performance, having reviewed the Notice of Formal Proceedings and the U.S. Supreme Court's June 27, 2002 opinion in *Republican Party of Minnesota v. White* (2002) 536 U.S. ___ [122 S.Ct. 2528], hereby dismisses its Notice of Formal Proceedings against former Judge Patricia Gray.

Commission members Judge Risë Jones Pichon, Justice Vance W. Raye, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mrs. Crystal Lui, Mrs. Penny Perez, Ms. Ramona Ripston, Ms. Barbara Schraeger, and Dr. Betty L. Wyman voted in favor of dismissing the commission's Notice of Formal Proceedings against former Judge Patricia Gray. Mr. Marshall B. Grossman and Mr. Michael A. Kahn were absent.

Dated: August 27, 2002

Risë Jones Pichon

Honorable Risë Jones Pichon
Chairperson

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Judicial Performance

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| Inquiry Concerning Judge Rodney E. Nelson<br><br>No. 176 |

ORDER DISMISSING PROCEEDINGS

The commission having considered the fact of Judge Nelson's resignation and retirement from judicial office that took effect on March 20, 2006, and following a vote of the members of the commission, good cause appearing,

IT IS HEREBY ORDERED that this matter is dismissed.

Dated: May 1, 2006

Marshall B. Grossman
Chairperson

61 Cal.2d 886
393 P.2d 709, 39 Cal.Rptr. 397
**(Cite as: 61 Cal.2d 886)**

CHARLES F. STEVENS, Petitioner,
v.
COMMISSION ON JUDICIAL QUALIFICATIONS, Respondent.

L. A. No. 27765.

Supreme Court of California, In Bank.

July 9, 1964.

SUMMARY

PROCEEDING to review a recommendation that a judge be removed from office. Recommendation rejected and proceedings dismissed.

COUNSEL

Schall, Nielsen, Boudreau & Price, W. J. Schall and William P. Gray for Petitioner.

Stanley Mosk, Attorney General, Gordon Ringer and Derald E. Granberg, Deputy Attorneys General, for Respondent.

THE COURT.

We have reviewed the record herein on the law and the facts as required by section 10b of article VI of the California Constitution. We find no basis for supporting, and therefore reject, the recommendation of the Commission on Judicial Qualifications that petitioner, Charles F. Stevens, be removed from office. The proceeding is dismissed. ***887**

Cal.,1964.

Stevens v. Commission of Judicial Qualifications

END OF DOCUMENT

L. A. No. 31506

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

IN BANK

LEWIS WENZEL
v.
COMMISSION ON JUDICIAL PERFORMANCE

FILED January 13, 1982

Bird, C.J., did not participate.

Let a writ of review issue to be heard before this court when the proceeding is ordered on calendar. The record of the Commission on Judicial Performance shall constitute a return thereto. The brief of the Commission shall be filed in this court on or before March 1, 1982.

The request for transfer of the appeal in People v. Wenzel (No. A-3535) is denied.

Richardson, J., is of the opinion that the recommendation of the Commission should be adopted and that Judge Wenzel should be suspended forthwith, without salary.

Opinion (*People* v. *Wright*)
on pages 168-225 omitted.

REHEARING GRANTED

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[No. S005227. Mar. 2, 1989.]

DAVID PRESS, Petitioner, v.
COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

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SUMMARY

Proceeding on a petition seeking an order rejecting or modifying a recommendation that the Supreme Court impose public censure on a former judge. Petition denied, with directions.

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COUNSEL

Joseph D. Canty, Jr., for Petitioner.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Louis R. Hanoian and Leslie Fleming, Deputy Attorneys General, for Respondent.

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OPINION

**LUCAS, C. J.**—David Press, formerly a judge of the Justice Court for the Crest Forest Judicial District of San Bernardino County, seeks an order rejecting or modifying a recommendation of the Commission on Judicial Performance that this court impose public censure. (Cal. Const., art. VI, § 18, subd. (c).) It appears, however, that Mr. Press no longer holds a judicial office, and that review of the recommendation by this court is not warranted.

The petition is therefore denied; the recommendation of the Commission is rejected; and the Commission is directed to dismiss the proceeding as moot.

[No. S045140. Dec. 21, 1995.]

BRUCE W. DODDS, a Judge of the Superior Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

## SUMMARY

The Commission on Judicial Performance found that a superior court judge had observed a colleague deflate a tire on a van that had been parked in the colleague's assigned parking space; that he had declined to report what he had observed, even after it appeared the colleague lied about the incident; that, when approached by a sheriff's department detective about the incident, he had initially refused to give a statement and suggested that his staff also refuse to talk; and that he had given a statement only after his colleague had made a statement. The commission also found that on four occasions the judge had engaged in rudeness and prejudgment in the handling of cases, and that on one occasion he had made an offensive remark in chambers about two lawyers who had appeared before him. The commission found that these acts constituted wilful misconduct in office and conduct prejudicial to the administration of justice that brought the judicial office into disrepute. It recommended that the judge be publicly censured.

The Supreme Court rejected the recommendation of public censure. The court held that the commission's findings of fact were supported by clear and convincing evidence. However, contrary to the commission's conclusion of law, the court held that the judge's interference with a law enforcement investigation constituted only prejudicial conduct and not wilful misconduct. The court further held that the commission was correct in finding that the judge's rudeness and prejudgment in the handling of cases on four occasions constituted prejudicial conduct. As to the one offensive remark, however, the court lacked the power to impose discipline, since the remark was made more than six years before the commencement of the judge's current term, and, under Cal. Const., art. VI, § 18, former subd. (c), the Supreme Court is limited to sanctioning "action occurring not more than 6 years prior to the commencement of the judge's current term." Finally, the court held, cases in which public censure has been imposed have involved more serious misconduct than that involved in the present proceeding, and

the record was replete with evidence that the judge was a talented one who was often sought for his ability to settle difficult cases. Moreover, his interference in the investigation of his colleague, though improper, was not motivated by a desire to conceal the truth. Public censure would not further the purpose of judicial performance proceedings, which is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield. (Opinion by The Court. Separate concurring and dissenting opinion by Baxter, J., with George, J., concurring.)

## HEADNOTES

Classified to California Digest of Official Reports

(1) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Review by Supreme Court.**—In reviewing the recommendations of the Commission on Judicial Performance, the Supreme Court's concern is only with the incidents that the commission has sustained. With respect to those incidents, the court reviews the record independently, cognizant that there must be proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty. Nevertheless, the court gives special weight to factual determinations in the report of the masters, as the masters had the advantage of observing the demeanor of the various witnesses. In addition, in recognition of the commission's expertise, the court accords great weight to the commission's conclusions of law. It is particularly deferential to the commission when it has acted unanimously. Finally, based on the court's findings of fact and conclusions of law, the court determines what discipline, if any, is appropriate.

(2) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Evidence—Character Evidence as Cumulative.**—In proceedings concerning alleged misconduct by a superior court judge, the masters and the Commission on Judicial Performance did not err in refusing to consider the testimony and declarations of a number of witnesses who had favorable impressions of the judge, though they had not observed any of the specific incidents that were the subject of the inquiry. The exclusion of this evidence was well within the discretion of the masters and the commission. The masters permitted many character witnesses to testify in the judge's favor and reasonably determined that additional testimony of this kind would be cumulative.

(3) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Wilful Misconduct: Words, Phrases, and Maxims—Wilful Misconduct.**—Under Cal. Const., art. VI, § 18, former subd. (c), the Supreme Court may censure a judge for wilful misconduct in office or conduct that is prejudicial to the administration of justice that brings the judicial office into disrepute. "Wilful misconduct" comprises three elements: (1) unjudicial conduct, (2) committed in bad faith, (3) by a judge acting in his or her judicial capacity. Whether conduct is unjudicial is determined with reference to the California Code of Judicial Conduct. "Bad faith" means the judge intentionally committed acts that he or she knew or should have known were beyond a judge's lawful power, or acts within the lawful power of a judge that nevertheless were committed for a purpose other than the faithful discharge of judicial duties. "Acting in his judicial capacity" means the judge is performing one of a judge's adjudicative or administrative duties. In determining whether the judge is acting in a judicial capacity, due weight is given to the location of the conduct. Further, if the judge uses, or attempts to use, his or her authority as a judge for improper ends, regardless of location, the judge is considered to be acting in a judicial capacity.

(4) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Prejudicial Conduct: Words, Phrases, and Maxims—Prejudicial Conduct.**—Unjudicial conduct that does not rise to the level of wilful misconduct, either because of a lack of bad faith or because the judge was not acting in a judicial capacity, may nevertheless constitute prejudicial conduct. Prejudicial conduct refers to conduct that would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office. The conduct, however, need not be notorious; it is enough that the conduct be known to those members of the public who observed it.

(5a, 5b) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Prejudicial Conduct—Interference With Law Enforcement Investigation.**—A superior court judge who observed a colleague deflate a tire on a van that had been parked in the colleague's assigned parking space; who declined to report what he had observed, even after it appeared the colleague lied about the incident; who, when approached by a sheriff's department detective about the incident, initially refused to give a statement and suggested that his staff also refuse to talk; and who only gave a statement after his colleague had made a statement engaged in prejudicial conduct, but not wilful misconduct. His interference in the investigation was unjudicial. It also

constituted bad faith, since the interference was intentional and he should have known that it was beyond his lawful power as a judge. However, he was not acting in a judicial capacity when he interfered, since he was not performing one of the functions generally associated with his position as a judge, in that when he advised his staff not to talk, he was giving advice as a witness to an event unrelated to the work of the court. Though he met the detective at the courthouse, that was simply a convenient meeting place selected by the detective.

(6) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Bad Faith Conduct—Actual Malice: Words, Phrases, and Maxims—Actual Malice.**—The "actual malice" that will support a finding that a judge acted in bad faith connotes only specific intent, not hate or ill will.

(7) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds —Prejudicial Conduct—Rudeness and Prejudgment of Cases.**—A superior court judge's rudeness and prejudgment in the handling of cases, as exhibited on four occasions, constituted prejudicial conduct. Interrupting and yelling loudly and angrily at counsel and a litigant, as well as telling a joke that suggested bias, was clearly unjudicial, and it brought disrepute upon the judicial office. The judge's contention that his "assertive" judicial style was desirable in that it helped him effect settlements betrayed an understanding of the judicial role that placed too much emphasis on the efficient disposition of cases and too little emphasis on the dignity of litigants.

[Disciplinary action against judge on ground of abusive or intemperate language or conduct toward attorneys, court personnel, or parties to or witnesses in actions, and the like, note, 89 **A.L.R.4th** 278.]

(8) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Limitation to Conduct Occurring Less Than Six Years Before Current Term.**—The Supreme Court, in reviewing a disciplinary recommendation of the Commission on Judicial Performance, lacked power to impose a sanction against a superior court judge based on a remark he allegedly made more than six years before the commencement of his current term. Under Cal. Const., art. VI, § 18, former subd. (c), the Supreme Court may "censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term." Although his current term began after disciplinary proceedings began, the constitutional provision is not a classic

statute of limitations—it does not place a limit on when an action or proceeding may be commenced. Rather, it places a limit on the total time that may elapse from the occurrence of an incident to the imposition of discipline based on that incident.

[See 2 **Witkin,** Cal. Procedure (3d ed. 1985) Courts, § 32.]

(9) **Judges § 6—Removal, Censure, and Other Discipline—Interference With Law Enforcement Investigation, Rudeness, and Prejudgment of Cases—Propriety of Public Censure.**—The Supreme Court rejected the Commission on Judicial Performance's recommendation of public censure concerning a superior court judge who had engaged in prejudicial conduct, including interfering in a law enforcement investigation of a colleague, rudeness, and the appearance of bias. Cases in which public censure has been imposed have involved more serious misconduct, and the record was replete with evidence that the judge was a talented one who was often sought for his ability to settle difficult cases. Moreover, his interference in the investigation of his colleague, though improper, was not motivated by a desire to conceal the truth. Public censure would not further the purpose of the judicial performance proceedings, which is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield.

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## COUNSEL

Lewis, D'Amato, Brisbois & Bisgaard, Robert F. Lewis, Gordon J. Calhoun, Douglas R. Reynolds and James E. Friedhofer for Petitioner.

Daniel E. Lungren, Attorney General, Marc E. Turchin and David F. Glassman, Deputy Attorneys General, for Respondent.

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## OPINION

**THE COURT.**—Judge Bruce W. Dodds of the Santa Barbara County Superior Court has petitioned for review of the recommendation of the Commission on Judicial Performance (Commission) that he be publicly censured for acts that the Commission found to constitute "wilful misconduct in office" and "conduct prejudicial to the administration of justice that

brings the judicial office into disrepute." (See Cal. Const., art. VI, § 18, subd. (d) [formerly subd. (c)];[1] Cal. Rules of Court, rule 919(b).)

The bases for the Commission's recommendation are 1) that petitioner obstructed a law enforcement investigation, 2) that petitioner "has frequently given the appearance of rudeness and prejudgment in his handling of cases," and 3) that petitioner made an offensive remark in chambers about two lawyers who had appeared before him. As set forth below, we agree with the Commission's findings of fact, but disagree with some of the Commission's conclusions of law. We reject the Commission's recommendation of public censure.

## I. SCOPE OF REVIEW

The Commission's notice of formal proceedings, dated January 27, 1994, and amended July 26, 1994, specified six counts and thirteen separate incidents of misconduct. (1) Our concern is only with the incidents that the Commission has sustained. (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 784, fn. 5 [119 Cal.Rptr. 841, 532 P.2d 1209] (*Spruance*).) With respect to those incidents, we review the record independently, cognizant that there must be "proof by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty." (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 275 [110 Cal.Rptr. 201, 515 P.2d 1] (*Geiler*); *Doan* v. *Commission on Judicial Performance* (1995) 11 Cal.4th 294, 313 [45 Cal.Rptr.2d 254, 902 P.2d 272] (*Doan*); *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 365 [188 Cal.Rptr. 880, 657 P.2d 372] (*Gonzalez*).) Nevertheless, we give "special weight" to factual determinations in the report of the masters, as the masters had the advantage of observing the demeanor of the various witnesses. (*Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 34 [207 Cal.Rptr. 171, 688 P.2d 551] (*Gubler*); *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 623 [175 Cal.Rptr. 420, 630 P.2d 954] (*Wenger*).) In addition, in recognition of the Commission's expertise, we accord "great weight" to the Commission's conclusions of law. (*Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 314 [267 Cal.Rptr. 293, 787 P.2d 591, 87 A.L.R.4th 679] (*Kennick*); *Wenger*, *supra*, 29 Cal.3d at p. 623.) We are particularly deferential to the Commission when it has acted unanimously. (*Wenger*, *supra*, 29 Cal.3d at p. 623.)

[1]The voters approved Proposition 190 at the November 8, 1994, election, thereby substantially amending article VI, section 18 of the California Constitution. By its terms, Proposition 190 became operative on March 1, 1995. Because petitioner's conduct preceded March 1, 1995, we apply the version of the Constitution that existed prior thereto.

Finally, based on our findings of fact and conclusions of law, we determine what discipline, if any, is appropriate. (*Gubler*, *supra*, 37 Cal.3d at p. 34; *Geiler*, *supra*, 10 Cal.3d at p. 276.)

## II. FAIRNESS OF COMMISSION PROCEEDINGS

Before turning to the facts underlying the various charges and the merits of the Commission's conclusions of law, we address petitioner's threshold arguments. First, petitioner asserts that some members of the Commission were likely biased against him because of collateral litigation that he brought against the Commission in an effort to preserve the confidentiality of this proceeding. We rejected this same argument in *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866, 880-884 [42 Cal.Rptr.2d 606, 897 P.2d 544] (*Adams*), and we need not repeat our discussion here. In the course of adjudicative proceedings, decisionmakers frequently make preliminary or collateral determinations against a party. Absent persuasive evidence of actual bias, there is no reason to assume that these decisionmakers thereby lose their objectivity. (*Ibid.*; see also *Withrow* v. *Larkin* (1975) 421 U.S. 35, 56 [43 L.Ed.2d 712, 728-729, 95 S.Ct. 1456].)

**(2)** Second, petitioner cites as error the refusal on the part of the masters and the Commission to consider the testimony or declarations of a number of witnesses who had favorable impressions of petitioner, though they had not observed any of the specific incidents that were the subject of the inquiry. The exclusion of this evidence was well within the discretion of the masters and the Commission. (Cal. Rules of Court, rule 909; Evid. Code, § 352.) The masters permitted many character witnesses to testify in petitioner's favor and reasonably determined that additional testimony of this kind would be cumulative.

In an effort to compensate for the exclusion of these witnesses, petitioner has submitted to this court 64 letters and declarations from members of the bar. These letters and declarations generally praise petitioner's skills as a judge, particularly noting his ability to settle difficult cases by getting to the heart of the dispute and speaking frankly with counsel and the parties. Nearly all of these declarants qualify their praise of petitioner, using such words as "tough," "short," "abrupt," "direct," "rude," "impatient," and "gruff." Though these terms are generally used in the context of describing petitioner's reaction when counsel is unprepared, many declarants opine that petitioner should exercise more self-restraint. Much of this evidence is cumulative or of little probative value. We decline to take it into consideration.

## III. FINDINGS OF FACT

We conclude that clear and convincing evidence supports the Commission's findings of fact. As in *Fitch* v. *Commission of Judicial Performance* (1995) 9 Cal.4th 552, 556 [37 Cal.Rptr.2d 581, 887 P.2d 937] (*Fitch*), "[b]ecause this case involves public censure rather than outright removal of a judge, we need not explore in detail the extensive factual matrix underlying each of the Commission's findings." The following summary adequately states our findings with respect to petitioner's misconduct.

### A. *Interference in a Law Enforcement Investigation*

On April 21, 1993, petitioner and some members of his staff, when returning from lunch, observed another superior court judge remove the air from the tire of a van that was parked in that judge's assigned parking space in the courthouse parking lot. Petitioner did not try to dissuade his colleague from deflating the van's tire. The van turned out to be registered to a disabled person. For four weeks, petitioner did nothing to bring the incident to the attention of appropriate authorities. Even after press reports indicated that the judge who had deflated the tire had denied responsibility, petitioner did not publicly disclose his knowledge about the incident. Petitioner did, however, discuss the matter with the presiding judge of the court as well as the court's research attorney. In those discussions, petitioner expressed concern that the responsible judge had apparently denied involvement. Petitioner also said that he intended to tell the truth if asked.

On May 19, 1993, a detective from the Santa Barbara County Sheriff's Department came to petitioner's courtroom while court was in session and spoke to the bailiff, who took a note to petitioner. Through the bailiff, petitioner told the detective that he did not want to make a statement regarding the incident. Later, during the noon recess, petitioner met the detective in chambers and repeated that he did not want to make a statement, explaining that he was "too close." Petitioner also suggested to his staff that they decline to make statements, at least until the detective had interviewed the responsible judge. Though petitioner told his staff that it would not affect their jobs if they chose to speak to the detective, most of petitioner's staff followed petitioner's suggestion and refused to do so.

Later the same day, the detective spoke with the Santa Barbara County District Attorney, explaining the situation. The district attorney telephoned petitioner and accused him of obstructing justice. Following this conversation, petitioner arranged to meet with the detective, as well as the judge who

had deflated the tire and the court's research attorney. Petitioner conferred with the latter two for a short time out of the detective's presence. Then petitioner invited the detective to join the group, and the judge who had deflated the tire gave a statement admitting his conduct. After this admission, petitioner also gave a statement to the detective. Petitioner's statement was only four and a half hours after the detective first approached petitioner.

On June 3, 1993, petitioner issued a press release that the court's research attorney had drafted. The press release briefly described the foregoing events.

B. *Appearance of Rudeness and Prejudgment*

During a settlement conference in a case involving alleged sexual misconduct by a physician, petitioner abruptly and repeatedly interrupted the plaintiff. Petitioner and the plaintiff then began to argue, and petitioner pressed the plaintiff for a settlement figure. Because of the inflammatory nature of the plaintiff's allegations, a key issue in the settlement was a confidentiality clause that the plaintiff opposed. The plaintiff was concerned that the confidentiality clause would prevent her from warning others about the physician's actions. Nevertheless, petitioner insisted that the case was about money and demanded a settlement figure. When the plaintiff finally provided a figure, petitioner angrily threw up his arms and yelled, "Get out, it will not settle." The plaintiff cried at the time, and cried again when asked to recount the incident as part of this proceeding.

In a second case, the plaintiff had sued a railroad, alleging that he had lost part of his foot when climbing across a stopped train that began to move. During proceedings immediately prior to trial, petitioner would not allow the plaintiff's counsel to explain his theory of liability, interrupting counsel in a hostile and angry manner, using a loud tone of voice, and disparaging counsel's arguments.

In a third case, after the parties reached a structured settlement, petitioner became angry when, for tax reasons, counsel declined to reveal the total value of the settlement. Petitioner required counsel for both sides to remain in the courtroom until late in the evening.

Finally, in a fourth case, petitioner reduced a chiropractor's lien and shortly thereafter made a joke that suggested that chiropractors provide excessive treatment. The joke was made outside the courtroom, but in front of the minor plaintiff's mother.

C. *Offensive Remark*

The Commission found that in approximately 1987 petitioner made an offensive remark in chambers about two lawyers who had appeared before him. For reasons discussed below, we do not reach this issue.

## IV. CONCLUSIONS OF LAW

(3) Under former subdivision (c) of article VI, section 18 of the California Constitution, we may censure a judge for "wilful misconduct in office . . . , or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." We have defined the phrase "wilful misconduct" as comprising three elements: 1) "unjudicial conduct," 2) "committed in bad faith," 3) "by a judge acting in his judicial capacity." (*Spruance*, *supra*, 13 Cal.3d at p. 795; *Doan*, *supra*, 11 Cal.4th at p. 311; *Geiler*, *supra*, 10 Cal.3d at p. 284.) Our decisions give further definition to each of these elements. First, in order to determine whether a judge's conduct is "unjudicial," we measure that conduct with reference to the California Code of Judicial Conduct. (*Doan*, *supra*, 11 Cal.4th at p. 312; *Adams*, *supra*, 10 Cal.4th at p. 878; *Spruance*, *supra*, 13 Cal.3d at p. 796; *Geiler*, *supra*, 10 Cal.3d at pp. 281-282.) Second, by "bad faith" we mean that the judge "intentionally committed acts which he knew or should have known were beyond his lawful power" (*Geiler*, *supra*, 10 Cal.3d at p. 286) or "acts within the lawful power of a judge which nevertheless [were] committed . . . for any purpose other than the faithful discharge of judicial duties" (*Spruance*, *supra*, 13 Cal.3d at p. 796; *Doan*, *supra*, 11 Cal.4th at p. 311). Third, a judge is "acting in his judicial capacity," when he is performing one of his "judicial functions," i.e., one of the varied functions generally associated with his position as a judge, whether adjudicative or administrative in nature. (*Adams*, *supra*, 10 Cal.4th at p. 910.) In determining whether a judge acted in his judicial capacity, we give due weight to the location of the judge's conduct. (*Kennick*, *supra*, 50 Cal.3d at p. 319.) Thus, when a judge is on the bench, he is presumptively acting in a judicial capacity. (See, e.g., *Gonzalez*, *supra*, 33 Cal.3d at p. 376.) Similarly, when a judge is in chambers during normal working hours, he is generally, though not necessarily, acting in a judicial capacity (See, e.g., *Geiler*, *supra*, 10 Cal.3d at pp. 277 and 284 [finding wilful misconduct based on conduct occurring in chambers].) In addition, if a judge uses, or attempts to use, his authority as a judge for improper ends, regardless of location, we consider the judge to be acting in his judicial capacity. (*Kennick*, *supra*, 50 Cal.3d at p. 319.)

(4) Unjudicial conduct that does not rise to the level of wilful misconduct, either because of a lack of bad faith or because the judge was not

acting in a judicial capacity, may nevertheless constitute prejudicial conduct. (*Spruance*, *supra*, 13 Cal.3d at p. 796; *Geiler*, *supra*, 10 Cal.3d at p. 284.) Prejudicial conduct refers to conduct that "would appear to an objective observer to be not only unjudicial . . . but . . . prejudicial to public esteem for the judicial office." (*Geiler*, *supra*, 10 Cal.3d at p. 284.) The conduct, however, need not be notorious. It is enough that the conduct be known to those members of the public who observed it. (*Kennick*, *supra*, 50 Cal.3d at p. 314; *Wenger*, *supra*, 29 Cal.3d at p. 622, fn. 4.)

With these principles in mind, we consider the three categories of misconduct that formed the bases for the Commission's recommendation.

A. *Interference in a Law Enforcement Investigation*

**(5a)** The Commission found that, in light of petitioner's inaction after observing his colleague deflate a tire on a van, his subsequent interference in the investigation of the incident constituted wilful misconduct. We disagree.

We agree with the Commission that petitioner's interference in the investigation was unjudicial. Canon 2A of the California Code of Judicial Conduct, adopted October 5, 1992 (Deering's Cal. Ann. Codes, Rules (appen.) (1995 Pocket supp.) p. 388), provides that "[a] judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3D provides that "[a] judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Petitioner's conduct was manifestly inconsistent with both these standards.[2] Petitioner observed his colleague engage in patently improper conduct. During the next

[2]The formal charge against petitioner notes that petitioner's "actions were contrary to Canon 2A of the California Code of Judicial Conduct." Petitioner argues that we should not take canon 3D into consideration because it was not noted in the charge. Judicial discipline proceedings, however, consider whether a judge has engaged in unjudicial conduct, not whether the judge has violated any particular canon of the California Code of Judicial Conduct. We consider the standards of conduct enunciated in the California Code of Judicial Conduct only for guidance (see, e.g., *Doan*, *supra*, 11 Cal.4th at p. 312), and the reference to canon 2A in the charge in no way bars us from measuring petitioner's conduct against other standards. Indeed, a charge of judicial misconduct need not cite the Code of Judicial Conduct at all. We conclude that canon 3D is relevant to our inquiry.

In considering canon 3D, however, we do not conclude that it is in all cases unjudicial for a judge to remain silent about unprofessional conduct of which he is aware. Rather, it is necessary to look to the totality of the circumstances. For example, a judge who hears a rumor about a lawyer or a colleague does not have to become an investigator, rooting out details and reporting those details to the State Bar or the Commission. On the other hand, if a judge is a direct witness to manifestly unprofessional conduct that is either serious or repeated, the

four weeks, petitioner did nothing to bring the truth about the incident to the attention of appropriate authorities. Even after it appeared that his colleague had lied about the incident, petitioner did not come forward, saying only that he would reveal the truth if anybody asked him. Shortly thereafter, somebody did ask him—a detective from the Santa Barbara County Sheriff's Department—and petitioner refused to give a statement, also suggesting to his staff that they refuse to give statements at least until the responsible judge had had a chance to admit his conduct. When the district attorney accused petitioner of obstructing justice, petitioner agreed to give a statement, but only after hearing the statement of his accused colleague.

It is true that petitioner ultimately acted so as to encourage his colleague to admit to deflating the van's tire. Indeed, petitioner's actions may have produced a complete statement from his colleague sooner than if petitioner had not intervened. Nevertheless, it was for the detective, not petitioner, to decide how best to pursue the investigation. An investigator may prefer to interview witnesses to an incident prior to interviewing a suspect. Such interviews often enable the investigator to ask more pointed questions when later interviewing the suspect. In addition, an investigator may prefer to interview witnesses separately so that he can detect inconsistencies in their statements. Petitioner's conduct prevented the detective from pursuing either of these strategies. Interfering in this way with the detective's investigation violated the California Code of Judicial Conduct and constituted unjudicial conduct. (*Adams*, *supra*, 10 Cal.4th at p. 878.)

Petitioner's conduct also constituted bad faith. Petitioner intentionally interfered in the investigation, and he should have known that this interference was beyond his lawful power as a judge. (*Geiler*, *supra*, 10 Cal.3d at p. 286.) Moreover, petitioner's conduct was for a purpose other than the faithful discharge of his duties. (*Spruance*, *supra*, 13 Cal.3d at p. 796.) There is no credibility to petitioner's assertion that he was trying to protect the reputation of the judiciary by ensuring that his colleague would admit his error voluntarily. There was much that petitioner could have done, short of interfering in a criminal investigation, that would have encouraged his colleague to come forward. For four weeks, petitioner did nothing. The evidence establishes that petitioner was more concerned about protecting the reputation of his colleague than that of the judiciary.

judge should, unless circumstances dictate otherwise, report that conduct to appropriate authorities who can investigate further and take any necessary disciplinary action. In addition, even in situations where a judge has no affirmative duty to come forward and report the misconduct of a lawyer or a colleague, a judge should cooperate fully with an official investigation.

**(6)** Citing *Spruance*, *supra*, 13 Cal.3d at page 796, petitioner argues that "actual malice" is a necessary element of bad faith, and that there is no evidence that petitioner acted maliciously. But in this context actual malice does not connote hate or ill will, but merely specific intent. (*Adams*, *supra*, 10 Cal.4th at p. 877; *Spruance*, *supra*, 13 Cal.3d at p. 796.) We conclude that petitioner's conduct satisfies the requirement of bad faith.

**(5b)** We find, however, that petitioner was not acting in a judicial capacity when he interfered in the investigation. First, petitioner was not performing one of the functions generally associated with his position as a judge. (Cf. *Doan*, *supra*, 11 Cal.4th at pp. 337-338; *Adams*, *supra*, 10 Cal.4th at p. 910; Gov. Code, § 68725.) Though one of those functions is to supervise staff, petitioner was not acting as a supervisor when he recommended to staff that they decline to give statements. Rather, petitioner was giving advice as a cowitness to an event that was unrelated to the work of the court. If petitioner had witnessed the incident with a friend instead of staff, no one would argue that giving advice to that friend was acting in a judicial capacity. To hold that petitioner acted in a judicial capacity simply because his advice carried with it a degree of authority due to his status as a judge and supervisor would mean that a judge is always acting in a judicial capacity when he talks to staff. We decline to interpret "judicial capacity" so broadly.

Second, though petitioner was at the courthouse when he met with the detective, that location was simply a convenient meeting place that the detective selected. The meeting had nothing to do with petitioner's work as a judge, but rather his status as a witness to an event that the detective was investigating. (Cf. *Kennick*, *supra*, 50 Cal.3d at p. 319.) Nor did petitioner's use of the bailiff cause petitioner to be acting in a judicial capacity. The detective approached petitioner while he was on the bench, and the detective chose to use the bailiff to communicate with petitioner. It would have been impolite for petitioner to ignore the detective, and it is hard to imagine how petitioner could have responded in a discreet way without using the bailiff. We are also unpersuaded that petitioner's use of the court's research attorney for advice and to prepare a press release caused petitioner to be acting in a judicial capacity. It is appropriate, indeed desirable, for a judge to consult with legal staff concerning what constitutes proper judicial conduct. In certain circumstances, this consultation may include advice as to the appropriate wording of a press release. If we were to hold that such a consultation caused a judge to be acting in a judicial capacity, thereby converting what might have been prejudicial conduct into wilful misconduct, we would discourage judges from seeking advice, which we decline to do.

Finally, petitioner did not attempt to curry favor with the detective, or anyone else, on account of his judicial status. (Cf. *Kennick*, *supra*, 50 Cal.3d at p. 319.)

Because petitioner was not acting in a judicial capacity, his interference in the investigation did not constitute wilful misconduct. Nevertheless, that interference, which was both unjudicial and prejudicial to public esteem for the judicial office, did constitute prejudicial conduct. (*Geiler*, *supra*, 10 Cal.3d at p. 284; *In re Chargin* (1970) 2 Cal.3d 617 [87 Cal.Rptr. 709, 471 P.2d 29] [newspaper coverage evidences prejudice to the public esteem for the judicial office].)

B. *Appearance of Rudeness and Prejudgment*

(7) The Commission found that petitioner's rudeness and prejudgment in the handling of cases, as exhibited on four occasions, constituted prejudicial conduct. We agree.

Canon 3B, subdivision (4) of the California Code of Judicial Conduct provides that "[a] judge should be patient, dignified, and courteous to all litigants, jurors, witnesses, lawyers, and others whom the judge deals with in an official capacity . . . ." Canon 3B, subdivision (5) provides that "[a] judge should not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice . . . ." When measured against these standards (*Adams*, *supra*, 10 Cal.4th at p. 878), petitioner's conduct—which included interrupting and yelling loudly and angrily at counsel and a litigant, as well as telling a joke that suggested bias—was clearly unjudicial. It also brought disrepute upon the judicial office. (Cf. *Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 841-844 [264 Cal.Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235]; *Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1306-1307 [240 Cal.Rptr. 859, 743 P.2d 919] (*Furey*); *Spruance*, *supra*, 13 Cal.3d at pp. 789, 797; *In re Chargin*, *supra*, 2 Cal.3d 617.)

Petitioner argues that his "assertive" judicial "style" is desirable because it enables him to effect settlements in difficult cases. Petitioner's argument betrays an understanding of the judicial role that places too much emphasis on the efficient disposition of cases and too little emphasis on the dignity of litigants. The judicial system is not concerned only with the resolution of disputes. It also permits individuals and entities to participate in the process by which the state determines to exercise its power. Thus, due process

affords a litigant a right to be heard, "not only because he might contribute to accurate determinations, but also because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable." (Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews* v. *Eldridge: Three Factors in Search of a Theory of Value* (1976) 44 U. Chi. L.Rev. 28, 49-50.) Even an otherwise just settlement, if imposed summarily and coercively, is likely to disserve justice by leaving the parties with a lingering resentment of one another and the judicial system. We laud the creative and diverse means by which judges assist parties in reaching voluntary settlements of complex disputes. But when a judge, clothed with the prestige and authority of his judicial office, repeatedly interrupts a litigant and yells angrily and without adequate provocation, the judge exceeds his proper role and casts disrepute on the judicial office.

C. *Offensive Remark*

The Commission found that petitioner made an offensive remark in 1987 that constituted prejudicial conduct. We do not reach this issue.

**(8)** Under former subdivision (c) of article VI, section 18 of the California Constitution, "the Supreme Court may . . . censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term . . . ." Petitioner's current term began on January 1, 1995. Six years prior to the commencement of petitioner's current term was January 1, 1989. Petitioner allegedly made the offensive remark in approximately 1987. Accordingly, we are without power to impose a sanction based on the alleged remark.

Respondent points out that the Commission commenced disciplinary proceedings during petitioner's prior term, at which time we could have imposed discipline based on the alleged 1987 remark. Respondent argues that petitioner, who was put on notice of the charge in a timely fashion, should not be able to avoid discipline simply because he happened to commence a new term while the charges were being adjudicated. Though this argument has some appeal, we find the constitutional language to be unambiguous, and we see no way to read into that language the rule that respondent proposes. The constitutional provision is not a classic statute of limitations—it does not place a limit on when an action or proceeding may be *commenced.* Rather, it places a limit on the *total* time that may elapse from occurrence of an incident to imposition of discipline based on that incident. It thus

combines the functions of a statute of limitations and a rule limiting the time proceedings may remain pending. Respondent's interpretation would eliminate the latter function, allowing the Commission and this court an unlimited time to resolve disciplinary charges once they were filed. Moreover, the constitutional provision in question differs from a typical statute of limitations in that the limitations period varies depending upon how recently the judge began a new term. Thus, the relative difficulty of determining the truth about events that transpired many years in the past is not the only policy underlying the constitutional limitation. The provision also gives due deference to the will of the electorate in reelecting a judge to a new term. In sum, we are constitutionally precluded from imposing discipline based on the alleged 1987 remark.

## V. DISCIPLINE

**(9)** It remains for us to determine what discipline is appropriate based on our findings of fact and conclusions of law. Petitioner has served as a judge of the Santa Barbara County Superior Court since January 1977 with praise from many members of the bar and with the approval of the electorate. Nevertheless, petitioner has engaged in prejudicial conduct, including interfering in a law enforcement investigation, rudeness and the appearance of bias.

Cases in which we have publicly censured judges involve conduct more serious than that involved here. (Cf. *Fitch*, *supra*, 9 Cal.4th at pp. 556-557 [judge told a court reporter, "Your butt looks good in that dress"; judge said to a court reporter, "I certainly hope you're not that frigid at home with your husband"; judge slapped or patted a court reporter and a court trainee on their buttocks]; *In re Rasmussen* (1987) 43 Cal.3d 536, 538 [236 Cal.Rptr. 152, 734 P.2d 988] [judge initiated probation revocation proceedings for personal reasons]; *In re McCullough* (1987) 43 Cal.3d 534, 535 [236 Cal.Rptr. 151, 734 P.2d 987] [delay in deciding case; erroneous salary affidavits]; *In re Creede* (1986) 42 Cal.3d 1098, 1099 [233 Cal.Rptr. 1, 729 P.2d 79] [same and repeated]; *Mardikian* v. *Commission on Judicial Performance* (1985) 40 Cal.3d 473, 478 [220 Cal.Rptr. 833, 709 P.2d 852] [same with mitigating circumstances]; *Gubler*, *supra*, 37 Cal.3d at p. 45 [judge used threats of criminal sanctions as a means of collecting attorney fees for the county]; *In re Youngblood* (1983) 33 Cal.3d 788 [191 Cal.Rptr. 171, 662 P.2d 108] [judge abused contempt power including incarcerating persons without cause]; *Roberts* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 739, 745-746 [190 Cal.Rptr. 910, 661 P.2d 1064] [judge struck

officer in chest and shouted obscenities as officer tried to administer field sobriety test to judge's son; judge also tried to influence officers by identifying himself as a judge]; *In re Fisher* (1982) 31 Cal.3d 919, 920 [184 Cal.Rptr. 296, 647 P.2d 1075] [ex parte communication]; *In re Charles S. Stevens* (1982) 31 Cal.3d 403, 404-405 [183 Cal.Rptr. 48, 645 P.2d 99] [judge repeatedly used highly offensive racial and ethnic epithets to describe Blacks and persons with Spanish surnames]; *In re Robert S. Stevens* (1981) 28 Cal.3d 873 [172 Cal.Rptr. 676, 625 P.2d 219] [judge repeatedly telephoned former associates and discussed his sexual fantasies; recipients of these telephone calls repeatedly objected]; *In re Jensen* (1978) 24 Cal.3d 72, 73 [154 Cal.Rptr. 503, 593 P.2d 200] [repeated delay in deciding cases; erroneous salary affidavits]; *McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 532 [116 Cal.Rptr. 260, 526 P.2d 268] [judge repeatedly held benchside sentencing conferences with his bailiff, who would recommend the proposed sentence; judge also left the bench during court proceedings]; *In re Sanchez* (1973) 9 Cal.3d 844, 844-845 [109 Cal.Rptr. 78, 512 P.2d 302] [judge regularly gave bail bondsman prisoner release orders that were blank except for the judge's signature]; *In re Glickfeld* (1971) 3 Cal.3d 891 [92 Cal.Rptr. 278, 479 P.2d 638] [in chambers, judge called the victim of certain alleged crimes a "horse's ass"[3] and later made intemperate comments in open court]; and *In re Chargin, supra*, 2 Cal.3d at p. 617 [in the course of a juvenile court hearing, judge made inflammatory remarks reflecting upon the juvenile's family and members of the juvenile's ethnic group].) The record in this case is replete with evidence that petitioner is a talented judge who is often sought for his ability to settle difficult cases. Moreover, petitioner's interference in the investigation of his colleague, though improper, was not motivated by a desire to conceal the truth. "The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield." (*Furey, supra*, 43 Cal.3d at p. 1320; *Doan, supra*, 11 Cal.4th at p. 314.) We conclude that public censure in this case would not further this purpose. Accordingly, we reject the recommendation of the Commission.

**BAXTER, J.,** Concurring and Dissenting.—Like the majority, I agree with the findings of misconduct made by the Commission on Judicial Performance (Commission). I nonetheless believe this misconduct is not serious enough to warrant public censure. I therefore concur in rejecting the Commission's disciplinary recommendation.

Unlike the majority, however, I take the 1987 "offensive remark" incident into account when reaching my conclusion that no discipline by this court is

[3]The details of this case are described in Rothman, California Judicial Conduct Handbook (1990) page V-4.

warranted. In my view, the California Constitution, as applicable to this case, allows this court to impose discipline for any misconduct within six years before commencement of the "current term" the judge was serving *when the Commission set its formal hearing process in motion.* The Commission gave notice of formal proceedings against petitioner on January 27, 1994, and, sometime before August 17, 1994, the Commission requested the appointment of special masters to hear the case.[1] (See Cal. Rules of Court, rule 907.) At the latest of these times, petitioner was still serving a term which had commenced on January 1, 1989. Because the 1987 incident occurred less than six years before that date, the incident was a proper subject for our discipline. It makes no difference that petitioner has since been reelected and has started a new term.

In its pre-Proposition 190 form applicable to this case, the Constitution provided that "[o]n recommendation of the Commission . . . the Supreme Court may . . . censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term." (Cal. Const., art. VI, § 18, former subd. (c).)[2] The majority find this language "unambiguous" in providing that the "current term" is the one the judge happens to be serving when "the Supreme Court" finally acts on the Commission's recommendation. The result is that charges of serious misconduct, although properly made and proved before the Commission, and properly a basis for the discipline it proposes, may nonetheless suddenly drop away if the errant judge wins election to a new judicial "term" before we can act on the Commission's recommendation. I cannot agree that those who drafted and adopted the important provisions for judicial discipline "unambiguous-[ly]" intended such an unusual and anomalous result.

At the outset, I dispute the majority's assertion that the plain language of the constitutional provision compels their interpretation. The opposite is true. Article VI, section 18, former subdivision (c) of the California Constitution does not explicitly say whether the "6 years [before] current term" within which this court may remove or censure a judge is determined at the time we take final action or at some earlier stage of the disciplinary process. But when all the constitutional provisions for judicial discipline are read together, the flaw in the majority's construction is exposed.

[1]Hearings before the special masters began on August 17, 1994, and continued through September 2, 1994.

[2]As amended by Proposition 190, operative March 1, 1995, the Constitution transfers from this court to the Commission the powers of removal or censure and creates a new Commission power of "[public] admonish[ment]" short of censure. These Commission actions, like that of private admonishment, are now subject only to our review jurisdiction. As before, however, removal or censure may occur only for "action occurring not more than 6 years prior to the commencement of the judge's current term." (Cal. Const., art. VI, § 18, subd. (d).)

The Constitution gives this court no unilateral power to censure or remove a judge; we may act only upon a "recommendation" of the Commission. (Cal. Const., art. VI, § 18, former subd. (c).) The Commission's recommendation, in turn, depends entirely on its assessment of all the charges properly before it. This integrated disciplinary process, in which the Commission proposes and we merely dispose, cannot operate as contemplated by the literal constitutional language if charges which were timely when addressed by the Commission are no longer so by the time we act upon the Commission's findings and recommendations.

Indeed, even if there were literal support for the "plain language" construction the majority advance, we would thus be obliged to reject that construction under the well-settled rule that "[t]he literal language of [constitutional] enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers. [Citations.]" (*Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].)

Moreover, periods of limitation, such as that provided by California Constitution, article VI, section 18, former subdivision (c), are typically measured from the formal commencement of proceedings, not from the later time when a final judgment or determination is rendered. We should not assume the framers and adopters of this constitutional provision "silently, or at best obscurely," decided an "important and controversial" public policy issue by adopting so radical a departure from prevailing legal principles. (*In re Christian S.* (1994) 7 Cal.4th 768, 782 [30 Cal.Rptr.2d 33, 872 P.2d 574].)

The history of California Constitution, article VI, section 18, indicates that no such departure was intended. This court's power to censure or remove judges for misconduct, after a recommendation by the Commission, was added to the Constitution in 1960. (Cal. Const., art. VI, former §§ 1b, 10b, adopted at Gen. Elec. (Nov. 8, 1960) as Sen. Const. Amend. No. 14, Stats. 1959 (Reg. Sess.), res. ch. 254, pp. 5822-5825.) The original scheme empowered the Commission, "after such investigation as [it] deem[ed] necessary," to "order a hearing" on charges of misconduct, or to request this court to appoint special masters for that purpose. No time limit was placed on the misconduct which could be considered. (Cal. Const., art. VI, former § 10b.)

Subsequently, the Constitutional Revision Commission (CRC) undertook a comprehensive proposed modernization of the Constitution. An article VI committee was appointed to address judicial issues. The article VI committee's third working draft retained much of the form and substance of the

1960 provision for judicial discipline. However, a limitations period was included to the effect that "[t]he Commission on Judicial Qualifications [now the Commission on Judicial Performance] may order a hearing . . . or request the appointment of special masters . . . with respect to . . . cases [of misconduct] which occur in the term of office of the judge current *at the time of the hearing or request* or which occur in the term . . . of the judge immediately preceding *such* current term and the *Supreme Court* may make an order of removal . . . on the basis of any cause occurring during *such* terms of office." (Cal. Const. Revision Com., art. VI committee, third working draft (July 15, 1965) pp. 41-42, italics added.) The third working draft thus expressly stated that the period of limitations for exercise of *this court's* disciplinary power was to be measured backward from the time *the Commission* formally called for a hearing on the charges.

The third working draft was considered by the full CRC at its meeting of July 29, 1965. Judge Charles J. McGoldrick, speaking for the California Judges Association (CJA), commented upon the draft's provisions for judicial discipline. His only observation on the proposed limitations period was that "some [CJA] members feel . . . [the discipline provision] should be amended so that action could not be taken against a judge for his conduct prior to his current term of office or within four years of the date of the conduct charged against him." (Minutes, Cal. Const. Revision Com. meeting of July 29, 1965, p. 20.) The CRC referred the issue back to the article VI committee, which was to report directly to the drafting committee. (*Id.*, at p. 24.)

At its meeting of November 18, 1965, the CRC took up the drafting committee's final proposal, which tracked the current form of article VI, section 18, former subdivision (c), and included the current prohibition against censure or removal for conduct occurring more than six years before the judge's "current term." The final revised version was approved without discussion. (Minutes, Cal. Const. Revision Com. meeting of Nov. 18, 1965, pp. 12-13.)

The CRC's proposed constitutional revision was introduced in the Legislature as Assembly Constitutional Amendment No. 13 (1966 First Ex. Sess.) (A.C.A. No. 13). No changes were made to the limitations provision as A.C.A. No. 13 progressed through the two houses, and that provision (Stats.

1966 (First Ex. Sess.) res. ch. 139, par. Eighty-Second, p. 978) was adopted unaltered by the voters at the General Election of November 8, 1966.[3]

From this chronology of events the following principles emerge: the disciplinary limitations period proposed by the article VI committee clearly was to be measured by the term which the judge was "current[ly]" serving *at the time the Commission set the formal hearing process in motion.* That concept was never discussed or criticized, and no departure from it was ever suggested. While Judge McGoldrick proposed a shorter limitations period (current term or four years, whichever is less), he never intimated that the period should be measured from any later point in the disciplinary process, such as the imposition of final discipline by this court. Subsequent efforts by the article VI and drafting committees produced a briefer, semantically recast version of the discipline section. Most references to the Commission's detailed procedures were dropped, and the current limitations language was adopted. But there is no indication of an intent to alter the measurement of the limitations period as originally expressed in the third working draft.

It therefore seems quite clear that no such intent arose, and that the final language implicitly incorporates the original proposal in this respect. The modernization of the final language, with the consequent loss of procedural detail, simply eliminated the opportunity to include an express statement to that effect.

To overlook this clear history, and instead to adopt the majority's simplistic and unusual construction, has a distorting effect on the entire disciplinary process. An accused judge facing older but still timely charges has the incentive to delay the imposition of final discipline until after he commences a new term. By the same token, and with equally unjust implications, the Commission's examiner faces pressure to rush the matter to final discipline in order to avoid the intervening loss of valid and relevant charges.

The majority suggest the constitutional provision "combines the functions of a [classic] statute of limitations [measured by the time proceedings commence] and a rule limiting the time proceedings may remain pending."

[3]The ballot pamphlet materials for A.C.A. No. 13, submitted to the voters as Proposition 1-a, made no reference to the limitations period for judicial discipline. The argument in favor of the measure noted that a principal purpose of the constitutional revision effort was to reduce the length of the frequently amended Constitution of 1879, and to "put[] the Constitution into modern, concise, and easily understandable language." The argument also noted that judges would be under "stronger disciplinary procedures." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 8, 1966) p. 2.)

(Maj. opn., *ante*, at pp. 177-178.) By allowing commencement of a new term to shorten the total elapsed time between misconduct and final discipline, the majority assert, the constitutional provision "gives due deference to the will of the electorate in reelecting a judge . . . ." (*Id.* at p. 178.) But this "voters' will" analysis begs the fundamental question. There is no dispute that the Constitution immunizes a judge for certain past misconduct when the voters have more recently elected him to a new term. The issue is whether such immunity merely affects the charges the Commission may *hear*, or whether it may also prevent final discipline upon charges the Commission did properly hear. Contrary to the majority's conclusion, language, history, logic, and policy all indicate that the former construction is appropriate.[4]

As might therefore be expected, the majority's novel interpretation appears out of step with the rule in other jurisdictions. Of those few states that impose limitations on discipline for misconduct which precedes the judge's "current term," most appear to measure the limitations period backward from receipt of a complaint by the disciplinary agency. (See Rosenbaum, Practices and Procedures of State Judicial Conduct Organizations (1990) ch. 2, p. 17.)

Accordingly, I cannot endorse the majority's restrictive limitations period, under which petitioner may only be disciplined for judicial misconduct which took place within six years before the term he is serving at the moment we file this decision. Because the 1987 incident occurred within six years before the term petitioner was serving when the Commission's formal hearing process began, the Constitution does not prevent us from considering that incident.[5] Having done so, I nonetheless join the majority's

[4]One might argue that a judge is unlikely to "pull the wool over the voters' eyes" and win a new term when formal charges of misconduct are already pending against him. The facts of the instant case belie any such claim. Moreover, although Proposition 190 opens to the public all formal Commission proceedings begun after February 28, 1995 (Cal. Const., art. VI, § 18, subd. (j)), the Commission previously retained broad discretion to conduct a closed and confidential inquiry, even where charges of moral turpitude were involved. (*Id.*, former subds. (f), (g); see also Cal. Rules of Court, rules 902, 907.2; cf. *Adams* v. *Commission on Judicial Performance* (1994) 8 Cal.4th 630, 638 [34 Cal.Rptr.2d 641, 882 P.2d 358].) Thus, there has been no guarantee that the voters would become aware of pending charges which might affect their support for the judge.

[5]As previously noted, Proposition 190, operative March 1, 1995, provides that *the Commission*, subject to our discretionary review, "may . . . censure . . . or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term . . . ." (Cal. Const., art. VI, § 18, subd. (d).) I assume the majority would conclude, by reasoning parallel to its analysis here, that this limitations period must be measured from the time the Commission takes its final disciplinary action, so that charges properly heard by the Commission might nonetheless be obliterated if the judge commenced a new term before the

determination that the discipline recommended by the Commission is not warranted.[6]

George, J., concurred.

Respondent's petition for a rehearing was denied February 15, 1996.

Commission's proceedings were final there. Thus, I cannot be confident that the mischief wrought by the majority's holding is ameliorated in future cases.

[6]By rejecting the Commission's recommendation of public censure, we leave the case at large for a determination by the Commission whether it should exercise its own power of private admonishment. (Cal. Const., art. VI, § 18, former subd. (c).) The Commission's constitutional power of private admonishment derives from a discrete, self-contained sentence which, unlike the provisions for censure and removal, specifies *no* time limitation on the conduct which may be considered. (*Ibid.*) It appears the Commission may therefore take the 1987 incident into account for admonishment purposes, and I do not read the majority's opinion as holding otherwise.

[No. S064923. May 13, 1999.]

RICHARD J. OBERHOLZER, a Judge of the Superior Court, Petitioner,
v.
COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

## SUMMARY

The Supreme Court granted a petition for a writ of mandate filed by a superior court judge, and ordered the Commission on Judicial Performance to withdraw a confidential advisory letter it had issued to the judge sanctioning him for having dismissed a criminal prosecution on grounds that were allegedly contrary to controlling precedent. The court held that there was no evidence that the dismissal was motivated by bad faith, bias, abuse of authority, disregard of fundamental rights, intentional or reckless disregard of the law, or any purpose other than the faithful discharge of judicial duty. Specifically, after petitioner properly denied the prosecution's inadequate motion to continue, one that could have led to the imposition of sanctions under Pen. Code, § 1050.5, the prosecutor stated that the People unequivocally refused to proceed. Not unreasonably, the judge viewed this action as an intolerable affront to the trial court's authority that could have supported imposition of sanctions for contempt. Thus, the order dismissing the case, even if legally incorrect, failed to raise concerns regarding a reckless disregard of the law, bias, or a lack of impartiality, as the commission suggested in its advisory letter. The court also held that the commission was authorized to issue advisory letters, and that its procedure did not deny the judge due process of law. (Opinion by The Court. Concurring opinion by Werdegar, J. (see p. 400).)

## HEADNOTES

Classified to California Digest of Official Reports

(1) **Judges § 6.4—Removal, Censure, and Other Discipline—Advisory Letter—Review.**—The correct means to obtain judicial review of an advisory letter is by a petition for a writ of mandate. Because such review is neither a review of a determination by the Commission on Judicial Performance to retire, remove, censure, admonish, or disqualify a judge (Cal. Const., art. VI, § 18, subd. (d)) nor a legal

proceeding requesting injunctive relief or another provisional remedy (Cal. Const., art. VI, § 18, subd. (g)), the Supreme Court is not required to issue its decision within any specific time period.

(2) **Judges § 6—Removal, Censure, and Other Discipline—Advisory Letter—Authority.**—Cal. Const., art. VI, § 18, provides the mechanism for the disciplining of judges and establishes the Commission on Judicial Performance as the entity responsible for disciplining judges, subject to review by the Supreme Court. Cal. Const., art. VI, § 18, subd. (d), specifies that the disciplinary options available to the Commission include censure, removal, involuntary retirement, and public or private admonishment. The commission also has authority to issue a confidential advisory letter to a judge (Cal. Const., art. VI, § 18.5). The issuance of such a letter amounts to discipline that implicates a judge's right to due process of law. Advisory letters fairly may be characterized as disciplinary in nature, because they may be considered by the commission in subsequent proceedings and because the confidentiality of the letters is not assured.

(3a, 3b) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Advisory Letter—Due Process.**—The procedure the Commission on Judicial Performance utilized in issuing an advisory letter ("stinger") to a judge did not violate his right to due process of law. Under Cal. Rules of Court, rule 110, before an advisory letter may be issued, the judge must be given notice of the inquiry and the nature of the charge and a reasonable opportunity to respond. The commission sent the judge an inquiry letter that provided him with notice of the inquiry and the nature of the charge (misconduct in dismissing a criminal case), and gave him an opportunity to respond. The judge did respond in defense of his action. After the commission later informed the judge that it had ordered a preliminary investigation, the judge filed a supplemental response, again defending his conduct. The nature of the commission's investigation was, at its core, a factfinding mission focused upon the judge's handling of the case. The commission's inquiry lent itself well to proof through documentary forms of evidence, including hearing transcripts and the parties' briefs. Balancing the judge's private interest in maintaining a judicial career free of the infliction of disciplinary measures and the commission's interest in the effective and efficient safeguarding of the public from aberrant action by judicial officers, due process of law did not require additional protections.

(4) **Constitutional Law § 107—Due Process—Procedural—State—General Principles.**—Under the California Constitution, the extent to

which procedural due process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decisionmaking process. There are four factors to consider in determining whether the dictates of due process have been met: the private interest that will be affected by the individual action; the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; the dignitary interest of informing individuals of the nature, grounds, and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

(5) **Constitutional Law § 107—Due Process—Procedural—Federal—General Principles.**—Under federal due process analysis, the aggrieved party must establish a protected property interest. Although U.S. Const., 14th Amend., protects the pursuit of one's profession from abridgment by arbitrary state action, due process of law is not a fixed theory, requiring standardized procedures or a trial-like hearing in each instance. To the contrary, due process is an elusive concept: Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies make binding determinations that directly affect individuals' legal rights, they must use the procedures that have traditionally been associated with the judicial process. On the other hand, when governmental action does not amount to an adjudication, such as a general fact-finding investigation, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, due process embodies the differing rules of fair play, which, through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors, including the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding.

(6) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Legal Error.**—A judge who commits legal error that clearly and convincingly reflects bad faith, abuse of authority, disregard of fundamental rights, or any purpose other than the faithful discharge of

judicial duty, is subject to investigation. Mere legal error, without more, however, is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and thus should be disciplined.

[See 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, § 70.]

(7) **Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Legal Error—Advisory Letter—Dismissal of Criminal Prosecution.**—The Supreme Court ordered the Commission on Judicial Performance to withdraw a confidential advisory letter it had issued to a judge sanctioning him for having dismissed a criminal prosecution on grounds that were allegedly contrary to controlling precedent, since the evidence did not support the commission's determination. After petitioner properly denied the prosecutor's inadequate motion to continue, one that could have led to the imposition of sanctions under Pen. Code, § 1050.5, the prosecutor stated that the People unequivocally refused to proceed. Not unreasonably, the judge viewed this action as an intolerable affront to the trial court's authority, one that could have supported imposition of sanctions for contempt. Given the prosecution's recalcitrance to proceed, the order dismissing the case, even if legally incorrect, failed to raise concerns regarding a reckless disregard of the law, bias, or a lack of impartiality, as the commission suggested in its advisory letter. There was no evidence that the dismissal was motivated by bad faith, bias, abuse of authority, disregard of fundamental rights, intentional or reckless disregard of the law, or any purpose other than the faithful discharge of judicial duty.

[See 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, § 72.]

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**COUNSEL**

Lewis, D'Amato, Brisbois & Bisgaard, James E. Friedhofer and Lisa K. Roberts for Petitioner.

Jack Coyle for Respondent.

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**OPINION**

**THE COURT.**—This original writ proceeding presents the following issues: (1) whether the Commission on Judicial Performance (Commission)

has authority to issue a confidential advisory letter (commonly known as a "stinger" letter); (2) whether the issuance of such a letter amounts to "discipline" that implicates a judge's right to due process of law; (3) whether such a letter may be issued based upon a perceived legal error committed by a judge; and (4) whether petitioner here, Judge Richard J. Oberholzer, committed sanctionable legal error in dismissing a criminal case after the People indicated they were not ready to proceed.

As we shall explain, we conclude that the Commission has authority to issue advisory letters, that such letters are a form of discipline, that the Commission's procedures comport with the requirements of due process of law, and that such letters may be based upon a perceived legal error, if such error clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty. In the instant case, petitioner's dismissal of a criminal action, following the People's declaration of unreadiness, did not constitute such sanctionable conduct.

Accordingly, we find that the Commission improperly issued its advisory letter to petitioner.

## FACTS

### A. *The Commission's Staff Inquiry Letter*

By letter dated December 6, 1996, the Commission invited petitioner to "comment regarding a report that is before the commission." In pertinent part, the inquiry letter contained the following summation:

"It is reported that in the criminal case *People* v. *James*, Kern County Superior Court case no. 65661, defendant Keith James was charged with one felony count of committing a lewd and lascivious act upon his nine-year-old niece Alicia A. Reportedly, the preliminary hearing was held on January 12, 1996, and on January 17, 1996, an information was filed charging James with the felony. James reportedly successfully moved for one continuance, and the case was set for jury trial to begin on April 8, 1996.

"It is reported that on Monday, April 8, 1996, the trial was trailed to the following day because no courtroom was available for assignment. On April 9, 1996, Deputy District Attorney John Somers, who was the trial attorney assigned to the case, reportedly advised you that another of his cases, *People* v. *Hammock*, had been assigned to Department 2 for trial and was expected to run until the middle of the following week. You then set a trial date of Thursday, April 11, 1996.

"On April 11, 1996, you were reportedly advised by Deputy District Attorney Elizabeth Anderson that the case had been reassigned from DDA Somers to a different trial attorney the day before; you sent the case to Department 8 (Judge Kenneth C. Twisselman, II) for trial. Reportedly, defendant James and his attorney and Chief Deputy District Attorney Dan Sparks reported to Department 8, where DDA Sparks told Judge Twisselman that the prosecution was not ready to proceed because the case had been assigned to the trial attorney only the day before. Judge Twisselman reportedly told the parties to return to Department 1 to explain to you the prosecution's request for a continuance.

"Reportedly, the parties returned to Department 1. You reportedly sent them back to Department 8, without discussion. You then reportedly had a telephone conversation with Judge Twisselman during which you reportedly suggested that the prosecution's motion to continue should be denied. When the parties appeared in Department 8 for a second time, Judge Twisselman reportedly told them to return to Department 1.

"When the parties returned to Department 1, the prosecution advised the court that they were not ready to proceed because of the recent reassignment of the case. The prosecution requested a continuance of the trial until the following Monday (April 15) to allow the recently assigned trial attorney time to prepare. Reportedly, the 10-day period following the scheduled trial date, after which the case would be required to be dismissed pursuant to Penal Code section 1382, did not expire until April 18. It is reported that you denied the motion to continue on the grounds that no written motion to continue had been filed and the court had a heavy calendar of cases to be tried. DDA Sparks reportedly refused to return to Department 8 for trial and cited the case of *People* v. *Ferguson* [(1990) 218 Cal.App.3d 1173 [267 Cal.Rptr. 528]]. Reportedly, the defense then moved to dismiss, and you granted the motion on the grounds that the prosecution was not prepared to proceed to trial and had failed to file a written motion to continue the case. The hearing on the matter reportedly concluded as follows:

" 'Mr. Sparks: Does the Court remember its reversal in *People* v. *Ferguson*? This is the same mistake you made in that case.'

" 'The Court: That's the ruling of the Court.'

"In *People* v. *Ferguson* (1990) 218 Cal.App.3d 1173 [267 Cal.Rptr. 528], the Court of Appeal reversed an order entered by you dismissing a criminal case that had been trailed from the original trial date when the DDA assigned to the case was unable to proceed on the date set for trial. . . ."

B. *Petitioner's Response*

By letter dated January 27, 1997, petitioner responded to the Commission's letter, in pertinent part contending that he had ruled correctly in dismissing People v. James. The response asserted that the deputy district attorney assigned to the case, John Somers, had known in advance that he would be unable to try the case on the assigned date, yet failed to move for a continuance in writing or orally on April 8, 1996.

The response also reviewed certain provisions contained within Penal Code section 1050, governing motions for continuance of a criminal trial. As set forth more fully in the margin, the statute requires that a noticed motion be filed at least two court days prior to the hearing sought to be continued, and within two court days of learning of a conflict in the scheduling of any court hearing. (Pen. Code, § 1050, subd. (b).)[1] A party's failure to comply with these statutory requirements is excusable upon a showing of good cause. (§ 1050, subd. (c).) If the party seeking the continuance is unable to

[1] Penal Code section 1050 provides in pertinent part:

"(a) The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. . . .

"(b) To continue any hearing in a criminal proceeding, including the trial, (1) a written notice shall be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary; and (2) within two court days of learning that he or she has a conflict in the scheduling of any court hearing, including a trial, an attorney shall notify the calendar clerk of each court involved, in writing, indicating which hearing was set first. A party shall not be deemed to have been served within the meaning of this section until that party actually has received a copy of the documents to be served, unless the party, after receiving actual notice of the request for continuance, waives the right to have the documents served in a timely manner. Regardless of the proponent of the motion, the prosecuting attorney shall notify the people's witnesses and the defense attorney shall notify the defense's witnesses of the notice of motion, the date of the hearing, and the witnesses' right to be heard by the court. The superior and municipal courts of a county may adopt rules, which shall be consistent, regarding the method of giving the notice or waiver of service required by this subdivision, where a continuance is sought because of a conflict between scheduled appearances in the courts of that county.

"(c) Notwithstanding subdivision (b), a party may make a motion for a continuance without complying with the requirements of that subdivision. However, unless the moving party shows good cause for the failure to comply with those requirements, the court may impose sanctions as provided in Section 1050.5.

"(d) When a party makes a motion for a continuance without complying with the requirements of subdivision (b), the court shall hold a hearing on whether there is good cause for the failure to comply with those requirements. At the conclusion of the hearing the court shall make a finding whether good cause has been shown and, if it finds that there is good cause, shall state on the record the facts proved that justify its finding. A statement of the finding and a statement of facts proved shall be entered in the minutes. If the moving party is unable to

demonstrate good cause for failing to comply with the notice requirements, the motion for continuance shall not be granted, and the court may impose sanctions as provided in section 1050.5. (§ 1050, subds. (c), (d).)[2]

In his response letter, petitioner asserted that when the foregoing procedural requirements are not met by a prosecuting attorney seeking a continuance, witnesses' lives and schedules are disrupted, appropriate legal redress for victims may be impacted if witnesses are unavailable, defendants are left unable to prepare an opposition to the motion for continuance, and court clerks are denied the opportunity either to work out conflicts and priorities on their own or to expose a lack of true conflict. Relying upon sections 1050, subdivision (c), and 1050.5, petitioner argued that if the moving party fails to show good cause, the motion for continuance must be denied, and the movant's counsel may be subject to a monetary sanction and to the filing of a report with an appropriate disciplinary committee.

Petitioner's response emphasized the People's failure to properly request a continuance. Petitioner contended that Deputy District Attorney Somers appeared before him in department 1, on April 8, 1996, and the jury trial was trailed to the following day. On April 9, the case was put over to April 11, because Somers was in trial on another case. Petitioner informed him that a new prosecutor would have to be assigned in People v. James. On April 11, Deputy District Attorney Elizabeth Anderson appeared before petitioner and stated that, on the previous day, Deputy District Attorney Carla Grabert had been reassigned to replace Somers as trial counsel in James. Petitioner sent the matter to trial before Judge Twisselman, who presided in department 8.

Petitioner believes that when the parties arrived in department 8, Chief Deputy District Attorney Dan Sparks appeared on behalf of the People, requesting a continuance. Judge Twisselman sent the parties back to department 1, where motions for continuance were considered. Petitioner sent the parties back to department 8, because a motion for a continuance had not

show good cause for the failure to give notice, the motion for continuance shall not be granted."

All further undesignated statutory references are to the Penal Code.

[2]Section 1050.5 provides:

"(a) When, pursuant to subdivision (c) of Section 1050, the court imposes sanctions for failure to comply with the provisions of subdivision (b) of Section 1050, the court may impose one or both of the following sanctions when the moving party is the prosecuting or defense attorney:

"(1) A fine not exceeding one thousand dollars ($1,000) upon counsel for the moving party.

"(2) The filing of a report with an appropriate disciplinary committee.

"(b) The authority to impose sanctions provided for by this section shall be in addition to any other authority or power available to the court."

been filed. He recalls that, "It is possible that on this trip Sparks indicated his desire to make a record." Petitioner believes that he informed the prosecutor that the proper place in which to make that record was before Judge Twisselman in department 8.

After the parties returned to department 8, Judge Twisselman called petitioner to discuss the case. They agreed that the matter should be heard in department 1. Deputy District Attorney Sparks thereafter informed petitioner that the People were not ready to proceed to trial, but that Deputy District Attorney Grabert would be ready to proceed on April 15. (The last day on which the trial could commence under the relevant statute was April 18, but section 1050, subdivision (g), permitted that deadline to be extended 10 days, until April 28.) Deputy District Attorney Sparks orally moved for a continuance, which was denied, as set forth in the following colloquy:

"DDA Sparks: 'The People are not ready. The assigned attorney is Mr. Somers. He is engaged in another case in Department 2. I don't know what facts were presented to the Court this morning, but I'm here requesting a continuance of the case until Monday, because we are going to reassign the trial to Carla Grabert in an effort to accommodate this Court's congested trial calendar. However, she has not even read the file because of other case commitments. She will be ready Monday morning [April 15]. If the court would like to send this [case] to Department 8 to commence Monday, that's perfectly acceptable to me and to the victims in the case, but the People are not ready. The last day for trial is [April] 18th, and in fact under [section] 1050 [subdivision] (g), it's the 28th of April.'

"The Court: 'Well, I have April 18th as the last day this can go to trial, number one; number two, this case has been on the trial calendar since Monday of this week [April 8]. Mr. Somers was sent out on his case last week. He was sent out on a case that was going to go two weeks. It was known to the District Attorney's Office at that time that he would be unavailable to try this case within the statutory time limit. I had been telling him that it was April 18th, I believe I began telling you that on Monday, and there has been no attempt apparently to reassign the case.

" 'We have courts available, and I have an extremely heavy calendar of cases that have to get out and cases that have to get out next week. This is one of the cases that we show that ha[s] to get out next week. Consequently—there was no motion filed with this Court to continue this case, I've been trailing it on a day-to-day basis, and the Court requires two days notice, pursuant to statute, for a motion to continue. None was ever filed

with the Court, knowing that Mr. Somers was going to be in trial and would not be available to try this case.

" 'With that in mind, your motion to continue is denied and this [case] is sent to Department 8. You will have to start your trial.'

"DDA Sparks: 'We will not do that, Your Honor. We refuse to proceed. You can deal with it here, because [Judge Twisselman is] going to send it back up here. I suggest the Court read *People* v. *Ferguson.*

" 'Here is the position of the People. We are the executive authority under the Constitution. We pick the prosecutor. The last day for trial under [section] 1050[, subdivision] (g) in this case is the 28th of April. It is pointless to accommodate this Court by reassigning cases in an effort to assist with this congested calendar, because I am going to leave this case with Mr. Somers, I am not going to reassign it to Carla Grabert.'

"The Court: 'The District Attorney's Office is welcome to do what they want, but if there is a motion by defense counsel to dismiss because you are not ready to go, the Court's going to listen to that.'

"DDA Sparks: 'Under what grounds? [Section] 1385 requires that you state the grounds.'

"The Court: 'I will state that if it happens. There was no motion to continue this case before the Court, and you knew that Mr. Somers was not going to be available within the statutory time period.'

"DDA Sparks: 'It's not ready.'

"The Court: 'The Court is ready to send this case out. You've been notified. They answered up at readiness time. It was confirmed for trial at readiness. There was no motion to continue since that time, and that was ten, eleven, twelve, thirteen or fourteen days ago. [¶] Mr. McKnight?'

"[Defense Counsel] Mr. McKnight: 'Yes, Your Honor. At this time, based on the Court's findings at this time, I make a motion to dismiss.'

"The Court: 'All right. The Court, understanding that the People are not prepared to go to trial and they are not desirous of pursuing this case—'

"DDA Sparks: 'That is a misstatement of the facts.'

"The Court: '—at this time—'

"DDA Sparks: 'We are unable to proceed because we're not prepared. The record is quite clear on that.'

"The Court: '—and the Court notes that there is no motion to continue this case—'

"DDA Sparks: 'I just made one orally.'

"The Court: '—none has been filed with the Court, and that the District Attorney's Office knew well in advance of this case that we have a number of cases to get out, I am going to grant the defendant's motion.'

"DDA Sparks: 'You haven't satisfied the requirements of [section] 1385, Your Honor. Would you please do that?'

"The Court: 'What else do you want?'

"DDA Sparks: 'You must specify on the record the good cause, because you do not have grounds under [sections] 1381 or 1382.'

"The Court: 'The good cause is that this case is ready, was ready to go to trial—the defendant is ready, I presume—'

"Mr. McKnight: 'Ready, Your Honor.'

"The Court: 'Is ready to go to trial, there are courtrooms available, and the case was set for trial as of Monday and there has been no motion to continue.'

"DDA Sparks: 'I just made it orally.'

"The Court: 'Until you stepped into court, but failing to comply with the provisions for a motion to continue.'

"DDA Sparks: '[Section] 1050 provides for oral motions to continue. The penalty is sanctions for not filing it.'

"The Court: 'The Court does not find good cause for you waiting until the date this case is sent out to trial to make a motion when you knew well in advance if you had problems with the case and the assignment of the case.'

"DDA Sparks: 'Does the Court remember its reversal in *People* v. *Ferguson*? This is the same mistake you made in that case.'

"The Court: 'That's the ruling of the Court.' "

In his response to the Commission, dated January 12, 1997, petitioner explained that he "anticipated that the assigned DDA could seek 'logistical remedies' in the form of using the balance of the day (beginning in the afternoon) to pick a jury and/or conduct other preliminary matters which would not have required the actual opening statement and presentation of witnesses until perhaps the following Monday. Indeed, there were *in limine* motions to deal with as well as a scheduled conditional examination of a witness on the following day, Friday, April 12th."

Petitioner further explained that, in his view, *People* v. *Ferguson* (1990) 218 Cal.App.3d 1173 [267 Cal.Rptr. 528] was distinguishable. Petitioner also challenged the Commission's jurisdiction to investigate the matters set forth in the Commission's inquiry letter.[3]

C. *The Commission's Notice*

By letter dated April 17, 1997, the Commission informed petitioner that it had ordered a preliminary investigation pursuant to Rules of the Commission on Judicial Performance, rules 109 and 111.[4] The Commission's notice explained that "[t]he nature of the possible charges" was set forth in the Commission's letter dated December 6, 1996, and that "[i]f true as described, your actions may constitute misconduct within the meaning of California Constitution, Article VI, section 18(d)." The Commission afforded petitioner "an opportunity to present in writing such matters as you may chose [*sic*]."

[3]The People appealed from petitioner's order dismissing the case, and also sought writ relief. The Court of Appeal summarily denied the writ, and the People abandoned the appeal, instead refiling the case in the trial court. The defendant subsequently was acquitted by a jury.

[4]Rule 109 of the Rules of the Commission on Judicial Performance provides that if a complaint against a judge is not obviously unfounded or frivolous, the Commission may make a staff inquiry to determine whether sufficient facts exist to warrant a preliminary investigation and, if so, make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held. Unless otherwise noted, subsequent references to rules are to the Rules of the Commission on Judicial Performance.

Rule 111(a) provides that "[i]f the Commission commences a preliminary investigation, the judge shall be notified of the investigation and the nature of the charge, and shall be afforded a reasonable opportunity in the course of the preliminary investigation to present such matters as the judge may choose."

Rule 111(c) provides that "[a]t any time after notice of a preliminary investigation and a reasonable opportunity to respond has been given to the judge, the commission may determine that the judge's conduct does not constitute a basis for further proceedings and may terminate the investigation by issuing a confidential advisory letter to the judge."

D. *Petitioner's Supplemental Response*

By letter dated May 8, 1997, petitioner reiterated his belief that he had not violated any statute, court rule, or canon of judicial ethics in connection with his dismissal of People v. James. He asserted that he "made a proper legal ruling, the losing party made 'objections' to that ruling . . . , and the Court of Appeal considered and rejected those objections. The lack of success of the writ petition in People v. James demonstrates that the case cited as controlling by the Deputy District Attorney (*People* v. *Ferguson*) was not in fact on point." Petitioner's supplemental response opined that further inquiry by the Commission was unwarranted and that no basis existed to impose discipline.

E. *The Commission's Advisory Letter*

On July 14, 1997, the Commission sent the following confidential advisory (or "stinger") letter to petitioner:

"The matter about which you and commission staff have corresponded was considered by the Commission on Judicial Performance at its July meeting. After reviewing all the information before it, including the letters of January 27 and May 8, 1997, submitted on your behalf by counsel, the commission concluded that further proceedings are not warranted and determined to close the matter with this severe advisory letter.

"In making this determination, the commission strongly disapproved of your handling of the felony child molestation case of *People* v. *James*. Your dismissal of the case on April 11, 1996, occurred under circumstances equivalent to those in the earlier case of *People* v. *Ferguson*, in which the Court of Appeal reversed your dismissal of the case in a published opinion in 1990. When a judge's order is reversed in a published decision, and the judge repeats the action, such conduct necessarily raises concerns about a reckless disregard of the law, diminishing public confidence in the judiciary in contravention of Canon 2A. When the conduct is repeated against the same party, concerns of bias or a lack of impartiality may also be raised. *See* Canon 3B(5). As respects your conduct in dismissing the *People* v. *James* case, the commission was also particularly disturbed that the *People* v. *Ferguson* decision was brought to your attention by counsel before you dismissed the case.

"Article VI, section 18.5 of the California Constitution and Commission Rule 102 set forth the provisions concerning confidentiality of advisory letters.

"Thank you for your cooperation. The matter is now closed."

DISCUSSION

(1) (See fn. 5.) Petitioner filed this original writ proceeding on October 3, 1997.[5] He contends: (1) the Commission lacked authority to issue an advisory letter; (2) even if the Commission was empowered to issue such a letter, the Commission's procedure in doing so violated his right to due process of law; (3) the Commission may not issue a stinger letter based upon a perceived legal error committed by a judge; and (4) in the present case, no sanctionable legal error was committed.

Having issued an alternative writ of mandate, we now address these issues in turn.[6]

A. *Whether the Commission Has Authority to Issue an Advisory Letter*

(2) The California Constitution provides the mechanism for the disciplining of judges (Cal. Const., art. VI, § 18; *Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1320 [240 Cal.Rptr. 859, 743 P.2d 919]) and establishes the Commission on Judicial Performance as the entity responsible for disciplining judges, subject to review by this court. (Cal. Const., art. VI, §§ 8, 18.) Article VI, section 18, subdivision (d), of the California Constitution, specifies that the disciplinary options available to the Commission include censure, removal, involuntary retirement, and public or private admonishment.[7]

[5]The correct means by which to obtain judicial review of an advisory letter is by a petition for writ of mandate. Because the instant proceeding is neither a "review of a determination by the commission to retire, remove, censure, admonish, or disqualify" a judge (Cal. Const., art. VI, § 18, subd. (d)), nor a legal proceeding requesting "injunctive relief or other provisional remedy" (Cal. Const., art. VI, § 18, subd. (g)), this court is not required to issue its decision within any specific time period.

[6]Our alternative writ of mandate set forth in pertinent part: "The petition for writ of mandate on file herein having been considered and good cause appearing for the issuance of this alternative writ of mandate, respondent hereby is commanded to withdraw its advisory letter issued to petitioner, dated July 14, 1997, or, in the alternative, to show cause before this court why the relief sought in the petition should not be granted on the following ground or grounds: (1) the Commission lacks authority to issue confidential letters, (2) if the Commission has such authority, its procedure for doing so is invalid, and (3) if the Commission has such authority, the facts of this case did not warrant issuance of such a letter."

[7]Article VI, section 18, subdivision (d), of the California Constitution, provides in pertinent part: "Except as provided in subdivision (f) [which applies to justices and former justices of the California Supreme Court], the Commission on Judicial Performance may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, or (2) censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current

Petitioner contends that because the constitutional provision cited above makes no reference to advisory letters, the Commission is without jurisdiction to issue them. He further contends that, even if the Commission considers such letters to be "*advisory*" or "*educational*" in nature, in fact they represent *disciplinary* action. The Commission disagrees with these contentions.

In addressing the parties' respective positions, we briefly trace the evolutionary development of the relevant rules and practices involved. In each year since its inception in 1961, the Commission confidentially and informally has cautioned against and disapproved of judicial misbehavior when the Commission deemed it appropriate to do so. (See generally, Com. Jud. Performance ann. reps. to Governor, 1983-1997.) The Commission traditionally has issued advisory letters to judges regarding matters that it determines do not warrant admonishment, censure, removal, or involuntary retirement, but which it considers too significant to dismiss without comment. (See Com. Jud. Performance, Rep. to Governor (1983) p. 6; see also Rothman, Cal. Judicial Conduct Handbook (1990) Private Admonitions by the Commission on Judicial Performance, pp. VII:1 to VII:27.)[8]

The Commission's long-standing practice of issuing advisory letters was formally acknowledged in 1988 when the Judicial Council—which at that time had rulemaking authority for the Commission under former article VI,

term or of the former judge's last term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or (3) publicly or privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty. . . ."

[8]Typically, the largest category of advisory letters implicate California Code of Judicial Ethics, canon 3B(4): "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in an official capacity . . . ." Thus, most advisory letters involve judicial demeanor, including unnecessary harshness, sarcasm, impatience, name-calling, and a variety of other inappropriate conduct on the bench. (See, e.g., Com. Jud. Performance, 1990 Ann. Rep., p. 21; Com. Jud. Performance, 1989 Ann. Rep., p. 22; see also Com. Jud. Performance, 1996 Ann. Rep., p. 24: "An advisory letter may be issued when the impropriety is isolated or relatively minor, or when the impropriety is more serious but the judge has demonstrated an understanding of the problem and has taken steps to improve. An advisory letter is especially useful when there is an appearance of impropriety. An advisory letter might be appropriate when there is actionable misconduct offset by substantial mitigation.")

In recent years, the Commission has issued an average of approximately 37 advisory letters annually. (See Com. Jud. Performance, 1989-1997 ann. reps.)

section 18, subdivision (h), of the California Constitution—adopted California Rules of Court, rules 904.1 and 904.2(c), effective January 1, 1989.[9]

In discussing the proposed California Rules of Court, rules 904.1 and 904.2(c), the Judicial Council Advisory Committee on Judicial Performance Procedures recognized the salutary effect of advisory letters, observing that such communications do not constitute "formal" discipline.[10] The California Judges Association characterized advisory letters as "an informal quasi-discipline tool." (Cal. Judges Assn.: Procedures of Commission on Judicial

[9]California Rules of Court, former rule 904.1, provided: "At any time during the course of a staff inquiry, the commission may determine that a judge's conduct does not constitute a basis for further proceedings and may terminate the inquiry by issuing a confidential advisory letter to the judge. Before the commission issues an advisory letter, the judge shall be notified of the inquiry, the nature of the charge, and the name of the person making the verified statement or, if none, that the inquiry is on the commission's own motion. The judge shall be afforded a reasonable opportunity in the course of the inquiry to present such matters as the judge may choose. A reasonable time for a judge to respond to an inquiry letter shall be 20 days from the date the letter was mailed to the judge unless the time is extended for good cause shown.

"If the staff inquiry does not disclose sufficient cause to warrant issuance of a confidential advisory letter or further proceedings, the commission shall terminate the staff inquiry and notify the judge in writing." (Adopted eff. Jan. 1, 1989, and repealed eff. Dec. 1, 1996.)

California Rules of Court, former rule 904.2(c), provided: "At any time after notice of a preliminary investigation and a reasonable opportunity to respond has been given to the judge, the commission may determine that the judge's conduct does not constitute a basis for further proceedings and may terminate the investigation by issuing a confidential advisory letter to the judge." (Adopted eff. Jan. 1, 1989, and repealed eff. Dec. 1, 1996.)

[10]The Judicial Council Advisory Committee on Judicial Performance Procedures reported in pertinent part:

"The Commission on Judicial Performance uses an informal process of sending letters of caution, disapproval, and correction to judges whose conduct is questionable in some way or which might be considered 'borderline,' but which does not warrant formal discipline. This process is widely referred to as 'the stinger letter.' No specific authority for this procedure is contained in the rules governing commission procedures. The commission proposed that a rule be adopted which would authorize the commission to use this procedure. CJA [the California Judges Association] also supports adding specific authority for this procedure to the rules and clarifying the circumstances warranting its use.

"The committee found that use of an advisory letter procedure appears to be an effective educational tool for the commission and operates to benefit and assist the individual judge attempting in good faith to comply with all ethical duties. The committee further determined that since the letter merely provides advice and counseling, use of the procedure does not constitute a form of discipline. Legitimizing the procedure, the committee decided, need not involve a constitutional amendment and can properly be accomplished by rule.

"The advisory committee therefore recommends adoption of two provisions authorizing issuance of a confidential advisory letter at any time during the course of a staff inquiry or after commencement of a preliminary investigation. The proposed rule changes would require that notice to the judge and an opportunity to respond be afforded prior to issuance of the letter.

"These suggested changes are set forth in proposed rules 904.1 and 904.2(c) . . . . No adverse comments relating to these proposals were received." (Judicial Council of Cal., Rep.

Performance (July 24, 1987) p. 58.)[11] As noted above, the Commission similarly contends that advisory letters represent an action falling short of formal discipline; we observe, however, that the Commission has not been consistent in describing such letters as generally benign, educational advisories. (See Com. Jud. Performance, 1989 Ann. Rep., p. 22 ["In some cases, the commission will simply advise caution or express disapproval of the judge's conduct. *This milder form of discipline* is contained in letters of advice or disapproval called 'advisory letters' (Rule 904.1). The commission sometimes issues advisory letters *when the misconduct is clear* but the judge has demonstrated an understanding of the problem and has taken steps to improve. They are also used when the impropriety is isolated or relatively minor." (Italics added.)].) The circumstance that such letters may be considered by the Commission in subsequent proceedings further suggests that the letters have a potentially disciplinary *effect.* (See e.g., *Broadman* v. *Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1098-1099 [77 Cal.Rptr.2d 408, 959 P.2d 715] [upholding Commission's recommendation of public censure of judge who commented publicly on a pending case after

and Recommendation of Judicial Council Advisory Com. on Judicial Performance Procedures, Court Management Committee (Oct. 3, 1988) pp. 6-7.)

Although the cover sheet of the report herein cited is labeled "(Staff Draft)" and "Not for Release," the report is contained in a binder for the Court Management Committee's agenda for October 21, 1988, which is available to the public at the Administrative Office of the Courts. Further, the minutes of the Judicial Council's meeting of November 3, 1988, note that the council followed the Court Management Committee's recommendation that the proposed rules be adopted. (See Judicial Council of Cal., minutes of meeting (Nov. 3, 1988) pp. 14-15 [adopting rules 904.1 and 904.2]; Admin. Office of Courts, Press Release No. 84 (Nov. 17, 1988) p. 2 ["The Judicial Council adopted a rule which codifies an existing practice of the Commission on Judicial Performance of issuing a confidential advisory letter in an appropriate case after either a staff inquiry or a preliminary investigation. The advisory letter serves a warning or counseling function for judges whose conduct is not severe enough to warrant further action."].)

[11]The California Judges Association formerly promulgated the Code of Judicial Conduct, which, although not formally adopted by a governmental entity, served as a guide to judicial conduct and was relied upon by this court and the Commission on Judicial Performance in evaluating disciplinary charges against judicial officers. (See, e.g., *Cannon* v. *Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 707, fn. 22 [122 Cal.Rptr. 778, 537 P.2d 898] ["We do not rely on the code in ascertaining violations thereof as grounds for disciplining petitioner; discipline is imposed pursuant to the constitutional provisions and rules in implementation thereof heretofore noted and considered. However, we acknowledge the applicability of the code to any conduct we as judges participate in after its effective date."].)

As part of its promulgation of the former Code of Judicial Conduct, the California Judges Association provided interpretive and explanatory materials to assist judges in understanding and complying with the disciplinary system. In addressing the matter of confidential advisory letters, the California Judges Association reported: "The stinger [letter] is used when a judge's conduct is deemed to be marginal: not worthy of *formal discipline*, but not to be condoned. The stinger is supposed to be a form of constructive criticism or advice *as well as a harbinger of future bad tidings if the advice is not followed.*" (Cal. Judges Assn.: Procedures of Commission on Judicial Performance, *supra*, at p. 58, italics added.)

having received the Commission's advisory letter admonishing him for similar conduct].)

The electorate's passage of Proposition 190 in November 1994 directed the transfer of authority for rulemaking from the Judicial Council to the Commission. After Proposition 190 took effect in March 1995, the Commission invited public comment regarding proposed revisions to the rules, ultimately replacing California Rules of Court, rules 904.1 and 904.2(c), with virtually identical provisions, redesignated as Rules of the Commission on Judicial Performance, rules 110 and 111(c), effective December 1, 1996.[12]

In addition to the transfer of rulemaking authority noted above, the electorate's passage of Proposition 190 amended the California Constitution to include article VI, section 18.5, which provides that "the text of any private admonishment, *advisory letter, or other disciplinary action*" shall be provided by the Commission upon request to public officials who may be considering a judicial appointment of the judge, as well as to the Commission on Judicial Appointments with respect to an applicant for a judicial appointment. (Cal. Const., art. VI, § 18.5, subds. (a), (b), (c), italics added.)[13] Thus, although as petitioner observes, article VI, section 18,

[12]Rule 110 provides: "(a) (Notice prior to issuance of advisory letter) If the commission makes a staff inquiry, the judge shall be notified of the inquiry and the nature of the charge, before the commission issues an advisory letter. The respondent judge so notified shall be afforded a reasonable opportunity in the course of the inquiry to present such matters as the judge may choose. A reasonable time for a judge to respond to an inquiry letter shall be 20 days from the date the letter was mailed to the judge unless the time is extended pursuant to rule 108.

"(b) (Termination of staff inquiry) If the staff inquiry does not disclose sufficient cause to warrant issuance of a confidential advisory letter or further proceedings, the commission shall terminate the staff inquiry and notify the judge in writing of such action if the judge was notified of the staff inquiry pursuant to subdivision (a).

"(c) (Advisory letter) At any time after notice of a staff inquiry and a reasonable opportunity to respond has been given to the judge, the commission may determine that the judge's conduct does not constitute a basis for further proceedings and issue a confidential advisory letter to the judge."

As noted previously, rule 111(c) similarly provides: "(Advisory letter) At any time after notice of a preliminary investigation and a reasonable opportunity to respond has been given to the judge, the commission may determine that the judge's conduct does not constitute a basis for further proceedings and may terminate the investigation by issuing a confidential advisory letter to the judge."

[13]Article VI, section 18.5, subdivisions (a), (b), and (c), of the California Constitution provide:

"(a) Upon request, the Commission on Judicial Performance shall provide to the Governor of any State of the Union the text of any private admonishment, advisory letter, or other

subdivision (d), of the California Constitution, does not explicitly identify advisory letters as a form of discipline or admonishment available to the Commission, article VI, section 18.5, explicitly includes the issuance of such letters within the range of permissible alternatives. This latter constitutional provision codifies the Commission's long-standing practice of issuing advisory letters, characterizes such letters as "disciplinary action," recognizes the Commission's authority to issue such letters, and permits their release in certain circumstances. The section thus removes these letters from the realm of permanently private communications between the Commission and a judge, and makes clear that they may be transmitted to other, designated individuals. In the present case, the potentially detrimental impact of the Commission's advisory letter was plain, in view of the Commission's own characterization that its missive was a "severe advisory letter," used to "strongly disapprove" of petitioner's actions.[14]

In view of the foregoing, we reject petitioner's position that the Commission acted in excess of its jurisdiction when it issued the advisory letter challenged here. We find persuasive, however, his argument that advisory letters fairly may be characterized as "disciplinary" in nature, because they may be considered by the Commission in subsequent proceedings and because, in the wake of the new constitutional provision, the confidentiality of the letters no longer is assured.[15]

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disciplinary action together with any information that the Commission on Judicial Performance deems necessary to a full understanding of the commission's action, with respect to any applicant whom the Governor of any State of the Union indicates is under consideration for any judicial appointment.

"(b) Upon request, the Commission on Judicial Performance shall provide the President of the United States the text of any private admonishment, advisory letter, or other disciplinary action together with any information that the Commission on Judicial Performance deems necessary to a full understanding of the commission's action, with respect to any applicant whom the President indicates is under consideration for any federal judicial appointment.

"(c) Upon request, the Commission on Judicial Performance shall provide the Commission on Judicial Appointments the text of any private admonishment, advisory letter, or other disciplinary action together with any information that the Commission on Judicial Performance deems necessary to a full understanding of the commission action, with respect to any applicant whom the Commission on Judicial Appointments indicates is under consideration for any judicial appointment."

[14]An advisory letter issued by the Commission may be characterized as being analogous to a written reprimand given by an employer to an employee; such reprimands typically are considered part of a system of progressive *discipline*. (See, e.g., *Kazensky* v. *City of Merced* (1998) 65 Cal.App.4th 44, 73 [76 Cal.Rptr.2d 356]; *Fontana Teachers Assn.* v. *Fontana Unified School Dist.* (1988) 201 Cal.App.3d 1517, 1522 [247 Cal.Rptr. 761].)

[15]As noted, the Commission issued its advisory letter to petitioner on July 14, 1997. In view of our holding that article VI, section 18.5, of the California Constitution authorizes the Commission to issue advisory letters, we need not and do not reach petitioner's contention

B. *Whether the Commission's Procedure in Issuing an Advisory Letter Violated Petitioner's Right to Due Process of Law*

(3a) Having concluded that the Commission's issuance of its advisory letter amounted to a disciplinary response within the Commission's jurisdiction, we turn now to petitioner's contention that the Commission's procedures in issuing the letter violated his right to due process of law. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 7, subd. (a); *Allgeyer* v. *Louisiana* (1897) 165 U.S. 578, 589-590 [17 S.Ct. 427, 431, 41 L.Ed. 832] [the " 'right to follow any of the common occupations' " is " 'a large ingredient in the civil liberty of the citizen' "].)

Petitioner contends that "not even the minimal requirements of due process of law are ever satisfied before an investigated judge is issued a stinger letter . . . . There is no hearing at all. There is no right to review the evidence the Commission has reviewed. There is no right to confront adverse witnesses or evidence. There is no established right of review by the judicial branch of State government." Petitioner adds that, in view of article VI, section 18.5, of the California Constitution (authorizing the release of advisory letters to any Governor, the President, and the Commission on Judicial Appointments), the issuance of an advisory letter "is potentially devastating to a judge's chances of future appointments and advancement in the judge's profession." He also notes that the Commission has, in disciplinary proceedings involving other jurists, introduced advisory letters issued to the judge under investigation, "in order to show aggravation, or to show a common pattern of improper behavior, or to show a failure of the judge to heed the Commission's advice." For these reasons, petitioner urges this court to invalidate procedures followed by the Commission in issuing advisory letters.

We decline to do so. (4) "Under the California Constitution, the extent to which procedural due process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decisionmaking process. Specifically, determination of the dictates of due process generally requires consideration of four factors: the private interest that will be affected by the individual action; the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; the

that similar letters issued by the Commission prior to the December 1, 1996, effective date of section 18.5 "are illegal and must be purged from [the Commission's] files."

dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. [Citations.]" (5) (See fn. 16.) (*Rodriguez* v. *Department of Real Estate* (1996) 51 Cal.App.4th 1289, 1297 [59 Cal.Rptr.2d 652], fn. omitted; see also *People* v. *Hansel* (1992) 1 Cal.4th 1211, 1219 [4 Cal.Rptr.2d 888, 824 P.2d 694] [due process is a flexible concept]; *Saleeby* v. *State Bar* (1985) 39 Cal.3d 547, 565 [216 Cal.Rptr. 367, 702 P.2d 525] [not every situation requires a formal hearing with full rights of confrontation and cross-examination].)[16]

(3b) In the face of the well-established case law underscoring the elasticity inherent in due process principles, petitioner fails to provide this court with any authority to support his contention that the issuance of an advisory letter requires a level of due process greater than that provided in Rules of the Commission on Judicial Performance, rule 110. As specified in rule 110 (and its predecessor, California Rules of Court, rule 904.1), the prerequisites for issuance of an advisory letter are notice to the judge of "the inquiry and the nature of the charge," and a "reasonable opportunity to respond."

[16]Under federal due process analysis, the aggrieved party must establish a protected property interest. (*Morrissey* v. *Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 2600, 33 L.Ed.2d 484].) Although it is true that the Fourteenth Amendment "protects the pursuit of one's profession from abridgment by arbitrary state action" (*Endler* v. *Schutzbank* (1968) 68 Cal.2d 162, 169 [65 Cal.Rptr. 297, 436 P.2d 297]), "due process of law" is not a fixed theory, embodying a standardized set of procedures or a trial-like hearing in each instance. To the contrary, as noted by the United States Supreme Court in *Hannah* v. *Larche* (1960) 363 U.S. 420 [80 S.Ct. 1502, 4 L.Ed.2d 1307], due process is an elusive concept: "Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, *as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.* Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." (*Id.* at p. 442 [80 S.Ct. at pp. 1514-1515], italics added; see also *Mathews* v. *Eldridge* (1976) 424 U.S. 319, 334 [96 S.Ct. 893, 902, 47 L.Ed.2d 18] [same]; *Cafeteria Workers* v. *McElroy* (1961) 367 U.S. 886, 895 [81 S.Ct. 1743, 1748-1749, 6 L.Ed.2d 1230] ["The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . [¶] . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action."].)

The Commission's inquiry letter, dated December 6, 1996, provided petitioner with notice of the inquiry and the nature of the charge, and gave him an opportunity to respond. Petitioner presented his case in opposition (by letter dated January 27, 1997), defending his decision to grant the defendant's motion to dismiss People v. James, in substantial part because the prosecution had failed to comply with the statutory requirements applicable to a motion to continue the trial and thereafter had refused to proceed. The Commission subsequently informed petitioner that it had ordered a preliminary investigation, explaining that "[t]he nature of the possible charges" was set forth in the Commission's letter dated December 6, 1996. The reply also afforded petitioner a further opportunity to explain his handling of People v. James. Petitioner thereafter filed a supplemental response, again defending his conduct.

As noted previously, petitioner contends that, in addition to the procedures outlined in the preceding paragraph, he was entitled to a hearing, the right to review the evidence considered by the Commission, the right to confront adverse witnesses or evidence, and the right to judicial review—in other words, the functional equivalent of a trial. And, at oral argument, *the Commission* similarly contended that if advisory letters were deemed to be "disciplinary" in nature, then petitioner would be entitled to a "full adversary hearing." We disagree. "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' [Citation.] All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard' [citation], to insure that they are given a meaningful opportunity to present their case." (*Mathews* v. *Eldridge*, *supra*, 424 U.S. 319, 348-349 [96 S.Ct. 893, 909].) Thus, procedural due process does not require a trial-type hearing in every instance. (*Anderson Nat. Bank* v. *Luckett* (1944) 321 U.S. 233 [64 S.Ct. 599, 88 L.Ed. 692, 151 A.L.R. 824].)

The procedural protections petitioner contends were improperly withheld from him are of the type more appropriately required whenever action by the state significantly impairs an individual's freedom to pursue a private occupation. (*Willner* v. *Committee on Character* (1963) 373 U.S. 96, 103-106 [83 S.Ct. 1175, 1180-1182, 10 L.Ed.2d 224, 2 A.L.R.3d 1254]; accord, *Endler* v. *Schutzbank*, *supra*, 68 Cal.2d 162, 172-178; see also *Rodriguez* v. *Department of Real Estate*, *supra*, 51 Cal.App.4th 1289, 1296-1300 [notice and opportunity to provide *written* argument prior to *suspension* of broker's license held to comport with principles of due process].) In the present case, however, no such significant impairment was at risk at this early stage in the

disciplinary process.[17] Advisory letters may range from a mild suggestion to a severe rebuke; although they may reduce a judge's chance of being elevated to a higher court (or appointed to some other office), such letters do not inexorably subject a judge to public opprobrium or other inevitable consequences that might impair the individual's freedom to pursue his or her chosen occupation.

The nature of the Commission's investigation was, at its core, a *fact-finding mission* focused upon petitioner's handling of the case of People v. James. The Commission's inquiry lent itself well to proof though documentary forms of evidence including hearing transcripts and the parties' briefing. In view of these factors, we are satisfied that the Commission's procedures were adequate. They provided petitioner with sufficient notice of the Commission's inquiry, specifically identified the focus of, and evidentiary basis for, the Commission's investigation, and granted petitioner sufficient opportunities to address the Commission's concerns and defend himself against the allegation that he had acted improperly. (See generally, *Saleeby* v. *State Bar*, *supra*, 39 Cal.3d 547, 565 [in an action seeking a disbursement by the State Bar from the Client Security Fund, this court held that "[a] formal hearing, with full rights of confrontation and cross-examination is not necessarily required"]; see also *Shacket* v. *Osteopathic Medical Board* (1996) 51 Cal.App.4th 223, 231, fn. 4 [58 Cal.Rptr.2d 715] [medical peer review board was "not required to hold a formal hearing before filing and disseminating" a report involving suspension of physician].) The Commission thus fulfilled its obligation to inform petitioner of all material facts behind the allegations.

We are unpersuaded that the additional safeguards urged by petitioner are required. He fails to demonstrate that his interest in avoiding this relatively mild form of discipline is sufficiently significant to justify the added time and expense of the safeguards he proposes. Nor does he show that the consequences of an advisory letter are so severe as to invoke the need for a higher level of process. Similarly, he does not address the possibility that the safeguards he seeks could have a detrimental impact upon the Commission's effectiveness by requiring a disproportionate use of the Commission's resources. (See, e.g., *Mathews* v. *Eldridge*, *supra*, 424 U.S. 319, 348 [96 S.Ct.

[17]Had the preliminary investigation resulted in a determination by the Commission that a private or public admonishment was appropriate, petitioner would have been entitled to request a hearing and contest the Commission's intended action. (Rules 113-116, 118.) If, after the preliminary investigation, the Commission had concluded that formal proceedings should be instituted (rule 118), petitioner would have been afforded further opportunity to respond in writing (rule 119), as well as a hearing before special masters or the Commission (rules 121, 123-125). The Commission's rules provide the judge with procedural rights in such formal proceedings (rule 126).

893, 909] ["[T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."]; *Rodriguez* v. *Department of Real Estate*, *supra*, 51 Cal.App.4th 1289, 1299 [the full range of procedural due process rights sought, including the right to a hearing and to confront and cross-examine witnesses, "would impose great fiscal and administrative burdens on the process"].)[18]

The contrast between petitioner's position here, and that historically taken by the California Judges Association and the Judicial Council, also is instructive. The two organizations *endorsed* the Commission's practice of issuing advisory letters, in part because such letters provided an *informal, less severe alternative* to more formal discipline. Among the panoply of disciplinary measures available to the Commission, an advisory letter comprises a mild response. In view of these considerations, the additional procedural protections that petitioner urges appear paradoxical and unduly onerous.[19]

Article VI, section 18, subdivision (j), of the California Constitution provides that when the Commission institutes formal proceedings, the notice of charges, the answer, and all subsequent papers and proceedings shall be open to the public. The adoption of petitioner's position that more formal proceedings must be held before an advisory letter may be issued also might invoke the constitutional requirement that such proceedings be made public, thereby eliminating the confidentiality and informality of this form of discipline that makes it less onerous and detrimental to the judge. In short, granting the process requested by petitioner might well end up eliminating the benefits of the form of discipline itself.

Although, pursuant to article VI, section 18.5, of the California Constitution, information regarding an advisory letter may be requested by the President, a Governor, or the Commission on Judicial Appointments, and thus the confidentiality of the letter no longer is limited to the Commission and the judge (see Cal. Const., art. VI, § 18.5, subds. (a), (b), (c)), we also observe that the judge at that point is provided with information given to the

[18]We also observe that if a full trial-type hearing were held whenever the Commission contemplated the issuance of an advisory letter, the negative impact upon the administration of justice likely would be significant, because such hearings would involve diverting the affected jurists from their courtrooms.

[19]We note that the availability of writ review in this court provides an additional due process guarantee for the recipient of an advisory letter.

requesting party (*id.*, subd. (e)), and thus may fully respond, rebut, or otherwise explain the subject matter of the letter to the party that requested it. Moreover, the judge may describe the events that transpired in the period since the letter was issued. This additional opportunity to respond, although less preferable from a judge's standpoint than nondisclosure of the letter, provides a meaningful method to mitigate the potentially adverse impact created by such disclosure. Because the Commission's issuance of an advisory letter has only the potential, tangential effect of inflicting harm upon a judge's career, the implementation of additional procedural safeguards is unnecessary.

Balancing petitioner's private interest in maintaining a judicial career free of the infliction of disciplinary measures, and the Commission's interest in the effective and efficient safeguarding of the public from aberrant action by judicial officers, we are satisfied that due process of law does not require the additional protections urged by petitioner as prerequisites to the Commission's issuance of an advisory letter. The Commission's procedures sufficiently protect a judge's interests from the unreasonable issuance of such a letter, and thus are adequate to satisfy the requirements of due process of law.

C. *Whether the Commission May Issue an Advisory Letter Based upon a Perceived Legal Error Committed by a Judge*

In considering the scope of conduct for which the Commission may impose discipline, we are guided by the California Code of Judicial Ethics. (See Cal. Const., art. VI, § 18, subd. (m) [imposing upon this court the responsibility of making "rules for the conduct of judges, both on and off the bench, and for judicial candidates in the conduct of their campaigns"].) Canon 1 of the Code of Judicial Ethics provides: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code should be construed and applied to further that objective. *A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this Code.*" (Italics added.)

(6) In view of the foregoing provision, petitioner contends that the advisory letter issued to him is invalid, because at most the letter addresses a *legal error* committed by a judge—not *judicial misconduct.* In further support of this contention, he cites a number of judicial decisions rendered

by this court, and by our sister state courts, in which legal error, alone, was deemed insufficient to constitute sanctionable conduct. (See *Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 63 [207 Cal.Rptr. 171, 688 P.2d 551] [upholding the commission's recommendation of public censure where judge's culpability "transcend[ed] mere legal error"]; *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 646, fn. 13 [175 Cal.Rptr. 420, 630 P.2d 954] [judge's ruling "had at least enough merit" not to constitute misconduct]; see also *Matter of Seaman* (1993) 133 N.J. 67 [627 A.2d 106, 122]; *Matter of Barrett* (Del. Ct. on Judiciary 1991) 593 A.2d 529, 533; *Matter of Benoit* (Me. 1985) 487 A.2d 1158, 1162-1163; *West Va. Jud. Inquiry Com'n* v. *Dostert* (1980) 165 W.Va. 233 [271 S.E.2d 427, 433-434]; *People* ex rel. *Harrod* v. *Illinois Cts. Com.* (1977) 69 Ill.2d 445 [14 Ill.Dec. 248, 372 N.E.2d 53, 65]; *In re Mattera* (1961) 34 N.J. 259 [168 A.2d 38, 44].) Petitioner asserts that a legal ruling that has any "intellectual merit" cannot support a finding of judicial misconduct; to hold otherwise would compromise the independence of the judiciary. (See Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions* (1977) 54 Chi.-Kent L.Rev. 59, 65-66; see also Shaman et al., Judicial Conduct and Ethics (2d ed. 1995) Use of Power, § 2.02, p. 32.)[20]

The Commission concedes that a judge's legal error "is not ordinarily misconduct." The Commission contends, however, that an act that is legally erroneous nevertheless can constitute misconduct if it involves "bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law or any purpose other than the faithful discharge of judicial duty." (See *In re Whitney* (1996) 14 Cal.4th 1, 2-3 [56 Cal.Rptr.2d 705, 922 P.2d 868] [failure to follow the law regarding arraignment procedures]; *McCullough* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 186, 192 [260 Cal.Rptr. 557, 776 P.2d 259] [willful misconduct to direct guilty verdict in criminal action and thereby deprive the defendant of fundamental right to jury trial]; *Gonzalez* v. *Commission on Judicial Performance* (1983) 33 Cal.3d 359, 374-375 [188 Cal.Rptr. 880, 657 P.2d 372] [willful misconduct to visit jury room during deliberations]; *Gubler* v. *Commission on*

[20]"Imposing discipline upon a judge for an incorrect legal ruling is an extremely sensitive issue because of the potential impact on judicial independence. The preservation of an independent judiciary requires that judges not be exposed to personal discipline on the basis of case outcomes or particular rulings, other than in extreme or compelling circumstances. An independent judge is one who is able to rule as he or she determines appropriate, without fear of jeopardy or sanction. So long as the rulings are made in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or overreaching lies in the adversary system and appellate review. As the courts have often said, the disciplinary process should not be used as a substitute for appeal. Due to the possible threat to judicial independence, it has been suggested that legal error should be dealt with only in the appellate process and never should be considered judicial misconduct." (Shaman et al., Judicial Conduct and Ethics, *supra*, Use of Power, § 2.02, p. 32, fn. omitted.)

*Judicial Performance*, *supra*, 37 Cal.3d 27, 47-48, 55-59 [improper collection practices involving attorney fees, improper gun sale]; *Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 838-863 [264 Cal.Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235] [willful and prejudicial misconduct for failing to protect the rights of defendants, and abuses of power involving contempt procedure, orders to show cause, and bench warrants]; *Cannon* v. *Commission on Judicial Qualifications, supra,* 14 Cal.3d 678, 693-694 [failure to follow the law regarding contempt procedures].)

In response to petitioner's position that a judge's legal ruling cannot support a finding of judicial misconduct if the ruling has any intellectual merit, the Commission contends that petitioner overstates his case. The Commission argues that the decisions cited by petitioner stand for the proposition that the proper analysis focuses on the *additional circumstances that surround the ruling* in question. (See *Wenger* v. *Commission on Judicial Performance*, *supra*, 29 Cal.3d 615, 646-648 [although one of the judge's rulings "had at least enough merit" not to constitute misconduct, *other* legal errors *were* misconduct]; *Matter of Seaman*, *supra*, 627 A.2d 106, 122 [although "mere error[]" was not sanctionable, charges against judge did not involve legal error, but sexual harassment]; *Matter of Barrett*, *supra*, 593 A.2d 529, 533 [charges against judge did not involve legal error, which generally is not sanctionable, but matters such as tardiness and political misconduct]; *Matter of Benoit*, *supra*, 487 A.2d 1158, 1162-1167 [in imprisoning defendants charged only with a civil infraction, judge's legal error constituted misconduct]; *West Va. Jud. Inquiry Com'n* v. *Dostert*, *supra*, 271 S.E.2d 427, 434 [judge's use of invalid procedure was not misconduct "[a]bsent proof of improper motive"]; *People* ex rel. *Harrod* v. *Illinois Cts. Com.*, *supra*, 372 N.E.2d 53, 65 [although "mere errors" are not sanctionable, "a judge who repeatedly imposes punishment not provided for by law is subject to discipline"]; *In re Mattera*, *supra*, 168 A.2d 38, 47 [judge's noncompliance with procedural rules was not misconduct absent "improper motive"].)

Petitioner contends that a prohibition against "legal error investigation" is necessary in order to avoid abuse of the Commission's powers by persons politically or philosophically opposed to a particular jurist. Although we believe that the Commission properly should defer to a Court of Appeal's determination whether legal error in fact has occurred, we agree with the Commission's position that petitioner's proposed remedy is overbroad. A judge may, through repeated legal error, commit acts that would lead to violations of the judicial canons. For example, canon 2A of the California

Code of Judicial Ethics declares that "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A judge who repeatedly dismisses certain kinds of claims might be subject to discipline if the dismissals are shown to be not only legally erroneous, but also based upon bias, prejudice, or some other improper purpose.

Instead, we agree with the Commission that legal error does not *preclude* a finding of misconduct, and that the Commission properly may consider surrounding factors in ascertaining whether discipline may be in order. Nevertheless, a judge must be free not only to make the correct ruling for the proper reasons, but also to make an incorrect ruling, believing it to be correct.[21] The determination whether a legal error provides the basis for discipline thus requires an inquiry into additional factors that demonstrate more than legal error, alone.

In summary, a judge who commits legal error which, *in addition*, clearly and convincingly reflects bad faith (*Broadman* v. *Commission on Judicial Performance*, *supra*, 18 Cal.4th 1079, 1091-1092), bias (*Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 327-331 [267 Cal.Rptr. 293, 787 P.2d 591, 87 A.L.R.4th 679]), abuse of authority (*Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 786-795 [119 Cal.Rptr. 841, 532 P.2d 1209]), disregard for fundamental rights (*Kloepfer* v. *Commission on Judicial Performance, supra,* 49 Cal.3d 826, 849-854), intentional disregard of the law (*Cannon* v. *Commission on Judicial Qualifications, supra,* 14 Cal.3d 678, 695-698), or any purpose other than the faithful discharge of judicial duty (*Ryan* v. *Commission on Judicial Performance* (1988) 45 Cal.3d 518, 545-546 [247 Cal.Rptr. 378, 754 P.2d 724, 76 A.L.R.4th 951]), is subject to investigation. (See generally, Shaman et al., Judicial Conduct and Ethics, *supra*, § 2.02, pp. 32-37.) Mere legal error, without more, however, is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and thus should be disciplined.

### D. *Whether Petitioner Should Be Sanctioned for Dismissing a Criminal Case After the People Indicated They Were Not Ready to Proceed*

We turn now to the facts of this case. As noted, the Commission's advisory letter informed petitioner that the Commission "strongly disapproved" of his handling of the proceedings in People v. James: "Your

[21](See Greenhouse, *Judges Seek Aid in Effort to Remain Independent*, N.Y. Times (Dec. 10, 1998) p. A20, quoting Hon. Adolpho A. Birch, former Chief Justice of the Tennessee Supreme Court: " 'Judicial independence is the judge's right to do the right thing or, believing it to be the right thing, to do the wrong thing.' ")

dismissal of the case . . . occurred under circumstances equivalent to those in the earlier case of *People* v. *Ferguson*, in which the Court of Appeal reversed your dismissal of the case in a published opinion in 1990. . . . As respects your conduct in dismissing the *People* v. *James* case, the commission was also particularly disturbed that the *People* v. *Ferguson* decision was brought to your attention by counsel before you dismissed the case."

Petitioner contends that in issuing its advisory letter, the Commission erroneously relied upon purported similarities between James and *Ferguson* in reaching the conclusion that petitioner improperly had handled the motion to dismiss that had been made in James. According to petitioner, if one were to "take away the Commission's determination that James cannot be legally distinguished from *Ferguson*, [then] there is no basis for the conclusion that [petitioner] engaged in a reckless disregard for the law." More specifically, petitioner argues that *Ferguson* "involved different circumstances and is distinguishable" from James on three distinct grounds: (1) the issue presented in *Ferguson* was whether the trial court had *abused its discretion* in granting the defendant's motion to dismiss, in contrast to James, where the trial court believed the denial of the oral motion for continuance was *mandatory*; (2) the facts of the two cases are inapposite—in *Ferguson*, trial counsel was temporarily unavailable, but in James, trial counsel was available but unprepared and unwilling to proceed; and (3) in *Ferguson*, no policy objective was served by the dismissal, but in James the interests of the defendant, witnesses, and justice in general were advanced by the trial court's insistence that proper notice be given.[22]

(7) We need not enter the debate whether *Ferguson* and James were distinguishable, nor need we even decide whether petitioner committed "error" in dismissing the James matter. As noted, the critical inquiry is whether petitioner's action clearly and convincingly reflected bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty.

In the present case, we conclude that the evidence does not support such a determination. After *properly* denying an inadequate motion to continue (one that could have led to the imposition of sanctions under section 1050.5), petitioner was confronted with a prosecutor who stated that the People *unequivocally refused to proceed.* Not unreasonably, petitioner viewed the

[22]Petitioner also contends that in denying the writ relief sought by the People in James, the Court of Appeal impliedly rejected the Commission's position that *Ferguson* mandated a result different from that reached by the trial court in James. In view of our analysis and the conclusion we reach in the present opinion, we need not and do not address this contention.

prosecutor's challenge as an intolerable affront to the authority of the trial court, one that could have supported imposition of additional sanctions under the court's contempt power. (§ 166.) Our review of the proceedings as a whole suggests that petitioner in fact demonstrated extraordinary patience in dealing with an unprepared and unyielding prosecution. Viewed against the backdrop of the prosecution's recalcitrance to proceed, petitioner's order dismissing the case, even if legally incorrect, fails to "raise concerns" regarding "a reckless disregard of the law, . . . bias, or a lack of impartiality," as suggested by the Commission in its advisory letter. To the contrary, we find no evidence that petitioner's order dismissing the James case was motivated by bad faith, bias, abuse of authority, disregard for fundamental rights, intentional (or "reckless") disregard of the law, or any purpose other than the faithful discharge of judicial duty. Accordingly, we reject the Commission's position that petitioner's dismissal of the James case was sanctionable.

DISPOSITION

The petition for writ of mandate, seeking the withdrawal of the Commission's advisory letter, dated July 14, 1997, is granted. This court's alternative writ of mandate, filed December 31, 1997, is discharged. Each side shall bear its own costs incurred in this action.

**WERDEGAR, J.,** Concurring.—Although I agree with the result and with much of the reasoning in the majority opinion, I would take a somewhat different approach to the question of discipline for legal error. The question raised by this case, in my view, is not whether a judge's legal error is itself subject to investigation or discipline by the Commission on Judicial Performance (Commission)—even the Commission concedes it is not, and canon 1 of the California Code of Judicial Ethics so provides. The question, rather, is whether a legal error of the type asserted in the complaint against petitioner has such a tendency to reveal underlying misconduct as to justify investigation and discipline by the Commission. I would answer that question in the negative: Because the judge's position, as revealed in his initial response to the Commission's inquiry, had reasonably arguable merit, and because the Commission had no extrinsic evidence of bad faith, bias, abuse of authority, intentional disregard of the law, or any improper purpose, the Commission should have ended its investigation at the time of that response without any discipline.

The majority opinion (*ante*, at p. 397) rejects petitioner's "intellectual merit" argument, although we have previously adopted a similar threshold

standard. (See *Wenger* v. *Commission on Judicial Performance* (1981) 29 Cal.3d 615, 647, fn. 13 [175 Cal.Rptr. 420, 630 P.2d 954] [observing that, correct or not, one judge's ruling "had at least enough merit" not to constitute misconduct]; *Gubler* v. *Commission on Judicial Performance* (1984) 37 Cal.3d 27, 47-48 [207 Cal.Rptr. 171, 688 P.2d 551] [stating, with a citation to *Wenger* v. *Commission on Judicial Performance*, *supra*, that "a judge should not be disciplined for mere erroneous determination of legal issues . . . that are subject to reasonable differences of opinion"].) The majority, however, in order to explain why the rulings at issue here did not constitute misconduct, is nevertheless compelled to observe that the prosecutor's continuance was "*properly*" denied, that petitioner's view of the matter was "[n]ot unreasonabl[e]," and that petitioner demonstrated "extraordinary patience" (maj. opn., *ante*, at pp. 401-402, italics in original), all of which suggest the arguable correctness of petitioner's rulings is what precludes discipline. Rather than reject petitioner's position, then, I would accept it, at least in part: When, as here, the Commission has no extrinsic evidence of bad faith or improper motive—no evidence, that is, apart from the nature of the ruling itself—the Commission generally should not pursue an investigation into, or impose discipline for, a legal ruling that has reasonably arguable merit. In such circumstances, the principle of judicial independence requires that the determination whether the ruling was correct or not be left to a reviewing court.

In its letter of inquiry to petitioner, the Commission observed that petitioner had adhered to his dismissal ruling even after the deputy district attorney had drawn his attention to *People* v. *Ferguson* (1990) 218 Cal.App.3d 1173 [267 Cal.Rptr. 528] (*Ferguson*), in which the Court of Appeal reversed a dismissal under assertedly similar circumstances. I agree with the implication that, in some circumstances, a judge's ruling made in the face of directly contrary binding authority cited to him or her might be evidence of intentional disregard for the law. This was not such a case, however, because *Ferguson* was not so squarely on point as to absolutely preclude a different ruling in the James case. The Commission should have realized this, at the latest, when it received petitioner's responsive letter, which pointed out three arguably pertinent distinctions between *Ferguson* and James.[1] In the same letter, petitioner informed the Commission that the Court of Appeal had, despite its own *Ferguson* precedent, summarily denied

[1]Petitioner noted that *Ferguson* did not involve the mandatory denial of an improper oral motion for continuance (Pen. Code, § 1050, subd. (d)); that in *Ferguson* the assigned deputy district attorney was temporarily unavailable, while in James a deputy had been assigned who was available but unprepared to try the case; and that in *Ferguson* the People did not refuse to proceed and could have begun trial as soon as the same afternoon, while in James the chief deputy flatly refused to proceed without a continuance of several days. In addition, petitioner

the People's petition for a writ of mandate in James, an act suggesting the reviewing court did not consider *Ferguson* completely dispositive.

At this point, if not before, the Commission should have realized that this was a garden-variety legal dispute, in which a litigant complaining of an adverse ruling can (and did) seek review from a higher court. That the ruling complained of *appeared* contrary to a published decision should not, in itself, have concerned the Commission, especially when petitioner provided arguable grounds for distinguishing the precedent.[2] Disputes over whether a prior decision is distinguishable, or whether a particular statute applies, are as common as air in litigation and (to mix metaphors) are typical grist for the appellate mill. In the absence of any evidence of improper motive, such a dispute should not also become the focus of a disciplinary proceeding. Because, in this case, the judicial ruling complained of had at least arguable merit and the Commission cited no extrinsic evidence of improper purpose, the Commission was simply wrong to conclude, as it did in the advisory letter, that petitioner's order of dismissal after *Ferguson* was brought to his attention, "raises concerns about a reckless disregard of the law, . . . bias or a lack of impartiality . . . ."

Although the majority reaches the same ultimate conclusion as I, it unfortunately fails to address the hard question of when, if ever, the erroneous nature of a ruling might itself be evidence, sufficient for investigation or discipline, of a judge's improper disregard for the law. Without attempting to describe all the circumstances under which legal error does and does not demonstrate misconduct, I would hold that, at a minimum, the ruling must lack all reasonably arguable merit.[3]

For these reasons, I concur in granting the petition.

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argued the dismissal in James served certain policy objectives the *Ferguson* court found lacking in that case.

[2]Research into the subject, moreover, would have revealed precedent arguably *supporting* the dismissal order. (See, e.g., *People* v. *Torres* (1984) 159 Cal.App.3d Supp. 8, 13 [206 Cal.Rptr. 537] [dismissal proper when prosecutor demands continuance and refuses to proceed without one in order to control timing of trials].)

[3]To repeat, I speak here only of the case, such as this one, in which the Commission can cite no extrinsic evidence of improper motive or other misconduct.

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

| | |
|---|---|
| Inquiry Concerning Judge Eugene R. Bishop,<br><br>No. 161 | DECISION AND ORDER IMPOSING PRIVATE ADMONISHMENT |

This is a disciplinary matter concerning Judge Eugene R. Bishop of the Riverside County Superior Court. Formal proceedings having been instituted, this matter is before the Commission on Judicial Performance pursuant to rule 127 of the Rules of the Commission on Judicial Performance (discipline by consent).

For the reasons set forth in this decision, the commission privately admonishes Judge Bishop for violating the rights of minors, parents and guardians in four separate cases as set forth in the Notice of Formal Proceedings and stipulated to by Judge Bishop. The commission also has determined that this private admonishment shall be available to the public.[1]

## APPEARANCES

Judge Bishop is represented by James E. Friedhofer. Trial Counsel for the Commission on Judicial Performance is Jack Coyle.

## PROCEDURAL HISTORY

A Notice of Formal Proceedings was filed on September 5, 2001, charging Judge Bishop with four counts of misconduct. Judge Bishop filed his verified answer on September 18, 2001. Pursuant to rule 121, the commission requested the appointment of three special masters, and the Supreme Court appointed Justice Paul Turner, presiding, Justice Rebecca A. Wiseman, and Judge Nancy Wieben Stock as masters. The masters held a pretrial telephone conference on November 9, 2001, and the case was scheduled for an evidentiary hearing commencing January 16, 2002.

On January 10, 2002, Judge Bishop and Trial Counsel submitted a Stipulation for Discipline by Consent pursuant to rule 127 of the Rules of the Commission on Judicial Performance. On January 11, 2002, the commission issued an order vacating the hearing date in order that the commission might consider the Stipulation at its January 2002 meeting.

[1] With the issuance of this decision accepting the Stipulation for Discipline by Consent, the Stipulation is filed and is available to the public.

## THE STIPULATION FOR DISCIPLINE BY CONSENT

### A. Judge Bishop's Agreement to Discipline

Judge Bishop and Trial Counsel request that the commission resolve this matter by the imposition of a private admonishment. Judge Bishop, however, understands and accepts that the commission "may disclose publicly its decision and order of private admonishment, this stipulation, and respondent's affidavit of consent. (Cal. Const., art. VI, § 18(j).)" Judge Bishop further recognizes that in its decision and order the commission "may articulate the reasons for its decision," and he agrees "to accept any such explanatory language that the commission deems appropriate."

The Stipulation further notes that Judge Bishop is no longer acting in a judicial capacity. On December 22, 2001, Judge Bishop gave notice, without right of revocation, that he was electing to retire from judicial office, effective March 29, 2002. The Stipulation further notes that "because of vacation time, his last day on the bench was December 21, 2001."

Judge Bishop has agreed that he "will not seek or accept an assignment, appointment or reference of work from a California state court." In addition, he understands "that if he does seek or accept an assignment, appointment, or reference of work, the commission may rescind the private admonishment and reopen formal proceedings."

Judge Bishop has signed and submitted an affidavit consenting to the sanction of a private admonishment, stating that the consent is freely and voluntarily given, admitting the truth of the charges as alleged, and waiving review by the Supreme Court.

### B. Stipulated Facts

The Stipulation for Discipline sets forth the following factual stipulation, which tracks the allegations set forth in the Notice of Formal Proceedings.

#### COUNT ONE

> In *In re Daniel K., et al.*, No. IJ-8816, as set forth below, respondent violated the due process rights of Anna K. by removing her children, Daniel and Shane (spelled "Shayne" in the Notice of Formal Proceedings) K., from her home without notice or a reasonable opportunity to be heard.
>
> On April 1, 1997, respondent presided at the six-month review hearing for Anna K.'s daughter, Korah K., in case number IJ-8816, pursuant to Welfare and Institutions Code section 366.21(e). At the time of the hearing, Anna K. had two sons, Daniel and Shane, who resided with her.
>
> At the hearing, the attorney for Korah, who also represented Daniel and Shane, requested that the two boys "be pulled from the home." Respondent ordered that Daniel and Shane be removed from Anna K.'s home and be placed in foster care. Respondent did so without notice to Anna K. that such a request would

be considered at the hearing. Welfare and Institutions Code sections 332(e), 335(a), 337(c) and 387 require that such notice be given. Because no supplemental petition had been filed prior to respondent's order, and no noticed hearing on such a petition took place, respondent's order violated Welfare and Institutions Code section 387.

On March 4, 1998, the Court of Appeal for the Fourth Appellate District (hereafter "Court of Appeal" or "court") found that "the juvenile court violated the mother's right to basic due process under the federal and state constitutions and violated several statutes by removing the boys from their mother's physical custody at the six-month hearing without a supplemental petition[] being filed or prior notice."

Respondent's conduct violated the Code of Judicial Ethics, canons 1, 2A, 3B(2), 3B(7) and 3B(8).

**COUNT TWO**

In *In re Anthony B.*, No. IJ-9898, as set forth below, respondent violated the due process rights of William B., the father of Anthony B., by proceeding with hearings on July 28, 1997, September 25, 1997, and February 3, 1998, without adequate notice or a reasonable opportunity to be heard.

On July 25, 1997, the Riverside County Department of Public Social Services (hereafter "DPSS") filed a petition in *In re Anthony B.*, No. IJ-9898, alleging Anthony to be a dependent child of the court pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (g). The petition alleged that the father of Anthony B. was William B., and listed William B.'s address as Tehachapi State Prison. William B. was a state prisoner in California from on or about May 29, 1997, to on or about September 16, 1998.

On July 28, 1997, respondent presided over a detention hearing in the case. Respondent appointed counsel for Anthony and for Anthony's mother, but not for William B. At the hearing, respondent ordered the detention of Anthony. William B. was not present at the hearing and no attorney appeared on his behalf. No notice of the petition or of the hearing was provided to William B. Welfare and Institutions Code sections 302(b), 311(a), 335(a) and 337(a), and California Rules of Court, rule 1407(e)(3), require that such notice be given. In addition, respondent failed to determine whether notice was "given as required by law," or to "make an appropriate finding [regarding notice] noted in the minutes," as required by rule 1412(k) of the California Rules of Court.

On September 25, 1997, respondent presided over a combined jurisdictional and disposition hearing in the case. William B. was not present at the hearing and did not waive his right to be present, and no attorney appeared on his behalf. At the hearing, respondent found that Anthony was a dependent child of the court and ordered that he be placed in foster care. This action violated Penal Code section

2625(d), which provides that "no petition to adjudge the child of a prisoner a dependent child of the court" pursuant to Welfare and Institutions Code section 300(b) may be adjudicated without the physical presence of the prisoner or the prisoner's attorney, or a waiver by the prisoner. Although the minute order of the September 25, 1997, hearing indicates that the "COURT FINDS notice has been given/attempted by law[,]" notice was not given to William B. at least five days in advance of the hearing, as required by Welfare and Institutions Code section 337(a).

On February 3, 1998, respondent presided over a six-month review hearing, pursuant to Welfare and Institutions Code section 366.21(e). William B. was not present at the hearing and no attorney appeared on his behalf. Notice of the hearing was not provided to William B. Welfare and Institutions Code section 302(b) requires that unless their parental rights have been terminated, both parents shall be informed of all proceedings involving the child. Respondent failed to determine whether notice was "given as required by law," or to "make an appropriate finding noted in the minutes," as required by rule 1412(k) of the California Rules of Court. Respondent found that William B. had not complied with the requirements for reunification services, and terminated reunification services.

On June 4, 1998, respondent presided over a selection and implementation hearing in the case. At that hearing, respondent terminated the parental rights of William B. Counsel for William B., whom respondent appointed on April 21, 1998, appeared at the hearing. However, respondent's order terminating parental rights was based on respondent's findings at the six-month review hearing that respondent conducted on February 3, 1998, without notice to William B., or an appearance by William B. or counsel on his behalf.

On March 10, 1999, the Court of Appeal reversed respondent's order terminating parental rights and remanded the case for a new jurisdictional hearing. (*In re Anthony B.*, No. E023029.) The court found that "egregious due process violations" rendered the proceedings in the juvenile court "fundamentally unfair." The Court of Appeal found that due process violations in the case included the failure to provide adequate notice to William B. of the filing of the petition, the detention hearing, the jurisdictional hearing, and the six-month review hearing. The court also found that by the time respondent appointed counsel for William B., prior to the selection and implementation hearing:

> … it was too late because the juvenile court relied on the findings of the earlier [six-month review] hearing as the basis for its order terminating parental rights. Such reliance is proper only when the parent has had notice and the opportunity to appear at the earlier hearing. [Citation.]

Respondent's conduct violated the Code of Judicial Ethics, canons 1, 2A, 3B(2), 3B(7) and 3B(8).

**COUNT THREE**

In *In re Shawn P.*, No. IJ-10363, as set forth below, respondent violated the due process rights of Penelope P. and abused his authority by ordering that the legal custody of Penelope's child, Shawn P., be transferred to Shawn's father, without giving Penelope P. notice or a reasonable opportunity to be heard, and without making a finding of dependency.

On January 16, 1998, Penelope P. received legal and physical custody of Shawn in family law court. On February 3, 1998, the DPSS filed a petition in *In re Shawn P.*, No. IJ-10363, alleging Shawn to be a dependent child of the court pursuant to Welfare and Institutions Code section 300.

On February 4, 1998, respondent presided at a detention hearing in the case. At the hearing, respondent appointed separate counsel for Shawn, Shawn's mother, and Shawn's father. Shawn's attorney requested that custody of Shawn be given to Shawn's father. Penelope P.'s attorney objected to the request and stated, correctly, that his client was unaware that such action was going to take place that day. Respondent ordered that Shawn would go to the custody of the father, and dismissed the case without making a finding of dependency.

Because respondent issued his order without notice to Penelope P. that there would be a hearing at which it could be decided that custody of Shawn could be transferred to the father, respondent's order violated due process. Because respondent lacked jurisdiction to make a custody order without first finding Shawn to be a dependent child of the court, respondent's custody order exceeded respondent's jurisdiction and constituted an abuse of authority.

On March 5, 1999, the Court of Appeal reversed respondent's order. The court found that "the juvenile court … violated the mother's basic rights and exceeded its jurisdiction in giving custody to the out-of-custody parent…." (*In re Shawn P.*, No. E022375.)

Respondent's conduct violated the Code of Judicial Ethics, canons 1, 2A, 3B(2), 3B(7) and 3B(8).

**COUNT FOUR**

In *In re Emily D.*, No. IJ-11166, as set forth below, respondent violated the due process rights of the parents and maternal grandparents of Emily D. when respondent ordered, without notice or a reasonable opportunity to be heard, that Emily, who was residing with her grandparents, be placed in a non-relative foster/adoptive home and that there be no visitation by the parents or grandparents.

On August 17, 1999, respondent presided at the six-month review hearing in *In re Emily D.*, No. IJ-11166, pursuant to Welfare and Institutions Code section 366.21(e). At the time of the hearing, Emily was approximately eight months old

and had resided with her maternal grandparents, Cindy and John H., for all but one day since she was approximately three days old. The grandparents were not present at the hearing. Emily's two older siblings, Jordan and Megan, resided with their parents, Molly and Michael D., and were also in dependency proceedings.

At the hearing, the DPSS recommended that the dependency of Jordan and Megan be terminated, with custody of both children given to the parents. The DPSS also recommended that family reunification services be terminated with regard to Emily, based on the parents' waiving their right to further reunification services with her. The parents wanted Emily to be adopted by the maternal grandparents, Cindy and John H.

Emily's attorney expressed concern as to Emily's placement. She stated: "I think as the child that's not wanted, it's going to be very difficult for her to be adopted by the grandparents and live close to her siblings knowing that she's … an unwanted child."

The attorney for the DPSS pointed out that "it is the law to request placement of the children with relatives first if possible." Respondent replied:

> Well, I understand that, but this is weird here. There's got to be something wrong with their heads as I see it. They want to keep two but don't want the third one? They want to give the third one to Grandma and Grandpa. All sounds kind of ridiculous to me.

Respondent also stated: "Why don't we just take all of them, keep them all together, and find an adoptive home for all three of them and they can live together."

When the DPSS attorney stated that the DPSS was recommending that custody of the two older children be returned to the parents, respondent stated: "But they are going to have to decide whether they want all three or none. Not going to do this."

Following a recess, Emily's attorney requested that Emily be placed immediately in a non-relative foster/adoptive home. The attorney for Emily's mother, Molly D., stated that the mother "will reluctantly agree to that since it's the best alternative that seems to be available at this time." The father's attorney also expressed the father's agreement with the request. Respondent ordered that Emily be placed in a non-relative foster/adoptive home, and that there be no visitation by the parents or grandparents.

The hearing took place without notice to Emily's parents or to her custodial grandparents that an order removing Emily from the physical custody of the grandparents and placing her in a foster home would be considered at the hearing. Welfare and Institutions Code section 387 provides that "[a]n order changing or

modifying a previous order by removing a child from the physical custody of a … relative … and directing placement in a foster home … shall be made only after noticed hearing upon a supplemental petition." Notice of the hearing must be given to the parents and the present custodian of the minor pursuant to Welfare and Institutions Code sections 332(e), 335(a), 337(c) and 387(b), and California Rules of Court, rule 1431(c). Because no supplemental petition was filed and no noticed hearing on such a petition took place, respondent's order violated Welfare and Institutions Code section 387.

The failure to provide notice circumvented the rights of Emily's parents, and of Emily's grandparents as custodians, to request that the clerk of the juvenile court issue subpoenas requiring the testimony of witnesses and the production of papers at the hearing, pursuant to Welfare and Institutions Code section 341 and California Rules of Court, rule 1408(d).

The failure to provide notice to the grandparents that respondent would consider issuing an order to remove Emily from their home also precluded them from applying to respondent for recognition as Emily's "de facto" parents, pursuant to rule 1412(e) of the California Rules of Court. A de facto parent has the right to be present, to be represented by counsel, and to present evidence at hearings at which the status of the dependent child is at issue.

Following respondent's order, Molly D. filed a petition for writ of mandate in the Court of Appeal in *Molly D.* v. *Superior Court*, No. E025658. On September 30, 1999, the court invited the DPSS to file an informal response, stating:

> Based on our preliminary review of the petition and record, this court is concerned that the trial court abused its discretion in ordering that the minor be immediately removed from the care of her maternal grandparents and placed in a non-relative fost-adopt home. The Department of Public Social Services has not sought such an order, and the parents could not have anticipated such an action being taken by the court. Their reluctant agreement to the placement was prompted only by the trial court's threat to remove all three children, and we conclude that they did not waive objections to the court's order. At a minimum, the due process rights of the parents were violated because of the failure to afford them adequate notice and a hearing on the matter. Moreover, this procedure deprived the grandparents, who may well be entitled to de facto parent status, of an opportunity to appear and be heard in this matter.

Respondent's conduct violated the Code of Judicial Ethics, canons 1, 2A, 3B(2), 3B(7) and 3B(8).

## DISCIPLINE

The commission adopts the factual stipulations set forth in the Stipulation for Discipline by Consent and finds that Judge Bishop has admitted all of the factual allegations set forth in the Notice of Formal Proceedings.

The commission finds that Judge Bishop's misdeeds constitute sanctionable actions under article VI, section 18(d) of the California Constitution. The commission concludes that Judge Bishop's actions on each count violated canons 1 (a judge shall uphold the integrity and independence of the judiciary), 2A ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"), 3B(2) ("A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law"), 3B(7) ("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law"), and 3B(8) ("A judge shall dispose of all judicial matters fairly, promptly, and efficiently").

The commission accepts the request by Judge Bishop and Trial Counsel to resolve this matter by imposition of a private admonishment. A number of factors support this resolution, including: (1) Judge Bishop is 72 years old, has served as a judge for over 20 years, and is no longer acting in a judicial capacity; (2) Judge Bishop has agreed not to seek or accept an assignment, appointment or reference of work from a California state court and has further agreed that were he to seek or accept an assignment, appointment or reference of work, the commission could rescind this private admonishment and reopen formal proceedings; and (3) this resolution avoids the costs of an evidentiary hearing. The issuance of a private admonishment also is supported by the commission's determination that the private admonishment shall be "open to the public." (See Cal. Const., art. VI, § 18, subd. (j).)

This decision shall constitute the private admonishment of Judge Eugene R. Bishop.

Commission members Mr. Michael A. Kahn, Judge Rise Jones Pichon, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mrs. Crystal Lui, Justice Vance W. Raye, Ms. Ramona Ripston, Ms. Barbara Schraeger, and Dr. Betty L. Wyman voted to impose this private admonishment and to release the private admonishment to the public. Commission member Mr. Marshall B. Grossman concurs with the decision, but would characterize the admonishment as public as he believes that is what it is in substance. Commission member Ms. Gayle Gutierrez did not participate in this proceeding.

Dated: February 4, 2002

/s/
Michael A. Kahn, Esq.
Chairperson

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COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br>COMMISSIONER TAYLOR CULVER<br><br>No. 199 | ORDER DISMISSING PROCEEDINGS PURSUANT TO STIPULATED DISPOSITION AND VACATING HEARING |

The Commission on Judicial Performance filed a Notice of Formal Proceedings (Notice) in the inquiry concerning Taylor Culver, Commissioner of the Alameda County Superior Court on October 17, 2016.

A hearing before special masters appointed by the Supreme Court is set to commence in San Francisco on January 23, 2017. On December 12, 2016, former Commissioner Culver, represented by Arthur J. Harris, Esq., and the examiner for the commission, Mark A. Lizarraga, (the parties) submitted a Stipulated Disposition of Pending Proceedings in the above-entitled-matter (Stipulation). Pursuant to the Stipulation, the parties request that the commission dismiss the matter based on former Commissioner Culver's agreement not to seek or hold judicial office, or accept a position or an assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time in the future. In the Stipulation, the former commissioner acknowledges that he resigned his position with the Alameda County Superior Court on November 30, 2016.

The terms and conditions of the Stipulation state that if former Commissioner Culver fails to comply with any of the terms and conditions of the agreement, or seeks or holds judicial office, or accepts a position or an assignment as a judicial officer,

subordinate judicial officer, or judge pro tem with any court in the State of California, or accepts a reference of work from any California state court, at any time in the future, the commission may seek to discipline the former commissioner and may re-institute formal proceedings regarding the matters charged in the Notice. Further, the agreement provides that the terms of the disposition may be made public upon the commission's acceptance of the Stipulation and included in any dispositional order issued by the commission.

By a vote of 9 to 0, the commission determined to accept the Stipulation upon the terms and conditions set forth in the Stipulation. Commission members Anthony P. Capozzi, Esq.; Hon. Ignazio J. Ruvolo; Ms. Sarah Kruer Jager; Ms. Pattyl A. Kasparian; Hon. Thomas M. Maddock; Dr. Michael A. Moodian; Nanci E. Nishimura, Esq.; Mr. Richard Simpson and Mr. Adam N. Torres voted to accept the parties' Stipulation. Commission members Ms. Mary Lou Aranguren and Hon. Erica R. Yew were recused.

Based on the terms and conditions of the Stipulation, the commission hereby dismisses Inquiry No. 199, and agrees not to pursue further the matters charged in the Notice, provided the former commissioner complies with the terms and conditions of the Stipulation. The hearing set for January 23, 2017, is hereby vacated.

Dated: December 20, 2016

Anthony P. Capozzi
Chairperson

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COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

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| INQUIRY CONCERNING<br>COMMISSIONER TAYLOR CULVER,<br><br>No. 199 | STIPULATED DISPOSITION OF<br>PENDING FORMAL PROCEEDINGS |

Former Commissioner Taylor Culver, represented by Arthur J. Harris, Esq., and the examiner, Mark A. Lizarraga, ("the parties") submit this proposed disposition of Inquiry No. 199. The parties believe this agreement is in the best interests of the Commission on Judicial Performance ("commission") and former Commissioner Culver because it adequately protects the public and avoids the delay, cost, and uncertainty of further proceedings.

The parties request that the commission dismiss this matter based on former Commissioner Culver's agreement to not seek or hold judicial office, or accept a position or an assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time in the future. This proposed disposition is consistent with previous commission cases where proceedings were

closed when a subordinate judicial officer resigned with the agreement not to serve or seek to serve in a judicial capacity.[1]

The parties stipulate and agree to the following terms and conditions:

TERMS AND CONDITIONS OF AGREEMENT

1. This agreement resolves the matters at issue in Inquiry Concerning Commissioner Taylor Culver, No. 199.

2. Former Commissioner Culver acknowledges that he resigned his position as court commissioner with the Alameda County Superior Court on November 30, 2016, and now agrees to not seek or hold judicial office, accept a position or an assignment as a judicial officer, subordinate judicial officer, or judge pro tem with any court in the State of California, or accept a reference of work from any California state court, at any time in the future.

3. The commission shall dismiss Inquiry No. 199 and shall not in the future seek to discipline former Commissioner Culver for the matters charged in the Notice of Formal Proceedings filed on October 17, 2016, provided the commissioner complies with the terms of this agreement.

4. The commission may disclose to the State Bar of California all or any part of the information obtained through the commission's preliminary investigation of former Commissioner Culver that resulted in the filing of the Notice of Formal Proceedings.

5. In the future, if former Commissioner Culver fails to comply with any of the terms and conditions of this agreement, or seeks or holds judicial office, or accepts a position or an assignment as a judicial officer, subordinate judicial officer or judge pro tem with any court in the State of California, or accepts a reference of work from any California state court, the commission may seek to

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[1] See, e.g., Commission on Judicial Performance, 2012 Annual Report, p. 30; 2011 Annual Report, p. 28; 2010 Annual Report, p. 30; 2008 Annual Report, p. 30.

discipline the commissioner and may re-institute formal proceedings regarding the matters charged in the Notice of Formal Proceedings filed on October 17, 2016.

6. Former Commissioner Culver waives any further proceedings and review in this matter, including formal proceedings (Rules of Com. on Jud. Performance, rule 118, et seq.), and review by the Supreme Court (Cal. Rules of Court, rule 9.60; Cal Const., art. VI, § 18.1).

7. The terms of the disposition of this matter may be made public upon the commission's acceptance of this stipulation and included in any dispositional order issued by the commission.

Dated: December 12, 2016

Taylor Culver
Commissioner Taylor Culver
Respondent

Dated: December 12, 2016

Arthur J. Harris
Attorney for Commissioner Taylor Culver

Dated: December 12, 2016

Bill L. Bath for
Mark A. Lizarraga
Examiner

Based on the foregoing stipulation and in accordance with the vote of the members of the commission, the commission hereby accepts the proposed stipulation of the parties.

Dated: December 20, 2016

Anthony P Capozzi
Anthony P. Capozzi, Esq.
Chairperson

Marshall F. McCOMB, Petitioner,
v.
SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF
SAN FRANCISCO, Respondent;
The COMMISSION ON JUDICIAL PERFORMANCE, Real Party in Interest.

Civ. 40184.

Court of Appeal, First District, Division 2, California.

March 15, 1977.

Hearing Denied May 12, 1977.

Justice of the Supreme Court of California sought writ to review order of Superior Court finding him guilty of contempt of court for his failure and refusal to submit to the taking of his deposition and decreeing that he be punished for such contempt by imprisonment until he submits to taking of deposition. The Court of Appeal, Taylor, P.J., held that a judge who is the subject of proceedings instituted before the Commission on Judicial Performance to inquire into his fitness to perform duties does not have the privilege afforded to a defendant in a criminal case to refuse to respond as a witness and to testify; he may be called upon to testify and can refuse only to disclose a matter that may tend to incriminate him. The Court also held that as object of order fixing punishment for civil contempt was to obtain answers to questions for the Commission, and there was no longer any proceeding before the Commission in which questions might be asked, release of justice from the restraint imposed upon him was required.

Order vacated.

[1] CONTEMPT k21
93k21
An order made in violation of a person's constitutional rights is issued without or in excess of jurisdiction and cannot produce a valid judgment of contempt. West's Ann.Const. art. 1, § 15; art. 6, § 18; U.S.C.A.Const. Amends. 5, 14.

[2] CONTEMPT k21
93k21
Person affected by invalid order has choice of complying with the order or, at his peril, disobeying the order and raising his jurisdictional contentions when he is sought to be punished for such disobedience. West's Ann.Const. art. 1, § 15; art. 6, § 18; U.S.C.A.Const. Amends. 5, 14.

[3] CRIMINAL LAW k26
110k26
Under statute defining crime as an act committed or omitted in violation of law and to which is annexed specified punishments, both of the conditions must be satisfied before the act will constitute a crime. West's Ann.Pen.Code, § 15.

[4] JUDGES k11(3)
227k11(3)
Formerly 227k11, 227k1
Commission on Judicial Performance has no authority to prosecute or punish a person charged with a public offense; the power of the Commission extends no further than to recommend to the Supreme Court the removal or retirement of a judge who is the subject of proceeding to inquire into his fitness to perform his duties. West's Ann.Const. art. 6, § 18.

[5] WITNESSES k293.5
410k293.5
Formerly 410k2931/2
A judge who is the subject of proceedings before Commission on Judicial Performance to inquire into his fitness to perform his duties does not have the privilege afforded to a defendant in a criminal case to refuse to respond as a witness and to testify; he may be called upon to testify and can refuse only to disclose a matter that may tend to incriminate him. West's Ann.Pen.Code, §§ 681, 684, 685; West's Ann.Const. art. 6, § 18; West's Ann.Evid.Code, §§ 930, 940; West's Ann.Code Civ.Proc. § 1218.

[6] WITNESSES k21
410k21
Although an attorney may not be held in contempt of court for advising his client, in good faith, to assert his privilege against self-incrimination, the client risks contempt if the attorney's advice proves to be wrong.

[7] PRETRIAL PROCEDURE k73
307Ak73
Formerly 122k71 DEPOSITIONS
Inasmuch as order finding justice of the California Supreme Court guilty of contempt for failure and refusal to submit to taking of his deposition at the time and place specified in order obtained by the Commission on Judicial Performance had coercive, not punitive, purpose in that its object was to obtain answers to questions before the Commission, but there was no longer any proceeding pending before the Commission in which questions might be asked, release of justice from restraint imposed by the order was required. West's Ann.Const. art. 6, § 18; West's Ann.Gov.Code, § 68753; West's Ann.Code Civ.Proc. §§ 1209, subds. 5, 9, 1218, 1219.
***92 **234** Eugene J. Majeski of Ropers, Majeski, Kohn, Bentley & Wagner, Redwood City, Gregory S. Stout, Wallace P. Douglass, San

Francisco, for petitioner.

William O. Weissich, San Rafael, for real party in interest.

TAYLOR, Presiding Justice.

Petitioner is an 82-year-old judge who is the subject of formal proceedings instituted before the Commission on Judicial Qualifications (now the Commission on Judicial Performance) to inquire into his fitness to perform his duties as a justice of the Supreme Court of California. He seeks an appropriate writ to review an order of the superior court finding him guilty of contempt of court for his failure and refusal to submit to the taking of his deposition at the time and place specified and directed by the court and decreeing that he be punished for such contempt by imprisonment until he submits to the ***93** taking of his deposition. [FN1] This case has been fully briefed by petitioner and the commission and since the issues to be decided are purely matters of law, we have determined that an order to show cause would add nothing to the full presentation already made and we decide the matter peremptorily.

> FN1. A judgment of contempt which is made final and conclusive by section 1222 of the Code of Civil Procedure is not appealable (Code Civ.Proc., s 904.1, subd. (a)(2)), but may be reviewed by certiorari, or, where appropriate, by habeas corpus (In re Buckley (1973) 10 Cal.3d 237, 259, 110 Cal.Rptr. 121). We choose to treat the petition as a petition for a writ of review. Enforcement of the order has been stayed pending final determination of the merits of this petition.

The matter arose as follows: On April 29, 1976, after a preliminary investigation, the commission, real party in interest herein, instituted formal proceedings against petitioner to inquire into his ability to perform his duties as a justice of the Supreme Court of California.

On June 11, 1976, the commission issued an order directing that petitioner appear on July 9, 1976, and submit to the taking of his deposition. On August 5, 1976, after petitioner ****235** had failed and refused to appear at the time and place specified in the order, the commission petitioned the superior court for an order requiring petitioner to appear and testify. On September 20, 1976, over the objections of petitioner, the superior court made an order requiring petitioner to appear and testify on October 1, 1976; and a subpoena to take his deposition was issued by the clerk of the superior court.

On September 29, 1976, after petitioner had been personally served with certified copies of the order and subpoena, petitioner filed in the superior court his written declaration under penalty of perjury stating that upon the advice of his

attorneys, he would not appear at the time and placed set for the taking of his deposition and would not answer any questions touching upon the charges against him, asserting his constitutional privilege against self- incrimination.

On October 4, 1976, after petitioner had failed to obey the order and subpoena, the commission sought and the superior court issued an order that petitioner show cause why he should not be adjudged guilty of contempt of court and punished accordingly.

On October 18, 1976, petitioner filed an answer to the order to show cause, contending that he had, in his declaration under penalty of ***94** perjury, asserted his constitutional privilege not to be called as a witness and not to testify, and therefore he could not be held in contempt for his refusal to appear and submit to his deposition as directed in the order and the subpoena.

On October 25, 1976, after a hearing at which petitioner did not appear in person but did appear through counsel, the superior court found petitioner guilty of contempt of court for his failure and refusal to submit to the taking of his deposition at the time and place specified and directed by the court and ordered that he be punished for such contempt by imprisonment until he submits to the taking of his deposition. The superior court stayed the execution of the order until November 8, 1976, to afford petitioner an opportunity to seek review of the order.

Petitioner contests the jurisdiction of the commission to proceed against him, contends that the commission has exercised its powers in a manner which has abridged his privileges and immunities, denied him due process of the law and the equal protection of the laws, and argues that the enactment of Proposition 7 on November 2, 1976, has subjected him to an ex post facto law. [FN2] In this case, in view of subsequent developments hereafter noted, we are bound to vacate the contempt order for reasons wholly unconcerned with the jurisdiction of the commission to proceed against petitioner. Consequently, for purposes of this opinion, we need not discuss all of the issues raised. However, for the guidance of the commission, we deem it appropriate and helpful to discuss its authority to issue the subpoena and the authority of the court to act in aid of the commission.

> FN2. Under an amendment to article VI, section 18 of the California Constitution, adopted at the November 1976 general election, a recommendation by the commission for the removal or retirement of a justice of the Supreme Court is reviewed by a tribunal of seven Court of Appeal justices selected by lot.

The authority of the commission to inquire into the fitness of petitioner to perform his duties as a justice of the Supreme

Court of California has been granted under article VI, section 18 of the state Constitution and the necessary implementation of this constitutional power has been expressly provided for by statute (Gov. Code, s 68701, et seq.). In the conduct of investigations and formal proceedings, the commission has the general power to administer oaths, to issue subpoenas for the attendance of witnesses, and to make orders for or concerning the inspection of books and records (Gov. Code, s 68750). In addition, ***95** Government Code section 68753 expressly provides that 'In any pending investigation or formal proceeding, the commission or the masters may order the deposition of a person residing within or without the State to be taken in such form and subject to such limitations as may be prescribed in the order.' ****236** Neither this section nor any other provision of law exempts a judge who is the subject of a proceeding under article VI, section 18 from the class of 'person(s)' whose depositions may be taken under the provisions of Government Code section 68753.

Government Code section 68753 further provides that 'If the judge and counsel for the commission do not stipulate as to the manner of taking the deposition, either the judge or counsel may file in the superior court a petition . . . asking that an order be made requiring such person to appear and testify before a designated officer. Upon the filing of the petition, the court may make an order requiring such person to appear and testify. A subpoena for such deposition shall be issued by the clerk and the deposition shall be taken and returned, in the manner prescribed by law for depositions in civil actions.' Disobedience of a lawful order of a court of justice or of a subpoena duly served, or refusal to be sworn or answer as a witness are contempts of the authority of the court (Code Civ. Proc., s 1209, subds. 5 and 9), punishable under the provisions of Code of Civil Procedure section 1218 or 1219.

[1][2] Petitioner argues that he may not be held in contempt for disobedience of the order and subpoena, for the order and subpoena directing him to appear and submit to his deposition violated his constitutional privilege against self-incrimination (Cal.Const., art. I, s 15; United States Const., Amend. V and XIV). It is well established in this state that an order made in violation of a person's constitutional rights is issued without or in excess of jurisdiction and cannot produce a valid judgment of contempt (In re Berry (1968) 68 Cal.2d 137, 147, 65 Cal.Rptr. 273, 436 P.2d 273.) A person affected by such an order has a choice of complying with the order or, at his peril, disobeying the order and raising his jurisdictional contentions when he is sought to be punished for such disobedience. 'If he has correctly assessed his legal position, and it is therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong. (Citations.) If, however, the final judicial determination is otherwise he may be punished' (In re Berry, supra, p. 149, 65 Cal.Rptr. p. 281, 436 P.2d p. 281).

***96** The commission argues that the privilege not to be called as a witness and not to testify may be asserted only by a Defendant in a criminal case, and that all other persons, including a judge who is the subject of a proceeding under article VI, section 18, must appear when subpoenaed as a witness but may assert the privilege to refuse to disclose any matter that may tend to incriminate them, as provided in Evidence Code section 940 and People v. Whelchel (1967) 255 Cal.App.2d 455, 456, 63 Cal.Rptr. 258).

In order to determine whether petitioner has correctly assessed his legal position, we must decide whether petitioner is a Defendant in a criminal case and thus entitled to assert the privilege not to be called as a witness and not to testify. Except as otherwise provided by statute, no person has a privilege to refuse to be a witness (Evid. Code, s 911). An exception is contained in Evidence Code section 930, which provides that 'To the extent that such privilege exists under the Constitution of the United States or the State of California, a Defendant in a criminal case has a privilege not to be called as a witness and not to testify' (emphasis added). The Constitution of the United States, Amendment V, in pertinent part, declares that 'No person . . . shall be compelled in any Criminal case to be a witness against himself . . .' (emphasis added). The corresponding provision in the California Constitution is contained in article I, section 15, which declares that 'Persons may not . . . be compelled in a Criminal cause to be a witness against themselves . . .' (emphasis added).

[3] Penal Code section 15 defines a crime as follows: 'A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, And to which is annexed, upon conviction, ****237** either of the following punishments:

'1. Death;

'2. Imprisonment;

'3. Fine;

'4. Removal from office; or,

'5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State' (emphasis added). The section is in the conjunctive;***97** both of the conditions must be satisfied before the act will constitute a crime (People v. Crutcher (1968) 262 Cal.App.2d 750, 754, 68 Cal.Rptr. 904).

The notice of formal proceedings to inquire into allegations against petitioner charges petitioner in Count One with wilful and persistent failure to perform his duties; in Court Two with conduct prejudicial to the administration of justice that brings

the judicial office into disrepute; in Count Three with having a disability that seriously interferes with the performance of his duties and is, or is likely to become, permanent; and in Count Four with wilful misconduct in office. In order that a public offense be committed, some statute, ordinance, or regulation prior in time to the commission of the act must denounce it (Keeler v. Superior Court (1970) 2 Cal.3d 619, 632, 87 Cal.Rptr. 481, 470 P.2d 617). None of the foregoing acts or omissions described in the above counts is denounced as a crime by statute, ordinance or regulation. Subcount E under Count Four does charge petitioner with acts which would be in violation of statute (presentation of unlawful claims, defined as a crime by Pen.Code, s 72). [FN3]

FN3. Count Four was dismissed in its entirety by the special masters with the approval of the commission on November 8, 1976.

[4] But the commission is not invested with the power to prosecute a criminal action, nor is it a court with jurisdiction to legally convict and punish a person who is charged with a public offense. A criminal action, a proceeding by which a party charged with a public offense is accused and brought to trial and punished (Pen.Code, s 683), is prosecuted in the name of the People of the State of California, as a party, against the person charged with the offense (Pen.Code, s 684), who is designated as the defendant (Pen.Code, s 685). No person can be punished for a public offense, except upon a Legal conviction in a court having jurisdiction thereof (Pen.Code, s 681). The commission has no authority to prosecute or punish a person charged with a public offense; the power of the commission extends no further than to Recommend to the Supreme Court the removal or retirement of a judge who is the subject of a proceeding under article VI, section 18 of the Constitution.

We find the proceedings against petitioner instituted by the commission to be analogous to disciplinary proceedings instituted by the State Bar against attorneys at law to inquire into their fitness to continue in the capacity of officers of the court. It has been held that the purpose of ***98** disciplinary proceedings against attorneys is not to punish the individual but rather to protect the courts and public from the official ministrations of persons unfit to practice, and that such a proceeding is not a criminal case for purposes of the privilege against self-incrimination (Segretti v. State Bar (1976) 15 Cal.3d 878, 886, 126 Cal.Rptr. 793, 544 P.2d 929; Black v. State Bar (1972) 7 Cal.3d 676, 688, 103 Cal.Rptr. 288, 499 P.2d 968; In re Vaughan (1922) 189 Cal. 491, 496--497, 209 P. 353). Likewise, in the case of a judge who is the subject of a proceeding under article VI, section 18 of the Constitution, the object of the proceeding is to protect the public and the litigants before the court from the official ministrations of a judge unfit for his high office. Since the object of both proceedings is the same, we find no

valid reason for according to a judge who is the subject to a proceeding under article VI, section 18 of the Constitution any greater protection with respect to the privilege than that accorded to attorneys who are the subjects of disciplinary proceedings **238 to inquire into their fitness to continue in the capacity of officers of the court.

[5][6] Accordingly, we hold that a judge who is the subject of proceedings 'which are neither criminal nor before a 'court of justice' . . .' (McGartney v. Commission on Judicial Qualifications (1974)12 Cal.3d 512, 521, 116 Cal.Rptr. 260, 266, 526 P.2d 268, 274) does not have the privilege afforded to a defendant in a criminal case to refuse to respond as a witness and to testify (Evid.Code, s 930); he may be called upon to testify and can refuse only to disclose a matter that may tend to incriminate him (Evid.Code, s 940). (Cf. Black v. State Bar, supra, 7 Cal.3d p. 688, 103 Cal.Rptr. 288, 499 P.2d 968; Segretti v. State Bar, supra, 15 Cal.3d p. 886, 126 Cal.Rptr. 793, 544 P.2d 929.) We conclude that the order of the superior court and the subpoena directing petitioner to appear and testify at a deposition were valid, and that petitioner's disobedience of the order and subpoena was a contempt of the authority of the court. [FN4]

FN4. Although an attorney may not be held in contempt of court for advising his client, in good faith, to assert his privilege against self- incrimination (Maness v. Meyers (1975) 419 U.S. 449, 95 S.Ct. 584, 594-- 595, 42 L.Ed.2d 574), the client risks contempt if the attorney's advice proves to be wrong.

[7] If the superior court had elected to punish petitioner, pursuant to the provisions of Code of Civil Procedure section 1218, we would not interfere with the order. We have determined, however, that because of the provisional nature of the order and events occurring subsequent thereto, petitioner cannot be further restrained of his liberty. Unlike a commitment under Code of Civil Procedure section 1218, which authorizes imprisonment for a definite term, a commitment under Code *99 of Civil Procedure section 1219 is provisional. Under Code of Civil Procedure section 1219, a contemnor may be imprisoned until he has performed an act 'which is yet in the power of the person to perform . . ..' It has been held that the conditional imprisonment of a witness for civil contempt for refusal to testify must cease when the jury has been discharged and the trial concluded (Ex Parte Overend (1898) 122 Cal. 201, 203--204, 54 P. 740; In re McKinney (1968) 70 Cal.2d 8, 10, fn. 1, 73 Cal.Rptr. 580, 447 P.2d 972), where the grand jury has been finally discharged (Shillitani v. United States (1965) 384 U.S. 364, 371--372, 86 S.Ct. 1531, 16 L.Ed.2d 622), and where the litigation is otherwise terminated (Ex Parte Rowe (1857) 7 Cal. 175, 176--177; Morelli v. Superior Court (1969) 1 Cal.3d 328, 332, 82 Cal.Rptr. 375, 461 P.2d 665). On January 7, 1977, when

the commission submitted to the Supreme Court of California its findings, conclusions and recommendation that petitioner be retired or removed from the office of associate justice of that court, the commission completed its function and the basis for the civil contempt no longer existed. The law neither does nor requires idle acts (Civ.Code, s 3532). Since the purpose of the order fixing the punishment for civil contempt was coercive, not punitive, its object being to obtain answers to questions for the commission, and since there is no longer any proceeding pending before the commission in which questions may be asked, the contemnor must be released from the restraint imposed upon him by the order of the superior court (In re Lifschutz (1970) 2 Cal.3d 415, 439, fn. 27, 85 Cal.Rptr. 829, 467 P.2d 557).

The order of October 25, 1976, is hereby vacated.

KANE and ROUSE, JJ., concur.

END OF DOCUMENT

[L.A. No. 31140. Oct. 18, 1979]

STANLEY MOSK, an Associate Justice of the Supreme Court, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
COMMISSION ON JUDICIAL PERFORMANCE, Real Party in Interest.

SUMMARY

An associate Supreme Court justice filed a petition for a writ of mandate in the superior court to quash a subpoena ordering him to appear as a witness at a public hearing before the Commission on Judicial Performance, which was investigating the possible judicial misconduct by one or more justices of the Supreme Court. Petitioner sought to quash the subpoena on the ground the public investigation, pursuant to Cal. Rules of Court, rule 902.5, was unconstitutional in light of Cal. Const., art. VI, § 18, subd. (f), which requires the Judicial Council to make rules which provide for confidentiality of proceedings before the commission. The superior court denied the petition. However, the Court of Appeal granted the petition and issued a peremptory writ ordering the Superior Court to quash the commission's subpoena. Before the Court of Appeal's decision became final, the commission petitioned the California Supreme Court for a writ of mandate to compel the Court of Appeal to vacate the peremptory writ or to transfer the proceedings to itself on its own motion. All the Supreme Court justices, except one, disqualified themselves from acting on the commission's petition. The Chief Justice assigned six Court of Appeal justices, who were selected by lot pursuant to an order by the Supreme Court, to act on the petition. The court then ordered the superior court proceeding transferred to itself on its own motion. The Supreme Court subsequently found and delcared that the remaining Supreme Court justice was disqualified from participating in the case, and a seventh Court of Appeal justice was then selected to replace him.

The Supreme Court issued a peremptory writ of mandate directing the superior court to vacate the order entered and to enter a new order

quashing the commission's subpoena of the associate justice. The court held that the Supreme Court, composed of all assigned judges pro tempore, had constitutional authority and jurisdiction to act in the matter. The court also held the fact that the Chief Justice was disqualified from deciding the merits of a given case did not preclude her from exercising her administrative responsibilities in assigning judges to replace disqualified Supreme Court justices. The court further held that in light of the history and purpose of Cal. Const., art. VI, § 18, the limited scope of the commission's authority to investigate judicial misconduct, the strong public policy in favor of confidential investigations by the commission, and the absence of any indication that the people of California intended to change the constitutional requirement of constitutionality by revision of art. VI, in 1966, the Judicial Council had authority to adopt rules which provide for confidentiality, but it did not have the power to authorize public investigations and hearings before the commission. Accordingly, the court held the associate justice could not constitutionally be compelled to testify at the public hearing before the commission. (Opinion by The Court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

**(1a, 1b) Judges § 4—Temporary Judges—Authority of Supreme Court Composed of Temporary Judges.**—A Supreme Court composed of all assigned judges pro tempore had constitutional authority and jurisdiction to decide a petition by an associate Supreme Court justice to quash a subpoena ordering him to appear as a witness at a public hearing before the Commission on Judicial Performance which was investigating possible judicial misconduct by one or more justices of the Supreme Court, where all of the regular justices of the court were disqualified from acting in the matter. The Constitution gives the Chief Justice broad authority to expedite the work of the courts, and implicit in that authority is the Chief Justice's power to assign judges to assist the Supreme Court when regular Supreme Court justices are disqualified. The fact that the Chief Justice was disqualified from deciding the merits of a given case did not preclude her from exercising her administrative responsibilities in assigning justices to replace disqualified Supreme Court justices. Moreover, when all the Supreme Court justices were ultimately disqualified, the Chief Justice was empowered to make the assignment under the rule of necessity.

(2) **Judges § 4—Temporary Judges—Selection.**—The manner, method, or criteria for selection of duly qualified assigned judges is within the inherent power of the Supreme Court and within the discretion of the Chief Justice in the exercise of her constitutional authority to make the assignments. Selection of assigned judges by lot is a proper method which the Chief Justice may use to avoid charges of bias, prejudice, or favoritism in making the selection.

(3) **Judges § 4—Temporary Judges—Authority.**—A duly assigned judge pro tempore generally has the same power and authority (pro hac vice) as a regular judge of the court to which he or she is assigned.

(4a, 4b) **Judges § 1—Commission on Judicial Performance—Confidentiality of Proceedings.**—Rule 902.5, of the Cal. Rules of Court, which authorized a public hearing of an investigation by the Commission on Judicial Performance of possible judicial misconduct by one or more justices of the Supreme Court, was inconsistent with Cal. Const., art. VI, § 18, subd. (f), which requires the Judicial Council to make rules which provide for confidentiality of proceedings before the commission, in light of the history and purpose of the provision, the limited scope of the commission's authority to investigate judicial misconduct, the strong public policy in favor of confidential investigations by the commission, and in the absence of any indication that the people of California intended to change the constitutional requirement of confidentiality by revision of art. VI in 1966. Thus, the Judicial Council has authority to adopt rules which provide for confidentiality, but it does not have the power to authorize public investigations and hearings before the commission. Accordingly, an associate justice of the Supreme Court could not constitutionally be compelled to testify at a public hearing before the commission.

[See **Cal.Jur.3d,** Judges, § 65; **Am.Jur.2d,** Judges, § 18.]

(5) **Judges § 1—Commission on Judicial Performance—Authority.**—The Commission on Judicial Performance does not have the authority to investigate a "court"; its inquiry must be limited to misconduct or disability of an individual judge. The commission may privately admonish a judge for improper action or a dereliction of duty, but it has no power to censure, remove, retire or otherwise discipline a judge. It can only make certain recommendations to the Supreme Court, which then reviews the evidence and makes its own finding. Although the commission's findings are

given great weight by the Supreme Court, they are inconclusive except where the commission, having made a preliminary investigation, concludes that there is insufficient evidence to charge a judge with judicial misconduct.

(6) **Judges § 1—Commission on Judicial Performance—Confidentiality—Public Policy.**—The confidentiality of investigations and hearings by the Commission on Judicial Performance is based on sound public policy. Confidentiality encourages the filing of complaints and the willing participation of citizens and witnessess by providing protection against possible retaliation or recrimination. It protects judges from injury which might result from publication of unexamined and unwarranted complaints by disgruntled litigants or their attorneys, or by political adversaries. It preserves confidence in the judiciary as an institution by avoiding premature announcement of groundless claims of judicial misconduct or disability, and is essential to protecting the judge's constitutional right to a private admonishment if the circumstances so warrant. When removal or retirement is justified by the charges, judges are more likely to resign or retire voluntarily without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided.

(7) **Statutes § 13—Amendment—Meaning.**—Generally, a substantial change in the language of a statute or constitutional provision by an amendment indicates an intention to change its meaning. But a mere change in phraseology, incident to a revision of the Constitution or statute, does not result in a change or meaning unless the intent to make such a change clearly appears.

(8) **Words, Phrases and Maxims—"Provide for."**—The words "provide for" are generally used to mean "to take precautionary measures" or "to make a proviso" or "to supply or furnish" in view of a possible need.

(9) **Judges § 1—Commission on Judicial Performance—Confidentiality—Rules.**—Cal. Const., art. VI, § 18, subd. (f), requires the Judicial Council "to establish" rules for confidentiality of proceedings before the Commission on Judicial Performance, and while the Judicial Council is delegated discretionary power to establish rules which provide for confidentiality, § 18, subd. (f), does not, on its face, give the council discretionary power to make exceptions to the confidentiality requirement by authorizing public investigations and hearings.

(10) **Constitutional Law § 10—Construction of Constitutions—Ambiguity.**—Where a provision in a Constitution is ambiguous, a court must ordinarily adopt that interpretation which carries out the intent and objective of the drafters of the provision and the people by whose vote it was adopted. In order to ascertain the intent and objective of an ambiguous constitutional provision, a court may consider official reports of the Constitution Revision Commission.

(11) **Constitutional Law § 16—Construction of Constitutions—Contemporaneous and Longstanding Construction.**—While the contemporaneous administrative construction of an enactment by those charged with its enforcement and interpretation is entitled to great weight unless erroneous or unauthorized, the ultimate determination of the meaning of a constitutional provision rests with the court.

(12) **Mandamus and Prohibition § 52—Mandamus—Defenses—Laches—Delay—Commission on Judicial Performance—Public Hearings.**—An associate justice of the Supreme Court who sought a writ of mandate to quash a subpoena ordering him to appear as a witness at a public hearing before the Commission on Judicial Performance was not precluded from asserting the constitutional requirement of confidentiality by not filing the petition until after the commencement of the public hearings, where the justice delayed the filing of his petition at the request of the commission, and where he advised the commission of his present position well in advance of the public hearing.

(13) **Judges § 1—Commission on Judicial Performance—Confidentiality—Announcement of Results or Status of Investigation.**—Where an investigation by the Commission on Judicial Performance of alleged judicial misconduct is known to the public, the commission may report the results or status of the investigation to the public without violating the constitutional requirement of "confidentiality of proceedings." While Cal. Const., art. VI, § 18, subd. (f), prohibits public hearings and public reports of testimony and other evidence presented to the commission, it does not preclude either the commission or a judge under investigation publicly announcing the results of an investigation already known to the public.

COUNSEL

Mitchell, Silberberg & Knupp, Edward M. Medvene and Richard M. Mosk for Petitioner.

Ephraim Margolin, Richard J. Kohlman, Beauzay, Hammer, Ezgar, Bledsoe & Rucka, Victor H. Beauzay, Philip L. Hammer, Michael J. Ezgar, Robert T. Bledsoe, N. Michael Rucka, Stephen D. Sprenkle, Melvyn D. Silver, Emmett P. O'Boyle, Edward M. Suden, Louis H. Ginsberg, Alfred Lombardo, Paul E. Jacobs, Susan T. Levin, J. Andrew McKenna, Frederick L. Boyd, John A. Stonich and Ann E. Bailey as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Beardsley, Hufstedler & Kemble, Seth M. Hufstedler, John Sobieski, Burton J. Gindler, Peter O. Israel, Pierce O'Donnell and Evelyn Balderman for Real Party in Interest.

Gray, Cary, Ames & Frye, Josiah L. Neeper, Edward J. McIntyre, Jan S. Gonnerman, Lawrence W. Jordan, Jr., and Joanne M. Garvey as Amici Curiae on behalf of Real Party in Interest.

OPINION

THE COURT.*—Associate Supreme Court Justice Stanley Mosk filed a petition for a writ of mandate, or other appropriate relief, in the Los Angeles County Superior Court to quash a subpoena ordering him to appear as a witness at a public hearing before the Commission on Judicial Performance (hereinafter the Commission), which is investigating possible judicial misconduct by one or more justices of the Supreme Court.[1] Justice Mosk sought to quash the subpoena on the ground the public investigation, pursuant to rule 902.5 of the California Rules of Court, is unconstitutional in light of California Constitution article VI,

*Before seven assigned judges from the California Court of Appeal: Associate Justice James A. Cobey, Second Appellant District, Division Three (Los Angeles), as Acting Chief Justice; Associate Justice Joseph A. Rattigan, First Appellate District, Division Four (San Francisco); Associate Justice James B. Scott, First Appellate District, Division Three (San Francisco); Associate Justice Hugh A. Evans, Third Appellate District (Sacramento); Associate Justice George Hopper, Fifth Appellate District (Fresno); Presiding Justice Clinton W. White, First Appellate District, Division Three (San Francisco); Associate Justice John J. Miller, First Appellate District, Division Two (San Francisco).

[1]The Commission undertook the investigation, on request of the Chief Justice, in response to widespread news media reports that one or more of the justices improperly delayed the filing of controversial decisions, particularly the decision in *People* v. *Tanner*† (Cal. 1978) until after the November 1978 election at which the names of four Supreme Court justices were on the ballot for confirmation by the voters. Justice Mosk was not one of the four justices on the ballot for reconfirmation.

†Reporter's Note: Rehearing granted, for subsequent opinion see 24 Cal.3d 514 [156 Cal.Rptr. 450, 596 P.2d 329].

section 18, subdivision (f), which requires the Judicial Council to make rules which provide for confidentiality of proceedings before the Commission. The superior court denied Justice Mosk's petition. He then petitioned the Court of Appeal, Second Appellant District, for a writ of mandate to compel the superior court to vacate its order denying his petition and to enter a new order granting relief. The Court of Appeal granted Justice Mosk's petition and issued a peremptory writ which ordered the superior court to quash the Commission's subpoena of Justice Mosk. Before the Court of Appeal's decision became final, the Commission petitioned the California Supreme Court for a writ of mandate to compel the Court of Appeal to vacate the peremptory writ; in the alternative, the Commission requested that the Supreme Court transfer the proceeding to itself on its own motion. (*Commission on Judicial Performance* v. *Court of Appeal,* L.A. No. 31134.) All the Supreme Court justices, except Associate Justice Newman, disqualified themselves from acting on the Commission's petition. The Chief Justice assigned six Court of Appeal justices, who were selected by lot pursuant to an order by the Supreme Court, to act on the petition.[2] This court then ordered the first proceeding (*Mosk* v. *Superior Court,* L.A. No. 31140) transferred to itself on its own motion.[3] (See Cal. Const., art. VI, § 12; Cal. Rules of Court, rule 20.)

Justice Mosk raises two principal questions: (1) Does the Supreme Court, composed of all assigned judges pro tempore, have constitutional authority or jurisdiction to act in this matter? (2) If so, is rule 902.5 of the California Rules of Court unconstitutional in light of article VI, section 18, subdivision (f), of the California Constitution? As we shall explain, we conclude that this court has authority to decide the merits of this dispute, that rule 902.5 is unconstitutional because it violates the confidentiality requirement of article VI, section 18, subdivision (f), and that Justice Mosk consequently cannot be compelled to testify at a public hearing before the Commission.

I

**(1a)** Justice Mosk argues that this court, composed of all assigned judges pro tempore, has no constitutional authority or jurisdiction to act in this case, and that the peremptory writ of mandate issued by the Court of Appeal, Second Appellate District, must therefore stand as the

[2]On motion by the Commission, this court subsequently found and declared that Justice Newman was disqualified from participating in this case. A seventh Court of Appeal justice was then selected by lot to replace Justice Newman.

[3]For this reason the second proceeding (*Commission on Judicial Performance* v. *Court of Appeal,* L.A. No. 31134) is dismissed.

decision of the court of last resort.

The California Constitution, article VI, section 2, provides: "The Supreme Court consists of the Chief Justice of California and 6 associate justices. The Chief Justice may convene the court at any time. Concurrence of 4 judges present at the argument is necessary for a judgment. [¶] An acting Chief Justice shall perform all functions of the Chief Justice when the Chief Justice is absent or unable to act. The Chief Justice or, if the Chief Justice fails to do so, the court shall select an associate justice as acting Chief Justice."

The Chief Justice has long had constitutional authority to assign any lower court judge, who is otherwise qualified, to the Supreme Court to sit in place of a disqualified Supreme Court justice. The 1926 constitutional amendment which created the Judicial Council (Cal. Const., art. VI, § 1a, now § 6) provided that the Chief Justice, as chairman of the Judicial Council, "shall seek to expedite judicial business and to equalize the work of the judges, and shall provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred." As amended in 1966 and 1974, this provision now reads: "The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court." (Cal. Const., art. VI, § 6, par. 5th.)[4]

Although the 1966 revision of article VI eliminated the language which empowered the Chief Justice to assign any judge to another court to act for a judge who is disqualified or unable to act, the 1966 revision was not intended to preclude the Chief Justice from assigning a duly qualified judge to another court to act for a disqualified judge. The 1966 revision was part of an overall policy of the Constitution Revision Commission to eliminate unnecessary language and to state the substance of existing sections more concisely and in modern terms. (Cf. *People* v. *Tijerina* (1969) 1 Cal.3d 41, 48 [81 Cal.Rptr. 264, 459 P.2d 680]; see also Cal Const. Revision Com., Proposed Revision (1966) p. 82.) The Constitution gives the Chief Justice broad authority to expe-

[4]Code of Civil Procedure section 170.8 also provides that the Chairman of the Judicial Council (Chief Justice) may assign a judge to hear an action or proceeding in a court where there is no qualified judge in that court to hear the action or proceeding.

dite the work of the courts (see *People* v. *Najera* (1979) 88 Cal.App.3d 930, 933-934 [152 Cal.Rptr. 124]), and implicit in that authority is the Chief Justice's power to assign judges to assist the Supreme Court when regular Supreme Court justices are disqualified. Such assignments have become commonplace.

Justice Mosk argues that once the Chief Justice disqualified herself from participating in this proceeding, she was also disqualified from assigning other judges to the Supreme Court to decide this matter, and that the order assigning Court of Appeal judges to this court is therefore void (citing *Noorthoek* v. *Superior Court* (1969) 269 Cal.App.2d 600, 604-606 [75 Cal.Rptr. 61], and discussion of authority of judge disqualified under Code Civ. Proc., § 170, to make certain orders in the action or proceeding). When the Chief Justice is disqualified, normally the Acting Chief Justice makes assignments to the Supreme Court to fill vacancies. However, the fact that the Chief Justice is disqualified from deciding the merits of a given case does not preclude her from exercising her administrative responsibilities in assigning judges to replace disqualified Supreme Court justices. (Cf. *Yelle* v. *Kramer* (1974) 83 Wn.2d 464 [520 P.2d 927]; *State Board of Law Examiners* v. *Spriggs* (1945) 61 Wyo. 70 [155 P.2d 285], cert. den., 325 U.S. 886 [89 L.Ed. 2001, 65 S.Ct. 1571].) Moreover, where, as here, all the Supreme Court justices were ultimately disqualified, the Chief Justice is empowered to make the assignment under the rule of necessity.[5]

There is no constitutional provision, statute, or court rule which prescribes the manner in which assigned judges are to be selected, except for article VI, section 18, subdivision (e), which is not applicable here.[6]

[5]Under the rule of necessity a disqualified administrative officer may nevertheless act if his failure to act would necessarily result in a failure of justice. (*Caminetti* v. *Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 344, 366 [139 P.2d 908]; see also *Scannell* v. *Wolff* (1948) 86 Cal.App.2d 489, 493 [195 Cal.Rptr. 536]; *Brenkwitz* v. *City of Santa Cruz* (1969) 272 Cal.App.2d 812, 818 [77 Cal.Rptr. 705].)

[6]Article VI, section 18, subdivision (e), of the California Constitution provides: "A recommendation of the Commission on Judicial Performance for the censure, removal or retirement of a judge of the Supreme Court shall be determined by a tribunal of 7 court of appeal judges selected by lot." Justice Mosk argues that the adoption of this provision in 1976 indicates that prior to 1976 a Supreme Court composed of assigned judges pro tempore court not have been established to consider the censure, removal or retirement of a Supreme Court justice. Section 18, subdivision (e), however, was adopted to (1) expressly provide that the matter would be decided by judges other than fellow Supreme Court justices or superior court judges, and (2) to prevent the Chief Justice from selecting the judges to be assigned to hear the matter. Nothing in the adoption of section 18, subdivision (e), suggests that it was adopted because a Supreme Court composed of all assigned judges would not have constitutional authority to hear the matter.

(2) The manner, method, or criteria for selection of duly qualified assigned judges is within the inherent power of the Supreme Court and within the discretion of the Chief Justice in the exercise of her constitutional authority to make the assignments.[7] Selection of assigned judges by lot is a proper method which the Chief Justice may use to avoid charges of bias, prejudice, or favoritism in making the selection. (Cf. *Yelle* v. *Kramer, supra,* 83 Wn.2d 464 [520 P.2d 927].)

(3) A duly assigned judge pro tempore generally has the same power and authority (*pro hav vice*) as a regular judge of the court to which he or she is assigned. (See *Fay* v. *District Court of Appeal* (1927) 200 Cal. 522, 540 [254 P. 896]; see also *Metropolitan Water District* v. *Adams* (1942) 19 Cal.2d 463 [122 P.2d 257]; *Amos* v. *Superior Court* (1960) 182 Cal.App.2d 343, 349-350 [6 Cal.Rptr. 252]; see generally, 48 C.J.S., Judges, § 99, pp. 1111-1112; 46 Am.Jur.2d Judges, § 254, pp. 271-272.) Logically, if one judge assigned to the Supreme Court to replace a disqualified Supreme Court justice has the power and authority of a Supreme Court justice in the assigned case, including the power to cast the decisive vote (see e.g. *Metropolitan Water District* v. *Adams, supra,* 19 Cal.2d 463; *People* v. *Cheatham* (1979) 23 Cal.3d 829 [153 Cal.Rptr. 585, 591 P.2d 1237], majority opinion by three associate Supreme Court justices and three assigned judges; *California Hotel & Motel Assn.* v. *Industrial Welfare Com.* (1979) *ante* p. 200 [157 Cal. Rptr. 840, 599 P.2d 31], majority opinion by two associate Supreme Court justices and four assigned judges), it follows that four or more duly assigned judges have the authority to render a valid decision or judgment in a case before the Supreme Court.[8]

Nevertheless, relying primarily on dictum in *Fay* v. *District Court of Appeal, supra,* 200 Cal. 522, Justice Mosk argues that there is no constitutional authority for a Supreme Court composed only of all assigned judges pro tempore, and that such a court has no authority or jurisdiction to act. (See also *Landon* v. *District Court of Appeal* (1927) 200 Cal. 798 [254 P. 907].) In *Fay,* the Chief Justice, as chairman of the

[7]Code of Civil Procedure section 187 provides: 'When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necesssary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any sutitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

[8]Article VI, section 2, of the California Constitution provides, in part: "Concurrence of 4 judges present at the argument is necessary for a judgment." Justice Mosk argues that since the word "judge" includes "justice" this provision requires a decision by four Supreme Court justices. We conclude, however, that the word "judges," as used in article VI, section 2, includes assigned judges pro tempore.

Judicial Council, had assigned three Los Angeles Superior Court judges to sit and hold court as justices of the District Court of Appeal, Second Appellate District, Division Two. The order was made pursuant to the 1926 constitutional amendment of article VI which created the Judicial Council and authorized the Chief Justice, as chairman, to assign "any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested,..." Division Two of the Court of Appeal, Second Appellate District, then ordered the case of *People* v. *Fay* on calendar in that division for hearing and decision by the three assigned judges pro tempore. Fay objected and petitioned the Supreme Court for a writ of review of these orders and for a writ of prohibition to prevent the assigned judges from deciding his case. After a review of the history of article VI and the purpose of the 1926 amendment, the Supreme Court held that while it was proper for the Chief Justice to assign the superior court judges to the Court of Appeal to assist Division Two with its congested calender, it was improper for the Court of Appeal to assign Fay's case to a panel of three assigned judges pro tempore where the regular Court of Appeal justices in Division Two were neither disqualified nor unable to participate in the decision. Before reaching this conclusion the court reviewed the history of the 1904 and 1918 amendments of article VI as it pertained to the assignment of judges pro tempore to the Supreme Court and Court of Appeal (see *Fay* v. *District Court of Appeal, supra,* 200 Cal. at pp. 532-536). In the course of that review the court said, at pages 535-536: "...and it is interesting to note that the plan of calling in *pro tempore* justices as adopted in 1904 was evidently intended to be one of the ways then devised to relieve 'congestions'; since the same amendment which created the District Courts of Appeal for that then much needed relief also provided for the maintenance of the man power of both courts by the selection of justices *pro tempore* in each as the emergency required. It has, however, never been considered, nor is it now contended, that the power then reposed in the justices of the Supreme Court or of the District Courts of Appeal to make selections of justices or judges to act in the stated emergencies as justices *pro tempore,* however flexible its operation as disclosed in the Reeves case, could be so indefinitely expanded as to permit either of these tribunals to so far replace its constituent membership as to create or constitute a Supreme Court or a District Court of Appeal so far composed of justices *pro tempore* as to exercise the judicial functions of the regularly constituted tribunal. It has never, for example, been considered, nor is it now contended, that under the terms of the amendments of 1904 or 1918 of the constitution relating to *pro tempore* justices that the members of the Supreme Court

or District Courts of Appeal were thereby invested with the power to substitute for themselves, acting as a group in the performance of the judicial function, another body of men composed of justices *pro tempore* and as such empowered to exercise the functions of a Supreme Court or District Court of Appeal. In other words, it was never intended to provide for the creation of a *court pro tempore.* To so interpret these provisions in said amendments, evidently intended to afford temporary and emergency relief, would be to encourage the violation of a very vital principle of popular government which is none other than that of the right of the people of a commonwealth to have their essential rights, liberties, and interests in respect to person and property heard and determined by courts of last resort, the constituent membership of which is composed of public servants of their own selection. That the people might transfer the direct exercise of this selection to those whom they may have chosen to administer the functions of our representative scheme of government is undoubted, but the text of such transfer, whether embodied in a constitution or a statute, should be plain and unambiguous." Justice Mosk relies on these statements in *Fay* to support his argument that a Supreme Court composed of a majority or all assigned judges pro tempore has no authority to act. The statements were made, however, with reference to the 1904 and 1918 constitutional amendments, which have since been repealed, and they must be read in light of the issue whether judges from lower courts could be assigned to assist a court with its congested calendar. As we read *Fay,* it does not suggest, and certainly does not hold, that the Supreme Court, composed of a majority or all assigned judges pro tempore, has no authority to act where, as here, all the regular Supreme Court justices are disqualified.

In *Metropolitan Water District* v. *Adams, supra,* 19 Cal.2d 463, the court said that a judge assigned to the Supreme Court does not have authority to act in place of a Supreme Court justice who is qualified and able to participate in the given action or proceeding. The court also recognized, however, that if a full complement of the qualified members of the Supreme Court is not available, then the matter may be decided by "such justice or justices as may be duly assigned to the court, provided that in no event shall there be more than seven justices acting on a particular matter." (*Id.,* at p. 469.) Implicit in this language is a determination that severn justices pro tempore have authority to decide a matter before the Supreme Court if the Supreme Court justices are disqualified.

In other states, Supreme Courts composed entirely of assigned judges pro tempore have decided cases where all the regular Supreme Court

justices were disqualified. For example, in *Yelle* v. *Kramer, supra,* 83 Wn.2d 464 [520 P.2d 927], all nine justices of the Washington Supreme Court disqualified themselves from participating in a mandamus proceeding which challenged an initiative measure prescribing salaries of certain elected state officials. A provision in the Washington Constitution states: "When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court. . . ." (520 P.2d at p. 928.) Pursuant to this provision, all nine justices of the supreme court assigned an order appointing nine retired justices pro tempore, who were selected by lot, to decide the case.

In *State Board of Law Examiners* v. *Spriggs, supra,* 61 Wyo. 70 [155 P.2d 285, 287], cert. den., 325 U.S. 886, all the justices (three) of the Wyoming Supreme Court disqualified themselves from participating in the case. Pursuant to a provision in the Wyoming Constitution, the chief justice assigned three district court judges to sit as members of the supreme court to decide the matter. Spriggs objected on the ground that the supreme court, consisting of three judges pro tempore, did not have jurisdiction of the matter. In overruling Spriggs' objection, the court said, in substance, that the constitutional provision empowered the chief justice to assign as many district court judges to the supreme court as necessary to replace supreme court justices who were disqualified or unable to act, that the constitutional provision was adopted to expedite the disposition of cases in the supreme court and to provide a full panel to hear and determine litigation before it.

Similarly, in *State* ex rel. *Langer* v. *Kositzky* (1918) 38 N.D. 616 [166 N.W. 534], four of the five justices of the North Dakota Supreme Court disqualified themselves from ruling on a petition for a writ of mandate to compel the state auditor to provide additional compensation for members of that court. Four district court judges were assigned to the supreme court and they decided the matter.

Justice Mosk argues that where, as here, all the Supreme Court justices are disqualified, and the Supreme Court need not decide the case under the rule of necessity,[9] the decision by the Court of Appeal should

[9]Under the "rule of necessity" an appellate court consisting of judges who ordinarily would be disqualified may nevertheless decide the case if there is no other qualified judge or court with exclusive jurisdiction to decide the matter. (See *Evans* v. *Gore* (1920) 253 U.S. 245 [64 L.Ed. 887, 40 S.Ct. 550]; *Atkins* v. *United States* (Ct.Cl. 1977) 566 F.2d 1028, 1035-1040, cert. den., 434 U.S. 1009 [54 L.Ed.2d 751, 98 S.Ct. 718]; *Brinkley* v. *Hassig* (10th Cir. 1936) 83 F.2d 351, 357; see *Johnson* v. *State Bar*

stand as the decision of the court of last resort. Justice Mosk argues that this court should apply the so-called doctrine of "judicial void" as applied by the United States Supreme Court when it lacks a quorum of qualified justices to decide a given case. When the United States Supreme Court lacks a quorum of qualified justices, it can either place the case on a special docket until it has a quorum (see e.g., *United States* v. *Aluminum Co. of America,* and *North American Co.* v. *Securities & Exchange Commission* (1943) 320 U.S. 708-709 [88 L.Ed. 415, 64 S.Ct. 73]), or, if no quorum is possible, the court may dismiss the appeal and thereby affirm the circuit court of appeals judgment (see, e.g., *Chrysler Corporation* v. *United States,* and *Commercial Credit Co.* v. *United States* (1941) 314 U.S. 583 [86 L.Ed. 471, 62 S.Ct. 356]; see also Cunningham, *The Problem of the Supreme Court Quorum* (1943) 12 Geo.Wash.L.Rev. 175; Frank, *Disqualification of Judges* (1947) 56 Yale L.J. 605). Where the appeal is directly from a federal district court, the case is remanded to the court of appeals for decision.[10]

Where the United States Supreme Court lacks a quorum of qualified justices, it cannot decide the case because there is no procedure for the assignment of justices pro tempore to the Supreme Court to sit in place of disqualified justices. By contrast, in this state, as we have explained, the Chief Justice has constitutional authority to assign judges from lower courts to the Supreme Court to replace disqualified Supreme Court justices, and therefore it is not necessary for the California Supreme Court to adopt the United States Supreme Court's procedure of letting the lower court judgment stand.

(1935) 4 Cal.2d 744, 760 [52 P.2d 928], recognizing rule.) Justice Mosk argues that the Supreme Court need not invoke the rule of necessity since the Court of Appeal had jurisdiction and qualified judges to rule on his petition. We agree that the rule of necessity does not apply because there is an alternate method of selecting Supreme Court judges to decide the cause.

[10]As enacted in June 1948, 28 United States Code section 2109 provides: "If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title. [¶] In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

(1b) Accordingly, we conclude that this court, composed of all duly assigned judges pro tempore, has authority to decide the merits of this proceeding.

II

(4a) Justice Mosk contends that rule 902.5 of the California Rules of Court, which authorizes a public hearing of this investigation by the Commission on Judicial Performance,[11] is unconstitutional in light of California Constitution article VI, section 18, subdivision (f), which requires the Judicial Council to make rules which provide for

[11]Since the Commission was first established by constitutional amendment in November 1960, all investigations by, and hearings before, the Commission were required to be confidential until the record was filed with the Supreme Court. Because of the unprecedented nature of the pending investigation of the Supreme Court justices, however, the Commission asked the Judicial Council, which has the rule-making authority, to modify the confidentiality requirement by amending the rules to allow the Commission's proceedings, "after completion of the preliminary investigation," to be "publicly conducted, disclosed or reported, in whole or in part, having due regard for the personal reputations and other legitimate interests of the judge or judges and their right to due process." The executive committee of the Judicial Council recommended rejection of the Commission's request, but the full council adopted rule 902.5 in January 1979. Rule 902.5 provides:

"*In a proceeding in which the Commission finds that: (1) the subject matter is generally known to the public; (2) there is broad public interest; (3) confidence in the administration of justice is threatened due to lack of public information concerning the status and conduct of the proceeding; and (4) the public interest in maintaining confidence in the judicial office and the integrity of the administration of justice requires that some or all aspects of such proceeding should be publicly conducted or otherwise reported or disclosed to the public, the requirement of confidentiality may, to the extent determined by the Commission, be modified with respect to said proceeding; and, after completion of the investigation, a public hearing shall be held and shall be publicly conducted. The public hearing shall include the right of all segments of the news media to be present and report the proceedings.*

"The Commission's determination shall be based solely on evidence taken at the hearing.

"Such determination to modify may be made at any time after the Commission undertakes to conduct an inquiry or investigation, or otherwise to institute such proceeding with respect to the subject matter, but only after affording notice and an opportunity to be heard on the issue to any judge whose conduct may be called into question in such proceeding. [As amended effective Jan. 29, 1979, adopted effective Jan. 16, 1979. This rule shall apply to any investigation or proceeding of the Commission on Judicial Performance relating to any possible improper conduct of any Justice of the Supreme Court of California arising out of (1) any irregularities or delays in handling the *Tanner* case; (2) any irregularities or delays in handling any other case or cases pending before the Supreme Court prior to the election of November 7, 1978, caused or instituted for the purpose of delaying the filing of the Court's decision in any such case until after the date of the election, and/or (3) any unauthorized disclosure of confidential information regarding any of the above pending cases prior to the public release of the decision. (Judicial Council resolution, January 16, 1979, as revised January 29, 1979.)]"

confidentiality of proceedings before the Commission.[12] The Commission, on the other hand, contends that article VI, section 18, subdivision (f), gives the Judicial Council discretionary rule-making authority to determine when, and under what circumstances, proceedings before the Commission shall be confidential, and that the adoption of rule 902.5 was within the discretionary rule-making authority of the Judicial Council. Both parties argue that their respective interpretations of section 18, subdivision (f), are (1) based on the plain and ordinary meaning of the words in that section; (2) supported by judicial and contemporaneous administrative construction; and (3) consistent with the history, intent, and objectives of that section. No reported California case has decided this issue.

The question of confidentiality of proceedings before the Commission on Judicial Performance must be considered in light of the Commission's history and the limited scope of its constitutional authority. It was, as previously noted, created by constitutional amendment in November 1960. (See Cal. Const., art. VI, § 8.) It has authority to investigate complaints of judicial misconduct, a judge's failure or inabil-

[12]Article VI, section 18, of the California Constitution provides:

"(a) A judge is disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging the judge in the United States with a crime punishable as a felony under California or federal law, or (2) a recommendation to the Supreme Court by the Commission on Judicial Performance for removal or retirement of the judge.

"(b) On recommendation of the Commission on Judicial Performance or on its own motion, the Supreme Court may suspend a judge from office without salary when in the United States the judge pleads guilty or no contest or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. If the conviction is reversed suspension terminates, and the judge shall be paid the salary for the judicial office held by the judge for the period of suspension. If the judge is suspended and the conviction becomes final the Supreme Court shall remove the judge from office.

"(c) On recommendation of the Commission on Judicial Performance the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The commission may privately admonish a judge found to have engaged in an improper action or a dereliction of duty, subject to review in the Supreme Court in the manner provided for review of causes decided by a court of appeal.

"(d) A judge retired by the Supreme Court shall be considered to have retired voluntarily. A judge removed by the Supreme Court is ineligible for judicial office and pending further order of the court is suspended from practicing law in this State.

"(e) A recommendation of the Commission on Judicial Performance for the censure, removal or retirement of a judge of the Supreme Court shall be determined by a tribu-

ity to perform the duties of a judge, and other conduct prejudicial to the administration of justice. (See *ante,* fn. 12.) (5) The Commission does not have the authority to investigate a "court." Its inquiry must be limited to misconduct or disability of an individual judge.[13] The Commission has authority to conduct hearings, make findings of fact (see Gov. Code, §§ 68750-68755; Cal. Rules of Court, rules 901-922), and recommend to the Supreme Court that a given judge be censured or removed or retired from the court. (Cal. Const., art. VI, § 18, subd. (c).) The Commission may privately admonish a judge for improper action or a dereliction of duty, but it has no power to censure, remove, retire or otherwise discipline a judge. It can only make certain recommendations to the Supreme Court, which then reviews the evidence and makes its own findings. (*Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 276 [110 Cal.Rptr. 201, 515 P.2d 1]; *Spruance* v. *Commission on Judicial Qualifications* (1975) 13 Cal.3d 778 [119 Cal.Rptr. 841, 523 P.2d 1209].) Although the Commission's findings are given great weight by the Supreme Court, they are inconclusive except where the Commission, having made a preliminary investigation, concludes that there is insufficient evidence to charge a judge with judicial misconduct.

The confidentiality of investigations and hearings before the Commission was considered essential to the success of the Commission from the outset. As adopted by the people in November 1960, article VI, section 10b, paragraph three, expressly provided that "*[a]ll papers filed with and proceedings before the Commission on Judicial Qualifications or masters appointed by the Supreme Court, pursuant to this section, shall be confidential*..." until the Commission filed the record in the Supreme Court.[14] The ballot argument in favor of this mearure stated:

nal of 7 court of appeal judges selected by lot.

"(f) The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings."

[13]According to certain resolutions adopted by the Judicial Council and the Commission, each body purportedly resolved to investigate the "Supreme Court." As Commission counsel has conceded, however, the Commission has no constitutional authority to investigate the "Supreme Court" or any other "court." Its investigation must be limited to misconduct or disability of a judge.

[14]In its entirety paragraph three of former section 10b, article VI, provides: "All paper filed with and proceedings before the Commission on Judicial Qualifications or masters appointed by the Supreme Court, pursuant to this section, shall be confidential, and the filing of papers with and the giving of testimony before the commission or the masters shall be privileged; but no other publication of such papers or proceedings shall be privileged in any action for defamation except that (a) the record filed by the commission in the Supreme Court continues privileged and upon such filing loses its confidential character and (b) a writing which was privileged prior to its filing with the commission or the masters does not lose such privilege by such filing. The Judicial

"To avoid the unfairness of publicizing complaints of merely disgruntled litigants, proceedings before the Commission will not be public, unless and until it recommends to the Supreme Court the removal or retirement of the judge."

(6) The confidentiality of investigations and hearings by the Commission is based on sound public policy. Confidentiality encourages the filing of complaints and the willing participation of citizens and witnesses by providing protection against possible retaliation or recrimination. (*McCartney* v. *Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 521 [116 Cal.Rptr. 260, 526 P.2d 268]; *Landmark Communications, Inc.* v. *Virginia* (1978) 435 U.S. 829 [56 L.Ed.2d 1, 98 S.Ct. 1535, 1539].) Confidentiality protects judges from injury which might result from publication of unexamined and unwarranted complaints by disgruntled litigants or their attorneys (*Landmark Communications, Inc.* v. *Virginia, supra*), or by political adversaries. Confidentiality of investigations by the Commission preserves confidence in the judiciary as an institution by avoiding premature announcement of groundless claims of judicial misconduct or disability. (*Landmark Communications, Inc.* v. *Virginia, supra.*) Confidentiality of proceedings before the Commission is essential to protecting the judge's constitutional right to a private admonishment (see Cal. Const., art. VI, § 18, subd. (c)), if the circumstances so warrant. When removal or retirement is justified by the charges, judges are more likely to resign or retire voluntarily without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided.[15] (*Landmark Communications, Inc.* v. *Virginia, supra,*

Council shall by rule provide for procedure under this section before the Commission on Judicial Qualifications, the masters, and the Supreme Court. A justice or judge who is a member of the commission or Supreme Court shall not participate in any proceedings involving his own removal or retirement."

[15]The Commission on Judicial Performance has furnished the following data:

| Year | Complaints Filed | Inquiries (some kind of investigation) | Judge Contacted | Preliminary Investigation (if tabulated) | Admonishments | Resignations or Retirements | Public Discipline |
|---|---|---|---|---|---|---|---|
| 1961 | 68 | 23 | (This breakdown not made before 1964) | | | 4 | |
| 1962 | 95 | 23 | | | | 6 | |
| 1963 | 114 | 40 | | | | 10 | No |
| 1964 | 67 | 32 | 18 | | | 6 | Censures |
| 1965 | 85 | 38 | 29 | | | 4 | or |
| 1966 | 75 | 33 | 29 | | | 9 | Removals |
| 1967 | 101 | 48 | 33 | | | 5 | |
| 1968 | 132 | 48 | 35 | | | 2 | |
| 1969 | 155 | 46 | 28 | | | 4 | |
| 1970 | 181 | 33 | 24 | | | 2 | 1 censure |

435 U.S. 829.)[16] Leading writers have recognized that confidentiality of investigations and hearings by the Commission is essential to its success. (See Frankel, *Judicial Conduct and Removal of Judges for Cause in California* (1962) 36 So.Cal.L.Rev. 72; Frankel, *Removal of Judges: California Tackles an Old Problem* (1963) 49 A.B.A. J. 166, 170; Traynor, *Rising Standards of Courts and Judges* (1965) 40 State Bar J. 677, 688; 1965 Rep. of the Com. on Judicial Qualifications to the Governor, p. 2.)

In November 1966, as part of an overall revision of the California Constitution, sections 10a and 10b of article VI were eliminated and replaced with the present section 18. (See *ante,* fn. 12.) The revision eliminated the language of paragraph three of section 10b, which required that all papers filed with and proceedings before the Commission or special masters "shall be confidential" until the record is filed in the Supreme Court. The language was replaced by section 18, subdivision (e), now subdivision (f), which provides: "The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings." The question is whether the people of the State of California, in adopting the 1966 amendment of article VI, intended to eliminate the constitutional mandate that all proceedings before the Commission shall be confidential, and to vest the Judicial Council with discretionary rule-making authority to provide for confidential (i.e., nonpublic) or public proceedings as circumstances might warrant, or whether the people intended no substantive change in the confidentiality requirement.

| Year | Complaints Filed | Inquiries (some kind of investigation) | Judge Contacted | Preliminary Investigation (if tabulated) | Admonishments | Resignations or Retirements | Public Discipline |
|---|---|---|---|---|---|---|---|
| 1971 | 217 | 54 | 42 | 9 | | 2 | 1 censure |
| 1972 | 213 | 64 | 49 | | | 2 | |
| 1973 | 197 | 40 | 32 | 11 | | 2 | 2 censures<br>1 removal |
| 1974 | 247 | 36 | 33 | | | 3 | 1 censure |
| 1975 | 239 | 48 | 43 | 11 | | 3 | 2 removals |
| 1976 | 251 | 63 | 46 | 14 | | 3 | |
| 1977 | 217 | 53 | 52 | 11 | 8 | 1 | 1 retirement (involuntary) |
| 1978 | 274 | 72 | 59 | 20 | 7 | 3 | 1 censure<br>1 retirement (involuntary) |

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[16]In *Landmark Communications, Inc.* v. *Virginia, supra,* the Supreme Court noted that 47 states, the District of Columbia and Puerto Rico have established by constitution, statute or court rule some type of judicial inquiry and disciplinary procedures, and that all these jurisdictions (with the apparent exception of Puerto Rico) provide for the confidentiality of judicial disciplinary proceedings, at least until a formal complaint is filed with the state Supreme Court or equivalent body.

(7) Generally, a substantial change in the language of a statute or constitutional provision by an amendment indicates an intention to change its meaning. But a mere change in phraseology, incident to a revision of the Constitution or statute, does not result in a change of meaning unless the intent to make such a change clearly appears. (*Hammond* v. *McDonald* (1942) 49 Cal.App.2d 671, 681 [122 P.2d 332]; cf. *Tillie Lewis Foods, Inc.* v. *City of Pittsburg* (1975) 52 Cal.App.3d 983, 1003 [124 Cal.Rptr. 698]; *Forde* v. *Cory* (1977) 66 Cal.App.3d 434, 438 [135 Cal.Rptr. 903].) The Commission concedes that article VI, section 18, subdivision (f), mandates that the Judicial Council shall make rules which provide for confidentiality of proceedings.[17] The Commission, nevertheless, argues that when section 18, subdivision (f), is considered in light of the former language requiring confidentiality of *all* proceedings before the Commission, it should be construed to mean that not *all* proceedings before the Commission need to be confidential; and that the words "providing for confidentiality" vest the Judicial Council with discretion and broad authority to determine when, and under what circumstances, proceedings before the Commission shall be confidential. The Commission argues that this is the practical and common sense interpretation of this provision.

As Justice Mosk argues, however, the words "providing for confidentiality" must be given their ordinary and usual meaning. (8) The words "provide for" are generally used to mean "to take precautionary measures" or "to make a proviso" or "to supply or furnish" in view of a possible need. (See Webster's New Internat. Dict. (3d ed. 1965) p. 1827; see also Words and Phrases, "Provide For.") (9) Section 18, subdivision (f), requires the Judicial Council "to establish" rules for confidentiality of proceedings before the Commission. While the Judicial Council is delegated discretionary power to establish rules which provide for confidentiality, section 18, subdivision (f), does not, on its face, give the council discretionary power to make exceptions to the confidentiality requirement by authorizing public investigations and hearings.

The Commission disputes this interpretation on the basis that if arti-

[17]Article I, section 26, of the California Constitution provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." This rule of construction applies to all provisions of the Constitution and to all branches of the state government, including the judiciary. (*State Board of Education* v. *Levit* (1959) 52 Cal.2d 441, 460-461 [343 P.2d 8]; see also *Jenkins* v. *Knight* (1956) 46 Cal.2d 220, 224 [293 P.2d 6].) As applied to article VI, section 18, subdivision (f), the Constitution mandates that the Judicial Council make rules which provide for confidentiality of proceedings before the Commission.

cle VI, section 18, subdivision (f), merely means that the Judicial Council shall make rules requiring confidentiality in all proceedings, there would be no need for any rules on the subject. However, a close analysis of the confidentiality requirement indicates a number of areas where court rules may be helpful or necessary. For example, specific court rules may be helpful in resolving such problems pertaining to confidentiality of discovery procedures in judicial disciplinary proceedings (see, e.g., *People* ex rel. *the Ill. Jud. Inquiry Bd.* v. *Hartel* (1978) 72 Ill.2d 225 [380 N.E.2d 801]), and whether the judge under investigation may make public statements without violating the confidentiality requirement (see, e.g., *Matter of Buford* (Mo. 1979) 577 S.W.2d 809, 825). Other jurisdictions with provisions that all proceedings "shall be confidential" have adopted rules implementing that requirement. (See, e.g., Va. Const., art. VI, § 10; Va. Code, § 2.1-37.13.)

In the *McCartney* case, the judge under investigation by the Commission claimed a denial of due process in its refusal of his demand that certain hearings before special masters be opened to the public. (*McCartney* v. *Commission on Judicial Qualifications, supra,* 12 Cal.3d 512 at pp. 518, 520-521.) The Supreme Court rejected his contention on review, stating: "Equally unfounded is petitioner's complaint that he should have been accorded an open hearing. This state has adopted a constitutional policy that proceedings before the Commission shall be confidential (Cal. Const., art. VI, § 18, subd. (e), authorizing the Judicial Council to 'make rules...providing for confidentiality of proceedings.') While such a policy undoubtedly was adopted in part to protect the particular judge charged with misconduct and might, therefore, arguably be waived by him, we recognize that the provision for confidentiality also protects witnesses and citizen complainants from intimidation. Inasmuch as confidentiality is constitutionally authorized, is based on sound reason, and is imposed in proceedings which are neither criminal nor before a 'court of justice' we preceive no impropriety in the Commission's refusal to open the hearings before the special masters to the public." (12 Cal.3d at pp. 520-521 [citations omitted].)

The Commission argues that the *McCartney* court's reference to the cited constitutional source as "authorizing the Judicial Council to 'make rules...providing for confidentiality of proceedings'" supports the view that the source invests the Judicial Council with authority to provide for exceptions to the confidentiality requirement. The focus is on the word "authorizing." The operative portion of the sentence where the quoted words appear is the indisputable recital that "[t]his state has adopted a constitutional policy that proceedings before the Commission

shall be confidential." The words follow this statement in a parenthetical citation of the constitutional source of the policy mentioned. Read in context, they identify the source but do not interpret it. The single word "authorizing" cannot be isolated from the context to import something the court did not say in the operative portion of the sentence. The related words used later in the context ("...confidentiality is constitutionally authorized...") convey no broader meaning. The passages quoted from *McCartney* do not support the Commission's interpretation of article VI, section 18, subdivision (f).

The conflicting contentions of the parties point to a latent ambiguity in article VI, section 18, subdivision (f).[18] **(10)** Where a provision in the Constitution is ambiguous, a court must ordinarily adopt that interpretation which carries out the intent and objective of the drafters of the provision and the people by whose vote it was adopted. (See *Story* v. *Richardson* (1921) 186 Cal. 162, 165 [198 P. 1057, 18 A.L.R. 750]; *Bakkenson* v. *Superior Court* (1925) 197 Cal. 504, 510-511 [241 P. 874]; *Kaiser* v. *Hopkins* (1936) 6 Cal.2d 537, 539 [58 P.2d 1278]; *State Board of Education* v. *Levit, supra,* 52 Cal.2d 441, 462-463; *Flood* v. *Riggs* (1978) 80 Cal.App.3d 138, 152 [145 Cal.Rptr. 573].) To ascertain the intent and objective of an ambiguous constitutional provision, a court may consider official reports of the California Constitution Revision Commission (*District Election Committee* v. *O'Connor* (1978) 78 Cal.App.3d 261, 270 [144 Cal.Rptr. 442]), the record of the debates (see *State Board of Education* v. *Levit, supra,* 52 Cal.2d at p. 462; *Pitts* v. *Reagan* (1971) 14 Cal.App.3d 112, 118 [92 Cal.Rptr. 27]), legislative committee reports (see *Jolicoeur* v. *Mihaly* (1971) 5 Cal.3d 565, 573 [96 Cal.Rptr. 697, 488 P.2d 1]; *Miro* v. *Superior Court* (1970) 5 Cal.App.3d 87, 99 [84 Cal.Rptr. 874]; *Arellano* v. *Moreno* (1973) 33 Cal.App.3d 877, 884 [109 Cal.Rptr. 421]), contemporaneous exposition or interpretation of the provision (*Carter* v. *Commission on Qualifications of Judicial Appointments* (1939) 14 Cal.2d 179, 185 [93 P.2d 140]), and written arguments in voter pamphlets (*White* v. *Davis* (1975) 13 Cal.3d 757, 775 [120 Cal.Rptr. 94, 533 P.2d 222]).

We have taken judicial notice, pursuant to Evidence Code sections 459 and 452, subdivision (c), of all material of the California Constitu-

[18]A law review writer states: "[A] latent ambiguity is said to exist where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic evidence creates a *necessity* for interpretation or a choice among two or more *possible meanings.*" (See Note, *Constitutional Law: The Doctrine of Latent Ambiguities As Applied to the California Constitution* (1943) 31 Cal.L.Rev. 203, 205.)

tion Revision Commission (Revision Commission) relating to the 1966 revision of article VI. Those materials include minutes and drafts by the Revision Commission, the article VI committee, and the drafting committee which was composed of certain members of the article VI committee.[19] An examination of those materials demonstrates that the basic objectives of the Revision Commission were to delete provisions which were redundant, obsolete, or unnecessary for inclusion in the Constitution, such as procedural matters which could be prescribed or provided for by statute or court rule. (Cal. Const. Revision Com., Proposed Revision (1966) p. 82.) The Revision Commission contemplated few substantive changes in article VI.

The first draft of the proposed revision of article VI was completed in June 1964. It proposed no change in the confidentiality requirement as stated in then existing section 10b, paragraph three. Later drafts, identified as the first subcommittee draft, a second working draft, an amended second working draft, and a third working draft also left the confidentiality requirement unchanged.

[19]Minutes summarizing the discussions engaged in and the decisions reached by the commission and its committee on article VI at their respective meetings regarding provisions in the drafts mentioned, with specific references to the particular drafts considered at the meetings, are enumerated in the following table:*

| Draft | Commission Minutes | Committee on Article VI Minutes |
|---|---|---|
| First Draft (June 1, 1964) | | July 30, 1964<br>September 18, 1964<br>October 17, 1964<br>November 5-6, 1964 |
| First Subcommittee Draft (November 4, 1964) | November 7, 1964<br>December 11-12, 1964 | December 10, 1964<br>February 12, 1966 |
| First Working Draft (February 28, 1965) | March 6, 1965<br>April 2, 1965 | March 4, 1965<br>April 22, 1965 |
| Second Working Draft (April 26, 1965) | May 7, 1965 | May 6, 1965 |
| Amended Second Working Draft (May 10, 1965) | | July 9, 1965 |
| Third Working Draft (July 15, 1965) | July 29, 1965 | |
| Amended Third Working Draft (September 10, 1965) | | September 3, 1965 |
| Drafting Committee Draft (November 1, 1965) | November 18-19, 1965 | |
| Final Commission Draft (December 1, 1965) | January 6, 1965 | |

*Source: Report of the Revision Commission, page 36, prepared for the Joint Rules Committee of the California Legislature, by J. Gould, formerly with the Office of Legislative Counsel.

At a meeting in May 1965, the Revision Commission decided to refer the proposed draft of what is now section 18 to the article VI committee with instructions to delete procedural portions which could be handled by statute. The article VI committee considered the matter and concluded that such transfers from the Constitution to statutes would be undesirable, and that in the sensitive area of disciplining judges the procedural safeguards were sufficiently important to be given "constitutional status."

At a meeting in July 1965, the Revision Commission approved a motion to delete paragraph three of existing section 10b (see *ante*, fn. 14), and referred the proposed draft to the article VI committee with instructions to delete the procedural portions of the draft. At a meeting in September 1965, the article VI committee discussed the meaning of the word "procedural" and the need for keeping confidential all records pertaining to the censure of judges. The article VI committee then approved a proposed draft which included the following provision: "The procedure under this section shall be prescribed by rules of the Judicial Council. The Judicial Council shall also prescribe rules implementing this section and providing for the confidentiality of proceedings hereunder." A subsequent draft changed this provision to read: "The Judicial Council shall prescribe rules implementing this section and provide for confidentiality of proceedings under it." The final draft, which was approved by the Revision Commission, read: "The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings." The Revision Commission's only comment on this provision was that it "gives exclusive rule-making power to the Judicial Council. It requires the council to make rules implementing the section and providing for confidentiality of proceedings before the Commission on Judicial Performance." (Cal. Const. Revision Com., Proposed Revision (1966) p. 98.) The summary and arguments in the voters pamphlet submitted to the electorate in November 1966 did not mention or explain the scope of the Judicial Council's authority to make rules providing for confidentiality of proceedings before the Commission on Judicial Performance.

Thus a review of the Revision Commission's materials and minutes fails to show that either the commission or the article VI committee considered the question whether the Judicial Council should be given discretionary rule-making authority to modify, or make exceptions to, the existing policy of confidential proceedings before the Commission on Judicial Performance. The minutes of meetings of the Revision

Commission, and of the article VI committee, show that the constitutional language pertaining to the confidentiality requirement was changed as part of the Revision Commission's policy of deleting procedural matters from the Constitution without changing the substance. (Cf. *District Election Committee* v. *O'Connor, supra,* 78 Cal.App.3d 261, 270.) The Revision Commission concluded that the Constitution should expressly require the Judicial Council to make rules which provide for confidentiality of proceedings before the Commission on Judicial Performance. The Revision Commission did not contemplate that section 18, subdivision (e), now subdivision (f), would give the Judicial Council discretionary rule-making power to authorize public investigations and hearings by the Commission on Judicial Performance as circumstances might warrant.

Moreover, the Judicial Council itself did not immediately contemplate that article VI, section 18, subdivision (e), (now subd. (f)), gave it authority to modify the constitutional policy requiring confidentiality of proceedings before the Commission on Judicial Performance. (See Judicial Council of Cal., Annual Rep. (1967) p. 88.) Within four days after the electorate approved the proposed revision of article VI in November 1966, the Judicial Council adopted rule 902, which provided that all papers filed with and proceedings before the Commission, or before the masters appointed by the Supreme Court, shall be confidential until a record is filed by the Commission in the Supreme Court. This rule was adopted to continue in rule form, without change in substance, the confidentiality requirement as formerly stated in the Constitution. (*Op. cit., supra,* at p. 151.)

Effective July 1, 1971, the Judicial Council amended rule 902 by adding subdivision (b), which authorizes the Commission to release information regarding its proceedings under limited circumstances. Rule 902(b) was further amended in 1977 and 1978.[20] The Commission ar-

[20]Rule 902(b), California Rules of Court, provides: "The Commission may release information regarding its proceedings under the following circumstances:

"(1) If a judge is publicly charged with involvement in proceedings before the Commission resulting in substantial unfairness to him, the Commission may, at the request of the judge involved, issue a short statement of clarification and correction.

"(2) If a judge is publicly associated with having engaged in serious reprehensible conduct or having committed a major offense, and after a preliminary investigation or a formal hearing it is determined there is no basis for further proceedings or recommendation of discipline, the Commission may issue a short explanatory statement.

"(3) When a formal hearing has been ordered in a proceeding in which the subject matter is generally known to the public and in which there is broad public interest, and

gues that these amendments of rule 902 indicate that the Judicial Council construed article VI, section 18, subdivision (f), to mean that it had authority to modify the constitutional policy requiring confidentiality of proceedings before the Commission, and that the council's contemporaneous construction is persuasive in determining the scope of the council's rule-making authority. (11) The Commission relies on the established rule that the contemporaneous administrative construction of an enactment by those charged with its enforcement and interpretation is entitled to great weight unless erroneous or unauthorized. (*Wilkinson* v. *Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 501 [138 Cal.Rptr. 696, 564 P.2d 848].) However, the ultimate determination of the meaning of the provision rests with the court. (*Morris* v. *Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697].)

(4b) We conclude that in light of the history and purpose of article VI, section 18, the limited scope of the Commission's authority to investigate judicial misconduct, the strong public policy in favor of confidential investigations by the Commission, and the absence of any indication that the people of California intended to change the constitutional requirement of confidentiality by revision of article VI in 1966, the Judicial Council has authority to adopt rules which provide for confidentiality but it does not have the power to authorize public investigations and hearings before the Commission. Rule 902.5 is inconsistent with article VI, section 18, subdivision (f), which mandates confidentiality. For this reason Justice Mosk cannot constitutionally be compelled to testify at a public hearing before the Commission in C.J.P. No. 3012.[21]

in which confidence in the administration of justice is threatened due to lack of information concerning the status of the proceeding and the requirements of due process, the Commission may issue one or more short announcements confirming the hearing, clarifying the procedural aspects, and defending the right of a judge to a fair hearing.

"(4) If a judge retires or resigns from judicial office following institution of formal proceedings, the Commission may, in the interest of justice or to maintain confidence in the administration of justice, release information concerning the investigation and proceedings to a public entity.

"(5) Upon completion of an investigation or proceeding, the Commission shall disclose to the person complaining against the judge that after an investigation of the charges the Commission (i) has found no basis for action against the judge, (ii) has taken an appropriate corrective action, the nature of which shall not be disclosed, or (iii) has filed a recommendation for the censure, removal, or retirement of the judge. The name of the judge shall not be used in any written communication to the complainant unless the record has been filed in the Supreme Court."

[21]Counsel has represented that Justice Mosk has testified at a private hearing before the Commission in this matter. The confidentiality requirement precludes the Commission from releasing Justice Mosk's confidential testimony to the public.

III

In an amici curiae brief in support of the Commission on Judicial Performance, the Union Tribune Publishing Company (a division of the Copley Press, Inc.), the California Newspaper Publishers Association, Inc., and the San Jose Mercury News argue that the pending investigation, which was open to the public before Justice Mosk challenged the constitutionality of rule 902.5 in court, should be completed at public hearings in order to maintain public confidence in the integrity of the Supreme Court and the judicial system. No such purpose warrants deviation from the constitutional requirement of confidentiality established by the people of this state. Amici curiae further argue that the hearings should be continued in public because the focus of the Commission's investigation is the conduct of the Supreme Court as an institution and not an investigation into the conduct of the justices. As we have previously stated, however, the Commission has no constitutional authority to investigate the "Supreme Court" or any "court." The scope of its authority is limited to investigations of misconduct or disability of a judge (see *ante,* fns. 12, 13), and those investigations must comply with the constitutional requirement of confidentiality.

(12) Amici curiae also argue that Justice Mosk should be precluded from asserting the constitutional requirement of confidentiality because he delayed the filing of his petition for a writ of mandate until after commencement of the public hearings he challenges. The record shows, however, that Justice Mosk delayed the filing of his petition at the request of the Commission, and that he had advised the Commission of his present position well in advance of the public hearings. The pertinent sequence of events was as follows.

Shortly after the election in November 1978, the Chief Justice asked the Commission to investigate news media reports that certain controversial decisions had been improperly delayed until after the election. The Chief Justice also asked the Commission to issue a public report of its investigation, pursuant to rule 902(b)(2). In December the Commission asked the Judicial Council to adopt a rule which would modify the rule requiring confidential proceedings before the Commission. In January the Judicial Council adopted rule 902.5. In a letter dated February 15, 1979, and addressed to the Commission chairman, Justice Mosk stated his opinion that the Judicial Council is not constitutionally empowered to authorize public hearings before the Commission, and that

the Commission has no authority to proceed with any inquiry except in confidence. The Commission, nevertheless, proceeded with a preliminary investigation and, in April, made the findings required by rule 902.5 and decided to proceed with a public hearing. In another letter dated May 9, 1979, and addressed to the Commission chairman, Justice Mosk again objected to a public hearing on the ground that it would violate article VI, section 18, subdivision (f).

On or about June 11, all seven justices of the Supreme Court (and other court personnel) were served with subpoenas to appear as witnesses at the public hearing scheduled to begin on June 18. On or about June 13, Justice Mosk informed Commission counsel that if he were required to testify in public he would challenge the constitutionality of the public hearing by filing a petition for a writ of mandate in the superior court. A copy of the petition was apparently delivered to Commission counsel on that date. Pursuant to an understanding with Commission counsel, Justice Mosk delayed filing the petition until the Commission decided if and when Justice Mosk would be ordered to testify. The Commission proceeded with the public hearing, which received extensive coverage in the news media. Five of the Supreme Court justices and a number of court personnel testified in public. Justice Mosk, the last Supreme Court justice on the list of witnesses, was scheduled to appear before the Commission on July 9. He filed his petition for a writ of mandate on July 6, and the superior court denied it on July 12. His petition to the Court of Appeal was granted on July 17. The public hearing before the Commission terminated on that date. Justices Mosk and Newman subsequently testified at a Commission hearing which was closed to the public. In these circumstances, there is no merit to the assertations by amici curiae that Justice Mosk delayed his challenge of the constitutionality of rule 902.5.

## IV

Appearing as amici curiae, the San Francisco Bar Association and the California Attorneys for Criminal Justice argue that if this court declares rule 902.5 unconstitutional, the court should also determine whether the Commission may publicly announce its findings and conclusions in this matter pursuant to rule 902(b). (See *ante,* fn. 20.) The narrow issue decided by this court is whether article VI, section 18, subdivision (f), of the Constitution precludes the Judicial Council from

adopting rules, such as rule 902.5, which authorize public investigations and hearings by the Commission. The constitutionality of rule 902(b) is not an issue before this court, and we decline to express our views on the constitutionality of all the provisions of that section. (13) Because of the public importance of the question raised by amici curiae, we will nevertheless state that where a Commission investigation of alleged judicial misconduct is known to the public, as in the present case, the Commission may report the results or status of the investigation to the public without violating the constitutional requirement of "confidentiality of proceedings." Article VI, section 18, subdivision (f), prohibits public hearings and public reports of testimony and other evidence presented to the Commission. It does not preclude either the Commission or a judge under investigation from publicly announcing the results of an investigation already known to the public.

Let a peremptory writ of mandate issue directing the Los Angeles County Superior Court to vacate the order entered in the case of Mosk v. Commission on Judicial Performance, No. SOC 55720, on July 12, 1979, and to enter a new order quashing the Commission's subpoena of Justice Mosk in C.J.P. No. 3012.

On November 15, 1979, the opinion was modified to read as printed above.

[No. S037475. Oct. 31, 1994.]

G. DENNIS ADAMS, a Judge of the Superior Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE,[1] Respondent.

SUMMARY

Pursuant to its authority granted by Cal. Const., art. VI, § 18, subd. (f)(3), the Commission on Judicial Performance exercised its authority to open a judicial disciplinary hearing to the public, after determining that two counts of formal charges against a judge involved moral turpitude and corruption, and that another count involved moral turpitude, corruption, and dishonesty. The judge filed a petition for a writ of mandate with the Supreme Court seeking to stay issuance of a press release and to maintain the confidentiality of the proceedings before the commission. On transfer, the Court of Appeal, Fourth Dist., No. G014710, filed an unpublished, confidential opinion granting in part and denying in part the relief sought by the judge.

The Supreme Court reversed the judgment of the Court of Appeal to the extent it granted the relief sought by the judge, and otherwise affirmed. The court held that the provisions on open hearings by the Commission on Judicial Performance on charges involving moral turpitude, dishonesty, or corruption (Cal. Const., art. VI, § 18, subd. (f)(3); Cal. Rules of Court, rule 907.2(c)) do not violate constitutional provisions for separation of powers (Cal. Const., art. III, § 3) and judicial powers (Cal. Const., art. VI, § 1). It also held that a determination that charges involve moral turpitude is based not on the particular language chosen by the commission in framing the

[1]The petition in this matter originally was filed under the caption "Inquiry Concerning a Judge, No. 104." We have changed the caption to reflect that the matter is a mandate proceeding against the Commission of Judicial Performance, and we have substituted the name of the petitoner, because the information reflecting the petitioner's identity has been unsealed.

This proceeding involves a challenge to a ruling by the Commission on Judicial Performance, ordering that a disciplinary hearing before the commission be open to the public. While this proceeding was pending before the Court of Appeal, the commission decided to proceed with a closed disciplinary hearing, and, after holding such a closed hearing, the commission filed a recommendation with this court proposing a disciplinary sanction againt petitioner. (See, *post*, p. 640, fn. 8.) Petitioner has filed a separate petition challenging the proposed sanction. (*Adams* v. *Commission on Judicial Performance* (S042149).) The present decision is concerned solely with the validity of the commission's order opening to the public the disciplinary hearing before the commission.

formal written charges, but rather on the commission's independent preliminary assessment of the judge's conduct and the reliability and truth of the allegations, including evidence relating to the motivation of the judge as well as his or her explanation for the alleged misconduct uncovered by the commission in its preliminary investigation. However, the commission is not required, prior to the determination to open a hearing, to render some form of preliminary formal findings relating to the defenses asserted by the judge in the answer to the formal charges. The court further held that even if the facts alleged in the notice of formal proceedings do not necessarily or unavoidably involve moral turpitude, the commission nevertheless has the discretion to determine that the particular facts established in the course of its investigation, and the decision to file formal charges, justify the conclusion that the judge's actions did involve moral turpitude, dishonesty, or corruption. Moreover, the Judicial Council acted within its authority in construing the constitutional language as authorizing the commission in its discretion to order an open hearing on all charges in the event one of the charges involves moral turpitude (Cal. Rules of Court, rule 907.2). The court held that the procedure does not violate equal protection provisions of the state and federal Constitutions by creating arbitrary classifications between judges facing charges involving moral turpitude and judges facing charges that do not fall within that category, and between judges facing no charges of moral turpitude and judges facing charges, one or more of which (but not all of which) involve moral turpitude. It held that the strict scrutiny standard for review for suspect classifications does not apply to an equal protection challenge to the procedure, since any "right" of a judge to maintain the confidentiality of disciplinary proceedings is not a constitutionally fundamental one. Finally the court held that the commission properly exercised its discretion in determining that certain counts of the formal charges against the judge, concerning the acceptance of benefits and favors, involved moral turpitude, dishonesty, or corruption. (Opinion by George, J., expressing the unanimous view of the court.)

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## HEADNOTES

Classified to California Digest of Official Reports

(1) Judges § 6.4 —Removal, Censure, and Other Discipline—Proceedings—Open Hearing Provisions—Separation of Powers.—The provisions for open hearings by the Commission on Judicial Performance on charges involving moral turpitude, dishonesty, or corruption (Cal. Const., art. VI, § 18, subd. (f)(3); Cal. Rules of Court, rule 907.2(c)) do not violate or contravene constitutional provisions for separation of

powers (Cal. Const., art. III, § 3) and establishing judicial powers (Cal. Const., art. VI, § 1). Cal. Const., art. III, § 3, provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." The commission itself was created by constitutional amendment and the commission's authority to order that a hearing be open is established by Cal. Const., art. VI, § 18, subd. (f), adopted by amendment in 1988. Thus, the commission was created to act as a constitutionally independent body, and the Constitution expressly authorizes the commission to provide public access to judicial disciplinary proceedings under appropriate circumstances. Appropriate judicial review of a commission order opening a hearing is available by way of petition for a writ of mandamus (Code Civ. Proc., § 1085), and a judge may seek an immediate stay of an order that a press release issue or that a hearing be open (Cal. Rules of Court, rule 56(c)).

[See 1 Witkin, Cal. Procedure (3d ed. 1985) Courts, § 23.]

(2) Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Open Hearing Provisions—Constitutionality.—The fact that Cal. Const., art. VI, § 18, former subd. (f) (now subd. (h)), provides for confidentiality of proceedings before the Commission on Judicial Performance does not render the provisions for open hearings in Cal. Const., art. VI, § 18, subd. (f)(3), unconstitutional. The California Supreme Court decision that so interpreted art. VI, § 18, former subd. (f), predated the 1988 constitutional amendment to Cal. Const., art. VI, § 18, that provided for open hearings. The fact that the 1988 constitutional amendment did not eliminate former subd. (f), but rather retained and relabeled it, does not reflect any contrary intent. The newly relabeled subd. (h) simply affirms the continuing authority of the commission to promulgate rules implementing Cal. Const., art. VI, § 18, including but not limited to provisions relating to confidentiality.

(3a, 3b) Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Open Hearing Provisions—Charges Involving Moral Turpitude—Defenses and Explanations.—Under the constitutional provision providing for open disciplinary hearings by the Commission on Judicial Performance in cases involving moral turpitude (Cal. Const., art. VI, § 18, subd. (f)(3)), a determination that charges involve moral turpitude is based not on the particular language chosen by the commission in framing the formal written charges, but rather on the commission's independent preliminary assessment of the judge's conduct and the reliability and truth of the allegations, including evidence relating to the motivation of the judge as well as his or her explanation

for the alleged misconduct uncovered by the commission in its preliminary investigation. Thus, the commission does not make its determination whether charges warrant an open hearing based solely on the "four corners" of the pleading. However, the commission is not required, prior to the determination to open a hearing, to render some form of preliminary formal findings relating to the defenses asserted by the judge in the answer to the formal charges.

(4) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Open Hearing Provisions—Construction of Constitutional Provision.**—Under Cal. Const, art. VI, § 18, subd. (f)(3), stating that the "Commission on Judicial Performance may in the pursuit of public confidence and the interest of justice, issue press statements or releases or, in the event charges involve moral turpitude, dishonesty, or corruption, open hearings to the public," the phrase "may in the pursuit of public confidence and the interests of justice" modifies both the issuance of press statements or releases and the opening of commission hearings to the public.

(5) Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Open Hearing Provisions—Charges Involving Moral Turpitude—Construction.—Under Cal. Const., art. VI, § 18, subd. (f)(3), authorizing an open hearing in judicial disciplinary proceedings when the charges involve moral turpitude, even if the facts alleged in the notice of formal proceedings do not necessarily or unavoidably involve moral turpitude, the Commission on Judicial Performance has the discretion to determine that the particular facts established in the course of its investigation, and the decision to file formal charges, justify the conclusion that the judge's actions did involve moral turpitude, dishonesty, or corruption within the meaning of art. VI, § 18, subd. (f)(3).

(6) Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Open Hearing Provisions—Charges Involving Moral Turpitude—Scope.—Under Cal. Const., art. VI, § 18, subd. (f)(3), providing that the Commission on Judicial Performance "may in the pursuit of public confidence and the interest of justice . . . in the event charges involve moral turpitude, dishonesty, or corruption, open hearings to the public," the Judicial Council has acted within its authority in construing the language as authorizing the commission in its discretion to order an open hearing on all charges in the event one of the charges involves moral turpitude (Cal. Rules of Court, rule 907.2). The Judicial Council, as an independent agency charged with the specialized and focused task of promulgating rules implementing an open hearing procedure in

judicial disciplinary proceedings, is the entity presumably equipped or informed by experience to perform such tasks, is entitled to deferential treatment by the court as to its findings. The single hearing procedure authorized by the rule does not constitute an improper expansion of the commission's grant of authority under the constitutional provision. However, the commission is not required to hold open hearings on all charges whenever any charge involves moral turpitude, as it may determine that the charges that do not involve moral turpitude are clearly distinct and severable from the charges that do, and that a closed hearing on those charges would not threaten public confidence in the proceedings or imperil the interests of justice.

(7a, 7b) Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Open Hearing Provisions—Charges Involving Moral Turpitude—Equal Protection—Rational Basis: Constitutional Law § 80—Equal Protection—Equality in Legal Proceedings—Judicial Disciplinary Proceedings—Open Hearings—Charges Involving Moral Turpitude.—Under Cal. Const., art. VI, § 18, subd. (f)(3), authorizing open hearings and disciplinary proceedings against judges charged with misconduct involving moral turpitude, the open hearing procedure provided for under Cal. Rules of Court, rule 907.2, does not violate equal protection provisions of the state and federal Constitutions by creating arbitrary classifications between judges facing charges involving moral turpitude and judges facing charges that do not fall within that category, and between judges facing no charges of moral turpitude and judges facing charges, one or more of which (but not all of which) involve moral turpitude. Because the classifications do not impinge on a fundamental interest, the rational basis test is applicable. With respect to the first classification, the need to promote public confidence in the judiciary is a rational basis for treating proceedings involving charges of moral turpitude, dishonesty, or corruption differently from proceedings that do not involve such charges. As to the second classification, the significance and gravity of the moral turpitude charges may well be determined only in the context of the other charges, and public confidence in the fairness and final result of a disciplinary procedure may be diminished if the public is permitted to observe only a portion of the proceedings. A single hearing on all charges also may be a more efficient means of implementing the open hearing procedure.

(8) Constitutional Law § 76—Equal Protection—Nature and Scope of Equal Protection.—The equality granted by the equal protection clauses of the federal and state Constitutions is equality under the same

conditions, and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities, provided the classifications are based on some legitimate object to be accomplished. The strict scrutiny standard of review applies only if a legislative classification involves a suspect classification or significantly infringes on a fundamental right.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 599.]

(9) Constitutional Law § 87.2—Equal Protection—Classification—Judicial Review—Fixed Standard of Review—Particular Classifications—Judges Facing Charges of Moral Turpitude—Open Hearing Provision.—The determination to open to the public a judicial disciplinary proceeding before the Commission on Judicial Performance (Cal. Const., art. VI, § 18, subd. (f)(3)) does not impinge on any fundamental right of the subject judge, and, therefore, the strict scrutiny standard for review for suspect classifications does not apply to an equal protection challenge to the procedure. Any "right" of a judge to maintain the confidentiality of disciplinary proceedings is not a constitutionally fundamental one. Among the primary traditional purposes of confidentiality are the need to accommodate the interests of complainants and witnesses, to avoid unnecessary publicity related to unfounded complaints, and to encourage a judge guilty of serious misconduct to retire before the commencement of formal proceedings—and not solely, or even primarily, to avoid unwarranted damage to the reputation of the subject judge.

(10a, 10b) Judges § 6.2—Removal, Censure, and Other Discipline—Grounds—Charges Involving Moral Turpitude, Dishonesty, and Corruption—Sufficiency of Evidence—Open Hearing Provisions.—Under Cal. Const., art. VI, § 18, subd. (f)(3), authorizing open judicial disciplinary hearings on charges involving moral turpitude, dishonesty, and corruption, the Commission on Judicial Performance properly exercised its discretion in determining that certain counts of formal charges against a judge involved moral turpitude, dishonesty, and corruption. One charge alleged facts involving the judge's active solicitation of a favorable transaction involving the purchase of an automobile from a litigant at the same time the litigant's case was pending before the court. Another charge involved the alleged payment of substantial monetary amounts by a litigant's attorney for the judge's benefit shortly after the attorney and his client had prevailed in significant litigation before the judge. Remaining allegations and benefits

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OPINION

GEORGE, J.—An impartial and independent judiciary is indispensable to our legal system. Of equal importance is public confidence in the independence and integrity of the judiciary, because the effective functioning of our legal system is dependent upon the public's willingness to accept the judgments and rulings of the courts. (Cal. Code Jud. Conduct, com. to canon 1.)[2] As a consequence, California judges must act in accordance with high standards of conduct that foster the utmost trust of the public.

In 1960, as a means of attempting to meet the public's expectations with regard to a fair and impartial judiciary, and in order to enforce rigorous standards of judicial conduct, California established the first permanent state judicial disciplinary commission in the nation, the Commission on Judicial Performance (hereafter the Commission). (See Cal. Const., art. VI, § 8;[3] Shaman & Begue, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process* (1985) 58 Temple L.Q. 755, 756 [hereafter *Silence Isn't Always Golden*].) An independent state agency, the Commission is authorized to investigate complaints of judicial misconduct and other conduct prejudicial to the administration of justice, to file formal charges, to hold adjudicative hearings and make findings, to order less serious discipline on its own authority, and to recommend the imposition of more serious discipline—including removal from office—by this court. (Art. VI, § 18.) In its 1993 Annual Report, the Commission recognized that "[t]he

[2]The California Code of Judicial Conduct, adapted from the American Bar Association Code of Judicial Conduct of 1972, was adopted by the California Conference of Judges (later renamed the California Judges Association) on September 10, 1974, effective January 5, 1975. In 1992, the California Judges Association adopted a revised California Code of Judicial Conduct. All further references to the Code of Judicial Conduct are to the 1992 California Code.

[3]All further references to articles and sections are to the California Constitution, unless otherwise indicated.

importance of providing a forum for complaints about judicial misconduct cannot be overestimated in terms of public confidence in the judiciary." (Com. on Jud. Performance, Ann. Rep. (1993) p. 4.)

Prior to November 1988, proceedings before the Commission relating to judicial performance remained confidential unless, and until, charges were filed with this court. Thus, public scrutiny of a judicial disciplinary proceeding occurred only when the Commission recommended serious discipline and the proceeding reached the final stage of review in this court.[4]

In November 1988, however, the voters of this state approved a legislative resolution pursuant to article XVIII, sections 1, 4—designated on the ballot as Proposition 92—that amended the provisions of the California Constitution relating to the judicial disciplinary process. Based upon the determination that, under appropriate circumstances, public scrutiny of the initial stages of a judicial disciplinary proceeding before the Commission is necessary and warranted in order to maintain public confidence in the judiciary, the constitutional amendment authorized the Commission to open its hearings to the public "in the event charges involve moral turpitude, dishonesty, or corruption . . . ." (Art. VI, § 18, subd. (f)(3).)

The present proceeding arises from the Commission's exercise of its authority to open a judicial disciplinary hearing to the public pursuant to the 1988 constitutional amendment. On December 10, 1992, following an extensive preliminary investigation (Cal. Rules of Court, rule 904.2)[5] that generated substantial publicity in the local media as well as in legal journals,[6] the Commission filed a notice of formal proceedings, charging Judge G. Dennis Adams of the San Diego County Superior Court (hereafter petitioner) with willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (Art. VI, § 18, subd. (c).) Petitioner filed an answer denying the charges. On May 10, 1993, the Commission filed an amended notice of formal proceedings, and the judge answered, again denying the charges. Thereafter, the Commission concluded

[4]Most other states adopted a similar system of limited public scrutiny. "From the beginning of the modern stage of judicial discipline, there has been widespread belief that the records and proceedings of judicial conduct organizations should be kept confidential, at least until a conduct organization files formal charges of misconduct against a judge." (*Silence Isn't Always Golden, op. cit. supra*, 58 Temple L.Q. at p. 756.)

[5]All further references to rules are to the California Rules of Court.

[6]Articles relating to the Commission investigation were published in numerous newspapers and legal journals, including the April 2, 1992, edition of the San Diego Reader, the April 4, 8, and 10, June 3 and 7, and October 20, 1992, editions of the San Diego Union-Tribune, the April 10, 11, and 19, June 2, and October 20, 1992, editions of the Los Angeles Times, the April 10, June 3, and October 20, 1992, editions of the San Diego Daily Journal, and the October 1992 edition of the California Lawyer.

that counts 1 and 2 of the formal charges involved moral turpitude and corruption and that count 4 of the formal charges involved moral turpitude, corruption, and dishonesty, and that opening to the public the hearing on the charges would serve to maintain public confidence in the judiciary and would further the interests of justice. (Art. VI, § 18, subd. (f)(3); rule 907.2 (c).) On these grounds, the Commission determined to open the hearing, notified the parties of its decision, and scheduled a press release.

In response, petitioner filed in this court, in the first instance, a petition for writ of mandate (or other appropriate relief), seeking to stay issuance of the press release and to maintain the confidentiality of the proceedings before the Commission. In his petition, he challenged, among other matters, the determination of the Commission that several of the charges alleged against him involved moral turpitude, dishonesty, or corruption. On August 12, 1993, we transferred the matter to the Court of Appeal, Fourth Appellate District, and ordered that the Commission maintain the confidentiality of the proceedings, and that the record remain sealed, during the pendency of the proceedings in the Court of Appeal.[7]

In August 1993, the Court of Appeal issued an order to show cause, subsequently filing an unpublished, confidential opinion, in which the court, in a two-to-one decision, granted in part and denied in part the relief sought by petitioner. The majority in the Court of Appeal construed the term "involve," in the context of the phrase "involve moral turpitude, dishonesty, or corruption" in article VI, section 18, subdivision (f)(3), to mean *necessarily* involve such behavior. The appellate court also concluded that if some, but not all, of the charges necessarily involved moral turpitude, dishonesty, or corruption, equal protection principles dictate that the Commission may open the hearing only on the charges that meet such criteria and must maintain the confidentiality of the proceedings relating to the charges that do not meet the criteria. Finally, the appellate court determined that certain charges alleged in counts 1 and 4 of the notice of formal proceedings necessarily involved moral turpitude, corruption, or dishonesty, but that the remaining charges did not meet that criteria, and that hearings on these other charges therefore should remain confidential.

Both petitioner and the Commission sought review of the decision of the Court of Appeal, challenging in a variety of respects the conclusions reached

[7]On August 20, 1993, the Commission filed a second amended notice of formal proceedings, which contained new charges. The Commission determined that the amendments comprised additional instances of the same type of misconduct that was the subject of the first amended notice, and that the filing of the new charges did not alter the Commission's earlier determination that the criteria for an open hearing had been satisfied. In the briefing it filed with this court, the Commission indicates that, subsequently, additional amendments to the formal charges have been filed.

by the Court of Appeal. We granted the petitions for review filed by both parties.[5]

Petitioner contends that: (1) article VI, section 18, subdivision (f)(3), and rule 907.2(c), which authorize the Commission to open to the public a hearing on charges relating to judicial performance if certain criteria are met, violate the doctrines of separation of powers under article III, section 3, and judicial powers under article VI, section 1; (2) the adoption of article VI, section 18, subdivision (f)(3), in Proposition 92, did not repeal or vitiate section 18, subdivision (h) (former subd. (f)), which assertedly mandates confidentiality of hearings on judicial performance; (3) in determining whether to open to the public the hearing on charges relating to judicial performance, the Commission must consider not only the formal written charges, but also the evidence supporting the defenses asserted by a judge in response to the charges; (4) the distinction drawn under section 18, subdivision (f)(3), between judges facing charges involving moral turpitude, dishonesty, or corruption, and judges charged with misconduct that does not fall within that category, violates constitutional guarantees of equal protection of the laws; (5) rule 907.2(c), permitting an open hearing on *all* the charges of judicial misconduct if *any* of the charges meet the constitutional criteria, violates equal protection guarantees, and therefore should be declared void; and (6) none of the charges filed against petitioner involved moral turpitude, dishonesty, or corruption.

The Commission, in turn, contends that: (1) charges of misconduct that "involve moral turpitude, dishonesty, or corruption," under article VI, section 18, subdivision (f)(3), should be construed to signify charges that *may* prove to involve, rather than "necessarily" involve, moral turpitude, dishonesty, or corruption; (2) when a judge is charged with numerous acts of judicial misconduct, some (but not all) of which involve moral turpitude, dishonesty, or corruption, article VI, section 18, subdivision (f)(3), as implemented by rule 907.2(c), properly permits an open hearing on *all* the

[5]Prior to the filing of the Court of Appeal's decision, the Commission, on October 25, 1993, commenced a confidential evidentiary hearing on the charges before the three special masters appointed by this court. (Rule 908.) The hearing concluded on April 6, 1994. On April 25, 1994, pursuant to rule 912(a), the special masters transmitted to the Commission their proposed report, together with findings of fact and conclusions of law. On September 13, 1994, the Commission filed with this court its findings of fact, conclusions of law, and recommendation. After the commission filed its recommendation with this court, we ordered that the record in the present proceeding be unsealed.

By separate motion, petitioner requests that this court take judicial notice pursuant to Evidence Code section 459 of the proposed report of the special masters. We decline to do so, concluding that this report is irrelevant to the issues involved in the present proceeding, relating to the Commission's determination, reached prior to the commencement of the hearing, to open the hearing on the charges.

charges; and (3) the Commission properly determined that counts 1 and 2 of the formal charges involved moral turpitude and corruption, and that count 4 of the formal charges involved moral turpitude, dishonesty, and corruption.

After reviewing the substance of the charges against petitioner, we shall turn to the numerous legal issues raised by the parties.

I

A. *The charges.*

The amended notice of formal proceedings (hereafter sometimes referred to as the notice) charged petitioner with willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, within the meaning of article VI, section 18, subdivision (c), based upon the following allegations:

*Count 1*: Petitioner received substantial financial benefits in the form of discounts and favorable prices for the purchase of automobiles and repairs from James Williams, who owned a car dealership, and who was a litigant in favor of whom the judge previously had awarded a substantial monetary judgment. In doing so, petitioner failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Specifically, the notice alleged that, in 1986, petitioner presided over a court trial in litigation entitled Security Pacific National Bank v. Williams, and a related cross-action, and entered a $5 million judgment in favor of Williams, reserving jurisdiction to determine attorney fees and costs on appeal. Williams's counsel in that litigation was Patrick Frega. While the case was pending on appeal, petitioner contacted Williams regarding the purchase of a Mercedes automobile. In March 1989, Williams sold a used Mercedes to petitioner, personally handling the transaction. He set the sales price at $20,537, which, according to the notice, "appeared to be favorable" to petitioner.

The judgment in the Security Pacific litigation was affirmed on appeal, and on January 9, 1990, the remittitur issued. The notice alleged that "[i]n or about early 1990," petitioner again contacted Williams and asked the car dealer to locate a used automobile for his daughter. In March 1990, Williams sold and delivered a 1988 Jeep to petitioner, setting the sales price at $13,500, which "appeared to be favorable" to petitioner. The total sales price, including taxes and other charges, was $14,796.74. At the time of the purchase, the only consideration paid by petitioner for the Jeep was the

trade-in of a 1983 Oldsmobile, having a value of $800. On April 16, 1990, petitioner caused to be issued to Williams's dealership a cashier's check in the amount of $5,000 as further payment for the Jeep. On or about June 4, 1990, "Patrick R. Frega, counselor at law, a professional corporation," issued to Williams a check for $9,796.74, a sum equal to the total sales price of $14,796.74, less the $5,000 Williams had received from petitioner on April 16. The check bore a notation to the title and docket number of the Security Pacific litigation (the case in which petitioner had awarded Williams a $5 million judgment). On June 7, 1990, petitioner wrote a check, payable to Frega personally, for $5,672.40. The check bore a notation indicating it was a "pay-off" on his daughter's vehicle.

In November and December 1991, Williams's dealership performed substantial repairs on the Jeep. After giving petitioner a 10 percent discount for parts and labor, Williams billed him for the amount of $8,500. On December 9, 1991, petitioner paid Williams the sum of $7,000 on this bill. On the same day, "Patrick R. Frega, counselor at law, a professional corporation" paid to Williams's dealership $1,500 as the balance owing on the bill.

In December 1990, the same year Williams received satisfaction of his $5 million judgment, Williams gave petitioner a gift of a sweater. Pursuant to Government Code section 87207, which requires judges to report gifts they have received having a value of $50 or more, petitioner reported the gift of the sweater, valuing it at $150.

*Count 2*: Petitioner received gifts from attorneys whose interests had or were likely to come before the judge. In proceedings involving these attorneys, petitioner failed to disqualify himself or make full disclosure on the record of his relationship with these attorneys or their firms, or obtain a written waiver of disqualification. In doing so, he failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary. This conduct was manifested by the following specific incidents:

i. Beginning in July 1987, through 1991, petitioner began to collaborate with Frega in the writing of a novel. During this period, petitioner reported accepting a loan from Frega of a laptop computer, valuing the loan at $1,300. On July 2, 1987, Frega took petitioner and petitioner's wife to dinner to celebrate Frega's award from the San Diego Trial Lawyers Association as "trial lawyer of the year," which was based upon the successful outcome in the Security Pacific v. Williams litigation. Petitioner reported the value of the dinner at $100.

ii. On or about June 4, 1990, Frega paid to Williams the sum of $9,796.74 toward the purchase of petitioner's daughter's Jeep. Of this sum, at least $4,124.34 constituted Frega's contribution for the purchase of the Jeep.

iii. Frega or members of his firm have appeared before petitioner in several cases since July 2, 1987.

iv. In 1985, petitioner was represented in a legal matter by members of the then-named law firm of Ault, Midlam, & Deuprey. In December 1986, petitioner accepted from that firm a legal fee "write-off" of $600. Since December 1986, members of that firm and its successors have appeared before petitioner in numerous cases.[9]

v. In October 1989, petitioner accepted the use of Attorney Michael Duckor's desert condominium for a weekend. In the Summer of 1989 or 1990, petitioner was a guest of Duckor's law firm, Duckor & Spradling, on a day fishing trip. Since 1989, members of Duckor & Spradling have appeared before petitioner in several cases, and petitioner has appointed Duckor regularly as a special master.

*Count 3*: Petitioner provided legal advice to Frega and members of his firm on cases being handled by that firm. In doing so, petitioner failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The notice charged the following incidents:

i. In 1988 or 1989, petitioner assisted Frega's associate, George Manning, in preparing a settlement conference brief for a case pending in the San Diego County Superior Court. In early 1989, petitioner assisted Manning in preparing a settlement conference brief in another case.

ii. In the spring of 1989, petitioner met with Frega to discuss a case pending in the San Diego County Superior Court in which Frega represented the plaintiff. Petitioner provided Frega with advice, recommending that he file a "*Tarasoff* motion" (*Tarasoff* v. *Regents of University of California* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166].) The Frega firm subsequently filed such a motion.

iii. Petitioner communicated with Frega regarding litigation pending in Los Angeles County Superior Court, providing Frega with petitioner's opinion regarding a special verdict.

*Count 4*: In response to inquiries by the Commission regarding complaints of misconduct, petitioner made material omissions and misrepresentations

[9]In his answer filed in response to the notice of formal proceedings, petitioner submitted documentation indicating, in certain cases involving the appearance of members of the law firm of Ault, Midlam, & Deuprey, as well as the law firm of Duckor & Spradling (see subpt. v., *post*), before petitioner, that petitioner had made full disclosure to opposing counsel of the nature of his relationship with these firms.

and demonstrated a lack of candor. He thereby failed to conduct himself in a manner that promotes public confidence in the integrity of the judiciary. Count 4 charged the following incidents:

i. In the course of its investigation, the Commission inquired of petitioner regarding the gift (which the judge had declared) of the $150 sweater received from Williams (discussed, *ante*), asking him to comment and supply information "regarding any appearances before [petitioner] by any of the donors [of gifts], or any attorney or entity associated with a donor, since January 1, 1985." Petitioner was directed to "[p]lease describe any appearance by a donor or associate and indicate whether you have taken any legal action affecting a donor or associate, or whether you have recused yourself from a case involving a donor or associate." Petitioner responded by letter that the sweater "was a Christmas gift from Williams who is a personal friend and has no business before me." Petitioner failed to disclose that Williams had been a litigant who had appeared before the judge in 1985 and 1986, and in favor of whom the judge had awarded a $5 million judgment.

ii. The Commission inquired regarding any gifts received by petitioner from any donor listed in a previous letter of the Commission, dated October 18, 1991, which had identified both Frega and Williams as donors. In response, petitioner asserted, "I received no gifts requiring disclosure and nothing from any of the donors listed in the letter of October 18." Petitioner failed to disclose the discount given by Williams's dealership for the repairs to the judge's daughter's Jeep or the $1500 payment made by Frega for those repairs.

iii. In a letter to the Commission, petitioner's attorney represented that "[a] separate check was written by Judge Adams in the amount of $5,672.40 to the dealership." This statement was false. The check was payable to Frega.

iv. The Commission inquired regarding petitioner's declaration of a gift of legal services by the law firm of Ault, Midlam, & Deuprey, requesting information regarding any appearances by that law firm in cases before petitioner. The judge responded: "Because of our friendship, Tom Ault has never appeared in front of me." He failed to disclose that members of the law firm had appeared before the judge on several occasions since January 1, 1985.

v. The Commission inquired regarding declared gifts from Frega, requesting information regarding any appearances by Frega or other members of Frega's law firm in cases before petitioner. Adams responded that "Pat Frega

does not appear in front of me and I will not hear one of his cases." He also stated, "I will not hear a Frega case." In a follow-up letter, the Commission inquired whether Frega had appeared before him before he had given the gifts to petitioner. Petitioner falsely responded that "Mr. Frega last appeared before me in 1984." Petitioner failed to identify numerous cases involving Frega or his firm that had come before petitioner since 1984, including the Security Pacific litigation.

vi. The Commission inquired regarding petitioner's declared stay at Duckor's desert condominium. Petitioner responded: "I recuse myself from all Duckor matters although the court uses him as a special master in cases involving construction defects." He failed to disclose that the Duckor & Spradling firm had appeared before him in three cases.

B. *Answer.*

Petitioner submitted a lengthy response, dated June 10, 1993, to the amended notice of formal proceedings, denying all charges and providing detailed information, with supporting documentation. He asserted, among other matters, that he paid fair market value when he purchased the Mercedes from Williams's dealership, and, prior to the Commission's investigation, had no knowledge regarding any payments made by Frega toward the purchase of the Jeep or the repairs. He also explained he had not heard a contested matter in a case handled by Frega since the Security Pacific litigation, which was decided in early 1986, and that, on any occasion when settlement negotiations in a construction-defect case handled by a Frega associate reached an impasse, requiring that contested issues be decided, petitioner recused himself.

C. *Order to open hearing.*

Prior to the filing of petitioner's answer to the amended notice of formal proceedings, the Commission made a preliminary decision to conduct an open hearing and invited written arguments on the question. (Rule 907.2(a).) After considering the written briefing, on June 25, 1993, the Commission issued an order to open the hearing. In its order, the Commission determined that counts 1 and 2 of the formal charges involved moral turpitude and corruption, and that count 4 involved moral turpitude, corruption, and dishonesty. The Commission further determined that a formal hearing open to the public would further both public confidence in the judiciary and the interests of justice, because: (1) the judge allegedly received substantial financial benefits not previously revealed to the public and to the litigants appearing before the judge; (2) there had been substantial interest and

concern expressed by the public, the litigants, and the judiciary in the conduct underlying the charges in these proceedings; and (3) the risk of further speculation and misinformation about the charges and the proceedings would continue if the hearing were closed to the public, thus "eroding public confidence in the judiciary and the process of judicial discipline."

Pursuant to its determination to open the hearing, the Commission authorized a press release containing a general description of the charges, stating that the judge denied the charges, and explaining the hearing procedure.

II

Under the authority of article VI, section 18, the Commission may initiate and oversee proceedings for the censure, removal, retirement, or private admonishment of a judge. Rule 904 directs that an inquiry be made by the Commission staff into verified complaints of misconduct that are not obviously frivolous or unfounded, followed if appropriate by a preliminary investigation to determine whether formal proceedings are necessary. The Commission also is allowed to make such inquiry and investigation on its own motion without receipt of a verified complaint. If the Commission commences a preliminary investigation, the judge must be notified of that fact and afforded a reasonable opportunity to respond. (Rule 904.2(a).) If, following the preliminary investigation, the Commission concludes that formal proceedings should be instituted to inquire into the charges, the Commission must issue a written notice to the judge advising him or her of the decision to so proceed. (Rule 905(a).) The notice of formal proceedings must specify the charges against the judge and the alleged facts upon which the charges are based. (Rule 905(b).) The judge may file an answer to the notice of formal proceedings, and the notice and answer constitute the "pleadings." (Rule 906.) The Commission thereafter orders a hearing on the charges and may request that the California Supreme Court appoint special masters to hear and take evidence and report their findings and conclusions to the Commission. (Rule 907.)

Prior to the passage, at the November 1988 General Election, of the legislative proposal to amend the constitutional provision, former subdivision (f) of article VI, section 18, provided: "The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings." In *Mosk* v. *Superior Court* (1979) 25 Cal.3d 474 [159 Cal.Rptr. 494, 601 P.2d 1030], the court concluded that this former version of subdivision (f) mandated confidentiality of investigations and proceedings before the Commission, and that, accordingly, the Judicial Council did not have the authority to promulgate rules providing for investigations and hearings open

to the public. In reaching this conclusion, the court relied upon the language of former section 10b, paragraph (3), of article VI, as adopted by constitutional amendment in November 1960, which expressly provided for the confidentiality of all proceedings before the Commission, and concluded there was no indication "that the people of California intended to change the constitutional requirement of confidentiality by revision of article VI in 1966 . . . ." (25 Cal.3d at p. 499.)[10]

The constitutional provision interpreted in the *Mosk* decision remained unchanged until the November 1988 election. Prior to that election, the Senate resolved, with the Assembly concurring, to propose to the voters that article VI, sections 8 and 18, of the California Constitution, be amended to provide, inter alia, that, under some circumstances, hearings on judicial performance before the Commission could be opened to public scrutiny. (Sen. Const. Amend. No. 6, Stats. 1988 (1987-1988 Reg. Sess.) res. ch. 67, pp. 6115-6116.) The preamble to the legislative resolution proposing the constitutional amendment states: "WHEREAS, The Legislature finds and declares that maintaining public confidence in the integrity of the judicial system is essential to good government; and [¶] WHEREAS, The Commission on Judicial Performance bears a great public trust which it must currently fulfill in total secrecy; and [¶] WHEREAS, Because responsible public disclosure and accountability is proper, desirable, and consistent with the goal of public confidence, it is the intent of this measure that appropriate commission proceedings be open to public scrutiny, and that this measure be construed so as to accomplish this purpose which is hereby declared to be the public policy of this state . . . ." (*Id.*, at p. 6115.)

The constitutional amendment was submitted to the voters as Proposition 92 and was approved, effective November 9, 1988. The amendment included the addition of the current versions of article VI, section 18, subdivisions (f) and (g), and the relabeling of former subdivision (f) as subdivision (h). Section 18, subdivision (f), now provides that if, after conducting a preliminary investigation, the Commission by vote determines that formal proceedings should be instituted against a judge, the Commission "may in the pursuit of public confidence and the interests of justice, issue press statements or releases or, in the event charges involve moral turpitude, dishonesty, or corruption, open hearings to the public." (Art. VI, § 18, subd. (f)(3).)

The Judicial Council, pursuant to the delegation of authority under section 18, subdivision (h), promulgated rule 907.2, governing open hearings. Subdivision (a) of rule 907.2 provides that, in the event a judge against whom

[10]The 1966 revisions of article VI included the replacement of former sections 10a and 10b with section 18, former subdivision (f).

charges have been filed does not request an open hearing in accordance with the rules, "the commission shall determine whether the proceeding may meet the constitutional criteria for opening hearings to the public." In the event the Commission makes a preliminary determination that the proceeding may meet the constitutional criteria under section 18, subdivision (f)(3), it must allow the parties to submit written arguments on this issue. (Rule 907.2(a).) After considering the written arguments submitted, the Commission must determine whether any charge in the notice of formal proceedings involves moral turpitude, dishonesty, or corruption (hereafter sometimes referred to collectively as moral turpitude.) (Rule 907.2(b).) Having determined that one or more of the charges involve moral turpitude, the Commission must decide whether an open hearing "would be (1) in the pursuit of public confidence, and (2) in the interests of justice." (Rule 907.2(c).)[11] Upon making this determination, the Commission may order that the hearing be open.

III

(1) Petitioner initially contends that the open hearing provisions under article VI, section 18, subdivision (f)(3), as implemented by rule 907.2(c), violate the California Constitution's provisions for separation of powers under article III, section 3, and judicial powers under article VI, section 1, and that, accordingly, the open hearing procedure (established by the electorate's approval of the legislative resolution amending the Constitution) is void as an unconstitutional exercise of judicial power. Petitioner also maintains that rule 907.2(c) improperly authorizes the Commission to exercise judicial powers by granting the Commission unfettered discretion to determine whether the formal charges drafted by the Commission "involve moral turpitude, dishonesty, or corruption" and whether an open hearing on those charges would be in "the interests of justice" and "in the pursuit of public confidence." Petitioner argues that vesting such judicial powers in an administrative agency violates the separation of powers and judicial powers clauses, and the "principle of check" articulated by this court in *McHugh* v *Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 366 [261 Cal.Rptr. 318, 777 P.2d 91].

Even if we assume, arguendo, that the Commission's exercise of the authority to issue a press release concerning a pending proceeding, and to

[11]Rule 907.2(c) provides in full: "If the commission finds that no charge in the notice of formal proceedings involves moral turpitude, dishonesty, or corruption, the commission shall order that the hearing remain confidential. [¶] If the commission finds that any charge in the notice of formal proceedings involves moral turpitude, dishonesty, or corruption, the commission shall proceed to a determination of whether opening the formal hearing would be (1) in the pursuit of public confidence, and (2) in the interests of justice. [¶] The commission shall not order that a formal hearing be open to the public unless the commission finds that opening the hearing would be both in the pursuit of public confidence and in the interests of justice."

open the Commission's hearing related to such a proceeding, are "judicial-like" functions, petitioner's claim has no merit. Article III, section 3, provides: "The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others *except as permitted by this Constitution.*" (Italics added.) The Commission itself was created by constitutional amendment (art. VI, § 8), and the Commission's authority to order that a hearing be open now is established by our Constitution in article VI, section 18, subdivision (f), adopted by amendment in 1988. Thus, the Commission was created to act as a constitutionally independent body. In jurisdictions where public access to information relating to investigation of judicial misconduct is not authorized by the state Constitution, the power of the Legislature or the public to obtain such information may be limited by confidentiality provisions. (See *Silence Isn't Always Golden, op. cit. supra,* 58 Temple L.Q. at p. 782.) The California Constitution, however, now expressly authorizes the Commission to provide public access to judicial disciplinary proceedings under appropriate circumstances.

Petitioner's reliance upon *McHugh* v. *Santa Monica Rent Control Bd., supra,* 49 Cal.3d 348, and *Walnut Creek Manor* v. *Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 265 [284 Cal.Rptr. 718, 814 P.2d 704], is misplaced. Those decisions simply hold that administrative agencies not vested by the California Constitution with judicial powers may not exercise such powers, and may exercise only those powers reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes. (*McHugh, supra,* 49 Cal.3d at pp. 356, 372; *Walnut Creek Manor, supra,* 54 Cal.3d at p. 256.) *McHugh* expressly recognizes, however, that various administrative agencies are authorized by the Constitution to exercise judicial powers, and that the exercise by these agencies of such powers does not contravene the judicial powers or separation of powers clauses. (49 Cal.3d at p. 355.) The "principle of check" articulated in *McHugh,* and applicable to decisions of administrative agencies not vested by the Constitution with judicial powers (see *McHugh, supra,* 49 Cal.3d at p. 366), is inapplicable to agencies vested with such powers.

Petitioner's argument is similar to one rejected by the Wisconsin Supreme Court in *Matter of Seraphim* (1980) 97 Wis.2d 485 [294 N.W.2d 485], involving a formal complaint brought by a judicial commission against a Wisconsin judge for alleged judicial misconduct. The judge under investigation challenged the constitutionality of the judicial disciplinary procedure established by the Wisconsin legislature on the grounds it invaded the province of an independent judiciary and emasculated the judicial power vested in the court under the separation of powers clause contained in the

Wisconsin Constitution. Like the California Constitution, however, the Wisconsin Constitution expressly authorized the legislature to establish such a procedure, and the court concluded: "It is ludicrous to argue, as [the judge] appears to in his brief, that the legislature's establishment of the procedures to be used by this court in disciplining members of the judiciary is an unconstitutional exercise of judicial power when the constitution expressly provides that such procedures are to be 'established by the legislature by law.' [¶] Nor can it be said that the procedure established by the legislature offends any separation-of-powers principle embedded in the constitution. Nothing in the constitution requires that this court have exclusive control over the manner in which members of the judiciary are disciplined and removed from office." (*Id.*, at p. 490.)

A Commission order opening a hearing is not analogous to a Commission recommendation for the censure or removal of a judge, the latter being subject to the ultimate, independent decision of this court. (Art. VI, § 18, subd. (c).) Some means of judicial review, however, of an order opening a hearing must be afforded the judge under investigation. As evidenced by the present proceeding, appropriate judicial review of a Commission order opening a hearing is available by way of petition for writ of mandamus (Code Civ. Proc., § 1085; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1990) ¶ 15:32, p. 15-14), and a judge may seek an immediate stay of an order that a press release issue or that a hearing be open (rule 56(c)).

For these reasons, we conclude the Commission's authority to order an open hearing where the constitutional criteria are met does not constitute an unconstitutional usurpation of judicial power.

(2) Petitioner also asserts the provisions for open hearing are unconstitutional in light of our holding in *Mosk* v. *Superior Court*, *supra*, 25 Cal.3d 474, that former subdivision (f) (current subd. (h)) of article VI, section 18, mandates confidentiality of all proceedings before the Commission. Because, in drafting section 18, subdivision (f), in 1988, the Legislature relabeled subdivision (f) as section 18, subdivision (h), but did not repeal or abrogate that former provision of the California Constitution, petitioner contends that the Constitution continues to mandate complete confidentiality in such proceedings.

Petitioner's assertion is undermined in its entirety by the circumstance that the decision in *Mosk* v. *Superior Court*, *supra*, 25 Cal.3d 474, predated the 1988 constitutional amendment to article VI, section 18. The issue presented in *Mosk* was whether a public Commission investigation of the California

Supreme Court was unconstitutional in light of article VI, section 18, *former* subdivision (f), relating to confidentiality of proceedings. We observed that confidentiality had been considered an essential element of judicial discipline, and held that confidentiality was required under former subdivision (f), based upon, among other factors, "the absence of any indication that the people of California intended to change" the previous requirement of confidentiality when article VI was revised in 1966. (25 Cal.3d at p. 499.)

In 1988, however, the California electorate clearly manifested its intent to authorize, in appropriate cases, public access to proceedings before the Commission. The ballot arguments in favor of Proposition 92, presented to the voters, emphasized that, "[f]or our system of justice to work, it is absolutely necessary that we have complete faith in our judges," and that judicial abuses "must be addressed promptly, decisively and with sufficient openness to assure continued public confidence." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 8, 1988) argument in favor of Prop. 92, p. 58.) The ballot argument explained that "Proposition 92 proposes to open disciplinary proceedings against judges in a limited but reasonable way," allowing "an accused judge or the commission to open proceedings subsequent to formal charges in appropriate cases," because "every public official, no matter how high the office, must ultimately be accountable to the public. When the integrity of our courts comes under question, we can ill afford to be bound by a rule which concludes in every case that the public and press are better off in the dark. Such absolute secrecy is the antithesis of democracy." (*Ibid.*)

As noted in *Mosk* v. *Superior Court, supra,* 25 Cal.3d at page 491, however, confidentiality may serve several functions. These functions include: (1) encouraging participation in the disciplinary process, by protecting complainants and witnesses from retribution or harassment; (2) protecting the reputation of innocent judges, wrongfully accused of misconduct, from injury that might result from publication of unexamined and unwarranted complaints by disgruntled litigants, attorneys, or political adversaries; (3) maintaining confidence in the judiciary by avoiding premature disclosure of alleged misconduct; and (4) encouraging retirement as an alternative to costly and lengthy formal hearings. (See *Silence Isn't Always Golden, op. cit. supra,* 58 Temple L.Q. at p. 760.) In *Landmark Communications, Inc.* v. *Virginia* (1978) 435 U.S. 829, 835-836 [56 L.Ed.2d 1, 8-9, 98 S.Ct. 1535], cited extensively in our *Mosk* decision, the United States Supreme Court recognized that maintaining confidentiality *before the commencement of formal proceedings* involving judicial performance serves legitimate state interests by avoiding premature announcement of groundless claims of judicial misconduct, and, in cases where the alleged misconduct does not

warrant removal or even censure, the confidentiality of the proceedings allows the judge to be made aware of minor complaints that appropriately may be called to his or her attention without public notice.

Many of the benefits served by confidentiality diminish, however, when, following a preliminary investigation during which the judge under investigation has been afforded an opportunity to respond to and defend against accusations, a determination is made that the complaint is not frivolous and that formal proceedings should go forward. By its passage of Proposition 92, the electorate determined that, at this point in the process, the public interest in the operation of the judicial disciplinary system may be of greater concern than the risk of unwarranted damage to a judge's reputation or unwarranted loss of public confidence.

An additional reason identified in *Mosk* v. *Superior Court, supra*, in favor of confidentiality, was a "judge's constitutional right to a private admonishment (see art. VI, § 18, subd. (c)), if the circumstances so warrant." (25 Cal.3d at p. 491.) Following the passage of Proposition 92, however, any "right" to a private admonishment necessarily is limited by the constitutional amendment permitting public scrutiny of proceedings relating to judicial performance when the charges involve moral turpitude, dishonesty, or corruption. Moreover, the Commission retains the authority to maintain the confidentiality of proceedings and thus to have an entirely private admonishment in the event it concludes that public confidence and the interests of justice would not be served by an open hearing.

The circumstance that the 1988 constitutional amendment did not eliminate article VI, section 18, former subdivision (f), but rather retained and relabeled it as subdivision (h), does not reflect any contrary intent. The newly relabeled subdivision (h) simply affirms the continuing authority of the Judicial Council to promulgate rules implementing section 18, *including but not limited to* provisions relating to confidentiality (e.g., procedures for private admonishment, and to determine whether or not a hearing should be open).[12]

[12]Similarly, the 1988 constitutional amendment did not repeal rule 902, which provides in part that, "[e]xcept as provided in this rule, all papers filed with and proceedings before the Commission, or before the masters appointed by the Supreme Court pursuant to rule 907, shall be confidential until a record is filed by the Commission in the Supreme Court. . . ." (Rule 902(a).) Construing this rule in the context of the open hearing provisions of the 1988 constitutional amendment and rule 907.2, as we must, in the event the Commission orders open a hearing the Commission's files relating to the matters that are the subject of the open hearing may be disclosed partially or fully by the Commission incident to, and as a necessary consequence of, the open hearing, and to that extent would not remain confidential.

IV

(3a) Petitioner next contends that, in determining whether the charges involve moral turpitude, the Commission must consider not only the charges specified in the notice of formal proceedings, but, in addition, the defenses and explanations asserted by the judge in his or her answer to the charges, together with the evidence submitted in support of those defenses and explanations. He argues that if there is evidence made available to the Commission that justifies or explains the conduct in question, or that demonstrates the charges are unfounded, the Commission should consider this evidence before taking the "drastic step" of deviating from the state's general policy of confidentiality and thereby possibly imposing irreparable damage to the judge's reputation and credibility.

The Court of Appeal, focusing upon the language of article VI, section 18, subdivision (f)(3), and specifically the term "charges," concluded that the determination whether charges involve moral turpitude, dishonesty, or corruption must be based solely upon the written charges set forth in the formal pleading filed by the Commission, and does not require consideration of the judge's proffered defenses or explanations.

In our view, neither the contention of petitioner nor the conclusion of the Court of Appeal properly recognizes or takes into account the circumstance that, prior to making the determination whether charges involve moral turpitude, the Commission, pursuant to the authority vested in it by article VI, section 18, already will have reviewed and assessed a significant body of information pertinent to the complaint of misconduct, including all material provided by the judge that he or she believes to be relevant and material to the evaluation of the accusations, and that may explain, justify, or place in context the conduct in question. As explained *ante*, in part II, the decision to initiate formal proceedings with the filing of formal charges is preceded by the Commission's preliminary investigation (rule 904.2) of complaints of misconduct, an investigation that may involve contacting witnesses, reviewing court records, and conducting such other investigation as the issues may warrant. (Com. on Jud. Performance, Ann. Rep., *supra*, at pp. 2-3.) The judge must be notified of the preliminary investigation and the nature of the charges, and afforded an opportunity to respond and to "present such matters as the judge may choose." (Rule 904.2(a).) Thereafter, in inviting briefing (pursuant to rule 907.2 (a)) in response to the preliminary decision to open a hearing, the Commission *again* in its discretion considers the evidence, information, and arguments that may be submitted by the judge in opposition to an open hearing, a step in the proceedings that may shed further light upon the judge's conduct.

Thus, a determination that charges involve moral turpitude is based not upon the particular language chosen by the Commission in framing the

formal written charges, but rather upon the Commission's independent preliminary assessment of the judge's conduct and the reliability and truth of the allegations, including evidence relating to the motivation of the judge as well as his or her explanation for the alleged misconduct uncovered by the Commission in its preliminary investigation. (4)(see fn. 13.), (3b) The additional determinations requisite to an open hearing under article VI, section 18, subdivision (f)(3)—that such a hearing would promote public confidence and the interests of justice—also are based necessarily upon the Commission's broad, overall assessment of the judge's culpability.[13]

Contrary to the suggestion of the Court of Appeal, therefore, the Commission does not make its determination whether charges warrant an open hearing based solely upon the "four corners" of the pleading.

We reject, however, any suggestion by petitioner that the Commission, prior to the determination to open a hearing, must render some form of preliminary formal findings relating to the defenses asserted by the judge in the answer to the formal charges. Article VI, section 18, subdivision (f)(3), at this stage of the proceedings does not contemplate such a procedure, which would require the resolution of contested factual matters.

V

The Court of Appeal construed the criteria "involve moral turpitude, dishonesty, or corruption" under article VI, section 18, subdivision (f)(3), to signify charges that "necessarily" or "unavoidably" involve such conduct or behavior, and not charges that only possibly will prove to involve such

[13]In the course of its opinion, the Court of Appeal suggested that the phrase "in the pursuit of public confidence and the interests of justice" in article VI, section 18, subdivision (f)(3), applies only to the Commission's decision to "issue press statements or releases . . . ." In our view, neither the structure nor the purpose of the constitutional provision supports the Court of Appeal's conclusion in this regard.

The provision states in full that "[t]he Commission on Judicial Performance *may in the pursuit of public confidence and the interests of justice, issue press statements or releases* or, in the event charges involve moral turpitude, dishonesty, or corruption, open hearings to the public." (Italics added.) If the reference to "the pursuit of public confidence and the interests of justice" had been intended to refer solely to the issuance of press statements or releases (and not additionally to the opening of hearings), the drafters would not have included a comma after the word "justice" and prior to the phrase "issue press statements or releases . . . ." Furthermore, it appears clear, from the preamble to the legislative resolution, setting forth the purpose of the amendment, quoted, *ante*, that the Commission should consider "the pursuit of public confidence and the interests of justice" in determining both whether to open its hearings to the public and to issue press statements or releases. Thus, the Judicial Council, in drafting rule 907.2, reasonably construed the phrase "may in the pursuit of public confidence and the interests of justice" as modifying both the issuance of press statements or releases and the opening of Commission hearings to the public.

conduct or behavior. The Court of Appeal concluded, with respect to the allegation of petitioner's purchase of the Mercedes from Williams's dealership, that because petitioner had reserved jurisdiction in the Security Pacific litigation for the purpose of determining attorney fees and costs on appeal, the implication was unavoidable that, when petitioner contacted Williams, he was soliciting a "good deal" for an automobile, a circumstance necessarily involving corruption. The Court of Appeal further concluded that petitioner's alleged misconduct in falsely representing to the Commission that Williams's attorney, Patrick Frega, had not appeared before him since 1984 necessarily entailed dishonesty.

With respect to the remaining charges, however, the appellate court determined that it was possible petitioner had been unaware, as a result of mere inadvertence, that his conduct gave rise to a conflict of interest or violated a canon of judicial ethics, or that the statements he made to the Commission in response to its inquiries were inaccurate. The court concluded, therefore, that these latter charges "may or *may not* involve moral turpitude, dishonesty, or corruption, depending on all the circumstances which come to light," but did not *necessarily* involve such behavior, and therefore did not meet the constitutional criteria for an open hearing.

In reaching its construction of the language of article VI, section 18, subdivision (f)(3), the Court of Appeal relied upon this court's application of the phrase "involving moral turpitude" in the context of professional license-revocation cases. These cases are not determinative of the issue in the present case, however, and the Court of Appeal's reliance upon them was misplaced.

In professional license-revocation cases, involving revocation based upon conviction of a crime involving moral turpitude, this court has considered the issue whether a license may be revoked on the basis of mere proof of conviction, without any consideration of the specific facts underlying the conviction. In these cases we have held: " 'Only if the minimum elements for a conviction necessarily involve moral turpitude and a conviction cannot be had without proof of facts showing moral turpitude, can the conviction be held to be of an offense involving moral turpitude.' " (*Cartwright* v. *Board of Chiropractic Examiners* (1976) 16 Cal.3d 762, 766-767 [129 Cal.Rptr. 462, 548 P.2d 1134], quoting *Lorenz* v. *Board of Medical Examiners* (1956) 46 Cal.2d 684, 687 [298 P.2d 537].) These cases, however, do not stand for the proposition that when the crime underlying the conviction, considered in the abstract, does not necessarily involve moral turpitude, a disciplinary authority such as the Commission is precluded from reviewing the specific facts in the particular case constituting proof of the crime, independent of the fact of

the conviction, to determine whether the conduct of the charged individual actually involved moral turpitude. In *Lorenz* v. *Board of Medical Examiners*, *supra*, 46 Cal.2d at page 687, the court made clear that a licensee can be disciplined, even when the offense does not necessarily involve moral turpitude, provided he or she is charged with fraudulent or immoral acts and is afforded a hearing on that charge.

(5) With respect to judicial disciplinary proceedings before the Commission, however, article VI, section 18, subdivision (f)(3), authorizes an open hearing when the "charges" involve moral turpitude. As stated previously, the Commission does not make its moral turpitude determination based solely upon the language of the formal pleading, but rather does so upon the results of its investigation and assessment of the actual conduct of the judge, as determined preliminarily by the Commission. Thus, regardless whether the formal written charges encompass conduct that, in the abstract, may or may not involve moral turpitude, the Commission makes its independent overall assessment of the judge's culpability in determining whether the alleged misconduct involves moral turpitude.

Moreover, in a judicial disciplinary proceeding, the threshold requirements for an open hearing under article VI, section 18, subdivision (f)(3), serve a purpose different from that served by the criteria for revocation in professional-licensing cases. The policy supporting license revocation based upon conviction of a crime involving moral turpitude is the state's need to regulate a profession based upon criteria having a demonstrable bearing upon fitness to practice the profession. (*Cartwright* v. *Board of Chiropractic Examiners*, *supra*, 16 Cal.3d at p. 767.) In construing the meaning of the moral turpitude criteria under subdivision (f)(3), however, we must look to their purpose and the objective to be accomplished in the context of judicial disciplinary proceedings. In such a proceeding, the determination whether charges involve moral turpitude is not made for the purpose of a final adjudication of the merits of the charges, i.e., the determination is not made for the purpose of determining whether to censure or remove a judge for misconduct under article VI, section 18, subdivision (c). Instead, such a determination is made for the purpose of deciding whether public scrutiny should occur during the hearing process in order to further the policies to be served by an open hearing, including fostering public confidence in the integrity and accountability of the judiciary. The ultimate determination to be made is whether the charges should be heard by the public, not whether the charges necessarily involve certain behavior or reprehensible mens rea on the part of the judge under investigation.

Accordingly, in the present case, even if the facts alleged in the notice of formal proceedings did not necessarily or unavoidably involve moral turpitude, the Commission nevertheless had the discretion to determine that the

particular facts established in the course of its investigation, and the decision to file formal charges, justified the conclusion that the judge's actions did involve moral turpitude, dishonesty, or corruption, within the meaning of article VI, section 18, subdivision (f)(3).

VI

Under article VI, section 18, subdivision (h), the Judicial Council is granted authority to promulgate rules implementing section 18. Pursuant to this provision, the Judicial Council adopted rule 907.2, establishing a procedure enabling the Commission, in the event *any* of the charges involve moral turpitude, to open the hearing on *all* charges, if doing so would promote public confidence and the interests of justice. Petitioner contends the open hearing procedure under rule 907.2, implementing the constitutional amendment, constitutes an erroneous construction by the Judicial Council of article VI, section 18, subdivision (f)(3), and violates the equal protection provisions of the federal and state Constitutions in two respects.

Article VI, section 18, subdivision (f)(3), provides that the Commission "may in the pursuit of public confidence and the interests of justice . . . in the event charges involve moral turpitude, dishonesty, or corruption, open hearings to the public." (6) Petitioner argues this constitutional language does not contemplate a single, open hearing on *all* the charges in the event some, but not all, of the charges meet the constitutional criteria for an open hearing, and that, accordingly, rule 907.2 constitutes an overly broad construction of, and improperly extends the Commission's authority under, the constitutional amendment.

The language of article VI, section 18, subdivision (f)(3), is ambiguous with respect to whether the Commission must restrict an open hearing only to those charges involving moral turpitude, or whether instead an open hearing may be held for the proceeding as a whole whenever at least one of the charges at issue involves moral turpitude. In promulgating rule 907.2, the Judicial Council construed the pertinent constitutional language as authorizing the Commission in its discretion to order an open hearing on all charges in the event one of the charges involves moral turpitude.

As a general rule, past or contemporaneous interpretation by an administrative entity of its constitutional authority, and of a constitutional provision it is charged with implementing, is accorded considerable weight (see *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]), and courts generally will not depart from such construction unless it is clearly erroneous or

unauthorized. (See *County of Alameda* v. *State Bd. of Control* (1993) 14 Cal.App.4th 1096, 1106 [18 Cal.Rptr.2d 487]; *South Bay Union School Dist.* v. *Public Employment Relations Bd.* (1991) 228 Cal.App.3d 502, 506-507 [279 Cal.Rptr. 135].) The Judicial Council, as an independent agency charged with a specialized and focused task of promulgating rules implementing an open hearing procedure in judicial disciplinary proceedings, is the entity " 'presumably equipped or informed by experience' " to perform such task, and whose findings warrant deferential treatment by the court. (*South Bay Union School Dist.* v. *Public Employment Relations Bd.*, *supra*, 228 Cal.App.3d at p. 506.) In the present case, rule 907.2, authorizing a single, open hearing if one, but not all, of the charges involve moral turpitude, effectuates the purpose of the constitutional amendment by diminishing the risk of public skepticism that might result if only a segment of the charges brought against a judge in a particular case were dealt with in an open hearing. The Judicial Council reasonably could conclude that, in this setting, the goal of public confidence in the judiciary and in the disciplinary procedure might not be furthered if the public were permitted to observe only a portion of the proceedings, leaving to speculation the nature and gravity of the other alleged misconduct and its relationship to the moral turpitude charges.

For these reasons, we conclude the single-hearing procedure authorized under rule 907.2 does not constitute an improper expansion of the Commission's grant of authority under article VI, section 18, subdivision (f)(3).

We emphasize, however, that the Commission is not required to hold open hearings on all charges whenever any charge involves moral turpitude, and in many cases the Commission may well determine that the charges that do not involve moral turpitude clearly are distinct and severable from the charges that do involve moral turpitude, and that a closed hearing on those charges would not threaten public confidence in the proceedings or imperil the interests of justice.

(7a) Petitioner next contends that the open hearing procedure under rule 907.2 violates the equal protection provisions of the state and federal Constitutions by creating arbitrary classifications (1) between judges facing charges involving moral turpitude and judges facing charges that do not fall within that category, and (2) between judges facing no charges of moral turpitude and judges facing charges, one or more of which (but not all of which) involve moral turpitude.

Petitioner asserts these classifications impinge upon a fundamental interest, namely the judge's right to confidentiality under article VI, section 18,

subdivison (h) (former subd. (f)), as construed in *Mosk* v. *Superior Court*, *supra*, 25 Cal.3d 474, and his or her right to privacy under article I, section 1, of the California Constitution, and the federal Constitution. Because these classifications assertedly impinge upon a fundamental interest, he argues they are subject to strict scrutiny analysis and cannot withstand such scrutiny, because they do not further any compelling state interest.

(8) The equality guaranteed by the equal protection clauses of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities, provided the classifications are based upon some legitimate object to be accomplished. (8 Witkin, Summary of Cal. Law (9th ed 1988) Constitutional Law, § 599, p. 51.) The strict scrutiny standard of review applies only if a legislative classification involves a suspect classification or significantly infringes upon a fundamental right. (*In re Demergian* (1989) 48 Cal.3d 284, 291-292 [256 Cal.Rptr. 392, 768 P.2d 1069].)

(9) Contrary to petitioner's contention, the determination to open a disciplinary proceeding before the Commission does not impinge upon any fundamental right of the subject judge. Generally, classifications inherent in judicial or State Bar disciplinary procedures do not implicate any fundamental interest of the judge or attorney who is under investigation or subject to discipline. (See *Kennick* v. *Commission on Judicial Performance* (1990) 50 Cal.3d 297, 310-311 [267 Cal.Rptr. 293, 787 P.2d 591] [classification inherent in disciplinary sanctions distinguishing an attorney's conduct while a judge from other conduct was subject to rational basis test]; *In re Demergian*, *supra*, 48 Cal.3d at pp. 291-292; see also *Rittenband* v. *Cory* (1984) 159 Cal.App.3d 410, 423 [205 Cal.Rptr. 576] [burdens imposed by judge's retirement law upon a judge's right to seek and retain elective office do not infringe upon any fundamental right].) Any "right" of a judge to maintain the confidentiality of disciplinary proceedings is not a constitutionally fundamental one. As we have explained, *ante*, among the primary traditional purposes of confidentiality are the need to accommodate the interests of complainants and witnesses, to avoid unnecessary publicity related to unfounded complaints, and to encourage a judge guilty of serious misconduct to retire before the commencement of formal proceedings—and not solely, or even primarily, to avoid unwarranted damage to the reputation of the subject judge.[14] (See *Landmark Communications, Inc.* v. *Virginia*, *supra*, 435 U.S. 829, 835-836 [56 L.Ed.2d 1, 8-9].) The commentary to canon 2A of the Code of Judicial Conduct explains that "[a] judge must expect to be the

[14]Indeed, the interests and reputation of a judge likely will be served if the public is made aware of the evidence introduced at a hearing that leads to the judge's exoneration, thus

subject of constant public scrutiny." Moreover, "[a]lthough judges have a discernible privacy interest pending investigation of the alleged misconduct," the rationale is far less compelling for retaining confidentiality beyond the commencement of formal proceedings, at which point the charges have been found to have a sufficient basis to require a formal hearing and the risk of unwarranted damage to reputation is decreased. (See *Silence Isn't Always Golden, op. cit. supra*, 58 Temple L.Q. at pp. 762-763.)

(7b) For these reasons, in reviewing petitioner's equal protection claim we apply the rational basis test: are the challenged classifications " 'rationally related to a legitimate governmental purpose' "? (*Board of Supervisors* v. *Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913 [13 Cal.Rptr.2d 245, 838 P.2d 1198].) With respect to the first classification, the need to promote public confidence in the judiciary is a rational basis for treating proceedings involving charges of moral turpitude, dishonesty, or corruption differently from proceedings that do not involve such charges. In the abstract, an act of "moral turpitude" is defined as behavior that "gravely violates" accepted moral standards of a community (Black's Law Dict. (6th ed. 1990), p. 1009); dishonesty denotes a "lack of integrity" (*id.*, at p. 468), and "corruption" is "[t]he act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." (*Id.*, at p. 345.) Thus, moral turpitude, dishonesty, and corruption[15] generally refer to acts or a mens rea that adversely reflects upon a judge's integrity, honesty, and regard for the judicial office as a public trust. The independence and integrity of the judge therefore are seriously implicated when charges of this nature are involved. The policy promoted by an open hearing on such charges is that of responsible public disclosure and accountability, which will achieve the goal of public confidence in the integrity of the judicial system.

Therefore, we conclude the criteria of charges involving moral turpitude, dishonesty, or corruption constitute a reasonable, threshold requirement that must be met before the Commission, in its discretion, may open the hearing upon its determination that doing so would promote public confidence and the interests of justice.

This same purpose of promoting public confidence and reassurance in the integrity and accountability of the judiciary provides a rational basis for the

avoiding public suspicion that the judge has eluded appropriate discipline or that the disciplinary system otherwise has failed.

[15]The criteria of "moral turpitude, dishonesty, or corruption" appear to have been adopted directly from the State Bar Act (Bus. & Prof. Code, § 6106 ["The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."].)

second classification challenged by petitioner under rule 907.2(c), which permits a public hearing on *all* charges if *any* of the charges involve moral turpitude. The significance and gravity of the moral turpitude charges may well be determined only in the context of the other charges, for example, whether an alleged act of moral turpitude constitutes a single, isolated incident or part of a pattern of misconduct. Additionally, as explained, *ante*, public confidence in the fairness and final result of a disciplinary procedure may be diminished if the public is permitted to observe only a portion of the proceedings, and is left with an incomplete understanding of the conduct of the subject judge that gave rise to the institution of formal proceedings. A single hearing on all charges also may be a more efficient means of implementing the open hearing procedure.

Accordingly, we conclude that the single-hearing procedure under rule 907.2(c), permitting an open hearing on all the charges if any of the charges satisfy the criteria under article VI, section 18, subdivision (f)(3), for an open hearing, bears a rational relationship to a legitimate governmental objective.

For these reasons, the classifications embodied in the open hearing procedure under rule 907.2 do not violate petitioners right to equal protection of the laws under the federal or state Constitutions.

VII

(10a) Turning to the specific charges contained in the amended notice of formal proceedings, we conclude the Commission properly exercised its discretion in determining that counts 1 and 2 of the formal charges involve moral turpitude and corruption and that count 4 of the formal charges involve moral turpitude, dishonesty, and corruption.

(11) In evaluating the alleged misconduct of a judge, moral turpitude, dishonesty, and corruption must be construed in the context of the duties and responsibilities of the judicial office, and the standards to which we hold judges and their fitness for office. (See *Morrison* v. *State Board of Education* (1969) 1 Cal.3d 214, 227-228 [82 Cal.Rptr. 175, 461 P.2d 375].)

The standards of conduct to which judges are held are reflected in part in the canons of the Code of Judicial Conduct. Although these canons do not have the force of law or regulation, "they reflect a judicial consensus regarding appropriate behavior" for California judges. (*Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 838, fn. 6 [264 Cal.Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235]; see *Cannon* v. *Commission on*

*Judicial Qualifications* (1975) 14 Cal.3d 678, 707, fn. 22 [122 Cal.Rptr. 778, 537 P.2d 898].) The failure of a judge to comply with the canons "suggests performance below the minimum level necessary to maintain public confidence in the administration of justice." (*Kloepfer* v. *Commission on Judicial Performance*, *supra*, 49 Cal.3d at p. 838, fn. 6.)

Canon 4D(4), pertaining to gifts, states that judges "should not accept . . . a gift, bequest, favor or loan from anyone except for: . . ." The canon proceeds to list seven exceptions (including "ordinary social hospitality") to what is otherwise an absolute prohibition against the receipt of gifts. (Cal. Code Jud. Conduct, canon 4D(4)(a)-(g).)[16] Therefore, unless the gift falls within one of the enumerated exceptions, the judge's acceptance of the gift is prohibited.

Canon 4D(5) of the Code of Judicial Conduct appears to state a separate rule, that judges should not accept gifts from lawyers and others who are likely to come before the judge. The commentary to canon 4D(5) explains that the canon "prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms, if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge." (Cal. Code Jud. Conduct, com. to canon 4D(5).) By its express terms, canon 4D(5) does not apply if the gift otherwise falls within any of the exceptions listed in canon 4D(4). Canon 4D(5) serves to emphasize, however, that the receipt of a gift, like all other activities of a judge, must not cast reasonable doubt upon the judge's capacity to act impartially as specified in canons 2A and 4A(1).

The Code of Judicial Conduct does not define the word "gift." The California Fair Political Practices Commission defines it as "anything of value, whether tangible or intangible, for which equal or greater value is not provided." (Cal. Fair Political Practices Com., 1993-1994 Statement of Economic Interests, Schedule F.) In its formal opinion, the Judicial Ethics Committee observes in this regard: "It is the Committee's opinion that in applying the canons the word "gift" should be interpreted broadly, and consistent . . . with the policies which support the prohibition against gifts.

[16]In its formal opinion on the subject of acceptance of gifts from attorneys, the Judicial Ethics Committee of the California Judges Association has defined "ordinary social hospitality" (one of the exceptions to the prohibition of acceptance of gifts under canon 4D(4)) as follows: "It is that type of social event or other gift which is so common among people in the judge's community that no reasonable person would believe that (1) the donor was intending to or would obtain any advantage or (2) the donee would believe that the donor intended to obtain any advantage." (Cal. Judges Assn., Jud. Ethics Com., Opn. No. 43 (1994) at p. 4, published in Rothman, Cal. Judicial Conduct Handbook.)

(See Canons 2A, 2B, and 4A(1).)" (Cal. Judges Assn., Jud. Ethics Com., Opn. No. 43, *supra*, at p. 2.)

Although generally a violation of a canon will constitute conduct below the standards expected of California's judges, not all such violations involve moral turpitude, dishonesty, or corruption. But a judge's solicitation, or knowing acceptance, of favors or benefits having a substantial monetary value from a litigant or attorney whose case presently is pending before the court is inherently corruptive, suggesting improper use of the prestige of office.

In judicial disciplinary proceedings in other states, a judge's receipt of gifts from attorneys or litigants, who appeared (or were likely to appear) before the judge, has been found to warrant discipline. In *In re D'Auria* (1975) 67 N.J. 22 [334 A.2d 332, 333], a lawyer, while acting as a workers' compensation judge, on numerous occasions was a luncheon guest of attorneys and insurance representatives who had matters pending before him. The court, although finding that none of the attorneys had expected or received any preferential treatment from the judge, concluded the judge's acceptance of the lunches was "unprofessional, improper and unethical," bearing an "obvious appearance of impropriety." (*Ibid.*) The court explained: "[A] [j]udge's acceptance of gratuities and favors from those who have business with the [court] is inherently wrong. It has a subtle, corruptive effect, no matter how much a particular judge may feel that he is above improper influence." (*Ibid.*) In *In re Kral* (1973) 1 Ill. Cts. Com. 20, a judge was disciplined for accepting a discount for wallpaper and other decorating materials from a litigant who had appeared before him, the judge paying only $2,000 for $2,900 worth of merchandise. The discount had been arranged by an attorney who previously had appeared before the judge.

In decisions involving the discipline of *attorneys* for favors conferred upon judges, the principles supporting the condemnation of such conduct are comparable to those applicable in judicial disciplinary cases, reflecting the serious impropriety of conferring gifts upon judges under inappropriate circumstances. For example, in *In re D'Angelo* (1988) 126 Ill.2d 45 [127 Ill.Dec. 779, 533 N.E.2d 861], an attorney was disbarred for expending thousands of dollars for car rentals for judges and politicians. The court characterized the attorney's conduct as displaying "dishonesty, fraud, deceit, or misrepresentation," which "brought the court and the legal profession into disrepute" and was prejudicial to the administration of justice. (*Id.*, at p. 866; see also *In re Weinstein* (1989) 131 Ill.2d 261 [137 Ill.Dec. 72, 545 N.E.2d 725, 729] ["An attorney who performs a favor for a judge before whom he is likely to appear compromises the fairness and impartiality of the tribunal and prejudices the administration of justice."].)

(10b) In the present case, count 1 of the formal charges alleges facts involving petitioner's active solicitation of a favorable transaction, involving the purchase of an automobile, from a litigant at the same time the litigant's case was pending before the court. It is alleged that, shortly after awarding a $5 million judgment in favor of Williams in the Security Pacific v. Williams litigation, while retaining jurisdiction for a limited purpose (attorney fees and costs) pending appeal, petitioner contacted Williams, seeking to purchase a Mercedes, and ultimately purchased such a vehicle from this litigant at a price that appeared to be unduly favorable to petitioner. Seeking out and accepting a favorable transaction under these circumstances clearly would denote a lack of integrity, as well as corruption and conduct contrary to the moral standards required of the judicial office. Readily inferable from these allegations is that the judge was attempting to receive favors for past deeds, purposefully taking advantage of the power and prestige of his judicial office, and wrongfully using his office to procure a benefit for himself. Petitioner's alleged misconduct violated several canons of judicial conduct, particularly the proscription against acceptance of gifts from litigants whose interests have come, or are likely to come, before the judge (canon 4D(5)), as well as the more general proscription against conduct that may create an appearance of special influence over the judge (canon 2B) or that erodes public confidence in the integrity or impartiality of the judiciary (canon 2A).

The charges set forth in count 2, involving the alleged payment of substantial monetary amounts by Williams's attorney, Patrick Frega, for petitioner's benefit (for the purchase of a Jeep for the judge's daughter, and for automotive repairs), shortly after Frega and his client had prevailed in significant litigation before petitioner, also suggests petitioner's improper use of his office and lack of integrity. This alleged misconduct also constitutes a violation of canon 4D(5).

The remaining allegations of benefits and favors accepted by petitioner, including a discount on repairs for his daughter's Jeep, the celebratory dinner with Frega at the latter's expense, the loan of a computer from Frega, a weekend stay at a desert condominium owned by an attorney whom petitioner frequently appointed to serve as special master, and the $600 legal fee write-off, considered in the context of the other favors and benefits improperly accepted, suggest conduct going well beyond the inadvertent acceptance of trivial favors or gratuities, and depict a pattern of disregard for the high standards of ethical conduct required of our judiciary. Under these circumstances, the allegations relating to these gifts also denote corruption, poor moral conduct, and lack of integrity.

(12) We further conclude the Commission did not abuse its discretion in determining the charges set forth in count 4 of the notice of formal proceedings involved moral turpitude, dishonesty, and corruption. Providing information to the Commission—the governmental entity charged with the protection of the public from judicial corruption—that is false, inaccurate, and misleading in numerous, material respects clearly may fall within the scope of such reprehensible behavior and culpable mens rea.

Finally, although the Commission determined that the charges set forth in count 3 did not involve moral turpitude, we conclude that the Commission did not abuse its discretion in determining that the open hearing should encompass these charges as well. The latter charges are relatively minor in gravity in comparison to the charges set forth in the other counts, and evidence of the circumstances of these charges will place in better perspective the judge's relationship and dealings with Williams's attorney and his law firm.

## VIII

The judgment of the Court of Appeal is reversed to the extent it granted relief sought by petitioner, and is otherwise affirmed.

Lucas, C. J., Mosk, J., Kennard, J., Arabian, J., Baxter, J., and Werdegar, J., concurred.

[Nos. A079881 and A080466. First Dist., Div. Three. May 19, 1999.]

THE RECORDER, Plaintiff and Respondent, v.
COMMISSION ON JUDICIAL PERFORMANCE, Defendant and Appellant.

**[Opinion certified for partial publication.*]**

**SUMMARY**

The trial court issued an order granting a legal newspaper's petition for a writ of mandate to compel the state Commission on Judicial Performance to disclose how individual commissioners voted in formal disciplinary proceedings concerning a county municipal court judge, and in all subsequent formal proceedings regarding judicial discipline. The court found that disclosure is required by Cal. Const., art. VI, § 18, subd. (j), enacted as part of an initiative measure approved by the voters in 1994, which mandates that all proceedings subsequent to the filing of formal charges shall be open to the public. (Superior Court of the City and County of San Francisco, No. 987236, William J. Cahill, Judge.)

The Court of Appeal affirmed. The court held that the trial court did not err by ordering defendant to disclose the full results of the vote. Under Cal. Const., art. VI, § 18, subd. (j), the vote of the individual commission members on whether to impose judicial discipline is an integral part of the proceedings of the commission that must be open to the public in any case in which the commission determines to initiate formal disciplinary proceedings against a California judge. Thus, in this case, defendant had no discretion to withhold from the public information about how the individual commissioners voted. However, the commission is not required to conduct its deliberations in public. Cal. Const., art. VI, § 18, subd. (j), was clearly not intended as an open-meeting law but, rather, as a provision relating to adjudicatory proceedings, as to which the judicial thought process need not be publicly revealed. (Opinion by Phelan, J.,† with Corrigan, Acting P. J., and Walker, J., concurring.)

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III.

†Retired Presiding Justice of the Court of Appeal, First District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

## HEADNOTES

Classified to California Digest of Official Reports

(1) **Courts § 29—Jurisdiction—Superior Courts—Challenge to Proceedings of Commission on Judicial Performance: Judges § 6.4—Disciplinary Proceedings—Commission on Judicial Performance.**—The superior court had jurisdiction to rule on a legal newspaper's petition for a writ of mandate seeking to compel the state Commission on Judicial Performance to disclose how individual commissioners voted in formal disciplinary proceedings concerning a county municipal court judge, and in all subsequent formal proceedings regarding judicial discipline. Although Cal. Const., art. VI, § 18, subds. (g) and (h), make it clear that the state Supreme Court has exclusive jurisdiction over any legal proceeding of any sort brought against the commission by a judge, and that commissioners cannot be sued for any act undertaken in the course of their official duties, those provisions do not, expressly or otherwise, purport to limit the broad authority of the superior court, as conferred by Cal. Const., art. VI, § 10, and Code Civ. Proc., § 1085, to hear and decide petitions for writ of mandamus.

(2a, 2b) **Judges § 6.4—Disciplinary Proceedings—Commission on Judicial Performance—Necessity to Disclose Full Results of Vote.**—The trial court did not err in granting a legal newspaper's petition for a writ of mandate to compel the state Commission on Judicial Performance to disclose how individual commissioners voted in formal disciplinary proceedings concerning a county municipal court judge, and in all subsequent formal proceedings regarding judicial discipline. Under Cal. Const., art. VI, § 18, subd. (j), enacted as part of an initiative measure approved by the voters in 1994, which mandates that all proceedings subsequent to the filing of formal charges shall be open to the public, the vote of the individual commission members on whether to impose judicial discipline is an integral part of the proceedings of the commission that must be open to the public in any case in which the commission determines to initiate formal disciplinary proceedings against a California judge. Thus, in this case, the commission had no discretion to withhold from the public information about how the individual commissioners voted. However, like an intermediate appellate court or an administrative agency acting in an adjudicative capacity, the commission is not required to conduct its deliberations in public. Cal. Const., art. VI, § 18, subd. (j), was clearly not intended as an open-meeting law, but rather, as a provision relating to adjudicatory proceedings, as to which the judicial thought process need not be publicly revealed.

[See 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, § 88.]

(3) **Constitutional Law § 13—Construction of Constitutional Provisions—Language of Enactment—Amendment.**—Constitutional provisions must be construed to give full force and effect to every portion thereof. It is the legal intendment that each and every clause has been inserted for a useful purpose and when rightly understood has some practical operation. Furthermore, a constitutional amendment should be construed in accordance with the natural and ordinary meaning of the words as generally understood at the time of its enactment. Accordingly, where it does not appear that words used in a constitutional amendment were used in a technical sense, the voters must be deemed to have construed the amendment by the meaning apparent on its face according to the general use of the words employed. In the absence of definition of words in the Constitution, words having no technical meaning will be taken in their ordinary and generally accepted sense.

(4) **Constitutional Law § 13—Construction of Constitutional Provisions—Language of Enactment—Ambiguity.**—Where a constitutional provision is ambiguous, a court must ordinarily adopt the interpretation that carries out the intent and objective of the drafters of the provision and the people by whose vote it was adopted. The argument submitted to the electors in support of a proposed constitutional amendment is not controlling but may be resorted to as an aid in determining the intention of the framers and the electorate. New constitutional provisions must be considered with reference to the situation intended to be remedied or provided for.

(5) **Constitutional Law § 16—Construction of Constitutional Provisions—Past or Contemporaneous Construction—By Administrative Entity.**—Past or contemporaneous interpretation by an administrative entity of its constitutional authority, and of a constitutional provision it is charged with implementing, is accorded considerable weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. Past or contemporaneous agency interpretation can be particularly useful to resolve apparent ambiguities in a new enactment.

(6) **Constitutional Law § 13—Construction of Constitutional Provisions—Language of Enactment—Latent Ambiguity.**—A latent ambiguity exists where constitutional language is clear and intelligible and suggests but a single meaning, but some extrinsic evidence creates a necessity for interpretation or a choice among two or more possible meanings.

## COUNSEL

Stephen R. Barnett; Levy, Ram & Olson and Karl Olson for Plaintiff and Respondent The Recorder.

Lewis, D'Amato, Brisbois & Bisgaard and James E. Friedhofer for National Union Fire Insurance Company of Pittsburgh, PA and A.I. Management and Professional Liability Claims Adjusters as Amici Curiae on behalf of Plaintiff and Respondent.

Ephraim Margolin as Amicus Curiae on behalf of Plaintiff and Respondent.

Floger, Levin & Kan, Samuel R. Miller, Kelvin T. Wyles; Richard G. R. Schickele; Jack Coyle; and Roland W. Selman for Defendant and Appellant.

## OPINION

**PHELAN, J.***—These consolidated appeals present important questions of first impression about an initiative measure, commonly known as Proposition 190, which was approved by a large majority of California voters in 1994. The Commission on Judicial Performance (the commission) timely appeals from an order granting a petition for writ of mandate filed in June 1997 by The Recorder, a legal newspaper published in San Francisco, in an effort to compel the commission to disclose how individual commissioners voted in formal disciplinary proceedings concerning the Honorable Jose Angel Velasquez of the Municipal Court of Monterey County, and in all subsequent formal proceedings regarding judicial discipline. The Recorder contends that such disclosure is required by California Constitution, article VI, section 18, subdivision (j), a provision enacted as part of Proposition 190.

The commission claims it acted within its rulemaking authority as conferred by California Constitution, article VI, section 18, subdivision (i)[1]—which was also enacted as part of Proposition 190—by adopting procedures allowing it to withhold information about how individual commission members voted with respect to imposition of judicial discipline following "formal proceedings," despite the fact that pursuant to section 18(j) all such proceedings must now be "open to the public." (*Ibid.*) In fact, the commission has

*Retired Presiding Justice of the Court of Appeal, First District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1]All further constitutional references are to article VI of the California Constitution. In addition, for convenience we will hereinafter refer to sections 8 and 18 of article VI in shortened form. For example, the current versions of section 18, subdivisions (i) and (j) will be cited as, respectively, "section 18(i)" and "section 18(j)."

not adopted any specific rule affirmatively authorizing it to withhold this information from the public. Rather, the commission asserts that, even after passage of Proposition 190, it can simply continue its "longstanding historical practice" of revealing only the total vote count.

We conclude the vote of the members on whether or not to impose judicial discipline is such an essential and integral part of the formal proceedings of the commission—perhaps the single most important act a member takes in his or her capacity as such—that it would be plainly unreasonable to accept the commission's interpretation of its authority under section 18(i) and 18(j). That is, when California voters overwhelmingly approved a requirement that all "proceedings" subsequent to the filing of formal disciplinary charges "shall be open to the public" (§ 18(j)), they must have intended the commission to vote in public or at least to disclose the full results of its vote, including how each commission member voted. We further conclude, however, that—like an intermediate appellate court, or an administrative agency acting in an adjudicative capacity—the commission is not required to conduct its "deliberations" in public. Section 18(j) was clearly not intended as an "open meeting" law but, rather, as a provision relating to adjudicatory proceedings, as to which it is well settled and universally recognized that the judicial "thought process" need not be publicly revealed.

Accordingly, in the published portion of this opinion, we affirm the order directing the commission to disclose the full results of the vote on discipline in Judge Velasquez's case and in all subsequent formal proceedings regarding judicial discipline under section 18(j). In the unpublished portion of the opinion, we consider and reject the commission's argument that the trial court abused its discretion by awarding The Recorder its attorney fees pursuant to Code of Civil Procedure section 1021.5 (hereinafter, section 1021.5). Thus, the order granting The Recorder's request for attorney fees is also affirmed.

## I. BACKGROUND

### A. *The Enactment of Proposition 190 and Implementing Rules.*

Proposition 190 was derived from Assembly Constitutional Amendment No. 46, and placed on the November 8, 1994, ballot by the Legislature. (Assem. Const. Amend. No. 46 (1994-1995 Reg. Sess.) res. ch. 111.) The voters of California approved Proposition 190 at the November 1994 election, and thereby substantially amended sections 8 and 18 of article VI of the California Constitution. By its terms, Proposition 190 became operative on March 1, 1995. (§ 18(j); and see *Dodds* v. *Commission on Judicial Performance* (1995) 12 Cal.4th 163, 168, fn. 1 [48 Cal.Rptr.2d 106, 906 P.2d 1260].)

Proposition 190 effected several significant changes in the system for imposing judicial discipline in California. It increased the total membership of the commission from nine to eleven, and the number of public members from two to six, so that the public members would constitute a majority. (§ 8(a).)[2] It vested the commission with ultimate authority to make censure and removal determinations, subject to discretionary review by the Supreme Court. (§ 18(d).) It created absolute immunity for commission members and staff "from suit for all conduct at any time in the course of their official duties." (§ 18(h).) Most importantly for our purposes, Proposition 190 shifted authority to make rules "for the investigation of judges" and "for formal proceedings" from the Judicial Council to the commission itself (§ 18(i)),[3] and required that "the notice of charges, the answer, and *all subsequent papers and proceedings shall be open to the public* for all formal proceedings instituted after February 28, 1995." (§ 18(j), italics added.)[4]

After Proposition 190 took effect, the commission undertook a review of its rules and procedures. Proposed rules were circulated for public comment early in 1996, and revised rules were adopted effective December 1, 1996. In the course of this rulemaking proceeding, one of The Recorder's attorneys, Stephen R. Barnett, submitted a letter urging the commission to amend its rules to provide that "in the case of any official action by the [c]ommission, the votes of the individual [c]ommission members shall be made public." This comment was considered by the commission, but rejected, as follows: "One comment was received suggesting that the votes of the individual commission members should be made public. After consideration, the commission determined not to make this suggested modification, noting that

[2]Since the effective date of Proposition 190, section 8(a) has provided in relevant part: "The Commission on Judicial Performance consists of one judge of a court of appeal, one judge of a superior court, and one judge of a municipal court, each appointed by the Supreme Court; 2 members of the State Bar of California who have practiced law in this State for 10 years, each appointed by the Governor; and 6 citizens who are not judges, retired judges, or members of the State Bar of California, 2 of whom shall be appointed by the Governor, 2 by the Senate Committee on Rules, and 2 by the Speaker of the Assembly." Prior to the effective date of Proposition 190, former section 8(a) provided for a commission membership of nine, including two judges of the Courts of Appeal, two judges of the superior courts, and one judge of the municipal court, plus two members of the State Bar of California and two citizen members. (Former § 8(a), as amended by Prop. 92, approved Nov. 8, 1988.)

[3]Section 18(i) provides in full: "The Commission on Judicial Performance shall make rules implementing this section, including, but not limited to, the following: [¶] (1) The commission shall make rules for the investigation of judges. The commission may provide for the confidentiality of complaints to and investigations by the commission. [¶] (2) The commission shall make *rules for formal proceedings against judges* when there is cause to believe there is a disability or wrongdoing within the meaning of subdivision (d)." (Italics added.)

[4]Section 18(j) provides in full: "When the commission institutes formal proceedings, the notice of charges, the answer, and all subsequent papers and proceedings shall be open to the public for all formal proceedings instituted after February 28, 1995."

disclosure does not appear to be required by Proposition 190 or any other provision of law. It is the commission's *policy* to release only the tally of total votes in favor of and against public discipline decisions in order to foster determinations unaffected by concerns extraneous to the impartial consideration of matters before the commission." (Italics added.)

B. *The Recorder's Prelitigation Requests for the Commission's Voting Records.*

Asserting a belief that Proposition 190 assured to the general public a right to know how individual commission members cast their votes in formal proceedings for judicial discipline, The Recorder wrote to the commission on September 5, 1996, asking for this information in each post-Proposition-190 case. The Recorder also took its case to its readership with an editorial entitled "Judicial Panel's Votes Should Be Public."

The commission refused to comply with these requests and, in a letter to The Recorder dated September 18, 1996, then Vice-Chair Robert C. Bonner explained its refusal as follows: "Proposition 190 did significantly open up the proceedings of the Commission on Judicial Performance through a series of broad, yet very specific changes. Nothing in Proposition 190, however, requires that the votes of individual members be made public, and individual commissioner's votes have never been made public during the commission's history. Because Proposition 190 vested in the commission the authority to promulgate its procedural rules, the issue of what voting information should be released was necessarily left to the commission. [¶] Important policy considerations weigh in favor of disclosing the total votes in support of and against commission action, but against disclosing the way each individual commissioner voted. Releasing only the total number of votes in favor and in opposition to the commission decision is intended to safeguard the independent voting of the commissioners. As distinct from the judiciary, the members of the commission do not serve full-time in their adjudicatory function. As the editorial recognizes, judges no longer comprise the majority of the commission's members. Today, the majority are public members and attorneys who may be appearing before the judges under the commission's jurisdiction. Disclosing how individual commissioners voted might well diminish the independence and objectivity so important to the commission's decision-making."

In a letter dated, October 1, 1996, the commission's director and chief counsel, Victoria B. Henley, added: "[T]he breakdown of commission votes according to individual members has never been made public and the commission has determined to continue making public only the total number

of votes in support of and against commission action. Moreover, since the tally of votes for and against is the only information which has been made public historically, records have not been maintained by the commission of each member's individual voting."

Judge Velasquez was publicly censured following formal proceedings instituted in August 1996. At the conclusion of those proceedings, the commission issued a decision and order, dated April 16, 1997, which announced its vote as "8 to 2, with one [c]ommissioner abstaining." On April 30, 1997, The Recorder again wrote to the commission, requesting disclosure of the commissioners' votes in that proceeding. The Recorder's letter was signed by its counsel and stated that The Recorder was authorized to take legal action if the requested information was not provided.

After thus receiving notice of the instant lawsuit, the commission issued an order dated May 28, 1997, reporting a modified vote count of "7 to 2, with one [c]ommissioner recused."[5] The commission offered no explanation for the change in the vote tally and, in a letter signed by Mr. Bonner and dated June 2, 1997, reiterated its refusal to disclose how individual commission members voted. In the same letter, the commission asserted that it "does not vote by written ballots, secret or otherwise, nor does it maintain any other records identifying how individual members voted." However, Mr. Bonner did not explain how the commission was otherwise able to uncover the error in the vote count (and abstention) disclosed in the April 16 decision and order, or how it confirmed the correctness of the vote count (and recusal) disclosed over a month later on May 29.

C. *The Instant Litigation.*

On June 5, 1997, The Recorder filed a petition for writ of mandate in San Francisco Superior Court. Citing section 18(g),[6] the commission raised a jurisdictional objection to the mandate proceeding in superior court, contending that only the California Supreme Court has jurisdiction over it. The

[5]The Recorder suggests this is evidence that the commission must have some physical recording of its votes, which would constitute "papers" within the meaning of section 18(j), that must be "open to the public." (*Ibid.*) The commission has denied it maintains any "written ballots" or "any other records identifying how individual members voted" but, as we have noted, has not explained how it was nevertheless able to correct the error in the vote tally in the Velasquez matter or, more generally, how it could confirm the accuracy of any given vote if asked to do so. In any event, we need not reach this issue because, as we will discuss, the vote of each commission member is such an integral part of the "proceedings" for judicial discipline as to be subject to mandatory public disclosure whether or not it is reduced to writing or recorded in the commission's "papers."

[6]In relevant part, section 18(g) provides: "No court, except the Supreme Court, shall have jurisdiction in a civil action or other legal proceeding of any sort brought against the commission by a judge."

trial court reserved decision on the issue of jurisdiction and issued an alternative writ setting a hearing for June 26, 1997. On July 10, 1997, after considering the parties' briefs and arguments, the language of Proposition 190 and evidence of the voters' intent, the trial court issued an order requiring the commission "to reveal how individual commissioners voted" in the Velasquez matter and "in all subsequent formal decisions."[7] The commission timely appealed from this order on July 17, 1997, in No. A079881.

On August 19, 1997, The Recorder filed a motion seeking attorney fees pursuant to section 1021.5. The commission vigorously opposed the motion. After a hearing on September 5, 1997, the trial court granted The Recorder's motion in full, applying a multiplier of 1.25 and awarding "fees on fees" for preparation of the motion, for a total award of $49,207.20. The trial court's order recited that it was granting The Recorder's fee request for "all the reasons stated in the Recorder's motion." The commission timely appealed from this order on September 30, 1997, in No. A080466.

## II. DISCUSSION—APPEAL NO. A079881

In No. A079881, the parties' dispute centers on the commission's interpretation of its rulemaking authority under section 18(i), and its interpretation of section 18(j) insofar as it mandates that all "proceedings" subsequent to the filing of formal charges "shall be open to the public." The commission contends, and The Recorder does not dispute, that all the issues presented in this appeal are pure questions of law, subject to de novo review by this court. (*Ghirardo* v. *Antonioli* (1994) 8 Cal.4th 791, 799 [35 Cal.Rptr.2d 418, 883 P.2d 960].)

### A. *The Superior Court Had Jurisdiction to Adjudicate The Recorder's Petition for Writ of Mandate.*

(1) Before turning to the merits of this appeal, we must address the commission's claim, based on sections 18(g) and 18(h), that the superior court lacks subject matter jurisdiction to issue a writ of mandate against it or its members or otherwise to review any determination it makes regarding judicial discipline.

Obviously sections 18(g) and 18(h) do not, by their express terms, support the commission's argument. Those provisions make it clear that our Supreme Court has exclusive jurisdiction over any "legal proceeding of any

[7]The issue whether the commission's "deliberations" must be conducted in public was vigorously debated in the hearings before the trial court, but the Recorder did not (and does not) specifically seek to compel the commission to make any disclosure regarding the deliberations in either the Velasquez case or in any subsequent disciplinary proceedings.

sort *brought against the commission by a judge*," and that commissioners cannot be sued for any act undertaken in the course of their official duties. (Italics added.) Sections 18(g) and 18(h) do not—expressly or otherwise—purport to limit the broad authority of the superior court, as conferred by article VI, section 10 of the California Constitution and Code of Civil Procedure section 1085 to hear and decide petitions for writ of mandamus.[8]

The commission offers no cogent interpretation of the language used in section 18(g), and cites no ballot language or other historical data suggesting that the voters intended to insulate it from suit of any type in any judicial forum, save for actions by individual judges in the Supreme Court.[9] Indeed, the commission admits that section 18(g) does not "specifically address the issue of jurisdiction in writ proceedings brought against the commission by persons other than a judge." (Emphasis in original.)

Without recognizing even a hint of irony, the commission nevertheless contends that section 18(g) was designed to avoid the problem that arose in cases such as *Dodds* v. *Commission on Judicial Performance, supra,* 12 Cal.4th 163, and *Adams* v. *Commission on Judicial Performance* (1995) 10 Cal.4th 866 [42 Cal.Rptr.2d 606, 897 P.2d 544], where individual judges brought proceedings in superior court seeking to block the commission from conducting *open* hearings. Vesting exclusive jurisdiction in the Supreme Court, the commission claims, was intended to prevent such ancillary actions from delaying or interfering with disciplinary proceedings. However, there is no indication that the instant writ proceeding did, or could, delay or interfere with the Velasquez matter or with any other case pending before the commission.[10]

The commission further contends that third parties should have no greater access to a judicial forum to litigate with the commission than do the judges

[8]We are in no way bound to accept the commission's interpretation of Code of Civil Procedure section 1085, pursuant to which it claims it is "evident" that it is not an "inferior tribunal, corporation, board, or person" subject to the broad jurisdiction of the superior court in writ proceedings. Nor does the fact the Legislature has seen fit to enact certain explicit statutory limits on the jurisdiction of the superior court to issue writs as against certain state administrative agencies (see Lab. Code, § 5955 [Workers' Compensation Appeals Board]; Pub. Util. Code, § 1759 [Public Utilities Commission]; Bus. & Prof. Code, § 23090.5 [Department of Alcoholic Beverage Control]) mean that we should *imply* such a limitation as to the commission.

[9]Since The Recorder did not name, serve, or otherwise join any individual member of the commission, either in their official or individual capacities, we refrain from further comment on the meaning and effect of section 18(h).

[10]The commission posits various scenarios under which a judge as to whom the commission has commenced formal proceedings might enlist the aid of a third party to bring a writ proceeding to challenge some aspect of commission procedure. We need not address this issue because there is no indication in this case that The Recorder is acting at the behest or for the benefit of any individual judge.

who are subject to discipline before that body. This is, however, just another way of saying that the voters intended to insulate the commission and its members from any lawsuit of any type in any judicial forum, except for actions by individual judges in the Supreme Court. As we have noted, the commission cites no statutory language or case law to support this sweeping claim of immunity, and we have found none in our research. Accordingly, we reject the commission's jurisdictional objections.

B. *The Vote of the Commission Regarding Imposition of Judicial Discipline Is a Critical Stage of the "Formal Proceedings" Which Must Be "Open to the Public" Pursuant to Section 18(j).*

(2a) The central issue presented in this appeal involves the commission's interpretation of sections 18(i) and 18(j). The commission claims it has fully complied with the mandate of section 18(j) by conducting all formal "proceedings" in open session, under rules it duly adopted after the passage of Proposition 190 regarding "Confidentiality and Disclosure." (Rules Com. Jud. Performance, rule 102.)[11] Specifically, during its rulemaking and before this court, the commission has interpreted the word "proceedings" in section 18(j) to mean "any proceeding which the affected judge and his or her counsel could attend," including "all evidentiary hearings before the [c]ommission or special masters and any oral arguments before the [c]ommission itself," but not "the [c]ommission's deliberations or voting." For reasons we shall explain, we reject this interpretation.

(3) The rules governing interpretation of constitutional amendments are well established: "Constitutional provisions must be construed to give full force and effect to every portion thereof. It is the legal intendment that each and every clause has been inserted for a useful purpose and when rightly understood has some practical operation. [Citations.] Furthermore, a constitutional amendment should be construed in accordance with the natural and ordinary meaning of the words as generally understood at the time of its enactment. [Citations.] Accordingly, where it does not appear that words used in a constitutional amendment were used in a technical sense, the voters must be deemed to have construed the amendment by the meaning apparent

[11]In relevant part, rule 102 of the Rules of Commission on Judicial Performance provides: "(a) **(Scope of Rule)** Except as provided in this rule, all papers filed with and proceedings before the commission shall be confidential. . . . [¶] (b) **(Disclosure after institution of formal proceedings)** When the commission institutes formal proceedings, the following shall not be confidential: [¶] (1) The notice of formal proceedings and all subsequent papers filed with the commission and the special masters, all stipulations entered, all findings of fact and conclusions of law made by the special masters and by the commission, and all disciplinary determinations made by the commission; [and] [¶] (2) The formal hearing before the special masters and the appearance before the commission." (Boldface in original.)

on its face according to the general use of the words employed. [Citations.] . . . In the absence of definition of words in the Constitution, words having no technical meaning will be taken in their ordinary and generally accepted sense. [Citation.]" (*In re Quinn* (1973) 35 Cal.App.3d 473, 482-483 [110 Cal.Rptr. 881]; *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]; see also *People* ex rel. *Lungren* v. *Superior Court* (1996) 14 Cal.4th 294, 301, 305 [58 Cal.Rptr.2d 855, 926 P.2d 1042] [parallel rules of construction for initiatives approving new statutory provisions].)

(4) "Where a provision in the Constitution is ambiguous, a court must ordinarily adopt that interpretation which carries out the intent and objective of the drafters of the provision and the people by whose vote it was adopted. [Citations.]" (*Mosk* v. *Superior Court* (1979) 25 Cal.3d 474, 495 [159 Cal.Rptr. 494, 601 P.2d 1030]; see also *White* v. *Davis* (1975) 13 Cal.3d 757, 775 & fn. 11 [120 Cal.Rptr. 94, 533 P.2d 222].) "The argument submitted to the electors in support of a proposed constitutional amendment is not controlling but may be resorted to as an aid in determining the intention of the framers and the electorate. [Citations.] [¶] New provisions of the Constitution must be considered with reference to the situation intended to be remedied or provided for. [Citations.]" (*In re Quinn, supra,* 35 Cal.App.3d at p. 483; *Mosk* v. *Superior Court, supra,* at p. 495 ["To ascertain the intent and objective of an ambiguous constitutional provision, a court may consider . . . written arguments in voter pamphlets."]; see also *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization, supra,* 22 Cal.3d at pp. 245-246 ["[W]hen . . . the enactment follows voter approval, the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language."].)

(5) In addition, "As a general rule, past or contemporaneous interpretation by an administrative entity of its constitutional authority, and of a constitutional provision it is charged with implementing, is accorded considerable weight [citation], and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]" (*Adams* v. *Commission on Judicial Performance* (1994) 8 Cal.4th 630, 657-658 [34 Cal.Rptr.2d 641, 882 P.2d 358].) Past or contemporaneous agency interpretation can be particularly useful to resolve "apparent ambiguities" in a new enactment. (*Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization, supra,* 22 Cal.3d at p. 245.)

1. *Section 18(j) Is Ambiguous.*

Maneuvering for an advantageous position on the battlefield of constitutional interpretation, the commission and The Recorder both contend, at least

initially, that section 18(j) is unambiguous and that the "plain language" used in that provision favors their respective—but diametrically opposed—positions on the issue whether the votes of individual commission members must be disclosed to the public. That is, The Recorder contends that the term "papers" or the term "proceedings," or both, clearly encompass the casting and recording of votes by individual commissioners. For its "plain language" argument, the commission relies primarily on what is *not* found in section 18(j), i.e., on the *absence* of any specific provision requiring disclosure of the votes of individual commissioners. However, the commission also appears to contend that the "formal hearing before the special masters and the appearance before the commission" are its only "proceedings," and that those are the only activities it must conduct in public. (See Rules Com. Jud. Performance, rule 102(b).)

In its reply brief, the commission ultimately comes around to conceding that there is at least a "latent ambiguity" in the term "proceedings." This concession is appropriate. (See *Mosk* v. *Superior Court, supra,* 25 Cal.3d at p. 495 [The conflicting contentions of the parties regarding meaning of former section 18(f) point to a latent ambiguity in that provision].) (6) As the *Mosk* court explained: " '[A] latent ambiguity is said to exist where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic evidence creates a *necessity* for interpretation or a choice among two or more *possible meanings.*' " (25 Cal.3d at p. 495, fn. 18, italics in original, quoting Note, *Constitutional Law: The Doctrine of Latent Ambiguities as Applied to the California Constitution* (1943) 31 Cal.L.Rev. 203, 205.)

Indeed, the Legislature could hardly have chosen a more malleable term. "The word 'proceeding' necessarily has different meanings, according to the context and the subject to which it relates. . . . In section 473 of the Code of Civil Procedure, and in similar statutory provisions of other states, it has a broader signification, and includes any step taken in a case, whether by the court or by one of the parties thereto. [Citations.] 'In its more general sense, in law, it means *all the steps or measures adopted in the prosecution or defense of an action.*' [Citations.]" (*Burns* v. *Superior Court* (1903) 140 Cal. 1, 5-6 [73 P. 597], italics added; and see *id.* at p. 9 [the term "proceedings" includes the issuance of a subpoena by a notary at the request of one party seeking to depose another, and the taking of a deposition]; see also *Mann* v. *Cracchiolo* (1985) 38 Cal.3d 18, 43 [210 Cal.Rptr. 762, 694 P.2d 1134] (conc. opn. of Bird, C. J.); *Zellerino* v. *Brown* (1991) 235 Cal.App.3d 1097, 1105 [1 Cal.Rptr.2d 222]; *Lister* v. *Superior Court* (1979) 98 Cal.App.3d 64, 70 [159 Cal.Rptr. 280].)

(2b) Given the inherent ambiguity of the term "proceedings," we must look beyond the plain language of section 18(j) to ascertain its meaning and

scope in the present context. In particular, we must look to external sources to determine whether the drafters and the voters intended the term "proceedings" to encompass the "step" or stage of the process in which individual commissioners cast their votes and thereby decide whether to impose discipline upon a judge as to whom formal proceedings have been commenced. If so, it necessarily follows that that step of the proceedings must be "open to the public." We turn now to an examination of extrinsic "evidence" bearing on this issue.

2. *Interpreting Section 18(j) to Mandate Disclosure of the Votes of Individual Commission Members Effectuates the Intent and Objectives of the Drafters of Proposition 190 and the Voters Who Approved It.*

The commission offers a very simple, straightforward solution to the problem of ambiguity presented by the term "proceedings": that we should simply defer to its interpretation of section 18(j). The commission is, of course, correct that we must give "considerable weight" to its "past or contemporaneous interpretation . . . of its constitutional authority, and of a constitutional provision it is charged with implementing." (*Adams* v. *Commission on Judicial Performance, supra,* 8 Cal.4th at pp. 657-658.) We may also look to the commission's interpretation to help resolve "apparent ambiguities" in the new enactment. (*Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization, supra,* 22 Cal.3d at p. 245.) However, we must also examine "evidence" of the intent of the drafters and the voters who approved Proposition 190, including the ballot arguments prepared for the November 1994 elections. (*Mosk* v. *Superior Court, supra,* 25 Cal.3d at p. 495; *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization, supra,* 22 Cal.3d at pp. 245-246; *In re Quinn, supra,* 35 Cal.App.3d at p. 483; see also *Arcadia Unified School Dist.* v. *State Dept. of Education* (1992) 2 Cal.4th 251, 260 [5 Cal.Rptr.2d 545, 825 P.2d 438] ["The first step in interpreting an ambiguous constitutional provision is to look at the intent of the framers."]; *White* v. *Davis, supra,* 13 Cal.3d 757, 775 [the ballot arguments are the only available " 'legislative history' " for a constitutional amendment enacted by initiative].) After carefully considering these ballot materials and the commission's arguments about the proper construction of section 18(j), we respectfully decline to accept the commission's interpretation because we believe it is clearly erroneous, and because it is at odds with the express intent and objectives of the drafters of Proposition 190 and the voters who approved the constitutional amendments contained therein.

There are several problems with the commission's interpretation. It is, above all, far too grudging. In essence, the commission appears to treat the terms "proceedings" and "hearings" as interchangeable. California courts

have long recognized that the term "proceedings" is broader than the term "hearings." (*Forrest* v. *Trustees of Cal. State University & Colleges* (1984) 160 Cal.App.3d 357, 367 [206 Cal.Rptr. 595]; *Gipe* v. *Superior Court* (1981) 124 Cal.App.3d 617, 625-626 [177 Cal.Rptr. 590], citing *Burns* v. *Superior Court, supra,* 140 Cal. at p. 6.) Indeed, as the *Gipe* court put it, any attempt to equate the two "flies in the face of the ordinary meaning of 'proceedings.' " (124 Cal.App.3d at p. 626.)[12]

The commission's attempt to equate the terms "proceedings" and "hearings" also "flies in the face" of the history of sections 8 and 18. The broad significance of the phrase "all subsequent . . . proceedings" in Proposition 190 and section 18(j) can, perhaps, best be understood by contrasting the new scheme with what it replaced. (See *In re Quinn, supra,* 35 Cal.App.3d at p. 483 [new provisions of the Constitution must be considered with reference to the situation intended to be remedied or provided for]; *Resure, Inc.* v. *Superior Court* (1996) 42 Cal.App.4th 156, 164 [49 Cal.Rptr.2d 354].)

In 1994, in *Adams* v. *Commission on Judicial Performance, supra,* 8 Cal.4th 630, our Supreme Court described the evolution of the system of judicial discipline in California, and in particular the provisions of section 18, as follows: "Prior to the passage, at the November 1988 General Election, of the legislative proposal to amend the constitutional provision, former subdivision (f) of article VI, section 18, provided: 'The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings.' In *Mosk* v. *Superior Court*[, *supra,*] 25 Cal.3d 474 . . . , the court concluded that this former version of subdivision (f) mandated confidentiality of investigations and proceedings before the Commission, and that, accordingly, the Judicial Council did not have the authority to promulgate rules providing for investigations and hearings open to the public. In reaching this conclusion, the court relied upon the language of former section 10b, paragraph (3), of article VI, as adopted by constitutional amendment in November 1960, which expressly provided for the confidentiality of all proceedings before the Commission, and concluded there was no indication 'that the people of California intended to change the constitutional requirement of confidentiality by revision of article VI in 1966 . . . .' (25 Cal.3d at p. 499.)

[12]By asserting that issuance of a "signed" decision on matters it hears after a formal presentation of evidence is not an activity that must be held "open to the public," the commission even takes a narrow, truncated view of what constitutes a "hearing." As our Supreme Court recently noted, that term, too, is ambiguous and is subject to dispute. (*Lewis* v. *Superior Court* (1999) 19 Cal.4th 1232, 1247-1248 [82 Cal.Rptr.2d 85, 970 P.2d 872].) However, a long-standing definition found in the case law encompasses both the information-gathering and *decisional* aspects of such a proceeding: "A 'hearing' is generally understood to be a proceeding where *evidence is taken* to the end of determining an issue of fact *and a decision made* on the basis of that evidence.' " (*People* v. *Pennington* (1967) 66 Cal.2d 508, 521 [58 Cal.Rptr. 374, 426 P.2d 942], italics added.)

"The constitutional provision interpreted in the *Mosk* decision remained unchanged until the November 1988 election. Prior to that election, the Senate resolved, with the Assembly concurring, to propose to the voters that article VI, sections 8 and 18, of the California Constitution, be amended to provide, inter alia, that, under some circumstances, hearings on judicial performance before the Commission could be opened to public scrutiny. (Sen. Const. Amend. No. 6, Stats. 1988 (1987-1988 Reg. Sess.) res. ch. 67, pp. 6115-6116.) The preamble to the legislative resolution proposing the constitutional amendment states: 'WHEREAS, The Legislature finds and declares that maintaining public confidence in the integrity of the judicial system is essential to good government; and [¶] WHEREAS, The Commission on Judicial Performance bears a great public trust which it must currently fulfill in total secrecy; and [¶] WHEREAS, Because responsible public disclosure and accountability is proper, desirable, and consistent with the goal of public confidence, it is the intent of this measure that appropriate commission proceedings be open to public scrutiny, and that this measure be construed so as to accomplish this purpose which is hereby declared to be the public policy of this state . . . .' (*Id.*, at p. 6115.)

"The constitutional amendment was submitted to the voters as Proposition 92 and was approved, effective November 9, 1988. . . . Section 18, subdivision (f), now provides that if, after conducting a preliminary investigation, the Commission by vote determines that formal proceedings should be instituted against a judge, the Commission 'may in the pursuit of public confidence and the interests of justice, issue press statements or releases or, in the event charges involve moral turpitude, dishonesty, or corruption, *open hearings* to the public.' (Art. VI, § 18, subd. (f)(3).)" (*Adams* v. *Commission on Judicial Performance, supra,* 8 Cal.4th at pp. 646-647, fn. omitted, italics added.)

As the *Adams* court explained, the history of the constitutional provisions governing judicial discipline in California shows a trend toward greater openness and less secrecy, and that evolution continues with Proposition 190. (See *Adams* v. *Commission on Judicial Performance, supra,* 8 Cal.4th at pp. 646-647.) The 1988 and 1994 amendments also reflect the growing desire of the voters of California to limit the discretion of those in charge of the machinery of judicial discipline to determine which aspects of the process may be conducted behind closed doors. Thus, the law prior to passage of Proposition 190 *permitted* open "*hearings*" in certain circumstances, while the language of the 1994 amendments *mandates* that "*all . . . proceedings*" subsequent to the filing of formal charges must be "open to the public." (§ 18(j).) This history suggests that the drafters of Proposition 190 purposefully chose the broader term "proceedings" over "hearings," the term

that was being replaced, and meant to maximize the openness of formal disciplinary proceedings of the commission.[13]

The ballot arguments filed in connection with the November 1994 election support our conclusion on this point. A careful examination of those arguments reveals that the primary purposes of Proposition 190 were to *eliminate* secrecy in the commission's formal disciplinary proceedings and to ensure public accountability of the commission for its disciplinary determinations. The proponents of Proposition 190 could not have been more clear about this, as stated in their ballot argument: "Proposition 190 is an important and timely reform measure. Judges are public servants and play a critical role in our society. The public must have confidence and trust in those holding judicial office. PROPOSITION 190 PLACES JUDICIAL DISCIPLINE IN THE HANDS OF A BROAD PANEL OF PUBLIC CITIZENS, JUDGES AND ATTORNEYS AND OPENS ALL FORMAL PROCEEDINGS TO THE PUBLIC JUST AS OTHER STATES HAVE DONE IN RECENT YEARS. *CALIFORNIA MUST ELIMINATE SECRECY AND ENSURE INTEGRITY IN THE DISCIPLINARY PROCESS.*" (Ballot Pamp., argument in favor of Prop. 190 as presented to the voters, Gen. Elec. (Nov. 8, 1994) p. 12, upper case and italics in original.) The ballot argument in favor of Proposition 190 also stated: "Under Proposition 190, the commission would be required to open *all formal proceedings* against judges to the public. Currently, all hearings and commission documents, including the actual charges against the judge, are secret. WITHOUT KNOWLEDGE OF CHARGES OR PROCEEDINGS, THE PUBLIC CANNOT HAVE CONFIDENCE IN THE JUDICIAL SYSTEM." (*Ibid.*, upper case and italics in original.)

Perhaps the most fundamental problem with the commission's approach is that, by adopting rule 102(b) of the Rules of Commission on Judicial Performance, the commission has, in essence, established a sweeping rule of confidentiality with only a few narrow exceptions for aspects of formal disciplinary proceedings that will be held "open to the public." This is precisely the *opposite* of the regime the Legislature and the voters were

[13]Indeed, the formal hearings before the special masters and the commission are not the only "subsequent . . . proceedings" contemplated by section 18 and by the commission's own rules. They are not even the only types of "hearings" the commission is likely to hold. The commission does not explain why it appears to have excluded from the scope of "all subsequent . . . proceedings," all aspects of discovery, the issuance of subpoenas, depositions of witnesses who are unable or cannot be made to appear before the special masters, and any "pre-trial" motions a judge may wish to make, to name a few types of "proceedings" that are not included among the "exceptions" to confidentiality established by rule 102 of the Rules of Commission on Judicial Performance. Obviously, these additional proceedings are not at issue in this case, but we make this point to highlight how narrowly the commission has construed its constitutional mandate for "open" proceedings.

attempting to establish by enacting Proposition 190 and section 18(j).[14] In short, the commission's interpretation cannot be sustained because it cannot be reconciled with the clearly expressed intent to inspire public confidence in the California system of judicial discipline by eliminating the secrecy that shrouded formal disciplinary proceedings in the past.

But the proponents of Proposition 190 did not simply make broad pronouncements of their intent to eliminate secrecy and open judicial disciplinary proceedings to public scrutiny. They also provided some useful guidance as to the procedural model they envisioned for formal judicial discipline by saying: "*Just as we require criminal proceedings and attorney discipline proceedings to be open*, we should also hold judges to the same standard where serious misconduct is at issue." (Ballot Pamp., argument in favor of Prop. 190 as presented to the voters, *supra*, at p. 12, italics added.) That the proponents singled out these two adjudicative systems goes a long way toward persuading us that they, and the voters who approved Proposition 190, intended the commissioners' votes to be "open to the public," at least in the sense of revealing how each individual commissioner voted.[15]

[14]Indeed, the instant case presents the flip side of *Mosk* v. *Superior Court, supra,* 25 Cal.3d 474. In that case, the Supreme Court held that in view of a constitutional provision which then required the Judicial Council to make rules providing for the confidentiality of proceedings, the commission had acted outside its authority by promulgating rules under its discretionary rulemaking authority providing for public hearings in some cases. (*Id.* at p. 499.) Here, by contrast, the commission asks us to find that, despite the enactment of a constitutional mandate that "all . . . proceedings" subsequent to the institution of formal disciplinary proceedings must be open to the public, it may, nevertheless, under its discretionary rulemaking authority, provide for confidential proceedings. Thus, to the extent the commission adopted rule 102(b) of the Rules of Commission on Judicial Performance to compel the confidentiality of the commissioners' individual votes, it acted outside its authority. (See *Mosk* v. *Superior Court, supra,* at p. 499.)

[15]As we have noted, the proponents of Proposition 190 also mentioned approvingly the many other states that have "PLACE[D] JUDICIAL DISCIPLINE IN THE HANDS OF A BROAD PANEL OF PUBLIC CITIZENS, JUDGES AND ATTORNEYS AND OPEN[ED] ALL FORMAL PROCEEDINGS TO THE PUBLIC . . . IN RECENT YEARS." (Ballot Pamp., argument in favor of Prop. 190 as presented to the voters, *supra*, at p. 12.) In its brief and appendices, The Recorder has set forth detailed descriptions of the system of judicial discipline in 10 such states—Georgia, Kansas, Nevada, New York, Oregon, Pennsylvania, Tennessee, Utah, Vermont, and Washington—all of which have attorney and public members, and all of which apparently disclose the individual votes of their members, usually by issuing a signed decision. (See, e.g., Ga. Const., art. VI, § VII, ¶ VI; Rules Ga. Jud. Qualifications Com., rule 14; Kan. Supreme Ct. Rules Jud. Conduct, rules 602, 608, 622; Nev. Const., art. 6, § 21, subd. 2; Rules Nev. Com. Jud. Discipline, rule 7; N.Y. Jud. Law, § 44, subd. 7; Or. Rev. Stat. § 1.420, subd. (3); Pa. Const., art. V, § 18, subd. (b); Tenn. Code Ann. §§ 10-7-503, 17-5-201, 17-5-304, subd. (e); Utah Code Ann. § 78-7-27; Rules Utah Jud. Conduct Com. 595-1-10(h); Vt. State Disciplinary Control Rules 4(1), 6(15), 6(20)(b); Wash. Const., art. IV, § 31, subds. (1), (3), (4); Wash. Rev. Code, § 2.64.020.) The commission contends that The Recorder's survey of the law of these 10 states constitutes a tacit concession that the "overwhelming majority of states have a

In criminal proceedings, whether in the trial court or in the Court of Appeal, California judges always make their decisions and "cast their votes" publicly, with no mask of anonymity.[16] Even jurors, after rendering a verdict, are regularly required to confirm—individually and in open court—that they have indeed voted in support of the verdict. (Pen. Code, § 1163.)[17] We note, however, that the commission is less like a trial court, and more

different procedure," and that "other states whose judicial discipline bodies, like the commission here, do not make a disclosure" of individual votes. (Emphasis in original.) However, the commission provides us with citations regarding only *three* such states—Connecticut, Mississippi, and Missouri. (See *In re Honorable Bruce L. Levin* (Conn. Jud. Review Council, Sept. 21, 1995) 1995 WL 908006; Rules Miss. Com. Jud. Performance, rule 8F, G; Mo. Com. Retirement, Removal and Discipline, Internal Proc. art. VIII.) The foregoing does not conclusively prove the merit of either the commission's or The Recorder's interpretation of section 18(j). It does, however, undercut the commission's argument that disclosing the votes of individual commissioners gravely jeopardizes the integrity of proceedings for judicial discipline. In any event, we need not rely on the laws of other states because we believe the voters of California have spoken quite clearly by approving a measure designed to "eliminate secrecy" in proceedings for judicial discipline.

[16]During the trial court hearing on The Recorder's petition, the commission suggested that the Court of Appeal sometimes issues anonymous decisions by designating an opinion as authored "By the Court." This is simply incorrect. California Rules of Court, rule 23.5 requires attribution of the votes of individual justices on a panel deciding a case in the California Courts of Appeal. That rule provides: "The opinion of a Court of Appeal shall identify the judges participating in the decision, including the author of the majority opinion and of any concurring or dissenting opinion, or the three judges participating when the opinion is designated " 'by the court.' " (*Ibid.*) Thus, although the *author* of a "by the court" opinion may remain anonymous, it is *always* clear that the author (whoever he or she may be) and both of the other named justices all concurred in—i.e., "voted" in agreement with—the opinion. Similarly, our Supreme Court occasionally issues opinions without designating the author, especially in attorney and judicial disciplinary matters. (See, e.g., *In re Wright* (1973) 10 Cal.3d 374 [110 Cal.Rptr. 348, 515 P.2d 292]; *Siegel* v. *Committee of Bar Examiners* (1973) 10 Cal.3d 156 [110 Cal.Rptr. 15, 514 P.2d 967]; *Geiler* v. *Commission on Judicial Qualifications* (1973) 10 Cal.3d 270 [110 Cal.Rptr. 201, 515 P.2d 1].) Indeed, some of the Supreme Court's "Per Curiam" or "By the Court" decisions have not been unanimous. (See e.g., *In re Michael L.* (1985) 39 Cal.3d 81 [216 Cal.Rptr. 140, 702 P.2d 222] [unsigned majority opinion, signed concurring and dissenting opinions by named justices]; *Seaman's Direct Buying Service, Inc.* v. *Standard Oil Co.* (1984) 36 Cal.3d 752 [206 Cal.Rptr. 354, 686 P.2d 1158] [majority opinion unsigned; one opinion concurring and dissenting], overruled on other grounds by *Freeman & Mills, Inc.* v. *Belcher Oil Co.* (1995) 11 Cal.4th 85, 88 [44 Cal.Rptr.2d 420, 900 P.2d 669]; *Stanton* v. *Panish* (1980) 28 Cal.3d 107 [167 Cal.Rptr. 584, 615 P.2d 1372].) It is, nevertheless, always disclosed how each of the participating justices "voted" in each decision.

[17]Of course, there is no authority of which we are aware that a third party has the right to compel jurors to disclose how they voted in a criminal proceeding. By statute, California jurors may be so compelled at the behest of either the defense or the prosecution. (Pen. Code, § 1163.) This right is not one of state or federal constitutional dimension (*People* v. *Masajo* (1996) 41 Cal.App.4th 1335, 1340 [49 Cal.Rptr.2d 234]), and it will be deemed waived if the defendant fails to assert it at trial (*People* v. *Flynn* (1963) 217 Cal.App.2d 289, 294 [31 Cal.Rptr. 651]). However, it is our experience that it is extremely rare—at least in felony prosecutions—for a defendant to fail to request polling and it is, thus, understandable that the occasion for third party intervention rarely, if ever, arises.

closely analogous to an intermediate appellate court such as the Court of Appeal, insofar as it "reviews" decisions of the special masters (Rules Com. Jud. Performance, rules 129-135)[18] subject to further discretionary "review" in the Supreme Court. (See § 18(d); Cal. Rules of Court, rule 935.)

Even more closely analogous to the commission, however, is the State Bar Court.[19] Under Business and Professions Code section 6086.1 and rule 20 of the Rules of Procedure of the State Bar, formal attorney disciplinary proceedings (with certain exceptions) are held in public. Public hearings and trials are conducted before hearing judges (see Rules Proc. of State Bar, rules 2.58, 3.16, 20, 23), with review afforded in the Review Department of the State Bar Court (*id.*, rule 300 et seq.). Decisions of the Review Department—the counterpart of the commission—always identify the participating judges, including the author of the majority opinion and of any concurring or dissenting opinion. (See, e.g., *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657; *In the Matter of Jennings* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 337.) Thus, it is always disclosed how each of the participating State Bar Court judges "voted" in each case.

Like the votes of the judges of this court in criminal cases, or those of State Bar Court judges in attorney discipline cases, the commissioners' votes are the object and culmination of formal disciplinary proceedings against a

We also note the recent enactment of provisions requiring the trial courts to seal identifying information about trial jurors and to maintain the confidentiality of same absent further order of the court. (Code Civ. Proc., § 237; and Cal. Rules of Court, rule 33.6; see also *People* v. *Goodwin* (1997) 59 Cal.App.4th 1084, 1088 [69 Cal.Rptr.2d 576].) However important and effective these new laws may be in protecting the privacy and safety of citizen jurors, they do not apply to publicly appointed members of the commission. Moreover, to the extent there is a "jury" in formal proceedings for judicial discipline in California, that factfinding role is played primarily by the special masters, not commissioners. (See Rules Com. Jud. Performance, rules 121-129.) As the commission itself contends, the "ultimate" responsibility for judicial discipline rests with the commissioners, subject only to review by the Supreme Court when discipline is imposed. Thus, the role of the commissioners is more akin to that played by trial and intermediate appellate court judges in criminal proceedings.

[18]The special masters' decision is rendered in a "final report," which must contain "findings of fact and conclusions of law, along with an analysis of the evidence and reasons for the findings and conclusions, but shall not contain a recommendation as to discipline." (Rules Com. Jud. Performance, rule 129(d).) The respondent judge and/or the examiner may file with the commission a brief containing specific objections to the special masters' report, followed by response and reply briefs, and an opportunity to be heard orally before the commission. (*Id.*, rules 130, 132.) The commission may order the taking of additional evidence. (*Id.*, rule 133; cf. Code Civ. Proc., § 909 [Court of Appeal may take additional evidence on appeal and make additional findings of fact]; Cal. Rules of Court, rules 23 & 41 [procedures for same].) After a "determination" of the commission to impose discipline, the judge may seek review in the Supreme Court. (§ 18(d); Cal. Rules of Court, rule 935.)

[19]Unlike the commission, which originates in the state Constitution (§§ 8, 18), however, the State Bar Court is a creature of statute (see Bus. & Prof. Code, § 6086.5).

judge. They are essential to a valid exercise of the commission's authority, which requires the concurrence of a majority of its members. (Gov. Code, § 68704; Rules Com. Jud. Perf., rule 134.) The commission's final vote represents its " '. . . formal expression of a will, preference, wish or choice . . .' " with respect to imposition of judicial discipline. (See *California School Employees Assn.* v. *King City Union Elementary School* (1981) 116 Cal.App.3d 695, 702 [172 Cal.Rptr. 368].) Indeed, in all these respects, the vote of the membership is *the* most critical step in the commission's proceedings.

Given the broad mandatory language of Proposition 190, the clearly expressed intent of its proponents to eliminate secrecy in formal proceedings for judicial discipline, and the "legislative history" describing the adjudicative model the proponents were seeking to establish, it quite simply defies common sense to suggest that the votes of individual commissioners are not part of the "proceedings" that must, under the express terms of section 18(j), be "open to the public." Accordingly, we conclude that the commission's interpretation of section 18(j) is neither faithful to the language of the constitutional provision, nor " 'reasonable, fair and harmonious with its manifest purpose' " (see *Western Oil & Gas Assn.* v. *Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 425 [261 Cal.Rptr. 384, 777 P.2d 157]), and must be rejected.[20]

[20]For the first time at oral argument, the commission made an argument based on former rule 902 of the California Rules of Court, which provided, in relevant part: "Except as provided in this rule, *all papers filed with and proceedings before* the Commission . . . shall be confidential until a record is filed by the Commission in the Supreme Court." (*Id.*, subd. (a), italics added.) Former rule 902 was first adopted in 1966 (see *Mosk* v. *Superior Court, supra,* 25 Cal.3d at p. 498) and remained in effect until it was repealed in 1996 in response to passage of Proposition 190. Noting that the commission's consistent practice throughout that period was to disclose only numerical vote totals and not to reveal how individual commissioners voted in disciplinary "proceedings," counsel for the commission contended that, by drafting Proposition 190 to include language similar to that of former rule 902, the Legislature must be deemed to have understood the term "proceedings" to exclude the commissioners' voting practices. The commission has waived this argument by failing to raise it in its opening or reply briefs. (*Stevenson* v. *Baum* (1998) 65 Cal.App.4th 159, 167 [75 Cal.Rptr.2d 904]; *Chatterjee* v. *Kizer* (1991) 231 Cal.App.3d 1348, 1366, fn. 4 [283 Cal.Rptr. 60].) Even assuming it was not waived, however, we do not find this argument particularly enlightening. Whatever the meaning of the term "proceedings" in 1966 when the commission had no authority to hold public investigations or hearings (see *Mosk* v. *Superior Court, supra,* 25 Cal.3d at pp. 499-500), and even as late as 1994 when the commission was authorized to conduct public "hearings" in limited circumstances (see *Adams* v. *Commission on Judicial Performance, supra,* 8 Cal.4th at p. 647), the presumption of confidentiality that previously attached to all commission "proceedings" and "hearings" has now been reversed for "all . . . proceedings" in cases of formal discipline (§ 18(j)). As we have discussed, the drafters of Proposition 190 and the voters who approved it clearly expressed their intent to "eliminate secrecy" in our system of formal judicial discipline and to open all formal disciplinary

3. *Interpreting the Term "Proceedings" in Section 18(j) to Require Disclosure of the Votes of Individual Members Will Not Produce "Harmful" or "Absurd" Consequences.*

The commission issues dire warnings about the dangers of requiring public disclosure of the individual commissioners' votes, contending that *only* its interpretation of section 18(j) can ensure integrity in judicial disciplinary proceedings. It claims it must be allowed to continue its "long-standing historical practice" of secret voting because, otherwise, commissioners will be subject to political pressure and (especially with respect to the attorney members) retaliation by the judges who have been or may be called to appear before it. We will not dignify the latter suggestion with any extended discussion. As to political pressure, however, we fail to see how allowing the commissioners to act anonymously promotes, much less guarantees, integrity in the process. On the contrary, if the public is not allowed to see how the individual appointees are dispensing judicial discipline, it will be unable to determine what, if any, political pressure might be at work, or the sources of that pressure. Moreover, while the voters do not have direct control over who serves on the commission, they expressly reserved to themselves a fair measure of indirect control over commission membership insofar as a majority of the commissioners are now appointed by elected officials who must answer to the voters for, inter alia, their appointments to the commission and the conduct of their appointees.[21] Denying public access to full information about the commission's disciplinary decisions deprives the voters of an "ability to understand how the system operates and, in turn, its ability [to] make informed decisions regarding the need for positive changes to the system . . . ." (*San Bernardino County Dept. of Public Social Services* v. *Superior Court* (1991) 232 Cal.App.3d 188, 203 [283 Cal.Rptr. 332].)

The commission further suggests that the voters acted to open up formal disciplinary proceedings *only* because they were concerned with California judges' domination of their own disciplinary apparatus. The proponents of Proposition 190 did, of course, state that a chief purpose of the measure was to "eliminate judicial domination of the commission in favor of a public majority," and that "A PUBLIC MAJORITY WILL ENSURE A FAIR AND FIRM SYSTEM OF JUDICIAL DISCIPLINE." (Ballot Pamp., argument in favor of Prop.

proceedings to the public as the California courts do in criminal cases and the State Bar Court does in attorney discipline proceedings. It is, thus, immaterial that the commission has in the past narrowly construed its obligations to open its proceedings to public view.

[21]As The Recorder points out, without identifying how individual commissioners vote, it is impossible to know whether they are even showing up for work or whether members have (or should have) disqualified themselves for some reason. The vote tally in the Velasquez matter, and the change therein, suggests both problems, but there is no way to clarify what happened.

190 as presented to the voters, *supra*, at p. 12, upper case in original.) Obviously, however, they accomplished that objective by amending section 8(a), not section 18(j). Indeed, had elimination of judicial domination been the proponents' only objective, they could have cured that problem by changing the composition of the panel—to provide a majority of public members—without dispensing with the absolute "confidentiality" of all "proceedings" discussed in *Mosk* v. *Superior Court, supra,* 25 Cal.3d 474, or the more limited "confidentiality" for "hearings" at issue in *Adams* v. *Commission on Judicial Performance, supra,* 8 Cal.4th 630.

The commission has also claimed it will be difficult to find citizens willing to serve if prospective commissioners know their votes will be publicly disclosed. This is, however, a bald claim without support in the record. In any event, we fail to see the merit of a system in which public officials, sitting in judgment of other public officials regarding charges of official misconduct, are allowed to hide behind a veil of secrecy when making the "tough calls" necessary to any adjudicatory regime. A certain amount of courage and a "thick skin" are essential attributes for anyone who purports to perform "judicial" functions. We should expect, and accept, no less from members of the commission. (Cf. *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, 273 [84 S.Ct. 710, 722, 11 L.Ed.2d 686, 95 A.L.R.2d 1412] ["If judges are to be treated as 'men [and women] of fortitude, able to thrive in a hardy climate,' . . . surely the same must be true of other government officials, such as elected city commissioners."].)

Finally, the commission contends that interpreting the term "proceedings" in section 18(j) to require disclosure of the votes of individual members leads inexorably to the "absurd result" that its "deliberations" (and even those of the Supreme Court upon review of commission decisions) must also be conducted in public. The commission reasons that deliberations and voting are "dual components of the collective decision-making process" (*Sacramento Newspaper Guild* v. *Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 47 [69 Cal.Rptr. 480]), and that, if we hold that voting is part of the formal "proceedings" of the commission, there is no way to draw a line to shield its deliberations from public disclosure. The commission warns that The Recorder is, thus, seeking to "intrude into the judge's chamber and witness the deliberations of the justices," to observe "the deliberations and votes of the jury," and to " 'sit at the table' during the [c]ommission's deliberations."

The commission's argument on this point is vastly overstated. Indeed, we agree with the commission that it would be "absurd" to interpret the term "proceedings," as used in section 18(j), to include its deliberations. Unlike

the commission, however, we believe there is a principled way to define those "proceedings" that must be held "open to the public" to include the vote of the commissioners, but to exclude the deliberative process that produces those votes.

The argument that the term "proceedings" includes the "deliberations" of the commission is easily dispatched by reference to the "natural and ordinary meaning" (*In re Quinn, supra,* 35 Cal.App.3d at p. 482) of the term "proceedings" as generally understood when section 18(j) was enacted, and as intended by the proponents of Proposition 190. At the risk of sounding repetitious, the point is that when the commission acts in an adjudicatory capacity—as it does when it conducts "formal proceedings" for judicial discipline—the proponents of Proposition 190 intended the commission to conduct its formal "proceedings" as a court does in a criminal case and as the State Bar Court does in attorney discipline cases. It was and is widely understood that internal "deliberations" of American and California courts are, and always have been, conducted in secrecy and that the "judicial thought process" need not be disclosed to the public. Likewise, the *deliberations* of the judges of the State Bar Court are excluded from the provision requiring all State Bar Court proceedings to be public. (Rules Proc. of State Bar, rule 24.)[22]

There are, of course, good and sufficient reasons for secret deliberations in each of these settings.[23] As Professor Laurence Tribe has observed, protecting the confidentiality of "judicial" deliberations is "vitally needed to

[22]Similarly, although state administrative agencies subject to the Administrative Procedure Act are required to conduct their "adjudicative proceedings" openly (Gov. Code, §§ 11120, 11425.10, subd. (a)(3), 11425.20, 54950), the agency may conduct its deliberations in private (*id.,* § 11126, subd. (c)(3); and see Cal. Law. Revision Com. com., 32C West's Ann. Gov. Code, § 11425.20 (1998 pocket supp.) p. 94). Of course, thereafter, the agency's decision must be filed as a public record (Gov. Code, § 11517, subd. (e)), and must contain a written statement of the factual and legal basis for the decision (Cal. Law Revision Com. com., 32C West's Ann., Gov. Code, §§ 11425.10, subd. (a)(6), 11425.50, subd. (a)). One commentator has noted that the "vote" of the agency is not generally included in the decision because there is no specific statutory provision requiring such disclosure. (Cal. Administrative Hearing Practice (Cont.Ed.Bar 1997) § 8.31, p. 384.) However, a quick survey of case reporters from state administrative agencies reveals that many—including the Public Employment Relations Board, the Workers' Compensation Appeals Board, and the Public Utilities Commission—do, in adjudicatory matters, identify the participating commissioners, and identify the author of the panel's opinion and any dissenting, concurring, or nonparticipating members.

[23]As we have noted, we express no opinion about the scope of the term "papers," as used in section 18(j). We note, however, that it is a fairly simple matter to draw a line between "deliberative" written work product of a court or other adjudicatory body (draft decisions, memoranda, notes, or other critical analyses exchanged between and among adjudicators for the purpose of reaching a decision), and the opinion filed in a given case. Only the latter "speaks for" and constitutes the official "action" of the adjudicatory body. (*Copley Press, Inc.* v. *Superior Court* (1992) 6 Cal.App.4th 106, 114 [7 Cal.Rptr.2d 841].)

encourage collegiality, candor, and courage—both political and intellectual—protection needed not for the benefit of judges but for the benefit of society as a whole." (Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation*? (1979) 65 A.B.A. J. 1175, 1179.) Similarly, California courts have recognized the critical importance of allowing state administrative agencies, when acting in an adjudicative capacity, "to review the evidence before it, to exchange views and to deliberate thereon under conditions conducive to calm, orderly and frank discussion." (*California State Employees' Assn.* v. *State Personnel Bd.* (1973) 31 Cal.App.3d 1009, 1011-1013 [108 Cal.Rptr. 57].) We agree with the commission when it claims the same values are at stake when it deliberates to evaluate the evidence and legal arguments in a formal, adjudicatory proceeding for judicial discipline.[24]

In sum, then, we conclude the vote of the individual members is an integral part of the "proceedings" of the commission that must be "open to the public" in any case in which the commission determines to initiate formal disciplinary proceedings against a California judge. (§ 18(j).) Thus, the commission had no discretion to withhold from "the public" information about how the individual commissioners voted, and the trial court did not err by issuing a writ of mandamus to compel its release.[25]

[24]The commission's reliance on "open meeting" cases such as *Sacramento Newspaper Guild* v. *Sacramento County Bd. of Suprs., supra,* 263 Cal.App.2d 41, is misguided. "[T]he term 'meeting,' as used in the Brown Act ([Gov. Code,] §§ 54950, 54953), is not limited to gatherings at which action is taken by the relevant legislative body; 'deliberative gatherings' are included as well. [Citation.] Deliberation in this context connotes not only collective decisionmaking, but also 'the collective acquisition and exchange of facts preliminary to the ultimate decision.' [Citations.]" (*Frazer* v. *Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 794 [22 Cal.Rptr.2d 641]; *Sacramento Newspaper Guild* v. *Sacramento County Bd. of Suprs., supra,* 263 Cal.App.2d at p. 48.) However, the commission is expressly exempt from the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.), and that just drives home the point that the constitutional amendments enacted by Proposition 190 might have been—but were not—cast as "open *meeting*" laws. By requiring only the formal "proceedings" of the commission to be "open to the public," the Legislature and the voters undoubtedly understood they were dealing with an adjudicatory system—an apparatus for "judging" the judges of California—and not with an ordinary state or local administrative agency that conducts "meetings" to perform a variety of "legislative" *and* "judicial" or "quasi-judicial" functions.

[25]The commission appears to object to issuance of mandamus on the ground that the courts are thereby requiring it to account for the individual votes in the Velasquez matter and create a record of individual votes in future cases. The commission suggests it has discretion with respect to the creation and maintenance of such information. This objection rings hollow because the commission has imposed upon itself a *mandatory* duty to "maintain records of all *actions taken* by the commission concerning a judge." (Rules Com. Jud. Performance, rule 135.)

## III. DISCUSSION—APPEAL NO. A080466*

. . . . . .

## IV. CONCLUSION

For all the foregoing reasons the judgment of the trial court, including the order granting The Recorder's motion for attorney fees, is affirmed. The Recorder shall recover its costs on appeal, including reasonable attorney fees in an amount to be determined by the trial court on remand. (*Schmid* v. *Lovette* (1984) 154 Cal.App.3d 466, 480 [201 Cal.Rptr. 424].)

Corrigan, Acting P. J., and Walker, J., concurred.

*See footnote, *ante*, page 258.

[No. B201251. Second Dist., Div. One. Oct. 29, 2007.]

COMMISSION ON JUDICIAL PERFORMANCE, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
ERIC DAVIDSON, Real Party in Interest.

## SUMMARY

The trial court directed the Commission on Judicial Performance to produce, for an in camera hearing, a judge's statements to the commission in response to a criminal defendant's complaint about the judge's handling of a motion to suppress evidence. The complaint about the judge did not lead to public formal proceedings. The criminal case was assigned to another judge, who presided over a jury trial that resulted in a conviction. A new trial motion was filed, along with a *Pitchess* motion and a subpoena duces tecum seeking information from the commission about any statements made by the first judge in response to the commission's investigation of the complaint. The commission sought mandate relief. (Superior Court of Los Angeles County, No. SA052588, Antonio Barreto, Jr., Judge.)

The Court of Appeal granted the commission's petition and issued a peremptory writ of mandate commanding the trial court to vacate its order and to issue new orders denying the *Pitchess* motion and quashing the subpoena duces tecum. The court held that the commission's records are confidential and are not subject to discovery by means of a *Pitchess* motion or a subpoena duces tecum. Evid. Code, § 1040, prohibits the disclosure of confidential official records unless the need for disclosure outweighs the necessity for preserving the confidentiality of the information sought. The commission's records qualify for the official records privilege under § 1040. Moreover, as provided in Rules of Com. on Jud. Performance, rule 102, all nonpublic papers and proceedings of the commission are absolutely confidential except as stated in that rule. The rule contains no exception permitting disclosure to a trial court for in camera review or at all. (Opinion by Vogel, Acting P. J., with Rothschild, J., and Jackson, J.,* concurring.)

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

(1) **Witnesses § 16.3—Privileged Relationships and Communications—Official Information—Criminal Cases.**—Even upon a showing of good cause, the right of an accused to obtain discovery is not absolute and, in criminal cases, the trial court has wide discretion to protect against the disclosure of information that might unduly hamper the prosecution or violate some other legitimate governmental interest. When the accused seeks discovery of official information (typically complaints made to a law enforcement agency about its officers), the official information privilege created by Evid. Code, § 1040, represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy.

(2) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Confidential Investigation.**—The Commission on Judicial Performance is a constitutional body vested with the ultimate power to censure, remove, or retire judges, after which the judge may petition the Supreme Court for review of the commission's decision (Cal. Const., art. VI, §§ 8, 18, subd. (d)). More specifically, Cal. Const., art. VI, § 18, subds. (i)(1), (j) give the commission the power to make rules for the investigation of judges, which rules may provide for the confidentiality of complaints to and investigations by the commission provided only that, when the commission institutes formal proceedings, the notice of charges, the answer, and all subsequent papers and proceedings are open to the public for all formal proceedings.

(3) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Confidential Investigation.**—Rules of Com. on Jud. Performance, rule 102, provides that, except as stated in the rule, all nonpublic papers and proceedings are absolutely confidential.

(4) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Confidential Investigation—Exceptions to Confidentiality.**—If public reports concerning a proceeding of the Commission on Judicial Performance result in substantial unfairness to the judge involved in the proceedings, the commission may issue a statement of clarification (Rules of Com. on Jud. Performance, rule 102(d)). Upon completion of an investigation, the commission may disclose to the complainant that it has found no basis for action, or determined not to proceed, or taken appropriate corrective action, the nature of which shall not be disclosed, or has publicly admonished, censured, removed, or retired the judge (rule 102(e)). When the commission receives information concerning a threat to the safety of any person, that information

may be provided to the person threatened and to law enforcement (rule 102(f)). Information revealing possible criminal conduct by a judge or former judge may be released to prosecuting authorities (rule 102(g)). When a judge or former judge consents to the release of records to a public entity, those records may be released (rule 102(h)). Upon written request, information may be disclosed to appointing authorities (rule 102(i), (j)). There may be limited disclosure to the State Bar and the Chief Justice about retired judges, and to presiding judges about incapacitated judges and about subordinate judicial officers who are the subject of complaints (rule 102(k), (l), (m), (n)).

(5) **Judges § 6.4—Removal, Censure, and Other Discipline—Proceedings—Confidential Investigation.**—There is no exception in Rules of Com. on Jud. Performance, rule 102(d), permitting disclosure to a trial court for in camera review or at all.

(6) **Witnesses § 16.3—Privileged Relationships and Communications—Official Information—Confidential Investigation of Judicial Conduct.**—The *Pitchess* standards do not apply to the Commission on Judicial Performance. Evid. Code, § 1040, represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy, and § 1040 makes it clear that the commission qualifies for the official records privilege. Case law has not applied the relatively relaxed *Pitchess* standards of discoverability to anything other than law enforcement personnel records where the privacy rights of individual officers in the contents of their personnel files must be balanced against a criminal defendant's ability to prepare his or her defense. Even under *Pitchess*, § 1040 prohibits the disclosure of confidential official records unless the need for disclosure outweighs the necessity for preserving the confidentiality of the information sought.

(7) **Witnesses § 16.3—Privileged Relationships and Communications—Official Information—Confidential Investigation of Judicial Conduct.**—The records of the Commission on Judicial Performance are confidential and are not subject to discovery by means of a *Pitchess* motion or subpoena duces tecum. Consequently, the trial court erred in ordering the commission to produce, for an in camera hearing, a judge's statements to the commission in response to a criminal defendant's complaint about the judge's handling of a motion to suppress evidence.

[Cal. Forms of Pleading and Practice (2007) ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.81; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 50 et seq.; 2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 246.]

## COUNSEL

Andrew Blum for Petitioner.

No appearance for Respondent.

No appearance for Real Party in Interest.

## OPINION

**VOGEL, Acting P. J.**—A few months after Eric Davidson was charged with four felony counts, the trial court (Hon. Keith L. Schwartz) denied his pro se motion to suppress evidence. (Pen. Code, § 1538.5.) In response, Davidson complained to the Commission on Judicial Performance about Judge Schwartz. The case was thereafter assigned to another judge (Hon. Antonio Barreto, Jr.) who presided over a jury trial at which Davidson was convicted as charged. Davidson moved for a new trial, filed a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305]) in which he sought information from the Commission on Judicial Performance about all complaints filed against Judge Schwartz, and served a subpoena duces tecum on the Commission ordering it to produce the same information.[1] Over the Commission's objection that the requested records are confidential, the trial court denied the Commission's motion to quash the subpoena and ordered it to produce for an in camera hearing "any declaration or statement made by Judge Schwartz in response to [any] inquiry made by [the] Commission [in response to Davidson's] complaint about Judge Schwartz."

In response to the Commission's petition for a writ of mandate, we stayed the trial court's order and issued a *Palma* notice (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180 [203 Cal.Rptr. 626, 681 P.2d 893]) to advise the parties we were considering the issuance of a peremptory writ in the first instance (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240–1241 [82 Cal.Rptr.2d 85, 970 P.2d 872]). No opposition was received, and we now

[1] Davidson was convicted of two counts of possessing a forged driver's license, and two counts of unlawfully using personal identification, charges that arose out of a traffic stop. Davidson claims there never was a traffic offense, and that Judge Schwartz conspired with the arresting officer and the prosecutor to facilitate a sham trial (by denying Davidson's motion to suppress evidence).

issue the writ as prayed, explaining that the Commission's nonpublic records are not subject to a *Pitchess* motion.[2]

## DISCUSSION

### A.

**(1)** In *Pitchess v. Superior Court, supra,* 11 Cal.3d at pages 538, 540, our Supreme Court explained that, even upon a showing of good cause, the right of an accused to obtain discovery is not absolute and that, in criminal cases, the trial court has wide discretion to protect against the disclosure of information that might unduly hamper the prosecution or violate some other legitimate governmental interest. When the accused seeks discovery of official information (typically complaints made to a law enforcement agency about its officers), the official information privilege created by Evidence Code section 1040 represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy.

As relevant to the Commission on Judicial Performance, Evidence Code section 1040 provides: "(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made. [¶] (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or [¶] (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . . . In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

### B.

**(2)** The Commission on Judicial Performance is a constitutional body vested with the ultimate power to censure, remove, or retire judges, after which the judge may petition the Supreme Court for review of the Commission's decision. (Cal. Const., art. VI, §§ 8, 18, subd. (d).) More

[2] It is clear from the reporter's transcript of the hearing at which the order was made that the parties understood this petition would be filed and presumed the record made in the trial court would be sufficient to present both sides of the issue. It is.

specifically, subdivisions (i)(1) and (j) of section 18 of article VI of the California Constitution give the Commission the power to make rules for the investigation of judges, which rules "may provide for the confidentiality of complaints to and investigations by the commission" provided only that, when the Commission institutes formal proceedings, the notice of charges, the answer, and all subsequent papers and proceedings are open to the public for all formal proceedings.[3] (See *The Recorder v. Commission on Judicial Performance* (1999) 72 Cal.App.4th 258, 262–263 [85 Cal.Rptr.2d 56].)

The confidentiality of the Commission's investigations is based on sound public policy. Confidentiality encourages the filing of complaints and the willing participation of citizens and witnesses by providing protection against possible retaliation or recrimination. It protects judges from injury which might result from the publication of unexamined and unwarranted complaints by disgruntled litigants or their attorneys, or by political adversaries, and preserves confidence in the judiciary as an institution by avoiding premature announcement of groundless claims of judicial misconduct or disability. Confidentiality is essential to protecting the judge's constitutional right to a private admonishment if the circumstances so warrant, and when removal or retirement is justified by the charges, judges are more likely to resign or retire voluntarily without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided. Leading writers have recognized that confidentiality of investigations and hearings by the Commission is essential to its success. (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 491–492 [159 Cal.Rptr. 494, 601 P.2d 1030]; see *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 646–648 [34 Cal.Rptr.2d 641, 882 P.2d 358].)

**(3)** To these ends, the Commission's rule 102 provides that, except as stated in that rule, all nonpublic papers and proceedings are absolutely confidential.[4] **(4)** These are the exceptions: If public reports concerning a Commission proceeding result in substantial unfairness to the judge involved in the proceedings, the Commission may issue a statement of clarification. (Rule 102(d).) Upon completion of an investigation, the Commission may disclose to the complainant that it has found no basis for action, or determined not to proceed, or taken appropriate corrective action, "the nature of which shall not be disclosed," or has publicly admonished, censured, removed, or retired the judge. (Rule 102(e).) When the Commission receives information concerning a threat to the safety of any person, that information may be provided to the person threatened and to law enforcement. (Rule 102(f).) Information revealing possible criminal conduct by a judge or former judge may be released to prosecuting authorities. (Rule 102(g).) When a

[3] There have been no public formal proceedings involving Judge Schwartz.

[4] All rule references are to the Rules of the Commission on Judicial Performance.

judge or former judge consents to the release of records to a public entity, those records may be released. (Rule 102(h).) Upon written request, information may be disclosed to appointing authorities (governors, the President, the Commission on Judicial Appointments). (Rule 102(i), (j).) There may be limited disclosure to the State Bar and the Chief Justice about retired judges, and to presiding judges about incapacitated judges and about subordinate judicial officers who are the subject of complaints. (Rule 102(k), (l), (m), (n).)

**(5)** None of these exceptions apply here, and there is no exception permitting disclosure to a trial court for in camera review or at all.

**C.**

Davidson's *Pitchess* motion and subpoena duces tecum asked for all sustained complaints alleging that Judge Schwartz had engaged in any acts of judicial misconduct, including but not limited to the complaint Davidson himself had submitted to the Commission, plus the names and addresses of all the complaining parties, and the "full record of discipline imposed on Judge Schwartz as the result of any and all investigations resulting from any such sustained complaints of alleged judicial misconduct." Two hearings were held at which the trial court (Judge Barreto) viewed the Commission's records as relevant because there "might be a declaration from Judge Schwartz himself" that might "constitute an admission that the ruling [o]n the [Penal Code section] 1538.5 motion was based upon evidence outside of the record of [that] motion."

The trial court overruled the Commission's objection to an in camera review, and ordered it to disclose to the court under seal "any statement or declaration of Judge Schwartz [made in response to an inquiry by the Commission about Davidson's complaint] so that [the trial court could] review same to see if there's anything discoverable using the type of *Pitchess* rationale, whether or not there's anything that might be favorable to the defense in [its] effort to seek a new trial." The trial court acknowledged Judge Schwartz's right to be informed when and if disclosure was ordered, but held that he need not be notified about the court's proposed in camera review.

**D.**

**(6)** *Pitchess* does not apply to the Commission on Judicial Performance.

First, Evidence Code section 1040 represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy (*Pitchess v. Superior Court, supra,* 11 Cal.3d at

p. 540), and Evidence Code section 1040 makes it clear that the Commission qualifies for the official records privilege.

Second, we know of no case applying the "relatively relaxed" *Pitchess* standards of discoverability to anything other than law enforcement personnel records where the privacy rights of individual officers in the contents of their personnel files must be balanced against a criminal defendant's ability to prepare his defense. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1473 [6 Cal.Rptr.3d 138]; *People v. Mooc* (2001) 26 Cal.4th 1216, 1219–1220 [114 Cal.Rptr.2d 482, 36 P.3d 21]; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81–84 [260 Cal.Rptr. 520, 776 P.2d 222].) Even under *Pitchess*, Evidence Code section 1040 prohibits the disclosure of confidential official records unless the need for disclosure outweighs the necessity for preserving the confidentiality of the information sought. (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 123–125 [130 Cal.Rptr. 257, 550 P.2d 161], overruled on another ground in *People v. Holloway* (2004) 33 Cal.4th 96, 131 [14 Cal.Rptr.3d 212, 91 P.3d 164]; *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1126 [97 Cal.Rptr.2d 439].)

Third, a rule allowing discovery of the Commission's nonpublic records would encourage mischief without a concomitant benefit to a criminal defendant. No prescience is needed to foresee the flood of unfounded complaints that would follow our endorsement of the trial court's unprecedented extension of *Pitchess*. Any defendant could then submit a real or imagined complaint to the Commission, after which he could demand disclosure of any document provided by the judge in response to the Commission's inquiry about the complaint—thereby making a mockery of the rationale for the Commission's confidentiality rules (to encourage willing participation by witnesses, candor by judges, and to protect judges from the injury that might result from the publication of unexamined and unwarranted complaints by disgruntled litigants or their attorneys, all of which are essential to the Commission's success). (*Mosk v. Superior Court, supra,* 25 Cal.3d at pp. 491–492.)

Fourth, the order directing the Commission to produce any statements made by Judge Schwartz accomplishes indirectly that which Davidson cannot do directly—that is, question Judge Schwartz about his thought processes in reaching his decision to deny Davidson's motion to suppress evidence. (Cf. *Chicago, B. & Q. Ry. Co. v. Babcock* (1907) 204 U.S. 585, 593 [51 L.Ed. 636, 27 S.Ct. 326] [jurors cannot be called, even on a motion for a new trial

in the same case, to testify to the motives and influences leading to their verdict]; *United States v. Morgan* (1941) 313 U.S. 409, 422 [85 L.Ed. 1429, 61 S.Ct. 999].)[5]

Fifth, courts in other states with similar commissions have rejected attempted encroachments into their confidentiality rules. (E.g., *Garner v. Cherberg* (1988) 111 Wn.2d 811 [765 P.2d 1284, 1288] [quashing state Legislature's subpoena duces tecum issued to the Commission on Judicial Conduct, finding that confidentiality of the commission's process was "essential to the preservation of fundamental judicial independence"]; *Matter of Stern v. Morgenthau* (1984) 62 N.Y.2d 331 [476 N.Y.S.2d 810, 465 N.E.2d 349, 353] [quashing grand jury's subpoena to state's Commission on Judicial Conduct, notwithstanding that discovery was in furtherance of a criminal investigation involving two judges because the "responsibilities of the Commission . . . transcend the criminal prosecution of individuals"].)

Finally, the trial court's in camera review is just as improper as disclosure to Davidson. Because the Commission's records are not discoverable by means of a *Pitchess* motion, any in camera review would be a wasted effort. More to the point, the superior court judge presiding over the proceedings in which the Commission's confidential records are requested has no more right to see the Commission's records than does any other member of the public. (But see Evid. Code, § 915, subd. (b).)

**(7)** For these reasons, we conclude the Commission on Judicial Performance's records are confidential and are not subject to discovery by means of a *Pitchess* motion or subpoena duces tecum. (See *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1313–1315 [96 Cal.Rptr.2d 264] [a criminal defendant's discovery rights apply to the prosecution and agencies considered a part of the prosecution team, not to third parties].)

## DISPOSITION

The petition is granted, and a peremptory writ of mandate shall issue commanding the trial court to vacate its order of July 23, 2007, and issue new orders denying Davidson's *Pitchess* motion and quashing the subpoena duces

[5] When the Commission initiates an investigation, the judge is required by statute to provide information. (Gov. Code, § 68725; rule 104(a).) It stands to reason that the typical response to a charge of misconduct would include an explanation for the judge's reasoning, to make it clear why he did what he did.

tecum served on the Commission on Judicial Performance. Our stay is dissolved, effective on the day this opinion becomes final.

Rothschild, J., and Jackson, J.,* concurred.

On November 9, 2007, the opinion was modified to read as printed above.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

# COMMISSION ON JUDICIAL PERFORMANCE
# PRIVATE DISCIPLINE SUMMARIES

Private admonishments are categorized by year. To access a particular year, click on the listing for that year in the table of contents.

Advisory letters are categorized by misconduct type with the most recent cases listed first. If a case involved more than one type of misconduct, it may be listed in the More Than One Type of Misconduct category. To access a particular misconduct type, click on the listing for that misconduct in the table of contents.

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# Private Admonishments

## 2020

The judge initiated an improper ex parte communication with an individual with an interest in a matter. In a separate matter, the judge improperly barred a witness from consulting with counsel before the witness testified under oath in a proceeding. In that matter, the judge also made remarks reflecting embroilment. In another matter, the judge improperly instructed an attorney to stop filing peremptory challenges in a particular type of case. (Ann. Rept. (2020), Private Admonishment 1, p. 54.) [Bias/appearance of bias not directed toward a particular class; Disqualification/disclosure/post-disqualification conduct; Ex parte communications; Failure to ensure rights.]

In infraction matters, the judge accepted pleas without advising the parties of their right to confront their accuser and their privilege against self-incrimination, and without calling their cases, although the parties had been ordered to appear in court. The judge's misconduct was aggravated by prior discipline. (Ann. Rept. (2020), Private Admonishment 2, p. 54.) [Failure to ensure rights.]

The judge made false statements to litigants that tended to harm public confidence in the integrity and impartiality of the judiciary. (Ann. Rept. (2020), Private Admonishment 3, p. 54.) [Bias/appearance of bias not directed toward a particular class; Demeanor/decorum; On-bench abuse of authority in performance of judicial duties.]

The judge used the judge's court email, which included the judge's judicial title, to advance a personal interest. (Ann. Rept. (2020), Private Admonishment 4, p. 54.) [Off-bench abuse of office/misuse of court information.]

The judge inadvertently used the judge's court email to communicate with opposing parties in a matter over which the judge did not preside. In part, the judge acted as a mediator by seeking to facilitate an agreement between the parties. In part, the judge engaged in the practice of law by acting as an advocate on behalf of one of the parties. (Ann. Rept. (2020), Private Admonishment 5, p. 54.) [Miscellaneous off-bench conduct.]

In a civil case, the judge misused the contempt power, engaged in improper ex parte communication, and abused the judge's authority by recalling the case three times when no issue was pending before the court. The judge also elicited testimony from one of the parties in the absence of the other party, and instructed one party to report the other party's conduct to law enforcement. (Ann. Rept. (2020), Private Admonishment 6, p. 54.) [Abuse of contempt/sanctions; Ex parte communications; Failure to ensure rights; On-bench abuse of authority in performance of judicial duties.]

During a campaign for judicial office, the judge engaged in violations of the Political Reform Act. (Ann. Rept. (2020), Private Admonishment 7, p. 54.) [Improper political activities.]

During a campaign for judicial office, the judge engaged in violations of the Political Reform Act. (Ann. Rept. (2020), Private Admonishment 8, p. 54.) [Improper political activities.]

The judge maintained an email account and social media accounts with identifying information that cast doubt on the judge's capacity to act impartially. The judge posted a comment on social media that constituted an improper use of the judge's title and position to promote the pecuniary interest of another. The judge's misconduct was aggravated by prior discipline. (Ann. Rept. (2020), Private Admonishment 9, p. 54.) [Bias/appearance of bias not directed toward a particular class; Improper business, financial or fiduciary activities.]

## 2019

The judge improperly questioned an attorney about a peremptory challenge, engaged in conduct that appeared retaliatory and reflected embroilment, and failed to recuse when required. The judge also made discourteous remarks (some of which included profanity) in several cases, some of which involved pro per litigants. The judge also made comments that gave the appearance of prejudgment. (Ann. Rept. (2019), Private Admonishment 1, p. 34.) [Demeanor/decorum; Disqualification/disclosure/post-disqualification conduct.]

The judge made discourteous comments about a criminal defense attorney that could reasonably be expected to impair the attorney-client relationship. The judge threatened to incarcerate an attorney without a legal basis, and made comments that conveyed the appearance of bias. (Ann. Rept. (2019), Private Admonishment 2, p. 34.) [Abuse of contempt/sanctions; Bias/appearance of bias not directed toward a particular class; Demeanor/decorum.]

In several matters, the judge made discourteous comments to attorneys and litigants, and, in one matter, improperly injected the judge's personal experience. The judge's misconduct was aggravated by prior discipline. (Ann. Rept. (2019), Private Admonishment 3, p. 34.) [Demeanor/decorum.]

The judge engaged in improper ex parte communications with a criminal defendant and with a criminal defendant's attorney. The judge also spoke with a criminal defendant outside the presence of the defendant's counsel. In aggravation, the judge was previously disciplined for similar misconduct. (Ann. Rept. (2019), Private Admonishment 4, p. 34.) [Ex parte communications; Failure to ensure rights.]

In numerous matters involving pro per litigants, the judge wrote discourteous, gratuitous comments on form orders. The judge also improperly threatened sanctions. The judge also failed to respect and comply with the law while engaging in off-bench misconduct in the courthouse. (Ann. Rept. (2019), Private Admonishment 5, p. 34.) [Abuse of contempt/sanctions; Demeanor/decorum; Miscellaneous Off-bench conduct.]

## 2018

The judge failed to provide a party with notice and an opportunity to be heard on a motion, despite counsel informing the judge that there had not been proper notice. In a separate matter, the judge made a sarcastic remark about an attorney. The judge's misconduct was aggravated by prior discipline. (Ann. Rept. (2018), Private Admonishment 1, p. 27.) [Demeanor/decorum; Failure to ensure rights.]

The judge failed to exercise diligence in monitoring social media associated with the judge's name. The judge disregarded court directives regarding the setting of hearings and inappropriately handled a business transaction on the court's behalf. The judge made undignified remarks of an overly personal nature to a member of court staff. The judge engaged in a private conversation with an attorney that created the appearance of impropriety. (Ann. Rept. (2018), Private Admonishment 2, p. 27.) [Administrative malfeasance/improper comments, treatment of colleagues and staff; Demeanor/decorum; Ex parte communications; Improper political activities; Off-bench abuse of office/misuse of court information.]

The judge improperly accepted gifts from an attorney, and failed to make proper disclosure of one of the gifts on the judge's FPPC Form 700. The judge also failed to disclose certain contacts with that attorney. The judge failed to disclose or disqualify when two other attorneys with whom the judge had personal relationships appeared before the judge. (Ann. Rept. (2018), Private Admonishment 3, p. 27.) [Disqualification/disclosure/post-disqualification conduct; Gifts/loans/favors/ticket-fixing.]

The judge improperly accepted a gift from an attorney, and failed to make any disclosure of that gift when that attorney appeared before the judge. The judge failed to disclose or disqualify when another attorney with whom the judge had a personal relationship appeared before the judge. (Ann. Rept. (2018), Private Admonishment 4, p. 27.) [Disqualification/disclosure/post-disqualification conduct; Gifts/loans/favors/ticket-fixing.]

The judge made remarks that gave the appearance that the judge was trying to dissuade an attorney from filing a statement of disqualification for cause. The judge's remarks and handling of the matter reflected poor demeanor and gave the appearance of bias and embroilment. (Ann. Rept. (2018), Private Admonishment 5, p. 27.) [Demeanor/decorum; Disqualification/disclosure/post-disqualification conduct.]

The judge improperly denied a fee waiver, where eligibility was clear, and thereby denied a litigant the right of access to the courts. On different dates, while presiding over a small claims calendar, the judge made discourteous remarks to litigants. The judge's misconduct was aggravated by prior discipline. (Ann. Rept. (2018), Private Admonishment 6, p. 27.) [Demeanor/decorum; Failure to ensure rights.]

The judge conveyed the impression that candidates for a nonjudicial public office were in a special position to influence the judge, and lent the prestige of the judicial office to advance the pecuniary or personal interests of the candidates. The judge also permitted one candidate to convey the impression that the candidate was in a special position to influence the judge. (Ann. Rept. (2018), Private Admonishment 7, p. 27.) [Off-bench abuse of office/misuse of court information.]

During different hearings in a matter, the judge made comments that were undignified and discourteous, and made other comments that would reasonably be perceived as reflecting bias and prejudice toward a particular class. (Ann. Rept. (2018), Private Admonishment 8, p. 28.) [Bias/appearance of bias toward a particular class; Demeanor/decorum.]

The judge engaged in an act of dishonesty in a writing that was not related to court administration or the adjudication of a case. (Ann. Rept. (2018), Private Admonishment 9, p. 28.) [Miscellaneous Off-bench conduct.]

In entering a recusal order, the judge included information about a litigant that was gratuitous and not completely accurate. The judge's misconduct was aggravated by prior discipline. (Ann. Rept. (2018), Private Admonishment 10, p. 28.) [Disqualification/disclosure/post-disqualification conduct.]

On the record during proceedings, the judge mentioned information received ex parte about one of the litigants, without providing that litigant an opportunity to be heard. The judge made gratuitous and discourteous remarks in open court. The judge created the appearance of prejudgment and lack of impartiality by describing personal experiences on the record. (Ann. Rept. (2018), Private Admonishment 11, p. 28.) [Bias/appearance of bias not directed toward a particular class; Demeanor/decorum; Ex parte communications.]

## 2017

In multiple family law cases, the judge made discourteous remarks to counsel and to self-represented litigants. In one case, the judge made comments that suggested prejudgment and embroilment. The judge also failed to allow a litigant to present evidence and to accord that litigant a full right to be heard. The judge also appeared not to have undertaken the preparation necessary to preside over the matter. (Ann. Rept. (2017), Private Admonishment 1, p. 23.) [Bias/appearance of bias not directed toward a particular class; Demeanor/decorum; Failure to ensure rights.]

In multiple criminal cases, the judge failed to advise defendants of their right to court-appointed counsel and the right against self-incrimination before questioning them. The judge also made an improper independent investigation of the facts in one of the cases. (Ann. Rept. (2017), Private Admonishment 2, p. 23.) [Ex parte communications; Failure to ensure rights.]

In multiple family law matters, the judge made remarks to litigants that were discourteous and sometimes undignified. On one occasion, the judge improperly threatened a litigant. The judge failed to recuse from a case in which the judge's disqualification was required by law. The judge also engaged in improper political activity at the courthouse. The discipline included additional conditions. (Ann. Rept. (2017), Private Admonishment 3, p. 23.) [Demeanor/decorum; Disqualification/disclosure/post-disqualification conduct; Improper political activities; On-bench abuse of authority in performance of judicial duties.]

A judge engaged in an abuse of authority by making an appointment not permitted by law and in violation of a litigant's rights without affording the litigant notice and an opportunity to be heard. The judge also failed to comply with disclosure requirements for judicial campaign contributions. (Ann. Rept. (2017), Private Admonishment 4, p. 23.) [Disqualification/disclosure/post-disqualification conduct; Failure to ensure rights; On-bench abuse of authority in performance of judicial duties.]

A judge engaged in a course of conduct that violated canon 4F, which prohibits a judge from acting as an arbitrator or mediator or otherwise performing judicial functions in a private capacity unless expressly authorized by law. (Ann. Rept. (2017), Private Admonishment 5, p. 23.) [Miscellaneous Off-bench conduct.]

Without any matter pending before the court, a judge issued an order purporting to exempt an individual from a particular regulation. (Ann. Rept. (2017), Private Admonishment 6, p. 23.) [On-bench abuse of authority in performance of judicial duties.]

A judge used the court's email and mailing address in connection with business activities unrelated to court business. The judge also misused the prestige of office in communicating with law enforcement about a matter not related to official court business. (Ann. Rept. (2017), Private Admonishment 7, p. 24.) [Misuse of court resources; Off-bench abuse of office/misuse of court information.]

A judge engaged in improper charitable activities and improper political activity. (Ann. Rept. (2017), Private Admonishment 8, p. 24.) [Improper political activities; Miscellaneous Off-bench conduct .]

A judge made repeated remarks about female attorneys that were discourteous and unjudicial. (Ann. Rept. (2017), Private Admonishment 9, p. 24.) [Demeanor/decorum.]

A judge issued an order that a judge knew was beyond the judge's lawful authority for an improper purpose. (Ann. Rept. (2017), Private Admonishment 10, p. 24.) [On-bench abuse of authority in performance of judicial duties.]

A judge engaged in conduct that could reasonably be perceived as bias or sexual harassment. The judge also misused court resources. The judge displayed a lack of candor during the investigation of the judge's conduct. The discipline included additional conditions. (Ann. Rept. (2017), Private Admonishment 11, p. 24.) [Administrative malfeasance/improper comments/treatment of colleagues and staff; Bias/appearance of bias toward a particular class; Demeanor/decorum; Misuse of court resources; Sexual harassment/inappropriate workplace gender comments.]

A judge engaged in decisional delay in two matters and submitted five false salary affidavits (Ann. Rept. (2017), Private Admonishment 12, p. 24.) [Decisional delay/false salary affidavits .]

A judge's orders, denying a criminal defendant a fundamental right, reflected embroilment and appeared to retaliate against the defendant. (Ann. Rept. (2017), Private Admonishment 13, p. 24.) [Failure to ensure rights; On-bench abuse of authority in performance of judicial duties .]

## 2016

A judge initiated an ex parte communication with a prosecutor regarding the merits of anticipated motions and settlement prospects in a criminal case pending before the judge. In another case, the judge made comments at sentencing that gave the appearance that the judge rejected probation department recommendations based on considerations outside the record. (Ann. Rept. (2016), Private Admonishment 1, p. 26.) [Bias/appearance of bias not directed toward a particular class; ex parte communications.]

A judge's treatment of a criminal defense attorney gave rise to an appearance of embroilment. Without an adequate legal basis, the judge set a hearing for an order to show cause re contempt against the attorney, but then failed to follow the procedures required for an order to show cause. When the attorney filed a motion to disqualify the judge for cause, the judge improperly questioned witnesses and argued with the attorney about the facts alleged in the motion. (Ann. Rept. (2016), Private Admonishment 2, p. 26.) [Abuse of contempt/sanctions; disqualification/disclosure/post-disqualification conduct; bias/appearance of bias not directed toward a particular class.]

During *Marsden* hearings, the judge made comments that conveyed that the judge had a special relationship with defense counsel and made discourteous remarks about the prosecutor that gave the appearance of a lack of impartiality. The judge exceeded the scope of the authorization for ex parte communications in a *Marsden* hearing by discussing the merits of the case and the defense, stating negative opinions about the governing law, and giving advice to the defendant. In another case, the judge threatened to revoke a defendant's pro per status without sufficient grounds and handled the defendants complaints about access to the law library without giving the defendant the opportunity to have the matter fairly adjudicated. The judge also disparaged the defendant for representing himself. (Ann. Rept. (2016), Private Admonishment 3, p. 26.) [Bias/appearance of bias not directed toward a particular class; failure to ensure rights; ex parte communications; demeanor/decorum.]

In multiple criminal cases, the judge failed to disclose a social relationship with the prosecutor. In a traffic matter, the judge did not schedule a hearing to settle the statement on appeal until seven months after the proposed statement was filed, in violation of the rule of court that requires the court to promptly set a hearing date. (Ann. Rept. (2016), Private Admonishment 4, p. 27.) [Disqualification/disclosure/post-disqualification conduct; decisional delay/false salary affidavits.]

A judge made a disparaging remark to a defendant and appeared to be reacting punitively by refusing to recall a bench warrant or allowing the defendant's attorney to be heard about bail. In other cases, the judge made gratuitous, discourteous remarks to prosecutors. (Ann. Rept. (2016), Private Admonishment 5, p. 27.) [Demeanor/decorum; failure to ensure rights; on-bench abuse of authority in performance of judicial duties.]

During a pretrial hearing, the judge threatened to relieve defense counsel without adequate grounds. The judge also made statements that highlighted defense counsel's lack of experience and that were likely to undermine the attorney-client relationship. In another case, the judge's demeaning remarks in open court about a defense attorney who was not in court gave the appearance of retaliation. (Ann. Rept. (2016), Private Admonishment 6, p. 27.) [Demeanor/decorum; on-bench abuse of authority in performance of judicial duties; failure to ensure rights.]

A judge misused the prestige of office in connection with a personal legal matter in a manner that gave the appearance that the judge was seeking to advance the judge's personal interest. (Ann. Rept. (2016), Private Admonishment 7, p. 27.) [Off-bench abuse of office/misuse of court information.]

During remarks delivered prior to the start of calendars, the judge made derogatory comments about small claims litigants and the small claims process and repeatedly announced an arbitrary time limit for presentation of cases, which gave the impression that litigants should not expect a full and fair opportunity to be heard. (Ann. Rept. (2016), Private Admonishment 8, p. 27.) [Demeanor/decorum; bias/appearance of bias not directed toward a particular class.]

A judge submitted information ex parte to the reviewing court about a case decided by the judge. (Ann. Rept. (2016), Private Admonishment 9, p. 27.) [Ex parte communications.]

A judge used a court clerk for personal business and gave instructions to the clerk which could reasonably be construed as a directive to issue an order in a matter from which the judge was disqualified. The judge failed to fulfill continuing professional obligations to a former client. While under investigation by the commission, the judge approached the clerk about the investigation in a manner that carried the potential to improperly influence the clerk. (Ann. Rept. (2016), Private Admonishment 10, p. 27.) [Misuse of court resources; miscellaneous off-bench conduct; administrative malfeasance/improper comments, treatment of colleagues and staff.]

A judge signed and submitted a letter to a sentencing judge on behalf of a defendant, whom the judge knew personally. (Ann. Rept. (2016), Private Admonishment 11, p. 27.) [Off-bench abuse of office/misuse of court information.]

## 2015

A judge engaged in various off-bench activities which created an appearance of bias, cast reasonable doubt on the judge's capacity to act impartially or otherwise created an appearance of impropriety. Some activities also involved a misuse of court resources. The judge failed to avoid nepotism. The judge accepted a gift from a lawyer that did not fall within an exception in the Code of Judicial Ethics, which also created an appearance of impropriety and gave the impression that the attorney was in a special position to influence the judge. The judge also failed to disclose certain discounts as gifts on the judge's Statement of Economic Interests. (Ann. Rept. (2015), Private Admonishment 1, p. 23.) [Administrative malfeasance/improper comments, treatment of colleagues and staff; bias/appearance of bias not directed toward a particular class; gifts/loans/favors/ticket-fixing.]

In multiple dependency proceedings over an extended period, a judge made rude and demeaning remarks to parents, social workers, and lawyers. In one case, the judge made a remark suggesting that the judge was considering matters outside of the court record. In another matter, the judge made comments improperly suggesting that where a victim's allegations of sexual abuse are standing alone and disputed, they are presumptively insufficient to establish abuse. (Ann. Rept. (2015), Private Admonishment 2, p. 23.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

Without any involvement of a prosecutor, a judge added criminal contempt charges to a defendant's misdemeanor cases after the defendant failed to surrender to jail to serve the defendant's sentence. After a peremptory challenge was filed, the judge recused from the cases but reassigned the cases to another judge, rather than sending them to the presiding judge for reassignment, as required by statute. (Ann. Rept. (2015), Private Admonishment 3, p. 23.) [Disqualification/disclosure/post-disqualification conduct; on-bench abuse of authority in performance of judicial duties.]

A judge created an appearance of impropriety by publicly discussing a "hypothetical" case that was virtually identical to a case pending before the judge. During another public presentation, the judge made remarks that created the appearance of bias against a particular group of people, and disclosed confidential information. In a civil case, the judge made statements about an attorney when dismissing an order to show cause re: sanctions that gave the appearance that the judge was embroiled in the matter. (Ann. Rept. (2015), Private Admonishment 4, p. 23.) [Bias/appearance of bias not directed toward a particular class; comment on a pending case; miscellaneous off-bench conduct; off-bench abuse of office/misuse of court information.]

A judge failed to respect criminal defendants' right to counsel by questioning them directly when they had counsel or had the right to have counsel appointed. The judge also allowed a defendant in a criminal matter to serve as interpreter for a co-defendant, even though the individual was not qualified. (Ann. Rept. (2015), Private Admonishment 5, p. 24.) [Failure to ensure rights.]

A judge failed to issue a decision on a submitted matter for 190 days. During the period that the case was under submission for more than 90 days, the judge twice signed salary affidavits stating that the judge had no matters under submission for more than 90 days. (Ann. Rept. (2015), Private Admonishment 6, p. 24.) [Decisional delay/false salary affidavits.]

A judge failed to make reasonable efforts to keep informed about the judge's personal financial interests and failed to disqualify from multiple cases while the judge held stock worth over $2,000 in a party. (Ann. Rept. (2015), Private Admonishment 7, p. 24.) [Disqualification/disclosure/post-disqualification conduct.]

In two criminal cases, the judge made remarks to defendants at sentencing that improperly injected religion into the proceedings. (Ann. Rept. (2015), Private Admonishment 8, p. 24.) [Bias/appearance of bias not directed toward a particular class.]

After the Court of Appeal reversed a criminal conviction, the judge who had presided over the trial sent the prosecutor an ex parte email that was apparently intended to influence the prosecution to seek review in the Supreme Court. (Ann. Rept. (2015), Private Admonishment 9, p. 24.) [Ex parte communications.]

A judge made rude and sarcastic remarks to an attorney, in open court and, in the presence of the attorney's client, threatened to relieve the attorney as counsel and report the attorney to the State Bar, when the attorney sought to continue a preliminary hearing on the day of the hearing (without advance notice to prosecution) and contended that the attorney was unable to proceed. (Ann. Rept. (2015), Private Admonishment 10, p. 24.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A defendant appeared before the judge with counsel and submitted forms to plead guilty to DUI. The judge dismissed the case on the court's own motion, contrary to law, and made remarks creating the impression that the judge was dismissing the case based upon the defendant's occupation. (Ann. Rept. (2015), Private Admonishment 11, p. 24.) [Bias/appearance of bias not directed toward a particular class; on-bench abuse of authority in performance of judicial duties.]

## 2014

In pretrial and jury trial proceedings in a criminal case involving a pro per defendant, the judge made comments disparaging the defendant and the defendant's defense, made a statement reflecting bias against pro per defendants, and sometimes appeared to assume a prosecutorial role in questioning the defendant. In another criminal case, the judge engaged in a pattern of discourteous treatment toward defense counsel, and asked a witness a question that created the appearance that the judge was not impartial and was biased against the defendant. (Ann. Rept. (2014), Private Admonishment 1, p. 21.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

After a prospective juror failed to return to court during jury selection, the judge held the juror in contempt without giving the juror an opportunity to explain or apologize. There were aggravating factors. (Ann. Rept. (2014), Private Admonishment 2, p. 21.) [Abuse of contempt/sanctions.]

A judge made a gratuitous disparaging remark about a defendant in a criminal matter. There were aggravating factors. (Ann. Rept. (2014), Private Admonishment 3, p. 21.) [Demeanor/decorum.]

In numerous cases, mostly involving pro per litigants, the judge injected the judge's personal views or made remarks that were discourteous or created the appearance that the judge was acting as an advocate or lacked impartiality. There were mitigating factors, including corrective measures taken by the judge to change the judge's behavior. (Ann. Rept. (2014), Private Admonishment 4, p. 21.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A judge threatened to report an attorney to the State Bar without a valid basis. In another case, the judge failed to disclose information relevant to the issue of disqualification. The judge also left court early on multiple occasions to play sports. (Ann. Rept. (2014), Private Admonishment 5, p. 21.) [Non-performance of judicial functions/attendance/sleeping; disqualification/disclosure/post-disqualification conduct; on-bench abuse of authority in performance of judicial duties.]

A judge issued a restraining order in a confidential matter without jurisdiction over the restrained individual and without affording due process. The judge later engaged in an improper discussion of the matter with a non-party. In another case, the judge made a comment that conveyed the impression that a defendant's employer was in a position to influence the judge. In other proceedings, the judge made discourteous remarks to litigants or to counsel. (Ann. Rept. (2014), Private Admonishment 6, p. 21.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

Without jurisdiction, a judge required an attorney to appear in the judge's courtroom for an unauthorized proceeding, at which the judge failed to advise the attorney of the nature of the proceeding or of the attorney's rights. (Ann. Rept. (2014), Private Admonishment 7, p. 21.) [Failure to ensure rights; on-bench abuse of authority in performance of judicial duties.]

A judge issued what was tantamount to a restraining order against an individual over whom the judge lacked jurisdiction, without providing the individual notice or an opportunity to be heard. At a later hearing at which the order was rescinded, the judge made a statement that created the appearance that the judge was requiring a party to accept responsibility for the restrained individual's future conduct in exchange for rescinding the restraining order. The judge also made a remark at the hearing reflecting gender bias. (Ann. Rept. (2014), Private Admonishment 8, p. 21.) [Bias/appearance of bias toward a particular class; failure to ensure rights; on-bench abuse of authority in performance of judicial duties.]

A judge's handling of an administrative matter gave rise to an appearance of partiality. (Ann. Rept. (2014), Private Admonishment 9, p. 21.) [Administrative malfeasance/improper comments, treatment of colleagues and staff; bias/appearance of bias not directed toward a particular class.]

## 2013

A judge displayed poor demeanor toward counsel and embroilment, and assumed a prosecutorial role in various criminal proceedings. The judge made demeaning and discourteous remarks to a defendant and made undignified remarks about court personnel. The judge also criticized a jury's verdict, in violation of canon 3B(10). (Ann. Rept. (2013), Private Admonishment 1, p. 20.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; sexual harassment/inappropriate workplace gender comments.]

A judge made demeaning and sarcastic remarks to counsel during trial. There were aggravating factors. (Ann. Rept. (2013), Private Admonishment 2, p. 20.) [Demeanor/decorum.]

A judge failed to timely decide multiple family law matters that had been taken under submission. The judge also received salary in violation of law and submitted false salary affidavits while matters were under submission for more than 90 days; however, there was no evidence that any affidavit was knowingly false. There were mitigating factors, including that the judge self-reported the affidavits and most of the delays to the commission. (Ann. Rept. (2013), Private Admonishment 3, p. 20.) [Decisional delay/false salary affidavits.]

A judge used the prestige of office and court resources to advance the pecuniary and personal interests of a relative. (Ann. Rept. (2013), Private Admonishment 4, p. 20.) [Off-bench abuse of office/misuse of court information.]

A judge responded to the filing of peremptory challenges against another judge in a manner that appeared retaliatory. The judge engaged in political activity on behalf of a candidate for a nonjudicial office that was contrary to canon 5; the activity also involved abuse of the prestige of office. (Ann. Rept. (2013), Private Admonishment 5, p. 20.) [Disqualification/disclosure/post-disqualification conduct; improper political activities; off-bench abuse of office/misuse of court information.]

When the defendant's attorney announced ready for trial, the judge made a remark about sentencing that created the appearance that the judge was attempting to coerce a plea. There were aggravating factors. (Ann. Rept. (2013), Private Admonishment 6, p. 20.) [Bias/appearance of bias not directed toward a particular class.]

A judge directed court staff to place the court's official certification on a document that was not a court record, to help a relative. (Ann. Rept. (2013), Private Admonishment 7 p. 20.) [Misuse of court resources; off-bench abuse of office/misuse of court information.]

## 2012

A judge independently conducted online investigations and considered information not part of the record and not properly subject to judicial notice. The judge also relied on and drew inferences from this information before giving the parties notice or an opportunity to be heard, thereby prejudging the matter. (Ann. Rept. (2012), Private Admonishment 1, p. 24.) [Failure to ensure rights; ex parte communications.]

While presiding over a family law matter, a judge made remarks that failed to promote public confidence in the integrity and impartiality of the judiciary. For example, the judge suggested that newer judges made rulings on the basis of whom they do not like, rather than on the merits. The judge also made other remarks that were undignified or discourteous. (Ann. Rept. (2012), Private Admonishment 2, p. 24.) [Demeanor/decorum.]

On the date that a dissolution trial was scheduled to resume, a judge who was soon to be transferred, declared a mistrial without taking the bench. The judge did not give the parties, who were present and ready to proceed, the opportunity to be heard on this issue. Prior to this date, the parties had not been informed of the possibility of a mistrial, and the case had been pending before the judge for over three years. (Ann. Rept. (2012), Private Admonishment 3, p. 24.) [Failure to ensure rights.]

A judge disregarded a litigant's right to notice and a hearing and engaged in an abuse of authority when the judge improperly vacated the litigant's fee waiver application on the stated ground that the litigant had counsel. The judge improperly disclosed in open court confidential information submitted in the fee waiver application. The judge also made rude and disparaging remarks in open court about the plaintiff's attorney. The judge also issued a sanctions order that included an order to show cause as to why the sanctions had not been paid, although there had been no failure to pay at that point. (Ann. Rept. (2012), Private Admonishment 4, p. 24.) [Abuse of contempt/sanctions; demeanor/decorum; failure to ensure rights.]

A judge imposed an enhanced sentence based on the judge's belief that a defendant, who had not testified at trial, had lied to defense counsel. There were no facts concerning the defendant's alleged dishonesty in the record at trial. The judge's conduct and remarks at sentencing gave an appearance of retaliation for the defendant's exercise of the right to trial. The judge also routinely locked the courtroom door during arraignments and told a defense attorney that the judge "preferred" that the defense attorney not be present in the courtroom during pro per arraignments. (Ann. Rept. (2012), Private Admonishment 5, p. 24.) [On-bench abuse of authority in performance of judicial duties.]

A judge failed to disclose or to disqualify from post-trial proceedings in a case in which the judge commenced a social relationship with an alternate juror between the verdict and sentencing. In another matter, the judge improperly accused an attorney of misconduct in front of the jury. (Ann. Rept. (2012), Private Admonishment 6, p. 24.) [Demeanor/decorum; disqualification/disclosure/post-disqualification conduct.]

## 2011

In a family law case, the judge ordered a change of custody at a hearing without prior notice to the parties and failed to rule on one party's request for accommodations under the Americans with Disabilities Act. In another family law case, the judge made inappropriate, overly personal remarks to a child during a chambers interview. The judge improperly sealed the transcript of the chambers interview over the objection of counsel and without complying with court rules governing the sealing of court records. (Ann. Rept. (2011), Private Admonishment 1, p. 23.) [Demeanor/decorum; failure to ensure rights; on-bench abuse of authority in performance of judicial duties; decisional delay/false salary affidavits.]

A judge used sexist and demeaning terms and gestures to female court staff. The judge sent an inappropriate flirtatious email to another female court employee. The judge also used a court secretary to prepare personal correspondence and improperly used judicial stationery for the letters. In one of the letters, the judge abused the prestige of judicial office to advance the personal interests of another. (Ann. Rept. (2011), Private Admonishment 2, p. 23.) [Misuse of court resources; off-bench abuse of office/misuse of court information; sexual harassment/ inappropriate workplace gender comments.]

On the date a criminal case was set for trial, after relieving the defendant's attorney, the judge remanded the defendant for failing to obey the judge's order to be quiet, without following any of the procedures required for contempt. Before new counsel appeared, on the judge's own motion and off the record, the judge increased the defendant's bail significantly, which gave the appearance that the judge was acting out of pique and trying to coerce a guilty plea from the defendant. (Ann. Rept. (2011), Private Admonishment 3, p. 23.) [Abuse of contempt/sanctions; failure to ensure rights.]

After becoming a candidate for judicial office, the judge did not promptly remove endorsements of non-judicial candidates which the judge had made prior to becoming a candidate. When contacted by the State Bar about these endorsements, the judge provided a date on which the judge became a candidate, without ensuring that the date was accurate. The date provided was inaccurate, which created the impression that the judge had promptly removed the improper endorsements. The judge also failed to file the paperwork required by law to begin soliciting campaign contributions. After taking office, to assist an attorney, the judge asked a specialized legal question of a judicial colleague and then forwarded the response to the attorney. (Ann. Rept. (2011), Private Admonishment 4, p. 23.) [Failure to cooperate/lack of candor with regulatory authorities; improper political activities; ex parte communications; off-bench abuse of office/misuse of court information.]

While presiding over two related cases, a judge engaged in a course of conduct that gave the appearance that the judge was embroiled. The judge contacted one litigant at home in the absence of counsel or any representative and discussed the case. The judge contended the parties consented to ex parte communications; however, there was no clear record of the consent of all parties, nor was the consent specific. The judge dismissed one of the proceedings without prior notice to the parties. The judge treated the attorneys who appealed that decision rudely, and made a comment in an order that undermined the integrity of the judicial system. In a separate matter, the judge bought stock in a company while that company was a party in a case pending before the judge, which necessitated the judge's recusal from the case. (Ann. Rept. (2011), Private Admonishment 5, p. 23.) [Demeanor/decorum; disqualification/disclosure/post-disqualification conduct; ex parte communications; failure to ensure rights; bias/appearance of bias not directed toward a particular class.]

A judge publicly commented in news articles on a case pending in another court. The judge also appointed counsel in a case without disclosing a past professional relationship between the judge and counsel, and engaged in an improper ex parte communication with the attorney about the case. The judge also improperly struck a motion to disqualify the judge for cause, and made comments in an order on another disqualification motion that appeared to be false, undermining public confidence in the integrity of the judiciary. (Ann. Rept. (2011), Private Admonishment 6, p. 24.) [Comment on a pending case; disqualification/disclosure/post-disqualification conduct; ex parte communications.]

A judge threatened to order parties and attorneys to appear at monthly settlement conferences if they did not agree to mediation, creating an appearance of coercion. (Ann. Rept. (2011), Private Admonishment 7, p. 24.) [On-bench abuse of authority in performance of judicial duties.]

A judge had a pro per litigant taken into custody without following proper contempt procedures. The judge claimed the litigant had failed to follow an order by the judge, but no clear order was disobeyed. (Ann. Rept. (2011), Private Admonishment 8, p. 24.) [Abuse of contempt/ sanctions.]

A presiding judge failed to take appropriate corrective action after receiving reliable information about serious wrongdoing by another judge on the court. (Ann. Rept. (2011), Private Admonishment 9, p. 24.) [Administrative malfeasance/improper comments, treatment of colleagues and staff.]

A judge issued a peremptory writ of mandate without setting a briefing schedule as required by law, and before the time to respond to the petition had expired. (Ann. Rept. (2011), Private Admonishment 10, p. 24.) [Failure to ensure rights.]

## 2010

In two civil cases, a judge failed to be patient, dignified and courteous, and engaged in conduct giving rise to an appearance that the judge was not impartial. In one of the cases, the judge made a statement that reflected prejudgment while a party was testifying before the jury. In the other case, the judge made sarcastic and discourteous comments to an attorney at a hearing. Later at the jury trial, the judge chastised a testifying party and that party's expert witness, and made statements that made it appear that the judge was assuming an adversarial role. The judge also delayed decision in four civil cases; delays ranged from a few days to more than three months beyond the 90-day limit. Also, in a number of cases, the judge required jurors to return daily at 10:00 a.m. even though the judge's morning calendar did not finish until late morning and sometimes trial did not resume until after lunch, causing the jurors to wait in the hallway for several hours. (Ann. Rept. (2010), Private Admonishment 1, p. 23.) [Administrative malfeasance/ improper comments, treatment of colleagues and staff; bias/appearance of bias not directed toward a particular class; demeanor/decorum; decisional delay/false salary affidavits.]

A judge failed to appreciate limits to the judge's role in certain matters. The judge tried to order a juvenile to court to check up on the juvenile when no case was pending. In another matter, the judge enlisted court staff to drive a juvenile, whose case was pending before the judge, to a medical appointment. The judge also attended the appointment and participated in the execution of a medical release form. In a criminal matter, the judge applauded while sentencing a defendant to prison and encouraged courtroom spectators to wave good-bye. In another criminal case, the judge improperly completed a report for a state agency that only the prosecutor was authorized to complete. (Ann. Rept. (2010), Private Admonishment 2, p. 24.) [Bias/appearance of bias not directed toward a particular class; miscellaneous off-bench conduct; misuse of court resources; on-bench abuse of authority in performance of judicial duties.]

During restraining order proceedings, a judge ordered the respondent into custody without following any contempt procedures or imposing a sentence for contempt, and improperly kept the respondent in custody for about six hours before conducting a hearing. (Ann. Rept. (2010), Private Admonishment 3, p. 24.) [Abuse of contempt/sanctions.]

A judge engaged in an abuse of authority by issuing an overbroad restraining order. (Ann. Rept. (2010), Private Admonishment 4, p. 24.) [On-bench abuse of authority in performance of judicial duties.]

For over a year, in collection cases in which the defendant had been granted a full or partial fee waiver, a judge maintained a practice of requiring the prevailing plaintiff to pay the defendant's first appearance fee before a judgment would be issued. The appearance fee was then added to the judgment to be recovered from the defendant. There was no legal authority for such fee shifting. (Ann. Rept. (2010), Private Admonishment 5, p. 24.) [On-bench abuse of authority in performance of judicial duties.]

Due to embroilment, a judge failed to appoint a deputy public defender ("DPD") in a case, contrary to law; failed to subsequently disqualify from the DPD's cases; stated, in open court, that the DPD was incompetent; and had an ex parte discussion about a pending case with the DPD's supervisor. (Ann. Rept. (2010), Private Admonishment 6, p. 24.) [Bias/appearance of bias not directed toward a particular class; demeanor/ decorum; disqualification/disclosure/post-disqualification conduct; ex parte communications; on-bench abuse of authority in performance of judicial duties.]

A judge repeatedly used profanity while being interviewed by a reporter and the profanity appeared in the newspaper article. The judge used profanity with counsel in chambers. (Ann. Rept. (2010), Private Admonishment 7, p. 24.) [Demeanor/decorum.]

A judge delegated responsibility to conduct case management conferences and status conferences to the judge's clerk. On one occasion, the judge used stationery imprinted with the judge's official title and court address to advance the judge's personal interests. The judge also used the judge's official title and court address on the judge's personal checks. (Ann. Rept. (2010), Private Admonishment 8, p. 24.) [Off-bench abuse of office/misuse of court information; on-bench abuse of authority in performance of judicial duties.]

## 2009

During trial, a judge contacted one of the counsel's supervisors ex parte to criticize the attorney's performance. The judge also threatened to order the court reporter to stop reporting, which would be contrary to a statute requiring that all proceedings be reported. In another matter, the judge shouted at counsel, failed to comply with the law regarding contempt and engaged in an abuse of authority in conducting the contempt proceeding. In a different case, the judge refused to appoint counsel when required to do so by law. In a separate matter, the judge made an inappropriately personal remark to a lawyer. (Ann. Rept. (2009), Private Admonishment 1, p. 18.) [Abuse of contempt/sanctions; demeanor/decorum; ex parte communications; on-bench abuse of authority in performance of judicial duties; failure to ensure rights.]

A judge engaged in inappropriate fundraising efforts on behalf of a candidate for judicial office, that included distribution of written materials that demeaned the judicial office. The judge also used court resources in connection with campaign activities. (Ann. Rept. (2009), Private Admonishment 2, p. 18.) [Improper political activities; off-bench abuse of office/misuse of court information; misuse of court resources.]

A judge sent a letter to a local business on judicial stationery in which the judge complained about the termination of an employee and stated that the court and the judge would no longer use the business. The Commission found that the letter could be perceived as punitive and bullying. (Ann. Rept. (2009), Private Admonishment 3, p. 18.) [Off-bench abuse of office/misuse of court information.]

## 2008

A judge used demeaning and unduly harsh language toward a pro per litigant seeking a protective order, and told her that she should blame herself if she could not present her case and should hire a lawyer. On another occasion, in open court, the judge used demeaning and unduly harsh language toward a member of court staff and threatened the individual's employment with the court. (Ann. Rept. (2008), Private Admonishment 1, p. 25.) [Demeanor/decorum.]

A judge appeared at court under the influence of intoxicants. The judge engaged in a course of inappropriate and unwelcome conduct toward a member of court staff. The judge retired from office and agreed not to seek judicial office or sit on assignment. (Ann. Rept. (2008), Private Admonishment 2, p. 25.) [Substance abuse; sexual harassment/inappropriate workplace gender comments.]

A judge engaged in multiple displays of improper demeanor including threatening to slap a deputy sheriff and a lawyer. The judge also told an attorney whose client previously had been released on bail that the judge hoped, if the client reoffended while released, the attorney or someone close to the attorney would be the client's next victim. While presiding over a trial, the judge became embroiled, questioning a witness and sustaining objections in a manner that suggested the judge lacked impartiality. The judge agreed to retire and not to seek judicial office or to sit on assignment. (Ann. Rept. (2008), Private Admonishment 3, p. 25.) [Demeanor/decorum; bias/appearance of bias not directed toward a particular class.]

A judge became impatient with a defendant who had not made restitution payments and claimed to lack the ability to pay. The judge ordered the defendant into custody before allowing him to speak and without ascertaining whether the defendant could make the payments. (Ann. Rept. (2008), Private Admonishment 4, p. 26.) [Demeanor/decorum; failure to ensure rights.]

A judge had a witness taken into custody in a manner that suggested retaliation for the witness's assertion of Fifth Amendment rights. The judge did not follow contempt procedures or procedures to have the witness secured for examination. In another matter, the judge failed to be patient, dignified and courteous to an attorney, and the judge improperly threatened to report the attorney to the State Bar in a manner that gave the appearance of retaliation. (Ann. Rept. (2008), Private Admonishment 5, p. 26.) [On-bench abuse of authority in performance of judicial duties; abuse of contempt/sanctions; demeanor/decorum.]

A judge gave oral instructions to jurors, without a court reporter present, and responded to jurors' inquiries in the jury room in the absence of attorneys or the defendant. (Ann. Rept. (2008), Private Admonishment 6, p. 26.) [Ex parte communications; on-bench abuse of authority in performance of judicial duties.]

A judge failed to recuse or disclose on the record various relationships with attorneys appearing before the judge, including an intimate and prior professional relationship with an attorney whose partners were appearing before the judge, a financial connection with the attorneys' law firm, and ownership of real estate with another member of the firm. (Ann. Rept. (2008), Private Admonishment 7, p. 26.) [Disqualification/disclosure/post-disqualification conduct.]

## 2007

A judge engaged in a practice of reading police reports prior to arraignments in violation of applicable law. The judge engaged in ex parte communications in two cases and displayed inappropriate demeanor, including using profanity in expressing frustration during a bench conference when a case did not settle. In a separate case, the judge exhibited a lack of impartiality towards a pro per criminal defendant and also displayed inappropriate demeanor, including telling the defendant at the end of the proceeding to "Shut up and get out of here, please." (Ann. Rept. (2007), Private Admonishment 1, p. 30.) [Demeanor/decorum; on-bench abuse of authority in performance of judicial duties; ex parte communications; bias/appearance of bias not directed toward a particular class.]

A judge was inconsistent in making disclosures and in disqualification in cases involving the judge's former law partner who was also a close friend. The judge also made inappropriate remarks with sexual overtones to court staff. (Ann. Rept. (2007), Private Admonishment 2, p. 30.) [Disqualification/disclosure/post-disqualification conduct; sexual harassment/inappropriate workplace gender comments.]

A judge delayed in issuing decisions in seven cases over a period of several months. The judge executed three false salary affidavits during this period but stopped executing them when the judge became aware of delays in submitted matters. The judge also failed to disclose information about an out-of-court dispute with a party who appeared regularly before the judge. (Ann. Rept. (2007), Private Admonishment 3, p. 30.) [Disqualification/disclosure/post-disqualification conduct; decisional delay/false salary affidavits.]

A judge made remarks to jurors after trial that constituted improper comment on a pending case. The judge failed to take appropriate corrective action when the judge believed an attorney had engaged in misconduct and also failed to be patient, dignified and courteous in remarks about counsel in the proceeding. (Ann. Rept. (2007), Private Admonishment 4, p. 30.) [Administrative malfeasance; demeanor/decorum; comment on a pending case.]

A judge incarcerated courtroom spectators without following the procedures necessary for the proper imposition of contempt. (Ann. Rept. (2007), Private Admonishment 5, p. 30.) [Abuse of contempt/sanctions.]

In admonishing the defendant in a misdemeanor case about the consequences of not accepting a plea bargain, the judge told the defendant that the judge would immediately remand the defendant into custody to serve the maximum sentence if convicted at trial. After acknowledging the impropriety of the remarks, the judge made similar remarks in two other cases. (Ann. Rept. (2007), Private Admonishment 6, p. 30.) [Failure to ensure rights.]

A judge's comments regarding a pending proceeding violated the prohibition on judges making public comments regarding a pending proceeding or non-public comments that might interfere with a fair trial or hearing. In other matters, the judge failed to disclose the judge's relationship with an attorney and law firm appearing before the judge. The judge also failed to comply with campaign reporting requirements. (Ann. Rept. (2007), Private Admonishment 7, p. 31.) [Comment on a pending case; disqualification/ disclosure/post-disqualification conduct; improper political activities.]

A judge made offensive remarks to counsel and court personnel relating to litigants appearing before the judge. (Ann. Rept. (2007), Private Admonishment 8, p. 31.) [Demeanor/decorum.]

A judge's conduct in public, some of which was alcohol related, demeaned the judicial office. The judge also abused the prestige of judicial office on multiple occasions. The private admonishment was conditioned upon the judge's retirement and agreement not to seek judicial office or assignments. (Ann. Rept. (2007), Private Admonishment 9, p. 31.) [Miscellaneous off-bench conduct; off-bench abuse of office; substance abuse.]

## 2006

To expedite the calendar, a judge routinely refused to consider own recognizance release of defendants at arraignment in misdemeanor cases, telling defendants not to even ask for one. During the Commission's investigation, the judge ceased that practice. The judge displayed anger and bias and engaged in ex parte communications in a case. The judge then recused, but thereafter communicated with the newly assigned judge and one of the counsel. (Ann. Rept. (2006), Private Admonishment 1, p. 31.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; ex parte communications; disqualification/disclosure/post-disqualification conduct; failure to ensure rights; on-bench abuse of authority in performance of judicial duties.]

A judge's off-bench activities with law enforcement over a period of time might have created the impression that the judge had assumed a law-enforcement role and cast doubt on the judge's capacity to act impartially. (Ann. Rept. (2006), Private Admonishment 2, p. 31.) [Miscellaneous off-bench conduct; bias/appearance of bias not directed toward a particular class.]

A judge was irritated at an attorney's insistence on setting separately a minor case the judge thought should trail a more serious case and dismissed or threatened to dismiss the minor case. When the attorney appealed, the judge contacted the attorney ex parte to discuss the appeal. (Ann. Rept. (2006), Private Admonishment 3, p. 31.) [Ex parte communications; on-bench abuse of authority in performance of judicial duties.]

A judge continued issuing orders finding a waiver of a fundamental right despite an unambiguous Court of Appeal decision, in a prior case presided over by the judge, which prohibited such a waiver. (Ann. Rept. (2006), Private Admonishment 4, p. 31.) [On-bench abuse of authority in performance of judicial duties.]

A judge's e-mail to other judges gave the appearance of ethnic bias in the discharge of administrative responsibilities. (Ann. Rept. (2006), Private Admonishment 5, p. 31.) [Bias/appearance of bias toward a particular class.]

A judge had lunch during trial with a juror in the case. (Ann. Rept. (2006), Private Admonishment 6, p. 31.) [Miscellaneous off-bench conduct.]

A judge berated an attorney in front of the attorney's client, opposing counsel and others in the courtroom, and detained the attorney in the courtroom in excess of the judge's authority. In another matter, after being disqualified from the case, the judge reassigned the case to another judge, an action a disqualified judge is not permitted to take. (Ann. Rept. (2006), Private Admonishment 7, p. 31.) [Abuse of contempt/sanction; disqualification/disclosure/post-disqualification conduct; demeanor/decorum.]

## 2005

In two matters, a judge failed to disclose on the record the judge's relationship with a party. In orders in which the judge consented to be disqualified from two cases, the judge made gratuitous, harsh comments about the attorneys in the cases. (Ann. Rept. (2005), Private Admonishment 1, p. 25.) [Disqualification/disclosure/post-disqualification conduct.]

A judge's handling of guardianship proceedings gave the appearance of bias in favor of the petitioners, with whom the judge had interacted socially and in volunteer activities for a number of years. (Ann. Rept. (2005), Private Admonishment 2, p. 26.) [Bias/appearance of bias not directed toward a particular class.]

After forming the impression during jury voir dire that a potential juror was attempting to avoid jury service, a judge ordered the potential juror, who was not selected for the jury panel, to sit through two days of the trial under threat of a contempt finding and without following contempt procedures. (Ann. Rept. (2005), Private Admonishment 3, p. 26.) [Abuse of contempt/ sanctions.]

After refusing to cooperate with a judicial colleague and a court administrator, a judge defied a directive of the presiding judge of the court concerning a proceeding not pending before the judge. (Ann. Rept. (2005), Private Admonishment 4, p. 26.) [Administrative malfeasance.]

A judge made inappropriate comments and jokes involving sexual conduct and made improper overtures toward court staff and attorneys in the courthouse. The judge failed to disclose a social relationship with an attorney appearing before the judge. The judge also misused court resources. The discipline included additional conditions. (Ann. Rept. (2005), Private Admonishment 5, p. 26.) [Disqualification/disclosure/post-disqualification conduct; sexual harassment/inappropriate workplace gender comments; miscellaneous off-bench conduct; misuse of court resources; off-bench abuse of office; improper business, financial or fiduciary activities.]

A judge's practices at arraignments failed to ensure defendants' rights in a number of respects. The judge interfered with the attorney-client relationship in one matter. The judge also engaged in ex parte communications and delayed in ruling on a submitted matter. (Ann. Rept. (2005), Private Admonishment 6, p. 26.) [Decisional delay/false salary affidavits; failure to ensure rights; ex parte communications.]

## 2004

After initiating a perjury complaint, a judge gave the appearance of attempting to influence the district attorney's investigation by contacting witnesses and repeatedly contacting the district attorney. (Ann. Rept. (2004), Private Admonishment 1, p. 22.) [Off-bench abuse of office.]

In a criminal matter, a judge had ordered the defendant to appear for trial but then set a hearing on a motion to dismiss the case for violation of the defendant's right to a speedy trial. The hearing was set for a date after the scheduled trial date. The defense attorney assumed that the trial date had been vacated and told the defendant not to appear. The judge issued a bench warrant when the defendant did not appear on the trial date. After the defendant was arrested on the warrant, the judge refused to reinstate the defendant's own recognizance release although the defendant's explanation that he relied on counsel's advice was undisputed. In another matter, the judge remanded a spectator into custody, for allegedly contemptuous conduct, without following any contempt procedures; the spectator was held over the lunch hour. (Ann. Rept. (2004), Private Admonishment 2, p. 22.) [Abuse of contempt/sanctions; on-bench abuse of authority in performance of judicial duties.]

While presiding over a trial, a judge investigated one party's expert witness on the Internet, questioned that party's witnesses in an adversarial manner, and made disparaging and intimidating remarks to and about that party's witnesses and counsel, thereby appearing biased against that party. (Ann. Rept. (2004), Private Admonishment 3, p. 22.) [Bias/appearance of bias not directed toward a particular class; demeanor/ decorum.]

A judge served as a private arbitrator in violation of canon 4F. In addition, the judge failed to disclose to the parties the extent of the judge's relationship with one party to the arbitration. The judge also failed to report receipt of a campaign contribution as required by law. The judge lacked candor concerning aspects of the judge's conduct in responding to the Commission's investigation. (Ann. Rept. (2004), Private Admonishment 4, p. 22.) [Miscellaneous off-bench conduct; improper political activities; failure to cooperate/lack of candor with regulatory authorities; improper business, financial or fiduciary activities.]

A judge engaged in extensive use of a court computer during court hours over a period of at least two years for a purpose specifically prohibited by court policy. (Ann. Rept. (2004), Private Admonishment 5, p. 22.) [Misuse of court resources.]

A judge made sarcastic, demeaning and intimidating statements to counsel during court proceedings. The judge had been previously disciplined for similar conduct. (Ann. Rept. (2004), Private Admonishment 6, p. 22.) [Demeanor/decorum.]

A judge failed to disqualify in numerous collection matters involving financial institutions that had pending lawsuits against the judge for unpaid debt which were not contested. In mitigation, the judge's rulings did not evidence bias. (Ann. Rept. (2004), Private Admonishment 7, p. 22.) [Disqualification/disclosure/post-disqualification conduct.]

While ruling on a motion, a judge made a number of statements attempting to deflect responsibility for the ruling to another judge. The judge made these statements to avoid displeasing the party against whom the ruling was made. (Ann. Rept. (2004), Private Admonishment 8, p. 22.) [On-bench abuse of authority in performance of judicial duties.]

## 2003

A judge made sexually suggestive gestures and comments to a court reporter, an employee of the prosecutor's office and a courthouse visitor. The judge behaved offensively in front of court staff. The judge also failed to disclose when a friend and former law partner appeared before the judge, under circumstances that required disclosure but not recusal. The judge also engaged in an ex parte contact with an attorney immediately prior to a hearing at which the attorney appeared before the judge. (Ann. Rept. (2003), Private Admonishment 1, p. 25.) [Demeanor/decorum; disqualification/ disclosure/post-disqualification conduct; ex parte communications; sexual harassment/ inappropriate workplace gender comments.]

A judge's remarks concerning litigants in two separate matters displayed bias and offensive demeanor. (Ann. Rept. (2003), Private Admonishment 2, p. 25.) [Bias/ appearance of bias toward a particular class; demeanor/decorum.]

## 2002

In one civil matter, the judge ordered a party's spouse, over whom the judge did not have authority, to appear to defend the party's excuse for being absent. The judge also displayed prejudgment through flattering and solicitous comments to a witness who was testifying in the proceedings. In another case, the judge failed to follow the statutory requirements for due process in conservatorship proceedings, engaged in ex parte communication, displayed bias against an attorney, and made an appointment of counsel despite the counsel's obvious conflict of interest. In a third matter, the judge made remarks evidencing prejudgment and imposed sanctions without affording notice, a hearing, or a statement of reasons. (Ann. Rept. (2002), Private Admonishment 1, p. 22.) [Abuse of contempt/sanctions; ex parte communications; on-bench abuse of authority in performance of judicial duties; failure to ensure rights; bias/appearance of bias not directed toward a particular class.]

In four juvenile dependency matters, the judge violated the parents' due process rights. In one case, the judge removed siblings of a dependent child from their parent's custody at a six-month review hearing without prior notice or the filing of a supplemental dependency petition. In another matter, the judge issued orders affecting parental rights without notice to the affected parent and without making the findings regarding notice that are required by law. In another case, the judge ordered custody of a child transferred from one parent to the other without notice and without a finding that the child was a dependent of the court. In another case, the judge ordered the removal of a child from the custodial grandparents without notice to the parents or the grandparents and without affording them a reasonable opportunity to be heard on the matter. After institution of formal proceedings by the Commission, the judge retired and stipulated to a private admonishment, which the judge agreed could be made available to the public. The judge also agreed not to serve as a judge in the future by appointment or assignment. (Ann. Rept. (2002), Private Admonishment 2, p. 22.) [Failure to ensure rights.]

A judge failed to recuse or to fully disclose information relevant to the question of disqualification. The judge also received improper gifts from attorneys and engaged in off-bench activities that raised an appearance of partiality. In addition, the judge sent a letter on judicial stationery that did not concern official court business and that detracted from public confidence in the integrity and impartiality of the judiciary. (Ann. Rept. (2002), Private Admonishment 3, p. 22.) [Disqualification/disclosure/post-disqualification conduct; gifts/loans/favors/ticket-fixing; miscellaneous off-bench conduct; off-bench abuse of office; bias/appearance of bias not directed toward a particular class.]

A judge failed to disclose a past attorney-client relationship with an attorney appearing before the judge. In aggravation, the judge previously had received an advisory letter for a similar failure to disclose. (Ann. Rept. (2002), Private Admonishment 4, p. 22.) [Disqualification/disclosure/post-disqualification conduct.]

A judge initiated an angry and profane confrontation with a member of court staff on courthouse property. On a different occasion, the judge berated another member of court staff in open court. (Ann. Rept. (2002), Private Admonishment 5, p. 22.) [Demeanor/ decorum.]

A judge was convicted of a misdemeanor offense that did not involve alcohol, controlled substances or moral turpitude. (Ann. Rept. (2002), Private Admonishment 6, p. 22.) [Non-substance abuse criminal conduct.]

## 2001

A judge's off-bench conduct undermined public confidence in the integrity and impartiality of the judiciary. In addition, in a matter over which the judge had presided, the judge made comments that appeared to criticize the jury after its verdict. (Ann. Rept. (2001), Private Admonishment 1, p. 19.) [Bias/appearance of bias not directed toward a particular class; miscellaneous off-bench conduct.]

During a trial, the judge made comments to the jury reflecting bias about the case. In another matter, the judge abused the judge's authority in an order involving payment of fees. In a third matter, the judge improperly threatened an attorney with contempt. (Ann. Rept. (2001), Private Admonishment 2, p. 19.) [Abuse of contempt/sanction; bias/appearance of bias not directed toward a particular class; on-bench abuse of authority in performance of judicial duties.]

In two separate civil matters, the judge made remarks during court proceedings that disparaged the litigants and counsel. Some remarks appeared to advocate one side of the case, and some remarks appeared to reflect bias against a particular class; some of the remarks had been made in the presence of the jury. In a third matter, the judge demeaned a potential juror. (Ann. Rept. (2001), Private Admonishment 3, p. 19.) [Demeanor/ decorum; bias/appearance of bias toward a particular class; bias/appearance of bias not directed toward a particular class.]

A judge delayed in ruling on four matters and executed an inaccurate salary affidavit. (Ann. Rept. (2001), Private Admonishment 4, p. 19.) [Decisional delay/false salary affidavits.]

At arraignment on a failure to appear, the judge proceeded without appointed counsel despite the defendant's statements that he wanted counsel. The judge made comments that disparaged the defendant's version of the case and fostered the appearance that the judge was attempting to pressure the defendant into pleading guilty. (Ann. Rept. (2001), Private Admonishment 5, p. 19.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; on-bench abuse of authority in performance of judicial duties; failure to ensure rights.]

## 2000

A judge attempted to engage the judge's clerk in questionable financial transactions that would have involved substantial sums of money and were intended to benefit the judge. (Ann. Rept. (2000), Private Admonishment 1, p. 20.) [Improper business, financial or fiduciary activities.]

A judge's response to an inquiry from the Commission lacked candor. The judge misinformed a member of court staff concerning the employee's obligation to speak with the Commission and appeared to be attempting to influence the employee's interview with the Commission. (Ann. Rept. (2000), Private Admonishment 2, p. 20.) [Failure to cooperate/lack of candor with regulatory authorities.]

A judge was arrested for driving under the influence and convicted following a plea of no contest. In mitigation, the judge was cooperative with the police, self-reported to the presiding judge and to the Commission, and issued a public statement expressing embarrassment and remorse. The Commission's investigation revealed no evidence of an on-going alcohol problem. (Ann. Rept. (2000), Private Admonishment 3, p. 20.) [Alcohol or drug related criminal conduct.]

A judge delayed in deciding two matters and improperly signed salary affidavits. In response to the Commission's inquiry, the judge offered defenses that the judge later conceded were disingenuous and misleading. (Ann. Rept. (2000), Private Admonishment 4, p. 20.) [Decisional delay/false salary affidavits; on-bench abuse of authority in performance of judicial duties; failure to cooperate/lack of candor with regulatory authorities.]

A judge used and threatened to use excessive force to control litigants. (Ann. Rept. (2000), Private Admonishment 5, p. 20.) [On-bench abuse of authority in performance of judicial duties.]

A judge engaged in a pattern of erratic and inappropriate conduct toward court personnel and attorneys appearing before the judge. (Ann. Rept. (2000), Private Admonishment 6, p. 20.) [Miscellaneous off-bench conduct; sexual harassment/inappropriate workplace gender comments; off-bench abuse of office; bias/appearance of bias toward a particular class; demeanor/decorum; misuse of court resources.]

## 1999

In a number of cases, a judge inappropriately introduced religion into the proceedings, creating the appearance that the judge's rulings were influenced by the judge's personal religious views. (Ann. Rept. (1999), Private Admonishment 1, p. 21.) [Bias/appearance of bias toward a particular class.]

A judge conducted a proceeding in such an informal manner that some of the participants were unaware that the judge would rule on the matter at that time; consequently, they did not introduce evidence and testimony. The judge – not wearing the judicial robe – sat at counsel table with the litigants and informally explored their positions. (Ann. Rept. (1999), Private Admonishment 2, p. 21.) [Failure to ensure rights.]

A judge made improper use of court resources and displayed a lack of candor in responding to the Commission's inquiries about the judge's conduct. (Ann. Rept. (1999), Private Admonishment 3, p. 21.) [Failure to cooperate/lack of candor with regulatory authorities; misuse of court resources.]

## 1998

On the judge's own initiative and after being informed that the action was contrary to law, a judge reduced a misdemeanor charge under circumstances which created the appearance that the judge had acted for the purpose of depriving the defendant of a jury trial and representation by court appointed counsel. (Ann. Rept. (1998), Private Admonishment 1, p. 26.) [Failure to ensure rights; on-bench abuse of authority in performance of judicial duties.]

After receiving an advisory letter from the Commission for similar conduct, a judge displayed a weapon in open court, causing some observers to be concerned or fearful. (Ann. Rept. (1998), Private Admonishment 2, p. 26.) [Demeanor/decorum.]

A judge failed to observe high standards of conduct in the judge's personal, off-bench activities which undermined confidence in the integrity of the judiciary. (Ann. Rept. (1998), Private Admonishment 3, p. 26.) [Miscellaneous off-bench conduct.]

# Advisory Letters

## Abuse of Contempt/Sanctions

The judge failed to follow required contempt procedures and made a litigant attend a contempt hearing that the court lacked the jurisdiction to hold. (Ann. Rept. (2019), Advisory Letter 1, p. 34.)

The judge threatened to impose fees and costs to improperly attempt to deter a litigant from making a good faith legal argument. (Ann. Rept. (2019), Advisory Letter 2, p. 34.)

A judge imposed a sanction not authorized by law for an attorney's failure to appear. (Ann. Rept. (2014), Advisory Letter 1, p. 21.)

After a court proceeding, the bailiff asked if a court spectator had recorded the proceeding. The spectator denied having done so. The judge ordered the spectator taken into custody; the individual was handcuffed and detained briefly. The judge then questioned the individual about recording the proceedings, without advising that contempt was being contemplated. The judge apologized to the spectator at a later date, and reported the incident to the commission. (Ann. Rept. (2013), Advisory Letter 1, p. 21.)

At a settlement conference in a family law case, after learning of misconduct by an attorney in the handling of discovery in the case, a judge sanctioned the attorney without providing the attorney notice or an opportunity to be heard. (Ann. Rept. (2012), Advisory Letter 1, p. 24.)

After courtroom spectators had been detained for allegedly speaking with an in-custody defendant, a judge stated to them that they could resolve their case that day for a $150 fine or hire an attorney and have a hearing, which did not constitute an opportunity to be heard prior to imposition of sanctions and appeared coercive. (Ann. Rept. (2012), Advisory Letter 2, p. 25.)

A judge sanctioned an attorney without giving notice and an opportunity to be heard and failed to issue an order setting forth the conduct that gave rise to the sanctions, as required by law. (Ann. Rept. (2012), Advisory Letter 3, p. 25.)

A judge sanctioned an attorney for an alleged direct contempt without complying with statutory or due process requirements for contempt or sanctions. (Ann. Rept. (2012), Advisory Letter 4, p. 25.)

A judge issued two sanctions orders to a party without notice in the manner prescribed by law. (Ann. Rept. (2011), Advisory Letter 1, p. 24.)

A judge granted a motion to set aside a dismissal for excusable neglect by plaintiff's counsel. In the attorney's absence and without providing notice or a hearing, the judge ordered the attorney to pay sanctions. Also, the minute order failed to specify the reason for the sanctions. (Ann. Rept. (2011), Advisory Letter 2, p. 24.)

During a hearing at which the opposing party and counsel were appearing by telephone, a litigant hit the mute button, briefly preventing the opposing party and attorney from hearing or participating in the proceedings. The judge immediately imposed monetary sanctions, without providing the litigant notice or an opportunity to be heard as required by law. (The transcript showed the litigant was seeking to tell the judge privately about the litigant's mental and medical issues that were hampering the litigant's participation in the proceedings.) (Ann. Rept. (2011), Advisory Letter 3, p. 24.)

A judge engaged in an abuse of authority by issuing sanctions without following due process procedures. (Ann. Rept. (2010), Advisory Letter 5, p. 25.)

A judge's conduct in contempt proceedings against counsel gave rise to an appearance of embroilment and lack of impartiality. The judge did not follow procedures required for indirect contempt and failed to disqualify from the contempt proceedings when disqualification was required. In the order to show cause re: contempt and in verified answers to statements of disqualification, the judge made statements that were factually inaccurate and that made allegations against counsel appear more egregious. The advisory was strong. (Ann. Rept. (2010), Advisory Letter 6, p. 25.) [Abuse of contempt/sanctions; disqualification/disclosure.]

A judge held an attorney in contempt without adhering to the substantive and procedural requirements for contempt. The judge was new to the bench. The advisory was strong. (Ann. Rept. (2010), Advisory Letter 7, p. 25.)

A judge held a juror in contempt without following required procedures and displayed sarcasm toward the juror. The judge later improperly remanded the juror to a lockup area before adjudicating further contempt by the juror. (Ann. Rept. (2008), Advisory Letter 16, p. 27.) [Abuse of contempt/sanctions; demeanor/decorum.]

In dealing with an alleged indirect contempt — for conduct not occurring in the court's presence — a judge failed to provide due process by not giving the contemnor proper notice of the contempt charge and appointing counsel as required under the circumstances. The judge immediately remanded the contemnor to serve a jail sentence. The Commission took note that the contemnor was a difficult litigant. (Ann. Rept. (2004), Advisory Letter 8, p. 23.)

A judge engaged in an abuse of authority by imposing additional conditions to a sanctions order after the sanctions were paid. (Ann. Rept. (2003), Advisory Letter 9, p. 27.)

A judge commenced a contempt proceeding without affording the alleged contemnor notice of the charges or the hearing, and gave him an opportunity to be heard only after finding him in contempt. Because the judge had become embroiled, the judge should have recused. (Ann. Rept. (2003), Advisory Letter 14, p. 27.) [Abuse of contempt/ sanctions; bias/appearance of bias not directed toward a particular class.]

A judge failed to follow procedures required to sanction indirect contempt. (Ann. Rept. (2001), Advisory Letter 16, p. 21.)

A judge sanctioned an attorney without affording due process. The sanctions order also failed to provide the requisite details of the attorney's conduct, on which the award of sanctions was based. (Ann. Rept. (1999), Advisory Letter 8, p. 22.)

A judge imposed sanctions on attorneys and pro per litigants without notice or hearing for violation of local delay reduction rules. (Ann. Rept. (1999), Advisory Letter 10, p. 22.)

In a civil case, a judge had a litigant handcuffed for contempt without conducting contempt proceedings. (Ann. Rept. (1998), Advisory Letter 14, p. 27.)

A judge had a prospective juror taken into custody by the bailiff for a short period of time for contempt without following proper contempt procedures. The judge's order of contempt failed to recite the facts constituting contempt. (Ann. Rept. (1998), Advisory Letter 15, p. 27.)

A judge ordered a litigant briefly taken into custody for contempt without conducting contempt proceedings. (Ann. Rept. (1998), Advisory Letter 16, p. 27.)

A judge imposed sanctions against attorneys without notice or hearing in two cases, giving the appearance of embroilment and bias. In a separate matter, the judge considered ex parte communications during the case. (Ann. Rept. (1998), Advisory Letter 17, p. 27.) [Abuse of contempt/sanctions; ex parte communications.]

Without notice or a hearing, a judge ordered sanctions against an attorney who failed to attend a mandatory settlement conference. (Ann. Rept. (1998), Advisory Letter 18, p. 27.)

A judge failed to afford notice and to comply with other requirements for issuance of an order to show cause re: sanctions. (Ann. Rept. (1998), Advisory Letter 19, p. 27.)

## Administrative Malfeasance/Improper Comments/Treatment of Colleagues and Staff

A judge failed to take appropriate corrective action when made aware that another judge was engaged in conduct that violated the Code of Judicial Ethics. (Ann. Rept. (2017), Advisory Letter 1, p. 24.)

A presiding judge failed to diligently discharge administrative responsibilities with respect to case management and timely disposition of cases. (Ann. Rept. (2015), Advisory Letter 1, p. 24.)

A judge was absent from court for two days without notice to or permission from the presiding judge. (Ann. Rept. (2015), Advisory Letter 2, p. 24.)

A judge permitted the judge's close relative to remain employed in the judge's courtroom for a substantial period of time. (Ann. Rept. (2014), Advisory Letter 2, p. 22.)

A presiding judge did not properly respond to a complaint about a delay of more than a year in the issuance of a final statement of decision by a commissioner in a family law case. The judge's closing letter to the litigant stated there was no merit to the complaint even though the commissioner had admitted the substantial delay. (Ann. Rept. (2010), Advisory Letter 22, p. 27.)

A supervising judge failed to report a written reprimand of a subordinate judicial officer to the Commission on Judicial Performance as required by California Rules of Court, rule 10.703. (Ann. Rept. (2009), Advisory Letter 12, p. 19.)

A judge who was responsible for the handling of complaints against subordinate judicial officers under California Rules of Court, rule 10.703, failed to ensure the appropriate handling of litigants' complaints about a subordinate judicial officer. (Ann. Rept. (2009), Advisory Letter 13, p. 19.)

A judge who was responsible for handling complaints about subordinate judicial officers under California Rules of Court, rule 10.703, failed to ensure timely responses to litigants' complaints about a subordinate judicial officer. (Ann. Rept. (2009), Advisory Letter 14, p. 19.)

A judge who was responsible for handling complaints against subordinate judicial officers under California Rules of Court, rule 10.703, approved a supervising judge's decision not to report a written reprimand of a subordinate judicial officer to the Commission on Judicial Performance, notwithstanding the reporting requirements of rule 10.703. (Ann. Rept. (2009), Advisory Letter 15, p. 19.)

A judge failed to obtain prior approval from the presiding judge for absences of more than one-half day, as required by California Rules of Court, rule 10.603. (Ann. Rept. (2008), Advisory Letter 15, p. 27.)

A judge participated in the decision to enter into a financial transaction on behalf of the court with an individual who was a close personal friend of the judge and with whom the judge had financial ties. (Ann. Rept. (2005), Advisory Letter 8, p. 27.)

A presiding judge did not respond to a litigant's complaint about a subordinate judicial officer in a timely manner, or to a letter from the Commission inquiring about the status of the matter. (Ann. Rept. (2002), Advisory Letter 1, p. 23.)

A judge failed to take any action when information revealing potential serious wrongdoing by a judicial colleague was before the judge. (Ann. Rept. (2002), Advisory Letter 2, p. 23.)

A judge performed administrative functions in a manner that appeared to reflect abuse of authority and a lack of impartiality. (Ann. Rept. (2001), Advisory Letter 7, p. 20.)

A presiding judge failed to respond in a timely manner to a complaint about a court commissioner. (Ann. Rept. (2000), Advisory Letter 17, p. 22.)

A presiding judge promptly acknowledged and investigated a complaint against a court commissioner and took informal corrective action but delayed five months before notifying the complainant of the outcome of the investigation. (Ann. Rept. (2000), Advisory Letter 18, p. 22.)

A judge was unduly harsh in his treatment of court staff. (Ann. Rept. (1998), Advisory Letter 13, p. 27.)

A judge failed to respond to a complaint against a court commissioner. (Ann. Rept. (1998), Advisory Letter 26, p. 28.)

A judge appeared to retaliate against a court employee for remarks made outside of work by the employee. (Ann. Rept. (1998), Advisory Letter 27, p. 28.)

A supervising judge failed to respond to a complaint against two court commissioners. In another matter, the judge failed to respond timely to a complaint against a court commissioner. There were mitigating circumstances. (Ann. Rept. (1998), Advisory Letter 28, p. 28.)

A supervising judge failed to respond to a complaint about a court commissioner. (Ann. Rept. (1998), Advisory Letter 29, p. 28.)

## Bias/Appearance of Bias Toward a Particular Class

During a hearing, the judge made comments that reflected bias toward a particular class. (Ann. Rept. (2018), Advisory Letter 2, p. 28.)

A judge used the court computer to forward to judicial officers a satirical e-mail that promoted negative stereotypes about people from a certain country, apparently realizing that it would be offensive to at least one judge whose ancestors were from that country. (Ann. Rept. (2008), Advisory Letter 6, p. 26.)

A judge's remarks in a public setting appeared to reflect negative racial and ethnic stereotypes. (Ann. Rept. (2007), Advisory Letter 12, p. 32.)

During a chambers proceeding in a civil case, a judge referred to the case by the national origin of the litigants and made other comments which appeared to disparage persons from that nation. The judge acknowledged that the remarks were inappropriate and indicated regret for having made them. (Ann. Rept. (1999), Advisory Letter 14, p. 23.)

A judge's remarks about sexual orientation may have created the appearance of bias. (Ann. Rept. (1999), Advisory Letter 16, p. 23.)

A judge made remarks during a court proceeding that gave the appearance of bias against a litigant based on the litigant's country of origin. (Ann. Rept. (1998), Advisory Letter 32, p. 28.)

## Bias/Appearance of Bias Not Directed Toward a Particular Class

During a hearing and jury trial in a criminal matter, the judge made comments to and about a witness that were discourteous and reflected embroilment. (Ann. Rept. (2020), Advisory Letter 1, p. 55.)

During a hearing, the judge improperly interjected a personal story. (Ann. Rept. (2018), Advisory Letter 1, p. 28.)

A presiding judge made remarks about a litigant that created an appearance of bias. (Ann. Rept. (2016), Advisory Letter 1, p. 27.)

During a criminal calendar not staffed by the district attorney's office, the judge made comments to a defendant that gave the appearance that the judge was not impartial and was trying to give the defendant an advantage in the proceedings. In another matter, the judge made statements about refiling a case that appeared to intrude on the district attorney's charging decision. (Ann. Rept. (2016), Advisory Letter 2, p. 27.)

A judge made remarks that gave the appearance that the judge had prejudged a motion and decided to deny it before it was filed. In another matter, the judge made comments to attorneys that created the impression that the judge believed that an attorney, who was not present, had been deliberately untruthful in an unrelated case. (Ann. Rept. (2014), Advisory Letter 3, p. 22.)

A judge's off-bench activities gave rise to an appearance of impropriety and cast reasonable doubt on the judge's capacity to act impartially. (Ann. Rept. (2014), Advisory Letter 4, p. 22.)

A judge usurped the prosecutorial role and gave the appearance of bias when the judge required a defendant to plead guilty to an uncharged misdemeanor failure to appear in order to resolve pending charges. There were mitigating factors. (Ann. Rept. (2014), Advisory Letter 5, p. 22.)

A judge's treatment of a witness gave the appearance that the witness had special access to the judge or that the judge was coaching the witness. (Ann. Rept. (2014), Advisory Letter 6, p. 22.)

A judge's off-bench activities gave rise to an appearance of impropriety and cast reasonable doubt on the judge's capacity to act impartially. (Ann. Rept. (2014), Advisory Letter 7, p. 22.)

A judge's remarks at sentencing created the appearance that the sentence was based in part on considerations not relevant to sentencing, such as the defendant's ethnicity or family's national origin. The judge also made sarcastic remarks directed to the defendant's parents. (Ann. Rept. (2014), Advisory Letter 8, p. 22.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A judge's social media activities created an appearance of impropriety and an appearance of partiality. (Ann. Rept. (2014), Advisory Letter 9, p. 22.) [Bias/appearance of bias not directed toward a particular class; disqualification/disclosure/post-disqualification conduct.]

During a jury trial with a difficult pro per criminal defendant, the judge made a number of statements in the presence of the jury to the effect that the defendant was misrepresenting facts and was attempting to manipulate the proceedings; this created an appearance of lack of impartiality. (Ann. Rept. (2011), Advisory Letter 4, p. 24.)

During a traffic calendar, the judge announced that the judge wanted to meet with the police officers privately. When one of the traffic defendants expressed concern about the meeting, the judge called the defendant a demeaning name. The judge previously had met with law enforcement supervisors about their ticketing practices and presentation of evidence, which gave the appearance of alignment with law enforcement. (Ann. Rept. (2011), Advisory Letter 5, p. 24.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

During a telephonic appearance, a pro per inmate plaintiff was able to hear the judge and the opposing counsel, but they could not hear the inmate and believed the inmate was not on the line. The judge made remarks that created the appearance the judge was coaching counsel about responding to the inmate's legal position. The judge also made a remark about the inmate's case being no different from other inmate cases, suggesting stereotyping of inmates' cases. (Ann. Rept. (2011), Advisory Letter 6, p. 25.)

In setting a probation violation hearing, a judge told the probationer that the judge was going to send the probationer to prison, and made other remarks that reflected prejudgment and a lack of impartiality. (Ann. Rept. (2010), Advisory Letter 1, p. 24.)

During the lengthy criminal trial of an obstreperous pro per defendant, a judge made disparaging and demeaning comments to the defendant and made improper threats, sometimes in the presence of the jury, in an attempt to control the defendant. At one point, the judge ordered the out-of-custody defendant placed in a holding cell without following proper procedures. The judge engaged in conduct suggesting assumption of a prosecutorial role rather than that of an impartial arbiter. The advisory was strong. (Ann. Rept. (2010), Advisory Letter 2, p. 24.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; failure to ensure rights; abuse of contempt.]

After learning that a defendant's probation had terminated, a judge made several remarks that reflected embroilment, including asking the prosecutor to "keep tabs" on the defendant. The judge also failed to promote public confidence in the impartiality of the judiciary by suggesting that the judge would not hear challenges to an order the judge had signed when the judge lacked jurisdiction. (Ann. Rept. (2010), Advisory Letter 3, p. 25.)

After a preliminary hearing, a judge ordered a defendant to undergo drug testing in a manner that suggested that the judge was assuming a law enforcement role rather than that of a neutral magistrate. The judge engaged in an ex parte communication with a sheriff's deputy about the testing. The advisory was strong. (Ann. Rept. (2010), Advisory Letter 4, p. 25.) [Bias/appearance of bias not directed toward a particular class; ex parte communications.]

While meeting with counsel in chambers, a judge professed dislike of one parent in a dependency matter just prior to a hearing regarding custody. (Ann. Rept. (2009), Advisory Letter 4, p. 19.)

Before conducting a hearing directed by the Court of Appeal, a judge made angry remarks to counsel that suggested prejudgment and a lack of impartiality, for example, "Let the Court of Appeal reverse." (Ann. Rept. (2008), Advisory Letter 4, p. 26.)

In a civil matter, a judge appeared to display deference to the defendant, who was a celebrity. When counsel for the plaintiff brought the plaintiff's concerns to the judge's attention, the judge overreacted and displayed a lack of patience and dignity in responding to counsel. (Ann. Rept. (2008), Advisory Letter 5, p. 26.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A judge, who had just ordered an arrest warrant and increased bail, suggested to the police officer that the judge should be contacted if the defendant later appeared to be about to make bail. While the judge appeared to be motivated by concern for public safety, the judge's conduct created the appearance of embroilment and lack of impartiality. (Ann. Rept. (2008), Advisory Letter 7, p. 26.)

A judge, while presiding over post-trial proceedings, made comments about the parties and the prospects of settlement that reflected embroilment and created an appearance of lack of impartiality. (Ann. Rept. (2008), Advisory Letter 8, p. 27.)

A judge made remarks suggesting bias against counsel that appeared to be based on off-bench comments made by another judicial officer about the attorney. The judge made additional remarks that were sarcastic and demeaning. (Ann. Rept. (2007), Advisory Letter 10, p. 32.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

In a dependency matter, a judge made remarks demonstrating bias and remarks that failed to demonstrate patience, dignity and courtesy. (Ann. Rept. (2007), Advisory Letter 11, p. 32.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A judge's off-bench conduct might have created the impression that the judge had assumed a law enforcement role, and cast doubt on the judge's capacity to act impartially. The judge expressed contrition. (Ann. Rept. (2006), Advisory Letter 15, p. 33.) [Miscellaneous off-bench conduct; appearance of bias not directed toward a particular class.]

A judge assigned to a criminal case predicted that the defendant would be convicted and made disparaging comments about the defendant's case that reflected a lack of impartiality and suggested prejudgment. (Ann. Rept. (2004), Advisory Letter 4, p. 23.)

A judge's comments gave the appearance that the judge was biased and embroiled and had prejudged a contempt matter that was to be heard at a later date and the likely sanction. (Ann. Rept. (2004), Advisory Letter 5, p. 23.)

In a civil matter, a judge fraternized with one of the litigants during trial recesses by conversing and examining one of the trial exhibits with the litigant. (Ann. Rept. (2003), Advisory Letter 1, p. 26.)

A judge made disparaging remarks at a hearing about an attorney who was not present but was a member of the firm representing one of the parties. The remarks, made after the attorney had prevailed on a writ, suggested bias against the attorney. (Ann. Rept. (2002), Advisory Letter 3, p. 23.)

A judge's remarks in open court at the outset of a criminal trial about the likelihood that the defendant would be convicted conveyed the appearance of prejudgment and a lack of impartiality. (Ann. Rept. (2002), Advisory Letter 4, p. 23.)

In two juvenile dependency matters, a judge made comments to parents that were demeaning and created the appearance of a lack of impartiality. (Ann. Rept. (2001), Advisory Letter 3, p. 19.)

A judge made rude and disparaging remarks to a witness and improperly raised the prospect of incarceration of the witness in a manner that implied prejudgment. (Ann. Rept. (2001), Advisory Letter 18, p. 21.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A judge made remarks during a sentencing hearing that evidenced embroilment and a lack of impartiality. The judge's highly disparaging remarks reflected the judge's personal view that the case – which had resulted in a conviction – should not have been pursued. (Ann. Rept. (2000), Advisory Letter 5, p. 21.)

A judge's letter to the sheriff urging administrative action against an inmate demonstrated embroilment and a lack of impartiality. (Ann. Rept. (2000), Advisory Letter 6, p. 21.)

A judge used a vulgar expression in response to a party's presentation and stated that the judge would rule regardless of the applicable law, which fostered an appearance of prejudgment and bias. (Ann. Rept. (1999), Advisory Letter 17, p. 23.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

In open court, a judge accused an attorney of unethical conduct. The attorney was not present in court when the remarks were made. The judge's comments were unfounded. (Ann. Rept. (1999), Advisory Letter 18, p. 23.)

After a jury returned a verdict of not guilty, but before the jury was discharged, a judge referred to prejudicial and incriminating facts about the defendant, thereby creating the appearance of a lack of impartiality. The judge's remarks also posed the risk of influencing jurors with respect to future jury service. (Ann. Rept. (1999), Advisory Letter 19, p. 23.)

While a case was still pending but no longer before the judge, the judge initiated a private conversation with one of the litigants about the case when the litigant's counsel was not present. The judge made derogatory comments about the litigant's attorney. When information was sought about the contact in other litigation, the judge gave inaccurate information about the incident. (Ann. Rept. (1999), Advisory Letter 20, p. 23.) [Bias/appearance of bias not directed toward a particular class; disqualification/disclosure /post-disqualification conduct.]

A judge appeared to provide legal assistance outside of court to a pro per litigant in a case pending in another department of the judge's court. (Ann. Rept. (1998), Advisory Letter 31, p. 28.)

During a break in proceedings, a judge left the bench to shake hands in the courtroom with a litigant in the case being tried before the judge. (Ann. Rept. (1998), Advisory Letter 33, p. 28.)

A judge made extraneous remarks to a jury which were determined in a subsequent proceeding to have prejudiced a litigant's rights. (Ann. Rept. (1998), Advisory Letter 35, p. 28.)

A judge's repeated remarks to a jury fostered the appearance of encouraging them to identify with one of the parties. (Ann. Rept. (1998), Advisory Letter 36, p. 28.)

In a criminal case, a judge made disparaging remarks about the defendants and appeared to remand one of the defendants into custody out of pique. (Ann. Rept. (1998), Advisory Letter 37, p. 28.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

## Comment on a Pending Case

A judge commented publicly on pending proceedings involving another judge. (Ann. Rept. (2014), Advisory Letter 10, p. 22.)

A judge gave advice to an attorney friend about a case over which a different judge on the judge's court was presiding. (Ann. Rept. (2014), Advisory Letter 11, p. 22.)

A judge made a comment to a news reporter in support of a federal judge's ruling while the case was on appeal. (Ann. Rept. (2012), Advisory Letter 22, p. 26.)

A judge made public comments about the litigants in a pending, highly publicized case. (Ann. Rept. (2010), Advisory Letter 25, p. 27.)

In a published interview, a judge made comments about a case the judge had heard, which was pending before the Court of Appeal, that violated the prohibition on public comment regarding pending cases. (Ann. Rept. (2009), Advisory Letter 16, p. 20.)

A judge participated in a public meeting where a case pending before the judge and related claims were discussed with both parties to the litigation and non-parties. (Ann. Rept. (2004), Advisory Letter 9, p. 23.)

A judge made an improper public comment on a pending case. (Ann. Rept. (2002), Advisory Letter 5, p. 23.)

A judge made an improper public comment on a pending case. (Ann. Rept. (2001), Advisory Letter 12, p. 20.)

A judge made public comments to the media concerning a pending case. (Ann. Rept. (2000), Advisory Letter 13, p. 22.)

A judge made comments to the media concerning a pending case. (Ann. Rept. (1998), Advisory Letter 23, p. 28.)

A judge made comments to the media concerning a pending case. (Ann. Rept. (1998), Advisory Letter 24, p. 28.)

## Decisional Delay/False Salary Affidavits

The judge delayed, beyond statutory deadlines, decisions and rulings on more than one petition for writ of habeas corpus, and received salary payments when one habeas matter was pending and undetermined for more than 90 days. The judge's misconduct was mitigated by various factors, including remedial actions undertaken by the judge. (Ann. Rept. (2020), Advisory Letter 2, p. 55.)

An appellate justice delayed decision in an appeal by finalizing an opinion in the case several years after the case was fully briefed and assigned to the justice. (Ann. Rept. (2020), Advisory Letter 3, p. 55.)

An appellate justice delayed decision in a matter. (Ann. Rept. (2018), Advisory Letter 3, p. 28.)

The judge delayed decision in a matter, which led to related and unnecessary proceedings and a waste of public resources. (Ann. Rept. (2018), Advisory Letter 4, p. 28.)

The judge failed to timely rule on two habeas corpus petitions, without extending the deadlines for ruling for good cause. The judge failed to monitor and supervise the matters to avoid or reduce dilatory practices and delays. (Ann. Rept. (2018), Advisory Letter 5, p. 28.)

In a family law case, a judge's post-trial statement of decision was not issued for six months after briefing concluded. (Ann. Rept. (2017), Advisory Letter 2, p. 24.)

A judge delayed issuing decisions on submitted matters in two family law cases. The decisions were issued approximately 110 days after submission. (Ann. Rept. (2016), Advisory Letter 3, p. 28.)

A judge delayed in ruling on a submitted matter in a family law matter. The decision was issued about 120 days after the matter was submitted. The judge also signed one salary affidavit while the matter was under submission. There was no showing that the affidavit was knowingly false. (Ann. Rept. (2016), Advisory Letter 4, p. 28.)

A judge engaged in substantial delays in ruling on two habeas petitions. The delays were each about seven months long. (Ann. Rept. (2016), Advisory Letter 5, p. 28.)

Instead of either denying or returning post-conviction motions for discovery that were deficient and not properly served, the judge delayed acting on the motions for almost 10 months and then issued an order that did not dispose of any of the motions. (Ann. Rept. (2016), Advisory Letter 6, p. 28.)

A judge signed a prospective salary affidavit declaring that no cause remained pending and undetermined that had been submitted to the judge for decision for a period of 90 days prior to the effective date of the affidavit, at which time an undecided matter would be pending for 92 days. The judge also received judicial salary in violation of law when the same undecided matter was pending for more than 90 days. (Ann. Rept. (2015), Advisory Letter 3, p. 24.)

A judge delayed signing a proposed judgment in a civil case for more than nine months. (Ann. Rept. (2014), Advisory Letter 12, p. 22.)

A judge failed to timely rule on two requests for needs-based attorney's fees. (Ann. Rept. (2013), Advisory Letter 2, p. 21.)

A judge delayed making decisions in numerous cases by issuing orders designated as "tentative rulings" that contained no substantive rulings and only delayed hearing dates or postponed issuance of tentative rulings indefinitely. (Ann. Rept. (2013), Advisory Letter 3, p. 21.)

A judge did not rule on a habeas petition for more than 18 months after the judge received it. Although the underlying case file was missing for most of that time, the commission believed that the judge should have made a greater effort to locate the documents needed to make a ruling given the length of the delay and the fact that the judge was aware of the delay. (Ann. Rept. (2012), Advisory Letter 5, p. 25.)

A judge failed to rule on two motions until 137 days after they were taken under submission. During the period that the matters were under submission for more than 90 days, the judge signed one false salary affidavit and received one month's salary in violation of law. There was no showing that the affidavit was knowingly false. (Ann. Rept. (2012), Advisory Letter 6, p. 25.)

A judge failed to rule promptly on five peremptory challenges. The delays ranged between 12 and 42 days. (Ann. Rept. (2011), Advisory Letter 7, p. 25.)

A judge ruled on a habeas petition 114 days after it was filed; Rule of Court 4.551(a)(3)(A) requires a ruling within 60 days. (Ann. Rept. (2011), Advisory Letter 8, p. 25.)

A judge delayed 10 months in deciding a motion to disqualify another judge, which had been assigned by the Judicial Council. (Ann. Rept. (2011), Advisory Letter 9, p. 25.)

A pro per family law litigant brought a motion to modify child support which was heard the same day as the opposing party's motion to modify spousal support. The judge gave the parties two weeks for further briefing, after which the motions would be deemed submitted. Two months later, the judge decided only the spousal support motion. Two months thereafter, the pro per litigant began inquiring about the child support motion. The judge took no action until three months later, when the judge ordered a further hearing on child support issues. (Ann. Rept. (2010), Advisory Letter 23, p. 27.)

A judge did not to rule on a habeas petition for six months, and failed to rule on two subsequent habeas petitions filed by the same petitioner shortly before the judge's ruling on the initial petition. (Ann. Rept. (2009), Advisory Letter 17, p. 20.)

A judge delayed ruling in a family law matter for almost a year and a half. There were mitigating circumstances. (Ann. Rept. (2007), Advisory Letter 7, p. 31.)

A judge contributed to excessive delay in a habeas matter by ordering 16 extensions of time for filing the return, over a three-year period. Extensions were requested informally by petitioner's assigned counsel; the judge's orders contained no statement of good cause as required. The judge also failed to take action regarding petitioner's claim that petitioner had been abandoned by counsel. (Ann. Rept. (2006), Advisory Letter 6, p. 32.) [Decisional delay/false salary affidavits; failure to ensure rights.]

A judge failed to issue a decision on a custody issue in a family law case for 112 days after telling the parties a decision would be issued within 10 days. (Ann. Rept. (2006), Advisory Letter 7, p. 32.)

A judge did not decide a motion for child support for almost seven and one half months, and did not decide a request for attorneys' fees in the same case for almost a year. (Ann. Rept. (2006), Advisory Letter 8, p. 32.)

A judge failed to rule on a petition for habeas corpus for nearly seven months. (Ann. Rept. (2005), Advisory Letter 9, p. 27.)

At a time when the law required a judge to act on petitions for writs of habeas corpus within 30 days, a judge failed to take action on a petition for almost six months. (Ann. Rept. (2004), Advisory Letter 6, p. 23.)

Although the law now requires a judge to act on petitions for writs of habeas corpus in 60 days, a judge did not act on a habeas petition for 128 days. The judge issued two extensions of time for the court to act that were not met. (Ann. Rept. (2004), Advisory Letter 7, p. 23.)

A judge failed to render a decision on submitted matters in a family law proceeding for six months and had failed to adequately track the matters. (Ann. Rept. (2002), Advisory Letter 6, p. 23.)

In a family law matter, a judge delayed over five months between the filing of objections to a proposed statement of decision and the issuance of a signed statement. (Ann. Rept. (2001), Advisory Letter 2, p. 19.)

A judge delayed more than a year in issuing a final order on attorneys' fees. A tentative decision had issued earlier. (Ann. Rept. (1999), Advisory Letter 26, p. 24.)

A judge failed to rule for 12 months on a submitted matter, despite inquiries from one of the parties. (Ann. Rept. (1998), Advisory Letter 45, p. 29.)

A judge failed to rule on a submitted matter for over 22 months. (Ann. Rept. (1998), Advisory Letter 46, p. 29.)

A judge failed to rule on submitted matters in a family law case – including child and spousal support – for four months. The judge executed one false salary affidavit. (Ann. Rept. (1998), Advisory Letter 47, p. 29.)

A judge failed to review and act on a habeas petition for over six months. (Ann. Rept. (1998), Advisory Letter 48, p. 29.)

## Demeanor/Decorum

During a hearing in a case with the litigant present, the judge addressed the litigant's attorney in a manner that was impatient, discourteous, and demeaning. Some of the judge's remarks were of a nature that could be expected to impair the attorney-client relationship. (Ann. Rept. (2020), Advisory Letter 4, p. 55.)

During a hearing, the judge made discourteous comments and also improperly injected the judge's personal experience into the hearing. (Ann. Rept. (2019), Advisory Letter 3, p. 35.)

The judge made a discourteous comment about an attorney. (Ann. Rept. (2019), Advisory Letter 4, p. 35.)

The judge made disparaging remarks about a party appearing before the judge. (Ann. Rept. (2018), Advisory Letter 6, p. 28.)

The judge made discourteous remarks in a raised voice to a witness. (Ann. Rept. (2018), Advisory Letter 7, p. 28.)

The judge made improper remarks concerning the parties' minor child during a custody dispute. (Ann. Rept. (2018), Advisory Letter 8, p. 28.)

The judge displayed anger and directed an intemperate comment to an attorney after the attorney stated an objection to the judge's ruling. (The judge's prompt apology to the attorney for the intemperate comment was a factor in mitigation.) (Ann. Rept. (2018), Advisory Letter 9, p. 28.)

During a hearing, the judge addressed an attorney in a hostile manner with a raised voice. (Ann. Rept. (2018), Advisory Letter 10, p. 28.)

A judge made a gratuitous reference to malpractice in describing an attorney's conduct during a hearing in open court. (Ann. Rept. (2017), Advisory Letter 3, p. 24.)

A judge made discourteous remarks to a self-represented litigant during trial. (Ann. Rept. (2017), Advisory Letter 4, p. 24.)

A judge made sarcastic remarks to a witness during trial in the presence of the jury. (Ann. Rept. (2017), Advisory Letter 5, p. 24.)

A judge made a profane remark while conducting court business. (Ann. Rept. (2017), Advisory Letter 6, p. 24.)

During court proceedings, the judge made discourteous, demeaning and disparaging remarks to an attorney, many of which were likely to undermine the attorney-client relationship. (Ann. Rept. (2017), Advisory Letter 7, p. 24.)

A judge's remark to a self-represented litigant demonstrated a lack of patience, dignity, and courtesy. (Ann. Rept. (2017), Advisory Letter 8, p. 24.)

A judge's remark in open court about an absent attorney demonstrated a lack of patience, dignity, and courtesy. (Ann. Rept. (2017), Advisory Letter 9, p. 25.)

A supervising judge chastised and disparaged an individual for complaining about a subordinate judicial officer's handling of a case because the complainant was not a party to the case. (Ann. Rept. (2016), Advisory Letter 7, p. 28.)

In a family law case, the judge made an undignified and discourteous remark about a pro per litigant's weight during a hearing on the litigant's motion to reduce support payments. (Ann. Rept. (2014), Advisory Letter 13, p. 23.)

A judge made sarcastic remarks ridiculing an unemployed parent who was seeking to reduce child support payments. (Ann. Rept. (2013), Advisory Letter 4, p. 21.)

During a criminal trial, in the presence of the jury, the judge made a remark expressing a negative personal opinion of the defense attorney. (Ann. Rept. (2013), Advisory Letter 5, p. 21.)

In the presence of an attorney's client, a judge criticized the attorney and threatened to refer the attorney to the State Bar, in a manner that appeared to interfere with the attorney-client relationship. (Ann. Rept. (2012), Advisory Letter 7, p. 25.)

A judge tossed small rewards from the bench to drug court participants. The commission did not take issue with giving these items to defendants, but emphasized concern that they be delivered in a manner that does not either demean the defendants or diminish the dignity of the court. (Ann. Rept. (2012), Advisory Letter 8, p. 25.)

A family law judge made denigrating remarks to an attorney, including questioning where the attorney went to law school and in what country the attorney thought the attorney was practicing law. (Ann. Rept. (2012), Advisory Letter 9, p. 25.)

During a hearing, the judge made a denigrating remark about a minor seeking a protective order. (Ann. Rept. (2011), Advisory Letter 10, p. 25.)

A judge made denigrating comments to a pro per litigant who said he was an attorney in another state, but had a different profession here. The judge's comments included a statement that the judge hoped the litigant was better at his other profession than at practicing law. (Ann. Rept. (2011), Advisory Letter 11, p. 25.)

A judge made disparaging comments about an attorney during a hearing on the attorney's motion for attorney's fees and in a tentative ruling that the judge posted on the court's Web site. (Ann. Rept. (2010), Advisory Letter 14, p. 26.)

At the conclusion of a settlement conference in a civil case, a judge made a disparaging remark to the plaintiff, to the effect that the plaintiff should be institutionalized. (Ann. Rept. (2010), Advisory Letter 15, p. 26.)

In a published interview, a judge used profanity, once in reference to a litigant. (Ann. Rept. (2009), Advisory Letter 1, p. 18.)

A judge took two personal cell phone calls in open court during court proceedings and left the bench for at least five minutes for each call, returning without explanation or apology. The judge also made a disparaging remark to a small claims litigant. (Ann. Rept. (2009), Advisory Letter 2, p. 18.)

A judge inappropriately stated in open court, in the presence of an attorney's client, that the judge was considering reporting the attorney to the State Bar. (Ann. Rept. (2009), Advisory Letter 3, p. 18.)

In the presence of the jury, a judge displayed anger and used profanity toward counsel at a side bar conference for not following the judge's rule requiring attorneys to stand to make objections. (Ann. Rept. (2008), Advisory Letter 1, p. 26.)

In front of other jurors, a judge accused two potential jurors of lying to get out of jury duty. (Ann. Rept. (2008), Advisory Letter 2, p. 26.)

A judge was rude to counsel and litigants in three cases. (Ann. Rept. (2008), Advisory Letter 3, p. 26.)

On three occasions, a judge was loud and demeaning in dealing with court personnel. (Ann. Rept. (2007), Advisory Letter 1, p. 31.)

A judge displayed improper demeanor in two cases, making unduly harsh remarks. Some of the remarks concerned a litigant, others involved a witness, and others were directed to an attorney in a settlement conference. The advisory letter was issued after a six-month period of monitoring revealed no additional incidents of poor demeanor by the judge. (Ann. Rept. (2007), Advisory Letter 2, p. 31.)

A judge made sarcastic and demeaning remarks to a pro per litigant in family court, including mocking the litigant's use of a legal term. (Ann. Rept. (2007), Advisory Letter 3, p. 31.)

A judge used profanity in a sidebar conference with counsel while the jury and others were present in the courtroom. (Ann. Rept. (2007), Advisory Letter 4, p. 31.)

A judge made numerous sarcastic and demeaning remarks to both counsel in the presence of the jury in a criminal case. (Ann. Rept. (2007), Advisory Letter 5, p. 31.)

A judge made a vulgar remark to a pro per respondent in a domestic violence matter. (Ann. Rept. (2007), Advisory Letter 6, p. 31.)

A judge used profanity and vulgar language in two cases. The judge expressed contrition and gave assurances that the conduct would not be repeated. (Ann. Rept. (2006), Advisory Letter 1, p. 32.)

At sentencing, a judge made gratuitous remarks disparaging the criminal justice system in other jurisdictions. The remarks were likely to undermine public confidence in the judiciary, prosecutors and law enforcement. (Ann. Rept. (2006), Advisory Letter 2, p. 32.)

In an angry outburst during court proceedings, a judge expressed frustration with the judicial system and made rude and undignified remarks to a pro per family law litigant. (Ann. Rept. (2006), Advisory Letter 3, p. 32.)

During trial, a judge made numerous sarcastic and demeaning remarks to counsel in the presence of the jury. (Ann. Rept. (2006), Advisory Letter 5, p. 32.)

A judge questioned defense counsel in a criminal matter about the attorney's qualifications and competence. The questioning, some of which was demeaning, was done in open court, in front of the defendant and over the objection of defense counsel. (Ann. Rept. (2006), Advisory Letter 13, p. 33.)

A judge's treatment of a juror was not patient, dignified and courteous. (Ann. Rept. (2005), Advisory Letter 10, p. 27.)

In two separate matters a judge was rude and harsh toward lawyers. In another incident, the judge reprimanded a court clerk in a manner that was inappropriate under the circumstances. In another matter, during proceedings in open court, the judge suggested – without sufficient basis – that a lawyer had committed malpractice in advice given to a client; the client was present during the judge's remarks. (Ann. Rept. (2004), Advisory Letter 1, p. 23.) [Demeanor/decorum; administrative malfeasance.]

In a public area adjacent to the courthouse, a judge berated and insulted a law enforcement witness in a case pending before the judge for talking with jurors during a break. Later, in open court, the judge also made insulting remarks to the prosecutor. (Ann. Rept. (2004), Advisory Letter 2, p. 23.)

After determining not to pursue contempt proceedings against an attorney, a judge made humiliating and insulting remarks to the attorney. The judge did not allow the attorney to address the judge's accusations. (Ann. Rept. (2004), Advisory Letter 3, p. 23.)

A judge failed to be "patient, dignified and courteous" toward a medical witness, and improperly threatened the witness with contempt. (Ann. Rept. (2003), Advisory Letter 2, p. 26.) [Demeanor/decorum; abuse of contempt/sanctions.]

While ruling on an attorney's request, the judge's treatment of the attorney was discourteous and callous. (Ann. Rept. (2003), Advisory Letter 3, p. 26.)

A judge made a gratuitous comment about sending a pro per litigant to jail that was likely to be perceived as a threat. (Ann. Rept. (2003), Advisory Letter 4, p. 26.)

During jury selection, a judge made disparaging comments about jury service, court administration, and another judge. The judge also made a discourteous remark to a potential juror. (Ann. Rept. (2002), Advisory Letter 7, p. 23.)

A judge made demeaning remarks and expressed hostility in open court toward an attorney who sought correction of an inaccurate order. On another occasion, the judge made gratuitous and disparaging remarks in open court about an attorney, in the attorney's absence. (Ann. Rept. (2001), Advisory Letter 4, p. 20.)

A judge displayed anger and rudeness toward an attorney in open court. (Ann. Rept. (2001), Advisory Letter 5, p. 20.)

A judge displayed sarcasm and derision in remarks toward a pro-per litigant in a civil harassment matter. (Ann. Rept. (2001), Advisory Letter 6, p. 20.)

A judge made demeaning comments to a pro per defendant that impugned the defendant's intelligence. (Ann. Rept. (2000), Advisory Letter 3, p. 21.)

In questioning prospective jurors about their attitudes concerning race in a criminal trial, a judge repeatedly used a racial epithet and negative stereotypes in reference to the defendant's race, with the defendant's apparent consent. The Commission urged the use of other means to accomplish the judge's stated purpose of ferreting out attitudes of racial bias. (Ann. Rept. (1999), Advisory Letter 6, p. 22.)

A judge made undignified and sexually suggestive comments to defendants in two cases. (Ann. Rept. (1999), Advisory Letter 7, p. 22.)

A judge's comment to a jury appeared unduly harsh and punitive toward the jurors. (Ann. Rept. (1998), Advisory Letter 8, p. 27.)

A judge made an insensitive joking comment in a family law matter. (Ann. Rept. (1998), Advisory Letter 9, p. 27.)

During a court session, a judge made harsh and intimidating comments to one pro per defendant and used inappropriate humor in the judge's remarks to three other pro per defendants. (Ann. Rept. (1998), Advisory Letter 11, p. 27.)

A judge presided over a court trial without wearing a judicial robe, in violation of Government Code section 68110. (Ann. Rept. (1998), Advisory Letter 12, p. 27.)

## Disqualification/Disclosure/Post-disqualification Conduct

In two matters, the judge failed to disclose information reasonably relevant to the question of disqualification. (Ann. Rept. (2019), Advisory Letter 5, p. 35.)

After being disqualified, the judge initiated an inappropriate communication about the disqualification. (Ann. Rept. (2017), Advisory Letter 10, p. 25.)

After being disqualified, the judge's contact with another judge created the appearance that the disqualified judge was choosing the successor judge. (Ann. Rept. (2016), Advisory Letter 8, p. 28.)

After being disqualified from a case, the judge responded to an inquiry from the successor judge about the basis for an earlier ruling in the case. (Ann. Rept. (2016), Advisory Letter 9, p. 28.)

Over an extended period, the judge failed to disclose a relative's employment with the district attorney's office when attorneys from that office appeared before the judge. (Ann. Rept. (2016), Advisory Letter 10, p. 28.)

After an attorney filed a disqualification motion, the judge questioned the attorney about the attorney's intention to proceed. (Ann. Rept. (2016), Advisory Letter 11, p. 28.)

A judge failed to disclose a close personal relationship with an attorney who supervised other attorneys appearing before the judge. (Ann. Rept. (2016), Advisory Letter 12, p. 28.)

A judge failed to disclose on the record a relationship with a witness in a case before the judge. (Ann. Rept. (2015), Advisory Letter 4, p. 25.)

A judge failed to recuse from cases in which a public entity was a party despite representation of the public entity by the judge's former law firm within the previous two years. (Ann. Rept. (2015), Advisory Letter 5, p. 25.)

A judge failed to disclose out-of-court activities with attorneys who had cases pending before the judge at the time; the activities were relevant to the issue of disqualification. (Ann. Rept. (2014), Advisory Letter 14, p. 23.)

A judge presided over proceedings without disclosing financial dealings with one of the litigants that may have required disqualification. (Ann. Rept. (2014), Advisory Letter 15, p. 23.)

A judge failed to make reasonable efforts to keep informed of personal financial interests and failed to disqualify from multiple cases involving a corporation in which the judge owned stock valued at over $100,000. (Ann. Rept. (2014), Advisory Letter 16, p. 23.)

A judge failed to disclose in a criminal matter investigated by a law enforcement agency that the judge's close relative was employed by the agency, although the close relative was not involved in the case. (Ann. Rept. (2014), Advisory Letter 17, p. 23.)

A judge failed to disclose on the record in open court that the judge's child works for the local district attorney's office. (Ann. Rept. (2013), Advisory Letter 6, p. 21.)

A judge entered into a financial transaction with an attorney and failed to disqualify when the attorney appeared before the judge or to disclose the pending transaction on the record when members of the attorney's office appeared before the judge. The judge canceled the transaction when questions were raised and reported the conduct to the commission. (Ann. Rept. (2013), Advisory Letter 7 p. 21.)

A judge failed to timely recuse when the judge had a disqualifying financial conflict of interest. (Ann. Rept. (2013), Advisory Letter 8, p. 21.)

A judge failed to timely recuse when the judge had a disqualifying financial conflict of interest. (Ann. Rept. (2013), Advisory Letter 9, p. 21.)

By transferring a new trial motion alleging judicial misconduct during trial to another judge, a judge was disqualified from the case. When the judge later presided over the same case after the second judge ruled on the motion, the judge presided while disqualified. (Ann. Rept. (2012), Advisory Letter 10, p. 25.)

A judge ruled on two habeas petitions relating to a criminal case in which the judge had appeared nine times as a deputy district attorney seven to eight years earlier, including at the change of plea. (Ann. Rept. (2012), Advisory Letter 11, p. 25.)

A judge had a romantic relationship with a deputy district attorney whose colleagues appeared before the judge in criminal cases. The judge did not disclose the relationship on the record at all relevant times. (Ann. Rept. (2012), Advisory Letter 12, p. 25.)

In a criminal case, the judge failed to disclose until the first day of trial that the judge's spouse worked for the district attorney's office. The defendant had made multiple appearances before the judge prior to trial. (Ann. Rept. (2011), Advisory Letter 12, p. 25.)

A judge ruled upon a post-conviction petition without disclosing that the judge was married to the individual who, as district attorney, had prosecuted the petitioner. The judge's conflict was apparent from the file. (Ann. Rept. (2011), Advisory Letter 13, p. 25.)

A judge disclosed to the parties in a civil matter that one of the law firms in the case was representing a member of the judge's family, but did not disclose either that the judge had previously shared office space with the law firm or that the judge had social contacts with one of the firm's partners. (Ann. Rept. (2010), Advisory Letter 24, p. 27.)

A judge failed to disclose a relationship with an attorney appearing before the judge until the end of a hearing, after the judge had granted the relief sought by the attorney's client. (Ann. Rept. (2008), Advisory Letter 12, p. 27.)

A judge observed a defendant committing a misdemeanor. The following day, the judge initiated proceedings – over which the judge improperly presided – to revoke the defendant's own-recognizance release based on the conduct the judge had observed. (Ann. Rept. (2007), Advisory Letter 8, p. 31.)

A judge presided over a litigant's motion to disqualify another judge without the litigant's agreement, in violation of Code of Civil Procedure section 170.3(c)(5). (Ann. Rept. (2007), Advisory Letter 9, p. 32.)

A judge's disclosure of information relevant to the question of disqualification was not made on the record, as required by canon 3E(1) of the Code of Judicial Ethics. (Ann. Rept. (2006), Advisory Letter 9, p. 32.)

A judge failed to disclose a longtime friendship with an attorney appearing before the judge in a family law matter, even after the issue of a possible undisclosed conflict was raised. (Ann. Rept. (2005), Advisory Letter 11, p. 27.)

A judge presided over a hearing on a motion and issued a ruling before disclosing a conflict of interest. The judge then recused from further proceedings. (Ann. Rept. (2002), Advisory Letter 8, p. 23.)

A judge failed to fully disclose on the record the judge's relationship with one of the counsel, and failed to place the parties' waiver of disqualification on the record. (Ann. Rept. (2001), Advisory Letter 14, p. 20.)

A judge responded to a litigant's exercise of a peremptory challenge by criticizing the litigant's attorney and delaying the transfer of the case to the presiding judge for reassignment. (Ann. Rept. (2001), Advisory Letter 15, p. 20.)

A judge failed to recuse when an attorney who was representing the judge in a civil case appeared before the judge. When the attorney appeared before the judge after the attorney withdrew from the case, the judge failed to recuse and did not disclose that the attorney was the judge's former counsel. (Ann. Rept. (2000), Advisory Letter 2, p. 21.)

A judge failed to disclose that the judge was in a business partnership with a member of a law firm whose associate was appearing before the judge and that the partnership received income from the law firm. (Ann. Rept. (1999), Advisory Letter 1, p. 21.)

At sentencing, a judge failed to disclose an association between the judge and the prosecutor and failed to disclose that the judge and the prosecutor had attended a weekend function the week before the sentencing hearing. (Ann. Rept. (1999), Advisory Letter 2, p. 21.)

A judge appeared to retaliate against attorneys who had disqualified the judge. (Ann. Rept. (1998), Advisory Letter 1, p. 26.)

A judge used profanity in open court concerning a litigant's actions. After recusing for bias, the judge continued to preside over a second proceeding involving the same litigant. (Ann. Rept. (1998), Advisory Letter 2, p. 26.) [Demeanor/decorum; disqualification/ disclosure/post disqualification conduct.]

A judge recused and then discussed the case with a judge who subsequently handled the case. (Ann. Rept. (1998), Advisory Letter 3, p. 26.)

While recusing from a case, a judge made comments which were disparaging and unnecessary, creating an appearance of bias and the perception that a hearing was being conducted for a purpose other than the discharge of judicial duties. (Ann. Rept. (1998), Advisory Letter 4, p. 27.)

A judge ruled upon the merits of a motion for the judge's own disqualification in contravention of Code of Civil Procedure section 170.3(c)(5). (Ann. Rept. (1998), Advisory Letter 5, p. 27.)

## Ex Parte Communications

The judge had an improper ex parte communication with a potential juror. (Ann. Rept. (2019), Advisory Letter 6, p. 35.)

In a family law matter, the judge had an improper ex parte communication with a mediator. (Ann. Rept. (2019), Advisory Letter 7, p. 35.)

A judge engaged in ex parte communications with a prosecutor concerning a matter pending before the judge. (Ann. Rept. (2017), Advisory Letter 11, p. 25.)

A judge contacted an individual ex parte about a temporary restraining order that the judge had signed, which resulted in the judge's disqualification from further proceedings. (Ann. Rept. (2016), Advisory Letter 13, p. 28.)

A judge engaged in an ex parte meeting with a prosecutor about a pending case. (Ann. Rept. (2016), Advisory Letter 14, p. 28.)

A judge contacted a probation officer ex parte about a report the probation officer had submitted. (Ann. Rept. (2016), Advisory Letter 15, p. 28.)

A judge communicated with the judge who had been disqualified from the case about the basis of an order made by the disqualified judge. (Ann. Rept. (2015), Advisory Letter 6, p. 25.)

Before a pro per defendant was brought into the courtroom for a preliminary examination, the judge permitted the prosecutor and the complaining witness to talk to the judge about the witness's fear of testifying. The judge then encouraged and ordered the witness to testify and made remarks that gave the appearance of lack of impartiality. In addition to engaging in an improper ex parte communication, the judge failed to promptly inform the defendant of the discussion or give the defendant an opportunity to respond, as required by the Code of Judicial Ethics. (Ann. Rept. (2015), Advisory Letter 7, p. 25.) [Bias/appearance of bias not directed toward a particular class; ex parte communications.]

A judge engaged in an improper ex parte communication. (Ann. Rept. (2014), Advisory Letter 18, p. 23.)

During a hearing in drug court, the judge engaged in a sidebar conference with a deputy district attorney and a representative of a residential drug treatment program. The defendant, who was present in court in custody but whose counsel was not present, was not included. The judge then considered and acted upon the ex parte information. (Ann. Rept. (2013), Advisory Letter 10, p. 21.)

A judge met with two attorneys and discussed a disqualification challenge filed against the judge by another attorney in the case, outside the presence of that attorney. The judge also solicited declarations from the attorneys to be filed in opposition to the disqualification motion. (Ann. Rept. (2012), Advisory Letter 13, p. 25.)

A judge engaged in multiple ex parte communications with attorneys and others while presiding over a criminal case, which ultimately necessitated the judge's recusal from the case. The ex parte communications exceeded the scope and terms of the attorneys' consent. (Ann. Rept. (2011), Advisory Letter 14, p. 25.)

Without counsel present, a judge spoke in chambers with a juror during deliberations in a homicide case. (Ann. Rept. (2010), Advisory Letter 16, p. 26.)

After conducting a hearing and making a ruling, a judge advised a litigant ex parte, through a court clerk, that the litigant could submit additional evidence. The opposing party was not informed of these discussions or that the judge's ruling might be changed. Later that day, the judge changed the ruling based on the judge's ex parte review of the additional evidence. (Ann. Rept. (2010), Advisory Letter 17, p. 26.) [Ex parte communications; failure to ensure rights.]

A judge considered multiple ex parte communications from members of the public, including a message left on a court phone line, while presiding over sentencing in a criminal case. (Ann. Rept. (2009), Advisory Letter 18, p. 20.)

A judge acted on an unnoticed, ex parte motion for continuance of a traffic trial. The defense did not have notice of the motion at any time before it was granted, and had no opportunity to object to the continuance or to have any input into setting a new trial date. (Ann. Rept. (2009), Advisory Letter 19, p. 20.)

A judge participated in an ex parte communication by email with a district attorney about a pending case. (Ann. Rept. (2007), Advisory Letter 13, p. 32.)

A supervising judge signed an order in a case to which the judge was not assigned, at the request of a judicial officer, knowing that the judicial officer was recused from the case. (Ann. Rept. (2006), Advisory Letter 10, p. 32.) [Ex parte communications; failure to ensure rights.]

A judge engaged in an improper ex parte communication about a trial over which the judge was presiding. (Ann. Rept. (2006), Advisory Letter 11, p. 32.)

A judge received information ex parte from one party's attorney and, without notice to the other parties, took action in the case based on that information. (Ann. Rept. (2006), Advisory Letter 12, p. 32.) [Ex parte communications; failure to ensure rights.]

A judge received ex parte information about a pending case. The judge then transmitted the information ex parte in a manner that gave the appearance that the judge had been investigating the case and was not impartial. (Ann. Rept. (2005), Advisory Letter 5, p. 26.) [Bias/appearance of bias not directed toward a particular class; ex parte communications.]

A judge twice engaged in ex parte communications about a case pending before the judge and failed to promptly disclose the communications. (Ann. Rept. (2005), Advisory Letter 6, p. 26.)

A judge engaged in an ex parte communication. The judge also improperly received confidential information about a person who was the subject of the ex parte communication but who was not present. (Ann. Rept. (2005), Advisory Letter 7, p. 27.) [Ex parte communications; failure to ensure rights.]

Several hours after a judge presided over a hearing in a family law case at which the judge set the respondent's monthly support payments, the respondent's counsel returned to court and told the judge, in the absence of opposing counsel, that the judge had made mistakes in calculating support. Without notifying the petitioner's counsel, the judge issued an order that significantly reduced the respondent's monthly support obligation. (Ann. Rept. (2004), Advisory Letter 11, p. 24.) [Ex parte communications; failure to ensure rights.]

Responding to an improper ex parte communication from a party's attorney, a supervising judge, without notice or a hearing, modified a judgment entered against that party by a pro tem judge. (Ann. Rept. (2004), Advisory Letter 12, p. 24.) [Ex parte communications; failure to ensure rights.]

A judge met ex parte with representatives of the prosecution to discuss a pending motion. (Ann. Rept. (2002), Advisory Letter 9, p. 24.)

A judge initiated an ex parte discussion with a juror in a case tried before the judge while post-trial proceedings were pending. (Ann. Rept. (2001), Advisory Letter 17, p. 21.)

A judge initiated an ex parte discussion with attorneys present in court about a legal issue that was pending in another case before the judge. (Ann. Rept. (1999), Advisory Letter 11, p. 22.)

A judge engaged in ex parte communications with a defendant and his attorney about a possible sentence modification and then – without prior notice to the prosecutor – the judge modified the sentence. (Ann. Rept. (1999), Advisory Letter 12, p. 22.) [Ex parte communications; failure to ensure rights.]

A judge assigned to a case discussed the case with a judge who had been disqualified from the case. (Ann. Rept. (1998), Advisory Letter 20, p. 28.)

A judge denied a motion based on an ex parte communication from a litigant. (Ann. Rept. (1998), Advisory Letter 21, p. 28.)

A judge initiated an ex parte contact with an attorney in a family law matter pending before the judge. (Ann. Rept. (1998), Advisory Letter 22, p. 28.)

## Failure to Ensure Rights

The judge failed to comply with procedural requirements for an attorney's motion to withdraw as counsel and denied the client the right to be heard. (Ann. Rept. (2020), Advisory Letter 5, p. 56.)

The judge failed to assure advisement and waiver of fundamental rights before accepting guilty pleas from defendants. (Ann. Rept. (2018), Advisory Letter 11, p. 29.)

The judge entered a proposed order without according all of the parties to the action an opportunity to object and to be heard. (Ann. Rept. (2018), Advisory Letter 12, p. 29.)

A judge renewed a restraining order without notice to the restrained party and an opportunity to be heard. (Ann. Rept. (2017), Advisory Letter 12, p. 25.)

A judge improperly allowed an attorney to be present with a party for a small claims proceeding after earlier advising the party that attorneys were not allowed to appear in small claims. (Ann. Rept. (2016), Advisory Letter 16, p. 28.)

Over a year, the judge repeatedly extended a temporary conservatorship and continued the hearing on the conservatorship petition without ever requiring or receiving a current medical report or capacity declaration or directing that the conservatee be brought to court to be advised of the conservatee's rights. (Ann. Rept. (2016), Advisory Letter 17, p. 28.)

A judge regularly advised traffic defendants that traffic school was not generally available after trial, although judges had made exceptions to this practice. The advisory was strongly worded, pointing out that the law requires a court to base its decision to grant or deny traffic school on the individual circumstances of the case, that attendance should be authorized if the court believes a defendant's circumstances indicate that the defendant would benefit from attending traffic school, and that it is an abuse of discretion to rely on court policy to deny a defendant permission to attend traffic school after trial. The commission pointed out that the court may not punish defendants for exercise of their right to trial or discourage them from exercising their right to trial by telling them they will receive harsher sentences if convicted at trial. (Ann. Rept. (2015), Advisory Letter 8, p. 25.)

The judge, in a small claims trial, believing the plaintiff's evidence was insufficient to prove one theory of recovery, did not allow the plaintiff, whose claim included other theories, to speak at all. (Ann. Rept. (2015), Advisory Letter 9, p. 25.)

During a hearing, a judge disclosed confidential information submitted by one party in connection with an application for a fee waiver in another proceeding, thereby violating the party's right of privacy. The judge relied on the confidential information in making a ruling, without affording the party notice or an opportunity to be heard. (Ann. Rept. (2013), Advisory Letter 11, p. 22.)

A judge's handling of a defendant's motion to discharge privately retained counsel reflected intentional disregard of the applicable law and disregard of the defendant's right to counsel of choice. (Ann. Rept. (2012), Advisory Letter 14, p. 26.)

A judge improperly refused to hold a hearing on a defendant's motion to discharge appointed counsel, under circumstances that reflected prejudgment and disregard of the litigant's full right to be heard according to law. (Ann. Rept. (2012), Advisory Letter 15, p. 26.)

A judge delayed turning over to counsel a note from a juror pertaining to possible juror misconduct. (Ann. Rept. (2011), Advisory Letter 15, p. 25.)

During a criminal trial, the judge summarily precluded the defense from presenting surrebuttal evidence, improperly ruling that the defense has no such right. The judge displayed impatience toward the defense attorney when the attorney objected. (Ann. Rept. (2011), Advisory Letter 16, p. 25.) [Failure to ensure rights; demeanor/decorum.]

At sentencing after a negotiated plea, the judge failed to afford the crime victim the opportunity to present a victim impact statement in person in open court, as required by law. The judge had read a victim impact statement submitted earlier. (Ann. Rept. (2011), Advisory Letter 17, p. 26.)

A judge with administrative responsibilities adopted procedures for filings by pro per litigants that raised an appearance that the litigants received unequal treatment based on their indigency or lack of counsel. (Ann. Rept. (2011), Advisory Letter 18, p. 26.)

While presiding over a misdemeanor probation violation, the judge refused the defendant's attorney's request to be heard on the issue of bail, denied the defendant bail and remanded the defendant into custody. (Ann. Rept. (2011), Advisory Letter 19, p. 26.)

A judge to whom a case had been assigned for all purposes told the attorneys that their case was not going to trial because the judge settles every case, which appeared coercive and intended to deny their clients' right to trial. (Ann. Rept. (2011), Advisory Letter 20, p. 26.)

A judge heard that a judgment debtor, who had failed to appear at a debtor's examination and therefore was subject to arrest, was going to be in the courthouse at a particular time on other business. Without notice to the debtor, the judge had a clerk telephone the plaintiff's attorney ex parte and set another debtor's examination at the time the debtor was expected to be at court. While the debtor was at the courthouse, the judge had the debtor escorted to the judge's courtroom for the examination. (Ann. Rept. (2010), Advisory Letter 18, p. 26.) [Ex parte communications; failure to ensure rights.]

A judge allowed a member of the judge's family to attend a juvenile dependency calendar in the judge's courtroom, although the litigants were entitled to have proceedings be confidential. (Ann. Rept. (2010), Advisory Letter 19, p. 26.)

In a criminal case, a judge refused to hear a motion to suppress that was properly before the judge. (Ann. Rept. (2009), Advisory Letter 8, p. 19.)

A judge imposed an illegal and unconstitutional probation condition that reflected disregard of fundamental rights. (Ann. Rept. (2009), Advisory Letter 9, p. 19.)

During the hearing on an application for a restraining order, a judge denied the petitioner's right to be heard by improperly refusing to consider the statutorily permitted grounds on which the application was based, namely, a pattern of harassing conduct. (Ann. Rept. (2009), Advisory Letter 10, p. 19.)

A judge excused a represented party from the stand without offering the opposing party, a pro per litigant, an opportunity for cross-examination; the judge had offered the represented party's counsel the opportunity to cross-examine the pro per litigant. (Ann. Rept. (2009), Advisory Letter 11, p. 19.)

When a criminal defendant's counsel of record failed to appear for trial, the judge said that the defendant was nevertheless going to trial or pleading that day. The defendant pled that day, assisted by another attorney. (Ann. Rept. (2008), Advisory Letter 14, p. 27.)

At arraignment, a judge waived a defendant's right to a speedy trial. The judge gave assurances that the conduct would not be repeated. (Ann. Rept. (2006), Advisory Letter 14, p. 33.)

A judge went forward with a brief hearing in the absence of the pro per defendant. (Ann. Rept. (2005), Advisory Letter 1, p. 26.)

A judge failed to ensure fundamental rights of a witness appearing before the court. (Ann. Rept. (2005), Advisory Letter 2, p. 26.)

A judge failed to ensure fundamental rights of a witness appearing before the court. (Ann. Rept. (2005), Advisory Letter 3, p. 26.)

A judge met ex parte with jurors during deliberations. (Ann. Rept. (2003), Advisory Letter 5, p. 26.)

A judge granted an ex parte application for modification of child visitation without notice of the ex parte application having been given to the affected parent. (Ann. Rept. (2003), Advisory Letter 8, p. 26.)

A judge conducted all or portions of some criminal proceedings without the prosecutor being present. (Ann. Rept. (2001), Advisory Letter 8, p. 20.)

A judge imposed attorney's fees on a defendant represented by the public defender's office without holding a hearing or inquiring regarding ability to pay as required by law. (Ann. Rept. (2000), Advisory Letter 4, p. 21.)

After discovering an error in sentencing, the judge changed details of the disposition of the case without notice to the parties or a hearing. (Ann. Rept. (1999), Advisory Letter 4, p. 22.)

In two cases, a judge terminated parental visitation in violation of the parents' fundamental rights. In one of the cases, the parent did not receive either notice or a hearing. (Ann. Rept. (1999), Advisory Letter 13, p. 23.)

A judge modified a defendant's conditions of probation without notice to the parties. The judge also made a remark which suggested a lack of neutrality. (Ann. Rept. (1998), Advisory Letter 6, p. 27.) [Failure to ensure rights; bias/appearance of bias not directed toward a particular class.]

A judge failed to provide a habeas petitioner with notice and an opportunity to be heard, as required by law, regarding information which the judge was authorized to receive ex parte. (Ann. Rept. (1998), Advisory Letter 25, p. 28.)

## Gifts/Loans/Favors/Ticket-fixing

The judge accepted donations in violation of the no-gifts rule. The judge received mitigation as the result of challenging personal circumstances. (Ann. Rept. (2020), Advisory Letter 6, p. 56.)

While serving as a commissioner and before becoming a judge, the judge handled a traffic matter for the relative of an acquaintance without requiring the relative to be present. The disposition was not lenient or otherwise favorable to the relative. (Ann. Rept. (2002), Advisory Letter 10, p. 24.)

A judge ordered the own-recognizance release of the spouse of a member of the judge's staff after discussing the case with the employee and giving advice about the spouse's release. (Ann. Rept. (2000), Advisory Letter 1, p. 21.)

A judge exchanged gifts with a court vendor whose contract was supervised by the judge. There were mitigating circumstances. (Ann. Rept. (2000), Advisory Letter 14, p. 22.)

A judge appointed an attorney with whom the judge had a social relationship; the judge appointed that attorney far more frequently than the judge appointed other attorneys, giving rise to an appearance of favoritism in appointments. On at least one occasion, the judge failed to disclose the judge's relationship with the attorney. (Ann. Rept. (2000), Advisory Letter 15, p. 22.) [Gifts/loans/favors/ticket-fixing; disqualification/disclosure/ post disqualification conduct.]

A judge ordered the own-recognizance release of a professional acquaintance who called the judge personally to request the release. The defendant was released before being booked and visited the judge in chambers after being released, creating an appearance of preferential treatment. (Ann. Rept. (2000), Advisory Letter 16, p. 22.)

A judge directed the jury commissioner to excuse an employee of a friend of the judge from jury duty without following the court's requirements for release from jury duty. (Ann. Rept. (1999), Advisory Letter 5, p. 22.)

A judge improperly interceded with jail officials to help an acquaintance and contacted the judge assigned to the case. (Ann. Rept. (1999), Advisory Letter 24, p. 23.)

## Improper Business, Financial or Fiduciary Activities

A judge served as a trustee and attorney-in-fact for a person who was not a member of the judge's family. (Ann. Rept. (2000), Advisory Letter 9, p. 22.)

A new judge failed to ensure that the judge was no longer counsel of record in a number of cases after taking the bench. (Ann. Rept. (1998), Advisory Letter 43, p. 29.)

A new judge failed to ensure that the judge was no longer counsel of record in a pending case. The judge remained counsel of record for a lengthy period after taking the bench. (Ann. Rept. (1998), Advisory Letter 44, p. 29.)

## Improper Political Activities

During an election campaign, the judge failed to comply with applicable laws and regulations. (Ann. Rept. (2019), Advisory Letter 8, p. 35.)

The judge misused public resources in connection with a judicial campaign. (Ann. Rept. (2018), Advisory Letter 14, p. 29.)

The judge violated election law reporting requirements. (Ann. Rept. (2018), Advisory Letter 13, p. 29.)

A judge engaged in improper political activity in the courthouse. (Ann. Rept. (2017), Advisory Letter 13, p. 25.)

A judge failed to comply with a Political Reform Act regulation regarding election campaign committees. (Ann. Rept. (2016), Advisory Letter 18, p. 29.)

A judge failed to comply with a Political Reform Act regulation regarding election campaign committees. (Ann. Rept. (2016), Advisory Letter 19, p. 29.)

A judge made a misrepresentation in campaign materials regarding the judge's experience. (Ann. Rept. (2015), Advisory Letter 10, p. 25.)

A judge used the court's email system to send an email to court personnel endorsing a judicial candidate. (Ann. Rept. (2014), Advisory Letter 19, p. 23.)

While a judge was a candidate for judicial office, the judge's campaign materials created a false impression about the judge's prior judicial experience. (Ann. Rept. (2011), Advisory Letter 21, p. 26.)

A judge engaged in improper political activity during the judge's campaign for judicial office by distributing campaign literature on county property. (Ann. Rept. (2010), Advisory Letter 8, p. 25.)

A judge publicly endorsed a candidate for non-judicial office. The judge promptly arranged to have the endorsement removed. (Ann. Rept. (2010), Advisory Letter 9, p. 25.)

A candidate for judicial office misrepresented the qualifications and present position of an opponent in the campaign. (Ann. Rept. (2010), Advisory Letter 10, p. 25.)

A judge's campaign literature misrepresented the judge's professional experience. (Ann. Rept. (2002), Advisory Letter 11, p. 24.)

## Miscellaneous Off-bench Conduct

A judge failed to make reasonable efforts to keep informed about the judge's spouse's law firm and failed to disclose required information about the judge's financial interests in the law firm on Statements of Economic Interests filed with the Fair Political Practices Commission over a three-year period. (Ann. Rept. (2012), Advisory Letter 16, p. 26.)

A judge met with an officer seeking issuance of a warrant on a weekend when the judge was serving as duty judge. After the judge signed the warrant, the judge's teenage child expressed interest in accompanying the officer when the warrant was executed. The judge ascertained that it was acceptable to the officer for the judge's child to accompany the officer. The judge's child was thereby able to bypass the ordinary process for going on a police ride-along. (Ann. Rept. (2011), Advisory Letter 23, p. 26.)

A judge's active participation in a civil deposition of the person to whom the judge was engaged created the appearance that the judge was using the prestige of office to benefit that person and was acting as a legal advocate. Although the judge was not identified as a judge at the deposition, both parties knew of the judge's judicial position. When agreeing to testify at trial, the judge failed to exercise diligence to prevent the use of the judge's position and title at trial. The advisory was strong. (Ann. Rept. (2010), Advisory Letter 11, p. 25.)

Under circumstances that warranted inquiry, a judge failed to inquire whether benefits from a lender might have been extended based on the judge's judicial status. The judge also failed to keep informed of the judge's financial interests and failed to accurately report those interests on the judge's Statements of Economic Interests. The advisory was strong. (Ann. Rept. (2010), Advisory Letter 12, p. 25.) [Gifts/loans/favors/ticket-fixing; improper business, financial or fiduciary activities; miscellaneous off-bench conduct.]

The circumstances of a judge's consumption of alcoholic beverages in a bar during court hours created an appearance of impropriety. (Ann. Rept. (2009), Advisory Letter 7, p. 19.)

A judge failed to cooperate with the presiding judge in administrative matters concerning time off from court. (Ann. Rept. (2008), Advisory Letter 13, p. 27.)

A judge circulated an email over the court's computer system that contained offensive material. Recipients of the email included court personnel. (Ann. Rept. (2007), Advisory Letter 15, p. 32.)

A judge sent inappropriate emails, apparently intended as humor, over the court's computer system. Recipients of the emails included court personnel. (Ann. Rept. (2007), Advisory Letter 16, p. 32.)

A judge served in a non-judicial position incompatible with judicial office. (Ann. Rept. (2002), Advisory Letter 12, p. 24.)

A judge smoked in chambers in violation of law and despite being reminded of the prohibition by the presiding judge. (Ann. Rept. (2001), Advisory Letter 10, p. 20.)

A judge engaged in off-bench activities that appeared to denigrate the judicial system and had the potential to undermine juror respect for the court and public confidence in the judicial system. (Ann. Rept. (2000), Advisory Letter 8, p. 22.) [Administrative malfeasance; miscellaneous off-bench conduct; bias/appearance of bias not directed toward a particular class.]

A judge publicly participated in fundraising in violation of canon 4C. The judge also used court resources for the fundraising. (Ann. Rept. (1999), Advisory Letter 23, p. 23.) [Miscellaneous off-bench conduct; misuse of court resources.]

A judge smoked in chambers in violation of law. (Ann. Rept. (1998), Advisory Letter 39, p. 29.)

A judge smoked in chambers in violation of law. (Ann. Rept. (1998), Advisory Letter 40, p. 29.)

A judge smoked in chambers in violation of law. (Ann. Rept. (1998), Advisory Letter 41, p. 29.)

A judge smoked in chambers in violation of law. (Ann. Rept. (1998), Advisory Letter 42, p. 29.)

## Misuse of Court Resources

A judge engaged in a pattern of extensive use of court secretaries and other resources for purposes unrelated to court business, the law, the legal system or the administration of justice. (Ann. Rept. (2000), Advisory Letter 7, p. 21.)

## Non-performance of Judicial Functions/Attendance/Sleeping

A judge fell asleep during portions of trials. (Ann. Rept. (2017), Advisory Letter 14, p. 25.)

The judge frequently arrived at the courthouse after the judge's calendar was scheduled to start. (Ann. Rept. (2016), Advisory Letter 20, p. 29.)

Due to a lack of diligence, a judge issued an order in excess of the court's jurisdiction. (Ann. Rept. (2016), Advisory Letter 21, p. 29.)

A judge was repeatedly late arriving at court in the morning, over an extended period of time. (Ann. Rept. (2013), Advisory Letter 12, p. 22.)

A judge was habitually late in taking the bench for the morning calendar. (Ann. Rept. (2010), Advisory Letter 26, p. 27.)

A judge handled the multiple cases of a pro per probationer without the files and without ascertaining or reciting the case numbers on the record. The judge failed to implement previously promised action in the cases, including vacating future court dates. This failure, combined with errors by others, led to the probationer's being arrested and incarcerated for more than a week. (Ann. Rept. (2009), Advisory Letter 20, p. 20.)

A judge engaged in activities away from the courthouse during working hours that undermined public confidence in the integrity of the judiciary. (Ann. Rept. (2001), Advisory Letter 1, p. 19.) [Non-performance of judicial functions/attendance/sleeping; miscellaneous off-bench conduct.]

A judge was routinely late taking the bench for morning calendars. (Ann. Rept. (2000), Advisory Letter 10, p. 22.)

A judge engaged in activities away from the courthouse during working hours that undermined public confidence in the integrity of the judiciary. (Ann. Rept. (2000), Advisory Letter 11, p. 22.) [Non-performance of judicial functions/attendance/sleeping; miscellaneous off-bench conduct.]

A judge engaged in activities away from the courthouse during working hours that undermined public confidence in the integrity of the judiciary. (Ann. Rept. (2000), Advisory Letter 12, p. 22.) [Non-performance of judicial functions/attendance/sleeping; miscellaneous off-bench conduct.]

A judge appeared to be sleeping during court proceedings. (Ann. Rept. (2000), Advisory Letter 19, p. 22.)

A judge failed to perform certain assigned judicial duties. (Ann. Rept. (1998), Advisory Letter 49, p. 29.)

A judge failed to perform certain assigned judicial duties. (Ann. Rept. (1998), Advisory Letter 50, p. 29.)

A judge failed to perform certain assigned judicial duties. (Ann. Rept. (1998), Advisory Letter 51, p. 29.)

## Off-bench Abuse of Office/Misuse of Court Information

The judge engaged in conduct that raised an appearance of undue influence on court staff. (Ann. Rept. (2019), Advisory Letter 9, p. 35.)

A judge misused the prestige of office to advance the judge's personal interests. (Ann. Rept. (2017), Advisory Letter 15, p. 25.)

A judge misused the prestige of office to advance the personal interests of another person. (Ann. Rept. (2017), Advisory Letter 16, p. 25.)

A judge, while visiting a private building, failed to adhere to a directive from security personnel. (Ann. Rept. (2015), Advisory Letter 11, p. 25.)

A judge participated in the auction of donated goods at a fundraiser and failed to take steps to ensure that the judge's name and title were not used during the auction and in the promotional materials for the fundraiser. (Ann. Rept. (2015), Advisory Letter 12, p. 25.)

A judge failed to observe high standards of conduct in having certain personal material delivered by mail to the judge at the courthouse. (Ann. Rept. (2015), Advisory Letter 13, p. 25.)

A judge invoked the judge's judicial title during a traffic stop. (Ann. Rept. (2015), Advisory Letter 14, p. 25.)

A judge sent a letter to the district attorney concerning problematic conduct by a deputy district attorney. The wording of the letter created the appearance that the judge was not merely taking appropriate corrective action but encouraging the district attorney to reassign the deputy district attorney and/or take disciplinary action against the attorney. The judge sent copies of the letter to other judges and court administrators. (Ann. Rept. (2015), Advisory Letter 15, p. 26.)

A judge served as an auctioneer at a fundraising event, contrary to canon 4C(3)(d). (Ann. Rept. (2013), Advisory Letter 13, p. 22.)

A judge invoked the judicial office while reporting another driver to law enforcement. (Ann. Rept. (2013), Advisory Letter 14, p. 22.)

A judge used judicial stationery to write to a court in another county regarding payment of the judge's traffic ticket because the judge was having trouble getting the court clerk to acknowledge that payment had been made. (Ann. Rept. (2011), Advisory Letter 22, p. 26.)

A judge became involved in litigation in another county concerning a member of the judge's family. The judge filed a complaint with the Commission on Judicial Performance about the judge presiding over the case. The judge's family member thereafter filed a motion to disqualify that judge. The judge who complained gave the family member a copy of the CJP complaint, which clearly indicated the complainant was a judge, to attach to the disqualification motion. (Ann. Rept. (2010), Advisory Letter 13, p. 26.)

A judge used official court stationery to advance a personal business purpose. (Ann. Rept. (2007), Advisory Letter 14, p. 32.)

A judge used stationery bearing the judge's official title for correspondence related to a personal business dispute. (Ann. Rept. (2007), Advisory Letter 17, p. 32.)

A judge sent letters to public officials on judicial stationery concerning a personal dispute. (Ann. Rept. (2002), Advisory Letter 13, p. 24.)

A judge used judicial stationery to obtain an advantage in a personal business matter. (Ann. Rept. (2001), Advisory Letter 9, p. 20.)

A judge used chambers stationery in connection with a personal business dispute. (Ann. Rept. (2001), Advisory Letter 11, p. 20.)

A judge sent two complaint letters to a company regarding its billings, using official court stationery and the judge's title. The language and tone of the letters gave the appearance of trying to obtain special treatment for the judge. (Ann. Rept. (1999), Advisory Letter 22, p. 23.)

## On-bench Abuse of Authority in Performance of Judicial Duties

In deciding a matter, the judge made comments giving the appearance of relying on evidence outside the record, based on a personal observation outside of court. (Ann. Rept. (2019), Advisory Letter 10, p. 36.)

A judge threatened an attorney's license to practice law during a court hearing. The client was not present. (Ann. Rept. (2017), Advisory Letter 17, p. 25.)

A judge engaged in an abuse of authority in ordering a defendant physically restrained during court proceedings without the necessary showing. (Ann. Rept. (2016), Advisory Letter 22, p. 29.)

Before the conclusion of a judgment debtor examination, the judge exceeded the court's authority by ordering a self-represented debtor to give the debtor's wallet to the bailiff, who searched it and turned over the money found in the wallet to the judgment creditor. (Ann. Rept. (2015), Advisory Letter 16, p. 26.)

In a child custody proceeding, the judge ordered a grandparent to have no contact with the parties' two minor children, even though the grandparent was not a party to the proceeding and had no notice that a stay-away order was being contemplated. (Ann. Rept. (2014), Advisory Letter 20, p. 23.)

A judge repeatedly abused the judge's authority with respect to the appointment of counsel in criminal cases. (Ann. Rept. (2014), Advisory Letter 21, p. 23.)

After hearing that an attorney had made an unflattering remark about the judge, when the attorney appeared, the judge told the attorney to leave the courtroom and that the attorney could not appear there. The attorney and the judge later resolved the situation. (Ann. Rept. (2014), Advisory Letter 22, p. 23.) [Demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

After an attorney appeared for a defendant pursuant to Penal Code section 977, which permits a defendant charged with a misdemeanor to appear through counsel, the attorney failed to appear on the next court date. A judge issued a bench warrant for the defendant, notwithstanding the authorization for the attorney to appear on the defendant's behalf and the fact that the defendant had not been ordered to appear. The commission concluded that the judge's conduct involved disregard of fundamental rights and abuse of authority, and was of a nature that could seriously undermine the attorney-client relationship. (Ann. Rept. (2013), Advisory Letter 15, p. 22.)

In dealing with a probationer, the judge engaged in conduct that created the impression that the judge had abandoned the role of impartial judge and had undertaken a law enforcement function. (Ann. Rept. (2013), Advisory Letter 16, p. 22.)

A judge issued a bench warrant for the legal representative of a third party to the case who had received a subpoena duces tecum for the production of documents; the attorney was neither a party nor a personally-served witness, nor had the attorney previously been ordered by the court to appear. When the attorney appeared on the date to which the judge had ordered the warrant held, the judge appeared to impose conditions on the withdrawal of the warrant. Because there was no legal basis to issue the warrant and no reason for the judge to believe that the attorney was properly the subject of a bench warrant, the commission determined that the judge had abused the judge's authority. (Ann. Rept. (2013), Advisory Letter 17, p. 22.)

A judge engaged in abuse of authority in the appointment of counsel. (Ann. Rept. (2013), Advisory Letter 18, p. 22.)

A defendant in a criminal case sought to substitute in new counsel. A judge allowed the substitution but tripled the defendant's bail and remanded the defendant into custody, creating the impression that the judge was punishing the defendant for seeking new counsel or causing a delay in the case, neither of which is a valid basis for raising bail. (Ann. Rept. (2012), Advisory Letter 17, p. 26.)

A judge threatened a defendant appearing for arraignment on a traffic infraction with revocation of the defendant's own recognizance release and remand to custody if the defendant did not enter a plea. Since the defendant was charged only with an infraction, not punishable by jail, the defendant was not subject to being taken into custody. (Ann. Rept. (2012), Advisory Letter 18, p. 26.)

A defendant was brought back into court by law enforcement after a proceeding had been concluded, and was interrogated by the judge without the judge advising the defendant of the nature of the proceeding or advising the defendant of the right to counsel. (Ann. Rept. (2012), Advisory Letter 19, p. 26.)

A judge took action on a matter, contrary to a local court rule adopted in response to statutory and case law. (Ann. Rept. (2012), Advisory Letter 20, p. 26.)

A judge took action on a matter, contrary to a local court rule adopted in response to statutory and case law. (Ann. Rept. (2012), Advisory Letter 21, p. 26.)

A judge occasionally spoke in a language other than English during court proceedings, including while giving criminal defendants group advisements of their constitutional rights. In a civil case, the judge made a ruling based only on speculation that a litigant had not fulfilled a certain procedural requirement, and misstated the law in articulating a different basis for the ruling, thus creating a misleading record. (Ann. Rept. (2011), Advisory Letter 24, p. 26.)

When a judge was notified that an attorney was complaining to the court's executive officer about the court's trial setting practices, the judge ordered the attorney to the judge's courtroom, where the judge chastised the attorney and ordered the attorney to remain there while the judge summoned opposing counsel in one of the attorney's cases that was awaiting trial. That case was not pending before the judge. The advisory was strong. (Ann. Rept. (2010), Advisory Letter 20, p. 26.) [Demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

At the conclusion of a small claims hearing, a judge engaged in an abuse of authority by ordering one party to stay away from the other party and ordering a party to receive counseling. The advisory was strong. (Ann. Rept. (2010), Advisory Letter 21, p. 26.)

A judge, who was advisor and supervisor of the grand jury, exceeded the judge's authority by sending a letter to individuals who had submitted information and requests to the grand jury, ordering them to "cease and desist" contact with the grand jury on any matter as to which they had been advised that the grand jury no longer needed or desired contact. The letter also advised them that violation of this order could result in sanctions including contempt, which could result in fines or incarceration. (Ann. Rept. (2009), Advisory Letter 5, p. 19.)

A judge issued orders sealing court records without the requisite showing of cause and without following the procedures mandated by law. (Ann. Rept. (2009), Advisory Letter 6, p. 19.)

A judge threatened to terminate the reporting of a juvenile proceeding, contrary to Welfare and Institutions Code section 677 which requires that "all of the testimony and statements and remarks" of the judge and all persons appearing at all juvenile court proceedings be reported. (Ann. Rept. (2008), Advisory Letter 9, p. 27.)

During a probation revocation proceeding, a judge used a bail order for the improper purpose of collecting restitution by setting bail in cash and requiring the bail depositor to sign over the funds deposited as bail to pay restitution. (Ann. Rept. (2008), Advisory Letter 10, p. 27.)

A judge's use of a research attorney to confer with counsel regarding a motion appeared inconsistent with according the parties a full right to be heard and created an appearance of impropriety. (Ann. Rept. (2008), Advisory Letter 11, p. 27.)

During pretrial discussions with counsel, a judge angrily slapped the judge's hand down on the bench; one attorney then left the courtroom. When the attorney returned, the judge had the bailiff remove the attorney without sufficient cause. (Ann. Rept. (2007), Advisory Letter 19, p. 32.) [Demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

A judge chastised the attorneys in the presence of the jury and threatened to declare a mistrial over momentary confusion about the availability of a witness. (Ann. Rept. (2006), Advisory Letter 4, p. 32.) [Demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

On multiple occasions, a judge spoke directly to defendants in Spanish — often on matters of substance and even when interpreters were present — in violation of Code of Civil Procedure section 185(a), which requires all judicial proceedings to be conducted in English. (Ann. Rept. (2006), Advisory Letter 16, p. 33.)

In a case not pending before the judge and without notice to the parties, a judge rescinded another judge's order that a defendant be released on the defendant's own recognizance. (Ann. Rept. (2005), Advisory Letter 12, p. 27.)

A judge improperly invoked judicial authority in addressing an administrative problem. (Ann. Rept. (2003), Advisory Letter 6, p. 26.)

A judge's revocation of a criminal defendant's own-recognizance release gave the appearance of punishing the defendant for delays in the proceedings. (Ann. Rept. (2003), Advisory Letter 7, p. 26.)

While investigating a prospective juror's medical excuse, the judge contacted the juror's supervisor and disclosed the claimed medical excuse. The prospective juror had not consented to the release of this confidential information to the employer. (Ann. Rept. (2002), Advisory Letter 14 p. 24.)

A judge improperly required defendants to address the courtroom audience. (Ann. Rept. (2001), Advisory Letter 13, p. 20.)

After a criminal defendant requested representation by the public defender, the judge directed the bailiff to search the defendant's wallet. (Ann. Rept. (1998), Advisory Letter 7, p. 27.)

## Sexual Harassment/Inappropriate Workplace Gender Comments

A judge engaged in conduct toward a member of court staff that reflected unwelcome and excessive personal interest. (Ann. Rept. (1999), Advisory Letter 21, p. 23.)

A judge engaged in displays of affection toward court employees which were unwelcome to some. In mitigation, the judge attended training in appropriate workplace conduct. The judge also made a comment to an attorney appearing before the judge which reflected gender bias. (Ann. Rept. (1998), Advisory Letter 38, p. 29.)

## More Than One Type of Misconduct

The judge made improper and undignified comments to a litigant at a hearing. The judge proceeded with another hearing in the absence of the litigant's attorney. In another matter, the judge improperly commented on an exercise of a challenge for cause. (Ann. Rept. (2020), Advisory Letter 7, p. 56.) [Demeanor/decorum; Disqualification/disclosure/post-disqualification conduct; Failure to ensure rights .]

During a trial, the judge made a statement to the jury that reflected embroilment and raised an appearance of lack of impartiality. The judge later made statements to an attorney in the action that were argumentative, discourteous, and reflected embroilment. In another action, the judge addressed a party in a manner that was discourteous. (Ann. Rept. (2020), Advisory Letter 8, p. 56.) [Bias/appearance of bias not directed toward a particular class; Demeanor/decorum.]

In two proceedings, the judge issued orders without allowing the affected parties a full opportunity to be heard and to cross-examine witnesses. In a separate proceeding, the judge altered a previously-issued order out of pique. (Ann. Rept. (2020), Advisory Letter 9, p. 56.) [Bias/appearance of bias not directed toward a particular class; Failure to ensure rights.]

The judge conducted a hearing and ruled against a litigant in the absence of the litigant's attorney, and denied the litigant an opportunity to be heard. At another hearing, the judge disparaged an attorney and interfered with the attorney-client relationship. (Ann. Rept. (2019), Advisory Letter 11, p. 36.) [Demeanor/decorum; Failure to ensure rights.]

During several hearings, the judge displayed hostility and impatience, made sarcastic comments, and engaged in conduct that gave the appearance of embroilment. The judge also improperly threatened to sanction an attorney and report that attorney to the State Bar. (Ann. Rept. (2019), Advisory Letter 12, p. 36.) [Abuse of contempt/sanctions; Bias/appearance of bias not directed toward a particular class; Demeanor/decorum.]

After remanding a defendant whom the judge believed was self-represented, the judge refused to recall the matter later that day at the request of the defendant's counsel. The judge also engaged in an improper political activity. (Ann. Rept. (2019), Advisory Letter 13, p. 36.) [Failure to ensure rights; Improper political activities.]

The judge intentionally made physical contact with an attorney (which was mitigated by an immediate and sincere apology to the attorney). The judge improperly handled hearings in some matters, including juvenile delinquency matters. The judge made discourteous remarks to an attorney in the presence of the attorney's client. The judge also engaged in misconduct in connection with a social media account. (Ann. Rept. (2018), Advisory Letter 15, p. 29.) [Demeanor/decorum; Disqualification/disclosure/post-disqualification conduct; Improper political activities; On-bench abuse of authority in performance of judicial duties.]

The judge improperly accepted gifts from an attorney, and failed to properly disclose one of the gifts on the judge's Fair Political Practices Commission Form 700. The judge also failed to disclose a personal relationship with that attorney when the attorney appeared before the judge. (Ann. Rept. (2018), Advisory Letter 16, p. 29.) [Disqualification/disclosure/post-disqualification conduct; Gifts/loans/favors/ticket-fixing.]

During a hearing, the judge displayed poor demeanor by using a raised voice and making intemperate comments about an attorney, and, through repeated interruptions, denied the attorney a complete opportunity to be heard. The judge also improperly threatened to have the attorney removed from the courtroom. (Ann. Rept. (2018), Advisory Letter 17, p. 29.) [Demeanor/decorum; Failure to ensure rights.]

During a hearing, the judge asked an attorney, unrelated to the proceeding, for legal advice. The judge also exhibited inappropriate demeanor toward the parties during that hearing. (Ann. Rept. (2018), Advisory Letter 18, p. 29.) [Demeanor/decorum; On-bench abuse of authority in performance of judicial duties.]

The judge imposed an unauthorized non-monetary sanction against attorneys who were not before the court, and failed to follow proper contempt procedures. (Ann. Rept. (2018), Advisory Letter 19, p. 29.) [Abuse of contempt/sanctions; On-bench abuse of authority in performance of judicial duties.]

The judge made a comment on social media about a matter over which he did not preside. In a particular circumstance, the judge made no effort to preclude or avoid the use by others of the prestige of the judicial office or the judge's title. (Ann. Rept. (2018), Advisory Letter 20, p. 29.) [Comment on a pending case; Off-bench abuse of office/misuse of court information.]

During a hearing, the judge made a series of comments that constituted poor demeanor and embroilment; the judge also improperly threatened to report an attorney to the State Bar, failed to disqualify when required to do so, and ruled on a matter after the need to disqualify was apparent. (Ann. Rept. (2018), Advisory Letter 21, p. 29.) [Bias/appearance of bias not directed toward a particular class; Demeanor/decorum; Disqualification/disclosure/post-disqualification conduct; On-bench abuse of authority in performance of judicial duties.]

The judge engaged in conduct during a criminal case (including improperly going off the record) that created the appearance of retaliation against the defendant. The judge also displayed poor demeanor in comments that the judge made to the defendant. (Ann. Rept. (2018), Advisory Letter 22, p. 29.) [Demeanor/decorum; Failure to ensure rights.]

The judge denied a criminal defendant's own-recognizance release for improper reasons, including a reason that reflected bias toward a particular class. (Ann. Rept. (2018), Advisory Letter 23, p. 29.) [Bias/appearance of bias toward a particular class; Failure to ensure rights.]

A judge failed to appropriately discharge various administrative responsibilities and made undignified and discourteous remarks to court personnel. The judge also failed to personally observe high standards of conduct by not complying with a regulation. (Ann. Rept. (2017), Advisory Letter 18, p. 25.) [Administrative malfeasance/improper comments, treatment of colleagues and staff; Demeanor/decorum; Miscellaneous Off-bench conduct.]

While presiding over a criminal case, the judge engaged in independent investigation, which the judge failed to promptly disclose to the litigants. The judge failed to disqualify from the case when circumstances in the case warranted recusal. (Ann. Rept. (2017), Advisory Letter 19, p. 25.) [Disqualification/disclosure/post-disqualification conduct; Ex parte communications.]

A judge's off-bench remarks created the appearance of bias and lent the prestige of office to advance the personal interests of others. (Ann. Rept. (2017), Advisory Letter 20, p. 25.) [Bias/appearance of bias toward a particular class; Off-bench abuse of office/misuse of court information.]

At a hearing, the judge made repeated remarks suggesting bias against a party and prejudgment in a case. When the party moved to disqualify the judge, setting forth sufficient allegations in the statement of disqualification to cause a reasonable member of the public to doubt the judge's impartiality, the judge improperly struck the disqualification motion, rather than having it heard by another judge, as required by law. (Ann. Rept. (2017), Advisory Letter 21, p. 26.) [Bias/appearance of bias not directed toward a particular class; Disqualification/disclosure/post-disqualification conduct.]

After making efforts to comply with the requirement that a habeas petitioner be afforded the opportunity to reply to informal responses to habeas petitions, a judge denied the petitioner the opportunity to submit a reply. On one occasion, the judge denied a petition on the basis of an informal response that the judge knew had not been served on the petitioner. (Ann. Rept. (2016), Advisory Letter 23, p. 29.) [Ex parte communications; failure to ensure rights.]

A judge made injudicious remarks about a pro per defendant that suggested bias. When the remarks were cited in a motion to disqualify the judge for cause, the judge struck the motion on the grounds that the judge was not biased and no reasonable person would think that the judge was biased, thereby ruling on the merits of the disqualification motion, rather than having the matter decided by an assigned judge as required by law. (Ann. Rept. (2016), Advisory Letter 24, p. 29.) [Bias/appearance of bias not directed toward a particular class; disqualification/ disclosure/post-disqualification conduct.]

A judge received and acted upon an ex parte communication from the plaintiff in a case who arrived late to court after the case had been dismissed and the opposing party had left the courtroom. The judge did not give the opposing party notice or an opportunity to be heard before vacating the order of dismissal and resetting the matter for trial. (Ann. Rept. (2016), Advisory Letter 25, p. 29.) [Ex parte communications; failure to ensure rights.]

A judge attempted, in a private capacity, to help resolve a legal dispute between persons with whom the judge had a personal relationship, in violation of the prohibition on judges serving as mediators. After suit was filed, the judge engaged in other activities that appeared to lend the prestige of judicial office to advance the personal interests of another person. (Ann. Rept. (2016), Advisory Letter 26, p. 29.) [Off-bench abuse of office/misuse of court information; miscellaneous off-bench conduct.]

A judge entered judgment against a nonparty in a small claims case. In another matter, the judge was discourteous and demeaning to a self-represented civil litigant. During trial in a third case, the judge failed to be patient, dignified, and courteous toward counsel. (Ann. Rept. (2015), Advisory Letter 17, p. 26.) [Demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

In a family law matter in which the judge had ordered that there be no contact between the parties' children and a non-party, the judge also ordered that there be no contact between the nonparty and the non-party's own child, who lived in the same household as the other children. The judge did not give the non-party notice or an opportunity to be heard, and did not have jurisdiction over the individual's child. The judge also made a derogatory remark to one of the parties reflecting prejudgment. (Ann. Rept. (2015), Advisory Letter 18, p. 26.) [Bias/appearance of bias not directed toward a particular class; failure to ensure rights.]

In traffic court, a judge allowed court clerks to take pleas and impose sentences according to a fine schedule, without the involvement of a judicial officer. The judge also maintained a policy of not giving fine reductions after trial, and advising defendants that fines would not be reduced after trial, creating the appearance that defendants were being penalized for exercising their right to trial. In mitigation, the judge corrected the practices. (Ann. Rept. (2015), Advisory Letter 19, p. 26.) [Non-performance of judicial functions/attendance/sleeping; failure to ensure rights.]

A judge allowed the personal relationship with a criminal defendant appearing before the judge to influence the judge's conduct. Although the judge recused, the judge interacted with the defendant in a manner that breached court decorum and raised security concerns. (Ann. Rept. (2015), Advisory Letter 20, p. 26.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A judge solicited contributions for a candidate for judicial office from attorneys appearing before the judge. The judge also invoked the judicial office in correspondence to advance the judge's interests in a personal dispute. (Ann. Rept. (2015), Advisory Letter 21, p. 26.) [Improper political activities; off-bench abuse of office/misuse of court information.]

During a hearing, a judge engaged in a shouting match with an attorney, suggesting the attorney as playing games and not acting in the best interest of the attorney's client, which remarks were likely to undermine the attorney-client relationship. The judge also failed to follow proper contempt procedures by finding the attorney in contempt without giving the attorney an opportunity to be heard. (Ann. Rept. (2015), Advisory Letter 22, p. 26.) [Abuse of contempt/sanctions; demeanor/decorum; failure to ensure rights.]

In a family law case, the judge made comments to a litigant that were impatient and discourteous and gave the appearance of bias. In a separate matter, at the request of the mother, the judge issued a one-year restraining order against the out-of-state father specifically prohibiting visitation with his child, and awarding sole custody to the mother. The judge was aware of a pending family law case in the home state of the father and child, and had been told by the mother that the child essentially lived with the father, but did not consult with the other court before issuing the custody order, as required by law. (Ann. Rept. (2015), Advisory Letter 23, p. 26.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

At a hearing in a civil matter, the judge used a derogatory term for a witness and made comments about potential witnesses for the defendant and their possible testimony that reflected bias against the defendant. (Ann. Rept. (2015), Advisory Letter 24, p. 26.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A judge revoked probation and imposed sentence on a defendant, without giving the defendant an opportunity to be heard on whether the probation should be revoked, without obtaining a waiver of the defendant's right to a hearing, and without the defendant admitting a probation violation. The judge also made disparaging remarks to and about the defendant. (Ann. Rept. (2015), Advisory Letter 25, p. 27.) [Demeanor/decorum; failure to ensure rights; on-bench abuse of authority in performance of judicial duties.]

At sentencing, a judge made remarks to the defendant that were undignified and gave the appearance that the judge was inappropriately injecting the judge's personal experience into consideration of the matter. (Ann. Rept. (2015), Advisory Letter 26, p. 27.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

While an attorney was in chambers on a civil matter, the judge initiated an ex parte communication about another case, including questioning the attorney about the attorney's appeal of the judge's order and alternatives to appeal that were available. In another matter, the judge issued but held a bench warrant for an attorney on the date specified on a subpoena for the attorney's appearance, although the attorney had not been served with the subpoena, had not failed to appear on the date specified (which had already been continued due to the judge's unavailability), and had not consented to having a warrant issued and held. (Ann. Rept. (2014), Advisory Letter 23, p. 23.) [Ex parte communications; on-bench abuse of authority in performance of judicial duties.]

A judge failed to give a pro per litigant an opportunity to respond before holding the litigant in contempt. In another matter, the judge's treatment of a pro per family law litigant was discourteous and gave rise to an appearance of embroilment. (Ann. Rept. (2014), Advisory Letter 24, p. 23.) [Abuse of contempt/sanctions; bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

In traffic court, a judge allowed the judge's clerk to take pleas and impose sentences according to a fine schedule, while the judge was in chambers. In a civil matter, after the prevailing party's attorney requested that the judge make findings, the judge appeared to act out of pique by stating that the judge was going to set aside the order and set the matter for further argument. The judge also displayed poor demeanor during the proceedings. In another matter, the judge denied an attorney an opportunity to be heard before imposing sanctions and displayed poor demeanor. (Ann. Rept. (2014), Advisory Letter 25, p. 24.) [Non-performance of judicial functions/attendance/sleeping; demeanor/decorum; failure to ensure rights; on-bench abuse of authority in performance of judicial duties.]

A judge made remarks about a pro per criminal defendant – impugning the defendant's character, referring to the defendant as a fraud, and accusing the defendant of being willing to make false statements to the court – in an attempt to persuade the defendant to waive the right to self representation. When the defendant raised the judge's accusations in a statement of disqualification, the judge improperly struck the challenge rather than allowing the motion to be decided by another judge as required by law. (Ann. Rept. (2014), Advisory Letter 26, p. 24.) [Bias/appearance of bias not directed toward a particular class; disqualification/disclosure/post-disqualification conduct.]

During a hearing in a criminal case, the judge repeatedly criticized defense counsel's brief in a sarcastic and demeaning manner, and questioned the attorney about the defendant in a sarcastic manner. In another criminal matter, the judge made remarks that created the appearance of bias based upon the defendant's occupation. (Ann. Rept. (2014), Advisory Letter 27, p. 24.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

During a hearing in a criminal case, the judge was impatient and discourteous towards an attorney who was questioning a witness. Later, in open court, and in the presence of the attorney's client, the judge threatened to report the attorney to the State Bar if the attorney had engaged in improper conduct, which had not been determined. In another case, at a bail hearing, the judge made sarcastic, discourteous remarks about the probation department's recommendation that the defendant be released on the defendant's own recognizance. At sentencing later in the case, the judge referred to the judge's own experience as a victim of a crime similar to the one for which the defendant was being sentenced, which created the appearance of bias and prejudgment. The judge also made a discourteous remark to a person speaking on the defendant's behalf at sentencing. (Ann. Rept. (2014), Advisory Letter 28, p. 24.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A judge's off-bench activities created an appearance of bias. Some of the judge's activities involved a misuse of court resources. (Ann. Rept. (2014), Advisory Letter 29, p. 24.) [Bias/appearance of bias not directed toward a particular class; misuse of court resources.]

At the outset of a hearing on a temporary restraining order and without providing the petitioner an adequate opportunity to be heard, the judge ordered on the judge's own motion that the restrained parent would be allowed visitation as a condition of granting the restraining order. No notice had been given to the pro per petitioner that the visitation issue, which was previously set for hearing at a later date, would be addressed at the TRO hearing. The commission concluded that the judge abused the judge's authority and disregarded the litigant's fundamental right to due process. In another matter, the judge imposed sanctions on a pro per litigant without providing an adequate opportunity to be heard. (Ann. Rept. (2013), Advisory Letter 19, p. 22.) [Abuse of contempt/sanctions; failure to ensure rights; on-bench abuse of authority in performance of judicial duties.]

In a criminal matter, the judge failed to rule over a period of nine months on a pro per defendant's motion for appointment of an expert and engaged in an improper ex parte communication with the defendant's investigator. (Ann. Rept. (2013), Advisory Letter 20, p. 22.) [Comment on a pending case; miscellaneous off-bench conduct.]

A judge's remarks in emails to judicial colleagues failed to promote public confidence in the integrity and impartiality of the judiciary. The judge also also made public comments about a pending case. (Ann. Rept. (2013), Advisory Letter 21, p. 23.) [Decisional delay/false salary affidavits; ex parte communications.]

Prior to arraigning a defendant and granting the defendant own recognizance release, a judge failed to disclose on the record that the judge had interacted with the defendant professionally and knew a number of the prosecution witnesses well. In another matter, the judge modified a temporary restraining order without providing notice to the petitioner. In a family law matter, the judge communicated to counsel for one litigant a disparaging courthouse joke about a party in another case who was represented by the counsel's law firm, and conveyed the judge's displeasure with the contentiousness of both cases. Opposing counsel was not present for the judge's remarks. (Ann. Rept. (2012), Advisory Letter 23, p. 26.) [Demeanor/decorum; disqualification/disclosure/post-disqualification conduct; ex parte communications; failure to ensure rights.]

During a contested family law proceeding, a judge made inappropriate personal comments and hugged one of the litigants at the conclusion of the hearing. In another matter involving a restraining order, the judge denied the respondent the opportunity to cross-examine the petitioner. The judge also repeatedly urged the respondent to consult with a particular doctor, thus lending the prestige of judicial office to advance the doctor's interests. (Ann. Rept. (2012), Advisory Letter 24, p. 27.) [Demeanor/decorum; failure to ensure rights; on-bench abuse of authority in performance of judicial duties.]

A judge made harsh comments to an attorney, in the presence of the attorney's client, including inviting the attorney to admit that the attorney was inept and making references to sanctions and a possible referral to the State Bar. The nature of the judge's comments created the appearance of embroilment. In another matter, the judge spoke to a represented defendant regarding disposition while the defendant's attorney was out of the courtroom. (Ann. Rept. (2012), Advisory Letter 25, p. 27.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; failure to ensure rights.]

A judge displayed poor demeanor toward counsel or litigants in three family law cases. In one of the cases, after reprimanding counsel for the manner in which a motion was presented and continuing the hearing, the judge refused to allow counsel to be heard or to ask a clarifying question. (Ann. Rept. (2012), Advisory Letter 26, p. 27.) [Demeanor/decorum; failure to ensure rights.]

During a criminal trial, a judge expressed impatience and annoyance and reprimanded defense counsel in front of the jury. During the same trial when the judge began questioning the defendant about being late to court, defense counsel requested that the judge's questions be directed to counsel, not the defendant. The judge responded that the defendant's own recognizance release was revoked. The judge's revocation of the defendant's OR release appeared to be in retaliation for defense counsel's assertion of the defendant's right to have counsel, rather than the defendant, respond to questions. (Ann. Rept. (2012), Advisory Letter 27, p. 27.) [Demeanor/decorum; failure to ensure rights.]

A judge sent a highly accusatory and inaccurate email to the attorneys in a case that had been before the judge, without investigating the facts and ascertaining from the attorneys what had occurred. In another matter, the judge made remarks at a sentencing hearing that created a strong appearance that the judge had established a mandatory minimum sentence for a certain type of offense, when none was prescribed by law and without consideration of the individual facts and circumstances of each case. (Ann. Rept. (2012), Advisory Letter 28, p. 27.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

After being appointed to the bench, a judge failed to ensure that a case in which the judge was the attorney of record was transferred to another attorney before taking the oath of office. The judge remained counsel of record for three weeks after taking the oath. (Ann. Rept. (2012), Advisory Letter 29, p. 27.) [Miscellaneous off-bench conduct; pre-bench misconduct.]

A judge used vulgar language and was unduly harsh with an attorney who volunteered court scheduling information in a case that was not the attorney's. The judge also engaged in abuse of authority by ordering the attorney to leave the courtroom. (Ann. Rept. (2012), Advisory Letter 30, p. 27.) [Demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

A judge made unduly harsh and disparaging remarks to a pro per criminal defendant during a pretrial hearing. The judge also denied the defendant's motion to disqualify the judge for cause. (Ann. Rept. (2011), Advisory Letter 25, p. 26.) [Demeanor/decorum; disqualification/ disclosure/post-disqualification conduct.]

A judge engaged in ex parte communications with a witness. The judge improperly inferred the consent of the pro per parties from the fact that they did not object when the judge stated the intention to telephone the witness. When one party continued to express concern about the judge's ruling, the judge threatened to make an adverse ruling and used unduly harsh language. (Ann. Rept. (2011), Advisory Letter 26, p. 26.) [Demeanor/decorum; ex parte communications.]

A judge made remarks, in open court, to an attorney that reflected impatience, were undignified and demeaned the competence of the attorney. In another case, immediately after ruling in favor of one party, the judge met with that party's counsel in chambers on an unrelated matter, without offering an explanation to the other party, which created the appearance of impropriety. (Ann. Rept. (2010), Advisory Letter 27, p. 27.) [Demeanor/decorum; miscellaneous off-bench conduct.]

A judge violated canon 3B(10) by commending two juries for their verdicts. In another case, the judge made a comment to an attorney that appeared sarcastic and may have reflected a lack of patience. (Ann. Rept. (2010), Advisory Letter 28, p. 27.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

In an animal cruelty case, a judge failed to disclose the judge's extensive personal and professional activities involving animals. The judge also incarcerated the defendant under circumstances that appeared retaliatory and constituted an abuse of authority. (Ann. Rept. (2010), Advisory Letter 29, p. 27.) [Disqualification/disclosure/post-disqualification conduct; on-bench abuse of authority in performance of judicial duties.]

A judge's off-bench participation in law enforcement activities failed to promote public confidence in the integrity and impartiality of the judiciary. Also, while on the bench, the judge directed the bailiff to take the car keys of pro per defendants who were charged but had not been convicted of driving without a valid license if they stated they had driven themselves to court. (Ann. Rept. (2010), Advisory Letter 30, p. 27.) [Miscellaneous off-bench conduct; on-bench abuse of authority in performance of judicial duties.]

A judge failed to provide a party an opportunity to be heard before sanctioning the party for failure to appear. The judge also presided over two hearings in a family law matter in the absence of the minors' counsel, without proof in the record of notice to the minors' counsel, under circumstances which should have compelled the judge to inquire about notice. The judge was new to the bench. (Ann. Rept. (2010), Advisory Letter 31, p. 28.) [Abuse of contempt/sanctions; failure to ensure rights.]

A judge improperly refused to hear a petition for temporary guardianship, thereby failing to provide the petitioner full right to be heard according to law. The judge also failed to be patient, dignified and courteous toward individuals appearing on the matter on two dates. (Ann. Rept. (2009), Advisory Letter 21, p. 20.) [Demeanor/decorum; failure to ensure rights.]

On several occasions, a judge failed to disclose on the record the close personal relationship between a member of the judge's courtroom staff and an attorney appearing before the judge. In another matter, the judge made demeaning remarks in open court about an attorney in the case. (Ann. Rept. (2009), Advisory Letter 22, p. 20.) [Demeanor/decorum; disqualification/disclosure/post-disqualification conduct.]

In a written recusal order, a judge made disparaging, gratuitous statements about an attorney in the case. The tenor of the remarks the judge made to the attorney before recusing also appeared inconsistent with the judge's duty to be patient, dignified and courteous. (Ann. Rept. (2009), Advisory Letter 23, p. 20.) [Demeanor/decorum; disqualification/disclosure/post-disqualification conduct.]

A judge wrote a letter - not on judicial stationery and not using the judicial title - on behalf of a litigant personally known to the judge for use in a case then pending before another judge in the judge's court. The letter contained what could be considered character testimony. In addition, the judge failed to disclose a relationship with an attorney appearing before the judge. (Ann. Rept. (2009), Advisory Letter 24, p. 20.) [Disqualification/disclosure/post-disqualification conduct; off-bench abuse of office/misuse of court information.]

A judge's conduct at a hearing in a criminal case reflected embroilment. At the outset of the hearing, in open court and on the record, the judge accused the defendant of perjury and his lawyer of submitting false evidence and libeling the court. The judge also accused the attorney of lack of judgment and credibility, reckless disregard for the truth, a lack of integrity, and willingness to aid and abet perjury. The judge then told the attorney he was not welcome in the judge's court. The judge did not recuse until after the hearing, even though grounds for disqualification existed at the beginning of the hearing. (Ann. Rept. (2009), Advisory Letter 25, p. 20.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; disqualification/disclosure/post-disqualification conduct; on-bench abuse of authority in performance of judicial duties.]

During a hearing, when an attorney commented that the court reporter had apparently missed an answer, the judge interrogated counsel in an accusatory manner. In another matter, the judge inappropriately accused a prosecutor of unethical conduct for speaking to a defendant who was represented by counsel. The judge engaged in an abuse of judicial authority by ordering the prosecutor to call the prosecutor's supervisor and remain in the courtroom until the supervisor arrived. The judge's campaign disclosure form also failed to provide the street address of a donor, as required by law. (Ann. Rept. (2008), Advisory Letter 17, p. 28.) [Demeanor/decorum; on-bench abuse of authority in performance of judicial duties; improper political activities.]

In open court, while presiding over a criminal matter, a judge accused the defendant's attorney, who was asserting the client's rights, of being unethical, and stated that the attorney's unethical practices disgraced the legal profession. When the attorney later filed a statement of disqualification, the judge gave the appearance of soliciting the prosecution's assistance in opposing it. (Ann. Rept. (2008), Advisory Letter 18, p. 28.) [Demeanor/decorum; disqualification/disclosure/post-disqualification conduct.]

A judge was discourteous to counsel in three proceedings; in one of the cases, the judge also demonstrated a lack of impartiality. In a fourth proceeding, the judge disregarded a misdemeanant's right to bail. (Ann. Rept. (2007), Advisory Letter 18, p. 32.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; failure to ensure rights.]

A judge required an attorney to come into chambers after a preliminary hearing to listen to an explanation of the judge's decision and made comments, in an emotional and argumentative manner, that were intimidating. In a separate matter, the judge made discourteous remarks to one counsel that tended to improperly personalize the matter before the court. (Ann. Rept. (2007), Advisory Letter 20, p. 32.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum.]

A judge raised the bail of a defendant because a friend or family member of the defendant had caused a disturbance in court, which was not a proper reason to increase bail. In another matter, the judge failed to be patient, dignified and courteous to a defendant. (Ann. Rept. (2005), Advisory Letter 4, p. 26.) [On-bench abuse of authority in performance of judicial duties; demeanor/decorum.]

During a trial, a judge improperly spoke to the jury about another case. The judge told the jury that an attorney who would be appearing on the other case had filed inadequate papers; the judge made comments suggesting prejudgment. When the attorney appeared, the judge was sarcastic and impatient. In another case, the judge made sarcastic, demeaning and disparaging remarks to two attorneys. (Ann. Rept. (2004), Advisory Letter 10, p. 23.) [Demeanor/decorum; ex parte communications; bias/appearance of bias not directed toward a particular class.]

After a judge declined assignment in one case because of an association with a party, the judge presided over a second case involving the same parties. The judge set aside a default judgment entered against the party with whom the judge was associated, without notice or a hearing. When the other party objected in an ex parte letter, the judge vacated the prior order and set a hearing before another judge. In the order reassigning the case, the judge made statements about the pending motion that appeared intended to influence the decision of the other judge. (Ann. Rept. (2004), Advisory Letter 13, p. 24.) [Disqualification/disclosure/post-disqualification conduct; on-bench abuse of authority in performance of judicial duties; failure to ensure rights; ex parte communications.]

In a family law matter, the judge made remarks concerning the litigants that were undignified and disparaging. In another family law matter, the judge's remarks reflected a pattern of embroilment. The judge responded to criticism of the case in a manner that appeared to constitute an abuse of authority. A more severe sanction was not imposed because the judge agreed to and did attend appropriate educational programs. (Ann. Rept. (2003), Advisory Letter 10, p. 27.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; on-bench abuse of authority in performance of judicial duties.]

A judge's treatment of jurors undermined public confidence in the integrity and impartiality of the judiciary. The judge also appeared to engage in campaign activities in the courthouse during court hours. (Ann. Rept. (2003), Advisory Letter 11, p. 27.) [Administrative malfeasance; improper political activities.]

In one matter, the judge failed to disclose on the record a relationship with the defendant's family. In another matter, the judge created the appearance of favoritism by issuing a ruling on the judge's own motion based in part on personal knowledge of the defendant and on information received ex parte. The judge failed to disqualify from the matter, notwithstanding the judge's personal knowledge of evidentiary facts, and failed to disclose on the record that the judge was familiar with the defendant's family. In a third matter, the judge discussed a pending case with an attorney who was not involved in the case. The Commission strongly urged the judge to obtain further ethics education. (Ann. Rept. (2003), Advisory Letter 12, p. 27.) [Bias/appearance of bias not directed toward a particular class; disqualification/disclosure/post-disqualification conduct; ex parte communications.]

In one case, the judge made remarks indicating prejudgment. In another matter, the judge improperly failed to recuse. In a third matter, the judge struck another judge's order disqualifying the judge from the case. In another matter, the judge made a disparaging remark about a government attorneys' office. In addition, the judge's treatment of court staff failed to comply with Canon 3B(4), requiring judges to be "patient, dignified and courteous" toward those with whom they deal in an official capacity. (Ann. Rept. (2003), Advisory Letter 13, p. 27.) [Bias/appearance of bias not directed toward a particular class; demeanor/decorum; disqualification/disclosure/post-disqualification conduct.]

A judge frequently used a member of court staff to assist the judge with personal matters. The judge presided over a criminal matter without disclosing the judge's past friendship with—and current antipathy toward—the victim. (Ann. Rept. (2003), Advisory Letter 15, p. 27.) [Disqualification/disclosure/post-disqualification conduct; misuse of court resources.]

A judge made misleading public statements that diminished public confidence in the integrity of the judiciary. During a court proceeding, the judge made a disparaging remark about other judicial officers. (Ann. Rept. (2003), Advisory Letter 16, p. 27.) [Demeanor/decorum; administrative malfeasance.]

A presiding judge failed to process a complaint about a court commissioner for nine months. In another matter, when the judge's former law partner appeared before the judge, the judge disclosed only the judge's past professional and financial relationship with the law firm, not the judge's ongoing social relationship with the former law partner. (Ann. Rept. (2002), Advisory Letter 15, p. 24.) [Administrative malfeasance; disqualification/disclosure/post-disqualification conduct.]

A judge failed to recuse or to adequately disclose the judge's prior association in practice with an attorney appearing before the judge. On occasions when the conflict was waived, the judge failed to obtain written waivers of disqualification as required by law. The judge also was verbally abusive toward court staff. (Ann. Rept. (2002), Advisory Letter 16, p. 24.) [Demeanor/decorum; disqualification/disclosure/post-disqualification conduct.]